

**TO: STANDARDS COMMITTEE– 8 NOVEMBER 2006**

**SUBJECT: DIRECTORSHIPS & WORKING WITH OUTSIDE BODIES**

**FROM: HEAD OF LEGAL SERVICES**

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**1. RECOMMENDATION(S)**

- 1.1 To ask the Committee to consider this report and the draft guidance attached
- 1.2 To consider whether the draft guidance should be recommended to Council for adoption

**2. REASONS FOR RECOMMENDATIONS**

- 2.1 A discussion at Executive raised two matters concerning the Council and its work with outside bodies. The two matters on which advice was sought were:-
  - (a) the role and responsibility of Councillors appointed to Board Directors and what declarations of interest they should make when attending Council meetings which are discussing the performance of the companies involved; and
  - (b) if the Council did not appoint Councillors as directors how could the work of the companies be scrutinised effectively and performance level guaranteed
- 2.2 The work of councillors acting as Directors on a Company is one which can be complicated by conflicts of interest. However councillors working in other environments can face such problems. Advice has therefore been drafted for members in a variety of situations where these sorts of issues arise. A copy is attached as an Appendix to this report.
- 2.3 It is hoped that the guidance will not only be helpful to a variety of Councillors but also to the occasional member of the public who may want to know what is the guidance issued to such councillors when they are asked to perform their duties. Given that elections next year are likely to result in new members coming into contact with similar issues it is thought that some formal and adopted guidance should be put in place beforehand. The guidance would need to be considered and adopted by Council.
- 2.4 Where the Council is working with companies but does not have councillors as Board Directors the method of control is different. In these circumstances it is likely that the Council will be working with the company concerned within a contractual environment. An emerging practice in contractual arrangements has been for open book accounting, regular performance management meetings and clear and identifiable

contractual commitments. These can sometimes be based around the inputs, such as cleaning a public toilet 4 times a day. Alternatively they can be based around outputs, such as there being three arts events to be staged each year to involve local schools and youth groups.

- 2.5 Where there is not an adequate contractual arrangement to enable effective scrutiny then it is recommended that the next renewal of any arrangement should require that provisions to ensure effective scrutiny and performance are included. The terms will probably need to be tailored to each set of circumstances, hence a set of standard terms are not attached to this report. The Executive might wish to consider whether the current Code of Contract Practice should be amended to require that provisions to ensure effective scrutiny and performance are included in contracts.

### 3. **ALTERNATIVE OPTIONS CONSIDERED**

- 3.1 *Issuing guidance specific to Councillors sitting on a Board of Directors.* This was discounted because of the similarity of some other circumstances. It was felt that narrower guidance would comply with the request from the Executive but would miss the opportunity to provide advice appropriate to a other circumstances.

**Simon Best**  
**Head of Legal Services**

### **BACKGROUND PAPERS**

Memorandum giving details of Executive request for advice – 24 October 2006  
“*Lobby groups, dual-hatted members and the Code of Conduct*” - Standards Board for England; September 2004  
The Case Review - Standards Board for England; 2003 to date

<b>Areas in District Affected:</b>	All
<b>Executive Portfolio Area and Holder:</b>	Corporate – Councillor Crowther
<b>Key Decision:</b>	No
<b>Included in Forward Plan:</b>	No

#### **For further information about this report please contact:**

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# **Warwick District Council**

## **Guidance for Members serving on Outside Bodies**

*Draft (October 2006)*

This guidance was approved by the Council on [       ] 2006

## Introduction

This guidance draws attention to the main issues which members should consider when appointed to serve on outside bodies. In the context of this guidance an outside body is a non-statutory organisation which may be a charity, or it may be incorporated as a company (either limited by shares or guarantee), or it may be a friendly society or it may be unincorporated.

Service on outside bodies has always been an established part of a members role. An appointed member on an external body will be able to use to use their knowledge and skills as a council member to assist the organisation to which they are appointed. The Council is now increasingly working in partnership with external organisations and greater clarity is needed as to the role of members appointed to these bodies. Funding streams may benefit outside bodies and channelled through the Council as the accountable body and questions of accountability and governance will arise.

Membership of an outside body brings into play different considerations to those which relate to council membership. Members will have different duties, obligations and liabilities depending upon the type of organisation involved.

### The main issues:

- The application of the Council's Code of Conduct.
- The primary duty to act in the interests of the outside body.
- Duties as a charity trustee (if applicable).
- Duties as a company director (if applicable).
- Liabilities in respect of unincorporated organisations.
- Conflict with the member's role as a councillor.

### Code of Conduct – Register of Interests

The Code of Conduct requires that:-

*“15. Within 28 days of the provisions of the authority's code of conduct being adopted or applied to that authority or within 28 days of his election or appointment to office (if that is later), a member must register his other interests in the authority's register maintained under section 81(1) of the Local Government Act 2000 by providing written notification to the authority's monitoring officer of his membership of or position of general control or management in any -*

*body to which he has been appointed or nominated by the authority as its representative;”*

*As soon as you have been appointed you must take steps to have your appointment included in the Register of Interests. Any changes must also be notified within 28 days.*

### Matters to check – questions to ask

Members are advised that in the event of being appointed to an outside body they should be clear about the answers to the following questions:-

1. What is the nature of the organisation and its main activities? Is it a company, if so what type of company is it (limited by shares or guarantee)? Is it unincorporated? Does it have charitable status?
2. Is the effect of my appointment to make me a company director or a charitable trustee?
3. Do I have a copy of the body's governing instrument (this may be a trust deed, a constitution or memorandum and articles or association)?
4. Have I been supplied with a copy of any code of conduct to which I am subject as a member of the body.
5. Am I aware of the identity of other directors, trustees or committee members?
6. Is there an officer of the body such as a secretary or clerk to whom I can refer?
7. Are written minutes kept of meetings and have I seen these minutes?
8. Are meetings being conducted in accordance with the governing instrument?
9. Am I aware of the financial position of the organisation to which I have been appointed?
10. Am I aware of any contracts between the body and the Council?
11. Do the governing body of the organisation receive regular reports on the financial position?
12. Have I seen the last annual report and accounts?
13. Am I aware and have I been advised of the main risks the body faces and what steps are taken to deal with such risks?
14. Have I been informed of the main insurances held by the body?

### **Council's Code of Conduct**

The Council Code of Conduct requires that a member must observe the Council's Code of Conduct whenever the member is acting as a representative of the authority.

The Code of Conduct also states:-

*Where a member acts as a representative of the authority –*

*on another relevant authority, he must, when acting for that other authority, comply with that other authority's code of conduct; or*

*on any other body, he must, when acting for that other body, comply with the authority's code of conduct, except insofar as it conflicts with any other lawful obligations to which that other body may be subject.*

### **Directors Duties**

If the body is a limited company, it is likely that you will be appointed as a company director. You will need to complete a form giving your details for filing in the Register

of Companies at Companies House. The secretary of the body should assist you with this.

Duties of company directors are not the same as your responsibilities as a councillor. These duties can be summarised as follows:-

(1) A fiduciary duty to the company, not to the individual shareholders or members, to act honestly and in good faith and in the best interests of the company as a whole. Directors are, therefore, in a similar position to trustees who must take proper care of the assets of the company.

(2) A general duty of care and skill to the company, but a director requires no greater skill than might reasonably be expected of someone of that individual's particular knowledge and experience. A director is not deemed to be an expert, but is expected to use due diligence and to obtain expert advice if necessary.

(3) Like a councillor in respect of council decisions, the director is under a duty to exercise independent judgement, though it is permissible for him to take into account the interests of the third party which he represents. In such a case the director must disclose that position and tread a fine line between the interests of the company and the party represented. The director cannot vote simply in accordance with the Council mandate: to do so would be a breach of duty.

(4) There may be actual or potential conflicts between the interests of the council and the interests of the company. For example, the company might be inflating a bid for a council grant. In such rare circumstances the only proper way for the conflict to be resolved is for the councillor to resign either from the company or from the council.

(5) Directors are not allowed to make a private profit from their position. They must therefore disclose any interests they or their family have in relation to the company's contracts. Whether they are then allowed to vote will depend upon the company's Articles of Association.

(6) Directors must ensure compliance with the Companies Acts in relation to the keeping of accounts and that the relevant returns are made to the Registrar of Companies. Failure to do so incurs fines and persistent default can lead to disqualification as a director.

(7) They should also ensure compliance with other legislation such as health and safety and equalities legislation if the company employs staff or employs contractors to undertake works.

### **Charitable Trustees**

A number of useful publications are available on the Charity Commission's Website at : [www.charitycommission.gov.uk](http://www.charitycommission.gov.uk). See Publication CC3 – "Responsibility of Charity Trustees" is a useful reference document. Those who are responsible for the control and administration of a charity are referred to as trustees, even where the organisation is a company limited by guarantee even though they are not strictly trustees.

A charity may also be unincorporated (see below).

The duties of charity trustees can be summarised as follows:-

- (1) Trustees must take care to act in accordance with the charity's trust deed or governing document and to protect the charity's assets. They are also responsible for compliance with the Charities' Acts and the Trustee Act 2000.

- (2) Trustees must not make a private profit from their position. They must also perform their duty with the standard of care which an ordinary, prudent business person would show. Higher standards are required of professionals and in relation to investment matters.
- (3) Charitable trustees must ensure that the information relating to the trust and trustees is registered with the Charity Commissioners and that annual accounts and returns are completed and sent.
- (4) If charitable income exceeds £5,000 the letters, adverts, cheques etc must bear a statement that the organisation is a registered charity.
- (5) Trustees are under a duty to ensure compliance with all relevant legislation, for example, in relation to tax and health and safety.

## **Unincorporated organisations**

Groups which are not limited companies may be “unincorporated associations” which have no separate identity from their members. The rules governing the members’ duties and liabilities will (or should) be set out in a constitution, which is simply an agreement between members as to how the organisation will operate. Usually the constitution will provide for a management committee to be responsible for the everyday running of the organisation. Management Committee members must act within the constitution and must take reasonable care when exercising their powers.

Members who are involved in the administration of an unincorporated body will need to be aware that as the body has no separate corporate status, any liabilities will fall upon the members personally.

Members need to assess the risk of personal liability and the extent to which this has been covered by insurance arrangements.

## **Conflicts of interests and bias**

Members appointed to an outside body will have a personal interest in that body and will need to consider their position when they sit on a council committee or decision making body which is considering a matter to which that interest relates.

A personal interest will always need to be declared. Whether the member is required to leave the meeting and not take any further part in a discussion depends on whether that member has a “prejudicial interest” under the Code of Conduct.

The Code provides that a member may regard himself as not having a prejudicial interest in a matter if it relates to a body to which he has been appointed or nominated by the authority as its representative.

Even though the Code of Conduct may appear to allow participation by a member with a personal and prejudicial interest as an appointed member of an outside body, some care needs to be taken, as for certain types of decision there is the possibility that participation may amount to a decision being affected by “bias”.

Members participating in planning and licensing decisions, for example, should declare a personal and prejudicial interest in respect of their membership. Failure to do so could lead to a decision being challenged in the courts or result in a complaint to the Local Government Ombudsman.

There may however be occasions when it would be right for a member to take part in a discussion. For example, where there was a general discussion on the role of an outside body, it is clearly in the public interest that the Council’s representative should be able to speak and the Code enables that to happen. Where a decision was being taken which might directly affect the well being of financial position of the outside body it is suggested that further advice is sought from the Monitoring Officer.

## **Involvement and Reporting**

Members appointed to an outside body should ensure that they take a proper role in the management and governance of the body. This will include attending meetings regularly and being familiar with issues relating to that body.

It is recommended that a member appointed as the Council's representative should consider the need to make reports to the Council on the progress being made by that body and any issues which the Council should consider.

## **Further advice**

Relationships between the Council and outside bodies and the Council's representative can involve complex issues. In any case of dispute or difficulty advice should be sought from the Monitoring Officer.