

COPELAND BOROUGH COUNCIL

GUIDANCE TO COUNCILLORS ON THEIR RESPONSIBILITIES AS MEMBERS OF OUTSIDE BODIES

1. WHAT ACCEPTING AN APPOINTMENT MEANS

- Acting according to the rules, constitution and framework set by the outside body;
- Making independent and personal judgements in line with your duty of care to the outside body;
- Reporting back at least annually to the Council;
- Liaising with the officer appointed to advise you;
- Behaving ethically and following the Member Code of Conduct;
- A commitment of time and taking an active and informed role in the affairs of the outside body.

2. WHAT ACCEPTING AN APPOINTMENT DOES NOT MEAN

- Representing the political party to which you owe your political loyalty;
- A watching role, avoiding taking part in the outside body's discussions and decisions;
- Looking at things from the Council's point of view alone;
- Being there to make up the numbers.

3. GENERAL DUTIES

- Read all the papers carefully;
- Attend meetings whenever possible (absence from meetings will not necessarily protect you if things go wrong);
- Question officers or other members of the outside body if you do not believe you have been given all or sufficient information or if you have concerns;
- Ensure you understand you have other responsibilities;
- Ensure the outside body takes professional advice when necessary;
- Ensure that proper minutes are taken of meetings;
- Ensure that if you have a contrary view your vote is recorded together with your reasons for taking that decision;
- Ensure you report back at least every 6 months to the Council, Executive or appropriate Overview and Scrutiny Committee. Democratic Services will advise you further on this.
- If you can no longer participate in the outside body, you should resign immediately.

4. SPECIFIC RESPONSIBILITIES

As well as the general duties set out above, the status of your appointment will determine whether there are specific responsibilities which fall to you. Outside bodies can be loosely grouped into 5 categories:

- Informal groups which are consultative or information sharing. These groups will not hold funds or generally be decision making. You will usually be putting forward the Council's position and hearing that of other groups;
- Local Government Association or local authority groups. You will be representing the Council and putting its views forward;
- Companies limited by shares or guarantee;
- Charities and Charitable Trusts;

The specific responsibilities of the last two groups are set out below.

5. COMPANIES

Companies are often created, to make the administration of an organisation easier. Companies are separate legal entities, which can enter into contracts, and employ staff. They can also sue and be sued, and this *may* protect the members of the organisation from individual, personal liability. It should be noted, however, that in some cases, directors can still personally liable, as detailed below.

There are several forms of company with which Councillors may be involved. The two most common forms are:-

- Companies Limited by Shares
- Companies Limited by Guarantee

Companies Limited by Shares

This type of company will have a share capital, and the company allocates the shares to its members (the shareholders). In the event that the company is wound up, each shareholder is liable to pay the amount equivalent to the nominal value of his or her shareholding.

In return for this, shareholders share the ownership of the company, and its profits. This is normally done by the company paying a dividend to its shareholders. The dividend is usually declared on the basis of an amount of money per share held. In this type of company, the day to day management of the company is usually vested in the directors. The members ultimately control the company by electing the directors, and deciding major issues at general meetings.

Most high street companies are companies limited by shares, paying dividends to their shareholders (members).

Companies Limited by Guarantee

Companies limited by guarantee also have members, who control the activities of the company in the same way (ie. electing directors, and making decisions in general meetings). However, these companies do not normally seek to make a profit, and do not therefore pay dividends to their members. In the event of the company being wound up, the members guarantee to make a payment to the level of their guarantee (although this is usually a nominal sum, eg. £1). This type of company is more commonly used for voluntary and public bodies, especially where charitable status is sought (a company limited by shares cannot normally fulfil the criteria for registration as a charity).

General Company Matters

Whether a company is limited by shares, or limited by guarantee, the company is controlled by reference to its “constitution”, which is contained in the memorandum and articles of association. These documents will set out the powers of the company, and the rules by which it is to be managed.

Any act carried out by the company that is outside the powers set out in the memorandum will be unlawful, and a director involved in such an act may be personally liable for any resulting losses.

The articles of association will usually provide for the business of the company to be decided by the members of the company, acting in general meeting. At such meetings, the members would elect a board of directors, who would then deal with the day to day management of the company. In some cases, the articles may provide for the Board to elect further directors, in certain specified circumstances.

In some situations, the Council nominates Councillors to act as “observers” on the Board of Directors of a company. Although such observers would not be classed as directors for most purposes, Councillors should be aware that if an observer’s involvement increases, to such an extent that it could be said that there is an active engagement in the management of the company, he or she may be deemed to be a “shadow director” which may entail liability for losses, etc.

Once elected to the Board, a director has a number of duties and liabilities, under general company law. The fact that a director is appointed to the board as a representative of the Council does not diminish these duties. The director will be an agent of the company, whose prime duties and liabilities are as follows:

Duties

- A “fiduciary” duty to the company (not individual shareholders) to act honestly and in good faith and in the best interests of the company as a whole. This duty is akin to that owed by Councillors to the council tax payers of the district.
- A general duty of to take reasonable care and skill in acting in the company’s affairs, including seeking professional advice where this is necessary.

- A duty to exercise independent judgement when dealing with the company's affairs, rather than blindly voting in accordance with a direction from another body represented by the director (such as the Council in the case of a director nominated by the Council). A director representing another body may take into account the views of that body, but cannot allow them to rule against the *company's* best interests.
- A duty to avoid conflicts of interests. The interests of the Council and the company may conflict, but the director's primary duty is the company, not the organisation he or she is representing.
- A duty not to make a private profit from their position. Directors must therefore disclose any interests they or their family may have in relation to the company's contracts, and only take further part in discussions to the extent which the governing articles permit.
- A duty to ensure that the legislation contained in the Companies Act is complied with, eg. Submission of accounts and returns, etc. Failure to do so can lead to disqualification as a director.

Liabilities

- Personal liability where a company acts outside its powers, and the director knowingly causes or permits the company to so act.
- Liability to members of the company for breach of trust, if he/she misapplies the money or property of the company. Directors may also be liable if they fail to take action to prevent the breach of a co-director of which they are aware.
- Liability to the company for any losses sustained where a director abuses his position in some way, or fails to act in the best interests of the company.
- Liability for losses caused by a director who fails to exercise the requisite level of skill and care (and fails to seek appropriate advice).
- Liability to contribute towards a company's assets where a director knows or ought to know that there is no reasonable prospect of the company avoiding liquidation, but allows the company to continue to trade ("wrongful trading"). A director should alert his fellow directors and the company's position, and seek advice as necessary.
- Liability for fraudulent trading ie. where a company deals with the intent of defrauding creditors or others. As well as a fine, a director may be disqualified from acting as a director in another company.
- Liability to a fine and/or making good losses, where cheques and other documents do not bear the name of the company.
- Liability to pay damages where the director deals with an individual or another company, who believes that the director is authorised to so act, when in fact he or she has no such power.

Companies of all types, (guarantee or shares) can purchase insurance for their directors against claims for negligence, breaches of trust, etc., (subject to the company's powers permitting this). Directors should ensure that such insurance is in place, and that the provision of insurance is within the powers of the company.

Local Authority Companies

Legislation is in force, which seeks to restrict and control companies which have a connection with local authorities, either because of the level of interest owned by the Council, or because of the degree of business and involvement between the Council and the company. “Company” includes:-

- Companies limited by shares;
- Companies limited by guarantee;
- Industrial and Provident Societies (including therefore most Housing Associations).

There are three types of local authority companies which are affected by the legislation. These are controlled, influenced and minority companies.

In general terms, companies are “controlled” by a local authority where there are more than 50% local authority interests.

Companies are “influenced” companies where there is at least 20% local authority interest plus a business relationship with the company accounting for over 50% of the company’s turnover and/or the company was located on local authority land leased or sold for less than best consideration.

Regulated companies (ie. companies which are either “controlled” or “influenced” companies), will be under the effective control of the local authority, and under the legislation, will be subject to the capital finance regime which applies to local authorities, as well as other special propriety controls.

Minority companies are companies where the Council’s interest is less than 20%. This type of company is not treated as part of the local authority, and is able to act with more freedom (subject to the other provisions affecting companies in general).

For this reason, the Council usually ensures that any involvement it has in companies is kept below 20%, ie that less than 20% of voting rights/directors are associated with the Council. Councillors are requested to seek advice from the Head of Legal and Democratic Services if they consider that this limit may be exceeded at any time.

A person is “associated” with the Council if he or she is a current member or officer of the Council, or of a regulated company under the Council’s control, **or has been a member of the Council at any time within the preceding four years.**

Councillors who are directors of regulated companies to which they have been nominated by the Council are under the following obligations.

- To ensure that the remuneration they receive from the company should not exceed prescribed limits, and should be declared;

- To give information to Councillors about their activities as required by the local authority (save for confidential information); and
- To cease to be a director immediately upon disqualification as a Councillor.

6. **CHARITIES AND CHARITABLE TRUSTS**

A Charitable organisation is one which is formed for one or more of the following charitable purposes:-

- The relief of poverty and human suffering
- The advancement of education
- The advancement of religion
- Another purpose for the benefit of the community

An organisation that falls within the definition of a charity must be registered with the Charity Commissioners. The Commissioners oversee the operations of all charities, and grant consent to various transactions involving charities, where the law requires this.

Because of the nature of sharing profits with shareholders, a company limited by shares cannot be a charity.

To register as a charity the organisation must submit its governing instrument (ie. the Trust Deed (in the case of a trust) the Memorandum and Articles of Association (of a company limited by guarantee) or the constitution (unincorporated association) to the Charity Commissioners for approval. If they are satisfied that the organisation is charitable it will be registered as such.

The law relating to charities imposes a number of duties and liabilities on those controlling the organisation. They are normally referred to as “trustees” which will include the Directors (of a company limited by guarantee) and the management committee of an unincorporated association.

Trustees’ Duties

Trustees have the following duties:-

- A duty to act accordance with the Trust Deed and to protect the charity’s assets;
- A duty to comply with the Charities Acts and other legislation affecting the charity;
- A duty not to make a private profit from their position;
- A duty to act with the standard of care which an ordinary, prudent business person would show. Higher standards are required of professional, and in relation to investment matters;
- A duty to ensure that the information relating to the trust and trustees is registered and the Charity Commissioners and that annual accounts and returns are completed and sent;

- (where charitable income exceeds £5,000) a duty to ensure that letters, adverts, cheques etc bear a statement that the organisation is a registered charity.

Trustees Liabilities

Trustees have the following liabilities:-

- A liability to make good any deficiency where trust property has been used for a trustee's own purposes, or for purposes not in accordance with the purposes of the trust
- Personal liability for losses or claims where a trustee has acted outside the scope of the trust deed
- Personal liability where the trustee has not shown the required standard of care

Unlike a limited company, a trust has no separate identity from the trustees. Trustees are therefore personally liable for losses on contracts or claims by third parties although trustees are entitled to an indemnity from the trust assets, provided they act properly in incurring the liability.

For example, in the case of a trust set up to run a community transport scheme, the trustees will be liable personally for a claim from a pedestrian injured by one of the drivers, although the trust's insurance arrangements will indemnify the trustees against the claim.

Trustees remain personally liable once they retire (eg. If they have entered into a contract on behalf of the trust) and should therefore seek an indemnity from their successors. If the charity is a company however the trustees for the time being will be responsible.

Trustees may be liable to fines if they do not comply with the duty to make returns etc.

Trustees Indemnities

An indemnity may be given from the trust fund provided the trustee has acted properly and within his/her powers. Trustees may take out insurance to protect themselves against personal liability but not for criminal acts, fraud etc. There will be no problem if the trustees themselves pay the premiums but if they are paid out of the charitable funds the trustees will need the consent of the Charity Commissioners unless the trust deed allows it.

7. COMMITTEES OF MANAGEMENT

Groups which are not charities, or charitable trusts or companies are "unincorporated associations" and have no separate legal identity from their members. The rules governing members' duties and liability will usually be set out in a constitution which is simply an agreement between the members as to how the organisation will operate. Usually the constitution provides for a

management committee to be responsible for the everyday running of the organisation. Often unincorporated associations will be charitable and there are benefits to such organisations if they register as a charity.

Any property held by unincorporated associations eg. leases and licences of accommodation has to be held by individuals as the organisation does not have an existence of its own.

Broadly speaking, Management Committee Members must act within the constitution and must take reasonable care in exercising their powers. They should follow the guidance above as if they were Trustees.

Generally, the Management Committee Members are personally liable for the acts of the organisation, but are entitled to an indemnity from the funds of the organisation if they have acted properly. If there are not enough funds, the Committee Members are personally liable for the shortfall.

If one person is appointed by the constitution to act as the agent of the organisation for certain purposes, then that person acts as agent of all the members of the organisation, who all have joint liability for the agent's actions.

Members of the Committee of Management will have personal liability if they act outside the authority given to them or if they do not comply with statute eg. the payment of tax and national insurance for employees.

Members of Management Committees will be entitled to an indemnity if they act in accordance with the constitution and are not at fault. It is possible to obtain insurance but if the organisation is to pay the premium, it must be permitted by the constitution.

8. COUNCIL INDEMNITIES

Since November 2004, it has been possible for an indemnity to be provided in relation to any action of, or failure to act by, a Councillor, which is authorised by the Council or where the Councillor is carrying on any functions at the request of, or with the approval of, or for purposes of, the Council. However, it does not extend to situations where the Councillor acts other than as a Councillor.

9. INTERESTS

There are a number of rules which Councillors must be aware of, which may limit the extent to which they are able to take part in debates or votes on issues. These rules extend to matters involving outside bodies of which Councillors are members or representatives.

The Member Code of Conduct, adopted by the Council requires Councillors to register their involvement in various organisations. This involvement may also require them to declare interests when matters concerning the organisation are being discussed at a Council meeting. In some cases, Councillors may have to leave the meeting and refrain from taking part in discussion.

For further details Councillors should refer to the Member Code of Conduct to be found at the back of their copies of the Constitution.