

## **Appendix 3**

### **Extract from Part 8.4 - GUIDANCE FOR MEMBERS AND OFFICERS SERVING ON OUTSIDE BODIES**

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#### **2. COMPANIES**

2.1 The obligations imposed by company law are onerous and there are severe penalties for non-compliance with many of the duties imposed on directors. It is important for Members and officers appointed to act as company directors to ensure that they understand the duties and obligations which the law imposes on them.

2.2 A company is a separate legal entity which can hold property in its own right, enter into contracts, employ staff and sue and be sued in its own name. A company is distinct from its members, who may be either shareholders or guarantors.

2.3 Whether a company is limited by shares or by guarantee, 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 the major issues at general meetings. The main differences are as follows:-

- in a company limited by shares the shareholders share the ownership of the company and its profits and if the company is wound up each shareholder is liable to pay an amount equivalent to the nominal value of his or her shareholding;
- a company limited by guarantee does not normally seek to make a profit and in the event of the company being wound up, the members guarantee to make a payment to the level of their guarantee (usually a nominal figure of £1.00). Hence companies limited by guarantee are more commonly used for voluntary and public bodies, especially where charitable status is sought.

2.4 A 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.

In general Members and officers should avoid taking executive or managerial responsibility for the company's activities because the duties of executive or managing directors can be particularly onerous. This is because executive directors are directly responsible for particular aspects of the company's affairs. For example, a finance director will have responsibility for the company's financial position, which could give rise to liability for allowing the company to trade while insolvent if the

company goes into liquidation. However, all directors, including part-time and non-executive directors, are required to make themselves fully aware of the company's financial position and should attend Board meetings regularly.

- 2.5 In some situations, the Council may nominate Members or officers to act as “observers” on the board of directors of a company. Although such observers have no specific legal status, Members and officers 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 liabilities. Any person appointed to this role should therefore ensure that the extent of their role as an observer is clearly defined and agreed to avoid involvement in managing or directing the management of the company.
- 2.6 Under the Companies Act 2006 ('the Act'), directors owe a number of legal duties to their company. These are duties to:
- Act within powers (section 171 of the Act)
  - Promote the success of the company (section 172)
  - Exercise independent judgement (section 173). Although it is permissible to take account of the interests of a third party (in this case the council), a director cannot vote simply in accordance with the council's instructions.
  - Exercise reasonable skill, care and diligence (section 174)
  - Avoid conflicts of interest (section 175). There may be actual or potential conflicts between the interests of the company and those of the council. A Member or officer cannot waive their statutory responsibilities as a director; hence they may have to cease to act as a Member or officer in relation to the particular matter. In extreme cases, the only proper way for the conflict to be resolved may be for the Member or officer to resign either from the company or from the council. [If the company is a charitable company regulated by the Charity Commission the directors will also need to consider Charity Commission guidance \[\\[insert link here\\]\]\(#\) on conflicts of interest.](#)
  - Not accept benefits from third parties (section 176)
  - Declare interest in a proposed transaction or arrangement with the company (section 177). Directors must therefore disclose any interests they or their family may have in relation to the company's contracts. Whether they are then allowed to vote will depend on the company's Articles of Association. (Equally, officers are not allowed under cover of their office to take any more than their proper remuneration so they must obtain the consent of the Council if they are to receive any remuneration from a company to which they have been appointed by the Council).

Members acting as directors should be aware of these duties, particularly those which could lead to:

- A conflict with their role as member of the local authority (for example, the duties to promote the success of the company, to exercise independent judgement, and to avoid conflicts of interest).
- Personal liability for the debts of the company

The fact that a director is appointed to a company board as a representative of the council does not diminish these duties.

### 3. CHARITIES

3.1 Many outside bodies with which Members or officers will be involved will be charities.

3.2 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 (as detailed in Section 3 of the Charities act 2011).

3.3 It must operate for the public benefit and have exclusively charitable purposes. It 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.

3.4 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.

3.5 Charity Trustees have the following duties:

- (1) A duty to act in accordance with the charities governing instrument and to protect the charity's assets.
- (2) A duty to comply with the Charities Acts and other legislation affecting the charity.
- (3) A duty not to make a private profit from their position.
- (4) A duty to act 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.
- (5) A duty to ensure that the information relating to the trust and trustees is registered with the Charity Commissioners and that the necessary annual accounts and returns are completed and sent.
- (6) Where charitable income exceeds £10,000, a duty to ensure that letters, adverts, cheques etc. bear a statement that the organisation is a registered charity.

Trustees of charities regulated by the Charity Commission must follow Charity Commission guidance [\[insert link here\]](#). In particular they must consider the Charity Commission guidance in relation to conflicts of interest. Where there is a contractual relationship between

the charity and the council, the member will have an obvious conflict of interest when the charity discusses questions relating to that contractual relationship. That member will need to refer to the charity's governing document to determine whether they are able participate or vote where the local authority has an interest that is potentially adverse to that of the charity.

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[The list of outside bodies which are registered as Charitable Companies where the Council has appointed members includes:-](#)

- [Brighton Dome and Festival Limited - Charity Commission link](#)
- [Brighton and Hove Estates Conservation Trust - Charity Commission link](#)
- [Brighton and Hove Music Trust - Charity Commission link](#)
- [Brighton and Hove Seaside Community Homes Ltd - Charity Commission link](#)
- [Gorham's Gift - Charity Commission link](#)
- [The Brighton Fund - Charity Commission link](#)
- [The West Pier Trust Board - Charity Commission link](#)

[The Royal Pavilion and Museums Foundation – Charity Commission link](#)