



APPENDIX B

LONDON BOROUGH OF TOWER HAMLETS

GUIDANCE FOR MEMBERS REPRESENTING THE COUNCIL ON EXTERNAL BODIES

Updated June 2010

GUIDANCE FOR MEMBERS/OFFICERS REPRESENTING THE COUNCIL ON EXTERNAL BODIES

1. The Council has nomination/appointment rights to a large number of different external bodies and organisations. These may be joint committees, public, private and voluntary organisations operating in the Borough and statutory bodies. All nominations to outside bodies are published on the Council's website.
2. The Council may nominate or appoint members or officers to these bodies. Rules concerning who may be nominated or appointed and the term of office may be set out in the constitutional arrangements of each of the individual organisations.
3. Generally the Council will nominate elected members as its representative(s); however this guidance applies to both members and officers alike.
4. In carrying out such roles councillors and officers act both as individuals and as representatives of the Council. The role requires the appointed person to:-
 - act according to the rules, constitution and framework set by the outside body;
 - make independent and personal judgements in line with their duty of care to the outside body;
 - report to the Council and lead member or relevant committee as requested or necessary. Accordingly the council representatives shall keep the relevant lead member appropriately informed of all business to be or conducted by the external body;
 - behave ethically and follow as far as applicable the Council's Code of Conduct for Members;
 - take an active and informed role in the management of the outside body's affairs.
5. Such roles can be time consuming and require a commitment different from the political role of councillors or empowerment role of officers working within the Council. Membership on outside bodies does not entail representing the political party to which councillors owe their political loyalty, or to the Council by which the officer is employed. Representatives on such bodies will not be able to "avoid" taking part in the outside body's discussions and will be required to take a fully participative role. They will not be expected to look at things simply from the Council's perspective, nor to be there in name only.

6. The role of councillors or officers on outside bodies may give rise to occasional uncertainty and perhaps to conflicts of interest. The attached Annex offers a guide to the responsibilities of councillors and officers. Councillors and officers should read the guide before taking up any representational role and if there are issues arising from their particular situation at any time to contact the Assistant Chief Executive (Legal Services) or the Service Head, Democratic Services for advice.
7. Councillors and officers are under a specific obligation as a result of the 1995 Local Authorities (Companies) Order to report back to the Council on their involvement in *outside companies* to which they have been nominated by the Council. That obligation can be met by a six monthly report to the full Council. The Cabinet, Overview and Scrutiny committee or political groups may request more regular feedback in general or on specific issues. The representative must provide such information as is requested unless they have concerns that the information requested maybe confidential to the company or affect its business activity, in which case they should seek advice from the Assistant Chief Executive (Legal Services). While the law now makes this a requirement for involvement in outside companies, it is good practice for a requirement to report back to apply to involvement in all outside bodies.
8. Councillors will appreciate that the guide and also the Code of Conduct for Members address some of the issues around the possibility of conflicts of interests. If the outside body comes into conflict with the Council and the councillor or officer is on the management committee of the outside body, it is likely that the councillor or officer will have an interest which they will have to declare which if it is prejudicial will prevent them from participating in the Council decision-making affecting the outside body to which he or she has been appointed.
9. If there is a major dispute between the Council and the outside body, then the councillor or officer may be placed in an untenable situation. Before taking precipitate action, the councillor or officer should seek the advice of the Chief Executive or the Assistant Chief Executive (Legal Services).
10. The councillor or officer may find s/he is unable adequately to carry out their responsibilities properly, both as a councillor or officer and as a member or director of the outside body. That would be an exception, and should not deflect councillors or officers generally from being prepared to participate in the management and running of outside organisations.

ANNEX

A GUIDE TO THE LAW FOR COUNCILLORS AND OFFICERS ON EXTERNAL BODIES

This advice is for councillors and officers who represent the Council on organisations outside the Council, whether as a company director, the trustee of a charity or a representative on a management committee. It sets out some of the most important responsibilities. It is not meant to be a comprehensive guide. If Councillors or officers have queries then the Assistant Chief Executive (Legal Services) or the Service Head, Democratic Services should be consulted.

GENERAL

1. There are some general provisions which apply to councillors and officers who act in the role of company director, trustee or member of an incorporated body, or on the committee of management of an unincorporated voluntary organisation.
2. Members are under a duty to exercise independent judgement in the interest of the organisation in which they are involved. Whilst it is recognised that councillors and officers may have a commitment to representing the Council on the outside organisation, they must be aware that it is their responsibility to decide what view to take on any question before that organisation. Where a councillor or officer is participating in an outside organisation in a representative capacity, s/he must declare that fact to the organisation. There will be a fine line to tread between his/her duty to the organisation and to the Council.
3. In the final analysis, the councillor or officer in acting as a director/trustee or member of a management committee of an organisation must act in accordance with the interests of that organisation. A mandate from the Council to vote one way or the other would put the councillor or officer in breach of the duty to the organisation. It is permissible to take account of the Council's wishes, but not to vote simply in accordance with them. **The overriding duty in considering an item before the outside organisation is to vote in accordance with the interests of that organisation.**
4. Councillors and officers must also ensure that avoidable loss is not incurred in managing the organisation. They cannot avoid this responsibility by not reading the papers or failing to ask for appropriate reports. They will be expected to seek professional advice where appropriate.

COMPANIES

5. On incorporation a company becomes a separate legal entity which can hold property in its own right, enter into contracts and sue and be sued in its own name. The company is distinct from its shareholders and members. In the case of a limited liability company, the liability of members of the company is

limited to the amount they paid or agreed to pay when they joined the company. This can be as little as £1.

6. Companies limited by shares are those which have a share capital (e.g. 1000 shares of £1 each). Each Member holds shares and receives a share in the profits made by the company according to the value of the shares held. Shares can be sold. Companies limited by guarantee are those where there is no shareholding. Instead each Member agrees that in the event of the company being wound up they will agree to pay a certain amount. This may also be as little as £1. This form of company is the most usual in the public and voluntary sector particularly where charitable status is sought.
7. The management of a company is generally the responsibility of a board of directors. The powers of the directors are usually set out in the company's Articles of Association (the rules each company has to govern its internal management). Sometimes even though a company has been incorporated the directors may be referred to as members of the committee of management, governors or even trustees. However this does not change their status as directors. Conversely, sometimes officials are called directors but they are not members of the board. Again their status will not be affected. Directors are those who are appointed by the company to act in that capacity.

Directors' Duties

8. A director is an agent of the company. His/her prime duties are as follows:-
 - (1) **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. Directors are therefore in the position of "quasi trustees" who must take proper care of the assets of the company. The fiduciary duty of a director towards the company is very similar to the fiduciary duty of Councillors to the Council Tax payers.
 - (2) **A general duty of care and skill** to the company. So long as the Company remains solvent, 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. But note that if the Company becomes insolvent, the Court may expect that the director brings an appropriate level of skill, competence and experience to the job.
 - (3) Like a Councillor in respect of Council decisions, the director is under a duty **to exercise independent judgment**, though it is permissible for him/her to take account of the interests of a third party which he/she represents. In such a case the director must disclose that position and treads a fine line between the interests of the company and the party represented (in this case the Council). The director cannot vote simply in accordance with the Council mandate. To do so would be a breach of duty.

- (4) **No conflict.** There may be actual or potential conflicts between the interests of the Council and the interests of the company. In such circumstances the only proper way for the conflict to be resolved is for the Councillor or officer 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 may have in relation to the company's contracts. Whether they are then allowed to vote will depend on the 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.

Directors' Liabilities

9. The following liabilities apply to directors:

- (1) The company's identity must clearly be shown on its stationery. The company number, place of registration, registered office address and if any of the directors' names are shown then they must all appear. Non-compliance is an offence and the directors and company officers can be fined.
- (2) A company can only act within the scope set out in its Memorandum of Association (the document which sets out the objects of the company). Those directors knowingly causing the company to act beyond the activities set out in the Memorandum will be liable personally. In very limited circumstances it is possible for the actions of the directors to be ratified by the Members of the company.
- (3) A director may also be liable 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.
- (4) In the event of failure to act in accordance with the best interests of the company, or if a director uses his/her powers improperly or makes a personal profit from his/her position as director, then the director may be personally liable for loss to the company and may be required to give to the company the personal profit made.
- (5) If the level of skill and care shown by a director falls below that which could be reasonably expected and the company suffers loss, the director will be liable for the loss incurred. However if it believes the director acted honestly and reasonably, a Court may excuse the director the liability.

- (6) If a director knows or ought to know that there is no reasonable prospect of the company avoiding liquidation, a Court may require that director to contribute to the company's assets on liquidation if the company continues to trade. This is known as wrongful trading. No such order will be made if the Court is satisfied that the director took all reasonable steps to minimise the loss to the creditors. If a director has concerns about the company's financial position he/she could be well advised to inform the other directors and seek advice from the company auditors. He/she should try to ensure that further debts are not incurred.
- (7) A director will also be liable if to his/her knowledge the company carries on business with intent to defraud creditors or any other person, or for any other fraudulent purpose. Fraudulent trading can also lead to disqualification from acting as a director.
- (8) All cheques and similar documents which purport to be signed on behalf of the company must bear the company name. Where they do not, the director signing on behalf of the company may be liable to a fine and may also be liable to the payee if the company fails to honour the cheque. It is therefore wise for directors to make sure that all documents they sign on behalf of the company state very clearly that they act as agent for the company, (e.g. Director, for and on behalf of).
- (9) A third party who enters into a contract on the assumption that a director has power to bind the company, may be able to claim damages against the director if it subsequently transpires that the director had no such power. Directors would be well advised to ensure that contracts are approved by the board and that the authority to enter into any contract has been properly delegated before signing it.
- (10) Though company liability ceases on dissolution the liability of the directors (if any) may still be enforced after dissolution.

Indemnities

10. The following arrangements apply:

- (1) Councillors who are directors cannot be indemnified by the company against liability arising out of negligence, default, or breach of duty or trust. However the company's Articles of Association may allow for directors to be indemnified by the company in respect of the cost of defending such proceedings if the director is granted relief by the Court or acquitted. Equally, in making the appointment, the Council can offer an indemnity against losses which the councillor may suffer through acting conscientiously as a director. **But note that it is lawful for companies to purchase insurance to protect its directors against claims of negligence, breach of duty, trust, default. Directors**

would be well advised to ensure that such a policy of insurance is maintained at all times.

- (2) Under the Local Government Act 2000¹, it is now possible for the Council to provide indemnities for councillors or officers when appointing them to act as directors and to buy insurance to cover any losses which they may suffer through acting conscientiously as a director. However, the first recourse would be to ensure that the company had provided such insurance.

Local Authorities (Companies) Order 1995

11. These arrangements apply to local authority companies:

- (1) This Order, made under the Secretary of State's powers contained in Part V Local Government and Housing Act 1989, sets out rules concerning local authorities' involvement in "regulated companies" which are subject to extensive controls, and their involvement in other companies where a number of rules apply.
- (2) "Regulated companies" are so defined if they are controlled or influenced by the local authority. "Influenced companies", under the effective control of the local authority, will be subject to capital finance régime and special proprietary controls. In broad terms, the test as to whether companies are local authority influenced is whether the local authority has the right to or in fact does exercise a dominant influence over the company in question.
- (3) The original concept of controlled, influenced and minority interests in companies were introduced by the 1989 Act. "Influenced" means 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. "Controlled" means over 50% local authority interests, and "minority" less than 20% interest. The concept in the 1989 Act stands, but the Order introduces the term "regulated".
- (4) Councillors or officers who are directors of outside companies to which they have been nominated by the Council are under the following obligations:-
 - (a) (Councillors only) that the remuneration they receive from the company should not exceed that received from a local authority, and should be declared;
(Officers only) that they shall not receive any fee or reward other than their Council salary, unless so agreed with the Council;

¹ The Local Authorities (Indemnities for Members and Officers) Order 2004 made under sections 101 & 105.

- (b) to give information to councillors about their activities as required by the local authority (save for confidential information); and
- (c) to cease to be a director immediately upon disqualification as a Councillor or termination of their employment by the Council.

CHARITIES

12. To be a charity an organisation must operate for a charitable purpose. There are four such charitable purposes:
 - (i) the relief of poverty and human suffering
 - (ii) the advancement of education
 - (iii) the advancement of religion
 - (iv) another purpose for the benefit of the community.
13. It must operate for the public benefit and have exclusively charitable purposes. An organisation which operates for political purposes will not qualify for charitable status.
14. To register as a charity the organisation must submit its completed constitution (usually Certificate of Incorporation and the Memorandum and Articles of Association of a company limited by guarantee) to the Charity Commissioners for approval. If they are satisfied that the organisation is charitable it will be registered as such.
15. Those who are responsible for the control and administration of a charity are referred to as its trustees, even where the organisation is a company limited by guarantee even though they are not strictly trustees. Trustees of a charity retain personal liability, and can only delegate to the extent that the constitution authorises them so to do.

Trustees' Duties

16. Trustees have the following duties:
 - (1) Trustees must take care to act in accordance with the constitution and to protect the charity's assets. They are also responsible for compliance with the Charities Acts, and should note the particular requirements of the Acts in respect of land transactions.
 - (2) Trustees must not make a private profit from their position. They cannot receive remuneration without the sanction of the Charity Commission. 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 charity and trustees is registered with the Charity Commissioners and that annual accounts, reports and returns are completed and sent.
- (4) If charitable income exceeds £10,000, 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 (e.g. in relation to tax and land matters).

Trustees' Personal Liability

17. Liabilities may arise in the following ways:

- (1) If in doubt, always consult the Charity Commissioners. A trustee who does so can avoid personal liability for breach of trust if he/she acts in accordance with the advice given.
- (2) Generally though, a trustee incurs personal liability if he/she:-
 - acts outside the scope of the trust deed
 - falls below the required standard of care
 - acts otherwise than in the best interests of the charity, in a way which causes loss to the charity fund
 - makes a personal profit from the trust assets
- (3) In such circumstances the trustee will incur personal liability for losses incurred.
- (4) Trustees of a trust can be liable personally to third parties because unlike a company, a trust has no separate identity from the trustees. The constitution will normally provide for trustees to be given an indemnity from the trust assets, provided they act properly in incurring the liability. Trustees remain personally liable for their own acts and defaults once they have retired. If they have entered into any ongoing contracts on behalf of the trust they should seek an indemnity from their successors. If the charity is a company, the trustees will be protected from liabilities incurred in the day-to-day running of the charity in the normal course, but will be personally liable if they commit a breach of trust (see (2) above).
- (5) Trustees may be liable to fines if they do not comply with the duty to make returns etc.

Indemnities

18. An indemnity can 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 first, unless the trust deed allows it.

COMMITTEES OF MANAGEMENT

Unincorporated Associations

19. Groups which are not charitable trusts or limited companies are “unincorporated associations” and have no separate legal identity from their members. The rules governing the members’ duties and liability will be set out in a constitution, which is simply an agreement between the 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. An unincorporated organisation may be charitable and may register as a charity.
20. Property will have to be held by individuals as the organisation has no existence of its own.

Duties

21. Broadly, Management Committee members must act within the constitution, and must take reasonable care in exercising their powers.

Liabilities

22. The following liabilities may arise:
 - (1) Generally, the Management Committee members are 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.
 - (2) If one person is appointed by the constitution to act as the agent of the organisation for certain purposes, then that person acts as the agent of all the members, who have joint liability for the agent’s actions.
 - (3) 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 e.g. the payment of employees’ tax etc.

Indemnities

23. Members 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.

Acknowledgements

This document is a revised version of guidance originally prepared by Peter Keith-Lucas, Wragge & Co, with thanks to Colchester Borough Council upon whose guide the text was based.