PROTOCOL FOR COUNCIL REPRESENTATION ON OUTSIDE BODIES

1. Introduction

1.1. The Council has produced this protocol to ensure that members and officers are aware of their obligations when representing the Council on outside bodies.

1.2. For the purposes of this protocol, “outside bodies” include: -

- Companies
- Unincorporated associations
- Charities
- Other Public Authorities

1.3. This protocol does not offer guidance to members/officers who are representatives on school governing bodies.

1.4. This protocol is based upon legislation as well as guidance from a variety of sources, primarily: -

- The Members Code of Conduct
- Guidance from Standards for England
- The Local Government and Housing Act 1989
- The Local Government Act 2000
- The Companies Act 2006
- The Local Government Association

1.5. The fundamental principles of this protocol are as follows:

- Members and officers will act according to the rules, constitutions and frameworks set by the relevant outside body.
- Members and officers will make independent and personal judgements based on their duty of care to the outside body.
- Members will report back, on their involvement with the outside body, to the appropriate forum, including Council or the Cabinet .
- Members will comply with their obligations as far as they are applicable pursuant to the Code of Conduct.
- Members and officers will take an active and informed role in the management of the outside body’s affairs.
- Membership of an outside body does not include representing a political party.

2. Partnerships

2.1. Councils are increasingly involved in working in partnership with other organisations. The duty of best value imposed by the Local Government Act 1999 requires Councils to consider ways in which services may be delivered with efficiency, effectiveness and economy. Councils can form companies and enter joint venture arrangements under powers conferred by the Local

Government and Housing Act 1989 and the Local Government Act 2000. Councils are increasingly considering innovative and alternative ways of delivering services to their communities for example by entering long term partnership arrangements with private organisations or embarking upon private finance initiatives.

2.2. As these arrangements develop, this may involve the Council asking for members and/or officers to: -

- Become a director of a company, including joint venture companies set up with partners;
- Sit on the Management Committee of a partner organisation or a joint board or steering group;
- Become a charity trustee

3. General Provisions

3.1. There are some general provisions which apply to members and officers who act in the role of company director, charity trustee or member of an unincorporated body.

3.2. Members and officers are under a duty to exercise independent judgement in the interests of the organisation in which they are involved. Whilst it is recognised that members and officers may have a commitment to representing the Council on the Outside Body, they must be aware that it is their responsibility to decide on what view to take on any question before that organisation. For example, an instruction from the Council to vote one way or the other would put the member or officer in breach of his/her duty to the organisation. It is permissible to take account of the Council's wishes, but not to vote simply in accordance with them.

3.3. Where a member or officer is involved in an outside organisation as a representative of the Council, he/she must declare that fact to the organisation.

3.4. Members/Officers must also insure that avoidable loss is not incurred in managing the organisation concerned. They cannot avoid this responsibility by not reading the papers or failing to ask for the appropriate report. They will be expected to seek professional advice as appropriate.

3.5. Members and officers who represent the Council in such circumstances need to familiarise themselves with the duties they will assume and any potential liabilities they may face. It is essential that they are aware of how to deal with any conflicts of interest that may arise and they need to be sure that the proper procedures have been followed in respect of appointments to the relevant organisation.

4. Companies

4.1. Companies can be: -

- Limited by shares, usually operating a trade or business. They have shareholders and distribute profits to shareholders as dividends.
- Limited by guarantee – or so called "not for profit" organisations, which have members rather than shareholders. This type of company may also be a charity.

4.2. Companies employ staff, enter into contracts and own land/property. The day to day business of a company is managed by its board of directors.

4.3. Companies offer limited liability. This means that the members or shareholders are usually not personally liable for the company's debts and liabilities, subject to limited exceptions.

4.4. The powers of the directors are usually set out in the company's Articles of Association. These are the rules that govern the internal management of the company.

4.5. Duties of a Company Director – The Companies Act 2006

4.5.1. General statutory compliance

The directors of a company have a duty to comply with specific business legislation eg concerning employment, health and safety at work, and the payment of taxes. They also have a duty to ensure that their companies comply with the law in general, eg if a company is proved to have committed a criminal offence with the consent or neglect of a director, the director as well as the company may be liable. A company or its shareholders can also sue a director for breach of duty and damages.

4.5.2. Act within Powers

A director must not act outside the company's objects as set out in the Memorandum of Association prepared at the time of the formation of the company. Therefore, members appointed as directors should familiarise themselves with the Memorandum of Association concerned.

4.5.3. Duty to promote the success of the company

A director must act in the way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.

4.5.4. Duty to exercise Independent Judgement

A director must exercise independent judgement in relation to his/her responsibilities to the company, 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 tread 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 a Council mandate. To do so would be a breach of duty. A director must also disclose any interest he/she may have in actual or proposed contracts involving the company.

4.5.5. Duty to exercise reasonable care, skill and diligence

The duty imposes an objective standard on the director (the general knowledge, skill and experience to be expected of a person in his/her position), and a subjective standard (whereby he/she must exhibit the level of care to be expected of a director with his knowledge, skill and experience).

4.5.6. Compliance with Companies Acts

In addition, directors must ensure that proper accounting records are maintained and that annual audited accounts, which give a true and fair view of the company's financial position, are filed with the Registrar of Companies

within certain time limits. A director should be satisfied personally with the company's accounts. Ignorance is no excuse.

4.6. Directors can be indemnified against liability to a third party other than the company or an associated company, for example to shareholders, or creditors in negligence, as long as the indemnity does not extend to criminal fines or penalties incurred, whether or not judgement is given against the Director. It is also 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.

4.7. Directors are, to a certain extent financially protected by limited liability. This means that, while company members may lose the share capital they contribute or, in a company limited by guarantee, have to pay the guarantee (usually £1) that is the limit of their risk. Provided the director has performed his/her duties honestly and in good faith he/she does not normally have any financial responsibility for the company's debts.

4.8. However, company legislation aims to weed out the dishonest. A director may be personally liable for the debts of a company which has traded fraudulently and if he/she is to avoid accusations of wrongful trading a director must recognise the moment when his/her company can no longer avoid insolvent liquidation (ie its assets are insufficient to pay its debts or other liabilities) and take immediate action to protect the interest of creditors. A director is unlikely to be liable if he/she has taken every step he/she can to minimise the potential loss to the company's creditors. In considering whether a director ought to have known that the company could not avoid going into insolvent liquidation and what steps a director ought to have taken, the court will look at a director's actual knowledge, skill and experience and that which might reasonably be expected of a person in that position.

4.9. The Local Authorities (Companies) Order 1995

4.9.1. Members who are directors of companies to which they have been nominated by the Council must comply with the following specific obligations: -

- That the remuneration they receive from the company should not exceed that received from the local authority, and should be declared.
- To give information (or report) 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.

5. Conflicts of Interest

5.1. Conflicts of interest may arise between the Council and a company. Even if the Council and the company have the same overall aims and objectives you cannot assume that their interests will always be the same. The legal position, and your obligations, remain the same even if the company has worthy objectives or is formed in response to a Council or government initiative.

5.2. Conflicts of interest may arise: -

- If the council is selling, donating or leasing land to the company.
- If the company and the council are negotiating a contract with each other.
- If the company is seeking funding from the council.
- If the dispute between the company and the council.
- If the company is tendering or negotiating to provide goods, services or works to the council.

5.3. Company law requires you to act in the best interests of the company but the Council will have nominated you as a director to represent or promote the Council's interests. Accordingly, if you are uncertain whether a conflict of interest exists you should seek advice from the Monitoring Officer as soon as possible.

5.4. If you have a conflict of interest you should:

- Notify the Monitoring Officer (and your Line Manager, if you are an officer);
- Notify the company's board of directors.
- Take no further part in the matter on behalf of the company.
- If you are an officer you must take no part in the matter on behalf of the council either. This includes not taking part in any officer/member discussions on the matter or representing the council at meetings where the matter is discussed. You should declare an interest and leave the room whenever the matter is raised.

5.5. Conflicts of Interest and the Code of Conduct

If you are an elected member you must consider whether you have a prejudicial interest under the Council's Code of Conduct. The code provides that you do not need to treat yourself as having a prejudicial interest in discussions relating to outside bodies to which you have been appointed as the Council's representative. In most cases, therefore, you should be able to take part in the debate and vote. However, the Standards Board has indicated that where the Council and the company are involved in a commercial negotiation members should consider carefully whether the public would think it correct for them to take part in the debate or vote – and members should probably treat themselves as having a prejudicial interest in the matter.

6. Charities

6.1. Charities may be created by registering any of the following with the Charity Commission.

- A Trust Deed – the Trustees become charity trustees
- A company limited by guarantee – the directors become charity trustees.
- An unincorporated association – the Management Committee become charity trustees

6.2. In order to qualify for a charitable status, the Commission must be satisfied that the organisation is operating for a charitable purpose. These are:

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

6.3. An organisation which operates for political purposes cannot qualify for charitable status.

6.4. The Duties of a Charity Trustee

6.4.1. Charity Trustees must:-

- Act strictly in accordance with the charity's constitution and rules.
- Act in the best interests of the charity.
- Manage the charities affairs prudently.
- Not derive any personal benefit or gain from the charity.
- Take proper professional advice on matters you are not competent to decide yourself.
- Ensure that the charities bank accounts are operated by more than one person.
- Ensure the trustees have proper control of the charities property and assets.
- Ensure that the charity keeps full and accurate accounting records.
- Spend charity income solely for the purposes set out in the charity's constitution.
- Ensure charity property is properly maintained and insured.

6.5. Personal Liability

6.5.1. Personal liability may be incurred if a trustee:

- Acts outside the scope of the trust deed
- Falls below the required standard of care
- Makes a personal profit from the trust assets

6.5.2. Personal liability to a third party may arise because a charitable trust, unlike a company, is not a separate legal entity.

7. Unincorporated Associations / Bodies

7.1. Organisations which are neither charities nor companies are referred to as unincorporated associations. They usually operate pursuant to a constitution or set of rules defining the organisation's responsibilities and those of its members.

7.2. The affairs of an unincorporated association are usually governed by a management committee in accordance with the organisation's constitution or

agreed rules of procedure.

7.3. Unincorporated associations cannot do any of the following in their own name:

- Enter into contracts
- Own land
- Employ staff

7.4. Members of the organisation's management committee must act in accordance with its constitution and must take reasonable care in exercising the organisation's powers.

7.5. Generally, the members of the management committee 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

7.6. Members of a management committee will have personal liability if they act outside the authority given to them or if they do not comply with the relevant legal obligations.

8. Unincorporated associations – Duties

8.1. As a matter of good practice members/officers appointed to represent the Council on an unincorporated association (body or organisation) must:

- Act in the best interests of the association
- Use reasonable care and skill when involved in decision making on behalf of the association
- Act in accordance with the association's rules or constitution.

8.2. Members/officers are therefore encouraged to:

- Clarify the extent of any limits to their power to act on behalf of the Council
- Notify the Monitoring Officer if the association is proposing to take a course of action which is disadvantageous to the Council or which seems to involve considerable risk
- Ensure the association has clear rules and procedures for decision making, particularly for entering into contracts.

9. Other Public Authorities

9.1. Some members will be appointed to other public authorities, for example the Police Authority. Like the Council, these bodies are created by statute and have a range of powers and duties.

9.2. Members appointed to the following public authorities will be required to comply with that authority's code of conduct:

- Police Authority
- Fire Authority

9.3. Members of the Police or Fire Authority must comply with that authority's code of conduct whilst conducting the business of that authority. In other words, a

North East Lincolnshire Councillor who is also a member of the police authority is bound by the police authority's Code of Conduct when carrying out police authority business.

9.4. Members representing the Council on a non Standards Board regulated body (e.g. a company, charity or association), must comply with the Council's code of conduct except where it conflicts with any legal obligations the other body or organisation is bound by. Such conflicts are, in the view of the Standards Board, unlikely to arise frequently.

10. Indemnities

10.1. In the case of Outside Bodies that are not separate legal entities, the Council's Public and Employers liability policies extend to Members and Officers provided that they are acting within the scope of their authority as representatives of the Council and are conducting activities approved by the Council. It is therefore essential that members and officers identify and clarify the extent of their individual responsibilities.

10.2. Outside Bodies that are legal entities in their own right (e.g. companies) must have appropriate insurance arrangements in place to indemnify the individuals concerned. It is therefore imperative that members and officers confirm that appropriate cover exists. If there is any doubt, advice should be obtained from the Monitoring Officer.

10.3. In the case of officers, an indemnity cannot extend to any deliberate wrong doing. In any event, an indemnity cannot cover any act which is outside the scope of an officer's employment or anything that is outside the legal powers of the Council.

11. The Register of Interests

11.1. Members are reminded that the Code of Conduct provides:

- A member must provide written notification to the Council's Monitoring Officer of his/her membership of or position of general control or management in any:
  - body to which he/she has been appointed or nominated by the authority as its representative
  - public authority or body exercising functions of a public nature
  - company, industrial and provident society, charity or body directed to charitable purposes;
  - body whose principal purposes include the influence of public opinion or policy and
  - trade union or professional association

11.2. The Code of Conduct provides that members must, within 28 days of becoming aware of any changes to their registered interests, provide notification to the Monitoring Officer of the change(s).

11.3. If, during the term of office of a member, he/she is nominated to represent the Council on an outside body/organisation, as described in the Code of Conduct, that member must notify the Monitoring Officer within 28 days. The

same also applies if a member resigns or is otherwise disqualified from representing the Council on that particular body/organisation.

12. Appointments to Outside Bodies

12.1. As soon as reasonably practicable after the ordinary elections of the Council, or in the years of no such elections, as soon as possible at the beginning of the municipal year, the Chief Executive, in addition to advising on the political composition of the Council and the allocation of seats, will submit to the political groups a list of vacancies on outside bodies having regard to the provisions of the Council's Constitution.

12.2. Within one week of receiving the list of vacancies, the political group leaders will submit the names of their members nominated to represent the Council on the outside bodies.

12.3. Following the above, the Monitoring Officer will submit a report to the annual meeting of the Council (AGM) and, if necessary and/or delegated, the first Cabinet meeting following the AGM, setting out the proposals for Council representation on outside bodies.

13. Reporting Arrangements

13.1. Members who represent the Council on outside bodies are required to report back to the Council on the activities of the organisation.

13.2. Cabinet members with portfolio responsibilities may report back via formal Cabinet meetings or as part any Portfolio reports to Full Council. Members are also required to report to the appropriate Scrutiny Panel on an annual basis, initially in the form of a briefing paper for that purpose.

13.3. Officers who represent the Council on outside bodies are required to report to the relevant Portfolio Holder(s) as part of the Portfolio Holder briefing arrangements and, upon request, to the appropriate Scrutiny Panel.

13.4. The purpose of the reporting arrangements is to ensure that members are fully informed of the activities of the outside body or organisation concerned, the nature of the organisation's activities and the impact of such activities on the local community and Council services.

13.5. Where there is a statutory obligation to report to the Council (e.g. Councillor appointed as a Company Director) frequency of reporting will be annual, unless exceptional circumstances require a further report.

13.6. The Constitution already sets out the mechanism for the submission of reports by Portfolio Holders/Officers to Overview and Scrutiny meetings. This protocol does not alter the current arrangements.

14. Further Advice

14.1. Advice on the application of this protocol should be sought from the Monitoring Officer.