PART 8.4 GUIDANCE FOR MEMBERS AND OFFICERS SERVING ON OUTSIDE BODIES

CONTENTS

1. Introduction
2. Companies
3. Charities
4. Unincorporated Associations
5. Liabilities, Indemnities and Insurance
6. Registration and Disclosure of Outside Interests for Members
7. Disclosure of Outside Interests for Officers
8. Gifts, Hospitality and Bribery
9. Some “Do’s” and “Don’ts”

GUIDANCE FOR MEMBERS AND OFFICERS SERVING ON OUTSIDE BODIES

1. INTRODUCTION

1.1 This guide is intended to give a general overview of the issues which affect Members and officers who are appointed to outside bodies. The council's Monitoring Officer or legal team will be able to provide further advice to expand upon any of the issues raised.

1.2 At the council's annual meeting, Members are appointed to a range of outside bodies. The list of appointments is published in the minutes of those meetings. Equally, Members may be appointed directly by the outside body itself to serve in a private capacity (for instance as a member of the community) rather than as an elected member of the council, or they may be a serving member of that body before being elected a Member of the council.

1.3 The roles of Members or officers on outside bodies will depend upon the legal nature of that organisation and the capacity in which they are appointed to act. It may, for example, involve acting as a company director, the trustee of a charity, or a member on a management committee.

1.4 When participating in outside bodies, Members and officers may take into account the council's wishes regarding that body but must ultimately make independent judgements in line with their duty of care to the outside body. They must also act according to the framework set by the outside body and take an active and informed role in the management of the outside body's affairs. This involves attending meetings on a regular basis and carrying out their duties to the best of their abilities. In addition, they must follow as far as applicable the council's Code of Conduct for Members (found at part 8.1 of the council's constitution) or the Code of Conduct for Employees (Officers) (found at part 8.8 of the council's constitution).

1.5 Members should be aware that they will have to disclose membership of the outside body in their dealings with the council and where a conflict of interest arises it is likely that they will have to withdraw from any consideration by the council of any matter affecting the outside body. Members should bear this in mind when deciding whether or not to accept a particular nomination. In the case of officers, arrangements should be made to refer the matter to another officer to deal with whenever a conflict of interest arises.

1.6 Members and officers should report back at appropriate intervals to the council on their involvement in the outside bodies to which they have been nominated by the council. It may be that this is best achieved by way of an annual report to the relevant committee. In the case of officers, their participation should be discussed on a more

regular basis with their line managers at supervision or appraisal meetings.

1.7 The most common types of outside bodies in which Members or officers may become involved are considered in more detail below and include:-

(a) Limited Liability Companies
(b) Charities
(c) Unincorporated Associations

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 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. 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 to participate or vote where the local authority has an interest that is potentially adverse to that of the charity.

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

4. UNINCORPORATED ASSOCIATIONS

4.1 An unincorporated association is an informal organisation which may arise whenever several people join together, with the intention of creating legal relations, to carry out a mutual purpose otherwise than for profit.

4.2 The rules governing the members' duties and liabilities will usually be set out in a written constitution, which is simply an agreement between

the members as to how the organisation will operate. Usually the constitution will provide for the election by the members of a management committee, which will be responsible for the everyday running of the organisation. The constitution may also provide for members to have annual general meetings, to deal with business such as the accounts and the appointment of the management committee.

4.3 As the association is not a separate legal entity from its members, it cannot hold property in its own name. Any property which it controls will therefore have to be vested in an individual, or individuals, who are usually called the trustees of the association. They will hold the asset, subject to the direction of the members, or (more usually) the management committee.

4.4 Where an unincorporated association is a registered charity the members of the management committee may also be charity trustees. As such their role and responsibilities will be determined not only by the association's constitution but also by the general law relating to trusts and charities as referred to above.

4.5 The members of the management committee, and the trustees appointed to hold any assets for the association, must act within the constitution, and must take reasonable care in exercising their powers.

5. LIABILITIES, INDEMNITIES AND INSURANCE

5.1 General

5.1.1 The primary responsibility for providing proper indemnities and insurance cover to protect Members and officers when acting on behalf of the Council for outside bodies lies with those bodies. However, officers will assist in checking that there is a corporate or organisational structure which, on its face, appears adequate and that some form of indemnity exists to provide protection to the council's appointee or nominee.

5.1.2 As there may be occasions when the insurance or other indemnity arrangements made by the outside body prove inadequate to protect the council's appointee or nominee from liability, the council has put in place a general indemnity for its Members and officers so appointed or nominated. This would only apply where the indemnity or insurance offered by the outside body did not provide adequate cover.

5.1.3 The indemnity provided by the council applies only to those officers or Members whom the council has appointed or nominated to an outside body.

5.1.4 Where a Member or officer is serving on an outside body having been nominated by the body itself, or where the Member/officer was already serving on the body when elected a Member of the

council/employed by the council, the indemnity would apply only where that Member or officer was acting at the request of, or with the approval of, the council.

5.1.5 As provided for in the Local Authorities (Indemnities for Members and Officers) Order 2004, the indemnity provided by the council to Members or officers appointed by the council to serve on an outside body is subject to certain requirements and exclusions. In general, the indemnity may only be applied where the Member or officer believed his/her action was within the powers of the council or that the Member or officer believed that statements he/she made relating to the powers of the council were true. The indemnity may not be applied in respect of any criminal offence, fraudulent activity or reckless action. The 2004 Order permits councils to indemnify Members and officers if they need to defend themselves against claims that they have defamed someone. However, the indemnification of Members and officers who wish to take legal action against someone they believe has defamed them is expressly not permitted in the Order. Following developments in case law, this may be reviewed in certain circumstances and the council would need to decide whether to do this on the particular facts of the matter.

5.1.6 A complete copy of the council's general indemnity (as approved by Policy & Resources Committee in 2005) may be obtained from the council's legal team.

5.2 Liabilities, Indemnities and Insurance when nominated to a Company

5.2.1 As set out above, companies will be responsible for providing appropriate insurance and indemnities for its Directors. Directors cannot be indemnified by a company against liability arising out of negligence, fraud or breach of duty or trust. The company's Articles of Association may however allow for directors to be indemnified by the company in respect of the cost of defending such proceedings, where the director concerned is granted relief by the court or acquitted.

5.2.2 Directors of a company that has contravened provisions of the Companies Acts may find themselves personally liable if they have neglected to take reasonable steps both to inform themselves about and to take any available appropriate remedial action with regard to such contraventions.

5.2.3 It is appropriate for a company to purchase insurance to protect its directors against claims of negligence, breach of trust or duty,

or other default. Before taking up an appointment, directors should ensure that such insurance is in place and that the provision of the insurance is within the powers of the company.

5.3 Liabilities, Indemnity and Insurance when nominated to a Charity

5.3.1 Trustees have the following liabilities:

(1) To make good any deficiency where trust property has been used for the trustee's own purposes, or for purposes not in accordance with the purposes of the trust.
(2) Personal liability for losses or claims where the trustee has acted outside the scope of the trust deed.
(3) Personal liability where the trustee has not shown the required standard of care.

5.3.2 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. If premiums are to be paid out of the charitable funds the trustees will need the consent of the Charity Commissioners unless the trust deed allows it. Further guidance and advice can be obtained from the Charities Commission. A trustee who seeks advice from the Charity Commissioners in a particular situation and acts on that advice will generally avoid personal liability.

5.4 Liabilities, Indemnity and Insurance when nominated to an Unincorporated Association

5.4.1 Generally management committee members are liable for the acts or omissions 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.

5.4.2 Management committee members will have personal liability if they act outside the authority given to them or if they do not comply with the law.

5.4.3 It is possible (subject to the rules in the constitution) for insurance to be taken out, to cover trustees and members of the management committee for their potential liabilities. As with other outside bodies, Members and officers should satisfy themselves that the organisation has adequate insurance cover in this respect.

6. REGISTRATION AND DISCLOSURE OF OUTSIDE INTERESTS FOR MEMBERS

General

6.1 In accordance with Section 37 of the Localism Act 2011, the Council has adopted a Code of Conduct for Members. Each Member of the authority, elected or co-opted, has signed an undertaking to observe the provisions of the Code. The Code of Conduct for Members is set out in full in the Council's constitution (part 8.1) and its provisions continue to apply to Members in respect of their appointments to outside bodies.

Registration of Interests

6.2 The Code of Conduct for Members requires every Member to notify the Monitoring Officer of any registrable interests which he/she holds, within 28 days of election or appointment. These will be "Disclosable Pecuniary Interests" and "Personal Interests", as defined in the Code of Conduct. (Members will be aware that, in the absence of a reasonable excuse, it is a criminal offence to fail to notify the council's monitoring officer of a disclosable pecuniary interest). In addition, under the Arrangements Regarding The Register Of Members' Interests (found at part 8.3 of the council's constitution) the Member must notify the Monitoring Officer of any change in his/her registrable interests within 28 days of becoming aware of that change. Copies of the relevant declaration form and the form for amendments are set out at part 8.3 of the constitution.

Disclosure of Interests

6.3 There are a number of rules which Members must be aware of, which may limit the extent to which they are able to take part in debates or votes on issues at Council meetings. These participation rules extend to matters involving outside bodies. The rules require that, in certain situations, Members should disclose the fact that they have an interest in the matter under discussion. They may also be required not to take part in any debate or discussion on the matter, and may have to leave the meeting during the item; The rules are set out in the Code of Conduct, at paragraph 3.1 as regards disclosable pecuniary interests and at paragraphs 3.2 & 3.3 with regards other declarable interests.

Interests arising as a result of appointment to an outside body

6.4 A Member appointed to an outside body is likely to have a declarable interest if they attend a council meeting where a matter relating to that body is included or arises. In that situation, they should disclose to that meeting the existence and nature of their interest at the commencement of the consideration of the matter; or as soon as the existence of the interest becomes apparent to them. Depending on the nature of the matter, the Member's interest may require them in addition to leave the meeting room without further participating in the discussion or in voting (see below).

Declarable interests which require members to withdraw

6.5 Where a member is in a position of general control or management on an outside body then they will be required to withdraw if both a) the matter arising at the meeting affects their declarable interest more than the majority of the people affected by the matter and also b) a reasonable member of the public would think the member's judgement of the public interest would be adversely affected by the matter

6.6 Where a Member has a declarable interest in a matter under discussion which requires him/her to withdraw then he/she must declare the nature of that interest as soon as it becomes apparent to him/her. The Member should not take part in any discussion or voting on the item and should leave the room, including any part of the room normally open to the public, at the earliest possible opportunity, if possible before any consideration of the matter has begun.

Bias

6.7 Where there is no prejudicial interest in a matter, a Member's duties as a director or trustee or a member of a management committee may still mean that he/she should not participate in a decision because of a legitimate fear of lack of impartiality, or bias, which could potentially invalidate the decision.

6.8 Bias will not be assumed merely on the basis of the Member's membership of an outside body. However, where the outside body has an approach which is being advocated by the Member, it is quite possible that, in the context of a legal challenge to the council's decision, the Court would find the Member had been biased on the issue. Therefore the Member should consider very carefully whether to take part in a discussion or decision at a Council meeting on that matter. In such circumstances, it would be appropriate to seek advice from the Council's Executive Lead for Strategy, Governance & Law or one of the legal staff.

7. DISCLOSURE OF OUTSIDE INTERESTS FOR OFFICERS

Declaration of Interests

7.1 Section 117(1) of the Local Government Act 1972 requires that if it comes to the knowledge of any officer of a local authority that the authority has entered or proposes to enter into any contract in which he/she has a pecuniary interest, whether or not he/she would actually be a party to the contract, he/she must give notice in writing to the authority. A pecuniary interest should be interpreted as any circumstance in which he/she or a member of his/her immediate family stands to gain or lose financially as a result of the contract.

Conflicts of interest

7.2 Where an officer has been appointed to an outside body by the Council and a conflict of interest arises, this should always be disclosed to the

officer's immediate manager who should, in appropriate cases, seek advice from the Council's Corporate Law Team. Such conflicts may be dealt with in a number of different ways, depending on the nature and seriousness of the conflict. If the conflict is insubstantial then it should simply be recorded and no further action need be taken. Where there is a discrete conflict this may preclude the officer from undertaking a particular discrete task, such as dealing with the administration of a planning application, but would not be incompatible with the general performance of their job. In the case of a more serious incompatible conflict it may be determined that the nature of the conflict of interest is such that the officer must resign their position on the outside body and/or re-arrange their duties in a manner which avoids the conflict.

8. GIFTS, HOSPITALITY and BRIBERY

8.1 Members and officers must never accept any gift or consideration as an inducement for doing or forbearing to do anything in their roles as Councillors or officers of the authority. In the case of officers accepting any such gift or consideration from anyone who has or is seeking a contract with the authority, the gift or consideration is deemed to have been accepted for corrupt reasons unless the officer can prove the contrary. It is therefore very important to be completely open about any significant gift or hospitality to avoid the suspicion of misconduct.

8.2 Members are required by the Code of Conduct for Members to notify the Monitoring Officer, in writing, on receipt of any gift or hospitality with a value of more than £50, whatever the motivation for such a gift. Members should note that they only need to register gifts and hospitality worth more than £50 that are received in connection with their official duties as a Member. Gifts received by Members in a personal/private capacity do not need to be registered.

8.3 Officers are required to disclose offers and receipts of gifts and hospitality which must be recorded in the register of gifts and hospitality, in accordance with the Code of Conduct for Employees (Officers) (found at part 8.8 of the constitution). Officers should read the detailed guidance in the Code of Conduct for Employees (Officers) which explains what must be declared and where there is discretion to declare.

8.4 A particular issue arises for officers seconded to work on outside bodies, as section 117(2) of the Local Government Act 1972 provides that an officer shall not, under colour of his office or employment, accept any fee or reward whatsoever other than his/her proper remuneration. Where an officer is to be seconded and might be in receipt of any remuneration, bonus or allowances from the authority to which he/she is to be seconded, the seconding authority must agree that his/her proper remuneration shall henceforth include any remuneration, bonus or allowances paid to the officer by the body to which he/she is seconded.

8.5 Members and officers appointed to outside bodies need also to be aware of their potential liability under the Bribery Act 2010. This Act created a number of new criminal offences, of which the most relevant in the context of this guidance are:

- bribing another person
- receiving a bribe
- failure by a commercial organisation to prevent bribery

The Act defines bribery as offering, promising or giving someone a financial or other advantage either –

to encourage that person to perform their functions or activities improperly or to reward that person for having already done so; or

in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of the recipient's functions or activities.

8.6 Personal liability. Where any of the offences referred to in paragraph 8.5 are committed by a company, a senior officer of that company is liable to be prosecuted for the same offence if it is proved to have been committed with their consent or connivance. No indemnity or insurance is available to Members or officers found guilty in this situation.

8.7 As regards the offence of a commercial organisation failing to prevent bribery, Members and officers should note the following (taken from Ministry of Justice guidance): so long as the organisation is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.

8.8 Members and officers should also refer to the council's counter-fraud strategy for further details of (i) the bribery risks facing the council, its Members and officers, and (ii) advice on the measures that Members and officers should take to mitigate the risks identified.

9. DO'S and DON'TS

9.1 <u>"Do"</u>

- Act according to the rules, constitution and framework set by the outside body;
- Take an active and informed role in the outside body's affairs;
- Make independent and personal judgments in line with your duty of care to the outside body;
- Report back to the Council as appropriate;

- Promote equality as an integral part of the role and to treat everyone with fairness and dignity;

- Seek legal advice before setting off on a course of action which:

    - might give rise to a conflict of interest vis-à-vis your role on the outside body and your position as a Member of the council;

    - behave ethically and follow as far as applicable the Code of Conduct for Members;

    - Wherever possible and if appropriate approach the lead officer for the outside body for a briefing on agenda items before attending meetings of the outside body.

9.2 "Don't "

- See yourself as "representing" the political party to which you are aligned – you are appointed or nominated to the outside body by the council as a whole;

- Consider matters purely from the Council's perspective;

- Purport to commit the Council to any expenditure in relation to the outside body;

- Disclose any confidential or exempt information to or from the outside body, or act in breach of the Data Protection Act 1998 by disclosing personal data of a third party without that person's prior consent.