

# The Highland Council

## Guidance to Councillors and Officials who serve on Outside Bodies

Councillors and officials who serve in a decision-making capacity as members of outside bodies, whether companies, trusts or other associations, owe duties and responsibilities to those bodies which are separate and distinct from their duties owed to the Council. On occasion, it is likely that their duties owed to the outside body and to the Council will conflict.

The majority of outside bodies on which Councillors serve are, at present, companies. Even where the Council is a member of the company and nominates Councillors as directors, the company is a separate legal entity from the Council and Councillors owe separate duties and responsibilities as Directors.

### Guidance for company directors-

- 1) Act in the company's best interests, taking everything you think relevant into account
- 2) Obey the company's constitution and decisions taken under it
- 3) Be honest, and remember that the company's property belongs to it and not to you or to its shareholders
- 4) Be diligent, careful and well informed about the company's affairs. If you have any special skills or experience, use them
- 5) Make sure the company keeps records of your decisions
- 6) Remember that you remain responsible for the work you give to others
- 7) Avoid situations where your interests conflict with those of the company. When in doubt disclose potential conflicts quickly and take advice, prior to the meeting, on the particular issue concerned
- 8) Seek external advice where necessary, particularly if the company is in financial difficulty

The following are the main legal duties of directors of companies. Most of these obligations also apply to trustees and to members of committees of associations.

### Good Faith:

A Director's primary duty is to act in good faith, in the best interests of the company and its objects. A Director owes a fiduciary duty to their company, which means the Director owes loyalty to the company and must act in the way the Director considers would promote the success of the company for the benefit of its members as a whole, having regard to the likely consequences of decisions in the long term and having regard to the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers and others, the impact on the community and the environment, high standards of business conduct and the need to act fairly between members of the company.

**Care, Diligence and Skill:**

A Director must exercise the general knowledge, skill and experience that a reasonably diligent person would use for carrying out the Director's functions however if the Director actually has a greater general knowledge, skill and experience to carry out those functions then Director would be expected to exercise that greater knowledge, skill and expertise

Although Directors are not bound to attend all Meetings of Directors, attendance should be as frequent as possible and Directors should ensure that they are reasonably informed at all times.

Certain duties must be performed by officials e.g. Secretary and a Board of Directors who have made sensible arrangements authorising others to act on their behalf are entitled to trust those officials to perform their duties honestly. However, Directors should take steps to ensure that delegated responsibilities are properly performed.

**Honesty:**

Directors must exercise their powers for proper purposes only. They must not allow personal interests to conflict with those of the organisation.

Where a Director is directly or indirectly interested in a contract or proposed contract with the organisation, the Director is legally bound by the Companies Acts to declare the nature of the interest at a Meeting of the Board of Directors and may also need shareholders consent

All company property in the hands of Directors or under their control must be applied for the purposes of the organisation. Directors have a duty not to make any profit out of a transaction of the organisation, or to accept any financial inducements.

### **Not to Exceed Powers:**

Directors are under a duty to see that they do not act beyond the powers of the organisation. They must ensure that they do not exceed the powers conferred on them by the Memorandum and Articles of Association or constitution which can result in personal liability for Directors. They must not act illegally.

### **Exercise Financial Responsibility:**

Directors have a duty to ensure that the company operates within the limits of its financial resources, actual and expected. Despite the limited liability of a company, Directors can incur personal liability for its debts and obligations in certain circumstances.

For example Directors can be held personally liable if they have allowed a company to operate, or continue to operate, where there was no reasonable prospect that it could and would pay its debts, and these are left unpaid after the liquidation of the company.

It follows that Directors must be extremely scrupulous in the attention they pay to their company's present and future liquidity, and in ensuring that their concerns and actions are minuted and to seek professional advice if there are concerns.

### **Comply with the Companies Acts:**

Directors also have a duty to ensure that the company complies with the requirements of the Companies Acts, although they will normally look to the Company Secretary to ensure compliance.

An organisation's constitution generally says little about how the Board of Directors should run the organisation. In general, a company's Memorandum and Articles of Association will state the objectives of the organisation in the broadest terms and will provide rules for the appointment and periodic re-election of the Board of Directors. The actual responsibility for the running of the organisation is in the hands of the Board, and Directors must take appropriate steps to ensure the good management of their organisations.

### **Exercise Independent Judgement**

Directors must use their independent judgement.

### **Liability Issues:**

Because Councillors and officials who serve as Directors of companies, or in other decision-making capacities on outside bodies, serve the particular body rather than the Council, it follows that the Council cannot indemnify them against claims brought against them personally. Where there is any possibility of legal liability, therefore, the company or other body should effect appropriate insurance cover for its Directors, Company Officers, Committee Members etc.

The Council's insurance cover will extend to Councillors and Council officials assisting outside organisations as advisers or observers, either facilitating exchanges of views or information as an extension of their Council duties or otherwise representing the Council, but the Council's insurance cover does not extend to indemnify Councillors and officials who serve in an executive capacity on an outside body. Councillors and officials should be clear that if they serve on an outside body as decision makers, they do so in a personal capacity. Outside bodies on which Councillors or officials serve, therefore, should effect their own insurance cover.

**Conflicts of Interest:**

Where Councillors serve as members or Directors of outside bodies, it is inevitable that conflicts will arise, from time to time, between the duties they owe to the outside body, and the duties they owe to the Council. Conflicting interests should be declared on every occasion. Decisions on whether a councillor can participate in discussion of, and votes on, the particular item of business at a Council or a Council Committee where there is a conflict of interest. will require to be made against the background of the Councillors Code of Conduct and any advice sought and obtained from appropriate Council officials.

Further information available at

<http://www.legislation.gov.uk/ukpga/2006/46/part/10/chapter/2>

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