

Guidance for Authority members appointed to outside bodies

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1. Introduction

- 1.1. The Broads Authority occasionally appoints its members to serve on outside bodies including companies, charities and other public bodies.
- 1.2. This guidance summarises the legal position of such members. It is not an exhaustive explanation of the law, and members should contact the Governance Team for further advice (see Section 8 for contact details).

2. General guidance

- 2.1. As a Broads Authority member, you should accept an appointment to an outside body only if you are satisfied you have the time and capacity to undertake the duties involved, particularly for a Directorship or trusteeship.
- 2.2. You should also consider whether there is likely to be any significant conflict of interest between the external appointment and your role as an Authority member. If this may be the case, you should not take on the external appointment.

- 2.3. You must exercise independent judgement in the interests of the body you are appointed to. While it is recognised that you may have a commitment to representing the Authority on the outside body, you must decide what view to take on any matters before that body. Where you are serving on the outside body in a representative capacity, this should be made clear to that body. There is a fine line to tread between your duty to the outside body and to the Authority.
- 2.4. Ultimately, in acting as a Director, Trustee or member of a Management Committee of an outside body, you must (with one qualification, as set in paragraph 2.5 below) act in accordance with that body's interests, and not those of the Authority. A mandate from the Authority to vote one way or the other would put you in breach of the duty to the outside body. It is permissible to take account of the Authority's wishes, but not to vote simply in accordance with them. The overriding duty in considering an item before the outside body is to vote in accordance with the interests of that organisation.
- 2.5. The qualification referred to in paragraph 2.4 is that a company may authorise a Director with a conflict of interests or duties to participate in the consideration of matters where that conflict arises. However, this does not extend to cases where the matter in question relates to a particular transaction or arrangement with the company. This exemption is qualified for companies that are charities, and does not apply to unincorporated bodies. You should seek advice from the company's secretary on how this position applies to that particular company.
- 2.6. A member serving on an outside body must also ensure that avoidable loss is not incurred in managing that body. Individual responsibility cannot be avoided by not reading the papers, or failing to ask for appropriate reports. You should seek professional advice where appropriate.
- 2.7. If there is a major dispute between the Authority and the outside body it can place you, as the Authority's representative, in an untenable position. In these circumstances, you should seek advice from the Authority's Chief Executive or Monitoring Officer.
- 2.8. It is possible that you may find yourself unable to adequately carry out your responsibilities both as a member of the Authority and as an appointee to the outside body. This is unlikely, however, and should not deflect you from being prepared to participate in the management and running of outside organisations.
- 2.9. Finally, upon being appointed to an outside body we recommend that you obtain essential documents such as the body's governing document and their latest annual report and accounts. As above, please seek advice from the Chief Executive or Monitoring Officer if you have any concerns about the body to which you have been appointed.

3. Company Directors

3.1. Company Directors have the following duties:

- A duty to act in accordance with the company's constitution and only to exercise powers for the purposes for which they are conferred.
- A duty to act in a way which the Director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. However, where the purposes of the company consist of, or include, purposes other than the benefit of its members (as is the case with charitable companies), this duty is replaced by a duty to achieve those purposes. In exercising these two alternative duties, a Director must have regard (amongst other matters) to:
 - the likely consequences of any decision in the long term;
 - the interests of the company's employees;
 - the need to foster the company's business relationships with suppliers, customers and others;
 - the impact of the company's operations on the community and the environment;
 - the desirability of the company maintaining a reputation for high standards of business conduct; and
 - the need to act fairly as between members of the company.
- A duty to exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with:
 - a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the Director in relation to the company, and
 - b) the general knowledge, skill and experience the Director has.

However, Directors are not deemed to be experts, but are expected to use due diligence and to obtain expert advice if necessary.
- Directors must exercise independent judgement, although they may take account of the interests of any third party whom they represent. This may well require interests to be declared (see below). However, Directors cannot vote simply in accordance with the Authority's mandate.

- Directors must avoid conflicts of interest, subject to the qualification referred to in paragraph 2.5.
- Directors must not accept benefits from third parties conferred by reason of their Directorship, unless it cannot reasonably be regarded as likely to give rise to a conflict of interests.
- Duties to declare and register of interests.
- Directors must ensure compliance with the Companies Act in relation to the keeping of accounts, making of returns to the Registrar of Companies and the information to be shown on stationery.
- Directors also have a range of accounting and financial responsibilities, including the preparation of accounts for each financial year, ensuring accounting records are maintained sufficiently to demonstrate the company's day to day transactions, approving the annual accounts and laying them before a general meeting and ensuring that annual accounts and reports are sent to shareholders and anyone else entitled to receive them.

3.2. Individual Directors can also be liable in certain circumstances, including the following:

- A company can only act within the scope set out in its Memorandum of Association, and those Directors who knowingly cause the company to act beyond these activities will be liable personally.
- Directors may also be liable for breach of trust, if they misapply 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.
- In the event of a failure to act in accordance with the best interests of the company, or if Directors use their powers improperly or make a personal profit from their position as a Director, they may be personally liable for loss to the company and may be required to give to the company the personal profit made.
- If the level of skill and care shown by a Director falls below that which could reasonably be 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 from this liability.
- If a Director knows or ought to know that there is no reasonable prospect of the company avoiding liquidation, the Court may require the 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.

- Directors will also be liable if to their knowledge the company carried on business with intent to defraud creditors or any other person, or for any other fraudulent purpose.
 - Where a company fails to pay National Insurance contributions and this is due to fraud or neglect on the part of any Director(s) of the company, they may be held personally responsible for the outstanding contributions.
- 3.3. Finally, information (apart from confidential information) must be given to other members about their activities as required by the Authority.

4. Charity Trustees

- 4.1. Trustees must acquaint themselves with the terms of the Trust. In the case of a charity which is also a company, these terms will be found in the Memorandum and Articles of Association. Other Trusts will be found in the document under which the charity was established, such as a will or deed of gift or constitution.
- 4.2. Charity Trustees have the following duties:
- Trustees must act in accordance with the terms of the Trust.
 - The property of the charity must be used for the purposes for which the charity was set up. It must also be applied fairly between those properly entitled to benefit from it.
 - Trustees have a duty to exercise such care and skill as is reasonable in the circumstances having particular regard to any special knowledge or experience that they have or hold themselves out as having. In addition, where a Trustee acts in the course of a business or profession, particular regard must be had to any special knowledge or experience which it is reasonable to expect of a person acting in the course of that kind of business or profession.
 - Trustees must always act in the interests of the charity and of its beneficiaries or potential beneficiaries and without regard to their own private interests. This means that Charity Trustees must not put themselves in a position where their interests and duties conflict.
 - The work must generally be unpaid. Trustees may be paid for their expenses from the charity's income and, very occasionally, wider remuneration may be allowed where this is in the interests of the charity, and the Charity Commission agree certain conditions are met.
 - Trustees cannot benefit either directly or indirectly from the charity.

- Trustees must act reasonably and prudently in all matters relating to the charity and must always bear in mind the interests of the charity. They should manage the charity as carefully as if they were running their own business. Although they may delegate certain of their functions under the Trustee Act 2000 and also under any powers in the trust document, they remain legally responsible and must supervise and control the work of officers.
- Trustees must act in accordance with all relevant legislation.
- Trustees have a duty to provide information to the Charity Commissioners. Most charities (except small ones with an annual income under £5,000 a year) are required to register under charities legislation. The Charity Commissioners rely on this information when taking a decision about a charity, so it is important that it is accurate. It is an offence to give the Charity Commissioners false or misleading information, or to alter, conceal or destroy charity documents which may be required by the Commissioners.
- All registered charities are subject to a number of accounting and reporting requirements, depending on their income and expenditure. These involve maintaining proper accounts, preparing the annual statement of accounts and an annual report and in some cases submitting them to the Charity Commission, and where the charity's gross income and total expenditure exceeds £10,000, it must make an annual report to the Charity Commission. Charity Trustees are under a duty to ensure that these accounting and reporting requirements are carried out and to approve the annual report and accounts.
- The accounts of registered charities with a gross income or total expenditure exceeding £25,000 must, at the option of the Trustees, be either audited or independently examined. In addition, the accounts must be audited by a registered auditor if the gross annual income exceeds a much higher threshold.
- Retaining accounting records and statements of account for at least six years.
- The results of any audit must be accepted by the trustees and recorded in the minutes.
- Any charity with a gross income of more than £10,000 in its last financial year must state that it is a registered charity on all notices, advertisements and other documents asking for donations for the charity. All cheques, orders for goods, signed on behalf of the charity, bills, invoices, receipts and letters of credit must be similarly marked.
- The Trustees of a charity with a gross annual income in excess of £500,000 or gross income exceeding £250,000 with gross asset exceeding £3.26 million must make a

statement in the annual report as to whether they have considered the major risks the charity is exposed to, and systems designed to mitigate those risks.

- 4.3. Some charities are also limited companies, and in those cases the Charity Trustees will also be Company Directors. The above duties are in addition to those of company Directors, and do not override requirements under companies' legislation.
- 4.4. More generally, if a Charity Trustee is in doubt about how to act, they should always consult the Charity Commissioners. A Trustee who does this will avoid personal liability for breach of trust if he or she then acts in accordance with the advice given.
- 4.5. Finally:
 - Effective Trustees are those who constitute to maintaining high standards of governance and management as well as improving service provision.
 - It is crucial that, where Trustees administer a charity personally, they divide up their duties properly amongst themselves so that no one Trustee is overburdened or given too much authority.
 - Having sufficient rigorous controls provides not only protection for the charity property but also the best defence against a charge of failing to protect the charity's funds and therefore being in breach of trust.

5. Partnerships

- 5.1. Generally, partnerships (which for this purpose includes panels and forums) and partnership boards are not legal entities in their own right, and members are appointed purely to represent the Authority. In these circumstances, therefore, the specific duties referred to above will not tend to apply, nor will there be a potential for a conflict of interest. On the other hand, the position may well be different if a separate legal entity is formed as part of the partnership working.

6. Members' Code of Conduct

- 6.1. As a member representing the Authority on an outside body, you must comply with the Code of Conduct for Members except and insofar as it conflicts with any lawful obligations to which that other body may be subject. In particular, this includes the duty to declare personal interests and withdraw when the matter under discussion gives rise to a prejudicial interest.
- 6.2. In addition, membership of an outside body to which you have been appointed is (a) an interest that must be registered in the Members' Register of Interests and (b) an interest that may be declarable at meetings of the Authority and its committees. In certain circumstances that interest may be prejudicial, thereby requiring your withdrawal from the meeting while the matter is discussed.

- 6.3. When any members discuss, at Authority meetings, matters relating to an outside body they are serving on, they may take account of that outside body's interest. However, they must not vote simply in accordance with the mandate of that outside body. In short, the primary consideration is the public interest.

7. Indemnities

- 7.1. Local Authorities have express powers to indemnify members who represent them on outside bodies. In exercise of these powers, the Authority has agreed to indemnify all members who represent the Authority on outside bodies against claims made against them while serving on that body, subject to the following:

- a) the indemnity only applies to the extent that the outside body does not have in place relevant insurance cover;
- b) the indemnity does not extend to criminal actions, any other intentional wrong doing, fraud, recklessness or the bringing of an action for defamation;
- c) the appointment to the outside body must be formally approved by the Authority or a committee of the Authority;
- d) the indemnity will not apply if the appointee, without the express permission of the Authority, admits liability or negotiates or attempts to negotiate a settlement of the claim;
- e) the indemnity is given on the condition that the Authority may, at its discretion, take over the defence of any case to which the indemnity relates and to see any legal advice obtained by the member concerned.

- 7.2. As to the provision of indemnities by the outside body to which a member has been appointed:

- a) companies can now give their Directors indemnities. However, such indemnities cannot cover:
 - i. the Director's liability to the company itself or to other companies within the same group;
 - ii. fines imposed on a Director in criminal proceedings or in respect of a sum payable to a Regulatory Authority by way of penalty for non-compliance with any requirement of a regulatory nature; or
 - iii. liabilities incurred by a Director in defending criminal proceedings where convicted, or in defending any civil proceedings brought by the company, or an associated company in which judgement is made against such Director.
- b) With regard to Charitable Trusts, an indemnity can be given from the Trust Fund provided the Trustee has acted properly and within their 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 to consent to the Charity Commission unless the Trust Deed specifically allows it.

8. Contact information

- Write to: Governance, Broads Authority, Yare House, 62-64 Thorpe Road, Norwich NR1 1RY
- Email: committees@broads-authority.gov.uk