

## PROTOCOL 3

## GUIDANCE TO COUNCILLORS APPOINTED TO OUTSIDE BODIES

## Introduction

1. This guidance sets out the main issues which councillors should consider when appointed by the Council to serve on outside bodies. It supplements the advice included in paragraph 13 of the Councillor / Officer Relations Protocol, which forms part of the Council's Constitution.
2. In the context of this guidance 'outside bodies' include trusts, companies, charities, school governing bodies, industrial and provident societies and community associations. Councillors may be involved as a director, trustee, governor or member (with or without voting powers).
3. Councillors who are involved in the management of outside bodies have responsibilities to that body that must be acted upon. Their role, responsibilities and potential liabilities will depend upon the legal nature of the organisation and the capacity in which they have been appointed. Failure to act in a proper manner may give rise to personal liability or liability for the Council.
4. With the increasing emphasis on partnership working, councillors, as community leaders, have an important role to fulfil in supporting and advising outside bodies. However, this can give rise to conflicts of interest, particularly where the organisation is seeking or receiving funding from the Council. Councillors always need to be clear about their roles and alert to potential conflicts of interest in order to ensure transparency and public confidence in local democracy.
5. This guidance seeks to help councillors discharge their responsibilities on outside bodies clearly and effectively. It covers, primarily, the position of councillors appointed by the Council to serve on outside bodies, though much of the advice applies equally to councillors who are involved with outside bodies in a private capacity. In those situations, however, the Council's insurances will not apply.
6. This guidance is general and councillors should contact the Monitoring Officer for further advice if they have any particular issues of concern.
7. The responsibilities of officers in relation to outside bodies is dealt with separately in the Code of Conduct for Officers.
8. The remainder of this guidance includes the following:
  - issues to consider before appointment;
  - application of the Code of Conduct for Councillors;
  - legal status of outside bodies, capacity of appointment, duties and liabilities;
  - insurance and indemnity.

## Issues to consider before appointment

9. Before accepting an appointment to an outside body councillors should check:

- the legal status of the organisation e.g. company, trust, charity, unincorporated association;
  - the capacity in which the councillor is to be appointed e.g. director, trustee, member with voting rights or member with observer status;
  - the purpose of the organisation and how this relates to the Council's functions and objectives;
  - the relationship between the Council and the body and the likelihood and extent of any conflicts of interest;
  - the requirements of the organisation's governing instrument (eg constitution; trust deed; memorandum and articles of association), both as a member and generally;
  - the financial status of the organisation;
  - the governance and decision making arrangements, including the management of risk;
  - any code of conduct for members;
  - potential liabilities;
  - the extent of any insurance cover for members.
10. Having checked the above matters, councillors should consider carefully whether they should be appointed to participate formally in the management of the external organisation e.g. as a director, trustee or voting member, or whether their role as a representative of the Council may be more effectively discharged as a non-voting member with observer status only. Bearing in mind the potential liabilities that may be incurred through formal involvement in an organisation councillors are generally advised to seek appointment as members with observer status only, unless there are exceptional reasons for more formal participation.
11. Councillors are encouraged to seek advice from the Monitoring Officer where any of the above issues are unclear.

### Application of the Code of Conduct for Members

12. The Council's Code of Conduct for Members [in Part 13 of the Constitution](#) places specific obligations on ~~councillors~~ [councillors when acting in that capacity](#) in ~~relation to~~ their dealings with outside organisations, ~~including the registration and declaration of interests. The relevant provisions and guidance are covered in Appendix A. This includes guidance from Standards for England on the position of dual-hatted members under the Code of Conduct. Further guidance on the Code of Conduct may be obtained from the Standards for England web site at <http://www.standardsforengland.gov.uk>~~ The Code will, in particular, apply where a councillor is acting as a representative of the Council on an outside body.
13. [Apart from the general duty to promote and support high standards of conduct the following duties of the Code are particularly relevant in this context:](#)
- [act solely in the public interest and never improperly confer an advantage or disadvantage on any person or act to gain financial or other material benefits for yourself, your family, a friend or close associate;](#)
  - [avoid placing yourself under a financial or other obligation to outside individuals or organisations that might seek to influence you in the performance of your official duties;](#)
  - [make all choices, such as making public appointments, awarding contracts or](#)

recommending individuals for rewards or benefits, on merit;

- declare any private interests, both pecuniary and non-pecuniary, that relate to your public duties and take steps to resolve any conflicts in a way that protects the public interest.
- comply with the statutory requirements on the registration and declaration of interests.

[Final position on registration and declaration of any additional interests - to be determined by Council ]

14. Councillors who have a disclosable pecuniary interest in any business at a meeting of the Council e.g. award of a contract, must not participate in any discussion of the matter or vote on it unless a dispensation has been obtained. Failure to comply with these requirements without reasonable excuse may result in prosecution.

15. Councillors that serve on more than one body, in particular, need to be mindful of potential conflicts of interest and always act in an open and transparent manner in carrying out their respective roles. For example, where a councillor is at a council meeting considering an application for a grant or a community asset transfer request from a parish council or other public body of which they are a member they should declare the existence and nature of their interest. Having done so, they may, generally, take part in the discussion of that item and vote, unless there are particular reasons why this would not be appropriate. It is also advisable as a matter of transparency to include details of the interest in their register of interests.

16. The same principle will generally apply where councillors are appointed to serve as school governors, but it is always necessary to have regard to the nature and extent of any conflict of interest in deciding whether to participate or vote. Where the governing body is considering a matter which is likely to have a material effect on the councillor or a member of their family it would be advisable to declare an interest and take no further part in the proceedings.

17. Councillors appointed to serve on outside bodies should be mindful of their legal obligations regarding disclosure of confidential information and in case of doubt should seek advice from the Monitoring Officer.

#### Predetermination and Bias

18.13. Aside from the Code of Conduct, under the common law councillors must be careful to avoid any pre-determination or bias in their decision making. ~~Guidance from Standards for England on this issue is included at Appendix B.~~ Predetermination occurs where someone has a closed mind so that they are unable to apply their judgment fully and properly to the issue requiring a decision. This can lead to legal challenges and decisions being set aside.

19. The Localism Act 2011 has clarified the rules on predetermination. It makes it clear that a councillor is not deemed to have had a closed mind on an issue just because they have indicated what view they have taken or may take before the issue is decided. A councillor is not, for example, prevented from participating in discussion of an issue or voting on it if they have campaigned on the issue or made public statements about their approach to it.

20. The general position, however, remains that, whatever their views, members must approach their decision-making with an open mind in the sense that they must have

regard to all material considerations and must be prepared to change their views if persuaded that they should.

21. Councillors need to be aware that decisions may be challenged and set aside on the grounds of bias. Under the common law bias involves some element of partiality or personal interest in the outcome of a case, as a result of a close connection with the parties, or the subject matter of the dispute, or because of a tendency towards a particular shared point of view.

22. The relevant test for bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased.

23. The risk of a successful challenge on these grounds may be overcome by proper observance of the requirements of the code of conduct and particularly the provisions set out in paragraph 13 above.

## Legal status, capacity, duties and liabilities

24.44. The specific responsibilities of councillors will depend upon the legal status of the outside body and the capacity in which they have been appointed. The position of councillors in relation to various types of outside body is summarised in the appendices to this note as follows:

Appendix AG - Director of Limited Liability Company

Appendix BD - Trustee of Trust or Charitable Trust

Appendix CE - Member of Unincorporated Association

Appendix DF - Member of Steering Group, Joint Committee or Partnership Body

25.45. The key point to note is that where councillors are carrying out their duties as a trustee, director, or management committee member, they may take account of the wishes of the Council, but their primary duty is to act in the best interests of the organisation to which they have been appointed.

## Liability, Insurance and Indemnity

25.46. Councillors can incur personal civil and criminal liability from formal participation in outside bodies.

26.47. However, under section 265, Public Health Act 1875 (as applied by Section 39, Local Government (Miscellaneous Provisions) Act 1976), cCouncillors enjoy statutory immunity from civil liability where they act within the powers of the authority, in good faith and without negligence.

27.48. However, But this immunity does not apply where they act beyond the powers of the council or act in bad faith (i.e. with dishonest or malicious intent) or negligently, and it does not protect them from criminal liability, for example for fraud or for corporate killing where they exercise managerial responsibilities.

2028. Wiltshire Council has a wide insurance provision to protect its assets and liabilities. Within

these provisions the Council has extended its cover to protect its elected and co-opted members when carrying out duties in connection with the business of Wiltshire Council. Those afforded the protection are;

- elected Members of the Council or co-opted members of any Committee or Sub-Committee.
- members of committees, schemes or associations formed to assist in the activities of the Council.

| [2429](#). A summary of those policies which incorporate these two extensions are listed below as follows;

Type	Employers Liability
Insurer	Zurich Municipal
Policy Number	QLA-11U010-0043
Sum Insured	£ 50 million any one event
Cover	This policy provides an indemnity in respect of legal liability to pay damages and claimants costs and expenses in respect of death of or bodily injury to or disease or illness contracted by any members or employees and arising out of and in the course of their official duties or employment in the business and caused during the period of insurance. Cover includes defence costs incurred with Insurer's written consent.

Type	Officials Indemnity
Insurer	Zurich Municipal
Policy Number	QLA-11U010-0043
Sum Insured	£ 5 million
Cover	<p>This policy provides indemnity in respect of legal liability for damages and claimant's costs and expenses for financial loss arising out of: negligent acts, accidental errors or omissions by members or employees arising out of their duties on Wiltshire Council business. This includes activities of employees and members approved by the Council in connection with outside organisations where the Council is legally entitled to approve such activities and indemnify employees and members in respect of them.</p> <p>Cover includes legal costs and expenses incurred with Insurer's written consent.</p>

Type	Libel and Slander
Insurer	Zurich Municipal
Policy Number	QLA-11U010-0043
Sum Insured	£ 5 million
Cover	<p>This policy provides indemnity in respect of legal liability for damages in respect of: libels appearing in normal business publications by members or employees; slanders by members or employees in the course of their official duties. These must be notified to the Insurers during the period of insurance and occurring during the period of insurance. Cover includes defence costs incurred with the Insurer's written consent.</p>

2230. As a 'belts and braces' measure it is proposed to extend the existing officers' indemnity to cover Members and co-opted members are indemnified by the Council as follows:

The council will, subject to the exceptions set out below, indemnify its members and former members against claims made against them (including costs awarded and reasonable costs incurred) and will not itself make claims against them for any loss or damage (other than

claims falling within the cover provided to its members under any policy of insurance taken out by the Council or any motor vehicle insurance policy taken out by the members) occasioned by any neglect, act, error or omission committed by them in pursuit of their duties as they may from time to time undertake in the course of their duties with the Council whilst acting within the scope of their authority which shall include when they are acting for other persons or other bodies with the Council's consent.

Exceptions:

The indemnity will not extend to loss or damage directly or indirectly caused by or arising from:

- (a) fraud, dishonesty or a criminal offence on the part of the member;
- (b) any neglect, error or omission by the member otherwise than in the course of their duties;
- (c) liability in respect of losses certified by the Audit Commission as caused by wilful misconduct.

The indemnity will not apply if any member, without the written authority of the Council, admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of this indemnity, or where there is evidence that the member had acted with reckless disregard for the consequences.

#### Further Advice

| [2331](#). Further assistance on the issues covered in this guidance may be obtained from the Council's Monitoring Officer.

## APPENDIX A

### ~~Code of Conduct for Members – Relevant Provisions and Guidance~~

- ~~1. Where a councillor is acting as a representative of the Council on any other body (other than a relevant authority) they must comply with the Council's Code of Conduct except where it conflicts with any lawful obligations to which that body may be subject. (Paragraph 2 (5) of the Council's Code of Conduct for Members)~~
- ~~2. Councillors appointed to serve on outside bodies must be mindful of their duties regarding disclosure of confidential information under paragraph 4 of the Code of Conduct.~~
- ~~3. Councillors must not use or attempt to use their position as a councillor improperly to confer on or secure for themselves or any other person, an advantage or disadvantage – paragraph 6 (a) of the Code. In particular they must not use their position as a councillor improperly to secure benefits or advantages for the outside body to which they have been appointed.~~
- ~~4. Paragraph 13 of the Code requires councillors to register any personal interests which fall within the categories set out in paragraph 8 of the Code of Conduct. Registration is by written notification to the monitoring officer within 28 days of taking up office, or within 28 days of becoming aware of any new interest or change of interest.~~
- ~~5. The categories of interest which are most relevant in this context are:
  - ~~• any body of which you are a member or in a position of general control or management and to which you are appointed or nominated by your authority; (paragraph 8(1)(a)(i))~~
  - ~~• any body –
    - ~~a – exercising functions of a public nature;~~
    - ~~b – directed to charitable purposes;~~
    - ~~c – one of whose principal purposes includes the influence of public opinion or policy (including any political party or trade union);~~~~
    - ~~of which the councillor is a member or in a position of general control or management (paragraph 8(1)(a)(ii)).~~~~

#### ~~Personal interest~~

- ~~6. A councillor will have a personal interest in any business of the Council which relates to or is likely to affect any of their registrable interests. They will, therefore, have a personal interest in any business of the Council which relates to or is likely to affect an outside~~



body to which they have been appointed by the Council.

- ~~7. They may also have a personal interest where a decision in relation to the business under consideration might reasonably be regarded as affecting their well-being or financial position, or the well-being or financial position of a relevant person to a greater extent than the majority of council tax payers in the electoral division affected by the decision. A 'relevant person' includes a body which falls within the categories of interest described in paragraph 5 above. (paragraph 8(1)(b) of the Code)~~
- ~~8. Where a councillor has a personal interest in any business of the Council and attends a meeting of the Council at which the business is considered, they must disclose the existence and nature of their interest to the meeting when the matter begins to be considered or when the interest becomes apparent. (paragraph 9(1) of the Code). For example, if the councillor is attending a council debate on education policy and is also a council appointed governor, they would only need to declare an interest if and when they decided to speak during the debate.~~
- ~~9. In the case of a personal interest in any business which relates to or is likely to affect any body to which the councillor has been appointed, or a body exercising functions of a public nature, the councillor only needs to disclose the existence and nature of their interest when they address the meeting on that business. (paragraph 9(2) of the Code).~~

### ~~Prejudicial Interest~~

- ~~10. A councillor will also have a prejudicial interest in any business of the Council being considered where the personal interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice their judgment of the public interest. (paragraph 10(1))~~
- ~~11. A prejudicial interest will only arise, however, where none of the exemptions in paragraph 10(2)(c) of the Code apply, and the business being considered~~
- ~~• affects the councillor's financial position or the financial position of a person or body included in their register of interests e.g. a body to which they have been appointed by the Council;~~
  - ~~• relates to the determination of a regulatory matter affecting them or any such person or body.~~
- ~~12. A councillor who is considering an application for grant or a planning application by a body to which they have been appointed by the Council will, therefore, have a prejudicial interest in that matter. This will apply equally to a councillor who is a member of one of~~

~~the other bodies mentioned in paragraph 5 above.~~

- ~~13. Where a councillor has a prejudicial interest they may make representations on the matter to the same extent as a member of the public, answer questions or give evidence, if required, but they must then leave the meeting and not take any further part in it or vote. They must not seek to influence the decision improperly in any way. (paragraph 12 of the Code)~~
- ~~14. A councillor who participates in decision making on business in which they have a prejudicial interest may invalidate the decision.~~

## ~~Standards for England Guidance on Dual-hatted Members and the Code of Conduct~~

### ~~What is a dual-hatted member?~~

~~Dual-hatted members are members who serve on two or more relevant authorities; for instance, a member who is both a district and parish council member.~~

### ~~When should a dual-hatted member declare an interest?~~

~~If a dual-hatted member is taking part in a council meeting and an issue is under discussion which affects that member's other authority, then provided that they do not have a prejudicial interest, under paragraph 9(2) of the Code of Conduct the dual-hatted member only needs to declare a personal interest if they intend to speak on the matter involving the other authority. If the member does speak on the matter then they must declare a personal interest, but they are still able to vote.~~

~~Members must consider carefully, however, if the nature of the matter under discussion means that their membership of another authority may also give rise to a prejudicial interest.~~

~~For dual-hatted members who would not otherwise have a prejudicial interest for any other reason, a prejudicial interest will arise as a result of membership of the other authority if all of the following conditions are met:~~

- ~~• the matter affects the other authority's financial position or is about a licensing or regulatory matter applied for by the other authority;~~
- ~~• the matter does not fall within one of the exempt categories of decisions under paragraph 10(2)(c) of the Code;~~
- ~~• a reasonable member of the public with knowledge of the relevant facts would believe that the member's ability to judge the public interest would be impaired~~

~~Standards for England takes the view that where a regulatory application, including a matter of consent or approval, is made by a body on a member's register of interests, or a matter is discussed that would impact upon the financial interests of a body on a member's register of interests, then a prejudicial interest will arise. For example if a parish council planning application was being considered at a district council meeting, a member of the planning committee who is also a parish council member would need to declare a personal and prejudicial interest when that matter is considered, leave the chamber and not vote.~~

#### ~~Predetermination and dual-hatted members~~

- ~~• A dual-hatted member does not automatically have an interest in an item just by virtue of having considered the issue at the meeting of a different authority. If the issue does not meet the normal criteria for needing to declare a personal interest, then an interest does not need to be declared. However, the issue of predetermination or bias may need to be considered where members sit on different bodies determining matters. Further information on this is set out in Appendix B.~~

#### ~~Dual-hatted member scenarios~~

~~Standards for England have developed some scenarios covering dual-hatted member issues based on real queries that they have received and the advice they have given. These may be accessed using the following link:~~

~~<http://www.standardsforengland.gov.uk/Resources/ResourceLibrary/Trainingmaterials/Dual-hattedmembers-scenarios/>~~

## APPENDIX B

### ~~Predisposition, Predetermination or Bias, and the Code – Guidance from Standards for England~~

~~Both predetermination and bias have proved to be difficult and controversial issues for many councillors and monitoring officers. Although they are judge-made, common law issues, and not part of the Code of Conduct, Standards for England is publishing this up-dated guide to help clarify the issues.~~

~~We originally published a paper on this issue in August 2007. It was based on advice from leading treasury counsel Philip Sales QC, which can also be [found on our website](#).~~

~~This new version of the paper aims to clarify the issues involved. It includes examples of where councillors are predisposed, and so can take part in a debate and vote, and where they are predetermined and their participation in a decision would risk it being ruled as invalid.~~

~~This area of law is constantly developing which is why the paper has been revised. However, members should refer to their monitoring officers for the most up to date position.~~

#### ~~What is predisposition?~~

~~It is not a problem for councillors to be predisposed to a particular view. That predisposition can be strong and can be publicly voiced. They may even have been elected specifically because of their views on this particular issue. It might be in favour of or against a particular point of view, for example an application for planning permission.~~

~~However, the councillor must be open to the possibility that, however unlikely, they will hear arguments during the debate about the issue that will change their mind about how they intend to vote. As long as they are willing to keep an open mind about the issue they are entitled to take part in any vote on it.~~

#### ~~What is predetermination or bias?~~

~~Predetermination is where a councillor's mind is closed to the merits of any arguments which differ from their own about a particular issue on which they are making a decision, such as an application for planning permission. The councillor makes a decision on the issue without taking them all into account.~~

~~If councillors are involved in making a decision they should avoid giving the appearance that they have conclusively decided how they will vote at the meeting, such that nothing will change their mind. This impression can be created in a number of different ways such as quotes given in the press, and what they have said at meetings or written in correspondence.~~

~~Rarely will membership of an organisation on its own, such as a national charity, amount to apparent bias. This is unless the organisation has a particular vested interest in the outcome~~

~~of a specific decision that a councillor is involved in making, or the decision is quasi-judicial in nature.~~

### ~~Making the decision~~

~~There is an important difference between those councillors who are involved in making a decision and those councillors who are seeking to influence it. This is because councillors who are not involved with making a decision are generally free to speak about how they want that decision to go.~~

~~When considering whether there is an appearance of predetermination or bias, councillors who are responsible for making the decision should apply the following test: would a fair-minded and informed observer, having considered the facts, decide there is a real possibility that the councillor had predetermined the issue or was biased?~~

~~However, when applying this test, they should remember that it is legitimate for a councillor to be predisposed towards a particular outcome as long as they are prepared to consider all the arguments and points made about the specific issue under consideration.~~

~~Also the importance of appearances is generally more limited when the context of the decision-making is not judicial or similar to judicial. Planning decisions are not similar to judicial decisions, they are administrative. Therefore councillors can appear strongly predisposed for or against a particular planning decision.~~

### ~~How can predetermination or bias arise?~~

~~The following are some of the potential situations in which predetermination or bias could arise:~~

#### ~~Connection with someone affected by a decision~~

~~This sort of bias particularly concerns administrative decision-making, where the authority must take a decision which involves balancing the interests of people with opposing views. It is based on the belief that the decision-making body cannot make an unbiased decision, or a decision which objectively looks impartial, if a councillor serving on it is closely connected with one of the parties involved.~~

#### ~~15. Example:~~

- ~~a. A district councillor also belongs to a parish council that has complained about the conduct of an officer of the district council. As a result of the complaint the officer has been disciplined. The officer has appealed to a councillor panel and the councillor seeks to sit on the panel hearing the appeal. The councillor should not participate.~~

~~Contrast this with:~~

~~b. The complaint about the officer described above is made by the local office of a national charity of which the councillor is an ordinary member and has no involvement with the local office. The councillor should be able to participate in this situation because the matter is not concerned with the promotion of the interests of the charity.~~

#### ~~Improper involvement of someone with an interest in the outcome~~

~~This sort of bias involves someone who has, or appears to have, inappropriate influence in the decision being made by someone else. It is inappropriate because they have a vested interest in the decision.~~

#### Example:

~~A local authority receives an application to modify the Definitive Map of public rights of way.~~

~~A panel of councillors is given delegated authority to make the statutory modification Order. They have a private meeting with local representatives of a footpath organisation before deciding whether the Order should be made. However, they do not give the same opportunity to people with opposing interests.~~

#### ~~Prior involvement~~

~~This sort of bias arises because someone is being asked to make a decision about an issue which they have previously been involved with. This may be a problem if the second decision is a formal appeal from the first decision, so that someone is hearing an appeal from their own decision. However, if it is just a case of the person in question being required to reconsider a matter in the light of new evidence or representations, it is unlikely to be unlawful for them to participate.~~

#### Example:

~~A councillor of a local highway authority, who is also a member of a parish council that has been consulted about a road closure, could take part in the discussion at both councils. The important thing is that the councillor must be prepared to reconsider the matter at county level in the light of the information and evidence presented there.~~

#### ~~Commenting before a decision is made~~

~~Once a lobby group or advisory body has commented on a matter or application, it is likely that a councillor involved with that body will still be able to take part in making a decision about it. But this is as long as they do not give the appearance of being bound only by the views of that body. If the councillor makes comments which make it clear that they have already made up their mind, they may not take part in the decision.~~

~~If the councillor is merely seeking to lobby a public meeting at which the decision is taking place, but will not themselves be involved in making the decision, then they are not prevented by the principles of predetermination or bias from doing so. Unlike private~~

lobbying, there is no particular reason why the fact that councillors can address a public meeting in the same way as the public should lead to successful legal challenges.

#### Example 1:

A council appoints a barrister to hold a public inquiry into an application to register a village green. The barrister produces a report where he recommends that the application is rejected. A councillor attends a meeting in one of the affected wards and says publicly: "speaking for myself I am inclined to go along with the barrister's recommendation". He later participates in the council's decision to accept the barrister's recommendation. At the meeting the supporters of the application are given an opportunity to argue that the recommendation should not be accepted.

This is unlikely to give rise to a successful claim of predetermination or bias. The statement made by the councillor only suggests a predisposition to follow the recommendation of the barrister's report, and not that he has closed his mind to all possibilities. The subsequent conduct of the meeting, where supporters of the application could try and persuade councillors to disagree with the recommendation, would confirm this.

#### Example 2:

A developer has entered into negotiations to acquire some surplus local authority land for an incinerator. Planning permission for the incinerator has already been granted. Following local elections there is a change in the composition and political control of the council. After pressure from new councillors who have campaigned against the incinerator and a full debate, the council's executive decides to end the negotiations. This is on the grounds that the land is needed for housing and employment uses.

The council's decision is unlikely to be found to be biased, so long as the eventual decision was taken on proper grounds and after a full consideration of all the relevant issues.

#### Predetermination or Bias, and the Code

There is a difference between breaching the Code and being predetermined or biased. It is perfectly possible to act within the Code and still cause a decision you were involved in to be bad for predetermination or bias.

#### Example:

Under the Code, a councillor may take part in considering whether or not to grant a planning application which is recommended for refusal by planning officers and made by a colleague with whom they do not share a "close association". Nevertheless, because the councillor is the Chair of the planning committee, uses his casting vote to decide in favour of his colleague, and regularly shares a car with that colleague when coming to council meetings, this gives rise to an appearance of bias.

## Conclusion

When making administrative decisions like whether or not to grant planning permission, councillors are entitled to have and express their own views. However, this is as long as they are prepared to reconsider their position in the light of all the evidence and arguments. They must not give the impression that their mind is closed.

## Relationship to the Code of Conduct

The First tier Tribunal (Local Government Standards in England) in case reference 0352 has also looked at the relationship between the Code and predetermination and gave an indication that where such issues arise there is a potential paragraph 5 Code breach. The outcome is likely to depend on the individual circumstances of a case and any other Code issues and breaches. This is because a councillor who renders the decision of a council unlawful due to predetermination could reasonably be regarded as bringing that authority or his office into disrepute.

An important issue for members is that by and large predetermination will not amount to a personal or prejudicial interest. Therefore there is no specific requirement to declare an interest and leave the room under paragraphs 8 to 10 of the Code. Members may however find themselves the subject of a complaint under paragraph 5 on disrepute. This paragraph of the Code has no provision for declaring interests or leaving meetings.

For more information on the issue of predetermination or bias, councillors should talk to their monitoring officers or their political group.

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## APPENDIX AG

### Councillors appointed as Directors of Limited Liability Companies

#### Legal Status

1. Upon 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. 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.
2. 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. Liability in the event of a winding-up is limited to the amount unpaid on the shares held.
3. Companies limited by guarantee do not have shares. Instead, each member agrees that in the event of the company being wound up they will agree to pay an agreed amount eg £ 1. This is most common in the public and voluntary sector, particularly where charitable status is sought.

#### Directors' Duties

4. The role of a councillor who has been appointed as a director will depend upon the company's Memorandum and Articles of Association (its constitution). A company's constitution will vest most of its powers in the board of directors and the board will exercise these either directly or through managers appointed by the board. Directors must understand the requirements of the Memorandum and Articles of Association in order to fulfil their responsibilities properly.
5. Directors will need to be aware of the requirements of the "Combined Code on Corporate Governance" to the extent that this has been adopted by the company, including general management of the company, rules on directors' remuneration, internal financial and operational controls and risk management.
6. Directors, as agents of the company, must:
  - act in good faith in what they believe to be in the best interests of the company as a whole (not the Council).
  - act with reasonable care, diligence and skill;
  - exercise their powers reasonably and for the purpose for which they are given;
  - keep an open mind when making decisions on company business; in particular a councillor director must exercise independent judgment and not simply follow

Council policy when voting on company matters;

- avoid placing themselves in a position where their private interests or their position as a councillor conflict with their duties to the company;
- be aware of the company's financial position through attendance at board meetings and reading the accounts, agendas and minutes; it is not sufficient to assume that the other directors are doing a good job.

7. Some directors may be given special responsibilities under the company's constitution, for instance a managing director or finance director. Those with special roles will be expected to have the personal and technical skills to perform the duties associated with that role, which may be onerous.
8. The above duties apply to non-executive directors as well as executive directors.
9. There are other statutory requirements which may be relevant depending on the company's business. Directors will need to be familiar with these. For example, if the company is an investment vehicle which engages in fundraising activity, financial services legislation will apply.

#### Observer status

10. The position of observer has no specific legal status in company or local authority law. Any person appointed as an observer should ensure that their role is clearly defined and avoid involvement in the management of the Company. If an observer acts beyond their remit and exercises real influence over the company's affairs and decision making the observer may be deemed to be a shadow director, with all the duties of an ordinary director.
11. Observers and others, such as professional advisors, may attend board meetings. Generally the minutes of the meetings will note the names of observers and the fact that they are "in attendance". Persons "in attendance" have no specific legal status and in itself the phrase does not indicate any particular level of participation in the company's affairs. The extent of the participation of a councillor described in board minutes as "in attendance" is a question of fact. They should, however, take care to avoid involvement in the management of the company so as to avoid being treated as a shadow director.
12. A director (or shadow director) may incur personal liability if they are in breach of the above duties. This may arise where:
  - the company is found, in the course of winding up, to have been trading for fraudulent purposes. If a director has acted dishonestly this is also a criminal offence;
  - following liquidation, a director is found liable for wrongful trading, i.e. allowing the Company to continue to trade at a time when the director knew or ought

reasonably have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation;

- the company commits a breach of the criminal law, for example, health and safety legislation;
  - a director acts negligently or in breach of their duty to the company (including the duty to maintain confidential any confidential information relating to the company that comes into their possession).
  - a director knowingly causes the company to act beyond the activities authorised by its Memorandum of Association;
  - there is a breach of trust, such as the misappropriation of company funds or property;
  - a director uses their powers improperly or makes a personal profit from their position as director.
  - there is a failure to comply with the requirements of companies legislation, such as the making of returns to the Registrar of Companies.
- Insurance

13. Councillors appointed as directors should find out if the company maintains appropriate insurance cover against directors' liability. If this is not in place this should be requested, but this is a matter entirely for the board and the Council cannot insist upon this. It will be necessary to ensure that the company has the resources to maintain payment of the insurance premiums.

14. Further guidance on the responsibilities of company directors is available on the websites of the Institute of Directors and Companies House:

<https://www.iod.com/Home>

<http://www.companieshouse.gov.uk>

## APPENDIX

### BD

#### Appointment of a Trustee to a Trust or Charity

##### Legal Status

1. Trustees will be appointed under a Trust Deed. The role and responsibilities of a trustee will depend, therefore, upon the provisions of the trust deed and/or scheme (collectively referred to as its “governing documents”) and the general law relating to trusts and charities.
2. It is quite common for companies to be set up as trusts with charitable objects. In this case the trustees will also be directors of the company and will have the obligations set out in Appendix C above as well as the obligations set out in this section. Councillors involved with charitable companies should ensure that they understand the capacity in which they have been appointed.

##### Duties

3. The role of a trustee is generally to fulfil the objects of the trust and apply the income and, if appropriate, the capital of the trust in accordance with the provisions of its governing documents.
4. Trustees are subject to various duties, including the duty to:
  - act for the benefit of the charity and its beneficiaries;
  - preserve the capital of the charity (unless the trust deed gives the trustees the right to spend the capital or the charity is small and the trustees have resolved to spend the capital under the Charities Act 1993);
  - make sure income is spent only on the things authorised in the governing documents;
  - invest the capital only in authorised investments, having first taken professional advice;
  - produce annual accounts;
  - act with reasonable care and skill in administering the trust; and
  - to act unanimously (unless the trust deed allows majority decisions).
  - comply with the Charities Acts and other legislation affecting the charity.

5. The Charity Commission's website - [www.charitycommission.gov.uk](http://www.charitycommission.gov.uk) - contains useful guidance, in particular Publication CC3 - "Responsibilities of Charity Trustees" which outlines the basic principles that should guide trustees when administering their charity:
- the income and property of the charity must be applied for the purposes set out in the governing document and for no other purposes;
  - the 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 not let their personal views or prejudice affect their conduct as trustees;
  - trustees should exercise the same degree of care in dealing with the administration of their charity as a prudent businessman would exercise in managing his or her own affairs or those of somebody else for whom he or she was responsible; and
  - where trustees are required to make a decision which affects a personal interest of one of their members that person should not be present at any discussion or vote on the matter.

#### Liability

6. Trustees are jointly and severally liable to the charity for breaches of trust. They may incur personal liability for losses incurred if they:
- act outside the scope of the trust deed;
  - fall below the required standard of care;
  - make a personal profit from the trust assets;
7. Trustees will incur personal liabilities under contracts they enter into in the name of the charity. They are, however, entitled to be reimbursed from the charity's funds for all liabilities and expenses properly incurred by them, provided this is authorised by the trustees in accordance with the trust deed.

#### Insurance and Indemnity

8. 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 except criminal liability. Payment of the premiums must be authorised by the trust deed if they are to be met from charitable funds.

## APPENDIX

### CE

## Unincorporated Associations

### Legal Status

1. Most societies, clubs and similar organisations (other than companies, industrial societies and trusts), are unincorporated associations. This is an informal organisation, which may arise where several people join together, with the intention of creating legal relations, to carry out a mutual purpose otherwise than for profit.
2. There is no statutory definition of an unincorporated association but it has been described by the court as “an association of persons bound together by identifiable rules and having an identifiable membership”. Unlike a company it does not have a separate legal status distinct from its members.
3. The rules of an unincorporated association are found in its constitution, which sets out the roles and responsibilities of its members.

### Duties

4. An unincorporated association will typically have an executive or management committee with its powers and composition defined by the constitution. Key decisions will usually be made by the members at general meetings. The day to day administration of an association is usually undertaken by the officers and members of the executive or management committee.
5. Broadly executive or management committee members must act within the constitution and must take reasonable care in exercising their powers.
6. Where an unincorporated association is a registered charity the members of the executive or 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 set out Appendix D.

### Observer Status

7. The Council may appoint a councillor to the executive or management committee of an unincorporated association as an observer. A councillor acting as an observer should avoid exceeding this role by becoming directly involved in the management of the association as they may be deemed to be an ordinary member for the purposes of determining liability.

### Liabilities

8. Members of the management committee are generally liable, jointly and severally, 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 insufficient funds the members are personally liable for the shortfall

9. Particular care should also be taken when entering into contracts on behalf of the association. If the individual lacks the authority to do so, they may find themselves personally liable for the performance of the contract.

#### Insurance

10. Insurance may be available, but payment of the premiums must be authorised by the constitution if they are to be met from the association's funds.

## APPENDIX

### DF

#### SteeringGroups, JointCommitteesandPartnershipBodies,includingCommunity AreaPartnerships

1. The responsibilities of a councillor who is appointed as a member of any of these bodies will be determined by the terms of reference, constitution or partnership agreement under which they are established and governed.
2. It is necessary to ensure that the councillor's role on the body is clear, and, in particular, whether they are acting as a delegate or representative of the Council to further the interests of the Council, or whether they are expected to exercise independent judgment in the best interests of the body concerned.
3. Liability will depend on the nature and functions of the body and the constitution or agreement under which it is established. Insurance may be available to cover certain liability.