



Report to Shareholder Committee

Date: 11th January 2023
Title: Conflicts of Interest Guidance and Review of Directors
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Recommendations:

- **Approve the Conflicts of Interest Guidance (see Appendix A).**

1. Background

At the last meeting of the Buckinghamshire Shareholder Committee (12th October 22) there was a discussion around a draft 'Conflicts of Interest Guidance' note that had been produced for officers and councillors who may have a role in connection with the Council's trading companies and joint ventures. An updated version of that guidance is included as an appendix to this report.

One of the actions from that discussion was that, based on the guidance, we should review the existing articles of association / members agreements for alignment to the guidance as well as carrying out a review of the number and suitability of the current directors for each of the main companies and joint ventures of the Council.

2. Main content of report

Conflicts of Interest Guidance

The Conflicts of Interest guidance reflects current best practice as issued by recognised bodies (including CIPFA, the Institute of Directors, the Cabinet Office and Lawyers in Local Government). It also reflects the guidance issued by Max Caller, Strategic Adviser and Lead Inspector for HM Government, based on his inspection of local authorities' experience of company governance, particularly Nottingham City Council.

The guidance is intended for officers and councillors who may have a role in connection with the Council's trading companies and joint ventures. It aims to help them (and the Council itself) to recognise the interests involved and to avoid a conflict between them.

It, therefore, includes key sections on:

- A. Recognising the different roles – officers/councillors of the authority; and directors
- B. Avoiding the problem – factors to consider in the appointment of directors
- C. Recognising the interests involved – examples of the kinds of scenarios that can occur
- D. Behaviours, codes of conduct and responsibilities – a summary of the ethical environment for officers and councillors
- E. Handling conflicts of interest – a process for raising and dealing with potential conflicts

Under the Companies Act 2006, all company directors have a standing statutory duty to 'avoid conflicts of interest' and must 'declare an interest in proposed transactions or arrangements with the company' within the setting of the company.

A review has been made of the articles of association/members' agreements of each company/joint venture to check for any inconsistency with the principles contained in the Council's guidance. **No inconsistencies were found.** Company directors of wholly or partly owned entities are required, as are officers and councillors within their council, to act in accordance with the seven Nolan principles set out in the Council's guidance.

In practice, avoiding and managing conflicts depends on being able to evidence an ethical culture in the respective organisations. Such evidence would include: the existence of the Council's guidance; actual or potential conflicts being identified and declared; and the provision, refreshment and take-up of training. Such arrangements/evidence are also liable to the governance oversight afforded by the Shareholder Committee, the Audit & Governance Committee and internal and external auditors.

Review of Director Appointments

An initial review of current director appointments has been undertaken. This has identified that we also need to consider the process and principles that should be used for appointing directors to companies. Details of this, including the review of current appointments, will be brought back to the next meeting in March.

Conflicts of Interest Guidance

Guidance for members and officers – council companies and joint ventures

This is a practical guide for officers and councillors who may have a role in connection with the Council's trading companies and joint ventures. It helps them – and the Council itself - to recognise the interests involved and to avoid a conflict between them.

The guidance sets out:

- A. Why this guidance matters
- B. Recognising the different roles
- C. Avoiding the problem – the appointment of directors
- D. Recognising the interests involved
- E. Behaviours, codes of conduct and responsibilities
- F. Handling conflicts of interest

Annex – further information

A. Why this guidance matters

Being a director of a local authority-controlled company requires officers and elected members appointed to those roles to operate in a completely different legal and philosophical framework to that they are used to inside their local authority. It can lead to real conflicts between the duty owed to the company and the interests of your council.

It can also lead to conflicts of interest on a personal level which makes holding some roles in a local authority unviable whilst continuing as a director. It is necessary to make different assumptions about how things operate and what issues you need to have demonstrated you took into account, and what had no influence.

Too often, this is not understood until problems arise, resulting in reputational and financial damage and in some cases, external intervention directly impacting on your authority.

B. Recognising the roles

Officers and councillors can be appointed as directors of the Council's companies. It is essential, at the outset, for the Council to be clear on the roles that they intend the officer or councillor will continue to have within the authority; and how this differs from the role of director of the company.

Officer of the council: the first duty of an officer of the Council is to the Council itself, using their knowledge and professional expertise, and the council's information and resources, to give advice, make decisions under delegation, and to deploy line management reports generally to deliver the Council's objectives.

Member of the council: a member of the Council is democratically elected to represent their communities and may be appointed to formal roles or bodies within the decision-making structure, to make decisions and to shape policy on behalf of the Council. Such roles may involve executive decision making or scrutiny or oversight of the council of other bodies.

Director of a company: a director's first duty is to the interests of the company not to the Council. The Institute of Directors' *Corporate Governance Guidance and Principles* states: "an important principle of company law is that directors have a duty to promote the success of the company as a whole. They are specifically prohibited from directing the activities of the company in favour of themselves or particular shareholders and/or stakeholders".

By the nature of these various roles, each has an in-built 'interest', a fiduciary duty to the body concerned. A 'conflict of interest' arises where these roles and duties coincide.

"Council officers and members also have fiduciary duties to the council. Situations can inevitably arise where the same person will be a decision maker or advisor both for the council and one of its entities. Examples of this include matters of reporting, contractual discussions, investment requests or resourcing agreements."

Council appointed directors should, though, make themselves available for council scrutiny committees and other council governance forums which oversee the company (although they should not be obliged to disclose commercially confidential information about the entity).

C. Avoiding conflicts

Right person, right role – guidance for the Council in appointing directors

The Council can minimise the risk of a conflict by considering carefully at the outset who it appoints as a director. For example, a particular professional role – say a Head of Service – and the cluster of skills and experience such a role exhibits, may suggest that this post would be an ideal choice. In practice, this could significantly limit what the postholder is then able to do within the Council as regards decision making, access to information and influence.

Key consideration: in general, the more senior the officer, the more likely it is that their ‘day job’ for the Council may conflict with a company director role or would need to be inhibited to a counterproductive extent in trying to balance the two. For example, it is not considered good practice for a Section 151 Officer to hold a position within a council company.

“...Given that it is likely that certain decisions of the shareholder will require ratification by the Section 151 officer, it is not considered good practice for a Section 151 officer to hold a position with a council owned entity .”

“Conflicts may be reduced if local authority members and officers with designated roles acting for the local authority are not also appointed to senior positions in the company.”

However, it is not just organisational factors that could present a conflict – so could personal factors, for instance where a councillor (or their friend or relative) may have an interest in a competitor to the company concerned.

Key considerations: The council should carefully consider nominations to the board.

1) *Generally:*

Appointments should relate to the relevant position in the council, not to a specific individual. It then follows that if a council-appointed director ceases to be an employee or office holder of the council, they should automatically no longer be able to hold board membership. Appointments should take account of:

- the benefits of appointing independent directors to the entity
- the need to avoid council members and officers also being appointed to senior positions in the company, if such an eventuality is likely to lead to a conflict of interest
- achieving as wide a range of skills as possible relevant to the company's purposes and aims

2. Positions likely to be conflicted

Given the nature of their roles, and the likelihood of conflicts of interest, it may not be appropriate for certain officer and councillor positions to be appointed as directors and careful consideration should be given by the Council before an appointment is made. Such positions include:

- Section 151 Officer
- Cabinet Members whose portfolio relates to the aims of the company
- Corporate and Service Directors whose service areas relate to the aims of the company
- Any elected member appointed to the Shareholder Committee

3) Ethical walls

Consideration should be given prior to the appointment of any officers as to whether any ethical walls are necessary – for example restricting an officer's involvement in the 'council side' of any projects or initiatives that overlap with the aims and activities of the company/joint venture; or their access to confidential information relating to such projects, initiatives and activities. These should be discussed and agreed with the Monitoring Officer.

A Director will also need to be mindful of the sensitivity of the information gained within the company and take care not to disclose this inappropriately within the Council.

"It could be a breach of a director's duty to the company either to disclose confidential company information to their appointing council, even if it were relevant to something that the council was discussing, or to disclose confidential council information to the company."

D. Recognising potential conflicts

What kind of conflicts can arise for an officer or a councillor in serving as a director of a council company? Examples of areas where conflicts can arise include:

- **No scrutiny of own decisions/performance:** holding a council role which involves potential oversight and scrutiny of the entity, while also holding a position with the entity. For example, an entity board member who also holds a position on the council's Audit & Governance or the Shareholder Committee would clearly be conflicted
- **Council decision affecting the company:** a councillor as director making a decision on the Council that affects the company (such a councillor can however give evidence or advice to the Council on the company's behalf when invited to do so)
- **Personal/private interests:** holding a position as a company board member while having private financial or non-financial interests which may conflict or may be perceived to conflict with the role. For example, a company board member, or member of the family, having an interest in a supplier or competitor to the company
- **Gifts & hospitality:** board members receiving benefit (such as gifts and hospitality) from third parties (such as potential suppliers to the company)
- **Access & use of information; opportunity:** the exploitation by a board member of any asset, information or opportunity related to the entity; it could be a breach of a director's duty to the company either to disclose confidential company information to their appointing council, even if it were relevant to something that the council was discussing, or to disclose confidential council information to the company. (The Companies Act 2006, S175 terms this the avoidance of the "exploitation of any property, information or opportunity" – whether the company gains advantage from property, information or opportunity).

This latter bullet point highlights a significant **danger zone**. While a councillor or officer may be clear about their roles within the Council and the company, they must also be alive to what those roles mean for their use of market sensitive information or other confidential intelligence that might be 'of interest' to the other entity but to which they would not otherwise be entitled. The officer/councillor would need to be very clear about which role they were performing – which 'hat' they were wearing – and not to disclose or otherwise act on the awareness of any such information in the secondary setting.

Key considerations:

- 1) An appointee should use all opportunities to think about, identify and act to resolve any conflicts of interest. This means considering and registering their standing interests at the point of appointment. It also means taking advantage of the 'Declaration of Interests' item on each council or company board meeting agenda to think through what the business on that agenda means for any interests they may have. It is also important to think about the sources of information – particularly confidential information – that

the appointee can access or may receive as part of their roles; and the extent to which this is appropriate or requires mindfulness of their fiduciary duties. The same applies to thinking through the implications when managers may oversee staff who may be working on projects which may impact their company role. A discussion with the Monitoring Officer can help.

- 2) Where a potential conflict of interest may arise, then in addition to declaring it at the relevant meeting, the appointee should not vote on the matter.

E. Behaviours, Codes and Responsibilities

Officers and members of the Council are subject to the *Seven Principles of Public Life* (the “Nolan Principles”) and to their respective *Codes of Conduct* under the Council’s Constitution. This applies not only when acting within their organisation but when serving on a council company. This is in addition to the responsibilities each will have under local government and company law. Regard must also be had to the Articles of Association for each company and the conflicts of interest requirements within them. Other sources of guidance are listed in the Annex.

Key consideration: It’s important to be clear about the behavioural expectations. Any officers or members serving as directors should read and understand the guidance listed below.

Seven Principles of Public Life

Everyone serving in public life must act in accordance with the [Nolan Principles of Public Life](#). They also form the springboard for the officer and member codes of conduct.

As such, officers and councillors, even when serving as directors must always demonstrate:

1. selflessness
2. integrity
3. objectivity
4. accountability
5. openness
6. honesty
7. leadership

Member Code of Conduct

Councillors must act in accordance with their council’s Member Code of Conduct. The Council has adopted a Member Code, as the law requires, and this in the [Constitution](#) (Part

H, 2) . The Code applies to a councillor serving as a director of a council company – except in one respect:

“The member’s code of conduct applies to a member’s activity as a director, except only where it directly conflicts with the interests of the company and, where that may be the case, the potential conflict notified to the company secretary and to the Council’s monitoring officer.”

Local Authority Owned Companies – A Good Practice Guide (CIPFA, 2022)

The Code requires members to register and declare their interests. One of these interests would be their appointment as a director to a council company. Such transparency is key to instilling public confidence. The Member Code is also clear on the use of information received as a councillor (4.1): “I do not disclose information: a. given to me in confidence by anyone; b. acquired by me which I believe, or ought reasonably to be aware, is of a confidential nature, unless... I have consulted the Monitoring Officer prior to its release”.

Employee Code of Conduct

The Employee Code of Conduct is in the Council’s [Constitution](#) (Part I, 4). This similarly requires officers to register any interests: “Employees will be required to complete a Declaration of Interests Proforma...at regular intervals as is deemed necessary”. This should include at the point at which they are appointed as a director of a council company.

The Employee Code is also clear (4.38) about the need to avoid personal gain and to uphold and enhance the reputation of the Council. Similarly (4.42): “Employees must not use information obtained in the course of their employment for personal gain or benefit, nor should they pass it on to others who might use it in such a way unless it is necessary and within the law to do so.”

Articles of Association

Each of the companies will have its own Articles of Association and these will typically include their particular requirements for handling conflicts of interest.

F. Handling conflicts of interest

In matters of reporting, contractual discussion, investment requests or resourcing agreements, there is the potential for the same person to be a decision maker or advisor both for the Council and the company. It will become an actual conflict whenever that scenario occurs in practice.

Company directors have a duty in law to avoid a situation where they have, or may have, an interest that conflicts with the interest of the company. Company law and articles of association do allow provisions for directors and shareholders to authorise a conflict in some circumstances. However, an officer or councillor can never waive their duty to act in the public interest when exercising their duties to the Council.

This will on occasion create an inescapable conflict of interest between someone's role as a councillor or officer of the Council and as a director of a company. In practice, once a person is appointed as a director of the company/joint venture, their prime duty is to the company and their involvement in decision-making/voting on the company Board must reflect that.

Process

1. **Outset - declaration:** potential Council appointees to a company should complete declaration of interest forms before their appointment is made;
2. **Training:** training on identifying conflicts of interest should be given to each appointee, as arranged or commissioned by the Monitoring Officer;
3. **Potential conflicts:** an officer or councillor considers a potential conflict exists between their 'council' and their 'company' role, they should confidentially discuss with the Monitoring Officer (or her Deputies) to determine whether a conflict exists on the council side and with the Company Secretary on the company side;
4. **Declaring the interest:** the person should follow the Council's and the company's normal procedures for declaring and registering an interest; it's important that both officers and councillors take full note of the content of agendas and whether the business to be transacted raises any potential conflicts; there will be a point on each agenda where interests should be declared;
5. **Stand down from discussion:** having declared a conflict of interest, there should be no taking part in a decision about the issue;
6. **Ethical wall:** in the case of an officer who may have a conflict between their roles, the Monitoring Officer may consider implementing an 'ethical wall' between the person and their access to information, or their influence towards fellow officers; this would be recorded and proportionate to the circumstance;

7. **Annual update of registers of interest:** there should be an annual reminder to each officer/councillor to update their registers of interest to encourage continued thinking about potential or emerging interests.

Annex

A. Guidance to the Council on the advantages and disadvantages of appointments to a company:

Potential advantages of council nominees as board directors or trustees:

- Can improve the relationship between the ALEO [arm's length external organisation] and the council.
- Can bring an insight into the council and its objectives and the broader community.
- Council representatives can gain valuable first-hand experience of service issues and different sectors.

Potential disadvantages of council nominees as board directors or trustees:

- Can bring additional demands to their already diverse role.
- Representatives may lack the background, skills or understanding required of the role.
- Risk of conflict of interest between their role on the ALEO and their role on the council.
- Negative impact on council decision-making where councillors withdraw from committees owing to conflicts of interest.
- Exposure to legal risks and personal liability.
- Risk to continuity if councillors lose their position if not re-elected.

B. Sources of additional guidance for appointees as directors

[Local Authority Company Review Guidance](#), Max Caller

[Cabinet Office's Code of Conduct for Board Members of Public Bodies](#)

[The Governance of Council Interests in Companies – Code of Practice](#) (2018), Local Government Lawyers.

[Institute of Directors' Corporate Governance Guidance and Principles](#)

Local authority owned companies: a good practice guide (CIPFA, 2022 edition)

C. Duties of Directors – duty to avoid conflicts of interest

1. Companies Act 2006:

Section 175 of the Companies Act 2006 creates a statutory duty for company directors to “avoid situations” where they may have an interest which conflicts with that of the company.

(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed—

(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or

(b) if the matter has been authorised by the directors.

2. Local Authority Company Review Guidance

The *Local Authority Company Review Guidance* by Max Caller summarises the Company Act 2006 ‘duties of directors’ as:

- act within their powers
- promote the success of the company
- exercise independent judgement
- exercise reasonable care skill and diligence
- avoid conflicts of interest
- do not accept benefits from third parties
- declare an interest in proposed transaction