

CENTRAL BEDFORDSHIRE COUNCIL

DRAFT POLICY ON MEMBER APPOINTMENTS TO OUTSIDE BODIES

Definition of an Outside Body

1. For our purposes an outside body can be loosely defined as either a corporate or an unincorporated body which is not part of the Council's own governance structure but whose work helps in some way towards fulfilling the Council's own responsibilities and/or improving community life in Central Bedfordshire.
2. The term can embrace a diverse range of organisational purposes and structures and is in effect a "label of convenience" rather than an exact description. We have categorised outside bodies as either strategic, ward-based or general in nature.

Criteria for Appointing Members

3. Member appointments to outside bodies should only be made if there are clear benefits from this arrangement for either the Council or local communities, with reference to the descriptions below.

Strategic Bodies:

- 3.1 a body whose functions make a substantial contribution to the achievement of the Council's overall aims and objectives, as set out in its approved policies, plans and strategies, and to the delivery of essential local services;
- 3.2 an organisation which directly or indirectly represents local government (or aspects of its work) at local, regional or national level and whose membership comprises representatives of some or all local authorities;
- 3.3 an organisation to which the Council is required by statute to make appointments and where not doing so would affect the Council's ability to properly discharge its functions and obligations;

Ward-Based Bodies:

- 3.4 a local organisation or group, falling within one or more ward boundaries, which seeks the Council's assistance in meeting local needs;

General Bodies:

- 3.5 a voluntary/community organisation which receives funding from the Council and Member representation will provide a valuable mechanism for the exchange of information and views;
- 3.6 an organisation or discussion/liaison group where Council representation will in some other way provide clear 'added value' to either the Council or local communities in Central Bedfordshire.

The Capacity in which Members Serve On Outside Bodies

4. The capacity in which Members serve on outside bodies will mainly depend on:
 - 4.1 what legal form each organisation takes, and in particular whether it is incorporated as a separate legal entity or not;
 - 4.2 whether the appointment is to the main body or to a particular committee or sub-committee;
 - 4.3 whether the Member is acting as a voting or non-voting member.
5. Depending on the terms of the appointment, Members may serve as either:
 - 5.1 a board, executive or management committee member (voting);
 - 5.2 a committee or sub-committee member (voting);
 - 5.3 an ordinary member (voting only at the AGM);
 - 5.4 a company director (voting);
 - 5.5 a charity trustee (voting);
 - 5.6 an observer (non-voting); or
 - 5.7 a member of a discussion or liaison forum (where voting may not apply).

6. In relation to 5.6, an observer is a person who is not a member of the body but is invited to attend in order to give the body the benefit of the Council's views and to keep the Council informed of the body's actions.
7. The capacity in which the member serves, along with the organisation's duties and accountabilities under the law, as well as to any parent body or regulator, will determine the extent of their responsibilities and liabilities.

Members' Responsibilities and Potential Liabilities

8. The type of organisation to which the Council make appointments is so diverse that it is virtually impossible to give comprehensive guidance that covers every situation. The circumstances will vary widely from one organisation to another, but for convenience they have been divided below between corporate and non-corporate bodies.

Corporate Bodies

- 8.1 A corporate body has its own legal personality and is responsible for its own governance arrangements, finances and contractual responsibilities. The body itself will incur direct liability for its actions or inactions. Individual members who are acting within any mandate given to them by that body will usually be protected by limited liability if it becomes insolvent (except in the case of wrongful or fraudulent trading).
- 8.2 A Member appointed to a corporate body must when attending meetings of the body act in that body's best interests, which may not necessarily be the same as the Council's. Members may of course bring to bear their own experience and knowledge as a councillor, and may have regard to the Council's interests, but have a duty to exercise independent judgement when making decisions. Members should not claim to act or give the impression that they are acting under a Council mandate.

8.3 In the event of a clear conflict of interests the Member should consider whether it is (a) minor or occasional enough that it can be dealt with by declaring an interest and withdrawing from either the organisation's meeting or the Council's meeting, or (b) so frequent or significant that it prevents the Member from effectively fulfilling their responsibilities towards the outside body, in which case resignation from the body may need to be considered. Conflicts of interest are likely to be more acute for Executive Members, particularly where the financial position of the outside body is under consideration and the body depends on Council financial support (see the Monitoring Officer's guidance at Appendix C).

8.4 Corporate bodies include statutory or chartered corporations (including local authorities, non-departmental public bodies, NHS trusts, colleges and community, foundation or voluntary schools); companies limited by shares; companies limited by guarantee (not-for-profit, including incorporated charities where liability is normally limited to a nominal £1); industrial and provident societies (not-for-profit, including most housing associations); and limited liability partnerships. In many cases the body will have accountability requirements to a regulator such as the District Auditor, another inspectorate or government department, or Companies House.

Registered Companies

8.5 A Member appointed to a registered company may, depending on the approach taken by that organisation, be expected to become a signed-up company director rather than an observer. If appointed as a company director, the Member will be acting on behalf of the body itself, not as a 'representative' of the local authority, even though the Council may have appointed them. Company directors must have their appointment filed with Companies House and must abide by the company's own Memorandum and Articles of Association. Under the Companies Act 2006 a company director has duties:

- (a) to act within the company's powers;
- (b) to promote the success of the company;
- (c) to exercise independent judgement;
- (d) to exercise reasonable care, skill and diligence;
- (e) to avoid conflicts of interest;

- (f) not to accept benefits from third parties;
and
- (g) to declare any interests in a proposed transaction or arrangement entered into by the company.

8.6 It should also be borne in mind that an observer, even though not formally a director, can in some circumstances assume the status of a 'shadow director' if they are especially influential in the company's decision-making process.

8.7 Examples of corporate bodies to which this Council has made appointments would be school governing bodies, hospitals' councils of governors, housing associations, Citizens Advice Bureaux and a number of other third sector organisations which are fulfilling social objectives in the Central Bedfordshire area (where listed as a company limited by guarantee or an industrial and provident society in Appendix B). There may be different levels of responsibility and accountability for ordinary members and management or executive committee members. The Council has made no voting appointments to companies limited by shares or limited liability partnerships but has appointed a non-voting observer to the Board of NIRAH, a private limited company.

Statutory Bodies

8.8 In some cases a Member will be acting as the Council's representative on a board, committee or body that is exercising specific statutory functions which are distinct from the Council's own functions, where Council membership is required by law. These would include a police or fire authority, regional flood defence committee, internal drainage board, joint access forum or conservation board; also EERA, as the regional chamber and planning authority. While each body will have its own purpose and constitutional arrangements, in general an appointed Member can be expected to play their part in supporting the body's work, but taking particular account of the need to safeguard the Council's best interests and those of its communities. There may be some potential for conflicts of interest where there is a financial relationship such as a levy or precept between the body and the Council.

Non-corporate Bodies

- 8.9 A non-corporate body has no separate legal personality and is in effect a collection of individuals who will usually be acting together under a formal structure such as a constitution, rules or terms of reference that have been agreed between the members.

Advisory, Consultative or Liaison Bodies

- 8.10 In many cases Members will be appointed to an advisory, consultative or liaison body of some kind. It could take the form of a joint committee, partnership arrangement or discussion forum between the local authority and one or more other public and/or private or third sector bodies. Again, the Member appointed will be acting as the Council's representative and contributing to that body's purposes while taking account of the best interests of Central Bedfordshire and its residents.
- 8.11 Examples would include local government forums such as the LGA and County Councils Network; key partnerships such as the LSP, the Community Safety Partnership and the BDAT Partnership Board. The potential for incurring liabilities or conflicts of interest as a result of membership is likely to be minimal.
- 8.12 In other cases the 'body' will be more of an informal discussion group, acting as a forum for the exchange of views and information and inter-agency consultation, often on quite local issues. Council appointments have been made to several quarry, waste and transport liaison groups, the cycling forum, leisure centre advisory groups and town centre partnerships or working groups. With no decision-making powers, the scope for liabilities or conflicts of interest arising should again be minimal unless perhaps if a planning consent were involved.

Registered Charities

- 8.13 Charities and charitable trusts can be conveniently subdivided into:
- (a) endowed grant-making trusts where the trustees' duties are primarily to protect the trust's assets and ensure the charity is well-managed in accordance with its stated purposes (including disbursement of its funds, for instance as small educational or welfare grants); several of these are currently listed in our schedule of outside bodies; and

- (b) voluntary organisations and community associations that exist to provide some kind of local service, which can present more risks particularly if they have charge of annual budgets and/or financial reserves, or contractual obligations towards staff, property or suppliers; for this reason most of those voluntary or community groups to which the Council has made appointments have already incorporated themselves as companies limited by guarantee, a form which presents less risk to individual members.

8.14 Where the organisation is a registered charity there will also be specific accountability requirements towards the Charity Commission which include always to act in accordance with the charity's stated purposes (set out in its charity registration and constitution or trust deed) and to submit an annual report and accounts.

Other Unincorporated Associations

8.15 An unincorporated association, having no separate legal existence, is no more than a group of individuals who agree to pursue a common purpose. Members may be asked to make a financial contribution, for example in the form of a subscription, and to sign a membership agreement which can include an agreement to contribute to liabilities incurred by other members. When a member acts on behalf of the unincorporated association, for example in buying equipment to be used by the association, he/she incurs a personal liability for the cost of that equipment and then seeks to recover that expenditure from the funds of the association or from the other members of the association. In particular cases, the association may be regarded in law as a partnership in which case each member may be personally liable for any debts incurred by any member of the association.

8.16 Because of this potential liability the Council should avoid appointing voting members to unincorporated associations such as local community associations or sports clubs where there is a significant risk of personal liability.

8.17 In general, Members who are appointed to charities, community associations or other third sector bodies (whether incorporated or not) should:

- (a) understand clearly the organisation's purposes and main objectives and their own role in the organisation;
- (b) attend meetings regularly and take an active, informed and supportive role in the body's affairs;

- (c) take care always to act in the best interests of the organisation and in accordance with its rules or governing document, while contributing their knowledge and experience as a councillor;
- (d) satisfy themselves that the organisation has transparent governance arrangements, regular reports on its activities and sound financial management, with accounts regularly monitored; and that annual reports and accounts are submitted in timely fashion;
- (e) seek to protect the body's assets and manage its affairs prudently;
- (e) be aware of the main risks the body faces (including funding risks) and the steps to be taken to deal with them;
- (f) ensure it maintains its membership, so that the work of running the organisation and any financial obligations continue to be shared by a reasonable number of people;
- (g) behave ethically in accordance with the organisation's own code of conduct, if they have one, or otherwise the Council's Code of Conduct for Members;
- (h) not gain or seek to gain from their appointment any benefit or remuneration (beyond any travel or other allowances formally approved by the body);
- (i) ensure the organisation has appropriate health and safety and equal opportunities policies and adequate insurance arrangements;
- (j) seek to safeguard the Council's interests on those bodies which are funded by or through the Council, to the extent that this does not conflict with their duties towards the organisation; and
- (k) seek advice from the Monitoring Officer or other relevant Council officer if they have concerns about the running of the body.

Indemnity and Insurance Cover

9. The Council's Indemnity for Members and Officers (at Part 6 of the Ethical Handbook at the back of the Constitution) provides cover in connection with any liability the member may incur by reason of any action, or failure to act, which has been authorised by the Council or which forms part of, or arises from, any duties or functions placed upon the Member. This includes functions arising from the Member's service on an outside body, where the Member has been officially appointed by the Council and the outside body itself does not provide its own cover. Insurance cover is only provided, however, when either the Member is sitting on the outside body purely to represent the Council, or the body on which the Member sits is acting only in the interests of the Council.
10. This means that the Council's insurance-backed indemnity would extend to membership of statutory bodies, where the Member would be acting as the Council's representative (in situations where the body did not provide its own cover); to membership of the many advisory, consultative or liaison bodies of which the Council is a member; and to situations where the Council's representative was appointed purely as a non-voting observer on a company or other incorporated body. Insurance cover would not be provided, however, where the Member was appointed by the Council to serve as either a company director or a charity trustee, where their primary obligations would be to that body rather than to the Council. In this situation the outside body should be expected to provide its own indemnity, to avoid any potential liability falling back upon the Council.
11. The Schedule of Outside Body Appointments shows where appointments are understood to be covered by the Council's own indemnity and where they are covered by the company or charity concerned. As a matter of principle, Council appointments should not be made, other than as non-voting observers, to companies or charities which have not provided their own insurance-backed indemnities to appointed Members, nor to any unincorporated association where there is a significant risk of personal liability.
12. To avoid any potential liability, non-voting observers sitting on registered companies should take care not to exercise undue influence over the decisions of those companies.
13. In no circumstances will the Council's indemnity/insurance cover Members who are serving on an outside body in a personal capacity, i.e. at their own choice rather than by formal Council appointment.

Conflicts of Interests

14. As indicated earlier, Members appointed by the Council to an outside body will, when sitting on that body, often have duties to the organisation which take precedence over their duties to the Council. This will depend on the type of organisation on which they serve. Members will therefore wish to consider, at any time when it appears that the organisation's interests may conflict with the Council's interests, whether that conflict prevents them from taking part in decision-making either at the organisation's meeting or at the Council's meeting.
15. Under the Council's Code of Conduct for Members a personal interest always arises from membership of an outside body "of which you are a member or in a position of general control or management", including one to which a Member has been appointed or nominated by the Council. This interest needs to be recorded in the Register of Members' Interests and declared at any meeting where the business relates to or is likely to affect that body, although it does not impede full participation in the Council's meeting.
16. A personal and prejudicial interest will arise "where the 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 your judgement of the public interest", but only where the business at hand either:
 - (a) affects the financial position of the outside body; or
 - (b) relates to the determining of any approval, consent, licence, permission or registration in relation to that body.
17. Where a personal and prejudicial interest does arise at a Council meeting, the Member must withdraw from the room and take no further part in the discussion. The Monitoring Officer's advice note to Executive Members (Appendix C) elaborates.
18. For the sake of clarity it is unlikely, owing to an exemption in the Members' Code of Conduct regarding the setting of Council Tax, that a personal and prejudicial interest will arise solely by reason of funding for an outside body being included in the Council's overall annual budget at the time it is submitted in draft form for Council approval. An exception to this would be if a specific decision is sought about that particular organisation's funding arrangements.

Bias and Predetermination

19. Where membership of an outside body gives rise to a personal and prejudicial interest, it would be a breach of the Code of Conduct for a Member to participate within the Council on matters which affect that outside body. However, the common law goes further than the Code of Conduct in this respect and provides that decisions of the Council may be open to judicial review and held to be invalid where any Member who participated in that decision was, or gave the appearance that they might be, either "predetermined" or "biased".
20. "Predetermination" would arise if a Member made up their mind on a matter before they had all the relevant information to make that decision; it could be a particular problem in respect of outside bodies which made representations to the Council on matters such as planning and licensing applications, where a Member may be asked to take a view on a matter in the outside body, and then have to take a formal decision on the matter within the Council. Members who will be involved in decision-making within the Council should therefore be careful not to commit themselves, or appear to commit themselves, in advance as to how they will vote in the Council.
21. "Bias" would arise if a Member took a decision within the Council not on a balanced consideration of material factors, but allowed their decision to be improperly influenced by loyalty to an outside body, or agreed to act on the direction of an outside body.
22. For this reason any Member serving on an outside body should be particularly careful in dealing with any matter within the Council not to give the appearance of predetermination or bias.

Reporting Back on the Work of Outside Bodies

23. Members may wish to report back to their colleagues on the work of the outside body to which they are appointed by contributing an occasional article to the Members' Newsletter.
24. Any such articles should be forwarded to Member Services in Legal and Democratic Services.