

NORTH YORKSHIRE COUNTY COUNCIL

AUDIT COMMITTEE

30 November 2017

GOVERNANCE OF EXTERNAL COMPANIES

Report of the Corporate Director, Strategic Resources

1.0 Purpose of the report

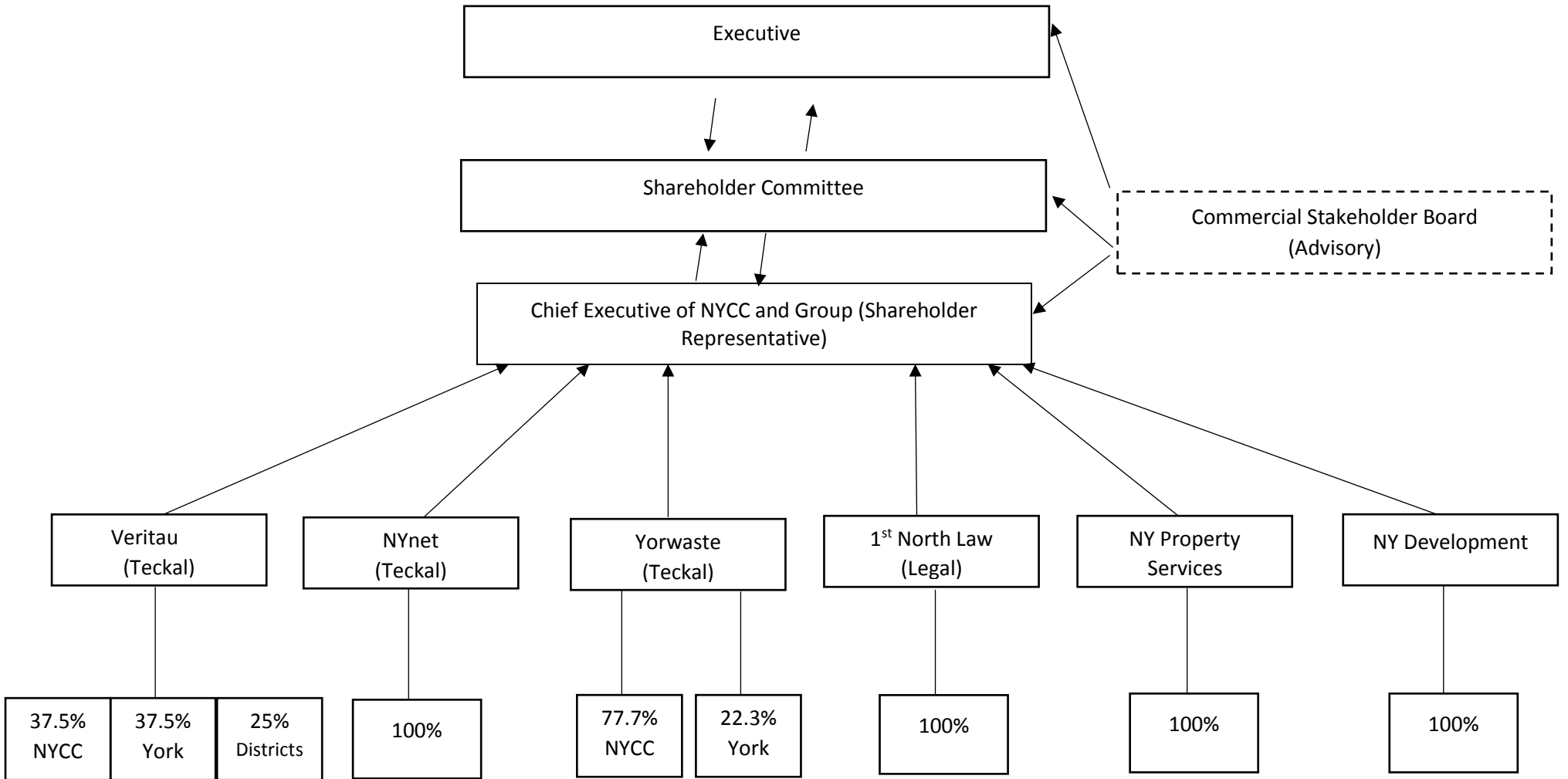
- 1.1 To update Members of the Audit Committee on arrangements that have been put in place to ensure effective Governance of the range of external companies that the County Council has an interest in.

2.0 Background

- 2.1 The County Council now has a significant number of external companies of which it has a majority interest. The circumstances for creation of these companies varies and some have a long history. However, the County Council's Commercial agenda has led to an increase in the last year or so. As a result the following companies have been created and are 100% owned by the County Council –
- a) Align Property Partners – replacement of Mouchel as the County Council's Building Design and Management Service. The creation of a Company was done to expedite "internalisation" of the service.
 - b) Brierley Homes – delivery of housing, principally aimed at using excess land in the ownership of the County Council. This company was created as this is a commercial venture and not motivated by social housing (although the County Council does not have the power to be a Housing Authority in any case).
 - c) First Law North – provision of professional legal services to outside bodies. Provision on services to outside bodies is prescribed by the Law Society and an ABS needs to be created of which First Law North is an example.
- 2.2 A report was taken to the County Council's Executive on the 17 October 2017 and was approved. A copy of this report is set out as **Appendix A**. This report covers all of the salient points and provides significant detail in terms of how Governance is intended in the future.
- 2.3 It should be noted that there is now a concerted effort to look at the range of companies of which the County Council has a financial interest and an attempt to make sure that they are working to the best interests of the shareholder – i.e. the County Council. There are some companies where

there are other minority shareholders and this of course impact upon Governance and how that company operates.

- 2.4 The Shareholder Sub-Committee has yet to meet but is scheduled to hold its first meeting on 6 December 2017. It is anticipated that meetings will be held quarterly or thereabouts and Stakeholder Board Meetings are likely to be more frequent, estimated bi-monthly. These timings will, however, change in line with requirements.
- 2.5 **Appendix 2** of the attached report to the Executive sets out the inter-relationships of the companies but for ease this is repeated below.



2.6 **Appendix 1** of the Executive report also sets out the delegations to the appropriate sub committee and individual officers.

3.0 Recommendation

3.1 The Audit Committee are asked to comment on the approach as set out in this report and the report to the Executive dated 17 October 2017.

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Northallerton

30 November 2017

Background Documents: Report to the Executive on 17 October 2017

North Yorkshire County Council

Executive

17 October 2017

Creation of a Shareholders Committee and Governance arrangements

Report of the Assistant Chief Executive, Legal and Democratic Services

1.0 Purpose of the Report

- 1.1 To create a Shareholder's Committee to strengthen governance arrangement of the Council Companies and to appoint the Chief Executive as Chief Executive of NYCC and Group (Shareholder Representative).

2.0 Executive Summary

2.1 It is important that the Council ensures that the companies act in the best interests of the Council overall and contributes to the Council's objectives. As the Council is creating more companies, it provides an appropriate time to review the governance arrangements for these companies to ensure that the Council properly exercises its rights as the owner or majority shareholder of our range of companies (as distinct from a customer perspective) and ensure they sit within the strategic direction of the Council.

2.2 This review looks at strengthening the governance arrangements by:

- creation of a formal Shareholders Committee
- delegating powers to the Chief Executive to exercise certain ownership rights on behalf of the Shareholder
- delegating powers to the Shareholders Committee to hold the Chief Executive to account
- providing senior officer support to exercise the Council's ownership rights and creating a Shareholder advisory body to assist the decision making of the Shareholders Committee.
- providing a protocol to ensure that conflicts of interests are handled appropriately

3.0 Issues

3.1 Local Authorities have been encouraged to create companies through legislation for a variety of reasons, not least to generate profit for the public purse in times of austerity.

3.2 It is important to ensure that the Council, as a shareholder/trustee/owner of these organisations has robust governance arrangements to exercise its relevant powers to ensure that they operate under and contribute to delivering the Council's priorities.

3.3 Further, proper governance arrangements should include safeguards and arrangements for oversight of the Council's ownership rights to protect the Council from poor performance, inappropriate risk taking and potential decisions that would not be in the best interests of the owner of the Companies.

3.4 Therefore the Council as either the sole owner or a part shareholder of these companies, should have robust arrangements to carry out the following activities:

- Being clear and transparent that the Council is the owner/joint owner of the company.
- Approve and sign off strategic business plans.
- Monitor performance and financial delivery against strategic business plans.
- Exercise decision-making over reserve matters.
- Determine remuneration of Directors.
- Delegating certain matters for each Company to be 'Reserved' so that they need approval of the Council as the shareholder/owner

3.5 The Council currently has ownership rights for the following companies:

- (a) NYnet (100%)
- (b) Yorwaste (77.7% owned by NYCC)
- (c) First North Law (100%)
- (d) North Yorkshire Housing Development (100%)
- (e) NY Property Services (100%)
- (f) Veritau (37.5% owned by NYCC)

The Council also successfully sells valued services to schools and the education market directly and whilst it does not do so through a separate company, it would be helpful to review how that operates under the review of governance as a whole.

3.6 To ensure that there are appropriate governance arrangements in dealing with all of the Council Companies and shareholdings, it is proposed to formally delegate decision making to :

- (a) The Executive
- (b) A sub-Committee of the Executive
- (c) The Chief Executive, as the Shareholders Representative

3.7 The delegations to each is described in Appendix 1 and shown diagrammatically in Appendix 2. Each part of the governance arrangements is described further below.

4.0 Shareholders Committee

4.1 As a shareholder, the Council's role is not to manage the business on a day to day level. The Company's Board will be responsible for running the business and should be given sufficient freedom to deliver the strategic and operational priorities of the Company. The Board should have Directors with the right skill to be able to manage the business of the company.

4.2 In order to strengthen the Council's governance arrangements over the ownership rights of the companies, it is proposed to create a Shareholder's Committee which is supported by the Statutory Officers. This Committee will be a sub-committee of the Executive and will carry out the functions as identified in Appendix 1. Certain functions will still be

retained by the Executive as identified in the Appendix but it is envisaged that the vast majority of formal decision making on behalf of the Council regarding the Companies will be made by the Shareholders Committee.

- 4.3 The Shareholders Committee will be chaired by the Leader of the Council and will comprise of two additional Executive members. The Shareholders Committee will meet quarterly and monitor the performance of all the companies.

Delegation to the Chief Executive of NYCC and Group (Shareholder Representative)

- 4.4 The Executive are asked to formally designate the County Council's Chief Executive as the *Chief Executive of NYCC and Group (Shareholder Representative)*. To be able to provide a manageable mechanism for accountability it is proposed that formal delegation is given to the Council's Chief Executive to hold certain shareholder rights so that he can hold the Companies to account through ownership rights and that the Shareholder's Committee can hold the Chief Executive to account on the performance of that role.

- 4.5 The delegation to an officer will allow a level of commercial flexibility for the companies to be able to report back on a more regular basis and to receive feedback from the Council as their owner or shareholder. It is therefore proposed that a significant amount of delegation is given to the Council's Chief Executive as a representative of the owner of the Companies and that the Shareholders Committee has a role in holding the Chief Executive to account in his role as the Shareholder Representative as well as reviewing the performance of the Companies directly (to be known as Chief Executive of NYCC and Group (Shareholder Representative)). The Shareholders Committee will undertake its role of scrutinising and holding to account the decisions of the Chief Executive.

NYCC Commercial Stakeholder Board – advisory body to the Shareholders committee

- 4.6 It is recommended that there is regular discussion between the Members of the Shareholders Committee and senior officers to ensure that there is a clear and agreed strategy on commercial matters. Therefore as well as creating a specific committee to solely concentrate on ownership rights, it is proposed to create an advisory board to the Committee to ensure that there is regularly dialogue between the Companies and the Council. Therefore it is proposed that there would be regular meeting of an informal advisory body to the Shareholders Committee. This Advisory Board will be called the "*NYCC Commercial Stakeholder Board*" which will consist of :

- (1) The Leader
- (2) Two Executive Members
- (3) Chief Executive
- (4) Corporate Director, Strategic Resources
- (5) Assistant Chief Executive, Legal & Democratic Services

- 4.7 This Board will ask each individual Company to provide a short report on key activities and key issues / progress to every meeting but there may be merit in having a periodic "deep dive" where a more detailed discussion can take place with the relevant Chair and MD from each respective Company.

- 4.8 Each Company will produce its own Business Plan which will then be monitored throughout the year on performance against the plan. It is important for the Shareholders Committee to approve the final business plan and therefore it is helpful that the Board

has early sight of and the ability to shape the Business Plan before it is finally submitted to the Shareholders Committee for approval. This then ensures that the Board can have appropriate input and understanding in considering the Company's targets and objectives. Such early dialogue and engagement from the company with its shareholders is seen to be good practice.

- 4.9 Securing new business is likely to be a key focus for all of the Companies. This is therefore likely to feature as a key area for reporting back to the Board and will require the Board to consider how it would recommend investing where that is a requirement. As the Board is merely advisory, the decision making will be made through the Shareholders Committee or through the Executive.

5.0 Conflicts of Interest

- 5.1 Conflicts of interest may arise between the Council and a company, even if the Council and the company have the same overall aims and objectives or is created in response to a Council or government initiative.

- 5.2 The management of conflicts of interests is a cornerstone of good governance. The Council has strong governance in place for its companies and it is important that decisions are not affected or tainted by conflicts of interests so that valid decisions are made, and are perceived to be made in the interests of the companies and the public. A copy of the Guidance provided by the Council is attached at Appendix 3.

- 5.3 This guidance recognises that Conflicts of interest between the Council and the Companies may arise in a number of circumstances, for example:

- If the Council is selling, transferring or leasing land or assets to the company
- If the Council is negotiating a contract with the company
- If the company is seeking funding from the Council
- If there is a dispute between the company and the Council

- 5.4 These conflicts can be appropriately handled through a combination of declaring interests, not taking part in certain decisions and applying for the appropriate dispensations. Ultimately the aim of the Council and the Companies is to ensure that the public purse is protected and the public are receiving value for money and it is vital that decisions are made with the appropriate governance arrangements in place.

- 5.5 The creation of a Shareholder's Committee does not change the need to deal with conflicts of interest as currently being undertaken. The Council currently has Directors on its companies, including Executive members, other Councillors and Officers and those perceived conflicts currently need to be managed. However to clarify the position, it is helpful to set out the number of roles that the Council interacts with its Companies: i.e. The Council carries out the following functions:

- (a) The Shareholder/owner
- (b) Appoints Members/Officers as Director on the Board
- (c) Often is a Customer of the services provided by the company

In carrying out each function it is important to understand where there can be a conflict, or a perceived conflict and how these conflicts can be managed effectively so that decision making is not challenged and can be made for the right reasons.

(a) Shareholder/Owner

- 5.6 As an owner or a significant shareholder in the Company, the Council is interested in ensuring the future success of the Company and in the return of 'Shareholder Value' – i.e the benefit the Council receives, whether it is direct financial return or added value through other outcomes. The Council's ownership of a company is an Executive Function which means that it is exercised by Executive members and can be delegated to officers, an Executive Sub-Committee and individual Executive members.
- 5.7 Under Company legislation, shareholders are not subject to the same restrictions regarding conflicts of interest that are imposed onto Directors. This is because shareholders generally can vote in their own best interests, which would normally mirror the Company's best interest i.e. the long term financial growth of the company. Where there is more than one shareholder, there is often a 'Shareholder's Agreement' to deal with conflicts between shareholders.
- 5.8 There are no prohibitions for an officer or member who exercises ownership rights not to be a Director on a Board of one of the companies. Indeed it is the Board of Directors who owe a duty to the shareholders to act in the best interests of the Company. It is not unusual in the commercial sector for Investor/owner Directors to sit on Board of Directors or for Directors to have shares in the Company. If an Executive member is on the Board of a company, then they will have to exercise their statutory duties as a Director and ensure their conflict of interest is appropriately managed- see below and Appendix 3.
- 5.9 Shareholders, as the owners of companies, have substantial powers of a company. They can authorise an actual or potential conflict by ordinary resolution (more than 50% support from those shareholders voting). Under the Companies Act 2006 a director who is also a shareholder can participate in the vote, even if he is one of the directors interested in the matter being authorised.

(b) Director on the Board of the Company

- 5.10 Company Directors have a duty to act in the interest of the members of the company as a whole (i.e. for current and future shareholders). Directors have an overriding duty to act in a way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its shareholders as a whole. This duty is to the Company and they have a duty to take into account the interests of the company's employees, business relationship with suppliers, customers and others. Individual shareholders can take action to enforce the duties in the name of the company and where the Council is the sole owner, this duty is enforceable by the Council.
- 5.11 However if a Councillor is appointed as a Director to the Company, that Councillor is still bound by the Members code of conduct. Similarly, if a Council Officer is a Director on the Company, the s/he will still be bound by their conditions of employment and the Officers' code of conduct. These conflicts which may arise are currently managed with through existing governance and operational arrangements and appropriate guidance. The Council's guidance on this can be found at Appendix 3.
- 5.12 Basically this provides that Directors must act in good faith and must promote the success of the Company when making decisions as a director. On rare occasions, the duties of the Company and the Council as owner may conflict and therefore it is important to have sound protocols in place.

- 5.13 A Director has a duty under Section 175 of the Companies Act 2006 to avoid a situation in which s/he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company of which he is a director, unless
- (a) The situation cannot reasonably be regarded as likely to give rise to a conflict of interest
 - (b) The matter is authorised in advance by other Directors who do not have a similar conflict of interest or by a general resolution by the Shareholders
- 5.14 Therefore under existing arrangements if a Board of a company is discussing any transactions with the Council directly, a Director who is an officer or a member will have duty to disclose that interest. If the interest does give rise to a conflict then that individual can ask for a dispensation from the Company or the Shareholder to take part in that decision making on behalf of the Company. If a Director is an Executive member (whether or not s/he sits on the Shareholder's Committee), then a similar situation arises. Either that member must get a dispensation from the Company (or the Shareholder) or not take part in that Board discussion. This situation is not unusual and is comparable to the commercial sector where a Director is a major shareholder in the company.
- 5.15. In either event, the Councillor is free to exercise his/her rights at the Shareholders Committee under company law. However the Code of Conduct still applies to members at all times. Therefore the creation of a Shareholder's Committee therefore does not change the conflict of interest position

(c) Customer of the services provided

- 5.16 The Council can also be a customer of the services provided by the Companies and this can lead to a conflict where it can be perceived that the customer will want to pay the cheapest price for services and the company will want to pay the highest price that the market can demand. The realities are that this is an oversimplification of the problem in that both sides wish to have a sustainable model that supports both organisations. However it is important that in any negotiations between the Council in its customer role and the Companies are done in a manner which reduces this inherent conflict of interest and that there is a clear separation between the Council as a customer and the company. The Council's existing arrangements of dealing with this inherent conflict have served it well and it is not proposed to change these arrangements.

6.0 Reasons For Recommendations

- 6.1 It is submitted that the Executive consider strengthening the governance arrangements for the Council's Companies by creating a Shareholder's Committee which concentrates solely on the Council's ownership rights and to formally delegate the Chief Executive of NYCC and Group (Shareholder Representative).

7.0 Recommendation(s)

7.1 Executive is asked to approve:

- (a) The creation of a Shareholders Committee
- (b) Delegate the Chief Executive as the Chief Executive of NYCC and Group (Shareholder Representative)
- (c) Note the conflicts of interests paragraphs and to remind executive members of their need to declare interests when on the board of a company which discusses transactions with the Council.

(d) Delegate to the Assistant Chief Executive (Legal and Democratic Services) all the necessary powers to implement the above, including reviewing the terms of the Companies governance documents.

Appendix 1 : terms of reference of the Shareholders Committee

Appendix 2: Governance Structure

Appendix 3: Guidance for Councillors and Officers on outside bodies.

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Author of report – Barry Khan, Assistant Chief Executive, Legal and Democratic Services

**DELEGATIONS OF DECISION-MAKING POWERS
FOR COMPANIES**

For matters relating to a company which would require a Council decision or where approval of the Council is required within the company's governance arrangements the following distribution of powers will apply:

Decisions reserved to the Executive

1. Approving steps to wind up a company.
2. Making loans in excess of (£500k) other than by way of normal trade credit.

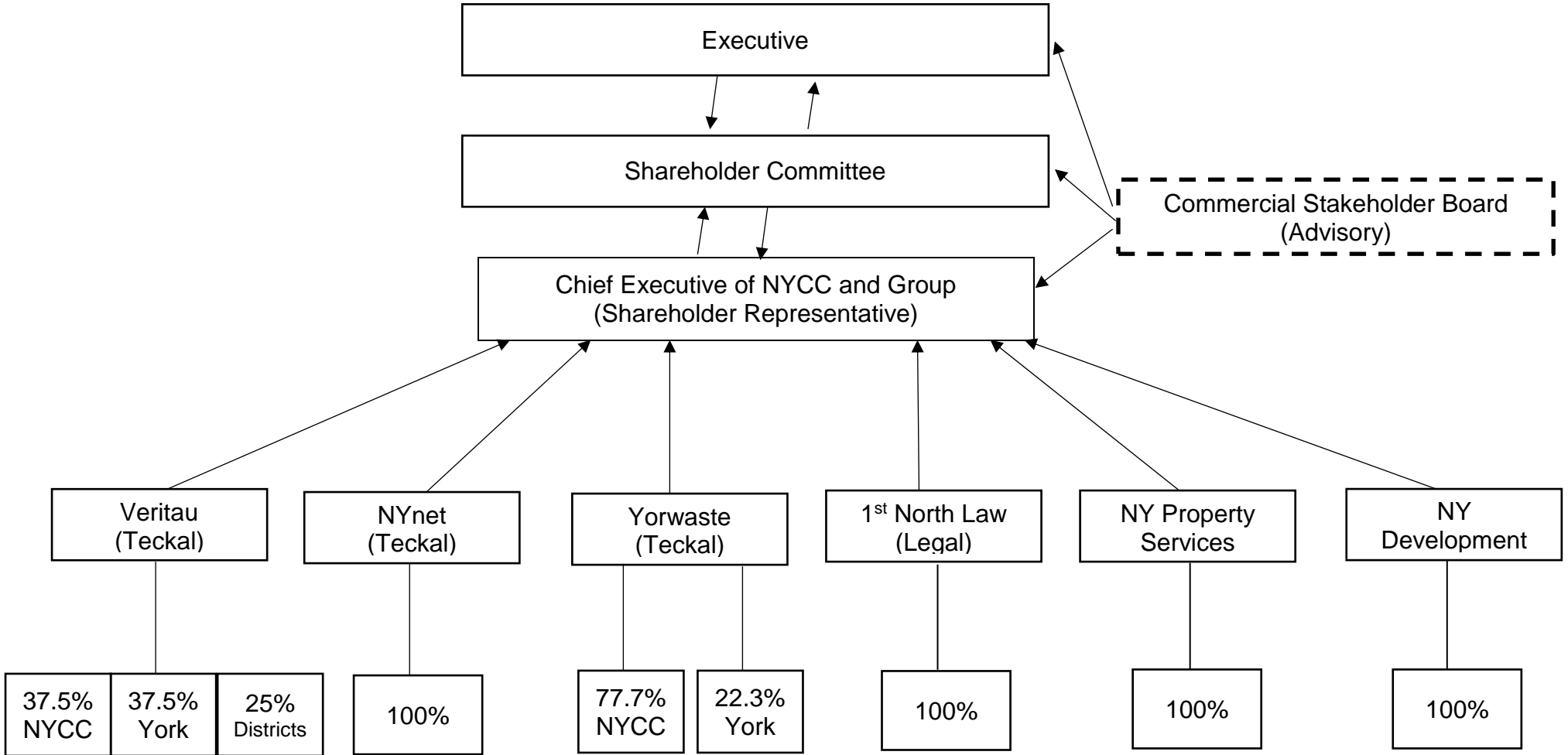
Decisions which would fall within the remit of the Shareholders Committee

3. Approving or making amendments to the strategic or business plans.
4. Monitoring the strategic and business plans
5. Acquiring shares in another company.
6. Changes to company governance eg changes to Articles, Shareholder Agreements.
7. Establishing subsidiary companies.
8. Approving disposals of assets valued over (£500k) [subject to the Company's articles of association]
9. Approving borrowing in excess of (£500k). [subject to the Company's articles of association]
10. Entering, amending or terminating any agreements which create a potential liability for the company in excess of £500k. [subject to the Company's articles of association]
11. Making changes to the nature of the company's business.
12. Matters relating to the approval of dividends requiring Council consent.
13. Reviewing the decisions of the Chief Executive of NYCC and Group (Shareholder Representative) and holding the decisions and that individual to account. Formal decisions made will be reported back to the Shareholders Committee

Decisions which fall within the remit of the Chief Executive of NYCC and Group (Shareholder Representative)

14. Monitoring the strategic and business plans and approving emergency amendments.
15. Approving the appointment or dismissal of company Directors including the Chair.
16. Matters relating to the terms and conditions of company Directors.
17. Matters relating to the entering of any contracts with company Directors.
18. Matters relating to the employment of senior management team of the company.
19. Changes to share capital and admission of shareholders.
20. Making changes to the nature of the company's business.
21. Approving changes to the area in which the company works.
22. Altering the company's name or registered office.
23. Where required giving any further specific approval to a matter provided for within the approved business plan.
24. To Act on behalf of the Shareholder's Committee to monitor Performance of the Company
25. To take appropriate action and decisions as the Shareholder as directed by the Shareholders Committee
26. To take all other decisions as the Shareholder as provided for by legislation or the Company's governance documents.
27. To report back to the Shareholders Committee from time to time on formal decisions made

Appendix 2: Governance Diagram





**NORTH YORKSHIRE COUNTY
COUNCIL**

GUIDANCE

NOTE

FOR COUNCILLORS

AND OFFICERS

ON OUTSIDE

BODIES

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Appendix

Matters for you to check – questions to ask

GUIDANCE FOR COUNCILLORS AND OFFICERS ON OUTSIDE BODIES

1. General

- 1.1 Serving on outside bodies has always been an established part of a Council Member or officer's role. The County Council encourages Councillors and officers to participate in the wider community in this manner. They will be able to use their knowledge and skills to help the organisation to which they are appointed. It brings the benefit of enabling the County Council to participate in partner organisations, and also means that Councillors and officers can bring back knowledge and experience which are of value to the County Council.
- 1.2 The Council is now increasingly working in partnership with outside bodies, and clarity and understanding of the roles that Members and officers play is important. This note aims to help you understand the main implications. It is not a fully comprehensive guide, so if you have any queries, you can obtain further advice from Legal and Democratic Services.

2. What sort of roles does this apply to?

- 2.1 You may be appointed to an outside body by the Council, or by the Executive, or an Area Committee. It can involve being a director of a company in which the Council has an interest, being a member of another authority such as the National Park Authority, or a trustee of a charity, a member of the management board for an unincorporated body, or a school governor.
- 2.2 The various roles will bring responsibilities to the organisation, and to the Council in so far as you are fulfilling a role for the Council, and also potential conflicts.
- 2.3 Your responsibilities will depend on the type of body in which you become involved. The main types are as follows:
 - (a) **Companies:** Companies are separate legal entities. They are set up by their members, who may be either shareholders or guarantors. Liability of company members is limited to the value of their shares or by guarantee. Directors of companies have a duty to the company to act properly and in good faith. If not, they can incur personal liability, particularly if the company becomes insolvent. The activities and operation of companies are regulated by their Memorandum and Articles of Association, and also by company law.
 - (b) **Charities:** Some companies and unincorporated associations are also charities. To be a charity, they must be established for charitable purposes only and are subject to stricter regulation by the Charity Commission, to ensure that they are properly managed and that their resources are used properly on the relevant charitable objects. Charities may carry on trading activities which contribute directly to the

furtherance of their charitable objects or where the purpose is to raise funds for the charity which do not involve significant risk. Although charities may qualify for a number of tax exemptions and reliefs on income, gains and on profits for some activities, charities do pay tax on trading profits and on some charity income unless specifically exempt. Additionally VAT rules apply as they do for any other business if the charity has business activities however, the charity may qualify for certain VAT reliefs and exemptions.

- (c) **Unincorporated Associations:** Unincorporated associations are informal organisations. The members regulate their relationship by agreement, such as a membership agreement or the rules of the club or association. Because the association has no legal existence separate from its members, the liability of the members is not limited. Each member can incur personal responsibility for liabilities incurred on behalf of the association, and relies on the membership agreement to be able to recover his/her costs from the other members.

- (d) **Statutory Corporations:** These are bodies which are set up under statute. They include, for example Fire Authorities, universities, and some quangoes. The membership and powers of a statutory corporation, and how they are appointed are set out in the statute. The statute will also set out the responsibilities and liabilities of members of the corporation.

3. Some other key points to consider at the outset

- 3.1 Firstly, make sure you are given a clear statement of what is expected of you if you are going to be nominated. . A list of questions to ask about the organisation is attached at Appendix 1. The Council should be able to obtain this from the organisation involved

- 3.2 Being on an outside body can bring many benefits to the Council, the organisation and the community, but it will sometimes create conflicts with your work as a Councillor or officer. For Council Members, it may have to be included as one of your interests in the Members' Register of Interests and you may have a disclosable pecuniary interest in Council business referring to it. You will need to be sure that involvement with the organisation will not prevent you from fully participating in your work as a Councillor or officer, particularly in areas that interest you, or, where you need to represent the community who elected you. This will depend on the nature of the body and type of involvement.

- 3.3 On the other hand, you will also need to make sure that you are able to commit enough time and attention to the organisation. You will want to make a meaningful contribution to their work too. If you cannot attend meetings very often, or are often conflicted out of participating, you will not be able to give the support that the organisation needs, and this will reflect badly upon the Council and upon you. It is best not to be appointed if you cannot participate fully.

- 3.4 As a member of the organisation's management committee, as a director of a company, or as a trustee, you will not only be representing the interests of the Council, but you will also owe duties and responsibilities towards the organisation. You will have to exercise your own best judgement in the best interests of the outside body and you cannot just take instructions from the County Council although you may take account of the County Council's wishes.

4. Duties and Responsibilities of Councillors and Officers on Outside Bodies

- 4.1 The following is a summary of the main duties and responsibilities of Councillors and officers who are nominated by the Council to the most common types of outside body. The main principles of the obligations applying to company directors also apply to trustees and members of management committees. If you are in doubt about your duties and responsibilities, seek advice from the Assistant Chief Executive (Legal and Democratic Services), or the advisers to the body involved.

5. Companies

- 5.1 A company is a separate legal entity which can hold property in its own right, enter into contracts, employ staff and sue and be sued in its own name. The company is distinct from its members, who may be either shareholders or guarantors. The Council itself may be a member of the company, either a shareholder or guarantor.
- 5.2 If the body is a limited company, and you are asked to be involved, it is likely that you will be appointed as a company director. The duties of a company director are now set out in the Companies Act 2006. The management of a company is usually the responsibility of the Board of Directors. Directors' powers are usually set out in the company's Articles of Association. Another important document is the Memorandum of Association, which sets out the Company's objectives and powers.
- 5.3 The duties of a company director are not the same as your responsibilities as a Councillor or officer. Basically, the company must come first. Directors must act in the interests of the company, and not in the interests of other parties, including shareholders.
- 5.4 The Companies Act 2006 codifies the existing common law and equitable principles relating to the duties of directors. Most provisions of the 2006 Act took effect from October 2007. The provisions reflected in the paragraphs below marked with an asterisk will take effect at a later date. The principles however remain relevant to the responsibilities of a director.
- 5.5 **Directors' Responsibilities** are:
- (a) To **promote the success of the company**, which includes having regard to the likely long term consequences of decisions, the interests of employees, fostering relationships with suppliers and customers and others, the impact of operations on the community and environment, maintaining a reputation for high standards of business conduct, and acting fairly between members of the company.
 - (b) To **exercise care, diligence and skill**, using your own knowledge, skill and experience, together with the care, skill and diligence which may reasonably be expected of a person who is carrying out the functions of a director. So a director with significant experience must exercise the appropriate level of diligence in exercising their duties in line with their higher level of expertise.

- (c) **Not to exceed powers.** A company director must act in accordance with the company's constitution, and exercise powers for the purposes for which they were given.
- (d) **To comply with the Companies Acts** in relation to the keeping of accounts, and ensure that the relevant returns are made to the Registrar of Companies. Failure to do so incur fines and persistent default can lead to disqualification as a director.
- (e) **To avoid conflicts of interest***. A director must avoid a situation in which he or she has, or may have, a direct or indirect interest which conflicts, or could conflict, with the interests of the company. This duty applies particularly to transactions between a director and a third party in relation to the exploitation of any property, information or opportunity.
- (f) **To exercise independent judgement.** A director nominated by the Council cannot, for example, simply vote in accordance with the Council's instructions. To do so would be a breach of duty. The director must act in the company's interests.
- (g) **Not to accept benefits from third parties***. A company director must not accept any benefit from a third party (whether monetary or otherwise) which has been conferred because of the fact that he or she is a director. This is based on the established principle that a director must not make a secret profit as a result of being a director. This duty applies unless the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.
- (h) **To declare an interest in a proposed transaction or arrangement with the company***. A company director who has either a direct or an indirect interest in a proposed transaction or arrangement with the company must declare the 'nature and extent' of that interest to the other directors before the company enters into the transaction.

5.6 **Directors' Liabilities:** If a director fails to carry out his/her duties, action can be brought for breach of duty, either by the company itself, or by a liquidator if the company goes into liquidation, or with the consent of the court, by a shareholder. Such actions are unlikely where the company is properly controlled by the directors.

5.7 Some important considerations are:

- (a) It is not always easy to reconcile the various factors which must be taken into account when reaching a major decision. The important thing as a director is to show that you are aware of and have taken account of the relevant factors, and have exercised due care and diligence in giving them all fair consideration.
- (b) It may be difficult to be certain whether benefits may be regarded as giving rise to a conflict of interest. If you are unsure take advice from the company's advisers.
- (c) Make sure you are aware of the company's constitution, its Memorandum and Articles of Association, so that you know what it can

and cannot do. You must take this into account when making decisions, as well as any shareholder decisions that are relevant.

- (d) Be diligent, and make sure you are well informed about the company's affairs. Make sure you are well briefed when taking up the role, and that you receive regular briefings throughout your term of office.
- (e) Attend training and briefing sessions.
- (f) Ensure director and officer insurance is in place.
- (g) Some Board decisions may be reviewed on a future occasion. Make sure detailed minutes show that all necessary factors have been considered when major decisions are being taken. Obtain expert advice where necessary e.g. regarding impact of a decision on the environment. Take legal advice where there are doubts about a director's duty in relation to a particular matter.

5.8 See Paragraph 9 below which deals with indemnities for Members and officers who are appointed to companies and other outside bodies.

5.9 **Local Authority Controlled and Influenced Companies:** There are special rules that affect companies in which councils have major interests. These are 'regulated' companies for the purposes of the Local Government and Housing Act 1989. They are in effect controlled by (more than 50% interest) or subject to a council's influence (20% interest plus business relationship) because of its level of interest, either individually, or with a group of other authorities. They will generally be subject to the local government capital finance regime and special propriety controls. However, so far as Members and officers who are involved are concerned, there are some additional requirements that need to be complied with as follows:

- (a) Remuneration that Councillors receive from the company should not exceed that received from a local authority for a similar role, and it should be declared. Officers should not receive any fee or reward other than their Council salary, unless so agreed with the Council;
- (b) To provide information to Councillors about their activities as required by the local authority (unless it is confidential); and
- (c) To cease to be a director immediately if disqualified as a Councillor, or on the termination of an officer's employment by the Council.

6. Charities:

6.1 A charity is an organisation which operates for the public benefit and exclusively charitable purposes, either:

- the relief of poverty and human suffering
- the advancement of education
- the advancement of religion
- another purpose for the benefit of the community.

6.2 A number of useful publications are available on the Charity Commission's website at www.charitycommission.gov.uk. Publication CC£ - 'The Essential

Trustee- What you Need to Know' is a useful guide. Those who are responsible for the control and administration of a charity are referred to as its *trustees*, even where the organisation is a company limited by guarantee and even though they are not strictly trustees. A charity may also be unincorporated.

6.3 Trustees of a charity retain personal liability, and can only delegate to the extent that the constitution authorises them so to do.

6.4 **Charitable Trustees' Responsibilities** are:

- (a) To act in accordance with the charity's trust deed or governing document.
- (b) To protect the charity's assets.
- (c) To comply with the Charities Acts, and the Trustee Act 2000.
- (d) Trustees must not make a private profit from their position. They cannot receive remuneration without the sanction of the Charity Commission.
- (e) To perform their duty with the standard of care which an ordinary, prudent business person would show. Higher standards are required of professionals, and in relation to investment matters.
- (f) Charitable trustees must ensure that the information relating to the charity and trustees is registered with the Charity Commissioners and that annual accounts, reports and returns are completed and sent.
- (g) Trustees are under a duty to ensure compliance with all relevant legislation (e.g. in relation to tax and land matters).

6.5 **Charitable Trustees' Liabilities:** Generally, a trustee may incur personal liability if he/she:-

- acts outside the scope of the trust deed
- falls below the required standard of care
- acts otherwise than in the best interests of the charity, in a way which causes loss to the charity fund
- makes a personal profit from the trust assets

6.6 In such circumstances the trustee will be in breach of the trust, and will incur personal liability for losses incurred. If in doubt, always consult the Charity Commissioners. You may avoid personal liability for breach of trust if you act in accordance with their advice.

6.7 Trustees can incur personal liabilities for contracts they enter into in the name of the charity. They will normally be entitled to be reimbursed from charitable funds for liabilities and expenses properly incurred by them. If the charity is a company, the trustees will be protected from liabilities incurred in the day-to-day running of the charity in the normal course of events, but will be personally liable if they commit a breach of trust, as stated above.

6.8 See Paragraph 9 below which deals with indemnities for Members and officers who are appointed to charitable bodies and other outside bodies.

7. Unincorporated Associations

- 7.1 Groups which are not charitable trusts or companies are “unincorporated associations” and have no separate identity from their members. The rules governing the members’ duties and liability will be set out in a constitution, which is simply an agreement between the members as to how the organisation will operate. Usually the constitution will provide for a management committee to be responsible for the everyday running of the organisation. Management Committee members must act within the constitution, and must take reasonable care in exercising their powers. An unincorporated organisation may be charitable and may register as a charity.
- 7.2 If you are involved in a decision making capacity or have a position of general control or management on an unincorporated body, as the body has no separate corporate status, any liabilities will fall upon you personally. Councillors or officers appointed to such bodies should familiarise themselves with the Constitution to understand the nature of their role responsibilities and liabilities, and should assess the risk of personal liability, and the extent to which it has been covered by insurance.
- 7.3 See Paragraph 9 below which deals with indemnities for Members and officers who are appointed to unincorporated associations and other outside bodies.

8. Non Council Appointments

- 8.1 Councillors and officers may become members of or be appointed to voluntary organisations *in their private capacity*. If you are appointed to a body in these circumstances, you will need to make sure that there is no conflict of interest with your position as a Councillor or officer. Your role and responsibilities will be governed by the organisation’s constitution, or governing document, as it is with Council nominations. You will not however be entitled to any indemnity from the Council in relation to such an appointment.

9. Indemnities

- 9.1 Councillors and officers who participate in external bodies may be indemnified in relation to liabilities they incur in that capacity, though this is subject to certain limitations.
- 9.2 Indemnity by the outside body:
- (a) Directors: Directors cannot be indemnified by the company against liability for negligence, default, breach of duty and trust. Companies can however purchase insurance to protect directors against claims of negligence, default, breach of duty and trust. Those appointed as directors should ensure that appropriate insurance is in place. Companies can, if their Articles of Association allow, provide for directors to be indemnified for the costs of defending such a claim if they are granted relief by the court or acquitted.
 - (b) Trustees: Provided a charitable trustee acts properly, and within his/her powers, indemnity can be given from the trust fund. Trustees can take out insurance to protect themselves from personal liabilities, but not for

criminal acts such as fraud. If the premiums are to be paid out of the charitable funds, the consent of the Charity Commissioners will be needed.

- (c) **Unincorporated Associations:** Members may be entitled to an indemnity if they act in accordance with the Constitution of the association, and are not at fault. However, regard must be had to the terms of the constitution. The constitution will determine whether insurance can be paid for by the organisation.

9.3 **Indemnity by the Council:** The Council has decided to adopt a specific policy relating to indemnifying Councillors and officers. If you are appointed to an outside body you should have regard to the detail in the policy relating to those activities.

9.4 The Council can provide an indemnity where Councillors and officers are acting on an outside body at the request of the County Council, and provided:

- the appointment was made by the Council,
- the nomination was made by the Council,
- the appointment was specifically approved for the purpose of the indemnity.

9.5 The indemnity the Council can provide is subject to limitations. In general terms, if a Councillor or officer is acting properly, within their powers and in good faith, the power to indemnify will usually apply. However, the Council cannot, for example, provide an indemnity in relation to any action or failure by any Member or officer which constitutes a criminal offence, or for any action or failure by any Member or officer which is the result of fraud, or other deliberate wrongdoing or recklessness on the part of the Member or officer. When you are serving on an outside body, the Council's indemnity will only apply after any indemnity or insurance from the body itself. There are further limitations and it is advisable to be clear about the scope of the Council indemnity that may be available to you. You can seek further advice on indemnity from the Assistant Chief Executive (Legal and Democratic Services).

10. Code of Conduct – Councillors' Interests

10.1 **Code of Conduct:** All Councillors are subject to the Council's Code of Conduct for Members. You will find a copy of the full Code in the Constitution. The Code sets out the standards of behavior required of you whenever you are acting in your official capacity as a Councillor. When Councillors act as the Council's representative on any other sort of outside body, they must comply with the County Council's Code of Conduct unless it conflicts with the lawful obligations of the other body.

10.2 Councillors may have to include their appointment to outside bodies in their register of interests, and must advise the Monitoring Officer of any change to registered interests within 28 days. Councillors may have a disclosable pecuniary interest in any matter to be considered at a meeting arising out of such registered interests.

10.3 This means that if you are present at a meeting when a matter is to be considered or is being considered, in which you have a disclosable pecuniary

interest, you must declare that you have an interest (if the interest is not already registered in the Register of Members' Interests) not participate in the discussion or vote and leave the meeting room (subject to the granting of a dispensation by the Standards Committee or Monitoring Officer).

- 10.4 **Bias:** Where you might be inclined to the view that you have no disclosable pecuniary interest, your duties as a director, or trustee, or member of a management committee may well be regarded, on an objective appraisal, as giving rise to a legitimate fear of lack of impartiality, especially having regard to the desirability of maintaining public confidence. Participation in the decision making at a Council committee meeting by a Councillor who is biased potentially invalidates the decision.
- 10.5 Where membership of the outside body is on an advisory or consultative basis, bias will not be assumed from mere membership. However, once the outside body has a line which is being advocated by you, this could potentially be viewed as bias, and the Council's decision on the issue could be vulnerable to challenge if you participate in those circumstances. It will depend on the facts, and in such circumstances advice should be sought from the Assistant Chief Executive (Legal and Democratic Services).

11. Officers - Registration and Disclosure of Outside Interests

- 11.1 **Declaring Officer Interests:** Section 117(1) of the Local Government Act 1972 requires that, if it comes to the knowledge of an officer of a local authority, that the County Council has entered or proposes to enter into any contract in which s/he has a pecuniary interest, whether or not s/he would actually be a party to the contract, s/he must give notice in writing to the County Council. This is interpreted as any circumstance in which s/he or a member of his/her immediate family stand to gain or lose financially as a result of the contract.
- 11.2 **Registration of Interests:** Under the County Council's Code of Conduct for Officers, officers must declare to their Business Unit Head any outside interests which they have, both upon appointment and as those interests change. Officers at Grade Band 12 and above are also required to make a declaration of interests in a register kept by the Monitoring Officer. This information is not available to the public but is accessible by other officers who have a "need to know".

12. Gifts and Hospitality

- 12.1 Councillors and officers must not accept gifts or consideration as an inducement for doing or not doing something in their roles as Members or officers of the County Council. Where officers accept inducements from anyone who has or is seeking a contract with the Council, the gift or consideration is deemed to have been accepted corruptly unless the officer can prove to the contrary. It is therefore very important to be completely open about any significant gift or hospitality, to avoid the suspicion of misconduct.
- 12.2 Members are required to register any gift or hospitality received by/offered to them because of their office with a value of £25 or more. This Register of Members' Gifts and Hospitality is held and maintained by the Monitoring Officer. Every Business Unit holds a similar register of Gifts and Hospitality for Officers, and the Monitoring Officer maintains a central Register of Officers' Gifts and Hospitality.

- 12.3 A particular issue arises for officers seconded to work on behalf of outside bodies, as Section 117(2) of the Local Government Act 1972 provides that an officer shall not, under colour of his office or employment, accept any fee or reward whatsoever other than his/her proper remuneration. It is therefore essential that, where an officer is to be seconded and might be in receipt of any payment from the authority to which s/he is to be seconded, that the Council agree that his/her proper remuneration shall include any payment to the officer by the body to which s/he is seconded.
- 12.4 A revised legal framework to deal with bribery was introduced in The Bribery Act 2010 which introduced new bribery offences, the main offences relating to bribing another person, being bribed, bribing a foreign official and the failure of commercial organisations to prevent bribery.

Matters for you to check – questions to ask

If you are appointed to an outside body, you should be clear about the answers to the following questions. The organisation should be able to respond to these questions:

1. What is the nature of the organisation and its main activities? Is it a company, and if so is it limited by shares or by guarantee? Is it unincorporated? Does it have charitable status?
2. In what capacity do I serve on the outside body? Is the effect of my appointment to make me a member of the company, a director or a charitable trustee?
3. Do I have a copy of the body's governing instrument (this may be a trust deed, a constitution, or memorandum and articles of association)?
4. Does the organisation have a Code of Conduct that I need to comply with? Have I been supplied with a copy?
5. Am I aware of the identity of the other directors, trustees and committee members?
6. Is there an officer of the organisation, such as the secretary or clerk to whom I can refer for advice and information?
7. Are written minutes kept of the meetings, and have I seen the minutes?
8. Are meetings conducted in accordance with the governing instrument?
9. Am I aware of the financial position of the organisation to which I have been appointed? Is it regularly reported to the governing body?
10. Am I aware of any contract between the organisation and the Council?
11. Have I seen the last annual report and accounts?
12. Have I been advised of the main risks the body faces and what steps are taken to deal with such risks?
13. Have I been informed of the main insurances/indemnities held by the organisation?