

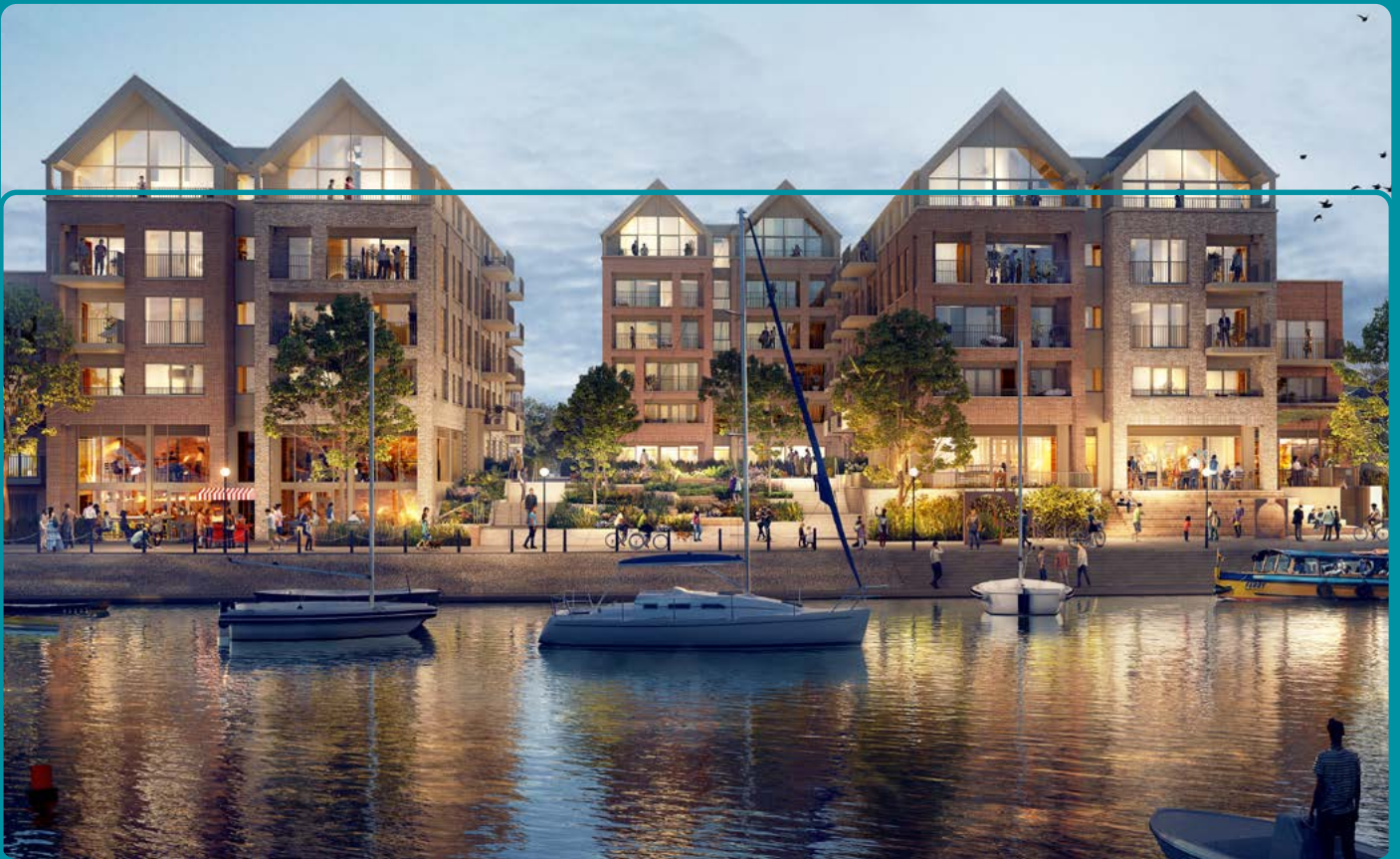
Company Handbook



Guidance for council-appointed directors

Directors' duties

An overview of directors' duties and how they apply to the council appointed directors of each company



Introduction

1. The council appoints the Chair and Non-Executive Directors (NEDs) of each of its wholly owned companies. It is expected that each Board will ensure that adequate training is provided to those directors, on an ongoing basis.
2. The council will typically appoint at least one Councillor (or sometimes a council officer), as a director of each company to ensure democratic accountability. The council wishes to provide some additional support and guidance to those directors in respect of their directors' duties, as it recognises that this may be their first board appointment.
3. The purpose of this Guidance Note is to help Councillor or officer directors appointed to the Boards of council companies understand their directors' duties and to be able to identify where to go to seek more detailed advice.

Overview of responsibilities of company directors

4. Directors are subject to a large number of duties and obligations as set out in the articles of association of the company, statute, common law and at equity (based on principles and case law decided by the courts over time).
5. In the context of the council companies, directors' duties (and the potential liabilities imposed on directors of companies) fall into the following three broad categories:
 - a) general duties under the Companies Act 2006;
 - b) duties under other legislation; and
 - c) insolvency legislation.
6. The general duties and duties under other legislation are covered below. Separate information can be provided in respect of insolvency as required.

General duties under the Companies Act 2006

7. The general duties are owed by the director to the company.
8. The relevant duties are explained below and are set out in sections 171-177 of the Companies Act 2006:
 - a) **To act within the powers of the company** – directors must ensure that the company is operating within its objects, its constitution (which includes its articles of association) and within its general legal powers. Directors should ensure they are familiar with the company's constitutional documents;
 - b) **To promote the success of the company** – a director must act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. What "success" means will be guided by any objects of the company. In the context of the wholly owned council companies, it is important to recognise that the 'member' (i.e. shareholder) is the council and so, ultimately, directors should take decisions that promote the company's success for the benefit of the council. There are certain exceptions to this duty in an insolvency situation (see below);
 - c) **To exercise independent judgment** – directors can seek advice, but they must exercise their own judgment in deciding whether or not to follow that advice. They

can also delegate their powers to others providing this is authorised by the company's constitution;

- d) **To exercise reasonable care, skill and diligence** – a director must exercise the general knowledge, care, skill and experience that can reasonably be expected of a person carrying out the functions of that director in the company and the specialist knowledge, skill and experience that the particular director actually has. So there are two parts to this test – an objective part (relating to the skills expected of any director in that role) and a subjective part (relating to the skills of the director in question);
 - e) **To avoid conflicts of interest** – a director must avoid situations in which they have or could have a direct or indirect interest that conflicts with the company's interests (for example a director should avoid a situation where they sit on the board of two companies that are competing for business unless this situation is known to both parties and authorised). Unless a "situational" conflict is authorised, a director cannot act. For more information on conflicts of interest, please refer to the Guidance Note: Conflicts of Interest;
 - f) **To not accept benefits from third parties** - a director must not accept any benefit from a third party which is conferred because they are a director or they have done anything or not done anything as a director; and
 - g) **To declare interests in proposed transactions with the company** – a director must declare to the other directors any interest they have in a proposed transaction or arrangement that involves the company before the company enters into the transaction or arrangement. This could be the case, for example, where a director is also a Councillor and the company is entering into a transaction with the council, unless the company's articles permit this. For more information on conflicts of interest, please refer to the Guidance Note: Conflicts of Interest.
9. Only the company will be able to enforce the general duties and, in certain circumstances, a shareholder (i.e. the council), may be able to bring a derivative action on the company's behalf. This should mean that the risk of a director being pursued for a breach of general duties in the context of the council's companies is minimised. In addition, if a breach of directors' duties is identified, the shareholder (i.e. the council) has the ability to ratify such act, further minimising the risk to directors.
10. "Director" is defined in the Companies Act 2006 to include any person occupying the position of director, by whatever name called. The Companies Act makes no distinction between executive and non-executive directors. Whether the general duties will apply to a person who is not formally appointed as a director will depend on their functions and the way in which they act.
11. As a general principle, a director is (and remains) liable for their acts and omissions carried out whilst they are a director and so they can be found liable for such acts and omissions even if they are no longer acting as a director.

Duties imposed by other legislation

12. As well as the general duties under the Companies Act 2006, there is a range of legislation and general law which imposes further duties on directors, including:

- a) **Companies Act 2006** - The Companies Act contains multiple provisions which govern the way in which directors manage the company including proper record keeping, the filing of accounts, maintenance of capital, etc.
- b) **Company Directors' Disqualification Act 1986** - An application can be made to the court to disqualify a person from acting as a director under the Company Directors' Disqualification Act 1986 where (1) the director is found guilty of failing to comply with legislation in relation to the filing of documents three or more times during the preceding five years; (2) the director was a director of a company that has become insolvent and their conduct makes them unfit to be concerned in the management of a company; and (3) the director is found guilty of wrongful or fraudulent trading. If successful, courts can disqualify directors from being concerned or taking part in the promotion, formation or management of a company for up to fifteen years.
- c) **Health and Safety at Work etc. Act 1974** - Directors can be held criminally responsible for a health and safety offence where the company is found guilty of an offence and the offence was committed with the consent or connivance or was attributable to any neglect on the part of the director.
- d) **Corporate Manslaughter and Corporate Homicide Act 2007** - Companies can be prosecuted under the 2007 Act if failings by a company's senior management causes (1) a person's death and (2) a duty of care to that person to be grossly breached. Companies can receive unlimited fines for such prosecutions as well as orders demanding compensation, payment of costs, payment towards victims, orders to publicise the conviction and orders to take steps to remedy the management failure.
- e) **Duty of confidentiality** - as well as legislation, there are also duties contained within common law and equity. Directors have a duty of confidentiality to the company. The duty of confidentiality can be particularly difficult to comply with where directors are sitting on multiple boards.

Duties under insolvency legislation

13. If there is a risk of insolvency in respect of a company, directors should be aware that they no longer owe their duties primarily to the company, but rather to the company's creditors. Directors, and the Board as a whole, should seek legal advice if this situation occurs or is anticipated to occur.

Further information

14. If you would like more detail on any aspects of this Guidance Note, or would like some advice in respect of a specific concern, please contact the Shareholder Liaison Service ShareholderLiaison@bristol.gov.uk who will be able to coordinate legal advice on your behalf.

Table 1: Version Control Table

Version	Summary of Edits	Editor	Date of Version
V 1	First version for publishing	Shareholder Liaison Service	November 2021
V 2	Second version for publishing	Shareholder Liaison Service	October 2023
	Review of second version (no changes made)		15 April 2024