



<b>Signed off by</b>	Strategic Head of Legal and Governance
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<b>To</b>	Partner, Shareholder and Trustee Executive Sub-Committee
<b>Date</b>	Thursday, 1 February 2024
<b>Executive Member</b>	Portfolio Holder for Commercial and Community Assets

<b>Key Decision Required</b>	N
<b>Wards Affected</b>	(All Wards);

<b>Subject</b>	Insurance/indemnity for Council Company Member and Officer Directors/Board representatives
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<b>Recommendations</b>
<p><b>That the Partner, Shareholder &amp; Trustee Sub-Committee:</b></p> <ul style="list-style-type: none"> <li><b>(i) Note the report to this Sub-Committee on 23 March 2023 (Insurance / Indemnity for Council Company Member and Officer Directors / Board Representatives) at Annex 1;</b></li> <li><b>(ii) Approves the clarification of the indemnity and insurances available to Council Company Member and Officer Directors / Board Representatives, contained within this report.</b></li> </ul>
<b>Reasons for Recommendations</b>
To provide further assurances and detail as to what risks are covered by the Council's indemnity and insurances in relation to the duties of Council appointed Directors and Board Representatives.
<b>Executive Summary</b>
It is widely accepted as best commercial practice for the Directors of companies (and

Member Representatives in Limited Liability Partnerships) to be protected by indemnities and/or Directors Insurance policies.

It is important for the Partner, Shareholder & Trustee Sub-Committee to note that, in providing cover, the Council is fulfilling a duty of care to those it asks to take on these responsibilities on its behalf.

**This Committee has authority to approve the above recommendations**

### **Statutory Powers**

1. Local authority power to grant indemnities to members or officers who serve as directors of a local authority-controlled company is provided for under the Local Authorities (Indemnities for Members and Officers) Order 2004 (SI No.2004/3082).
2. The Companies Act 2006 allows a company to take out insurance to cover any liability relating to negligence, default, breach of duty or breach of trust by the director or officer in relation to the company by which they are employed.

### **Background**

3. The Council have conducted a review in conjunction with its insurer to ensure that the most appropriate and best value cover is sourced whilst also ensuring Directors are afforded appropriate indemnities by the Council.

### **Key Information**

4. The companies referred to in this report are:
  - Greensand Holdings Ltd – wholly owned by RBBC with two Directors – Cllr R Michalowski and Derek Beck (external/independent);
  - Horley Business Park Developments LLP – a partnership with 2 private sector partners;
  - Pathway For Care Ltd – a joint venture with RBBC investment with one Council-appointed Director – Cllr V Lewanski;
  - RBBC Limited – wholly owned by RBBC with two Directors – M Roberts-Wood and L Mould.
5. This report is required to provide further assurances and clarification as to the risks covered by Council's indemnity and insurances in relation to the duties of Council appointed Directors/Board Representatives.
6. The Council confirms that the Council's indemnity and/or insurance would cover the following costs and liabilities relating to the duties of council appointed Directors/Board Representatives:
  - All costs (including legal costs).
  - All liabilities (including HMRC and those attributed to a Director/Board Representative personally)

- All alleged wrongful acts including (but not limited to), breach of trust, breach of duty, neglect, error, misleading statements, and wrongful trading.

## Options

7. The Sub-Committee has two Options:

**OPTION 1:** The members of PSTSC can approve the clarification of the indemnity and insurances available to Council Company Member and Officer Directors/Board Representatives.

This is the recommended option as it will provide protection to the Council appointed Directors/Board of Representatives.

**OPTION 2:** The members of PSTSC could not approve the clarification of the Council approved indemnity.

This is not the recommended option as it would expose the Directors to an unnecessary risk of personal liability.

## Legal Implications

8. Section 112 of the Local Government Act 1972 enables the Council to appoint staff, and such officers "shall hold office on such reasonable terms and conditions, including conditions as to remuneration, as the authority appointing him think fit". Therefore, an implicit power to indemnify or insure them as part of their terms and conditions of employment.
9. Prior to the enactment of the Local Government Act 2000, the powers of local authorities to indemnify Members and officers in respect of claims brought against them personally were severely limited mainly because of the case of *Burgoigne -v- London Borough of Waltham Forest*. In this case, the High Court indicated that local authorities could not indemnify Members and officers against personal liability for acts committed outside the powers of the local authorities in question.
10. Section 101 of the Local Government Act 2000 changed that position by conferring power on the Secretary of State to make an Order to provide authorities with the ability to indemnify their members and officers in respect of personal liabilities incurred in connection with their service on behalf of their authority.
11. The Order; Article 5 is the key provision in the Order. It states that an indemnity may be provided in relation to any action, or failure to act, which is:
  - (a) authorised by the authority or
  - (b) forms part of, or arises from, any powers conferred, or duties placed, upon a member or officer, as a consequence of any function being exercised by that member or officer
    - (i) at the request of, or with the approval of the authority or
    - (ii) for the purposes of the authority.

12. Article 5 also makes clear that an indemnity may be given whether or not, when exercising the function in question, the member or officer does so in his capacity as a member or officer of the authority. Therefore, an indemnity can apply to powers or duties being exercised by Members or officers when carrying out functions pertaining to outside bodies not connected with the Council, as long as the functions in question are being exercised at the request of, or with the approval of, the authority or for the purposes of the authority.
13. When a member or officer is acting in a fiduciary capacity as a member of an outside body, it is unlikely that his or her actions could be said to be undertaken at the “request” of, or for the “purposes” of the Council. However, the very fact that the member or officer will have been nominated to the outside body by the Council will mean that the action or failure to act will have been done whilst exercising powers or duties as a consequence of performing a function with the approval of the Council and so can be indemnified by the Council.
14. Article 6 of the Order prevents the provision of an indemnity (or securing of insurance) in relation to criminal acts, any other intentional wrongdoing, fraud, recklessness, or in relation to the bringing (but not the defence of) any action in defamation. An indemnity may, however, be provided in relation to the defence of criminal proceedings.
15. Article 7 makes clear that an indemnity can be given in relation to actions which are beyond the powers of an authority, provided that the member or officer in question believes that the action, or failure to act, is within the powers of the authority.
16. Article 8 conditions that any potential indemnity given against the costs of defending any criminal proceedings must contain provisions for the re-payment of sums expended by the authority or the insurer if the Member or officer has been convicted of a criminal offence and that conviction is not overturned following any appeal. It is anticipated that the decision as to whether it is appropriate to pay any sums upfront for the defence of criminal proceedings and recover the sums in the event of a conviction, or await the conclusion of such proceedings before making any payment will be on a case-by-case basis.

### **Financial Implications**

17. The Chief Finance Officer has assessed the risk implications of granting this indemnity and is satisfied that it is appropriate for the Council to take this course of action.
18. The payment of annual insurance premiums (c£1,000 per policy, per annum) will be incurred as a revenue expense to the Council and can be accommodated within approved budgets.

### **Equalities Implications**

19. There are no direct equalities implications arising from the recommendations of this report.

### **Communication Implications**

20. There are no direct communities implications arising from the recommendations of this report.

### **Environmental Sustainability Implications**

21. There are no direct environmental sustainability implications arising from the recommendations of this report.

### **Risk Management Considerations**

22. There are no direct risk management implications arising from the recommendations of this report.

### **Procurement/Contract Management and Subsidy Considerations**

23. There are no direct procurement/contract management implications arising from the recommendations of this report.

### **Consultation**

24. The Council has consulted with its insurer and the relevant Council appointed Directors/Member Representatives.

### **Policy Framework**

25. The recommendations of this report are consistent with the Council's Policy Framework.

26. All actions undertaken by the Council in respect of commercial activity (including company activity) will be undertaken for the purpose of contributing to the achievement of the 'Funding our Services' objective within the Council's Corporate Plan and supporting policy framework.

### **Background Papers**

27. Partner Shareholder Trustee Committee Report dated 23rd March 2023, Item 6 [Agenda for Partner, Shareholder and Trustee Executive Sub-Committee on Thursday, 23rd March, 2023, 6.30 pm | Reigate and Banstead Borough Council \(moderngov.co.uk\)](#)