


Agenda Item No:	7	
Committee:	Investment Board	
Date:	11th July 2022	
Report Title:	Indemnity Agreement for Fenland Future Ltd	

Cover sheet:

1 Purpose / Summary

- 1.1 For the Investment Board to consider the provision of an indemnity agreement to members and officers of FDC who are (or will be in the future) directors of Fenland Future Limited (FFL). The indemnity agreement provides arrangements for indemnifying those members and officers against claims made against them personally in their capacity as directors of FFL. [as per cabinet's instructions at their meeting on 9th June 2020 and as recommended by the Investment Board].

2 Key Issues

- 2.1 The attached draft document has a strong correlation with existing cover.
- 2.2 FDC insurers believe that their wording in the policy extension already in place is "more simplified" and this is reproduced in the report for clarification purposes.
- 2.3 FFL Board noted this agreement at their Board meeting on 27th May 2022.

3 Recommendations

- 3.1 The Investment Board is asked to approve the form of indemnity agreement attached to this report.

Wards Affected	All
Forward Reference	Plan N/A
Portfolio Holder(s)	Cllr C. Boden Cllr I Benney Cllr S Tierney
Report Originator(s)	Peter Catchpole, Corporate Director and CFO Amy Brown, Head of Governance and Legal
Contact Officer(s)	Peter Catchpole, Corporate Director and CFO Amy Brown, Head of Governance and Legal
Background Papers	Indemnity Agreement as attached.

Report:

1 BACKGROUND AND INTENDED OUTCOMES

- 1.1 FFL was incorporated in June 2020 following agreement by Full Council in January 2020 of the Commercial and Investment Strategy.
- 1.2 At the same meeting of Full Council it was noted the intention to utilise up to £25m to deliver the objectives of the strategy.
- 1.3 An initial Business Plan was prepared in-line with the articles of association by 31st January 2021 and has been subject to continued development resulting in the revised Business Plan as presented at today's meeting.
- 1.4 Since adoption two FDC owned sites have been identified for FFL to focus on and bring forward proposals for development.
- 1.5 Consultant teams have been procured in-line with FDC procurement rules and a series of technical reports have been commissioned to support outline planning applications for these sites.
- 1.6 Approving the indemnity agreement provides a level of protection to the FFL Directors in making their decisions, whilst recognising that it does not cover all circumstances e.g. deliberate wrongdoing or recklessness.

2 REASONS FOR RECOMMENDATIONS

- 2.1 Approving the FFL Indemnity agreement will ensure that members and officers are indemnified when they are performing duties on behalf of FDC, subject to certain exceptions, including those required by law.

3 CONSULTATION

- 3.1 The Indemnity Agreement has been agreed by the FFL Board following legal input from their advisors.
- 3.2 The indemnity agreement has been reviewed by the Council's insurers who believe that their wording in the policy extension already in place is "more simplified". It covers the FFL directors and the indemnity agreement requires, in any event, that the Council secures professional indemnity insurance cover.

Below is the wording from the Policy extension we currently have in place (italics)

Negligent Acts and Omissions - Indemnity to Other Persons

At Your request We will indemnify Financial Loss which Your director, member or Employee may become legally liable to pay together with Costs and Expenses in respect of any claim

against them directly arising from their actual or alleged negligent and accidental act or omission committed within the Territorial Limits in the normal execution of their duties as part of the provision of Services by the Business

Provided always that:

a) the claim is both first made against that director, member or Employee and notified to Us during the Period of Insurance;

b) You would have been entitled to indemnity under the 'Cover: Negligent Acts and Omissions' Clause of this Section had the claim been made against You, but this proviso will not apply to liability attaching to any Employee in their personal capacity which arises out of the performance by that Employee of a statutory function under the terms of a written agreement with You, under the terms of which You have agreed to provide the Employee with an indemnity

c) No indemnity will be provided to any person in respect of the consequences of their own fraud, dishonesty or criminal act

d) Any person claiming indemnity:

i. is not entitled to indemnity from any other source

ii. was at the time of the incident giving rise to the claim acting within the scope of their authority

*iii. will be subject to the terms and conditions of this Policy in so far as they can apply
e) agrees to Us having the sole conduct and control of any claim and/or settlement.*

4 ALTERNATIVE OPTIONS CONSIDERED

- 4.1 Not to indemnify officers and members, which leaves them at risk of personally being responsible for awards of damages/compensation and payment of costs as a consequence of their carrying out their duties on behalf of FDC. While FDC does have insurance, as detailed above, there is no guarantee (as far as the FFL directors are concerned) that FDC will seek to call on the insurance policy or that the insurers will always make payment. It is in FDC's interests to ensure that potential FFL directors are not deterred from acting out of concern for their own personal liability.

5 IMPLICATIONS

5.1 Legal Implications

5.1.1 FDC Legal have drafted the agreement.

5.1.2 There are various specific powers to provide indemnities and insurance to local authority officers and directors. Section 101 of the Local Government Act 2000 gave the Secretary of State the power 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. The Order made is the Local Authorities (Indemnities for Members and Officers) Order 2004.

- 5.1.3 Article 5 provides 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.
- 5.1.4 Article 5 also states 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. An indemnity can therefore apply to powers or duties being exercised by members or officers when carrying out functions relating 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 Council or for the purposes of the Council. This will apply to appointments as directors.
- 5.1.5 Article 4 of the Order provides that Council can take out insurance instead of giving an indemnity (and the Council is – in essence – doing this as well, order to mitigate its risk).
- 5.1.6 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.
- 5.1.7 Article 7 of the Order says 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.
- 5.1.8 Article 8 says 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.
- 5.1.9 The indemnity agreement has been drafted to reflect the limitations set out in the Order. This means that the indemnity agreement will not cover third party claims in all circumstances. An indemnity is required to exclude specifically deliberate or reckless breaches of trust or any deliberate wrongdoing or recklessness or members or officers serving on outside bodies in their private capacities. It is usual to cover the costs in defending members and officers against criminal and civil proceedings arising from activities carried out on

behalf of the Council (and the indemnity agreement provides for this), but this is qualified so as only to apply where the member or officer has acted honestly and in good faith and not from his/her deliberate or reckless wrongdoing.

5.1.10 The Council is not required to provide an indemnity agreement of this nature but local authorities frequently do so in similar circumstances, for the reasons set out above.

5.2 Financial Implications

5.2.1 If a member or officer claims on the indemnity then there will be a financial implication. The financial implications have been fully included in the Council's budget and it is expected that claims will be uncommon. In addition (and as noted above) the Council is largely insured against such claims and so its risk have been appropriately mitigated.

5.3 Equality Implications

N/A

5.4 Any Other Relevant Implications

5.4.1 There are none.

6 SCHEDULES

6.1 Schedule 1 - Draft Indemnity agreement

Deed of Indemnity

relating to the appointment of [] as a director of Fenland Future Limited

This Deed is dated 2022

Parties

- (1) Fenland District Council of Fenland Hall, County Road, March, Cambridgeshire PE15 8NQ (the **Council**); and
- (2) [] of [] (the **Director**).

Background

- A The Council is the sole shareholder of Fenland Future Limited (the **Company**). The Council has established the Company as a trading vehicle.
- B On [date] the Council nominated the Director as a representative of the Council on the Board of Directors of the Company.
- C Under the Local Authorities (Indemnities for Members and Officers) Order 2004 the Council has the power to indemnify its members and officers and insure them where they carry on functions when acting as the Council's representatives at the Council's request.
- D The Council is exercising that power when entering into this Deed of Indemnity with the Director.

It is agreed as follows:

1 Definitions and Interpretation

1.1 In this Deed, unless the context otherwise requires, the following definitions apply:

Act means the Local Authorities (Indemnities for Members and Officers) Order 2004;

Relevant Liability means a liability falling within clause 2.1.

1.2 In this Deed (except where the context otherwise requires):

1.2.1 words in the singular include the plural and vice versa;

1.2.2 references to clauses are the clauses of this Deed;

1.2.3 the clause headings are included for ease of reference only and shall not affect the interpretation of this Deed; and

1.2.4 a reference to a statute or statutory provision includes a reference to such a statute or statutory provision as from time to time amended, re-enacted or replaced (whether before or after the date of this Deed).

2 Indemnity

2.1 Subject to the Act and the provisions of this Deed, the Council shall indemnify and keep indemnified the Director against all liabilities (other than the liability set out in clause 2.2) attaching to **him** in connection with any negligence, default, breach of duty or breach of trust by **him** as a result of **his** acts and/or omissions relating to **his** role as the Council's representative on the Board of Directors of the Company.

2.2 Clause 2.1 shall not apply to any liability directly or indirectly incurred by the Director as a result of any action by or failure to act by **him**:

2.2.1 which constitutes a criminal offence; or

2.2.2 is the result of failure to act in good faith, fraud, dishonesty, or other deliberate wrong-doing or recklessness on **his** part; or

2.2.3 in the case of proceedings under Part 3 of the Local Government Act 2000, and Part 1 of the Localism Act 2011, if the Director admits that **he** has failed to comply with the Code of Conduct, or if there is a finding in those proceedings that that the Director has failed to comply with the Code of Conduct, and that finding is not overturned following any appeal.

2.3 Notwithstanding clause 2.2, and subject to clause 2.4 and clause 3, the Council shall provide an indemnity in relation to the defence of any criminal proceedings brought against the Director and any civil liability arising as a consequence of any action or failure to act which also constitutes a criminal offence provided that the Director believed that the action, or failure to act, in question was within the powers of the Company and it was reasonable for **him** to hold that belief at the time when **he** acted or failed to act.

2.4 Any indemnity payment by the Council to the Director is conditional upon:

2.4.1 the Director's compliance with clause 4; and

2.4.2 the Director promptly notifying the Council in writing to the [Monitoring Officer] that an indemnity payment is required, supported by the production of documentation which is, in the reasonable opinion of the Council, satisfactory evidence that the Relevant Liability has been incurred by the Director on the date that that the Director states it was incurred.

2.5 The obligation of the Council to indemnify the Director pursuant to clause 2.1 shall (subject to clauses 2.2, 2.4 and 4) remain in full force and effect in respect of any Relevant Liability arising from the acts or omissions of the Director at any time during **his** period of office as the Council's representative on the Board of Directors of the Company including, without limitation, any Relevant Liability arising from the Director's acts or omissions during such period but incurred after **he** ceases to hold the office set out above.

2.6 The Council shall not be required to indemnify the Director where it would be unlawful for the Council to do so.

3 Insurance

The Council shall secure in relation to this indemnity professional indemnity insurance cover for the Director which will include arranging for and paying for that insurance.

4 Conduct of Claims and Recovery

4.1 If the Director becomes aware of any circumstances which may lead to the Council being liable to make a payment or advance funds under this Deed, the Director shall:

4.1.1 as soon as practicable (but in any event within 3 days of becoming aware), give written notice to the Council's [Monitoring Officer] of such circumstances;

4.1.2 promptly keep the Council informed of any developments in relation to such circumstances and that the Council and/or their insurers have full conduct of any claims or potential claims;

4.1.3 promptly provide the Council with such information and copies of such documents as the Council may reasonably request;

4.1.4 consult the Company regarding the conduct of any claim arising in connection with such circumstances; and

4.1.5 make no admission of liability, agreement or compromise with any person in relation to any such circumstances without the prior written consent of the Council.

4.2 If the Council makes any payment under this Deed, the Council shall be subrogated to the extent of such payment to all of the Director's rights of recovery against third parties (including any claim under any applicable directors' and officers' insurance policy) in respect of the payment and the Director shall do everything that may be necessary to secure any rights including:

4.2.1 executing any documents necessary or desirable to enable the Company effectively to bring an action in the name of the Director, and

4.2.2 provide any assistance required by the Council as a witness.

4.3 If the Council makes any payment to or for the benefit of the Director under to this Deed and the Director subsequently recovers or becomes entitled to recover from a third party any amount which is referable to any part of the liability for which payment was made by the Council, the Director shall immediately repay or procure the repayment to the Council of such amount paid by the Council as does not exceed the amount recovered (or is entitled to be recovered) by the Director, less any reasonable costs and expenses incurred by the Director in making any such recovery which are not themselves recoverable from any third party.

4.4 The Director shall not be entitled to recover more than once pursuant to this Deed in respect of any matter giving rise to a Relevant Liability.

5 General

5.1 A party to this Deed may not (whether at law or in equity) assign, transfer, grant any security interest over, hold on trust or deal in any other manner with the benefit of

witness signature

name

address

occupation