

**QUEENSTOWN LAKES DISTRICT COUNCIL PROPOSED DISTRICT PLAN: PRIORITY AREA LANDSCAPE
SCHEDULES**

MINUTE OF COMMISSIONERS

30 August 2023

1. The Queenstown Lakes District Council (Council) has appointed a Hearing Panel, which comprises Commissioners Jane Taylor, Peter Kensington and Quentin Smith (the Commission), to hear all submissions and, after it has heard the submissions, to make recommendations on the Variation to the Proposed District Plan: Priority Area Landscape Schedules as to whether to accept or reject the submissions received and any amendments to the provisions of the Schedules.
2. The Council is then required to decide whether to accept or reject the Hearing Panel's recommendations.

Memorandum on behalf of Dr John Cossens dated 7th August 2023

3. A Memorandum on behalf of Dr John Cossens dated 7th August 2023 (the Memorandum) has been received by the Hearing Panel. The Memorandum challenges the appointment of Councillor and Deputy Mayor Smith ("Councillor Smith") to the Hearing Panel on the grounds of alleged "potential bias and conflict of interest". The grounds giving rise to the allegations of potential bias and conflict of interest, set out in paragraphs 4 to 11 of the Memorandum, relate to Councillor Smith's involvement as a member of the Queenstown Lakes District Council Planning and Strategy Committee and, in particular, his participation and voting record in relation to various motions concerning the process surrounding the landscape variation schedules.
4. At paragraph 27, the Memorandum seeks that Councillor Smith recuse himself from the role of commissioner, or alternatively that the Chair of the Hearing Panel, having considered the alleged facts as set out in the Memorandum, asks Councillor Smith to resign from his role.

Discussion

5. The Hearing Panel has carefully considered the allegations raised in the Memorandum by adopting the following approach:
 - (a) Consideration of the applicable legal principles and rules that apply to issues of bias or conflict of interest;
 - (b) The application of the principles to the alleged facts, as informed by our understanding following discussions with Councillor Smith and Council officers; and
 - (c) Any other relevant matters that have come to our attention as a result of our internal investigations.
6. The rules and expectations in relation to potential bias and conflict of interest, which includes predetermination, are governed by legislation, the common law, and general standards and expectations as applicable.

Legislative Framework

7. The Local Authorities (Members' Interests) Act 1968 ("the Act") applies to elected councillors and regulates *financial* interests. The Act essentially codifies the common law position that a councillor with

a financial interest is presumed to be biased as a result of that interest. Councillors are prohibited from discussing or voting on any matter in which they have a financial interest unless that interest is “in common with the public”. Whether an interest can be said to be “in common with the public” will depend on the nature of the interest; the size of the group affected and whether the group is large enough to comprise “the public”; and whether the interests of the councillor and the public are affected in a similar way. A councillor may apply to the Auditor General for an exemption from the financial interest rule, or alternatively a declaration that the rule does not apply in a specific circumstance.¹

8. It is also relevant that in the Resource Management Act 1991 context, the prohibition contained in the Act in relation to financial interests does not apply to the approval or review of a district plan; however, it does apply to a plan change or variation, and to the consideration of a resource consent application.²
9. As there have been no allegations, or indeed evidence, that Councillor Smith has any *financial interest* in the landscape variation schedules, or *any interest that is any greater than that of the public*, the provisions of the Act do not, prima facie, apply in this situation.

Applicable Principles of Common Law and General Standards and Expectations

10. The common law requires that all public decision making must be procedurally fair, including being free from the taint of bias and predetermination. Known as “the rule against bias”, the common law rule has two main objectives: first, to ensure that the best decision is made based on relevant information and arguments, not ulterior motives or prejudices; and secondly, to ensure that people affected by, or interested in, a decision have trust and confidence in the process.³
11. The rule against bias operates both to avoid actual bias and the *perception* of bias. The overriding principle is that justice should not only be done but should be seen to be done.⁴
12. The courts generally approach questions of bias by asking the following:⁵

“Would a fair-minded observer reasonably think that the decision-maker or member of the decision-making body might not bring an impartial mind to the decision, in the sense that they might unfairly treat someone’s case with favour or disfavour?”
13. We note that the Auditor-General has proposed a very similar test for determining whether a common law (or non-financial) interest exists:⁶ *“The test for whether a non-financial conflict of interest exists is whether an objective observer who knows the relevant facts would perceive the person to be biased because of that interest”*.
14. In addition to the common law tests set out above, there is a general expectation that public business should be conducted in the spirit of integrity, impartiality, accountability, trustworthiness, respect, and responsiveness. All decisions about conflicts of interest must be guided by ethical principles.
15. There is no single source of rules or expectations specifying what constitutes ethical behaviour for all situations or all public organisations. However, in this particular situation the Council's code of conduct or relevant internal policies and procedures are likely to be relevant, together with general guidance or

¹ Managing Conflicts of Interest in Regional Councils 2020: [Part 5: Managing conflicts of interest in regional councils — Office of the Auditor-General New Zealand \(oag.parliament.nz\)](https://www.oag.parliament.nz/publications/2020/05/Managing-conflicts-of-interest-in-regional-councils)

² *Making Good Decisions: A resource for RMA Decision-makers (5th ed)*, Ministry for the Environment, at page 26.

³ *“Managing conflicts of interest: A guide for the public sector”*, Office of the Auditor General, June 2020 at 6.8 – 6.9.

⁴ *Ibid* at 6.10.

⁵ *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35; [2010] 1 NZLR 76.

⁶ *Ibid*, footnote 1, at 5.10.

good practice guides, customary practice and behaviour in the public sector or a particular part of it, and analogies drawn from legal rules that apply to similar situations.

16. There are a number of good practice guides that are applicable to this situation, including the guidance issued by the Auditor General,⁷ the Quality Planning Resource online website,⁸ together with the guidance contained in Making Good Decisions: A resource for RMA decision-makers (5th edition).⁹

17. We have found the following paragraphs from the Auditor-General's guidance, which concern issues of predetermination (as has been broadly alleged in the Memorandum), to be particularly apposite:¹⁰

3.32 *Predetermination is any situation where you are making a decision about something and there is a risk that people will think you have made-up your mind before you have considered all of the evidence. Suggestions of predetermination usually arise because of something you have previously said or done.*

3.32 *Technically, predetermination is not a form of conflict of interest. However, the concept of predetermination is derived from the common law on bias, so we have covered it in this guide. The underlying risk with predetermination is the same as for conflicts of interest - that is, the risk that you will "taint" a decision you are involved in making because you are biased or appear to be biased.*

....

3.36 *The seriousness of the risk will depend on the context, such as what your role is and what sort of decision you are being asked to make.*

3.37 *For quasi-judicial decisions, decision makers are held to an exacting standard of impartiality and objectivity. Quasi-judicial decisions are those that directly affect the legal rights, interests, and obligations of an individual or small group of individuals. Quasi-judicial decisions can be, for example, a decision to grant a permit, confer a specific benefit, or impose a punishment.*

3.38 *In other situations, it might nevertheless be acceptable for employees or officeholders to bring personal or previously formed views to decision making - for example, when:*

- *discussing issues and exchanging ideas with members of the public;*
- *developing a preliminary position, especially where a proposal is being consulted on or where the public organisation is expected to perform an advocacy role;*
- *already holding - and perhaps having expressed - strong personal views about the matter, for decisions that are made by an elected or representative body and are political in nature or involve high level policy-making;*
- *promoting a particular view during debate in public hearings on a matter; and*
- *drawing on your own knowledge or experience, especially for discussions that are entrusted to particular people because of their special expertise in the subject.*

Is there any substance to the allegations at common law?

18. We make the following observations based on our understanding of the relevant law and general standards and expectations (with reference to the applicable guidance):

- (a) The hearing panel has been convened to make *recommendations* to Council in relation to the proposed landscape variation schedules, a component of the Proposed District Plan. Accordingly the panel is not acting in a quasi-judicial capacity that will impact on the legal rights, interests and obligations of an individual or small group of individuals; on the contrary, the

⁷ Refer to the material at footnotes 1 and 3, *ibid*, together with the *Local Authorities (Members Interests) Act 1968: A Guide for members of local authorities on managing financial conflicts of interest* (oag.parliament.nz).

⁸ [Welcome to the Quality Planning Website | Quality Planning](#)

⁹ Available to commissioners that have completed the Making Good Decisions certification, published by the Ministry for the Environment, 2023 ed.

¹⁰ *Ibid*, footnote 3, at 3.32 to 3.40.

landscape schedules are in the nature of broad policy that will apply to the public generally, as an integral component of the Proposed District Plan.

- (b) It is open to Councils to appoint elected members to be commissioners of hearings panels that are tasked with making recommendations on matters of policy, such as plan changes or, as in this case, landscape schedules that will comprise part of a proposed plan, provided that the commissioners meet the relevant training and experience requirements, and have no actual or perceived conflict of interest under the Act or at common law. In these situations, it is accepted that such appointees will almost certainly have been involved in the relevant Council processes, and that they may hold personal views on the matters that will be the subject of the recommendations.
19. Having considered the allegations based on the facts outlined in the Memorandum, it is our preliminary view that no relevant issue of predetermination or conflict of interest arises for the following reasons:
- (a) Councillor Smith's membership of the Council's Planning and Strategy Committee (the Committee) does not, prima facie, preclude his appointment as a commissioner in relation to this particular hearing panel, which is not acting in a quasi-judicial capacity. On the contrary, it is entirely appropriate for elected members to be appointed to hearing panels concerned with policy matters in situations where their knowledge and expertise will enhance the quality of the hearing and the panel's subsequent recommendations.
- (b) The allegations refer to Councillor Smith's voting record on *matters of process*. Notwithstanding that the allegations in relation to the motion of the Committee concerning consultation appear to have been misconstrued,¹¹ we do not consider that the discharge by Councillor Smith of his lawful responsibilities as a member of the Committee in relation to process matters raises any issue of predetermination or perceived bias apropos the substantive issues that will be the subject of the hearing panel's recommendations.
- (c) The allegation that Councillor Smith voiced his willingness to be part of the hearing panel does not raise any issue of predetermination. On the contrary, his knowledge, interest and experience in relation to the subject matter of the hearing is considered to be an asset to the hearing panel.
- (d) The standard of independence and objectivity required of an elected member of Council appointed to a non quasi-judicial hearing panel should not be compared to that of an expert witness, or for that matter, an independent commissioner. It is anticipated that elected members such as Councillor Smith will have been involved in the Council processes leading up to the hearing, that they may have prior knowledge and, potentially, thoughts on the issues. What it required is that they keep an open mind, and be prepared to adjust their views if the evidence warrants it.
20. We have discussed the matters raised in the Memorandum with Councillor Smith, including his obligations as a member of the hearing panel. We are satisfied that Councillor Smith is fully apprised of his responsibilities, including that of maintaining an open mind throughout the hearing and, ultimately, the overriding obligation of the hearing panel to make a recommendation to Council based on the evidence before us (as tested throughout the hearing process).

¹¹ For clarification purposes only, it is our understanding from discussions with Councillor Smith and Council staff that Councillor Smith voted against the resolution outlined at paragraph 4 of the Memorandum because he did not agree with the *question that was to be consulted on*, not against consultation per se.

21. It should also be noted that the hearing panel comprises a majority of independent commissioners (including the Chair), which accords with good practice guidelines. As such, any elected member of Council is in the minority, and we are confident that were any conflicts of interest to arise with respect to Councillor Smith, these can be appropriately managed.
22. In summary, having regard to the applicable legal principles, we have concluded that a fair-minded observer would not reasonably think that Councillor Smith might not bring an impartial mind to the recommendations, and that no question of predetermination, bias or conflict of interest arises.

Other Relevant Matters

23. During the course of our discussions, Councillor Smith alerted us to his role as a trustee of the Upper Clutha Tracks Trust (“the Trust”). The Upper Clutha Tracks Trust is a charitable organisation that advocates for, funds and builds walking and cycling tracks for the public, and advocates for public access in general. The Trust has lodged a submission on the proposed landscape variation schedules (Submission #99), seeking: *“That all of the VIF landscape schedules are amended such that they state that there is development capacity for future public walking and cycling tracks”*. Councillor Smith has advised us that he was not involved in the development of the Trust’s submission, in relation to which the Trust sought third party planning advice.
24. Given the nature of the Trust, which is a charitable organisation that is acting in the public interest only, together with the nature of the relief sought, we are of the view that there is no relevant or actionable conflict of interest in all of the circumstances, and certainly not one that would preclude Councillor Smith’s involvement on the hearing panel.
25. In accordance with best practice, the hearing panel has agreed that Councillor Smith will not be involved in deliberations or any subsequent recommendations in relation to the Trust’s submission.
26. That said, it is entirely appropriate to draw this matter to the attention of the parties in the interests of full disclosure, and to seek any objections that parties may have.

Next Steps

27. We are grateful to Dr Cossens for raising this matter at the earliest opportunity, so that the issues of Councillor Smith’s alleged bias and conflict of interest can be considered, and a determination reached, well in advance of the commencement of the hearing.
28. Having set out our preliminary position, we now invite memoranda from any other parties that wish to be heard on the matter of Councillor Smith’s alleged bias or conflict of interest, including in relation to his role as a trustee of the Upper Clutha Tracks Trust. Memoranda should clearly set out the reasons for the views expressed, with reference to the law and to any relevant case law as may be applicable.
29. Following consideration of any memoranda received, we will issue a final Minute summarising our views, and making any recommendations or directions that we determine appropriate. Given our preliminary views as outlined above, we have not received advice from Council’s legal team on the panel’s delegated authority in this matter at this stage; however, we will do so should this become necessary.
30. Any parties wishing to lodge a memorandum in relation to this matter should do so prior to **12 noon, 6 September 2023**.
31. Should any party have any queries in relation to this Minute or require any clarification in relation to the process for this hearing, please contact the Hearings Administrator at dp.hearings@qldc.govt.nz.



Jane Taylor

For the Commission

30 August 2023