

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

MINUTE OF COMMISSIONERS

14 September 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.

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

3. A memorandum was received on behalf of Dr John Cossens dated 7th August 2023 (the Cossens Memorandum), in which the appointment of Councillor and Deputy Mayor Smith ("Councillor Smith") to the Hearing Panel was challenged 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 Cossens Memorandum, related to Councillor Smith's involvement as a member of the Queenstown Lakes District Council ("the 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. The relief sought in the Cossens Memorandum was 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.
5. A Minute setting out our draft position in relation to the issues raised in the Cossens Memorandum was issued on 30th August 2023 (the August Minute). In summary, having had regard to the applicable legal principles and relevant authoritative guidance, we 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.
6. We also discussed Councillor Smith's role as a trustee of the Upper Clutha Tracks Trust, which submitted on the landscape variation schedules. In accordance with best practice, the hearing panel agreed that Councillor Smith would not be involved in deliberations or any subsequent recommendations in relation to the Trust's submission.
7. Having set out our preliminary position in the August Minute, we invited 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, prior to issuing a final determination on the matters.

Memorandum on behalf of the Cardrona Cattle Company Limited dated 6 September 2023

8. A memorandum on behalf of the Cardrona Cattle Company Limited (CCCL) dated 6 September 2023 (the CCCL Memorandum) was received in response to our August minute. The CCCL Memorandum discussed

the relevant principles of law at paragraphs 6 to 14 and, at paragraph 15, supported the “general concerns” raised in the Cossens Memorandum.

9. The CCCL Memorandum further outlined some specific additional concerns that it considered must preclude Councillor Smith from taking any part in the Panel's consideration, hearing, or deliberations on its recommendations in respect of CCCL's submission and further submission, as well as Queenstown Lakes District Council's own (late) submission, which see CCCL further submitted on.¹
10. We discuss the two areas of concern raised in the CCCL Memorandum as follows.

The Legal Principles and General Concerns raised in the Cossens Memorandum

11. In short, we largely agree with the brief summary of principles of law as set out in paragraphs 6 to 12 of the CCCL Memorandum, which is not materially dissimilar to the discussion of relevant legal principles set out in our August Minute. It may also be helpful, as an aid to understanding the test to be applied, to set out the Court's description of a “fair-minded, impartial and properly informed observer” as found in *Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1)*.² The Court stated:³

[5] *The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. Lord Hope of Craighead commented in Helow v Secretary of State for the Home Department that:*

11 *before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.*
[Our emphasis]

[6] *The elaboration of the features of the objective observer is, as Kirby J remarked in Smits v Roach, a reminder to judges, the parties and the community reading their reasons that the standard that is applied is not simply the reaction of the judges to a particular complaint:*

13 *It is, as far as it can be, an objective standard: one aimed at emphasising the undesirability of idiosyncratic and personal assessments of such matters. As the cases show, in such decisions different judges can reflect different assessments and reach different conclusions. The fact that this is so should make contemporary judges aware that, ultimately, they themselves have to shoulder the responsibility of reaching conclusions on the point and giving effect to them. They cannot ultimately hide behind a fiction and pretend that it provides an entirely objective standard by which to measure the individual case.*

12. In applying the principles to the facts as alleged in the Cossens Memorandum, we remain satisfied that a properly informed, impartial and fair minded observer, as described by the Court in *Saxmere*, would not hold a perception that Councillor Smith was biased,⁴ noting in particular that there has been no allegation that Councillor Smith has stated a view or opinion in relation to the substantive issues that will form the basis of the recommendations to Council.⁵

¹ Paragraph 15 of the CCCL Memorandum.

² [2009] NZSC 72, [2010] 1 NZLR 35 (*Saxmere*).

³ Ibid at [5].

⁴ Paragraph 10 of the CCCL Memorandum.

⁵ As per paragraph 11 of the CCCL Memorandum.

13. We further note that the CCCL Memorandum, in voicing support for the “general concerns” of Dr Cossens, did not set out any further evidence of actual or perceived bias in relation to Councillor Smith’s appointment to the hearing panel.
14. We do not agree with the statements set out at paragraphs 13 and 14 of the CCCL Memorandum, which discuss the nature of the panel’s role and function, recognising that our use of the term “quasi-judicial” is perhaps too broad a brush in this context without further explanation. Our conclusions in this regard were in part based on the Auditor-General’s guidance, which was set out at paragraph 17 of the August Minute and repeated here:⁶
- 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.*
15. Essentially, as we understand it, the panel is tasked with making recommendations as to what is *in the public interest* with respect to the landscape variation schedules. A decision as to what is in the public interest can be contrasted with determination of the legal rights, interests and obligations of an individual or small group of individuals, such as in relation to an application for resource consent(s). A recommendation as to the public interest, which is essentially a policy decision, is quite different from the determination of a right. Although the panel does have the ability to exercise discretion, taking multiple factors into account, the resulting recommendations will not give any person affected by the recommendations the right to any particular outcome. It is, of course, acknowledged that the panel does have a duty, in accordance with the rule of law, to behave fairly in the decision or recommendation-making procedure. But the decision or recommendation itself is not a judicial or quasi-judicial act, as alleged at paragraph 14(a) of the CCCL Memorandum. It does not involve deciding between the rights or interests of particular persons; rather, it is the exercise of a power delegated by the Council, representing the community, to decide what the public interest requires. This approach corresponds with the Auditor General’s guidance, as previously mentioned.
16. That said, it is plain that the administrative functions of the panel must uphold the principles of fair process and natural justice, including the avoidance of actual or perceived bias or conflict of interest. In a *procedural* sense the panel, once convened, could therefore be considered to be functioning in a ‘quasi-judicial’ manner, notwithstanding that the decision or recommendations are not a judicial or quasi-judicial act. However, for the reasons set out above and in our August Minute, we do not accept that the common law test, as set out in *Saxmere*, has been met generally in the case of Councillor Smith, other than in relation to the Upper Clutha Tracks Trust. We now turn to the specific concerns with respect to CCCL.

⁶ *Managing Conflicts of Interest: A Guide for the Public Sector*, Office of the Auditor-General, June 2020 at 3.37-3.38.

The specific concerns in relation to CCHL

17. THE CCCL Memorandum sets out its specific concerns at paragraphs 17 to 22. It concludes, at paragraph 22, that *“it is untenable for Councillor Smith to take any part in the panel’s consideration, hearing or deliberations on its recommendation in respect of CCCL’s submission and further submission, as well as the Council’s own (late) submission, which CCCL further submitted on”*. This conclusion was reached by CCCL after applying the principles in the *Muir v Commissioner of Inland Revenue*⁷ and *Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1)*⁸ cases, together with the general guidance found in the Making Good Decisions – Chair Re-certification material.
18. Having considered the specific concerns raised with respect to CCHL, the panel is of the view that, at first glance, the correspondence described in paragraph 20 of the CCCL Memorandum between Councillor Smith and Mr Henderson may give rise to a perception of bias in an impartial, fair-minded observer. We record, however, that the alleged “significant falling out” to which the correspondence related arose in a previous matter and, in Councillor Smith’s view, appears to be one-sided on the part of Mr Henderson.
19. We do not accept that it follows (as set out at paragraph 24 of the CCCL Memorandum) that because of the concerns raised by CCCL in relation to the relationship between Councillor Smith and Mr Henderson, there is a risk of actual or perceived bias or conflict of interest with respect to other submitters who own land in the Gibbston Valley Character Zone, noting that no other memoranda have been received in relation to this issue. There is no relevant basis or evidence to support such a finding, which the CCCL Memorandum refers to as “an observation” only.
20. Given the above findings, the panel has determined, applying an abundance of caution, that Councillor Smith will not be involved in deliberations or any subsequent recommendations in relation to CCCL’s submission or further submission and, to the extent that it concerns CCCL’s submission or further submission, the Council’s submission (which CCCL further submitted on).
21. We reiterate our previous observation 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.

Summary of Findings

22. In summary, having regard to the applicable legal principles and authoritative guidance, we have concluded that a fair-minded observer would not reasonably think Councillor Smith might not bring an impartial mind to the recommendations, and that no question of predetermination, bias or conflict of interest arises, except as noted in relation to the Upper Clutha Tracks Trust (as per our August Minute) and the specific concerns of CCCL as set out above.
23. We have determined that in addition to not taking part in deliberations and recommendations in relation to the Upper Clutha tracks trust submission, Councillor Smith will not take part in any deliberations or any subsequent recommendations in relation to CCCL’s submission or further submission and, to the extent that it concerns CCCL’s submission or further submission, the Council’s submission (which CCCL further submitted on).

⁷ [2007] 3 NZLR 495 (CA) at [64].

⁸ [2009] NZSC 72, [2010] 1 NZLR 35 at [37].

24. 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.

A handwritten signature in black ink, appearing to read 'Jane Taylor', with a stylized flourish at the end.

Jane Taylor

For the Commission

14 September 2023