

Central Hawke's Bay District Council – Report

TO: Council
FROM: Conduct Review Committee
DATE: 7 August 2008
FILE REF: COUI-801
SUBJECT: CONFLICTS OF INTEREST

1.0 SUMMARY

A formal complaint was received by Council from Mr Rod Hansen of Blackhead Beach, regarding Councillors Butler and Story allegedly having a clear bias and conflict of interest which they failed to declare, regarding submissions on the 2008/2009 Annual Plan. Council appointed Councillors Kingston and Mullins to a Conduct Review Committee along with Her Worship the Mayor as an ex-officio member to consider this formal complaint.

2.0 RECOMMENDATION

THAT

Council does not support the complaint received from Mr Hansen but reminds Elected Members of the need for open and transparent representation.

REASON:

Council will consider the report from the Conduct Review Committee on the allegation in open meeting of council.

3.0 BACKGROUND

Council received a formal complaint from Mr Rod Hansen of Blackhead Beach, regarding Councillors Butler and Story allegedly having a clear bias and conflict of interest which they failed to declare, regarding submissions received for the 2008/2009 Annual Plan on the Aramoana Woolshed project. Council appointed a Conduct Review Committee to consider this formal complaint

Council's Code of Conduct states:

“Elected members must be careful that they maintain a clear separation between their personal interests and the duties as an elected member. This is to ensure that people who fill positions of authority carry on their duties free from bias (whether real or perceived). Members therefore need to familiarise themselves with the provisions of the Local Authorities (Members' Interest) Act 1968 which concerns financial interests and with other legal requirements concerning non-financial conflicts of interest.”

“Compliance

Elected members must note that they are bound to comply with the provisions of this code of conduct (Local Government Act 2002, Schedule 7, Section 15(4)).

Members are also bound by the Local Government Act 2002, the Local Authorities (Members’ Interests) Act 1968, the Local Government Official Information and Meetings Act 1987, the Secret Commissions Act 1910, the Crimes Act 1961 and the Securities Act 1978. The Chief Executive will ensure that an explanation of these Acts is made at the first meeting after each triennial election and that copies of these Acts are freely available to elected members. Short explanations of the obligations that each of these has with respect to conduct of elected members is attached in the Appendix to this code.

Alleged breaches of the Code will be considered by the Conduct Review Committee. This committee will be constituted at the first meeting after triennial elections. The Mayor will be an ex-officio member. At the time a breach is brought to the attention of the Mayor and/or Chief Executive, two other elected members will by Council resolution be appointed to the Committee to consider the breach.

All alleged breaches of the code will be reported to the above committee. Any allegation of a breach of a code of conduct must be in writing, make a specific allegation of a breach of the code of conduct, and provide corroborating evidence.

The committee will investigate the alleged breach and prepare a report for the consideration of council. Before beginning any investigation, the committee will notify the elected member(s) in writing of the complaint and explaining when and how they will get the opportunity to put their version of events.

The council will consider the report in open meeting of council, except where the alleged breach relates to the misuse of confidential information or could impinge on the privacy of a member of staff or of the general public.”

4.0 COMPLAINT

The Conduct Review Committee met with Mr Hansen to consider his complaint and supporting evidence. After discussions and clarification from Mr Hansen the complaint fell into two parts

1. That Councillor Butler’s husband and many of her family submitted against the project and that she had a bias and a clear conflict of interest which she failed to declare.
2. That Councillor Story at election time may have promised some voters that he would vote against the woolshed project in return for their votes and therefore he had a bias. Councillor Story’s wife submitted against the project and he failed to declare a conflict of interest.

The Committee then met separately with Councillor Butler and Councillor Story.

5.0 FINDINGS

The Conduct Review Committee concluded that neither Councillor Butler nor Councillor Story breached the Local Government Act 2002, the Local Authorities (Members' Interests) Act 1968, the Local Government Official Information and Meetings Act 1987 or Councils Code of Conduct.

The Committee did however note sections from "Conflicts of Interest – A Guide to Local Authorities (Members' Interests) Act 1968 and Non-pecuniary Conflicts of Interest - The Controller and Auditor-General", which state:

Part Five

NON-PECUNIARY CONFLICTS OF INTEREST

Non-pecuniary conflicts of interest

Having a pecuniary interest in a matter before the local authority, as discussed in Part 3 (pages 25-35), is one type of conflict of interest. However, quite apart from the Local Authorities (Members' Interests) Act, there are legal rules about conflicts of interest more generally, which apply to non-pecuniary conflicts of interest. In this Part we focus on the legal rule against bias as it relates to non-pecuniary conflicts of interest.

What is bias?

To determine if bias exists, consider this question:

Is there, to a reasonable, fair-minded and informed observer, a real danger of bias on the part of a member of the decision-making body, in the sense that he or she might unfairly regard (with favour or disfavour) the case of a party to the issue under consideration?

The question is not limited to actual bias, but relates to the appearance or possibility of bias. This is in line with the principle that justice should not only be done, but should be seen to be done. Believing yourself to be not biased is irrelevant.

Your focus should be on the nature of the conflicting interest or relationship, and the risk it could pose for the decision-making process.

The need for public confidence in the process is paramount. Perception can be an important factor. Each case must be decided on its own circumstances.

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How does the law apply to local authorities?

The courts recognise that local authorities are different in nature from other decision-making bodies. In particular, they acknowledge that, where Parliament entrusts a function to an elected or political body (instead of to a tribunal or a court), it is natural to expect that:

- the members of the authority will bring their own experience and knowledge to the decision-making process;
- the members may already have views – even strong or publicly stated views – about the matter; and
- political considerations may play a part in the decision.

The courts also take into account the type of function being exercised. They are likely to take a stricter approach with decisions that directly affect the legal rights, interests and obligations of an individual or small group of individuals (as opposed to decisions with a large policy or political element).

For instance, the sorts of decisions where a stricter approach may be taken include:

- licensing applications;
- decisions under the Resource Management Act 1991;
- decisions requiring a formal statutory process and hearing (such as road-stopping proposals);
- dealings in land; or
- other decisions that have a regulatory or coercive effect.

By contrast, the courts may be more lenient with decisions about:

- high-level policy-making;
- issues in which the authority has only advocacy or recommendatory powers;
- operational or service functions; or
- matters where the authority is expected or required to have developed a preliminary view or proposal.

Situations where a risk of bias may exist

The most common risks of non-pecuniary bias are where:

- your statements or conduct indicate that you have predetermined the matter before hearing all relevant information (i.e. you have a “closed” mind); or
- you have a close relationship or involvement with an individual or organisation affected by the matter.

The next sections discuss these two types of non-pecuniary bias, and offer our view of some common scenarios. The examples are a general guide, but each situation needs to be assessed on its own merits. Our suggestions are neither authoritative nor comprehensive.

Predetermination

A claim of bias may be made on the basis of predetermination. Predetermination generally relates to conduct. Accordingly, it is an issue within your control. By exercising care over your statements and behaviour, you should be able to prevent this issue creating problems for you.

For example, predetermination might occur if your public statements indicate that you made up your mind about the matter before it came to be heard and deliberated upon. In other words, that you as decision-maker had a "closed" mind and were not prepared to listen fairly to all of the arguments.

You are not expected to approach matters without any existing opinions at all. Elected members take office with publicly stated views on a wide variety of policy issues. In local authority decision-making, the courts therefore acknowledge that a degree of local knowledge and pre-existing views – especially where a matter involves wide public policy issues – is both inevitable and desirable.

The critical factor is that you remain (and are seen to remain) open to persuasion – that is, that you do not express views in a way which implies an unwillingness to listen fairly to new arguments or to give the matter further consideration when it comes before the authority.

What is predetermination?

We think it is unacceptable to participate in the authority's consideration of a matter if you:

- make statements that suggest your mind is made up about the particular matter before having heard all views, or that your position is so fixed that you are unwilling to fairly consider the views of others, or that you are not prepared to be persuaded by further evidence or argument;
- refuse to read or listen to reports or submissions presented to the authority about the matter; or
- have made a formal submission to the authority in your personal capacity, to support or oppose a particular proposal, as part of a public submissions process.

As noted earlier, the nature of the decision is important. It is more acceptable for you to comment about broad policy issues, particularly where your remarks are expressed in general terms. We think it is wise to exercise extreme caution in respect of specific decisions that are focused on the rights and interests of one individual or a few individuals, and where other people have the right to make a submission to a formal hearing about the matter.

However, we think the law about bias should not prevent you from:

- discussing issues and exchanging ideas with members of the public;
- promoting a particular view during debate around the meeting table; or
- advocating opinions or policies in public – or campaigning for election – about issues of public interest (so long as you do not indicate that you have already closed your mind to further consideration of a particular matter).

General personal factors, such as your ethnicity, religion, national origin, age, political or philosophical leanings, wealth, or professional background, will almost never constitute predetermination.

Presence at hearings

Where evidence and submissions are being heard on a particular matter, you need to be present for the whole hearing to show a willingness to consider all points of view. Very short absences might be acceptable, but lengthy periods of non-attendance at a hearing could suggest that you have predetermined the matter.

Relationship with other persons or organisations

A conflict of interest may exist if you have a close relationship with a person or organisation involved in the matter before the local authority. For example, if the matter concerns a family member, or an organisation to which you belong, or a business of which you are an employee. Such a connection could affect how other people view your impartiality.

This sort of conflict of interest arises not from something you have said or done, but from a pre-existing state of affairs. Accordingly, no matter how careful you are, this type of conflict sometimes cannot be prevented.

In deciding whether to participate, you should consider:

- the extent of your personal links or involvement with the other person or group; and
- the degree to which the matter under discussion directly affects that person or group.

But remember that, in politics, the merest perception of impropriety can be extremely damaging, whether or not a court would find your actions to be lawful. If you have any relationship with a person or organisation involved in a matter, you should seriously consider the wisdom of whether to participate at all. The safest advice is always "if in doubt, stay out".

Personal relationships

We think it is unacceptable to participate in the authority's consideration of a matter if:

- the decision directly affects a member of your immediate family or a close friend; or
- a member of your immediate family has made a submission about the matter.

Exercise your judgement carefully where the matter concerns:

- a personal or professional acquaintance;
- someone who funded your election campaign; or
- a more distant relative.

It will often be wise to not participate in these situations.

Wider kinship relationships

Some cultures, including Māori culture, have a broad concept of who is regarded as a family member or relative. This can make it difficult to assess whether a conflict of interest exists.

In general, you should apply the same principles as for personal relationships set out above. However, we do not think that a person needs to be regarded as part of your immediate family just because they are part of your wider kin group descended from a common ancestor (such as an iwi or hapu).

The Committee acknowledges that at the end of the day it is up to individual Elected Members to exercise their own judgement to decide for themselves whether or not to participate in a matter being considered by Council.

The Committee felt that this complaint was a timely reminder to all Elected Members that public perception of how Councils dealt with issues and conducted Council business is very important and that Council need to ensure that its actions were open and transparent. If a member of Council is concerned about a possible conflict of interest or perceived bias, we recommend that that member contacts the Chief Executive for an opinion.

The Committee also recommends that Council should relook at the need for a Register of Members Interests.

6.0 OPTION

Recommendation

Council does not support the complaint received from Mr Hansen but reminds Elected Members of the need for open and transparent representation.

7.0 STATUTORY IMPLICATIONS

Local Government Act 2002
Local Authorities (Members' Interest) Act 1968

8.0 CONSULTATION

8.1 External

Local Government New Zealand
Office of the Auditor General

8.2 Internal

Mayor
Deputy Mayor
Councillors

9.0 FINANCIAL

N/A

10.0 STRATEGIC LINKS

N/A

11.0 POLICY/DELEGATION REFERENCE

Code of Conduct adopted 15 May 2008.

Conflicts of Interest – A Guide to Local Authorities (Members' Interests) Act 1968 and Non-pecuniary Conflicts of Interest - The Controller and Auditor-General.

Guidance for members of local authorities about the law on conflicts of interest - The Controller and Auditor-General.

Managing conflicts of interest: Guidance for public entities - The Controller and Auditor-General.

Local Government Elected Members' Handbook 2007 – Local Government New Zealand.

Model Standing Orders for Meetings of Local Authorities and Community Boards – NZS 9202:2003 (incorporating Amendment 1).

John Freeman
Chief Executive