



20 November 2018

Janine Dowding
Chief Executive
Tasman District Council

By email: Janine.Dowding@tasman.govt.nz

Tēna koe, Janine

Complaints of conflicts of interest against Cr Sue Brown and Cr Kit Maling

I am writing to advise you of the outcome of our work on the conflict of interest complaints to the Auditor-General about Councillors Sue Brown and Kit Maling. The complaints alleged financial and non-financial conflicts of interest by those councillors in respect of the proposed Waimea Community Dam in the Lee Valley.

We met with you and other Council staff on 29 October 2018 to discuss the complaints. You provided us with information, and conveyed to us responses to the allegations from the councillors concerned. We spoke to one of the councillors, and communicated via email with the other.

We considered all the information we gathered along with information provided to us by the complainants. Following this process, we have decided not to take any further action.

Our role

As you know, the Auditor-General administers the Local Authorities (Members' Interests) Act 1968. This Act governs the financial interests of elected members of local authorities.

Most of the issues raised by the complainants were about alleged non-financial conflicts of interest. The Auditor-General has no formal statutory role or powers for any non-financial conflicts of interest, although we do have an interest in supporting and encouraging good governance of public entities.

Managing non-financial interests

Non-financial conflicts of interest can arise where:

- A councillor's statements or conduct indicate that they have predetermined the matter before hearing all relevant information; or
- Where the councillor has a close relationship or involvement with an organisation affected by a matter.

In legal terms, both of these types of conflicts of interest are forms of bias.

No statute prescribes how to manage non-financial conflicts of interest. Individual elected members must decide whether an interest creates a risk of bias – or the appearance of bias – and then decide whether it

is appropriate to participate in a decision. In general, elected members who participate when they have a non-financial interest do not risk any personal liability. However, they can create a risk that the council's decision will be challenged in court on the grounds of bias.

Alleged conflicts of interest - Cr Sue Brown

The complainants allege that Cr Brown has financial conflicts of interest in relation to Council decisions about the proposed Waimea Community Dam arising from her dairy farm in Golden Bay, and her membership of the Fonterra Shareholders' Council.

Cr Brown's interests:

- Cr Brown is a director and 40% shareholder in Nalders Ferntown (2001) Limited.
- Nalders Ferntown Limited owns a dairy farm in Golden Bay.
- The Nalders Ferntown dairy farm cannot access water affected by the proposed Waimea Community Dam.
- The Nalders Ferntown dairy farm supplies milk to Fonterra under a contract which does not specify where milk produced by the Nalders Ferntown dairy farm is processed.
- To supply milk to Fonterra, Nalders Ferntown is required to hold shares in Fonterra, which it does.
- Cr Brown is an elected member of the Fonterra Shareholders' Council, representing Tasman/Marlborough. The Shareholders' Council represents the interests of Fonterra's farmer shareholders. It acts as a "cornerstone shareholder" being a funnel for 10,000 suppliers through 25 representatives (including Cr Brown).
- Cr Brown has declared her interest in Nalders Ferntown Limited and her role on the Fonterra Shareholders' Council in the Tasman District Council's interests register.
- Fonterra has a milk processing factory at Brightwater and a resource consent to take water from the area affected by the Dam proposal. It will benefit if the scheme goes ahead. This will affect the milk prices, therefore as a shareholder/supplier she will benefit.

The allegations are:

- As a dairy farmer and Fonterra shareholder, Cr Brown has a financial interest in the fluctuation of prices paid by Fonterra to farmers for milk.
- She also has a direct financial interest because her income will depend on the Brightwater Fonterra Processing Plant continuing to process her milk. She will benefit financially from any increase in production at the Fonterra factory in Brightwater. If Fonterra has to deliver milk to another factory because the Brightwater factory can't process it, this will affect the prices paid to dairy farmers.
- She advertised for election in the Golden Bay Newspaper on 16 September 2016 with the following statement, "I strongly support the pre-election view (Publication) of L. McKenzie, CEO of Tasman District Council of Building a Dam in the Lee Valley".
- As a member of the Fonterra Shareholders' Council, she has input into Fonterra decisions.
- She "made a formal submission, together with other Fonterra officials, to a Tasman District Council hearing on 5 November 2013 for plan changes 45-48 water rights".

Our view

The participation rule in the Local Authorities' (Members' Interests) Act 1968 is that elected members of a local authority are not allowed to participate in that authority's discussions or voting on any matter in which they have a direct or indirect pecuniary (financial) interest, other than an interest in common with the public.

It is an offence under the Act for a member to participate in the discussion, or voting, on any matter in which they have a financial interest.

The Act does not define a financial interest. The test we use is:

... whether, if the matter were dealt with in a particular way, discussing or voting on that matter could reasonably give rise to an expectation of a gain or loss of money for the member concerned.

The Act applies to both direct and indirect financial interests. The Act provides that a member is deemed to share the same financial interest a company has in a matter if the member – individually, or with their partner – owns 10% or more of the shares in the company. In this situation, the member would have an indirect financial interest.

Fonterra has a direct financial interest in the Dam proposal, if the proposal affects the milk processing costs at its Brightwater factory. However, under the Act, Cr Brown isn't deemed to share Fonterra's interest because her shareholding in Fonterra is too low. Therefore, Cr Brown does not have an indirect financial interest.

Cr Brown has also explained to us that whether her company's milk is processed at the Brightwater factory, or another plant, does not directly affect the price paid by Fonterra for her milk. Under her supply agreement it can be taken to any Fonterra processing plant. It normally goes to Fonterra's Takaka site in Golden Bay, not the Brightwater factory. On this basis, we do not consider that she has a direct financial interest either.

Regarding the alleged election statement, we reviewed the Golden Bay Weekly on the day the statement is alleged to have been published, and we found no statement in any way similar to what is alleged. We also reviewed the local papers published prior to the election and found nothing to substantiate this allegation.

The allegation that she made a submission to the Council on behalf of Fonterra is incorrect. We saw evidence that she supported Federated Farmers' (not Fonterra's) submission on Plan changes 45-48 to the Tasman Resource Management Plan on 4 November 2013. At that time she was not a member of Tasman District Council, but she was President of the Golden Bay Province of Federated Farmers (a position she relinquished when elected to the Council). In our good practice guide for members of local authorities (www.oag.govt.nz/2010/lamia), we note that where a councillor participates in a decision that involves or affects an organisation of which they have been a past member, the legal risks (arising from bias) are likely to be low.

Alleged conflicts of interest - Cr Kit Maling

This Office considered allegations of conflicts of interest against Cr Maling last year. Our letter to the Council's Chief Executive dated 23 November 2017 sets out our findings at that time. We understand that Cr Maling's circumstances have not materially changed since then.

The current complaints largely repeat the issues previously raised, with the exception of a new allegation that Cr Maling has an interest in the proposed Dam due to the election campaign donations he received from people and entities in favour of the Dam.

The other allegations are:

- He has a pre-determined and entrenched position on the proposed Dam. He is not prepared to listen fairly to all the arguments presented to the Council.
- Cr Maling has held the following positions in entities that are focused on building a dam in Lee Valley, which is evidence of his pre-determination:
 - Chairman and Shareholder of Waimea East Irrigation Company Limited for 11 years;
 - Director and shareholder of Waimea Community Dam Limited;
 - Director of Waimea Community Dam Limited; and
 - Director and shareholder of Waimea Irrigators Limited.

Our view

Election donations do not give rise to a financial interest for the purposes of the participation rule in section 6 of the Local Authorities' (Members Interests) Act 1968 (that a member must not discuss or vote on a matter in which they have a financial interest).

An election donation is a lawful payment to a prospective member, for a fixed amount. As the donation has been paid in the pre-election period, Cr Maling has no reasonable expectation of gain of money (that is, any further donations) during his council term as a result of voting a particular way.

However, we say in 5.37-5.38 of our good practice guide for members of local authorities, there is a risk of a perception of bias where a matter involves or affects someone who funded an elected member's election campaign. In that situation, that member "may want to consider carefully whether to participate... The particular facts will always be important for assessing the legal risks." We discuss this further below.

We spoke to Cr Maling when the earlier allegations of pre-determination were made. In our 23 November 2017 letter, we noted that Cr Maling had considered whether he had non-financial conflicts of interest for decisions about the Dam, but he believed he was not pre-determined. He told us that in 2014 he had submitted against a proposal related to the Dam, as he considered then that it would have been too expensive for the irrigators. He noted that while he supported the Dam, he had been explicit that his support depended on a number of criteria being met. These criteria included support from the Council, and sufficient support from irrigators and Crown Irrigation Investments Limited. Cr Maling told us that he still has an open-mind about the Dam, and recently met with a ratepayer who has an alternative proposal.

As we noted in respect of Cr Brown, where a councillor participates in a decision that involves or affects an organisation of which they have been a past member, the legal risks (arising from bias) are likely to be low. Of all the positions listed as evidence of Cr Maling's pre-determination, Cr Maling now only holds 10 or 20 shares in the Waimea East Irrigation Company (as part of his landholding). The other listed positions are all historical only and, in our view, are unlikely to create a risk of bias in relation to decisions about the Dam. However, this is a matter for the courts to determine.

The steps the Council has taken to manage conflicts of interest

Council staff must do their best to manage the risk that a Council decision will be legally challenged on the grounds of actual or apparent bias. Even if the practical risk of legal challenge is low, the Council has to be conscious of the need to protect its reputation and public confidence in the decision-making process. To do this, the Council needs to be able to demonstrate that decisions have been properly made, in accordance with the relevant statutory criteria, and with the proper degree of impartiality.

Council staff explained to us the considerable efforts they have taken to support the Council in making its decisions about the Waimea Community Dam project, which is a contentious project for the community and councillors.

To ensure that councillors are aware of the requirement to give fair consideration to competing views, and to maintain an open mind and remain open to persuasion, Council staff have taken the following steps:

- On 24 October 2017, Simpson Grierson provided a detailed training session for councillors on the subject of conflicts of interest and privilege. The session was attended by Cr Maling and Cr Brown;
- On 1 February 2018, in the public-excluded part of a Council meeting, Jonathan Salter from Simpson Grierson attended and explained the law on conflicts of interest to councillors;
- Obtaining legal advice on potential conflicts of interest as they arise.

In our view, Council staff have taken all the appropriate steps to manage conflict of interest risks in this situation through:

- Ensuring that the Council's register of interests is kept up to date;
- Inviting councillors to declare interest in matters to be discussed at the start of every Council meeting;
- Providing councillors with training by experts on how to identify and manage conflicts of interest; and
- Obtaining expert legal advice on potential risk to the Council.

Our good practice guides on conflicts of interest encourage a precautionary approach, with the advice "if in doubt, stay out". However, we appreciate that on matters of high community and political significance, an elected member with a marginal non-financial interest might decide that this approach was unduly restrictive.

Councillors Brown and Maling, and in fact every Tasman District Council councillor, should consider whether their conduct and statements about the Dam project indicate that they have predetermined views that could affect forthcoming Council decisions about the project.

Councillors should also consider whether they have close relationships (both current and past) with individuals or organisations that will be affected by decisions about the Dam. If they consider that there is a risk that the Council's decisions could be challenged, on the basis that they were biased, then they need to carefully consider whether it is appropriate for them to participate in the decisions.

The Waimea Community Dam project is of high interest to ratepayers, with strong views on both sides. The Chief Executive is keen that all councillors participate in the discussions and decisions about the Dam project unless there is a conflict of interest which prevents that. Council staff have appropriately sought and received legal advice to guide it in managing any potential risks to its decisions. In our view, the staff are professionally dealing with a challenging situation.

An elected member has obligations to carry out the duties of office and to represent their community. In our experience, elected members take these obligations seriously and do not decide lightly that they should withdraw from important decisions. They need to be satisfied that their participation would create a real legal risk for the council that outweighs their general obligations.

Ngā mihi nui

A handwritten signature in blue ink, appearing to read 'Melanie Webb', with a stylized flourish extending to the right.

Melanie Webb
Assistant Auditor-General, Legal