



23 November 2017

Lindsay McKenzie
Chief Executive
Tasman District Council
Private Bag 4
Richmond 7050

Dear Mr McKenzie

COUNCILLOR MALING AND THE WAIMEA COMMUNITY DAM PROJECT

Thank you for meeting with us on 27 October 2017 and providing us with the information that we requested.

We have now completed our consideration of the complaints made to us that Cr Maling had breached the Local Authorities (Members' Interests) Act 1968 (the Act). We have concluded that he has not breached the Act.

Summary of our conclusions

We have concluded there is no breach of the contracting rule by Cr Maling because he did not have a financial interest in any contracts between Waimea Irrigators Ltd and the Council.

We have concluded there is no breach of the participation rule by Cr Maling because:

- The decision on 10 November 2016 was a preliminary one as the nature and extent of the underwriting of the loan was likely to change as a result of negotiations, and was still subject to public consultation. For those reasons we consider that his financial interest at that point (holding a share in Waimea Irrigators Ltd) was too remote and that it could not be reasonably expected that he would gain or lose financially from participating in that decision.
- The decision on 14 June 2017 was also a preliminary decision as the Council could not make the final decision on its proposed funding for the Waimea Community Dam project without consulting the community and making provision for it in the Council's long-term plan.

By the time of this meeting Cr Maling had disposed of his share in Waimea Irrigators Ltd. We do not consider his family trust's ownership of land on the Waimea Plains gives rise to a financial interest in the Waimea Community Dam proposal. The land will potentially be liable for increased rates, but in this regard his interest is in common with the public.

We are not proposing to take any further action in response to the complaints. We will write to Cr Maling and the people who complained to us to let them know this.

We have set out below the reasons for our conclusions.

Alleged breaches of the contracting rule

We received a complaint that Cr Maling had breached the contracting rule in section 3 of the Act. Section 3 of the Act provides that a councillor is automatically disqualified from office if they are concerned or interested in contracts with their council, and the total payments made, or to be made, by or on behalf of the council exceeds \$25,000 in any financial year.

The rule applies:

- to a councillor who holds more than 10% of the shares in a company that has such a contract or contracts with the council; and
- to candidates for election, which means that a councillor cannot be elected if they are concerned or interested in a contract with the council that exceeds \$25,000 at the time of the election (subject to certain exceptions in the Act).

The complaint alleged that Cr Maling was disqualified from being elected because he was interested in a contract between Waimea Irrigators Ltd (a company in which he held shares) and the Council, at the time of his election.

We sought further information from you about the contracts the Council had with Waimea Irrigators Ltd. You told us that in the year of Cr Maling's election the Council had no contracts with Waimea Irrigators Ltd under which the Council paid more than \$25,000 in total, although it had provided the company with a grant of \$81,866. The Council and the company had also jointly funded some work in relation to the Waimea Community Dam project.

We do not consider the grant or the joint funding to be contracts covered by the Act. We have concluded that Cr Maling was not interested in any contracts between Waimea Irrigators Ltd and the Council, and has therefore not breached section 3 of the Act.

Alleged breaches of the participation rule

The participation rule in section 6 of the Act prohibits councillors from participating in discussion or voting on any matter before the council in which they have a direct or indirect pecuniary interest, other than an interest in common with the public. A breach of that rule is an offence under the Act. The Act does not define what a pecuniary interest is, however, 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 gain or loss of money for the councillor concerned.

The correspondence we received alleged that Cr Maling had breached the participation rule in the Act, by discussing and voting on matters related to the Waimea Community Dam project at Council meetings on 10 November 2016 and 14 June 2017.

Cr Maling's financial interests

(a) Ownership of shares in Waimea Irrigators Ltd

Before his election to council in October 2016, Cr Maling was a director and shareholder in Waimea Irrigators Ltd. He held one share, equivalent to 20% of the shares in the company. After he was elected he wrote to the company resigning from his directorship. He told us that he believed that by resigning his directorship that he had disposed of his share because he understood that the share ran with the directorship. He had never received a share certificate and he was unaware that he still held it until the matter was drawn to his attention at a Council meeting in March 2017, after which he promptly disposed of it.

(b) Land ownership

Cr Maling's family trust owns a lifestyle property on the Waimea Plains, which is approximately 1.43 ha in size. It is a small land holding which includes a house and two paddocks. The family trust currently has two cows, a horse and ten chickens on the land. The land receives water for irrigation from the Waimea East Irrigation Company. In order to receive this water the family trust holds a very small number of shares in this company (below the 10% threshold in the Act). The land is also located in the area of benefit for the Waimea Community Dam proposal.

Participation in Council's decision of 10 November 2016

At its meeting on 10 November 2016 the Council agreed '*...in principle (subject to contract) based on the information supplied, to underwrite the balance of the loan from Crown Irrigation Investments Ltd to Waimea Irrigators for the Waimea Water Augmentation Project in the event that the loan is unable to be commercially refinanced at the end of its term, up to a maximum of \$5 million*'.

The Council could not make the decision to underwrite the loan without consulting the community on the proposed funding and governance arrangements for the dam. The terms of the underwriting of the loan were also subject to negotiations between the parties. The decision had the effect of enabling negotiations to continue, but in order to implement the decision there would need to be further Council decisions made.

Although he was unaware of the fact, Cr Maling owned a share in Waimea Irrigators Ltd at the time this decision was made. The decision was a preliminary one as the nature and extent of the underwriting of the loan was likely to change as a result of negotiations, and was still subject to public consultation. For those reasons we consider that his financial interest at that point was too remote and that it could not be reasonably expected that he would gain or lose financially from participating in that decision.

The lifestyle block owned by Cr Maling's family trust is small. It seems very unlikely that the land could be used economically for horticultural or farming purposes and we consider that it is unlikely that the value of the land will be affected if the Waimea Community Dam were to proceed. Therefore we do not consider that the land owned by his family trust creates a financial interest in the dam for Cr Maling. The land is in the area of benefit of the Waimea Community Dam, and the family trust may be liable for increased rates if the Dam were to proceed. We consider that his interest in this respect is in common with other land owners in the area of benefit. Because of the size of this group of ratepayers (approximately 37% of the district's ratepayers), we consider that his interest is one that is in common with the public.

Participation in Council's decisions of 14 June 2017

The Council at its meeting on 14 June 2017 made a number of decisions. One of the correspondents raised concerns that Cr Maling had a conflict of interest in relation to the decision to '*request[s] that the Council members on the Joint Venture Working Group try and reach a draft agreement with the funding partners that provides for an increase in capital funding and operating cost share by the Council and credit support for the Crown Irrigation Investments Ltd loan from Council*'.

As with the decision of 10 November 2016, this was a preliminary decision and the Council could not make the final decision on its proposed funding for the Waimea Community Dam project without consulting the community and making provision for it in the Council's Long Term Plan. We note that the Council minutes for that meeting specifically record that '*any agreement will need to be approved by the Council and that any such agreement will form the basis for a Statement of Proposal relating to the Project*'.

By the time of this meeting Cr Maling had disposed of his share in Waimea Irrigators Ltd. As we set out above we do not consider his family trust's ownership of land on the Waimea Plains gives rise to a financial interest in the Waimea Community Dam proposal. The land will potentially be liable for increased rates, but in this regard his interest is in common with the public.

We do not consider that Cr Maling has breached section 6 by participating in the decisions discussed above.

Non-financial conflicts of interest

Both of the correspondents raised concerns that Cr Maling had non-financial conflicts of interest in relation to decisions about the Waimea Community Dam. The Auditor-General has no specific role in relation to conflicts of interest generally, we have a specific role only in relation to pecuniary conflicts of interest that are regulated by the Act.

However, we did ask Cr Maling whether he had considered whether he had a non-financial conflict of interest in decisions about the Waimea Community Dam project. He told us that he had considered the issue but

believed that he was not predetermined in relation to decisions about the Dam. He told us that in 2014 he had submitted against a proposal related to the Dam as he considered it would have been too expensive for the irrigators. He noted that while he supported the Dam, he had been explicit during the election campaign that that support was contingent on a number of criteria being met, including the Council supporting it, and that there was sufficient support from irrigators, and Crown Irrigation Investments Ltd.

We note in our Good practice guide *Guidance for members of local authorities about the Local Authorities (Members' Interests) Act 1968* 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. Cr Maling has been involved with a number of organisations that support the Dam, however, he is no longer involved with any of these (apart from his shareholding in Waimea East Irrigation Company). It is not our role to assess the degree of risk that may arise in this case. If necessary, we suggest the Council considers seeking specific advice on this point.

Yours sincerely



Melanie Webb
Assistant Auditor-General, Legal

Cc Cr Maling