BEFORE HEARING COMMISSIONERS
IN QUEENSTOWN | TĀHUNA

UNDER THE	Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	The Priority Area Landscape Schedules Variation ("**Variation**") to the Queenstown Lakes District Council's ("**QLDC**") Proposed District Plan ("**PDP**")
AND IN THE MATTER OF	a submission and further submission by Cardrona Cattle Company Limited ("**CCCL**"), seeking among other things, removal of Victoria Flats from the Priority Area Landscape Schedules
BETWEEN	**CARDRONA CATTLE COMPANY LIMITED**
	Submitter & Further Submitter
AND	**THE HEARING PANEL**
	A Panel with delegated authority to hear submissions and make recommendations to QLDC

MEMORANDUM OF 6 SEPTEMBER 2023
ON BEHALF OF CARDRONA CATTLE COMPANY LIMITED

Hearing Panel: Chairperson Jane Taylor, Commissioner Peter Kensington and Councillor Quentin Smith.

INTRODUCTION

1. I am the project manager for CCCL in respect of various of is resource consent and planning matters relating to its land and interests at Victoria Flats. The Chairperson may recall that I made representations on behalf of CCCL in respect of its application for a storage facility on CCCL's land at Victoria Flats (RM 220327), in respect of which she sat as a commissioner on the Panel that granted the consent application.[1]

2. The Panel has issued a minute dated 30 August 2023, following a memorandum filed by Dr Cossens on 7 August 2023 that:

   (a) challenged 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"; and

   (b) sought that Councillor Smith recuse himself from the role of commissioner, or alternatively that the Chair of the Hearing Panel, ask Councillor Smith to resign from his role.

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[1] Decision dated 15 November 2022.

3. The Panel's minute sets out its preliminary view that no relevant issue of predetermination or conflict of interest arises, summarising that:

> … 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

4. The Panel has further invited, by **12pm 6 September 2023**:

> … 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.

5. The memorandum responds to the Panel's invitation on behalf of CCCL.

Apparent bias – principles

6. As identified by the Panel, in *Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1)*, the Supreme Court set out the test for when a decision will be tainted by apparent bias as follows:[2]

> The crucial question … is whether a fair-minded, impartial, and properly informed observer could reasonably have thought that the Judge might have been unconsciously biased.

7. This test has two main steps:[3]

   (a) first, identifying what it is said might have led the Panel to decide the application other than on its merits; and

   (a) second, establishing the logical connection between that matter and the feared deviation from the course of deciding the application on its merits.

8. A perception of a lack of impartiality can arise from a range of circumstances and the courts have recognised that it is neither possible nor desirable to seek to create a complete list of disqualifiers. In *Muir v Commissioner of Inland Revenue*, however, Hammond J observed that for there to be no apparent bias :[4]

> … there should not reasonably be room for a perception that the Judge will decide the case on anything but the evidence in front of him or her.

9. Even a perception of bias may be sufficient to damage the credibility of a hearing, a decision or a hearings committee. For example, in *Barefoot v Auckland City Council* EnvC Auckland A160/06, 15 December 2006, the Environment Court held at [21]:

> We are not suggesting that actual bias was present in this case, but public perceptions of bias can only decrease public confidence in the Council's decisions, and increase the prospects of appeals to this Court.

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2 *Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1)* [2009] NZSC 72, [2010] 1 NZLR 35 (***Saxmere***) at [37] per Tipping J.

3 *Saxmere* at [4] per Blanchard J.

4 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA) at [64]

10. As summarised in the "Making Good Decisions" materials (referred to by the Panel, but not quoted from):

> There should be no possibility or even perception that anyone hearing and deciding an issue is biased.

11. The Chair's Re-certification Course Book as part of the extended Making Good Decisions programme also says this:

> Perception of bias is the important issue. If there is any public perception that you have a pre-stated view or opinion that may be relevant to the matter at issue – whether or not you are going to be able to set your beliefs aside – then you should stand down.

12. In terms of best practice, therefore, that requires erring on the side of caution. To put it more colloquially: "if there is any doubt, then a Panel member should step aside".

13. CCCL is also concerned that the Panel does not consider its role and function to be "quasi-judicial" (refer paras [19(a)] and [19(d)]), apparently on the basis that it has only been tasked with making a recommendation to Council (rather than a decision). This is not considered to be correct, given that the Panel bears all the other hallmarks of a quasi-judicial decision, including:

    (a) the decision-maker being a panel appointed to make a decision (even if just a recommendation) (as opposed to it being a permanently constituted Court, and therefore being a judicial decision);

    (b) the need to apply a legal framework, established under the RMA and the relevant planning instruments under it (rather than operating under a wider statutory powers);

    (c) operating under a level of formality (as evidenced memoranda and minutes issued to date) that has the hallmarks of a judicial process; and

    (d) in practice, its recommendations being adopted by the Council, with little or no amendment (noting the limitations in the amendments able to be made by the Council itself, given it has not heard the submissions or evidence), with the reasons usually being those given by such a panel in its recommendations.

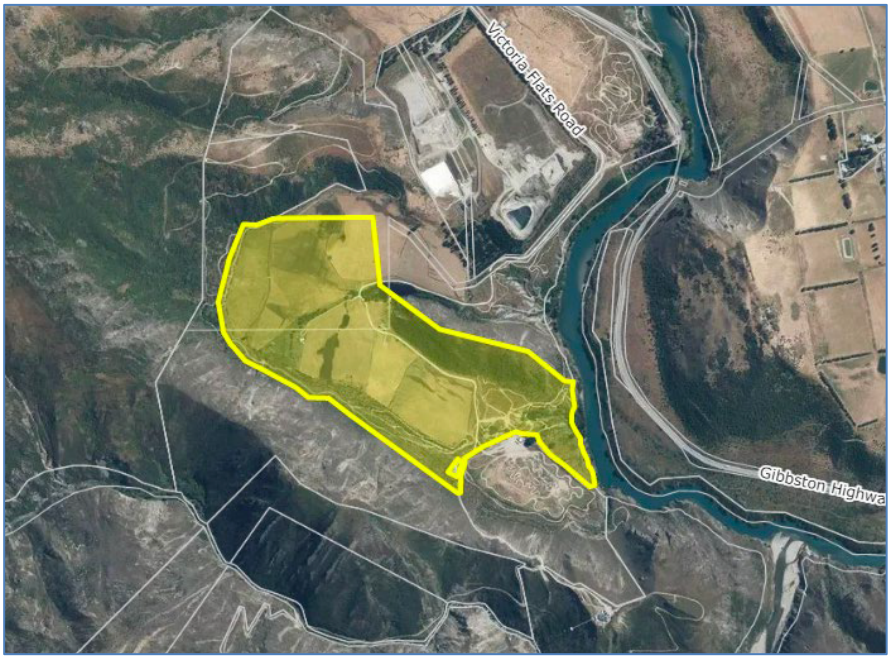
14. In short, the Panel is a quasi-judicial body, and the applicable legal standards governing bias are the same for the Panel as those that apply to judicial bodies, rather than those that apply to administrative bodies.

15. Against this framework, while CCCL tends to support the more general concerns that Dr Cossens has raised in respect of Councillor Smith's apparent bias, CCCL has some specific additional concerns that it considers 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 QLDC's own (late) submission (which CCCL further submitted on).

16. The context that leads to this conclusion is summarised below.

CCCL and its interests

17. CCCL's owns land at Victoria Flats. That land is zoned predominantly Gibbston Character Zone ("**GCZ**"), with some fringe areas of the site located in the Rural Zone under the Proposed Queenstown Lakes District Plan ("**PDP**"). Its location is shown in yellow in the plan below:



18. CCCL has two PDP appeals in respect of its land. The first seeks as its preferred relief to rezone the land to Rural with a sub zone overlaid the land that provides for a *'Yard and Service Sub Zone'* focused on low intensity industrial and service activities intended to retain the rural character of the wider landscape. This would also facilitate a (the original relief was for General Industrial and Service Zoning). This appeal is awaiting a hearing date before the Environment Court. The second appeal, which is on hold, seeks in the alternative to rezone the site Rural Visitor Zone.

19. CCCL's main shareholder and champion for the outcomes that CCCL is seeking is Mr David Henderson, usually known as Dave. Regrettably, Mr Henderson and Councillor Smith have had what could be described as a significant falling out, arising in particular from interactions in the advancement of CCCL's primary appeal. They are publicly known and reported on.[5] They have led to Mr Henderson putting Councillor Smith on notice as to an intention to bring a claim for defamation against him, and Council Smith in return raising the threat of a counterclaim.

20. One of the communications from Councillor Smith to Mr Henderson was as follows:

> Don't bother calling next week. You have well and truly burnt this bridge. Thanks Quentin

21. This was in the context of Councillor Smith having previously invited Mr Henderson to call him about the CCCL PDP appeal. Mr Henderson is

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5 Eg, see https://www.scene.co.nz/queenstown-news/council/ugly-plan-spat/.

rightfully concerned about someone that he has been told he has "burnt his bridges with" sitting in judgment on CCCL's submission.

22. In these circumstances, it is therefore untenable for Councillor Smith to take 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 QLDC's own (late) submission (which CCCL further submitted on). Put simply:

    (a) using the *Muir* test, there is reasonably room for a perception that Councillor Smith might decide CCCL's submissions on matters going beyond the evidence that will be put in front of the Panel;

    (b) applying *Saxmere*, a fair-minded, impartial, and properly informed observer could reasonably think that Commissioner Smith might be unconsciously biased against CCCL; and

    (c) the *Making Good Decisions* approach requires Councillor Smith to recuse himself from CCCL's matters to avoid a possibility or even perception that he may be biased.

23. While CCCL only seeks relief in respect of its own submission and further submission, it observes that with:

    (a) his recusal from CCCL's matters;

    (b) his recusal from the Trails Upper Clutha Tracks Trust matters; and

    (c) the general concerns raised by Mr Cossens;

    then he may be better to stand aside generally and avoid any taint of the Panel's recommendatory decisions.

24. Finally, I observe that other submitters, such as Gibbston Valley Station and The Station at Waiteri Ltd, have sought similar relief or interests to CCCL to exclude land that is in the Gibbston Character Zone from being within the Priority Area Landscape Schedules. There is a real risk, if the Panel's recommendation were to be to refuse that relief, that those submitters would question whether the recommendation on their relief had been refused because of the issues between Councillor Smith and Mr Henderson. In other words, that those other, innocent, submitters had been caught up in the falling out.

6 September 2023
James Gardner-Hopkins
Project Manager