BEFORE HEARING COMMISSIONERS
IN QUEENSTOWN | TĀHUNA ROHE

UNDER THE	Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	the proposed "Inclusionary Housing" Variation to Queenstown Lakes District Council's Proposed District Plan
AND IN THE MATTER OF	submissions on the Variation
BETWEEN	**GLENPANEL DEVELOPMENTS LIMITED** ("**GDL**")
	Submitter
AND	**QUEENSTOWN LAKES DISTRICT COUNCIL**
	Planning authority

MEMORANDUM ON BEHALF OF GDL: RECUSAL REQUEST

Before a Hearing Panel: Jan Caunter (Chair),
Jane Taylor, Ken Fletcher and Lee Beattie

Introduction

1. As the Panel is aware, I am project managing various matters for submitters, including GDL. I appeared for GDL on 5 March 2024, principally to introduce the evidence of Mr Oliver, a tax expert retained by GDL for these proceedings.

2. During the course of Mr Oliver giving his evidence to the Panel, Commissioner Fletcher explained that he had made his own independent inquiries of Statistics New Zealand as to how they categorise local authority development and financial contributions. He explained that he had been advised that they were an unrequited capital transfer, not a tax. The Panel requested that Mr Oliver make his own enquiries of Statistics NZ

3. On reflection, and reporting events back to GDL, Mr Fletcher's investigation is considered to be quite extraordinary, and improper. The Panel's task is a quasi-judicial one, with its decision to be made on the basis of the evidence put before it. It is quite unusual for a Panel member to embark

on their own investigations, and then use those investigations as a basis for interrogating a witness.

4. GDL is concerned that Commissioner Fletcher has "entered the fray" in a way that, regrettably, raises a question of apparent bias. This memorandum raised this matter for the Panel's consideration.

Apparent bias – principles

5. 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:[1]

> 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.

6. This test has two main steps:[2]

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

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

7. 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:[3]

> … 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.

8. 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

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1 *Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1)* [2009] NZSC 72, [2010] 1 NZLR 35 (***Saxmere***) at [37] per Tipping J.
2 *Saxmere* at [4] per Blanchard J.
3 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA) at [64]

> Council's decisions, and increase the prospects of appeals to this Court.

9. As summarised in the "Making Good Decisions" materials:

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

10. 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.

11. 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".

Application to the facts

12. It is a fundamental requirement of natural justice that decisions be made on evidence properly called through the hearing process. The "rule" is most starkly evident in criminal trials, where the Law Commission has stated (emphasis added):[4]

> We therefore recommend that jurors should be reminded during the trial that **undertaking their own research is contempt** (or an offence is our recommended statutory offence is adopted) and punishable by fine or imprisonment. Jurors should receive these directions when they take their oath or affirmation and should be reminded of them throughout the trial. We recommend more comprehensive and consistent directions that provide jurors with a clear explanation of why their decision must be based only on the evidence presented in Court and **the risks if they undertake their own research**. This recommendation, together with our other recommendations, if implemented, should reduce the prospect of jurors being discharged, trials abandoned and prosecutions for the new offence. These outcomes would also avoid significant costs for the state and the parties involved, including the jurors.

13. While life and liberty may not be at issue in these proceedings, property rights are, and it is essential to ensure the appearance of a fair process.

14. Using another example that may be "closer to home", is the caution that is frequently sounded when a decision-maker "takes a view" – the decision maker should not use that as a means of obtaining evidence, but only to

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[4] Law Commission Reforming the Law of Contempt of Court: A Modern Statute (NZLC R140, 2017) at [4.52].

put the evidence received in context. For example, refer the High Court's observations in *Shearing v Southland District Council*:[5]

> The work of the Environment Court makes taking a view desirable in many if not most cases. When the purpose of taking a view is limited solely to better understanding the evidence that had been taken in Court, which is also normally the substantial purpose, there is less risk of a breach of natural justice. But where the view is relied upon to obtain evidence or to contradict or reject evidence given in Court, great care must be taken to ensure that the process is fair.

15. To his credit, Commissioner Fletcher's admission in open hearing of his investigations, coupled with the Panel providing GDL with an opportunity to makes its own enquiries of Statistics NZ goes some way to resolving the natural justice issue.

16. However, Commissioner Fletcher's enthusiasm in undertaking his own research does raise the question of whether he has a particular agenda or position to promote, and may have the appearance of approaching matters without a fully open mind.

17. These sorts of issues were raised in *CK & S Ltd v Talbot 2002 Underwriting Capital Ltd*, CIV-2004-404-006957, 20 May 2009. In that case, the Court records at [7]-[8]:

> … I advised counsel in open Court of certain steps I had taken during the intervening weekend. Those steps are said to be that on my "own charts at home" I "had plotted the course of the vessel and the cyclone (the latter being not in evidence); and that as a result, it appeared [to me] that CKS's/Talbot's case may well have a fundamental causation flaw". The first defendant then submits that such action if carried out by a jury would plainly amount to juror misconduct. It is said that the conduct described would be sufficient by itself to require recusal and a new trial.
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> I have no difficulty with the legal principles the first defendant has outlined in its memorandum in support of this ground for recusal. However, the facts relied upon by the first defendant are wrong and are at odds with what actually occurred.

18. Later, the Court records at [23]-[24]:

> I referred counsel to the book I had read on marine diesel engines that referred to how the seals worked in principle, at a time when I had already heard conflicting evidence from the first defendant's witnesses (Dr Gregory and Mr Wood) on this topic. I happened to be reading my book on marine diesel engines for another purpose and came upon a reference to a type of seal like that which was the subject of the proceedings. I considered that, in the interests of justice, it was important to establish how the seal was intended to work. I also considered that the experts of both parties had the necessary expertise to reach a view on the topic. The book I had on diesel engines, which

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5 CIV 2005-485-000694, 29 September, 14 November 2005.

> I made available to counsel for the parties, said nothing about what could cause these particular seals to fail.
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> Given the approach taken in rr 9.43–9.46 of the High Court Rules and Sch 4 in relation to the evidence of expert witnesses, I considered it was appropriate to intervene and attempt to have the issue of how the seals worked in principle resolved. It was the divergence in the evidence of the two expert witnesses of the first defendant (Dr Gregory and Mr Wood), rather than anything I had read, which caused me to adopt this approach. It follows that I do not consider my conduct in this regard to amount to conducting my own research outside the parameters of the evidence being led in court. This ground for recusal for apparent bias is not made out.

19. In contrast, there was no "countervailing" evidence rebutting the evidence of Mr Oliver. At best, Commissioner Fletcher could have noted the alleged omission in Mr Oliver's evidence (of not stating the Statistics NZ position), and asking if that could be clarified; rather than Commissioner Fletcher undertaking his own research, outside the parameters of evidence being led in the hearing.

20. It might be considered that Commissioner Fletcher has an "angle", centred around uplift in value, which might appear to suggest an apparent bias against developers. For example:

> **Shamubeel Eaqub**
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> Q: I want to take you back to the example. I know you've put this in the economist favourite phrase of ceteris paribus. All other things being equal. If we're moving through the progression from in rural countryside, the growth boundary to be zoned those residential be rezoned medium residential density environmental. And each of those stages, is there a value uplift or.
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> A: I believe there is. Yes.
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> Q: Yeah. That's what I wanted to hear
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> …
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> Q: It's almost in many ways the council's best interest to down zone these things. And then have a value capture process, like what van do back is to capture that value.
>
> A Yeah.
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> Q: So from an economic point of view, because then you could assign the values to the land owner, the land owners, to the values of the property and the values of the community, because you're only getting that gain through, for example, process because the community is giving it to you.
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> A: Yeah. Um, Commissioner, I think we need to have a beer. We're talking about value capture because, you know, the reality is the conversation on that is really big. So I did a bunch of work for Auckland Council in terms of value capture, and it never got anywhere because it's really difficult to do. I did a bunch of work

for the, uh, the Auckland light rail stuff in terms of value capture, and that's kind of in the proposals, but it's still quite difficult. Right. And so you're absolutely right. There is value uplift. But whether we have a mechanism for value capture that ties in those gains in, in a direct way in the planning framework, in these, uh, rating framework, all those other bits and pieces, I don't know. So my experience has been that while we have put up these ideas and ways that people can do it, the councils find it very difficult to write policy on the back of it.

Ms Baker Galloway

Q: Speaker7: When there was increased. Um density allowed and enabled and perhaps required um, in that case, or there is an expansion to the urban growth boundary. Under those circumstances, is it not fair that the or not fair might be the wrong word, but equitable that the Council is able to tap into the uplift that's been provided to direct it to affordable housing?

A: It's still tapping into a narrower part of the potential source for revenue and one that's not having the direct adverse effect, on the provision of affordable housing in the first place. So, I guess the the response that a lot of our witnesses have, is targeting the people who are part of the potential solution rather than the cause – and that goes back to the cause, the multiple causes of the solution.

Q. Is the habit of developers to never provide affordable housing a contributor to the problem?.

A: I don't think a lot of developers would agree with you, that they never provide affordable housing. You'd be talking to Mr. Stalker tomorrow about Shotover Country, which as well as the official contributions of land to the Housing Trust, the actual products which were originally built in that development, are at the affordable end of the spectrum and that's where you see a lot of families and workers living. I think it's not correct to characterise to make that statement.

Mr Ferguson

Q. So are you saying that going forward, there should not be an attempt to capture that planning uplift that the council has been providing effectively, whereas previously was done by developer initiation, but now it's the council's initiation. I think it's.

Mr Sergeant

Q: … the actions of the council are giving them a huge private benefit. And that's the question. That's the this whole financial contributions regime is trying to tap into. So they are getting a big, big private benefit. Um, having done absolutely nothing other than help to own the land. Um, and then there's this problem with affordable housing, which is flowing from that because the land is so valuable.

A: Um, I mean, I think, I think that that sort of the, the windfall gain, which I've described, the windfall.

Q: It's got a it's a planning uplift.

A: It's about. Yeah. It's about. Generally, I think you're describing about sort of being in the right place at the right time and therefore. You know, you're in a situation of of getting that benefit.

Q: Yes you are.

A: Um, but that's all. I mean, that is all a matter of timing and under under what's what's proposed here. I mean, it's not the case that all those people will, will be in that situation.

Mr Osbourne

Q: So you rezone it from rural to urban low density. Um, if you then rezone it upwards again to medium density, this is specifically within the Queenstown market. Yep. Is there an uplift at that point?

A: It is potentially more depends on the infrastructure requirements and all that sort of stuff. But you would only rezone it up, I imagine, as a developer if there's more in it for you.

Q: Okay. But we're talking about potentially the council doing the rezoning rather than the owner. So if the council rezones from low density to medium density. Globally across Queensland. Um, is there an up planning uplift.

A: Of if there's demand for it? Absolutely. Okay. We see a lot of stuff around the country where there's a zone that's much higher than what's realised because the market's not there.

Q: But we're talking about Queenstown here. Speaker4: Sure. Yeah. There's plenty of demand at the moment. Yeah. Speaker5: Likewise if you go to high density for another uplift. Yep yep. And if you can add anything more to that you've got a further additional advantage. Okay. Good. Okay. So the whole rationale of the variation is to try and tap into that uplift.

Mr Colgrave

Q: … So what's happened now is the council is coming along and saying we're expanding the residential boundaries. We're up zoning from rural to residential in some form. The landowner is still getting the benefit. The developer will get the benefit and the fourth person on the end will pay the price as usual. Okay. And the whole point of the variation is to try and capture that which they were able to capture beforehand through the negotiation process. Mm.

A: Um, but but the ambit of it has changed completely and I think so. On the one hand you can say we're just codifying existing practice. That's one way of characterizing it, but you're not actually really doing that.

Q: So my next question is if you if the variation can be constrained in some way to affect just that, those areas that are zoned in some respect, does that change the dynamic?

A: Um, yes. This does if if this was only levied on people who were experiencing a genuine windfall, then it would be different. Yeah.

Mr Giddens

Q: … do you accept that resorts, um, produce an indirect demand for affordable housing?

A: No, um, I don't I, I established the, um, plan framework for the Gibbston Valley Resort Zone as part of the PDP, which was essentially used as the, um, the framework for the other ones that came through it. And we traversed works, accommodation and affordable housing as a general discussion as part of the resort. And the Gibbston Valley Resort Zone is a good example. Um, because what you say is that there is an area for workers accommodation there. It's not limited to just workers in the Gibbston Valley.

Q: Setting aside that issue with your provider, not that that a resort will generate indirect demand for affordable housing through the patrons of the resort,

going into town, going to restaurants, going to whatever they do, taking, taking advantage of all the activities which are employing people on low to moderate incomes.

A: No, I haven't found I've looked through the council's evidence for that, and I can't find any evidence that that would lead me to that. If there is an indirect effect, it would be extremely small. Um, because again, resorts and you're talking about people leaving the resort and going out to, into town, um, resorts by design and which basically, um, they're supposed to be all inclusive with the facilities. Um, so you come there and you spend your time at the resort, um, the residential component to all the resorts is obviously a little bit different. We would expect people to leave the resort and, and go and explore the neighbourhoods and, and Arrowtown Queenstown like, um, but I think if there is any influence would be very, very small. Okay.

Q: Thank you. Okay. Okay.

Mr Jared Baronian

Q: When you bought it, you weren't expecting to be able to develop in the immediate short tum. Um, you were thinking you'd have to hold, period.

A: You know, when we buy a land, it's going to be at least 4 to 5 years. Best case before you can do anything.

Q: So you would affect it in the holding costs, the likely holding costs that you'd have to face before you could develop, before you in your purchasing decision.

A: You're relying on a lot of different assumptions when you purchase land, um, you know the cost. You know, there's there's heaps of assumptions and your feasibility model. You know, you just look at during the Covid area, the cost base is increased 20 to 30% in general. So there's all kinds of assumptions that you're modelling in cost base interest rates, you know. Yeah.

Q: So what I'm saying what I'm asking is the holding costs that you face, they're not unexpected.

A: But they're a real cost.

Q: I agree.

A: They are.

Q: But yeah you've factored them into your purchasing decision.

A: Yeah. Like you factor in all kinds of assumptions.

Q: Yes okay.

Q: And in terms of. Uplift. You said you said in your statement, I think that it's not real. I just want to tease that out a little bit because everyone else is saying yes there is uplift, is acknowledging this is an uplift. Um, when it's increased, urbanization is enabled.

A: So I guess, I mean, that it's not real in the context of if we had taken that capital and redeployed it in an alternative investment, we would have got a return on that. So you need the uplift, um, to return the return that you would have otherwise have got.

Q: Okay. So you're planning on that uplift when you purchase?

A: Um, uh, we're planning on obviously being able to sell for a certain price under a certain cost base and hopefully return a profit margin.

Q: Okay. And just to be clear, you're a developer. You're not a long time land holder.

A: We're a developer.

21. Individually, the questions might not be an issue.

22. But collectively, when taken with the enthusiasm of independent investigations, a fair-minded, impartial, and properly informed observer might start to consider that Commissioner Fletcher has a personal agenda or predetermined outcome that his questions are designed to assist with.

23. It could be taken, by such a person, for example, that Commissioner Fletcher has formed a view (or made a determination) that:

    (a) *if* there is an uplift; then

    (b) *it is* fair to take a financial contribution for social housing as proposed (which is quite different to asking *if it is* fair to take such a financial contribution).

24. It is also unknown what other undeclared investigations Commissioner Fletcher might have undertaken, behind the scenes.

Forward progress

25. GDL thought it would be remiss in not raising its concerns at this stage (and that it might be criticised later if it raised them after any substantive decision had been made).

26. Accordingly, GDL has requested this memorandum to be filed, for the Panel's attention. The formal request is for Commissioner Fletcher to be recused, for the reasons identified. Given the timing, however, GDL is content for the matter to be considered on the papers.

Project Manager
8 March 2024