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24 September 2020

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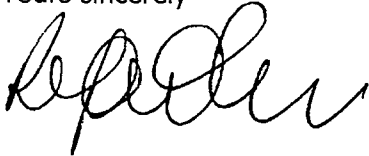
Dear Beth

**Wellington City Council: Shelly Bay: Councillor conflict vis-à-vis further voting on sale of Council land**

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1. I have been asked to provide a brief update on the advice I provided to Council in my letter dated 20 January 2020 on this matter.
2. I have not been made aware of any further factual matters affecting that advice. In the absence of any such fresh factual considerations I have recently reviewed that advice and there is nothing in it that I would amend.
3. In my paragraph 1.1 of that letter I posed the first issue on which I was providing advice as referable to "voting on the sale of Council land...". I have been asked whether it would make any difference if the issue was posed as referable to "voting on the key commercial terms of the sale of Council land....". It does not. My advice would remain exactly the same even if the issue posed in paragraph 1.1 of that letter was posed in those latter terms.

Yours sincerely



**Richard Fowler QC**

**RICHARD FOWLER**  
— QUEEN'S COUNSEL —

29 January 2020

Associate General Counsel  
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Dear

**Wellington City Council: Shelly Bay: Councillor conflict vis-à-vis further voting on sale of Council Land**

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1. I have been asked to undertake a review and to provide advice to Council about:
  - 1.1. Whether any of the current councillors have an actual or perceived disqualifying conflict with respect to voting on the sale of Council land or the development at Shelly Bay;
  - 1.2. Whether I consider there are any other issues in relation to the voting process that should be raised;
  - 1.3. Whether I have recommendations as to how the Council should manage any conflict or other issues.

**Executive Summary**

2. On account of the nature of the further decision for councillors together with the process that has been followed to this point, I do not consider that any members of Council (Mayor or councillors) have an actual or perceived disqualifying conflict that should prevent them from voting.
3. I do not consider there are any other issues apparent at this stage that require identification.
4. Although there is no legal necessity to do so (at least at this stage) I recommend that this advice should be made publicly available.

**The facts**

5. To describe the factual trail concerning the development of Shelly Bay as tortuous is almost certainly an understatement. To adequately describe even the formal decisions and the legal challenges would probably require several pages. I will therefore confine my factual narrative to the facts that are immediately relevant to the voting about which I have been asked.

6. In the previous triennium the developer obtained resource consent for a major mixed-use development at Shelly Bay<sup>1</sup>. Armed with the resource consent the developer approached Council with a view to purchasing and entering into a long term ground lease over land that was included within the resource consent<sup>2</sup>.
7. The position regarding how the proposed lease and sale arrangements triggered public consultation is not clear-cut. The report for the April 2017 Council meeting simply stated that consultation was required under the Council's Significance Policy.<sup>3</sup> However, there was no mention of anything relevant to this proposal in either the Long Term Plan or in the strategic asset list schedule which are the two routes that would automatically trigger a consultation requirement under the Significance Policy. Yet the Significance Policy at clauses 3.4 to 4.4 did provide for high significance decision-making and therefore use of the special consultative procedure outside of those two triggers, and the Local Government Act 2002 certainly permits that. It would seem from the April 2017 report proposing consultation that emphasis at that time was placed on the impact of the proposed lease and sale and subsequent development on rates income and maintenance of infrastructure works (including deferred maintenance liabilities) plus the employment and other costs benefits, and the numbers and metrics referred to were large.
8. After that April 2017 meeting Council accordingly resolved:
  - 8.1. To submit the proposal to public consultation; and
  - 8.2. Following that consultation, to proceed with the suggested sale with various conditions, one of which was that the Chief Executive and the Mayor were given delegated authority to finalise and execute the relevant agreements.
9. In 2018 the Court of Appeal set aside the decision granting the resource consent on the basis that there had been an error of law in the way that the original decision had been granted as to the interfacing of the Resource Management Act 1991 and the Housing Accords and Special Housing Areas Act 2013. The court also recommended that any fresh determination of the resource consent application should be made by independent commissioners.
10. On 11 July 2019 the Council Chief Executive advised that on account of the high level of public interest he did not intend to carry out any action under the delegation referred to in para 8.2 above, and that the issue of possible sale of Council's Shelly Bay land would be returned to Council for a further decision following the 2019 triennial elections.
11. In September 2019 shortly prior to the triennial elections, candidates were surveyed by Enterprise Miramar Incorporated. The survey included a question that if independent commissioners were to grant the resource consent, would the candidate support the decisions required to facilitate and implement the current proposed development such as the sale and lease of the Council land at Shelly Bay. Eight

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<sup>1</sup> This resource consent was granted by Council, not independent hearing commissioners.

<sup>2</sup> A significant portion of the land included within the resource consent was not owned or controlled by Council.

<sup>3</sup> The relevant "Significance and Engagement Policy" was that adopted on 15 October 2014. The current version (June 2018) is unchanged vis-à-vis application to this development.

successful candidates of the fifteen member Council (including the Mayor) that was subsequently elected answered that question affirmatively.

12. In addition the Mayor received a donation from Sir Peter Jackson towards his election campaign. Sir Peter Jackson is a known opponent of the proposed Shelly Bay development the subject of the resource consent, and he has made a number of media statements to that effect. The Mayor's election campaign was launched at Shelly Bay.
13. In late October 2019 and hard on the heels of the election result, the independent commissioners issued their decision granting resource consent.
14. It is now proposed to progress the return of the issue of possible sale of the Council owned land to the Council for determination as per the Chief Executive's initiative referred to in paragraph 10 above.

**First question: whether any of the current councillors have an actual or perceived disqualifying conflict with respect to voting on the sale of Council land or the development of Shelly Bay?**

15. In my view what is critical here is to identify the nature of the decision at issue as well as the process point that has been reached. It is necessary to analyse that in terms of the possible legal disqualifications from participation by members. That is because it is important to understand that not every Council decision can be impugned on the basis of a "conflict of interest", and that that term carries different meanings and consequences even within the categories of decisions that can come under scrutiny.
16. The first port of call here is the Local Authorities (Members' Interests) Act 1968 which is directed to pecuniary interests. Effectively that Act creates two categories of disqualification:
  - 16.1. under s.3 a state of incapability is created in law if a member has an interest in Council contracts that exceeds \$25,000 in any financial year. That is, if the member has such an interest he / she is legally incapable of being a member. There are a number of provisions that attempt to define or qualify interests through a company or a family member, etc.
  - 16.2. under s.6 a member is prohibited from voting on or taking part in a discussion in which he / she has "directly or indirectly, any pecuniary interest, other than an interest in common with the public". Unlike s.3 no monetary threshold applies, and legal disqualification requires a conviction first. Again, there are various definitions and qualifications that address interests held through spouses or companies, etc.
17. I do not consider that either s.3 or s.6 have any application here. The Mayor is the only member in respect of which there is even a mention of a pecuniary aspect. As to his position, an election donation is either exactly that – a donation given at the time, or at worst an unconditional pledge. It is not a contract (i.e. "I am providing you or pledging you \$x on the basis that once elected you are obliged to vote in a particular way"). Such corruption would be covered by other law.

18. That very distinction goes to the heart of the s.6 issue. The election donation is not a "pecuniary interest, other than an interest in common with the public" within the meaning of s.6. The Mayor's (personal) interest in whether or not the Council asset is sold is the same as the rest of the public. There is nothing wrong with Sir Peter Jackson or anyone else who has a preference for or against a possible sale of a Council asset donating to the campaign of the candidate most likely to favour their views, as long as those donations are made within the relevant rules. If it were otherwise, donations to campaigns would frequently stymie the ability of members to participate – not just on issues involving asset sales, but many other issues as well that may have been included in their election platforms. Further, any donor donates always assuming the risk that the candidate's eventual voting may deviate from or not reflect the candidate's election platform. If the candidate is not free to deviate it would not be a lawful donation as per the above mentioned distinction.
19. If the matter was the subject of doubt, it would be possible to seek the advice and ruling of the Auditor General pursuant to s.6(4) and (5). Having said that, in my view the position is clear-cut and that would be unnecessary.
20. However, the question here is not answered solely by reference to pecuniary interests under the Local Authorities (Members' Interest) Act.
21. There are other circumstances where a member can be held to have unlawfully participated in a Council deliberation or decision aside from where that member might have a disqualifying pecuniary interest under the Local Authorities (Members' Interests) Act. Such disqualifying factors can be other types of conflicts of interests (i.e. other than a pecuniary interest) or bias. However, for these types of disqualifications the nature of the decision and the process become critically important. In other words, much turns on the nature of the decision to be taken and the process that it tracks.
22. The legal framework for this can be seen as something of a continuum: at one end where the Council is taking a decision that is quasi-judicial in nature (e.g. determining a resource consent application) a strict adherence to natural justice principles requiring disqualification or recusal for linkages between a councillor potentially available for a hearing committee and one of the contesting parties or the subject matter would be expected. At the other end of the continuum, a decision involving an acknowledgement or a vote of thanks or a request for a report where such a linkage exists is unlikely to trigger disqualification. It is an interesting and sometimes challenging reality that local government decisions present a far more complex array and cross-current of legal obligations on decision makers than many other democratic institutions. The mere fact that a decision involves the sale of a Council asset does not, of itself, place that decision at a particular point along the continuum: it depends on the nature of the decision, such as whether consultation is required or involved.
23. Along that continuum decisions that involve consultation sit in something of a special place. Certainly the obligations that are subject to consultation procedures do not require anything like the degree of 'disqualification hygiene' as those participating in a quasi-judicial decision. It is therefore perfectly acceptable for councillors involved in a matter undergoing consultation to have formed views, even strong views, as long as they are not conclusive. On the other hand there are some restraints. The leading authority is *Wellington International Airport v Air New Zealand* [1993] 1NZLR 671 (CA) which articulated the requirement that the decision-maker should not have a 'closed mind' during the consultation process. Thus it is not really elimination of a

conflict of interest as such, but more a requirement akin to, but not the same as, elimination of bias. No further higher authority has developed the concept and one would expect a fair degree of pragmatism to apply in this field where many consultations require a proposal in the first place that someone has had to initiate and seek to justify.

24. Turning to the decision at issue here, two things are apparent:
  - 24.1. While the decision to sell this asset did not trigger either of the two 'automatic' categories that required consultation under s.83 of the Local Government Act 2002, it comfortably qualified as warranting consultation as a matter of choice by Council under the Significance Policy<sup>4</sup>;
  - 24.2. Any unqualified affirmative or negative answer to the question posed by Enterprise Miramar Inc to the 2019 election candidates would indicate a closed mind. The question specifically refers to implementing "the current proposed development, such as the sale and lease of the WCC land at Shelly Bay".
25. However, the consultation process has been and gone. It is simply the final decision to sell that is being re-run. There is no legal impediment to the decision-makers, having considered all the material including the reports on the completed consultation, now forming firm and even concluded views if they choose to do so.
26. It therefore seems to me that there is no reason why any of the Mayor or councillors cannot fully participate in the decision that the Chief Executive intends to return to the members of Council as to whether the Council owned land at Shelly Bay should be sold to the developer.

### **Two further observations**

27. There are two further observations I wish to make at this point.
28. Firstly, I am conscious that the consultation occurred during the previous triennium involving a different membership of Council. Lest it might be raised, I would reject any suggestion that fresh consultation is required on that account. There is nothing in the legislation or in any authority that suggests that the decision making procedure involving consultation cannot straddle a triennial election. Whilst those discharging the consultation obligation must not have closed minds, the process contributes to and feeds into a Council corporate decision process, and it is the integrity of that process that is at issue. To pose the point another way, I see no reason why a new incoming councillor cannot consider the outcome of the pre-election consultation in order to then form a concluded view.
29. That then raises my second observation, which relates to the minds of council members at the time of the historic consultation that did occur. I should record that in the material I have reviewed I have not sighted any statement by a member of Council made prior to that consultation process that would have indicated a disqualifying closed mind such that that member ought not to have participated in consultation. But of course any such review has its limits. One cannot be completely sure that every media search has captured every utterance or whether there may

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<sup>4</sup> See para 7 and footnote 3 above.

have been utterances not captured in the media at all. But even if such a disqualifying statement were to be identified, I very much doubt that any court would impugn that historical consultation and consequently halt the Chief Executive's initiative. Unless the consultation process could be shown to have been deeply flawed on a widespread basis (i.e. more than just one or two councillors having manifested closed minds) then in my view the court would exercise the judicial review discretion against any challenge.

30. I now turn to the second issue I have been asked to consider.

**Second question: whether I consider there are any other issues in relation to the voting process that should be raised?**

31. I do not consider there are any other issues in relation to the voting process arising from this that I should draw to your attention.

**Third question: whether I have recommendations as to how the Council should manage any conflict or other issues?**

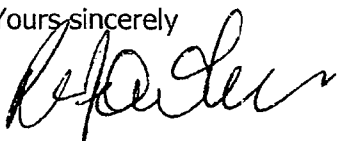
32. As will be apparent from the above, I have reached the view that there is no legal impediment to any of the Mayor or councillors participating in the fresh deliberation and decision-making now envisaged by the Chief Executive.

33. As is well known, in the first instance the most Council officers can do in this type of situation is to provide advice to members of Council on voting disqualification issues. Each member is free to obtain his or her own independent advice, and that may differ from officers' advice. And it is even open to individual members to take independent advice as to whether other members are disqualified or ought to be disqualified, regardless of Council officers' advice. But in the absence of a pre-emptive injunction or declaration, an individual member may insist on participating and the consequential option for other members or outside entities is to then seek to impugn that decision on the basis of such participation.

34. It is not difficult to predict that a number of parties will have an intense interest in the question of who can participate or who ought not to be participating in the foreshadowed deliberation and decision at issue here. It is possible, even if the likelihood is low, that there are some further facts unknown to Council officers or to me that would cause this advice to be reviewed or raise the possibility of pre-emptive steps being taken.

35. Therefore, although there is no legal requirement to do so, I would recommend that my advice (and any other supporting material senior Council officers deem appropriate) should be made publicly available.

Yours sincerely



**Richard Fowler QC**