

25. OUTSIDE APPOINTMENTS - CONFLICT OF INTEREST

General Manager responsible:	General Manager Regulation and Democracy Services, DDI 941-8462
Officer responsible:	General Manager Regulation and Democracy Services
Author:	Peter Mitchell

PURPOSE OF REPORT

1. The purpose of this report is to advise Councillors regarding the conflict of interest issues that can arise with Councillors being appointees to outside bodies and to recommend that the Council ask the new Council to cease, with some exceptions, making appointments to outside bodies.

STAFF RECOMMENDATION

It is recommended that the Council:

- (a) Recommend to the next Council that it not make appointments to outside organisations, except to organisations making a significant contribution to the finances or development of the City.
- (b) Recommend to the next Council that it alter the 2007 Policy on Appointment and Remuneration of Directors by deleting paragraph 83 and substituting the following paragraph:

83. Appointments to COs will only be made to organisations that make a significant contribution to the finances or development of the city
- (c) Advise the Riccarton Bush Trust that it wishes the Riccarton Trust Bill to be altered so that the Council has the right to appoint four persons, and the two community boards can appoint two persons each.

BACKGROUND (THE ISSUES)

2. From time to time questions arise at a Council meeting regarding the involvement of a Councillor in debating and voting on a matter. These questions do not raise questions of any pecuniary interest but do raise issues of a non pecuniary interest, also known as a conflict of interest.
3. When these conflict of interest issues arise there is often discussion as to the need for Councillors to withdraw. The Chief Executive has previously indicated to the Council that there would be a report back to the Council on the issue of Councillors being members of outside bodies, the potential for conflicts of interest as a result of such appointments and how those can be managed going forward. This is the report referred to by the Chief Executive.
4. By way of background **Attachment A** is a list of the current appointments of Councillors the Council has chosen to make in this term. Councillors may also be members of other organisations, either as a member on an Executive or Committee, in their own right.
5. Some organisations, when they write their constitution, provide for a member of the Executive or Management Committee of the organisation to be appointed by the Council and then ask the Council to make that appointment. That in no way compels the Council to do so but Council has done so on a number of occasions over the years. Except for its 2007 Policy on Appointment and Remuneration of Directors (see below), there are no written criteria as to when the Council will or will not make an appointment to an outside organisation.

AUDITOR GENERAL REPORTS

6. In 2007 the Auditor General issued two reports which are relevant to this report. Those reports are:
 - Managing Conflicts of Interest; Guidance for public entities.
 - Guidance for members of local authorities about the law on conflicts of interest.
7. What follows is a summation of general information from those two reports and information specific in the context of appointments to outside organisations and how those appointments may lead to conflicts of interest for Councillors involved.
8. Councillors will be aware that the Local Authorities (Members' Interests) Act 1968 provides a statutory framework for when they may not take part in discussions in which they have a **pecuniary** interest. While the 1968 Act does not regulate non pecuniary interests (or conflicts of interest) the common law, the law as developed by the Courts in individual cases over the years, does provide a framework as to when Councillors should and should not be involved in discussion on a particular matter before the Council. This report considers those occasions where there may be a conflict of interest in relation to being an appointee by the Council to an outside body.

What is a Conflict of Interest?

9. The Auditor General has said:
 - *A conflict of interest exists where two different interests intersect; in other words, where your responsibilities as a (Councillor) could be affected by some other separate interest or duty that you may have in relation to a particular matter.*
 - *That other interest or duty might exist because of:*
 - *your own financial affairs.*
 - *a relationship or role that you have.*
 - *something you have said or done.*

10. The separate interests or duties referred to by the Auditor-General can arise because all Councillors, when coming into office after an election, sign the declaration required by the Local Government Act 2002 which says:

*"I will faithfully and impartially, and according to the best of my skill and judgment, execute and perform, **in the best interests of Christchurch City**, the powers, authorities, and duties vested in, or imposed upon me as Mayor/member of the Christchurch City Council ..."*

11. The words in bold establish the duty the Councillor then owes to the Council.
12. When Councillors are appointed by the Council as directors of a statutory body, a company or as a trustee (or are a director or a trustee in their own right) other legislation relevant to that appointment can create a separate duty on the Councillor to that statutory body, company or trust. The creation of those separate duties can be seen in legislation as follows:

*".....a director of a company, when exercising powers or performing duties, must act in good faith and **in what the director believes to be the best interest of the company**"*

(Section 131 Companies Act 1993)

13. A trustee has a duty to:

*"...exercise the powers of a **trustee in the best interests of all present and future beneficiaries of the trust.**"*

(Section 13F Trustee Act 1956)

14. In his reports the Auditor-General goes onto say:

"The common law requires that public decision-making be procedurally fair. In particular, conflicts of interest are usually dealt with under the rule about bias.

The law about bias exists to ensure that people with the power to make decisions affecting the rights and obligations of others carry out their duties fairly and free from bias.

It is summed up in the saying "no one may be judge in their own cause".

15. He says the current judicial expression of the test for bias is:

"Is there a real danger of bias on the part of a member of the decision making body, in the sense that they might unfairly regard with a favour (or disfavour) the case of a party to the issue under consideration?"

16. Another way of expressing the issue is:

- *Would a reasonable, informed observer think that your impartiality **might** have been affected?*

OR

- *Is there a real danger of bias on the part of a (Councillor), in the sense that he or she **might** unfairly regard with favor (or disfavor) the case of a party to the issue under consideration?*

17. If a person challenges a local authority's decision by way of judicial review proceedings, the courts could invalidate the decision because of bias arising from a conflict of interest on the part of a member of the decision-making body.

18. The law about bias does not put a Councillor at risk of personal liability. Instead, the validity of the Council's decision could be at risk.

19. It is the appearance of bias, not proof of actual bias, that is important. Whether or not a Councillor believe they are not biased is irrelevant.
20. If a Council's decision is tainted by bias then the Courts may declare the decision invalid and the risks, delay and expense in the Council then defending a decision against a legal challenge can be significant. Further a party who made a financial commitment in reliance on a Council decision which is subsequently held by a Court to be invalid because of bias, for example, a decision by a party to enter into a lease, can sue the Council to recover the loss they will suffer because they cannot rely on the decision to grant the lease.

Managing Conflicts of Interest

21. Regarding managing potential conflicts the Auditor-General has said:
 - *The management of conflicts of interest also involves appearances - what an outside observer might reasonably perceive. Most often, what needs to be managed (and be seen to be managed) is the risk of the adverse public perception that could arise from the overlapping interests.*
 - *Sometimes there may be a perception of conflict of interest but the interest comes close but do not actually overlap. It may still be necessary to take some steps to manage these situations. Not taking steps to manage these risks can undermine an entity's reputation.*
22. He goes on to note that judgement will need to be exercised as to whether or not a conflict exists. There are two aspects of dealing with a particular situation:
 - firstly, identify and disclose any conflict of interest.
 - secondly, deciding what action needs to be taken to avoid or mitigate the effects of that conflict of interest.
23. He says there is an obligation on a Councillor with a conflict of interest to identify and disclose to relevant people in a timely and effective manner. He notes there is scope for a range of options and exercise of judgment. The Council needs to carefully assess the seriousness of the conflict and the range of possible mitigation options.
24. He notes that the assessment is about:
 - (a) the seriousness of the connection between the interests;
 - (b) the risk that the Council's capacity to make decisions lawfully and fairly may be compromised; and
 - (c) the risk that the Council's reputation may be damaged.
25. In making this assessment the Council needs to consider how the situation may reasonably appear to an outside observer.
26. Usually mitigation of a conflict of interest means that the Councillor withdraws or is excluded from being involved in any of the Council's work on that particular matter.
27. He notes that every member of a public entity (such as a Councillor) has a number of professional and personal interests in roles, and that occasionally some of those interests or roles may overlap. This is almost inevitable in a small country like New Zealand where communities and organisations are often close knit and people have many different connections. Conflicts of interest sometimes cannot be avoided and can arise without anyone being at fault. They are a fact of life but they need to be managed carefully.

Membership of other organisations

28. Regarding membership of other organisations he notes a conflict of interest can arise in a wide range of circumstances.

29. For example the Councillor's other interest could be:

- Holding another public office.
- Being a member of a club, society or association.
- Having a professional or legal obligation for someone else (such as being a trustee).
- Being a director of another organisation.

30. He says:

“A conflict of interest may exist if you have a close relationship with a person or organisation involved in or affected by the matter before the local authority; for example, if the matter involves ...an organisation to which you belong, ..”

31. Such a connection could affect how other people view your impartiality.

32. In deciding whether to participate, you should consider:

- The extent of your personal links or involvement with the other group; and
- The degree to which the matter under discussion directly affects that group.

33. However, remember that, in politics, the merest perception of impropriety can be extremely damaging, whether or not a court would find your actions to be lawful.

34. If you have any relationship with a person or organisation involved in a matter, you should seriously consider the wisdom of whether to participate at all. The safest advice is always “if in doubt, stay out”.

35. We consider that it is unwise to participate in consideration of a matter before the (Council) involving or affecting a club or similar organisation if:

- You are an executive officeholder or trustee, or are otherwise strongly publicly identified with the club; or
- The matter specifically and significantly involves or affects the club – such as a proposed grant of money to the club, or something else directly affecting the club’s finances or property.

Appointment by Council as Council representative to another organisation

36. Regarding being appointed as a Council representative on another organisation such as statutory bodies (e.g. Canterbury Museum Trust Board, Riccarton Bush Trustees), companies (e.g. CCHL) or trusts or incorporated societies.

he said:

“That role will not usually prevent you from participating in (Council) matters concerning the organisation – especially if the role gives you specialised knowledge that would be valuable to contribute.

However, you should not participate in a matter that raises a conflict between your duty as a member of the (Council) and your duty to act in the interests of the other organisation.”

37. An example may be if the council is considering a change in the mode of delivery of one of its services that could affect the financial position of a council controlled organisation, or where the authority is making a decision about funding the other organisation.

38. It will also be unwise to participate if your involvement with the other organisation raises a risk of predetermination – for example, if the other organisation has made a formal submission to the authority as part of a public submissions process.

39. Regarding the scenario of membership of another public body where the appointment has not been made by the Council then the Auditor General comments:

"Membership of some other public body

If you have been appointed or elected to the governing body of some other public entity unconnected with your position on the local authority (such as a district health board), you will need to consider potential conflicts of interest on a case by- case basis. You should consider whether your ability to consider a matter before the local authority with an open mind could be affected by:

- *your legal duty to act in the interests of the other body;*
- *any involvement you may have had in the matter through the other body; or*
- *the degree to which the other body is affected by or interested in the local authority's decision on the matter.*

We consider that it will often be wise to not participate.

Other personal involvement with an organisation

Even if you are not formally associated with an organisation affected by a matter before the local authority, it may be unwise to participate if you have a close personal involvement with the organisation – for example, if you have helped the organisation prepare its application to the authority, or have been paid to do so in a professional capacity."

Council Policy on Appointments

40. The only Council policy which touches on the matter of the Council making appointments to outside organisations is the Council's September 2007 Policy on Appointment and Remuneration of Directors. That policy, which is required by the Local Government Act 2002, sets out an objective and transparent process for the appointment and remuneration of Directors to a Council organisation. A Council organisation is defined in the Policy as an organisation in which the Council has a voting interest or the right to appoint a Director, Trustee or Manager. So this is a very wide definition which covers the outside appointments that the Council currently makes.
41. While most of the 2007 Policy refers to appointments of directors to Council Controlled Organisations the Policy contains the following provision regarding appointment of persons to Council Organisations ('COs'). Those provisions in the 2007 policy provide:
- "82. *The Council has non-controlling interests in numerous COs. These are not-for-profit bodies and, in contrast with CCTOs, Christchurch City Holdings Ltd has no involvement in monitoring or the director/trustee appointment process.*
83. *Appointments to COs are made for a number of reasons. These include:*
- (a) To provide a means of monitoring where the Council has made a grant to that body.*
(b) To enable Council involvement where the CO's activity is relevant to the Council.
(c) To satisfy a request from the CO that the Council appoint a representative.
(d) Statutory requirements.
84. *Appointments to a CO are generally for a three year term, and are made after the triennial Council elections.*
85. *The Council will endeavour to minimise the number of appointments where the benefit to the Council of such an appointment is minimal. Identification of required skills, knowledge and experience of CO directors, and appointment.*

86. *The range of reasons for the appointment of Council representatives to COs results in a wider range of desired attributes for appointees to these bodies.*
87. *The Council will determine the required skills, knowledge and experience for each appointment. Candidates are not restricted to Councils – in some cases, it may be more appropriate to appoint Council staff or external people with affiliations to the Council.*

Remuneration of CO directors

88. *CO directors appointed by the Council (or Community Boards) will receive the remuneration (if any), offered by that body. Council staff members appointed to such bodies will not accept any remuneration."*
42. It will be appreciated from the discussion above regarding the Auditor General's comments that conflicts of interest are inevitable when Councillors are appointed to, or are members, of outside bodies.
43. There will be situations where there is a clear conflict between their duty to the Council as a Councillor, and their duty to the other organisation as a director or trustee.
44. The Auditor General notes it is important for the Council to be able to effectively manage these conflicts. He noted that there was scope for a range of options with the exercise of judgement and with a range of possible mitigation options. There can be a risk that the Councils capacity to make lawful decisions fairly can be compromised and that the Council reputation can be damaged. He also noted that usually mitigation meant that the Councillor withdrew or was excluded from being involved in any of the Councils work on a particular matter.
45. His advice can be best summed up by his comments:
- "you should not participate in a matter that raises a conflict between your duty as a member of the (Council) and your duty to act in the interests of the other organisation.*
-remember that, in politics, the merest perception of impropriety can be extremely damaging, whether or not a court would find your actions to be lawful.*
- If you have any relationship with a person or organisation involved in a matter, you should seriously consider the wisdom of whether to participate at all. The safest advice is always "if in doubt, stay out".*
46. As Councillors will be aware from past experiences these questions can often arise suddenly during the course of a debate and often Councillors are inclined to withdraw from a discussion on a particular item to avoid any concern around potential conflict of interest.
47. Councillors are elected to act on behalf of the people of Christchurch. Given the practical experience of the number of occasions (and which will be ongoing) where Councillors have properly chosen to withdraw from a matter before the Council, and where that withdrawal is in accordance with the Auditor General's advice "*if in doubt, stay out*" the question needs to be asked, when a Councillor has in the past been appointed by the Council to an outside organisation, as to the real value to the Council itself of making such appointments if that appointment is going to result in a Councillor, or a number of Councillors at the same time, not being able to participate in a matter at the Council table.
48. As noted earlier in this report the Council's Policy on Appointment and Remuneration of Directors stated that there are a number of reasons for making such appointments to outside bodies. These include:
- (a) To provide a means of monitoring where the Council has made a grant to a body.
 - (b) To enable Council involvement where the organisations activity is relevant to the Council.
 - (c) To satisfy a request from the organisation that Council appoints a representative.
 - (d) Statutory requirements.

49. Given the experience Councillors have had the question needs to be asked whether a) to c) are now of sufficient value to the Council to continue the current practice of such appointments today. There are high expectations from the public regarding the Council being able to manage any conflict of interest and given the inclination, in the case of any potential conflict, of the Councillor withdrawing if its doubtful whether it is considered that the value to the Council of having a Councillor being able to continue to discuss and vote on items before the Council outweighs any of the reason provided for in (a) to (c) above.
50. Regarding reason (a) with the appointment as a means of monitoring where the Council has made a grant to the body, the processes the Council has now put in place since 2005 can provide that reassurance to the Council that any grants it has made are being effectively spent. It is not considered that there should be a need to appoint a Councillor to act in that monitoring role on behalf of the Council. The funding arrangements entered into by the Council establish separate monitoring processes to provide the accountability the Council seeks when making a grant.
51. Regarding reason (b) enabling Councillor involvement where the organisation's activity is relevant to the Council could be seen today to be of lesser value than having the Councillor being able to take part in discussions regarding that organisation at the Council table.
52. Regarding reason (c) simply satisfying a request from an organisation for a Councillor, while understandable, should not be a reason for the Council making an appointment which then results in a Councillor being unable to take part in a discussion and decision regarding that organisation at the Council table.
53. Over the last 20 years the Council has reduced the number of appointments it has made to outside organisations and experience in time has shown that that has not lessened the contact the Council has with those organisations which no longer have a Councillor representative. As can be seen from the table attached there are a number of organisations which do not have a Councillor and there has been no feedback from such organisations that the appointees are of any less value to them than if a Councillor had been appointed. It can just the opposite. If a Councillor is an appointee that now invariably has the effect of that Councillor not discussing or voting on issues important to the organisation. If the Councillor was not an appointee there would be no conflict arising to stop the Councillor's involvement in a matter.
54. Regarding reason (d) and the reason of statutory appointments these are of little number today with the Canterbury Museum Trust Board and Riccarton Bush Trust being the significant requirements. The Museum's 1993 legislation, while providing for 4 appointees by this Council, does not require those appointees to be Councillors, and the Museum currently has non – councillors appointed by territorial authorities.
55. As the Riccarton Bush Bill is currently drafted, and as approved by the Council in June last year, the Bill requires the appointment of two Councillors and two community boards to appoint two community board members each. Councillors have previously indicated that following their decision on this report they would advise the Riccarton Bush Trust as to whether they wish the appointment of Councillors to be mandatory to that Trust, or whether the Council has the discretion to appoint any person to the Trust.
56. It is recommended that the Council advise the Riccarton Bush Trustees that the Council wishes the Bill to provide for the Council to have the right to appoint four persons to the Trust, and the two community boards to appoint two persons each (rather than the Bill stating they must be elected members). This appointment system would then align with the Canterbury Museum.
57. While staff advice above is that value for the Council in minimising the conflicts of interest that can be created by making appointments to outside bodies then can be situations where the Council may take the view that the organisation makes a significant contribution to the finances or development of the city and that the council would wish to continue to make Councillor appointments recognising the conflict situations that can arise and that the appointees from time to time will not be able to fully participate in all matters relating to that organisation.

Examples of such organisations could be Christchurch city Holdings Ltd, Canterbury Development Corporation, Christchurch and Canterbury Marketing, Vbase and the Christchurch Agency for Energy Trust. In other words those organisations make a significant contribution to the Christchurch economy or development that it balances the value in having a Councillor being able to participate in all matters relating to that organisation.

Proposed Amendment to the 2007 Policy

58. If the Council accepts the staff recommendations above not to make appointments to outside bodies other than where there is a significant reason to do so then it is considered appropriate for the Council to amend its 2007 policy on Appointment and Remuneration of Directors to reflect this change in approach by the Council.
59. It is considered the following proposed amendments to the 2007 policy are provided for the Council's consideration:
 83. *Appointments to COs will only be made to organisations that make a significant contribution to the finances or development of the city*

Summary

60. In summary is it the staff advice that the Council resolve to recommend to the next Council that it not make Councillor appointments to outside bodies except to organisations making a significant contribution to the finances or development of the City. Current examples of such organisations are Christchurch City Holdings Ltd, Canterbury Development Corporation, Christchurch and Canterbury Marketing, Vbase and the Christchurch Agency for Energy Trust.