

# A General Guide Through The Laws Affecting Elected Members

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## Introduction

Congratulations on your election to the Far North District Council for the 2019-2022 triennium and your governance role over the next three years.

Some of you have been involved with Council for some time and for others this may be your first experience as a Councillor and you will be new to the process and procedures as to how Council conducts its business.

Council is created by a Statute of Parliament and therefore some understanding of the law and legal issues plays an important role in your decision making and this paper hopes to assist with that in providing a general explanation of some of the laws that regulate the conduct of elected members.

Generally the role and function of the Council and councillors, as well as the conduct of meetings are dealt with in the Local Government Act 2002 (LGA 02) and Local Government Official Information and Meetings Act 1987 (LGOIMA).

Clause 21(5)(c) of Schedule 7 of the LGA 02 requires that, at the first meeting of the Council following a triennial general election, the chief executive must give or arrange for a general explanation of certain laws affecting members, including:

1. Local Government Official Information and Meetings Act 1987;
2. Local Authorities (Members' Interests) Act 1968;
3. Sections 99, 105 and 105A of the Crimes Act 1961;
4. Secret Commissions Act 1910; and
5. Financial Markets Conduct Act 2013.

In particular your attention is drawn to certain legal provisions within the following Acts;

- Secret Commissions Act 1910
- Crimes Act 1961
- Local Authorities (Members' Interests) Act 1968;

Contravention of these provisions may result in the loss of office.

This paper is prepared to firstly meet the above mentioned statutory obligation and also to provide a resource to which members may refer in the performance of their functions. It addresses principles rather than detail, but should nevertheless be of assistance when applied to real problems.

There is a caveat to the above, as this paper does not in any way deal with all the legislation you will come into contact with that effects your role as elected members such as the Rating legislation and a plethora of other Acts that impact on how you will decide matters. The relevant sections of law should be set out in any paper that comes to you for consideration.

This paper has five parts:

- Council Structure and Governance
- Meetings
- Confidentiality
- Conflicts of Interest
- Administrative Law Principles.

## Council Structure and Governance

### So what is Council?

Section 12 of the LGA states that a local authority is a body corporate with perpetual succession (s12(1)). It has full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction. The only restrictions on the above is that it must exercise those powers wholly or principally for the benefit of its district. There are some exclusions and you are encouraged to read section 12.

### Structure of Council

The Far North District Council is comprised of the Mayor and 9 Councillors (Governance).

The purpose of Governance is to enable local decision-making and action by and on behalf of communities and to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future (s10 of LGA).

The Council aims to achieve this by;

- defining the overall vision for the Far North District
- determining local policy and bylaws
- engaging and encouraging community participation in decision-making
- considering the needs and future needs of our district
- monitoring the performance of the organisation against the objectives set in the Long Term Plan
- employing the Chief Executive and monitoring their performance against agreed key performance indicators.

### Role of the Mayor

The role of the Mayor is to provide leadership to Elected Members and the people of the Far North District. The Mayor performs civic duties and leads the development of Council's plans (long term and annual plans), policies and budgets for consideration by Elected Members.

The Mayor at Council meetings has one vote and in the event of a deadlock has a casting vote.

Post-election the Mayor may appoint a Councillor as Deputy Mayor and will establish committees and appoint the committee chairpersons, if he chooses to exercise this power under (s41A). Alternatively, it can be a decision of the Council.

### Role of Councillor

The role of a councillor is governance - this should be open and transparent and clear. Resolutions passed at council meetings setting the strategic direction and tasking the Chief Executive to implement them should be precise and clear.

Councillors are responsible for decision-making on behalf of the ratepayer and must commit to the large amount of reading required and attend workshops to ensure they make sound decisions.

If good government is to be delivered, then the standard of integrity of the members must be the foundation of good decisions.

## Role of the Chief Executive Officer

The Chief Executive Officer (CEO) has overall responsibility for the Far North District Council's operational management and is expected to be apolitical and not to make political or policy decisions. That is the role of the Elected Members.

He is responsible for employing staff, providing leadership to them and implementing and managing Council's decisions. These responsibilities are performed by him delegating tasks to his Strategic Leadership Team and then tasking the work to their staff.

A key part of the role of council staff is to provide Elected Members with comprehensive advice to enable them to make informed and effective decisions. Therefore, a high level of cooperation and mutual respect between Elected Members and staff is essential for the council to perform effectively.

To ensure such cooperation and trust is maintained, Elected Members are expected to:

- recognise the Chief Executive's role as the employer of council staff
- make themselves aware of the obligations the Far North District Council and Chief Executive have as an employer and observe those requirements at all times
- treat all council staff with courtesy and respect
- observe any guidelines the Chief Executive puts in place regarding contact with employees
- not do anything which compromises, or could be seen as compromising, a staff member's impartiality
- avoid publicly criticising council staff, especially in ways that reflect on the staff member's competence and integrity
- raise concerns about council staff directly with the Chief Executive
- raise concerns about the Chief Executive with the Mayor or the Chief Executive
- not seek to improperly influence staff in the normal undertaking of their duties

## Governance versus Management

As an Elected Member your job is oversight, not operations.

Elected Members and the Chief Executive must have a clear understanding of their different roles and responsibilities. One issue that may confront Members is finding the boundary between their role and the role of Management.

In the simplest terms, Members are responsible for oversight and planning, while the Chief Executive, his general managers and staff are responsible for the day to day operational activities.

Members are not permitted to contact staff directly. Communication should be through the Chief Executive, or the relevant General Manager.

## Community Boards

The Far North District has three community boards namely;

- Te Hiku in the north;
- Bay of Islands-Whangaroa in the East; and
- Kaikohe-Hokianga in the west.

The legal status of a community board is defined to constitute an unincorporated body. It is not a local authority nor is it a committee of the local authority. The local authority is therefore not entitled to censure or dismiss its members. The control and conduct of its members remains the sole jurisdiction of the board and it is for the board to adopt its own code of conduct.

The community board and can be joined into legal proceedings and the indemnities in the LGA 02 will apply to the community board members

## Role of the Community Board

The Local Government Act 2002 at s52 states the role of a community board is to:

- represent, and act as an advocate for the interests of its community;
- consider and report on all matters referred to it by the territorial authority, or any matter of interest or concern to the community board;
- maintain an overview of services provided by the territorial authority within the community;
- prepare an annual submission to the territorial authority for expenditure within the community;
- communicate with community organisations and special interest groups within the community; and
- undertake any other responsibilities that are delegated to it by the territorial authority.

The Far North District Council further delegates a number of responsibilities to community boards. *From time to time Council may consider some activities and assets as having district wide significance and these will remain the responsibility of Council. This information is set out in full on the Council website.*

## Powers of the Community Board

Its powers are solely those delegated to it by the local authority but it cannot hold property or hire staff. The provisions of Schedule 7 of the LGA02 apply apart from cls 15, 33 and 36.

## Official Information

As an Elected Member you may be subject to information requests under the Local Government Official Information and Meetings Act 1987 (LGOIMA).

Official information is not just documents or papers. It includes information held in any format, such as emails, phone calls, text messages, videos and photos.

Care should be taken with any information you generate or gain access to as part of your role. This information can be discoverable through the LGOIMA request process. This includes information on your personal email account or home computer, if it relates to Council business.

## Personal liability of elected members

Generally Elected Members of a local authority, which extends to a member of a committee, community board, or other subordinate decision-making body, are indemnified by the local authority for the costs and damages of a civil claim where acting in good faith on council business (s 43 of the LGA 02).

Further, Members are indemnified for the costs of a successfully defended criminal action relating to the member's functions.

A director of a council-controlled organisation is not indemnified by the local authority for actions in that capacity.

The indemnity does not cover any loss found by the Auditor-General to have been incurred or that may be attributed to an unlawful act or omission, or to an intentional or negligent failure to enforce the collection of valid debts by the Council. This could lead to the potential liability of members found responsible to account for the loss. If the Auditor-General makes a report on a loss to a local authority, without limiting the liability of any other person, the loss is recoverable as a debt due to the Crown against the members jointly and severally (s46 of the LGA02).

A member may have a defence to a claim for the recovery of the loss by proving the act or failure resulted without the defendant's knowledge or with knowledge but against the protest or contrary to a vote of the defendant (s46 (4) of the LGA02). For the defence to be upheld the member must have taken some positive step as a failure to vote, abstention or silence on the vote may be taken as assent.

A further defence is available to a member where the legality of a matter was questioned or in doubt, and advice was obtained from a competent professional adviser.

## Meetings

Most business of the Council is to be conducted before the public and generally, information held by the Council should be readily available to the public. The law requires a high standard of transparency to ensure that those governed know what has been done and why.

The fundamental principle in the LGOIMA is that information held by the Council is publicly available, unless one or more specified withholding grounds apply.

The LGOIMA deals with local authority meetings in Part VII. Briefly:

- (a) The Act states the grounds upon which the public may be excluded from meetings (section 48). That may generally only occur when good reason to withhold information exists, and there is a statutory definition of that concept in section 7 of the Act. Also, the public may be excluded where the subject matter of discussion is one in respect of which a right of appeal exists to any Court or Tribunal against the decision made by the Council.
- (b) In excluding the public, the Council must make a resolution stating the subject of each matter to be considered while the public is excluded, and the reasons must be given for excluding the public, in terms of the statutory grounds.
- (c) Chairpersons at meetings may require members of the public to leave a meeting if the behaviour of the person concerned is likely to prejudice or continue to prejudice the orderly conduct of the meeting (section 50). Councillors themselves whose conduct prevents the orderly conduct of the meeting may be asked to leave by the presiding member under the standing orders.
- (d) If a meeting is open to the public, and an agenda is supplied to a member of the public or the minutes of a meeting are produced for inspection by any member of the public after the conclusion of the meeting, any defamatory matter which is published in this way is to be treated as privileged, unless the publication was predominantly motivated by ill will (section 52). Oral statements made at meetings of the Council are also privileged, unless the statement is proved to be predominantly motivated by ill will (section 53). Ordinarily, a statement that is “privileged” cannot support a cause of action for defamation (even though that statement might be untrue or misleading).
- (e) Items which are not on an agenda for a meeting may nevertheless be dealt with if the meeting resolves to do so and the chairperson explains in open meeting why the item is not on the agenda and why consideration of it cannot be delayed to a subsequent meeting (section 46A(7)). (If the item is a minor matter relating to the general business of the Council then it may be discussed without the meeting having resolved to do so, so long as the chair explains at the beginning of the meeting, and when it is open to the public, that the item will be discussed; but in that case no resolution, decision or recommendation may be made except to refer the item to a subsequent meeting for further discussion (section 46A(7A)).)

## Confidentiality

There are occasions when, for particular and limited reasons, which are specified by law, the Council must conduct its business privately and protect the privacy or confidentiality of information it holds. When the public is excluded by due resolution of the Council and when the Council holds information confidentially, then it is critical that the rules of confidentiality are observed and maintained by the members and the officers of the Council.

The Council has adopted as the rules for the conduct of its business Standing Orders. Included therein is a provision that:

*No member or officer may disclose to any person other than another member, officer or person authorised by the chief executive, any information that has been presented or will be presented to any meeting from which the public is excluded or proposed to be excluded.” (rule 17.4)*

The obligation to comply with Standing Orders is reinforced by the LGA, which provides in clause 16(1) of Schedule 7, that:

*“A member of a local authority must abide by the standing orders adopted under clause 27”*

Then, section 238(1) of that Act addresses default:

*“238 Offence of failing to comply with Act*

- (1) *Every person who acts contrary to, or fails to comply with, a direction or prohibition given under this Act, or under an authority given to a local authority or to a member or officer of a local authority, commits an offence and is liable on conviction to the penalty specified in section 242(2).”*

Quite simply, a breach of standing orders may be an offence that might lead to prosecution and a fine not exceeding \$5000.00.

It might be thought that the obligation of confidentiality is less than the obligation for open government. It is not. The duty in each regard is the same.

Governance must be conducted in accordance with the law. The conduct of Council must be fully open until it becomes confidential according to law. Once confidentiality is imposed, that obligation must be observed with equal assurance.

Whistle blowing can be honourable. There are times and places for doing so. They do not include "going public". That is political self-promotion and is dishonourable.

The Ombudsmen's Office and the Auditor-General may be contacted and consulted with any concerns about due standards of performance by the Council, that **will maintain the confidentiality of the Council**.

Members must keep to the law. They cannot choose when to obey and when to breach the law. The constant and consistent observance of the law is necessary for the delivery of good governance.

## Conflicts of Interest

### Members' Financial Interests

The following comments are not an explanatory guide as these comments are limited to a few provisions only.

The Council does not provide legal advice to its members. Each member must seek his or her own independent legal advice.

The Council itself is only indirectly affected. It has some indirect concern for a member's interest, however, because of certain consequences that can follow in the event of the breach by a member.

First, an extraordinary vacancy could result as a consequence of a breach of the Act, but more particularly the breach might be grounds, in certain circumstances, for impugning or challenging, a Council decision.

The object of the statutory provisions discussed below:

*“is clearly to prevent councillors from voting on all matters which may affect their own pockets and therefore may affect their judgment”.*<sup>i</sup>

The cases make it clear that it is irrelevant whether there is or is not an actual pecuniary advantage or disadvantage as a result of the vote.

## **The Local Authorities (Members’ Interests) Act 1968**

The Local Authorities Members’ Interests Act 1968 (LAMIA) is one of the most important statutes governing the conduct of elected members and we strongly recommend you familiarise yourself with its provisions. (*Also see the Auditor General’s Guidance for Members of Local Authorities about the Local Authorities (Members Interests) Act 1968.*) This has been provided to you in your induction pack.

It has two main aspects:

1. The prohibition of certain contracts between local authorities and their members.
2. The prevention of voting on or discussing questions in which a member has a pecuniary interest.

As to the first aspect, LAMIA provides that no-one may be elected or appointed or be a member of a local authority or of any committee of it, if the total payments to be made by the Council in respect of contracts made by it with that person exceeds \$25,000 (including GST) in any year. The Act covers contracts made by the Council directly with the person concerned, and also contracts made by the Council in which the Councillor is concerned or interested. Special provisions deal with companies in which a member or his or her spouse is interested either as a shareholder, or as a member of the company, or by virtue of certain management positions. There are a number of exceptions to this rule but, in case of any doubt, Councillors should refer to the Chief Executive so that proper advice is obtained.

To assist section 3 is set out in full below

### **3 Disqualifying contracts between local authorities and their members**

- (1) *Except as provided in subsection (3), no person shall be capable of being elected as or appointed to be or of being a member of a local authority or of any committee of a local authority, if the total of all payments made or to be made by or on behalf of the local authority in respect of all contracts made by it in which that person is concerned or interested exceeds \$25,000 in any financial year.*
- (2) *For the purposes of subsection (1), a member of a local authority or of a committee thereof shall be deemed to be concerned or interested in a contract made by a local authority with an incorporated company, if—*
  - (a) *the member or his spouse or partner singly or between them own, whether directly or through a nominee, 10% or more of the issued capital of the company or of any other company controlling that company; or*
  - (b) *the member or his spouse or partner is a member of the company, and either of them is the managing director or the general manager (by whatever names they are called) of the company; or*
  - (c) *the member or his spouse or partner is a member of a company controlling the company with which the contract is made and either of them is the managing director or the general manager (by whatever names they are called) of that controlling company; or*
  - (d) *the member or his spouse or partner is the managing director or general manager (by whatever names they are called) of the company and either of them is a member of a company controlling that company:*

*provided that nothing in this subsection shall apply with respect to the spouse or partner of any member where, at the time when the contract was entered into,—*



- (i) *the member and his spouse or partner were living apart; or*
- (ii) *in any case to which paragraph (a) applies, the member did not know and had no reasonable opportunity of knowing that his spouse or partner owned any part of the issued capital of the company or of any company controlling that company; or*
- (iii) *in any case to which paragraph (b) or paragraph (c) or paragraph (d) applies, the member did not know and had no reasonable opportunity of knowing that his spouse or partner was a member of the company or of the controlling company, as the case may be, or held any of the offices specified in any of those paragraphs.*

(2A) *For the purposes of subsection (1), a member of a local authority or of a committee thereof shall be deemed to be concerned or interested in a contract made by the local authority in which his spouse or partner is concerned or interested (not being a contract made with an incorporated company):*

*provided that nothing in this subsection shall apply with respect to the spouse or partner of any member where, at the time when the contract was entered into,—*

- (a) *the member and his spouse or partner were living apart; or*
- (b) *the member did not know and had no reasonable opportunity of knowing that his spouse or partner was concerned or interested in the contract.*

(3) *Notwithstanding anything in subsection (1),—*

(a) *no person shall be disqualified under this section by virtue of his being concerned or interested in any contract made in any special case with the prior approval of the Auditor-General on the application of the local authority. In any such special case the Auditor-General may authorise the payment and receipt of such amount as it thinks fit:*

(aa) *a person shall be deemed not to have been disqualified by virtue of his being concerned or interested in any contract made in any special case where, on the application of the local authority, the subsequent approval of the Auditor-General is obtained; which approval shall be given only if the Auditor-General is satisfied that—*

(i) *there is a sufficient special reason why prior approval was not obtained under paragraph (a); and*

(ii) *prior approval would have been obtained under paragraph (a) if that approval had been sought:*

(ab) *no person shall be disqualified under this section by virtue of his being concerned or interested in any contract made on behalf of the local authority by an employee or committee of the local authority (unless the member of the local authority is a member of that committee) acting under delegated authority, where it is verified in writing to the Auditor-General, by such 1 or more persons and in such manner as the Auditor-General requires, that the member did not know and had no reasonable opportunity of knowing of that contract at the time it was made:*

(b) *where a person is concerned or interested in any contract solely by reason of being concerned or interested in any subcontract relating thereto, the provisions of this section shall, with the necessary modifications, apply to him as if references in this section to the amount payable by or on behalf of the local authority in respect of a contract were references to the amount payable by or on behalf of the contractor in respect of the subcontract:*



- (c) *in assessing under this section the amount of any payment made or to be made by or on behalf of the local authority in respect of any contract, no account shall be taken of any sum paid or to be paid as a refund of a deposit:*
- (d) *an interest in—*
- (i) *any loan raised by the local authority, whether on security or otherwise; or*
  - (ii) *any payments made or to be made in respect of advertisements inserted by the local authority in any newspaper; or*
  - (iii) *any lease granted or agreed to be granted to the local authority; or*
  - (iv) *any payment received by way of compensation under the [Public Works Act 1981](#) for any loss, damage, or injury suffered by reason of the exercise of any power under that Act; or*
  - (v) *any advance made by the local authority under the Rural Housing Act 1939; or*
  - (vi) *any advance made or guarantee given by the local authority under [Part 32](#) of the Local Government Act 1974; or*
  - (vii) *any contract for the supply of goods or services made during a state of emergency declared, or a transition period for which notice is given, under the [Civil Defence Emergency Management Act 2002](#), if that contract does not continue for more than 1 month after the end of that state of emergency or transition period, and if the goods or services are supplied at charges not in excess of those normally applying in the district of the local authority or in the area under its jurisdiction at the time immediately preceding the state of emergency or transition period,—*

*shall not constitute a disqualification under this section:*

- (e) *[Repealed]*
- (f) *no person shall be disqualified under this section by virtue of his being concerned or interested in any contract made before his election or appointment, if before that election or appointment his obligation in respect of the contract had been performed and the amount to be paid by or on behalf of the local authority in respect of the contract had been fixed; and any payment made thereafter by or on behalf of the local authority in respect of the contract shall not operate to disqualify that person for continuing to hold office or be taken into account for the purpose of calculating the amount that may be lawfully paid to him as a member of the local authority or, as the case may be, of a committee thereof in the same financial year in respect of any contract or contracts:*
- (g) *no person shall be disqualified under this section by virtue of his being concerned or interested in any contract, whether of a continuing nature or otherwise, made before his election or appointment and in respect of which his obligations have not been performed before that election or appointment, where the amount to be paid by or on behalf of the local authority in respect of the performance of the contract has been fixed in that contract subject to such amendments and additions as may be provided for in the contract, or, where the amount to be paid by or on behalf of the local authority in respect of the performance of the contract is not ascertainable until the contract has been performed, if—*
- (i) *the contract is for a continuous period not exceeding 12 months from the date on which the contract is made; or*

- (ii) *the contract is for a continuous period exceeding 12 months from the date on which the contract is made and that person has, with the consent of the local authority, relinquished that contract before acting as a member and within 1 month after the date of his election or appointment, as the case may be;—*

*and any payment made thereafter by or on behalf of the local authority in respect of the contract shall not operate to disqualify that person for continuing to hold office or be taken into account for the purpose of calculating the amount that may be lawfully paid to him as a member of the local authority or, as the case may be, of a committee thereof in the same financial year in respect of any contract or contracts:*

- (h) *no person shall be disqualified under this section by virtue of his being concerned or interested in any contract as an administrator or a trustee of any estate or trust in which he is not a beneficiary, or as the manager appointed under the [Protection of Personal and Property Rights Act 1988](#):*
- (i) *no person shall be disqualified under this section by virtue of his being concerned or interested in any agreement entered into pursuant to section 81 of the Noxious Plants Act 1978:*
- (j) *no person who is a member of a community board is disqualified under this section by virtue of that person or that person's spouse or partner being concerned or interested in any contract made by a territorial authority, if—*
- (i) *the contract, except for any preliminary work associated with it, is to be performed wholly outside the area under the jurisdiction of the community board of which that person is a member; and*
- (ii) *the contract is one in which the community board has no jurisdiction or control or which has not been reported on to the territorial authority by the community board; and*
- (iii) *neither that person nor that person's spouse or partner is also a member of the territorial authority that made the contract.*

(3A) *Nothing in subsection (3)(j)(iii) applies with respect to the spouse or partner of a member where, at the time when the contract was entered into, the member and the member's spouse or partner were living apart.*

(4) *For the purposes of subsection (3)(j), **territorial authority** has the same meaning as in the [Local Government Act 2002](#).*

The penalty for breach of these provisions (contained in section 3 of LAMIA) is immediate loss of office as well as the possibility of a fine being imposed (sections 4 and 5).

Section 6 of LAMIA provides that a member of a local authority or of a committee of it shall not vote on or take part in the discussion of any matter before the governing body of that local authority or before that committee in which he or she has, directly or indirectly, any pecuniary interest, other than an interest in common with the public. Once again, there are special provisions dealing with a pecuniary interest in the context of the interests of the member or his or her spouse in a company. The Office of the Auditor-General is empowered to declare that the rule will not apply with respect to any specified matter or specified class of matter on particular occasions. In doing so it must act in the interests of the electors or inhabitants of the district.

To assist section 6 is set out in full below:

***Member of local authority or committee not to discuss or vote on question in which he has pecuniary interest***

- (1) *A member of a local authority or of a committee thereof shall not vote on or take part in the discussion of any matter before the governing body of that local authority or before that committee in which he has, directly or indirectly, any pecuniary interest, other than an interest in common with the public.*
- (1A) *Nothing in subsection (1) shall apply in any case where a member of a local authority or a committee of the local authority has been elected by or appointed to represent any activity, industry, business, organisation, or group of persons and his pecuniary interest is not different in kind from the interests of other persons in the activity, industry, business, organisation, or group by which the member is elected or in respect of which he is appointed.*
- (2) *For the purposes of subsection (1), where an incorporated company has, directly or indirectly, a pecuniary interest in a matter before the governing body of a local authority or before a committee thereof, a member of the local authority or, as the case may be, of the committee shall be deemed to have a pecuniary interest in the matter, if—*
- (a) *the member or his spouse or partner singly or between them own, whether directly or through a nominee, 10% or more of the issued capital of the company or of any other company controlling that company; or*
  - (b) *the member or his spouse or partner is a member of the company, and either of them is the managing director or the general manager (by whatever names they are called) of the company; or*
  - (c) *the member or his spouse or partner is a member of a company controlling the company having a pecuniary interest in the matter before the governing body of the local authority or, as the case may be, before the committee, and either the member or his spouse or partner is the managing director or the general manager (by whatever names they are called) of that controlling company; or*
  - (d) *the member or his spouse or partner is the managing director or general manager (by whatever names they are called) of the company having a pecuniary interest in the matter before the governing body of the local authority or, as the case may be, before the committee, and either of them is a member of a company controlling that company.*
- (2A) *Where the spouse or partner of a member of a local authority or of any committee thereof has, directly or indirectly, a pecuniary interest in a matter before the governing body of a local authority or before a committee thereof as the owner or one of the owners (otherwise than as a member of an incorporated company) of an estate or interest in any real or personal property or of any business or as a party to any contract or proposed contract with the local authority, the member shall, for the purposes of subsection (1), be deemed to have a pecuniary interest in the matter.*
- (2B) *Nothing in subsection (2) or subsection (2A) shall apply with respect to the spouse or partner of any member where, at the time when the member took part in the discussion of or, as the case may be, voted on the matter before the local authority or committee, the member and his spouse or partner were living apart.*
- (3) *Nothing in subsection (1) shall apply with respect to any of the following matters:*
- (a) *any payment to or for the benefit of a member where it is legally payable and the amount or maximum amount or the rate or maximum rate of the payment has already been fixed; or*
  - (b) *any contract of insurance insuring members against personal accident; or*
  - (c) *an election or appointment of a member of the local authority to any office, notwithstanding that any remuneration or allowance is or may be payable in respect of that office; or*
  - (d) *any formal resolution to seal or otherwise complete any contract or document in accordance with a resolution already adopted; or*

- (e) *the preparation, recommendation, approval, or review of a district plan under the [Resource Management Act 1991](#) or any section of such a scheme, unless the matter relates to any variation or change of or departure from a district scheme or section thereof or to the conditional use of land as defined in that Act; or*
  - (ea) *the preparation, recommendation, approval, or review of general schemes under the [Soil Conservation and Rivers Control Act 1941](#) for the preventing or minimising of damage by floods and by erosion; or*
  - (eb) *the preparation, recommendation, approval, or review of reports as to the effect or likely effect on the environment of any public work or proposed public work within the meaning of the [Public Works Act 1981](#); or*
  - (f) *any matter in which, in the opinion of the Auditor-General given before the vote or discussion and on written application to the Auditor-General for his or her opinion, the pecuniary interest of a member is so remote or insignificant that it cannot reasonably be regarded as likely to influence him in voting on or taking part in the discussion of that matter.*
- (4) *Notwithstanding anything in subsection (1), the Auditor-General may, of his or her own motion or upon written application made to him or her by the member concerned, declare that that subsection shall not apply with respect to any specified matter or specified class of matter to be considered by the local authority or committee, as the case may be, if the Auditor-General is satisfied that the application of that subsection would impede the transaction of business by the local authority or committee or that it would be in the interests of the electors or inhabitants of the district of the local authority or of the area under its jurisdiction that the subsection should not apply.*
- (5) *Any person who under subsection (1) is prohibited from voting on or taking part in the discussion of any matter at any meeting at which he is present shall, when the matter is raised before the local authority or committee of which he is a member, declare to the meeting that he has a pecuniary interest in the matter, and the fact of the disclosure of interest and of the abstention from discussion and voting shall be recorded in the minutes of the meeting. Any such record in the minutes of the meeting shall be prima facie evidence of its contents, in the event of any question arising as to whether a member made a disclosure of interest and abstained from discussion and voting.*
- (6) *Notwithstanding anything in subsection (1), a member of any of the following bodies:*
- (a) *the University Grants Committee:*
  - (b) *the Council of Massey University:*
  - (c) *the Council of the University of Auckland:*
  - (d) *the Council of the University of Canterbury:*
  - (e) *the Council of the University of Otago:*
  - (f) *the Council of the University of Waikato:*
  - (g) *the Council of the Victoria University of Wellington:*
  - (gg) *[Repealed]*
  - (h) *the Council of Lincoln University:*
  - (i) *[Repealed]*

(j) [Repealed]

(k) [Repealed]

*shall be entitled to take part in the discussion before that body, or any committee thereof, of any matter that directly or indirectly affects his salary or allowances, but shall not be entitled to vote thereon.*

The penalty for discussing or voting when there is a pecuniary interest is, once again, loss of office, but only upon conviction of an offence (section 7). Related to these statutory provisions is the common law principle of natural justice, which includes obligations to listen to both sides and not to be a judge in one's own cause.

## Indirect Pecuniary Interest

One question that at some stage may face an elected member is how does one deal with an indirect pecuniary interest? At what point, or in what way, is the interest to be distinct from that of the public in general? Not surprisingly, because the circumstances can be infinite in their variety, the Courts have deliberately refrained from providing fixed boundaries. Each case must be considered on its own facts.

The Courts have recognised that the constraint should not be interpreted so as to make

*"The conduct of municipal business impossible and recognised that since a contravention is made an offence punishable by a penalty the language should only be given meaning which it clearly bears"*<sup>iii</sup>

What is clear is that is that the member's interest is not to be one that is shared in common with the public, it has to be "special and peculiar to him/herself".

The meaning of "the public" is very vague. It will depend upon the circumstances of the case and will always be a question of degree.

An indirect pecuniary interest may involve (see section 6 of LAMIA):

- An interest arising from a relationship and not from any specific contract or monetary connection; and
- Considering whether an informed objective bystander would conclude that there was a likelihood or reasonable apprehension of bias; and
- That any motives and good faith of councillors are irrelevant to whether or not they had an indirect pecuniary interest; and
- Either a potential benefit or a potential liability. It does not matter whether a member gains or loses from his or her interest, "the situation contemplated by the legislation is a particular formalised illustration of the rule that persons charged with an obligation to make decisions should not be affected by any personal motive".

It must be emphasised that pecuniary interests are ones for members themselves to address and resolve. It is not the business of the Council to order, direct or formally advise any member what he or she should do in any particular instance.

Only the member will know sufficient detail to be able to determine his or her liability. There is no authority for the executive of the Council to provide legal advice to members as to their personal affairs.

## Crimes of Bribery and Corruption - Crimes Act 1961

Councillors are within the definition of an "official" in section 99 of the Crimes Act. Section 105 of that Act provides that every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in an official capacity.

Putting this simply, it is an offence against this section to seek or obtain a reward for performing one's official duties as a councillor.

Section 105A, further states that it is an offence, carrying a term of imprisonment of up to 7 years, for an official to use any information acquired by him or her in an official capacity to obtain, directly or indirectly, an advantage or a pecuniary gain for himself or herself, or any other person.

## Secret Commissions Act 1910

The Secret Commissions Act 1910 deems every councillor to be an agent of the Council (section 16(1)(b)). It creates offences in relation to accepting inducements or rewards for doing or forbearing to do something in relation to the Council's affairs, or showing or having shown favour or disfavour to any person in relation to the Council's affairs or business (section 4(1)). It is an offence, similarly, to divert, obstruct, or interfere with the proper course of the affairs or



business of the Council, or to fail to use due diligence in the prosecution of its affairs or business, with intent to obtain any gift or other consideration from any person interested in the affairs or business of the Council (section 4(2)).

Section 5 makes it an offence for a member not to disclose to the Council his or her pecuniary interest in a contract when making a contract on behalf of the Council.

Section 9 of the Act makes it an offence to aid or abet, or to be in any way directly or indirectly concerned in, or privy to, the commission of any offence against the Act.

Conviction of an offence under the Act carries with it the possibility of imprisonment for up to 7 years. Such a conviction would also have the consequence of loss of office, in terms of clause 1 of Schedule 7 to the Local Government Act 2002.

### Financial Markets Conduct Act 2013

Under the Financial Markets Conduct Act 2013, elected members are in a similar position to company directors if the Council were to issue financial products, such as equity or debt securities, under its borrowing powers. Elected members may therefore be personally liable if product disclosure statements to investors contain untrue information, and may be liable for civil action or criminal prosecution if the requirements of the Act, such as keeping an audited register of financial products issued, are not met.

### Health and Safety at Work Act 2015

The Act specifically exempts Local body members at section 52 set out below.

#### 52 Liability of certain office holders

- (1) An office holder listed in subsection (2), when acting in that capacity, does not commit an offence under [section 47](#), [48](#), or [49](#) for a failure to comply with the duty imposed by [section 44](#) (duties of officers).
- (2) The office holders are—
  - (a) a member of the governing body of a territorial authority or regional council elected in accordance with the [Local Electoral Act 2001](#);
  - (b) a member of a local board elected or appointed under the [Local Electoral Act 2001](#);
  - (c) a member of a community board elected or appointed in accordance with the [Local Electoral Act 2001](#);
  - (d) a trustee of a board of a school appointed or elected under the [Education Act 1989](#).
- (3) In this section,—
 

**board** and **trustee**, in relation to a school, have the same meanings as in [section 92\(1\)](#) of the Education Act 1989

**community board** means a board established under [section 49\(1\)](#) of the Local Government Act 2002

**local authority** and **local board** have the same meanings as in [section 5\(1\)](#) of the Local Government Act 2002.

## Administrative Law Principles

This is a brief introductory overview of administrative law principles, which apply to the making of all decisions by the Council. There is an overriding obligation to make decisions fairly.

The Council is subject to the same laws as any other person or body corporate. However, The Council is not the same as a company or an individual. Its public nature, derived from the Crown and being in control of public funds creates a need for additional obligation that Council must adhere to. These additional obligations are the administrative law principles otherwise known as the rules of natural justice which apply to council's decision making.

The Council can be taken to court for both private claims and public action. An example of a private claim is seeking damages against the Council for breach of contract and an example of a public action is judicial review of a Council decision.

What then are the administrative law principles? Three major categories of grounds for judicial review have been recognised. One judge has spoken of illegality, irrationality and procedural impropriety. Another would have councils act in accordance with law, fairly and reasonably.

These are clearly broad principles and are of universal application. Narrower legal terms apply to certain kinds of behaviour, which are found within these requirements to achieve fairness.

## Illegality /Procedural Impropriety

Although Council has a power of general competence, that power is given and constrained by the Local Government Act 2002, other legislation and the common law. This means it cannot do whatever it wants in whatever manner it chooses.

Whenever the Council does act, by resolution of the members themselves in Council meeting, by committee, subcommittee or delegated officer, it must act in the manner specified in the legislation or standing orders. Particular attention should be given to procedural compliance as a to comply with the statutory duties set out in the LGA02 can result in the decision of the Council being illegal and on judicial review overturned.

## A Degree of Conflict in Council Decision Making is Allowed

Elected members will often be involved in other organisations in the community, in addition to private interests and those of their friends and families. Accordingly, having possible conflicting interests is natural and unavoidable

It however is important to note that a conflict only arises if, in a particular situation, there is an overlap between private interest and responsibilities to a public entity, or where a person's duty to one entity is in conflict with a duty to another entity (a conflict of roles/duties).

The law recognises the inevitability of a degree of conflict with in councils when exercising certain functions. It is established, for example, that a council may object to its own district plan and apply to itself for resource consent.

Where there is inevitably an element of pre-consideration by the council of the issue it has to decide, the Courts have tolerated:

*“a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office...”<sup>iii</sup>*

This lesser standard of impartiality has been described in the case of councils in these terms:

*“... the state of impartiality which is required in a council to preserve a freedom, notwithstanding earlier investigations and decisions, to approach their duty of inquiring into and disposing of objections without a*

*closed mind, so that if considerations advanced by objectors bring them to a different frame of mind they can and will go back on their proposals.*<sup>iv</sup>

However, that the necessary element of inevitability is lacking where one member of the Council chooses to make preliminary submissions to the Council or become publicly involved on behalf of one particular option, rather than argue his case in the deliberations of the Council. By taking a prior public position, he steps outside the Council and should not, subsequently, seek to rejoin the Council in its deliberations.

The Council's actions will be tested for bias against strict rules. There must be no:

*"suspicion of bias reasonably and not fancifully entertained by responsible minds".*<sup>v</sup>

## Bias

The law around conflict of interest and bias is interesting but difficult to apply as it is often a matter of degree. For example in our legislation it is not just a matter of exclusion from the vote, but also exclusion from the deliberation on the particular issue. A public body must be seen to be impartial when making a decision. A prior contract, undertaking or commitment may make later considerations unlawful.

Bias and section 6 of LAMIA are similar in some respects. The test is:

*"whether an informed objective bystander would conclude that there was a likelihood or reasonable apprehension of bias".*<sup>vi</sup>

Bias is part of the administrative law principles of natural justice, which requires the Council to act fairly in reaching its decisions. The fairness principle has been described in these terms:

*"In exercising that discretion as in exercising any other administrative function they [members] owe a constitutional duty to perform it fairly and honestly... What is a fair procedure to be adopted at a particular enquiry will depend on the nature of its subject matter."*<sup>vii</sup>

More particularly, in the present context:

*"presumptive bias through interest is a disqualifying factor in the judicial process not because actual bias was present, but because a reasonable man might think it was".*<sup>viii</sup>

A breach, however, does not automatically invalidate a decision, nor render it void. The decision remains until it is declared by a court to be invalid and set aside.

Administrative law principles, sometimes spoken of as "natural justice", require the Council to act fairly in reaching its decisions. Among other things, that duty requires that conflicting views to be considered in any particular process are given a fair hearing and that the decision is free of predetermination or bias.

Administrative law principles are matters of public law affecting the Council, rather than private law by which a member can be subjected to sanctions. The remedy in public law, in the event of conflict giving rise to bias, is the invalidation of the Council decision, not the imposition of a penalty. It is this potential consequence of non-pecuniary conflict of interest that affects the Council.

The Council needs to consider the decision-making process. Is the process impartial? Might an informed objective bystander think that a member has a conflict of interest? To this extent, the duty of disclosure by members to the Council is vital.

## Reasonableness

The test for reasonableness, known as **Wednesbury unreasonableness**<sup>ix</sup> was stated like this:

*“...a person entrusted with a discretion must so to speak direct to himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not ... he may truly be said ... to be acting “unreasonably”.”*

Further, what is often quoted:

*“If a decision is so unreasonable that no reasonable authority could ever have come to it then the courts can interfere.”*

It is on this standard that rates of McKenzie and Waimate Districts have been struck down.

The Court of Appeal has stated the test of unreasonableness in Wellington City Council v Woolworths in this way:

*“For the ultimate decisions to be invalidated as “unreasonable” to repeat expressions used in the cases, the must be so perverse or absurd or outrageous in their defiance of logic that Parliament could not have contemplated such decisions being made by an elected council.”<sup>x</sup>*

Just because a wide majority of elected representatives, often considering the matter a number of times, have come to a decision which seemed to them to be wise policy, well made, the Courts have nevertheless exercised the power to review and uphold, or reject those Council decisions.

The approach has been refined by the High Court in the recent case of MPR v Refugee Status Appeals Authority. Judge Duffy said at paragraph 14:

*“The test for reasonableness can vary according to the context. Decisions that are entirely about money or that largely involve questions of central or local government policy are subject to the test applied in Wellington City Council v Woolworths (No 2) [1986] 2 NZLR 537 (CA) at 545.... However, it has long been recognised that a lower threshold may be applied in cases involving human rights.”<sup>xi</sup>*

## Conclusion

In decision-making, the Council must act with lawful authority in accordance with lawful procedure and produce rational results. This sounds simple, but in practice circumstances and complexity of the matters that you may have to deal with often make for difficulties in coming to a decision. When there is doubt, act carefully, ask and take advice and in need request further information so that at all times you as a Councillor can strive to make the best decisions you can for the benefit of the district.

## References and Acknowledgements

<sup>i</sup> Brown v DPP [1956] 2 All ER 189,192, Donovan J

<sup>ii</sup> Downward v Babington [1975] VR 872,877

<sup>iii</sup> Franklin v Minister of Town & Country Planning [1948] AC 87 at 103

<sup>iv</sup> Lower Hutt City Council v Bank [1974] 1 NZLR 545 at 550

<sup>v</sup> Turner v Allison and Others [1971] NZLR 833 at 848

<sup>vi</sup> Calvert & Co v Dunedin City Council [1993] 2 NZLR 460

<sup>vii</sup> Bushell v Secretary of State for the Environment [1981] AC 75, 95

<sup>viii</sup> Meadowvale Stud Farms Limited v Stratford County Council [1979] 1 NZLR 342

<sup>ix</sup> Associated Provincial Housing Ltd v Wednesbury Corporation [1948] 1KB 2

<sup>x</sup> Wellington City Council v Woolworths New Zealand Limited [1996] NZLR 537

<sup>xi</sup> MPR v Refugee Status Appeals Authority [2012] NZHC 567

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