

BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Of the Variation to the Proposed District
Plan, Priority Area Landscape Schedules

MEMORANDUM ON BEHALF OF

DR JOHN COSSENS

Date: 7th August 2023

MAY IT PLEASE THE COMMISSION

APPLICATION FOR THE REMOVAL OF COMMISSIONER SMITH FROM THE HEARINGS PANEL

COUNCIL LANDSCAPE VALUE SCHEDULES CONSULTATION

1. This memorandum seeks to challenge the appointment of Councillor and Deputy Mayor Smith to the Hearings panel on the grounds of potential bias and conflict of interest. The grounds for the challenge are set out below.
2. As the Commission has outlined in their first minute, by vote of the Full Council on the 2nd of June 2022, the Priority Area Landscapes Variation was publicly notified for submissions on 30 June 2022. As a result, some 208 submissions were received on the Variation, and over 2,500 individual submission points.
3. As the commission will be now aware, close to 90% of those submissions were opposed to the content of the Priority Area Landscape variation reports, with many submissions challenging the methodology used to develop the Priority Area landscape schedules. This is important, because it is respectfully submitted the first order of business for the Commission is to approve the methodology employed based on submissions received, whether they be in the form of individual submitter responses, legal submissions or expert opinion. Respectfully, it would seem a futile, expensive and time consuming exercise to hear submissions on the landscape schedules if the methodology which developed those schedules is flawed.
4. The genesis of the priority area landscape consultation came from the 2021 QLDC Planning and Strategy committee, of which Councillor Smith was a member. Council staff put to the committee a report which sought the committee's approval to commence consultation for the landscape scheduling project. Specifically, the motion that was put to the committee to vote on was:

*On the motion of Councillors Clark and Lewers the Planning & Strategy Committee resolved to: 1. Note the contents of the report; and 2. **Approve commencement of consultation for the landscape scheduling project.***

Councillor Smith recorded his vote against the motion.

5. So on its face, we have Councillor Smith voting against the motion to 'approve commencement of consultation for the landscape scheduling project'.
6. The Council 'consultation' on landscape scheduling was subsequently undertaken and fed into a report prepared by landscape consultants which outlined the priority landscape value schedules and was then put forward for notification by the full Council on the 2nd June 2022, and subsequently approved.
7. However, Council planning staff and Councillors were made aware prior to the 2nd of June 2022 of significant concerns about the methodology of the consultation that was undertaken. Indeed, as early as April 2022, the Council was made aware of serious shortcomings in the landscape schedule consultation. The Mayor and all Councillors were again contacted prior to the June 2nd full Council meeting.
8. Despite being aware of serious concerns about the methodology, Councillors, including Councillor Smith, voted to approve the notification of the schedules.
9. It is also noted that at the 2nd of June 2021 full council meeting, Councillor Smith made the comment in regard any future hearings on the landscape schedules,

'It is certainly one I would be keen to be involved in as a Commissioner'¹

¹ See QLDC Full Council meeting live stream 2nd June 2022

10. The test for non-financial conflict of interest as outlined by the Controller and Auditor-General is clear:

The test for whether a non-financial conflict of interest exists is whether an objective observer who knows the relevant facts would perceive the person to be biased because of that interest.²

11. So the relevant facts are; we have the current situation of a Commissioner (QLDC Councillor and Deputy Mayor Smith), who appointed (by the QLDC) to the hearings panel for the landscape schedules:

- a. Has been a member of the Planning and strategy Committee of the QLDC for a number of years and as such has been privy to confidential information regarding resource consent applications which have involved organisations of individuals which have made submissions about the landscape schedules now to be heard by the Commission.
- b. Voted against consultation for the landscape schedules at the planning and strategy committee.
- c. Voted in favour of the notification of the landscape schedules despite knowing serious concerns had been raised about the landscape methodology employed.
- d. Put himself forward as someone who would like to be a hearings Commissioner for the landscape schedules.

12. To be clear, this is not a personal attack on Councillor Smith but rather it is about ensuring all Commissioners involved in the hearing are fully independent and do not have any conflicts of interest, nor any subconscious bias.

² <https://oag.parliament.nz/2021/local-govt/part5.htm> [5.10]

13. The requirements for Commissioners are clear, particularly for elected members, namely, that:

*councillors nominated to be appointed as elected member commissioners should have no actual or perceived conflict of interest*³

14. It is respectfully put to the Commission, that Councillor Smith has a clear conflict of interest and there is a real chance that a subconscious bias will arise because of how Councillor Smith has previously acted and voted in relation to the landscape schedule consultation.

15. I refer the Commission to an address by Justice Glazebrook in relation subconscious bias in expert witnesses, but which I submit is just as pertinent to hearing Commissioners.

The last theme I have called impartiality. This involves striving to remove both personal and what I would term institutional or systemic bias. Despite the use of objective methods of analysis in the forensic sciences the determination of, for example, a match or exclusion in pattern analysis ultimately rests with the scientist and can therefore be seen as, in part at least, subjective. The potential for bias and error exists.

What is required of an expert is an independent view, whether or not that accords with the interests of the party retaining him or her. Most people's personal and professional integrity would not allow overt bias. So the main issue will be unconscious bias, stemming from such factors as being briefed from the perspective of one side only and the natural desire to be of assistance to the party retaining them. This is often referred to as "adversarial bias" which has been described as an "almost inevitable consequence" of experts being appointed by partisans. There may also be unconscious bias arising from having a particular cultural or gender perspective. Studies have shown that a number of social factors can affect what scientific research is conducted and what results may be accepted by the scientific community.

In terms of systemic bias, I point to matters such as confirmation and contextual bias which can arise in any review process where the conclusions of others are known.

³ <https://www.qualityplanning.org.nz/node/681>

Confirmation bias, in general terms, can be described as the tendency to interpret information in a way that confirms an existing hypothesis. This is sometimes referred to as an example of a “hot” bias where, although often unintentional and even unconscious, an expert is directionally motivated because he or she wants or expects a particular outcome to prevail.

More specific is “forensic confirmation bias” which refers to the “class of effects through which an individual’s pre-existing beliefs, expectations, motives, and situational context influence the collection, perception, and interpretation of evidence during the course of a criminal case.” Confirmation bias is a “natural and automatic feature of human cognition that can occur in the absence of self-interest”. All involved in the justice system need to remain aware of this. (my emphasis)⁴

16. And further, Justice Glazebrook highlighted:

The objectivity of an expert can be influenced and lead to the subconscious development of expectations about the outcome. This bias is difficult to overcome given the natural human tendency to see what we expect to see. We all use prior knowledge, experiences and contextual clues in order to interpret and understand the events that occur in our everyday lives. But we are unaware of the processes that we rely on and that carries the risk of bias. While we have over time become aware of the dangers of physical contamination of evidence, more needs to be done to address the risks of “cognitive contamination”⁵

17. So in applying Justice Glazebrook’s analysis, we have Councillor and deputy Mayor Smith, appointed as Commissioner by his own Council, to hear submissions on the landscape schedules (developed by the Council and its consultants) where 90% of the submissions are against the schedules. I submit Councillor Smith has been put in an untenable situation by the QLDC because he has been asked to adjudicate over submissions on landscape schedules which he has a had a significant role in

⁴ Justice S Glazebrook, Opening address, Australian and New Zealand Forensic Science Society: 23rd Symposium on the Forensic Sciences “Together Informing Justice”, held on 18–23 September 2016, [pages 8-10]

⁵ Ibid

overseeing. I would further submit that there is a cognitive contamination on the part of Councillor Smith which cannot be overcome.

18. This subconscious bias is particularly relevant where Councillor Smith will be asked by submitters to decide on the validity of the consultation methodology employed by the Council when he has already indicated (by his voting) that he has no concerns with the consultation method employed.
19. It is further submitted that a Commissioner should not be appointed simply because a Councillor has expressed the desire to be involved.
20. *'It is certainly one I would be keen to be involved in as a Commissioner'*. Quite obviously, a Commissioner should be appointed based on their skill, experience, qualifications, independence and lack of any conflict of interest. Just because Councillor Smith has expressed a desire to be a Commissioner on these hearings is not sufficient reason to engage him. On the contrary, it would be unheard of for a Judge to be appointed to a case on the basis of *'it is one that I would like to be involved in'*.
21. It should go without saying that any quasi-judicial process must require total independence and a lack of potential conflict within the Judiciary appointed to that process.
22. Mr Smith or the Council may attempt to argue that Councillor Smith was making the decision as a democratically elected representative of the community rather than making a decision in their personal capacity. With respect, that would be a trite response, in that there is no separation between Mr Smith as a Commissioner and Mr Smith as a member of the planning and strategy committee, Councillor and Deputy Mayor. They are one and the same person.
23. As previously stated, one of the critical early issues the Commission will be asked to adjudicate on, is whether the Landscape assessment methodology used to produce the schedules was fair reliable and valid. In particular, whether the Council undertook fair and reasonable consultation with residents and ratepayers. It is

submitted that this must be considered before any consideration of the schedules and submissions can take place.

24. And yet, Councillor Smith has sat in on, considered and voted on matters relating to the landscape schedules, despite knowing that there had been serious concerns raised about the methodology employed. Perhaps, more concerningly, Councillor Smith voted against any public consultation, and further was silent on whether the consultation was fair, which to my mind is a tacit endorsement of the methodology and resulting schedules. It seems inconceivable that the same Councillor can now sit impartially as a Commissioner on the panel to hear submissions.
25. The essence of our Judicial system, particularly where it crosses with administrative duties of local body organisations is that justice should not only be done, but should manifestly and undoubtedly be seen to be done. And in regard to fairness and due process, for the local resident or ratepayer to have confidence in QLDC administration, it is paramount that independence is maintained by quasi-judicial decision makers.
26. As earlier stated, **the test is whether a fair-minded, fully informed observer would have a reasonable apprehension that Commissioner Smith might not bring an impartial mind to the resolution of the question required to decide.**
27. To summarise, this memorandum seeks that Councillor Smith recuse himself from the role of Commissioner, or the Chairperson, having considered all the facts, ask Councillor Smith to resign from his role as a Commissioner considering submissions on Landscape Priority Area schedules.
28. At the very least, this memorandum should be put before submitters and their counsel, and submissions be allowed to be made on the issue of Councillor Smith and any potential conflicts of interest as a Commissioner hearing appeals on the priority landscape schedules.

Dated this 7th August 2023

A handwritten signature in black ink, appearing to read 'John Cossens', written in a cursive style.

Dr John Cossens, Wanaka