

Ashburton District Council: Allegations of conflicts of interest affecting decisions on a second bridge

This is an independent report about
an investigation under the Local
Authorities (Members' Interests) Act
1968.

October 2014

ISBN 978-0-478-41096-9 (online)

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Auditor-General's overview

This report looks at how three elected members of Ashburton District Council managed conflict of interest questions recently. The questions arose in the context of the decisions the Council had to make on its project to build a second bridge across the Ashburton River in 2026.

We needed to carry out an investigation, because one of the interests raised a question under the Local Authorities (Members' Interests) Act 1968, which I administer. We took a broad approach to the investigation and looked at all of the interests that were involved, because we decided that the local community deserved a clear explanation about the nature of the different interests and the choices that the councillors had made.

In brief, we have concluded that:

- The Council's decision to designate land for the bridge project did not have a certain or significant enough effect on the value of Councillor Urquhart's adjacent property, for him to be regarded as having a financial interest in the decision that would trigger the application of the rule against participation in the Act.
- Councillors Urquhart, Nelson, and Wilson all made reasonable choices on whether to participate in the Council's decisions, given that they each had relatives with properties that would or might be affected by the designation decision.
- Councillor Urquhart's decision to participate in the Council's decision on whether to designate the land, despite the risk that he would be regarded as predetermined, was a choice that he was entitled to make. The final decision on whether to take part rests with the individual councillor and there is considerable room for judgement.

This investigation, and the different conflict of interest questions that the three councillors had to consider, provide a good illustration of the types of issues that arise in local authorities throughout the country every week. We regularly receive calls and emails from elected members and staff struggling to make the "right" decision about how to handle potential conflicts of interests.

Our experience is that conflicts of interest questions are more likely to be grey than black and white. Deciding whether there is one and – if so – how to manage it, is rarely clear or straightforward. An elected member with a potential conflict of interest needs to weigh a complex mix of competing concerns. Unless there is a clear financial interest, in the end they will need to make their own decision on whether it is appropriate to take part in a decision.

In small communities, elected members will have many connections through family and friends with many of the matters coming to the Council for decision. People with strong community connections and attachment are likely to stand and be elected to govern their local authority. The result is that potential conflicts of interest in small communities are inevitable, frequent, and difficult to manage.

Many people, including this Office, have commented in recent years that the Local Authorities (Members' Interests) Act governing financial interests is outdated and can be difficult to apply to modern local government decision-making. It also imposes criminal sanctions that can seem disproportionately severe for the behaviour in question.

My office will continue to administer the Act regulating financial interests so long as it remains in force, and to provide general guidance on questions about non-financial interests where we can.

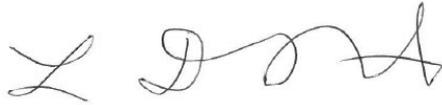
For non-financial conflicts of interests:

- The “rules” on identifying and managing conflicts come solely from the common law, which cannot provide clear or definitive guidance about the many different situations that arise.
- Working out whether a conflict of interest is significant enough to require a councillor to withdraw because of a relationship they have can be difficult, particularly in small communities where “everybody knows everybody”.
- The concept of predetermination is particularly challenging for local authorities because they are elected decision-making bodies. Elected members who have campaigned on a particular platform might be torn between their desire to represent the people who voted for them and the need to consider the council's risk of judicial review if they do.

There are no obvious or simple solutions to these challenges. Legislative change might provide some assistance, but no legislation will ever provide the answer to every situation.

In practice, the local government sector will continue to have to work through these questions, when they arise, in a careful, principled, and transparent way. I emphasise transparency, because I regard it as vital for maintaining the trust of the public. It enables the community to see and debate how these challenges are being managed.

I would like to thank the individual elected members and the staff from Ashburton District Council who helped us with our investigation.

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

Lyn Provost
Controller and Auditor-General

14 October 2014

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Introduction

Background

- 1.1 On 22 May 2014, the Ashburton District Council (the Council) met to decide whether to designate certain land for the Second Urban Bridge Project (the Project). The Project is to build a second bridge across the Ashburton River to provide an alternative access route for traffic joining state highway 1. Although construction of the bridge is not intended to begin until 2026, designating the relevant land now enables the Council to restrict what can be done with that land and to start buying some of it.
- 1.2 At the meeting, the Council had to decide whether to accept the recommendation of independent commissioners to confirm a “Notice of Requirement” for the designation of the land needed for the Project. The Council was divided 50/50, which meant that the Mayor was called on to use his casting vote. The Mayor voted to accept the commissioners’ recommendation.
- 1.3 After the meeting, a member of the public wrote to us with questions about how conflicts of interest had been managed at this and earlier meetings. He told us that Councillor Urquhart might have had a financial conflict of interest, because he owns a house adjacent to the designated area, and might have had a predetermined view on the matter. He noted that at a meeting in November 2013, Councillor Urquhart had declared an interest and withdrawn from the discussion of the Project. The correspondent also told us that two other councillors had relatives with property interests in the designated area. One had participated in the November meeting but withdrawn from the May meeting. The other had participated in both meetings.

Why we decided to investigate

- 1.4 We decided to investigate these concerns for two main reasons.
- 1.5 First, elected members who participate in a decision in which they have a financial interest commit an offence under the Local Authorities (Members’ Interests) Act 1968. The Auditor-General is the prosecuting authority under that Act and so we needed to investigate the allegation that Councillor Urquhart took part in a decision in which he had a financial interest.
- 1.6 Second, there seemed to be significant confusion and concern about why different councillors with apparently similar interests had reached different conclusions about whether they should participate. They had also made different decisions at different meetings.

- 1.7 The Auditor-General does not have a formal role in regulating non-financial conflicts of interests. However, we do from time to time assess how well public entities are managing conflicts of interest of all kinds as part of our consideration of whether the entity has appropriate and effective governance arrangements. We decided that we should establish exactly what the various interests were and how each councillor had managed them, to provide some clarity for the community.

Types of conflicts of interest questions involved

- 1.8 Members of local authorities have to consider two broad categories of conflicts of interest – financial and non-financial. Different legal rules apply in each case.
- 1.9 A financial conflict of interest arises when an elected member stands to gain or lose financially by a decision the local authority is making. The Local Authorities (Members' Interests) Act 1968 (the Act) regulates financial conflicts of interest and creates a general rule that an elected member cannot participate in a decision in which they have a financial interest. The Auditor-General administers the Act.
- 1.10 Non-financial conflicts of interest arise when an elected member might be regarded as biased for some reason other than a financial one. The common law regulates these interests. The main situations that we encounter are:
- An elected member who has a relationship with a person or organisation that might be affected by the local authority's decision (for example, the decision might affect an immediate family member).
 - An elected member who has a role with another organisation that might be affected by the local authority's decision (for example, a councillor is on the governing body of a trust or company that will be affected by the local authority's decision).
 - An elected member's actions or comments suggest that they have already made up their minds on the issue the local authority has to decide, before they have considered all the relevant information and had the discussion (predetermination).¹
- 1.11 The different types of interests and the different rules that apply can create confusion and uncertainty – for elected members, for council staff trying to advise them, and for the public watching how their council is operating. The Appendix summarises the different types of interests and the risks they create for individual members and local authorities.
- 1.12 This situation in Ashburton District Council involves the full range of conflict of interest questions, as Figure 1 shows.

1 Strictly speaking, predetermination is not a conflict of interest but is a separate form of bias. However, it is often included in conflicts of interest in discussions about managing the risks of bias in the public sector.

Figure 1
Summary of Councillors’ interests and participation in decisions on the Project

Councillor	Nature of personal interest	Type of risk	Took part in decision?	
			28/11/13	22/5/14
Urquhart	Councillor owns land adjacent to the designated area.	Financial interest	No	Yes
	Son owns land adjacent to the designated area.	Non-financial interest		
	Risk from having been an active member of the Bridge Action Group (which opposes the proposed location) and previous public statements.	Predetermination		
Wilson	Brother owns land within the designated area.	Non-financial interest	Yes	Yes
Nelson	Sister-in-law owns land within the designated area.	Non-financial interest	Yes	No

How we carried out this investigation

- 1.13 The Council provided us with the background papers about the Project as well as the correspondence and Council papers relating to the issues we were investigating. We then travelled to Ashburton and met with each of the three elected members as well as relevant Council staff.
- 1.14 Based on the information we had gathered, we prepared a draft report and sought comment on all or part of it from the individuals affected by it. We revised the draft report in the light of the comments we received and then finalised it for publication.

Recent events on the bridge project

2.1 The Project has a long history dating back to 2005. We summarise recent events in this Part. More background and the relevant documents are available on the Council's website.

Figure 2
Summary of recent events on the second urban bridge project

Date	Events
4 July 2013	<p>Council decision</p> <p>The Council approved "Option A" as the selected route for the second bridge, which was to proceed to the land designation process under the RMA. The land designation process involves:</p> <ul style="list-style-type: none"> • publishing a notice of requirement for land designation; • public submissions; • hearings by independent commissioners (because the Council was the applicant); • recommendations from the commissioners to the Council; and • a final decision by the Council on whether to designate the land.
17 September 2013	A draft notice of requirement was circulated to councillors.
19 September 2013	A Council workshop discussed the draft notice of requirement. Staff addressed two follow-up queries in a later report to councillors.
3 October 2013	<p>Council decision</p> <p>A report from Council staff notes that the designation for the works was being sought to secure the required land before any future development, so that the project could proceed when required.</p> <p>The Council voted to "... proceed to lodge a notice of requirement for land designation associated with the second urban bridge across the Ashburton River, including road infrastructure and associated works as shown in the Option A plan dated 4 March 2013".</p>
12 October 2013	Local authority elections.
30 October 2013	<p>Inaugural meeting of the newly elected councillors.</p> <p>Ashburton District Council has 12 councillors and a mayor. As a result of the election, eight councillors were returned to office and four new ones, including Councillor Urquhart, were elected.</p>
7 November 2013	The notice of requirement was publicly notified under the Resource Management Act 1991.
14 November 2013	Five councillors, including Councillor Urquhart, provided the Chief Executive with a notice of motion proposing: "That the designation process for the Ashburton second urban bridge be put on hold until such time as the newly elected Council reconsiders the matter; and that this matter be considered at an extraordinary Council meeting".

<p>27 November 2013</p>	<p>Councillor McLeod emailed the Chief Executive and Mayor to say that three people had raised concerns with him about possible conflicts of interest. The email said:</p> <p>“Hi Andrew and Angus,</p> <p>Three people have raised the issue that there may be a conflict tomorrow – some Councillors may still be members of the Bridge Action Group, and/or may own land adjoining the proposed route, which could mean a pecuniary interest if their land value is affected. I request that you seek clarification of these matters before we have the meeting, so we are all in clear territory when the discussion takes place.</p> <p>Thanks Don”</p> <p>The Chief Executive reminded councillors that afternoon, by email, of their obligation to declare any financial or non-financial conflicts of interest.</p>
<p>28 November 2013</p>	<p>Before the Council meeting</p> <p>Councillor Urquhart emailed the Chief Executive and told him that he had been involved with the Bridge Action Group but had stood down. He asked to meet with the Chief Executive that morning. The email did not mention that Councillor Urquhart owned land adjacent to the land to be designated.</p> <p>The Chief Executive sought legal advice by telephone about Councillor Urquhart’s situation. The advice was that:</p> <ul style="list-style-type: none"> • there was a strong risk of apparent bias if Councillor Urquhart were to take part in the decision that afternoon; and • the risk of apparent bias arose from his strongly held views combined with active participation in the Bridge Action Group. <p>The Chief Executive told Councillor Urquhart about the legal advice.</p> <p>The Chief Executive told us that he did not ask for advice about whether Councillor Urquhart had a financial conflict of interest at that point, because he did not know that Councillor Urquhart owned a property adjacent to the designated area.</p> <p>At the Council meeting</p> <p>The purpose of the 28 November meeting was to consider the notice of motion provided to the Chief Executive on 14 November.</p> <p>In a report from the Chief Executive to the councillors, it was noted that it was “understood that the Councillors are seeking to revoke Council’s decision of 3 October 2013”.The report explained that, to give effect to the proposed motion to put the decision on hold, the decision of 3 October would need to be revoked. This was because the notice of requirement had already been publicly notified. This had triggered a formal statutory process of public submissions and hearings. The Council had no power to pause that statutory process when it was under way. Instead, it would have to revoke the notice of requirement.</p> <p>The meeting discussed and voted on a motion to revoke the Council’s decision on 3 October 2013. The motion was lost. The Mayor used his casting vote in this decision.</p>

	Councillor Urquhart declared a conflict of interest and did not participate in the discussion or vote. He later told us that he did not believe he had a conflict and felt like he was letting down the people who had voted for him by not participating. However, he did not have time to follow up on the legal advice received by the Chief Executive.
19 December 2013	<p>The chief executive received formal written legal advice on Councillor Urquhart's position which he passed on to Councillor Urquhart. The legal advice confirmed that there would have been a risk of apparent bias if Councillor Urquhart had participated in the decision on 28 November.</p> <p>Since giving the initial verbal advice, the Council's legal advisors had learned that Councillor Urquhart owned a property adjacent to the land proposed to be designated. They said that this meant he had a pecuniary interest because the value of his land could be affected and, if he had taken part in the meeting on 28 November 2013, he would have been at risk of prosecution under the Local Authorities (Members' Interests) Act 1968.</p>
February 2014	<p>Councillor Urquhart wrote to our Office. He told us that:</p> <ul style="list-style-type: none"> • Before he was elected, he had been an active member of the Bridge Action Group, which opposed the Project, and he had campaigned to join the Council on a platform that included that opposition. • He opposed the Project not because his land was adjacent to the proposed access route, but because he believed that the Project would do little to address the district's traffic problems, there were better options, and the New Zealand Transport Agency should be funding these better options. • He had not disclosed his land interests to the Chief Executive because other councillors had relatives with land that the notice of requirement would affect. He said that, if they were allowed to participate, he felt he should be able to as well, especially because his land was not directly affected. He said he felt he had been unfairly singled out. • He understood that the appearance of impartiality is important if the Council acts in a quasi-judicial role. He was prepared to consider any information in an unbiased manner, whether it affected him or not, if the information and evidence stacked up. • Since the decision, his son had bought land nearby but was not affected by the notice of requirement. <p>Our response to Councillor Urquhart said that:</p> <ul style="list-style-type: none"> • The Council's legal opinion had identified apparent bias and predetermination as the main concern affecting his involvement in this decision-making process. His potential pecuniary interest was correctly treated as a secondary matter. • If we were to consider an exemption from the prohibition on participation because of his pecuniary interests, this would not resolve the apparent bias and predetermination issues. • The Council had done the right thing by obtaining specific legal advice. • He should work with the Council and take account of that advice.
10–13 March 2014	Two independent commissioners heard public submissions on the notice of requirement.
8 May 2014	The commissioners formally recommended to the Council that it proceed with the notice of requirement to designate the land.

<p>22 May 2014</p>	<p>Council decision</p> <p>At this meeting, the Council had to consider the recommendation of the commissioners. One of the commissioners was present to answer questions from councillors.</p> <p>Council officers recommended that the Council adopt the commissioners' recommendation and confirm the notice of requirement for the designation of land.</p> <p>The Chief Executive also gave councillors a summary of legal advice he had received on the options open to the Council at this stage of the process.</p> <p>At the meeting:</p> <ul style="list-style-type: none">• Councillor Nelson declared a non-pecuniary conflict of interest and gave notice that he would not take part in the discussion or decision-making.• Councillor Totty then sought clarification on the conflict of interest process, noting that other councillors might also have conflicts of interest.• Councillors were reminded of the need to declare any conflict of interest.• The Chief Executive reminded Councillor Urquhart that legal advice had noted that the prudent course of action would be for him to withdraw from debate and decision.• Councillor Urquhart reported that he had sought his own legal advice and he believed he was unfairly discriminated against in the 28 November meeting. He referred the Council to the email of 27 November, and he asked for that to be disclosed. The Mayor read the email. <p>The recommendation "that Council adopts the Commissioners' recommendation attached to the report and confirms the notice of requirement for the designation of land for a second urban bridge over the Ashburton River and associated road purposes" was passed, with the Mayor using his casting vote. The votes were:</p> <ul style="list-style-type: none">• For: Councillors McLeod, Totty, Nordqvist, Beavan, Brown, and McKay.• Against: Councillors Favel, Wilson, Reveley, Cutforth, Ellis, and Urquhart.
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Did Councillor Urquhart have a financial conflict of interest?

The relevant law

The rule on participation in decisions

- 3.1 Section 6(1) of the Local Authorities (Members' Interests) Act prohibits a member of a local authority from discussing or voting on any matter in which they have a pecuniary interest (whether direct or indirect), unless that interest is "in common with the public".
- 3.2 A member with a possible pecuniary interest can apply to the Auditor-General for:
- an exemption allowing the member to participate because the interest is so remote or insignificant that it is unlikely to influence how the person votes; or
 - a declaration that section 6(1) should not apply to a particular matter because:
 - applying it would impede the transaction of business by the local authority,²
 - or
 - it is in the interests of the people of the district that the rule should not apply.³
- 3.3 The Auditor-General's role is to investigate alleged breaches and, if the circumstances warrant it, to bring prosecution proceedings. However, ultimately only a court can determine whether the Act's requirements have been breached.

What is a "pecuniary interest"?

- 3.4 The Act does not define what a pecuniary interest is. The interpretation we give it, drawn from case law in New Zealand and overseas, is that a pecuniary interest is "a reasonable expectation of financial loss or gain". For clarity, we usually simply refer to a "financial interest".
- 3.5 Case law establishes the following general principles:
- In determining whether an interest exists, the motives and good faith of the councillor concerned are irrelevant.
 - Whether a financial interest exists is a matter of fact, not a matter of opinion.
 - It is relevant to consider whether an informed objective bystander would conclude there was a reasonable likelihood of bias.
 - A financial interest might be direct or indirect, and might arise in a wide variety of factual situations.
 - Financial interests include potential benefits or liabilities.

2 For example, if many Councillors had financial interests in the same matter, the Council might not be able to make effective decisions.

3 For example, the matter under discussion could be of such significance for the district, that it is preferable for all elected members to participate, despite the fact that some of them may have financial interests.

Part 3

Did Councillor Urquhart have a financial conflict of interest?

- Assessing whether someone has a financial interest must be done by reference to the particular matter under discussion, rather than to a matter in a broad or abstract sense.

3.6 This last point is particularly important in the local government context where a local authority often makes many different decisions about a matter (such as a development project) over a period of time. A councillor with a potential interest will not necessarily be affected financially by all of those decisions. For example, early decisions to commission work on options or to consult are unlikely to have a financial effect and so the rule against participation would not apply to them. However, a later decision to confirm a particular option might have a clear financial effect on a person and so the rule against participation would apply.

The facts

The Council decision

- 3.7 At its meeting on 22 May 2014, the Council had to decide whether to accept the recommendation of the independent commissioners and confirm the proposed designation of land for a second urban bridge over the Ashburton River. If the Council did, the land would become subject to a designation to be included in the District Plan.
- 3.8 As set out in Part 2, the chief executive reminded Councillor Urquhart that the Council's legal advice was that it would be prudent for him to withdraw from the debate and decision, in part because of the risk that he had a financial interest in the decision. However, Councillor Urquhart said that he had different advice. He voted against accepting the recommendation and designating the land.
- 3.9 The Council vote was tied and so the Mayor used his casting vote to support the commissioners' recommendation and confirm the designation.

The effect on Councillor Urquhart

- 3.10 Councillor Urquhart owns a property adjacent to the area that was proposed for designation. Matters that might affect properties near the area to be designated, such as changes to zoning areas and classification of roads, had already been made in recent changes to the District Plan. The decision on 22 May 2014 was simply about whether to confirm the designation.

- 3.11 The report from the commissioners described the functions of a designation as:
- (i) Enabling the construction and operation of public works where those activities would otherwise be contrary to the provisions of a district plan;*
 - (ii) Founding a process of land acquisition (where necessary), subject to the payment of compensation;*
 - (iii) Protecting designated land against developments that might make it more difficult (or more costly) for the public work to proceed; and*
 - (iv) By giving notice of a proposal, enabling people to factor its future existence in to their own decision-making.*
- 3.12 The designation does not apply to Councillor Urquhart's property and so the decision to designate has no direct effect on how he might use or develop the land. However, it increases the chance that at some future time a significant road might be developed near his land as part of the Project. At present, construction is planned to begin 12 years from now, in 2026.

What Councillor Urquhart told us

- 3.13 Councillor Urquhart told us that he knew that the Council's legal advice said that he had a financial conflict of interest. However, he told us that two different lawyers told him that he did not have a conflict of interest.
- 3.14 He also contacted our office for advice, as set out in Part 2. He said that he did not find our response particularly helpful because it did not explicitly confirm whether the Council's legal advice was correct. He decided to be guided by the advice from the lawyers he had talked to, rather than the written legal advice that the Council had sought and passed on to him.
- 3.15 Councillor Urquhart told us that he disagreed with the view that he had a financial interest because his property is not in the area that was to be designated. He said that, under one of the options considered earlier in the process, his property would have been within the designated area. He told us that, if that option had been chosen, he would probably not have participated in the decision.
- 3.16 He noted that, because his property is not in the designated area, the Council is not required to provide any form of compensation or offer to buy his land under the Public Works Act 1981. In his view, this suggested that the value of his property was not affected by the designation.

Our view

- 3.17 In our view, it is possible that the value of Councillor Urquhart’s land has been affected in some way by the Council’s decision to designate the adjacent land for the Project. However, attempting to assess the nature and scale of any change would be highly speculative. The access road is not due to be built until 2026, it is contingent on a number of other factors and steps in the process, and it is still possible that it may not proceed at all. As the commissioners noted, a measure of urban development is expected in Ashburton, whether or not the Project proceeds.
- 3.18 We do not regard the possible effect of the designation decision on the value of his land as sufficiently certain or significant enough to constitute a financial interest that would trigger the application of the rule against participation in the Act.
- 3.19 In case we are wrong in this view, we have also considered whether a financial interest in this situation would warrant a prosecution for breach of the Act. The Prosecution Guidelines issued by the Solicitor-General require us to take into account:
- whether it is more likely than not that a prosecution will result in conviction;
 - the size and immediacy of any financial interest, the damage caused, the amount of public concern, and the extent to which the member’s participation influenced the outcome;
 - mitigating and aggravating factors, such as any previous misconduct, willingness to co-operate with an investigation, evidence of recklessness or irresponsibility, and previous breaches, cautions, and warnings;
 - the effect on public opinion of deciding not to prosecute;
 - the availability of alternatives to prosecution, such as reporting publicly to the Council or the public;
 - the prevalence of offending and need for deterrence;
 - whether the consequences of a conviction would be unduly harsh or oppressive; and
 - the likely length and expense of a trial.
- 3.20 We also considered the most recent case to have considered the application of section 6(1) in the context of a prosecution: *Auditor-General v Christensen* [2004] DCR 524. In that case, the Court said that:
- the existence of a financial interest must be established “beyond reasonable doubt”;

- on the particular facts, if the charge had been made out, the judge would have considered discharging the defendant without conviction because the councillor had not been motivated by self-interest and the consequences of convicting him (a criminal conviction and automatic loss of office) would have seriously outweighed his fault.

3.21 Applying the *Prosecution Guideline* factors and the comments from the Court, we have concluded that a court would be highly unlikely to convict in this situation. In particular, it would be difficult to establish beyond reasonable doubt that there had been a financial loss or gain. We think a court would also take into account that Councillor Urquhart is a first-time Councillor, that he made a genuine effort to seek advice about his situation, and that he did not appear to have been motivated by self-interest.

3.22 In summary we concluded that, although there is a possibility that Councillor Urquhart had some kind of financial interest when he participated in the Council's decision on 22 May, that is not certain enough to trigger the application of the Act or to justify bringing criminal proceedings against him.

4

The non-financial interests of Councillors Nelson, Wilson, and Urquhart

- 4.1 No statute prescribes how to manage non-financial conflicts of interest. Individual elected members must decide whether an interest creates a risk of bias – or the appearance of bias – and decide whether it is appropriate to participate in a decision. In general, elected members who participate when they have a non-financial interest do not risk any personal liability. However, they can still create a risk that the Council’s decision will be challenged in court on the grounds of bias.
- 4.2 In this Part we explain the type of interest that Councillors Urquhart, Nelson, and Wilson had and the reasons for the decisions they each made, and set out our comments.

Councillor Nelson

- 4.3 Councillor Nelson’s sister-in-law owns land within the area that has been designated. Because of this link, he has declared an interest and did not take part in the Council’s decisions on two occasions:
- On 15 November 2012, when the operations committee of the Council decided on the preferred location of the land for the second urban bridge; and
 - On 22 May 2014, when the Council formally decided to accept the commissioners’ recommendation and designate that land.
- 4.4 He has participated in all other decisions on this issue.
- 4.5 Councillor Nelson told us that he drew a distinction between:
- “process” decisions – for example, about seeking submissions and obtaining the community’s views – when he considered his role was to support the process; and
 - “substantive” decisions, when the Council was actually taking firm decisions on the location of the route and the land that would be affected.
- 4.6 Councillor Nelson told us that he understood that there was a risk that he could be regarded as having a conflict of interest if he took part in the discussion and voted at the 22 May meeting. This was because a relative could be financially affected by the Council’s decision to designate the land for the second urban bridge – the designation would restrict what she could do with her land. He noted that, although he did not socialise with his sister-in-law, he felt he should err on the side of caution.
- 4.7 He declared a conflict of interest at the May 2014 meeting because the Council was making a substantive decision that would determine whether the Project would proceed using that route. He regarded the previous decisions he had participated in as process decisions.

Councillor Wilson

- 4.8 Councillor Wilson's brother owns land within the area that has now been designated. Councillor Wilson told us he accepted that there was a need for a second bridge but that he opposed the proposed route. He was not convinced it was the right traffic solution. He also felt that the New Zealand Transport Agency should fund the bridge, not the Council.
- 4.9 Councillor Wilson told us that he was financially independent of his brother and that they moved in independent social circles. He told us that, although he was aware there could be a perception of a conflict of interest, he decided to participate in the discussion because he had been elected to represent all ratepayers of the district, many of whom had contacted him agreeing with his stance on the bridge. He felt that he owed it to the ratepayers who had encouraged him to participate.

Councillor Urquhart

- 4.10 Councillor Urquhart had two potential non-financial conflicts of interests to consider:
- His son owns property adjacent to the designated area, but not within it.
 - He had been an active member of the Bridge Action Group campaigning against the proposed route. The bridge issue was a feature of his election campaign, and he has made some strong public statements on it.
- 4.11 Councillor Urquhart told us that his election campaign was based on not supporting the bridge decision and seeking more transparency from the Council as a whole. He did not object to a second bridge. However, he had concerns about the location and who should pay for it. Councillor Urquhart told us that he believed that he approached the decision about the bridge with an open mind. He also felt that his main responsibility was to consider the views of the community.
- 4.12 Councillor Urquhart told us that he had declared a conflict of interest at the meeting on 28 November 2013 because the chief executive advised him that he should, based on the legal advice the chief executive had received by telephone about the risk of perceived predetermination. Councillor Urquhart did not have time to seek his own advice and so followed the chief executive's advice.
- 4.13 As set out in Part 2, Councillor Urquhart later sought his own advice by talking with two other lawyers. He told us that both lawyers thought the Council's advice was not sound and that he was free to participate. He also wrote to us. He did not find our response helpful, because we did not explicitly say whether we agreed with the Council's advice.

- 4.14 Councillor Urquhart knew that he had to make up his own mind about whether to participate. He decided that he did not have a conflict of interest that would prevent him from participating in the decision on 22 May 2014.

Our views

- 4.15 Each of these three councillors had to decide whether their personal situation created a risk that the Council's decision would be tainted by bias if they took part. These decisions are rarely straightforward.
- 4.16 Holding office as an elected member of a local authority carries obligations to carry out the duties of office and to represent the people of their community. In our experience, elected members take these obligations seriously and do not decide lightly that they should withdraw from important decisions. They need to be satisfied that their participation would create a real legal risk for the council that outweighs their general obligations.
- 4.17 Nobody has the power to prevent an elected member from taking part: elected members have to make those decisions themselves. Colleagues and council staff can provide advice, but cannot tell them what to do.
- 4.18 Most local authorities provide training and support to help elected members through these situations. However, training is inevitably limited to the general principles and concepts and some common examples. Few cases come to court, so the law does not provide clear or detailed guidance for many of the practical situations that regularly arise in the local government sector.
- 4.19 Councillors need to consider how close the relevant relationship or link is to the affected interest, how substantially the decision will affect the person or organisation that they are linked to, how direct the effect of the decision will be, the nature of the decision being taken, how it might look to an objective observer, and any other relevant factors. It is rare for situations to be black and white. In our experience, these assessments can be a matter of fine judgement.
- 4.20 Because the legal and practical risks of participation are often vague, and the assessment of what constitutes a conflict of interest is uncertain, the individual councillor has considerable room for judgement on what to do.

The steps the Council took

- 4.21 Council staff must do their best to manage the risk that a Council decision will be legally challenged on the grounds of actual or apparent bias. Even if the practical risk of legal challenge is low, the Council has to be conscious of the need to protect its reputation and public confidence in the decision making process.

To do this, the Council needs to be able to demonstrate that decisions have been properly made, in accordance with the relevant statutory criteria, and with the proper degree of impartiality.

- 4.22 In our view, Council staff took all the proper steps to manage conflict of interest risks in this situation. Elected members were provided with appropriate guidance on how to identify and manage conflicts of interest, including a workshop for new members shortly after they were sworn in. As soon as the chief executive learned of the possibility of conflicts of interest affecting the decisions on the Project, he wrote to all of the elected members to explain the risks and remind them of their legal obligations. When Councillor Urquhart approached him for advice, he arranged for him to be given specialised advice from a law firm recognised for its experience and expertise in this area. He also specifically reminded elected members of their obligations during the relevant meetings. The meeting papers also included substantial advice on the legal constraints applying to the Council's decision-making.
- 4.23 There is little more that staff can do. After talking with all three councillors, we found that each of them had a reasonable understanding of the risks and principles that they needed to consider before making their own decisions about participation.

The Councillors' decisions on non-financial interests

- 4.24 Our assessment is that all three councillors thought seriously about their own situations and the risk of a conflict of interest arising from their family's property interests. They all made considered decisions on what to do. Councillors Urquhart and Wilson decided that the effect on their relatives' land did not prevent them from participating. Councillor Nelson decided that he could participate on procedural decisions but did not participate in the main substantive decisions.
- 4.25 Our good practice guides on conflicts of interest encourage a precautionary approach, with the advice "if in doubt, stay out". However, we appreciate that on matters of high community and political significance, an elected member with a marginal non-financial interest might decide that this approach was unduly restrictive.
- 4.26 In our view, the choices that each of these councillors made on this issue, although different, were all reasonable.

Councillor Urquhart's decision on the predetermination risk

- 4.27 Councillor Urquhart's decision to take part, despite the risk that he would be regarded as predetermined, is more complex. This is a difficult area of law and practice, because the legal principles on bias and predetermination have largely been set in cases about decisions of an administrative or judicial character. Few cases consider how far those principles should apply to elected decision-makers deciding matters of policy or political concern. Those cases acknowledge that the democratic context, political policy platforms, and electoral mandates are relevant. However, they do not spell out the boundary between the different types of decisions or say how open a councillor's mind needs to be in a given situation.
- 4.28 Council staff had written legal advice that Councillor Urquhart would probably be perceived as biased, and so his participation would taint the decision and create a legal risk. They had communicated this advice to Councillor Urquhart. We had also encouraged him to take account of that advice (without providing our own view). Councillor Urquhart talked to other lawyers and was given different views. He also put weight on his representative responsibilities and the fact that concern about the Project was central to his reason for standing for office. In the end, he decided that his sense of responsibility to the people he represented outweighed the risks of his participation and so he took part in the vote.
- 4.29 This was a choice that Councillor Urquhart was entitled to make. As explained in paragraphs 4.15 - 4.20, the decision on whether to take part does rest with the individual councillor and there is considerable room for judgement.
- 4.30 From our discussions with him, we consider that Councillor Urquhart understood the legal principles and risks, received advice from a range of sources, and made up his own mind. It was a reasonably significant decision not to follow the formal advice that Council staff had obtained for him. It is entirely possible that he has exposed the Council decision to some level of risk. However, in our view it was a choice that was open to him.
- 4.31 In our work, we do see situations from time to time where the council and an individual councillor reach different views on whether it is appropriate for the councillor to participate in a decision. In that situation we always encourage the councillor to work through the issues closely with council staff and to seek advice on any matters in dispute. In the end though it is for the individual councillor to decide whether to participate.

Appendix

Types of interests and the risks they create in local government

Type of conflict	Relevant law	Legal risks
<p>Does the member stand to gain or lose financially from the decision the Council is being asked to make?</p> <p>Or</p> <p>Does the member's spouse/partner or business stand to gain or lose financially from the decision the Council is being asked to make?</p> <p>If yes, the potential conflict is financial.</p>	Local Authorities (Members' Interests) Act 1968	<p>For the member:</p> <ul style="list-style-type: none"> • criminal conviction • loss of office • fine <p>For the Council:</p> <ul style="list-style-type: none"> • judicial review
<p>Is the decision likely to affect someone that the member is related to or closely associated with, or another organisation they are involved with?</p> <p>If yes, is there a risk that the member will be seen to be biased in the way they vote because of their relationship or association with that person or organisation?</p> <p>If yes, the potential conflict is non-financial.</p>	Common law	<p>For the member:</p> <ul style="list-style-type: none"> • no personal liability <p>For the Council:</p> <ul style="list-style-type: none"> • judicial review
<p>Is the decision likely to affect another organisation that the member has a role in?</p> <p>If yes:</p> <p>Is there a risk that the member will be seen to be acting in the interests of the other organisation rather than the Council?</p> <p>If the member participates, is there a risk that they might breach obligations owed to the Council or the other organisation, such as a duty of loyalty or of confidentiality?</p> <p>If yes, the member has a potential conflict of roles.</p>	Common law	<p>For the member:</p> <ul style="list-style-type: none"> • potential civil liability if the member breaches legal duties owed to the other organisation <p>For the Council:</p> <ul style="list-style-type: none"> • judicial review
<p>If member participates in this decision, is there a risk that people will think they have made up their mind about how they are going to vote before they have listened fairly to all the arguments?</p> <p>If yes, there is a risk of predetermination.</p>	Common law	<p>For the member:</p> <ul style="list-style-type: none"> • no personal liability <p>For the Council:</p> <ul style="list-style-type: none"> • judicial review