

# LACHLAN MULDOWNEY

BARRISTER

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21 April 2026

Chairperson  
PC120 Independent Hearing Panel  
Auckland Council  
Private Bag 92300  
Victoria Street West  
Auckland 1142

For: Sarah Shaw  
By email: pc120hearings@aucklandcouncil.govt.nz

Dear Panel

**RE: PC120 - Identification of interests and potential conflicts**

## Introduction

1. I refer to your letter dated 7 April 2026, which sought advice concerning the identification of interests and potential conflicts arising for members of the Plan Change 120 hearing panel (**Panel**). In particular you sought advice on:
  - a) Whether, in light of actions to date, there are any further procedural steps that I recommend the Panel take to ensure interests/potential conflicts are identified and appropriately disclosed.
  - b) What factors should the Panel consider in consistently evaluating and characterising Panel members' interests and potential actual or perceived conflicts of interest.
  - c) The extent to which any of the following would provide a useful framework for the Panel in assessing and managing potential actual or perceived conflicts of interest:
    - i. The District Court's recusal guidelines;

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- ii. The Auditor-General's public sector conflict of interest guidelines;
  - iii. Any relevant caselaw, including that relating to hearing commissioner conflict of interest or judicial recusal, and the circumstances in which recusal has/has not been found to be appropriate.
- d) Any other relevant matters bearing upon natural justice and conflict management considerations.

### Summary of advice

2. Effective management of potential actual or perceived conflicts of interest (**conflict/s**) requires that two steps be taken:
  - a) Identifying and disclosing the conflict (primarily the responsibility of the Panel member); and
  - b) Deciding what action, if any, is necessary to best manage the conflict.
3. In terms of the first step, I endorse the action taken by Panel members to date, which includes completing the 'Register of Interests' and reviewing the list of approximately 10,500 original submitters with a disclosure of any conflicts associated with original submitters recorded in a 'Register of Relationships with Submitter Parties'.
4. To ensure this initial conflict identification and disclosure process is robust, Panel members should be familiar with the categorisation of conflicts identified in the published *Auditor-General's Managing conflicts of interest: A guide for the public sector*. These categories are described as financial, non-financial, conflict of roles, and predetermination. Panel members should reflect on current and future disclosures with this in mind, and ensure the registers categorise conflicts in this way.
5. Once conflicts are identified and categorised, a decision must be taken on what action, if any, is necessary. Decisions of this nature initially sit with the relevant Panel member, in consultation with the Panel Chair. Ultimately however, if the conflict management approach adopted is deemed unacceptable to either the Ministers (in respect of those members appointed under cl 78 of Schedule 1 of the Resource Management Act 1991 (**RMA**)), or Council (in respect of those members appointed under s 34A of the RMA), the Panel member may be removed by the Ministers or Council.
6. The decision on what action, if any, to take will be informed by an assessment of 'seriousness'. Seriousness is a question of degree. It involves a spectrum of directness and significance – how close and how big. Depending on this assessment, the overlap of the two interests may so

slight that there is no realistic connection between the two interests, or any potential connection is so remote or insignificant that it could not reasonably be regarded as a conflict.

7. While recognising the distinctions between the role of a judge and that of a Panel member, in those instances where the relationship is direct, and very capable of influencing decision making, the Panel should take guidance from the High Court Judicial Recusal Guidelines. These guidelines will assist in determining whether a Panel member's conflict is so significant that it requires that the Panel member stand aside or stand down. In reliance on those guidelines, a Panel member should stand aside or stand down if, in the circumstances, a fair-minded, fully informed observer would have a reasonable apprehension that the Panel member might not bring an impartial mind to the resolution of the question the Panel is required to determine and make a recommendation on.
8. Panel members should reflect carefully on this standard, apply the principles firmly and fairly, and not accede too readily to suggestions of bias.

## **Analysis**

### ***Background***

9. By Gazette Notice dated 28 October 2025, the Minister Responsible for RMA Reform (Hon Chris Bishop) and the Minister for Conservation (Hon Tama Potaka) (**Ministers**) directed, pursuant to cl 78 of Schedule 1 to the RMA, that Auckland Council (**Council**) use a streamlined planning process (**Ministers' direction**) for Proposed Plan Change 120: Housing Intensification and Resilience (**PC120**) to the Auckland Unitary Plan (**AUP**).<sup>1</sup>
10. The Ministers' direction sets out a series of procedural steps required to be taken by Council, and in respect of the establishment of a panel required to hear and make recommendations on submissions received, states:

In accordance with clause 78(4B) of Schedule 1 of the RMA, the Minister Responsible for RMA Reform and the Minister of Conservation direct that the SPP panel convened to hear submissions under Step 7 must include no fewer than eight members and no more than nine members.

In accordance with clauses 78(4B) and 78(4C) of Schedule 1 of the RMA, the Minister Responsible for RMA Reform and Minister of Conservation will appoint four members of the SPP panel.

11. On 11 November 2025 Council appointed Sarah Shaw as Chairperson of the PC120 Panel (**Panel**) and followed that with the appointments of

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<sup>1</sup> The Resource Management (Direction to Auckland Council to use the Streamlined Planning Process to Prepare Proposed Plan Change 120: Housing Intensification and Resilience) Notice 2025 dated 28 October 2025.

members Karyn Sinclair, Karyn Kurzeja, Dr Lee Beattie and Jack Turner on 27 November 2025. The Ministers appointed members Vicki Morrison-Shaw, Matthew Prasad, Dr Stuart Donovan and Malcolm McCracken on 11 December 2025.

12. In respect of the identification of interests and potential conflicts you advise:<sup>2</sup>

Prior to appointment by the Council or the Ministers, respectively, each prospective Panel member was required to complete a disclosure of interests /conflicts of interest form relating to PC120. Following the appointment, all of the appointment disclosures have been provided to the Chair.

Subsequent to appointment, each Panel member has provided to the Chair a disclosure of any property interests within the areas affected by PC120 and any personal or professional connection to PC120. Those disclosures are being compiled by the Panel's Secretariat (**the Secretariat**) into a Register of Interests.

Subsequent to these initial disclosures, following a direction from the Panel to the Council on 11 February 2026, in advance of notifying the Summary of Decisions Requested, the Council provided all original submissions to the Panel. The Panel has published those original submissions on the PC120 website.

Each Panel member has reviewed the list of approximately 10,500 original submitters and has provided the Chair with a disclosure of any potential actual or perceived conflicts of interest associated with original submitters. Those disclosures are being compiled by the Secretariat into a *Register of Relationships with Submitter Parties*.

The Panel proposes to:

Publish each Register on the PC120 website; and

Treat each Register as a "living document", updating each as and when necessary (for example, once the lists of further submitters and additional submitters (enabled by the amendment to the RMA are known, and when the legal representatives and witnesses for submitters are identified).

13. In light of action taken to date you seek advice on what, if any, further procedural steps should be taken, what are the relevant factors to be evaluated, and whether there are any other relevant matters bearing upon natural justice and conflict management which should be considered.

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<sup>2</sup> Letter from Panel dated 7 April 2025; paras 6-9.

## ***Legal principles***

14. The Panel's functions and duties prescribed in the Ministers' direction include the requirement to conduct a public hearing into submissions under cl 8B of Schedule 1, to prepare a report showing how submissions and evidence presented at the hearing have been considered, and setting out the changes (if any) recommended to PC120. The Panel's recommendations are then to be considered by Council, which will then decide which of the Panel's recommendations will be accepted and reflected in the 'decisions version' of PC120.<sup>3</sup>
15. While it does not have ultimate decision making powers in relation to the final content of PC120, the Panel is empowered to set the procedural requirements associated with public participation in the PC120 process, including to undertake dispute resolution functions under cl 8AA of Schedule 1 of the RMA, and to conduct a hearing under cl 8B of Schedule 1 of the RMA. The Panel's powers and duties in relation to hearings are set out in ss 39-42 of the RMA. A review of those provisions clearly establishes that while the Panel's final report on submissions may be recommendatory only, within the conduct of the PC120 public participatory process, and the hearing itself, the Panel may make decisions which affect submitter rights and interests, and could be subject to review. In this context, the Panel's role and function is clearly of a quasi-judicial nature.
16. For the purpose of addressing the questions raised by you, it is not necessary to undertake a detailed traverse of the law relating to conflicts and how they are to be managed. In the context of the streamlined planning process under subpart 5 of Part 5 of the RMA, much of the generally relevant information is captured in the published Auditor-General's Managing conflicts of interest: A guide for the public sector (**Auditor-General guidelines**).<sup>4</sup> In addition, given the quasi-judicial nature of the Panel's role and function, the High Court Judicial Recusal Guidelines<sup>5</sup>, which are mirrored by the District Court Recusal Guidelines<sup>6</sup>, provide more targeted guidance.<sup>7</sup>
17. The Auditor-General guidelines identify the following two important aspects of dealing with conflicts:
  - a) Identifying and disclosing the conflict (primarily the responsibility of the Panel member); and

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<sup>3</sup> See Gazette Notice; Ministerial prescribed steps 7,8, 10, 11

<sup>4</sup> Controller and Auditor General Good Practice Guide published under s 21 of the Public Audit Act 2001 dated June 2020

<sup>5</sup> High Court Judicial Recusal Guidelines: Hon Justice G J Venning Chief High Court Judge – Te Kaiwhakawā Matua 12 June 2017

<sup>6</sup> District Court Judicial Recusal Guidelines: Heemi Taumaunu Chief District Court Judge November 2024

<sup>7</sup> I note that your instructions refer to the District Court Guidelines which contain no material differences to the High Court Guidelines.

- b) Deciding what action, if any, is necessary to best manage the conflict.
18. The primary responsibility for identifying and disclosing conflicts to the relevant people in a timely and effective manner rests with the person concerned. This is because it is the individual person who will always have the fullest knowledge of their own affairs.<sup>8</sup>
19. The Auditor-General guidelines note that in order to assist with both the identification of a conflict, and determining how it is to be managed, it is helpful to categorise the conflict as a:<sup>9</sup>
- a) Financial conflict (e.g. A Panel member owns property potentially affected by PC120); or
  - b) Non-financial conflict (e.g. A Panel member's family or close friend owns property potentially affected by PC120); or
  - c) Conflict of roles (e.g. A Panel member holds a separate role within an organisation with an interest in PC120); or
  - d) Predetermination (e.g. A Panel member has made up his or her mind before considering all of the relevant evidence).
20. You advise that each Panel member has made a disclosure of any property interests within the areas affected by PC120, and any personal or professional connection to PC120. In addition to this initial disclosure, which is being recorded in a *Register of Interests*, each Panel member has reviewed the list of submitters in order to identify any conflicts associated with the original submitters. You advise that any conflicts identified are being recorded in a *Register of Relationships with Submitter Parties*. I endorse the process adopted to date and note that this initial disclosure does not itself constitute an acknowledgment that the circumstances give rise to a reasonable apprehension of bias.<sup>10</sup> Rather it is the first important step in dealing with any conflict.
21. To ensure this initial conflict identification and disclosure process is robust, it is critical that when undertaking the task of identifying conflicts, the Panel has a clear understanding of the four categories of conflicts identified in the Auditor-General guidelines, and applies this lens to the task. This will provide clarity to the identification process. Accordingly, I recommend that Panel members be familiar with these categories, and that they reflect on current (and future) disclosures with this in mind, and ensure the registers categorise interests in this way.

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<sup>8</sup> Auditor-General guidelines; section 4.4,4.5.

<sup>9</sup> Ibid; section 3.

<sup>10</sup> See High Court Judicial Recusal Guidelines: section 6.2.

22. Once a conflict is identified, characterised, and disclosed, the Panel must decide what action, if any, is to be taken to address the conflict. In some cases, declaring a conflict and identifying it in the register may be sufficient; e.g., owning a residential property within Auckland. For other conflicts, more may be required depending on the seriousness of the conflict and the level of risk it presents. In relation to the question of ‘seriousness’, the Auditor-General guidelines note:<sup>11</sup>

Seriousness is a question of degree. It involves a spectrum of directness and significance – how close and how big. Directness (and its opposite, remoteness) is about how closely or specifically the two interests concern each other. Significance is about the magnitude of the potential effect of one on the other.

The public organisation might judge that the overlap of the two interests is so slight that it does not really constitute a conflict of interest. In other words, there is no realistic connection between the two interests, or any potential connection is so remote or insignificant that it could not reasonably be regarded as a conflict of interest.

23. Depending on the judgements made about seriousness, in the context of the role and functions of the Panel, the appropriate action could include (but is not necessarily limited to):
- a) Disclosure only;
  - b) Disclosure and seeking views of interested parties before action taken;
  - c) Disclosure and action taken within the PC120 process for the Panel member to step aside from participating in and influencing the Panel’s evaluation of an issue;
  - d) Disclosure and full recusal/stepping down, or removal by the Council or Ministers, as a Panel member.
24. In relation to conflicts which are deemed to be of such ‘seriousness’ that stepping aside or stepping down (or similar action) is potentially necessary, the High Court Judicial Recusal Guidelines offer helpful assistance. The guidelines were published in June 2017, and draw on the leading authorities on apparent bias and conflict identification and management in a judicial context, being: *Muir v CIR*<sup>12</sup> (**Muir**) and *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*<sup>13</sup> (**Saxmere**).
25. In *Saxmere*, the Supreme Court cited with approval the Court of Appeal decision in *Muir*, which in turn had adopted the test laid out in the

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<sup>11</sup> Section 4.32, 4.33.

<sup>12</sup> *Muir v CIR* [2007] NZCA 334.

<sup>13</sup> *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35; *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122.

Australian authority *Ebner v Official Trustee in Bankruptcy*<sup>14</sup> that a judge is disqualified ‘if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide’. The Court observed that the fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge’s decision.<sup>15</sup>

26. The Court considered the question is one of possibility (real and not remote), not probability, and that the inquiry required two steps be taken:
- a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
  - b) Secondly, there must be “an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits”.<sup>16</sup>
27. These concepts are reflected in the High Court Recusal Guidelines which state:

**1. General principles**

- 1.1 A judge has an obligation to sit on any case allocated to him or her unless grounds for recusal exist.
- 1.2 A judge should recuse him or herself if, in the circumstances, a fair-minded, fully informed observer would have a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.
- 1.3 The standard for recusal is one of “real and not remote possibility”, rather than probability.
- 1.4 The test is a two-stage one. The judge must consider
  - 1.4.1 First, what it is that might possibly lead to a reasonable apprehension by a fully informed observer that the judge might decide the case other than on its merits; and
  - 1.4.2 Second, whether there is a “logical and sufficient connection” between those circumstances and that apprehension.

28. In respect of a conflict which is ‘relationship’ based, the guidelines state:

- 2.1 The existence of a relationship with a party, lawyer or witness will not in itself create a reasonable apprehension of bias. There must be some logical connection between the relationship and its capacity to

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<sup>14</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>15</sup> *Saxmere* at [5].

<sup>16</sup> *Saxmere* at [4].

influence the judge to deviate from the course of deciding a case on its merits alone.

29. In respect of a conflict arising due to previously expressed opinions, the guidelines state:

5.1 A judge should consider recusing him or herself if the case concerns a matter upon which the judge has made public statements of firm opinion on the issue before the court.

5.2 An expression of opinion in an earlier case or in an earlier stage of a proceeding is not of itself a ground for recusal.

30. The guidelines also emphasise that these principles should be applied firmly and fairly, and that judges should not accede too readily to suggestions of bias.<sup>17</sup> In *Saxmere*, the Supreme Court observed that judges are expected to be independent, having taken a judicial oath, and are not entitled to pick and choose their cases, stating:<sup>18</sup>

[8]...Making this point in *Muir*, the Court of Appeal referred to the following passage from the judgment of Mason J in *Re JRL; ex p CJL*:

[I]t is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

31. While there are important distinctions between the role of the Panel members and the role of the judiciary<sup>19</sup>, these guidelines offer helpful assistance on how to approach the secondary question, once a conflict is identified and is considered sufficiently serious, of what action to take.

32. I am advised that all Panel members have completed their independent commissioner accreditation under s 39A of the RMA and on that basis I expect they will understand the core principles of natural justice which underpin their functions. On this basis I consider that they too should not accede too readily to suggestions of appearance of bias and should apply the recusal principles set out above firmly and fairly.

33. In terms of apparent bias, it is also relevant that the Ministers may set directions which provide for the composition and expertise of the Panel.<sup>20</sup> In the present case, the direction also included a statement of expectations regarding relevant considerations applicable to the evaluation of PC120. Those considerations are highly technical matters, including relating to

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<sup>17</sup> See High Court Judicial Recusal Guidelines: section 1.5.1.

<sup>18</sup> *Saxmere* at [8]; *Re JRL; ex p CJL* (1986) 161 CLR 342.

<sup>19</sup> See for example Terence Arnold "Judicial and Quasi-Judicial Decision Making" (paper presented to New Zealand Law Society Conflict, Governance and Professionalism seminar, April 2013) 1 at 6–7.

<sup>20</sup> Clause 78 of Schedule 1 of the RMA

urban form and density.<sup>21</sup> Accordingly, it is reasonable to expect that the Panel be comprised of (at least some) members with expertise in relation to these matters. However, while that may be so, care must still be taken to manage perception of apparent bias.<sup>22</sup>

34. I note also that under the recusal guidelines, the question of recusal is for the judge hearing the case.<sup>23</sup> The position of a Panel member is different. Each member of the Panel sits pursuant to either the Ministers' direction or a delegation of Council made under s 34A of the RMA. A Ministerial direction under cl 78 can be the subject of an amendment initiated by the Minister, and amendment can be requested by Council; see cl 80(1) and 80(2) of Schedule 1 of the RMA. In terms of the Council delegation, Council reserves the power of revocation; see ss 34(7) and s 34A(4) of the RMA.
35. Accordingly, while I consider the responsibility to identify and manage conflicts sits first and foremost with the individual Panel member in consultation with the Panel Chair, the Ministers and Council, retain control over the ongoing composition of the Panel and could take action to address a conflict if they considered it necessary to step in.

## Conclusion

36. Finally, I note your advice that the Panel intends to treat each Register as a 'living document', updating each as and when necessary (for example, once the lists of further submitters and additional submitters are known, and when the legal representatives and witnesses for submitters are identified). I endorse this approach and recommend that the Panel remains live to the potential for new and additional conflicts to arise during the course of hearing PC120, and that the considerations set out in this advice be applied on an ongoing basis.

Yours faithfully,



Lachlan Muldowney  
Barrister

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<sup>21</sup> Gazette Notice 29 October 2025 Statement of Expectations

<sup>22</sup> See *Glenpanel Development Limited v Expert Consenting Panel* [2025] NZCA 154; at [59]

<sup>23</sup> See High Court Judicial Recusal Guidelines: section 1.5.