

How the Thames- Coromandel District Council managed leasing arrangements for Council land in Whitianga

This is the report of an inquiry we
carried out under section 18 of the
Public Audit Act 2001.

November 2009

ISBN 978-0-478-32639-0

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Overview

The Auditor-General inquired into aspects of how the Thames-Coromandel District Council (the Council) has managed leasing arrangements for a block of land in Moewai Road, Whitianga. The block of land is commonly referred to as the Sherriff Block, and the Council has owned it since 2000.

Our inquiry included considering the nature of the Council's leasing arrangements with Mr Dirk Sieling before he was elected to the Council in 2007 and the handling of his interest in the Sherriff Block after he became a Councillor. In this report, we use Mr or Cr to make it clear what his status was at the time.

We acknowledge the high level of local community and media interest in this matter. This did not affect our ability to carry out a thorough inquiry and we received full co-operation from all parties involved.

Most local authorities have extensive land holdings. Our findings from this inquiry reinforce the importance for all local authorities to have in place effective systems and processes to manage their land well on behalf of their communities.

Summary of findings

The Council was not effective in its management of the Sherriff Block because it did not formally document a lease agreement or have arrangements in place to manage its interests in the land.

In our view, a formal lease agreement would have provided clarity about the terms and conditions of the lease of the Sherriff Block, including the requirement to pay rates.

Despite the Council's poor management of leasing arrangements for the Sherriff Block, we note that all financial matters relating to Cr Sieling's use of the land have been or are being settled. Thames-Coromandel ratepayers are not out of pocket in relation to Cr Sieling's lease of the Sherriff Block.

We also concluded that the Council's administration systems did not adequately support the management of conflicts of interest in this matter.

We understand that the Council has now addressed the way that it administers matters where there are conflicts of interest. For example, the staff member responsible for sending out papers for Council or Committee meetings takes steps to ensure that Councillors do not receive information about matters in which they have declared a conflict of interest.

In our view, Cr Sieling handled his interest in the land in a reasonable manner.

Our recommendations

We recommend that the Thames-Coromandel District Council:

- put in place formal agreements for all Council-owned land whether it is leased or not and ensure that the relevant information for each agreement, such as terms and conditions, is formally documented and held in its central register of leases;
- update and maintain information about all Council-owned land in the central register of leases, and regularly monitor the register to provide assurance that terms and conditions are being adhered to and the land is being managed in keeping with the Council's original intentions;
- prioritise the completion of its property strategy;
- clarify roles and responsibilities for managing Council land, including staff roles and responsibilities, and make sure they are understood by Council staff; and
- review its recently implemented procedures for managing potential conflicts of interest to consider whether the procedures are operating as expected, and add additional controls if necessary.

We wish to thank all those who assisted us during our inquiry. We received full co-operation throughout from all parties.



Phillippa Smith
Deputy Controller and Auditor-General

23 November 2009

Part 1

Introduction

Our inquiry scope and process

- 1.1 The Auditor-General received a request to inquire into the Council's management of leasing arrangements for a block of land in Moewai Road, Whitianga – commonly referred to as the Sherriff Block. The request raised concerns about the way the Council had managed the lease for the land and the handling of Cr Sieling's interest in the lease.
- 1.2 We assessed the material provided to us and decided that there were matters that warranted further inquiry. We set the terms of reference for our inquiry in April 2009.
- 1.3 We carried out our inquiry under section 18 of the Public Audit Act 2001, which provides for the Auditor-General to inquire into any matter concerning a public entity's use of resources.
- 1.4 In carrying out our inquiry, we held telephone discussions with Mr Steve Ruru (the Council's Chief Executive), Cr Sieling, and Mr Manolo Echave (the promoter of a music festival event that was held on the Sherriff Block).
- 1.5 We reviewed information provided by the Council, Cr Sieling, and the parties who raised the matter with us.
- 1.6 Our report sets out:
 - the background to the matter;
 - our comments and views about:
 - the Council's management of the lease; and
 - the handling of Cr Sieling's interest in the lease.

Part 2

Background

Council purchases the Sherriff Block

- 2.1 In October 2000, the Council authorised the purchase of 28.73 hectares of land in Moewai Road, commonly referred to as the Sherriff Block (Lot 1 DPS 91047). The land was being used for farming at the time of purchase.
- 2.2 As outlined in a Council agenda on 25 October 2000, the land was purchased for:
- the future development of a multi-sports park;
 - an extension to the Whitianga wastewater treatment plant; and
 - a possible extension to the Mercury Bay airfield.
- 2.3 The conditional sale and purchase agreement for the Sherriff Block was signed in December 2000.

Council appoints the Moewai Road Land Development Committee

- 2.4 On 13 March 2001, the Mercury Bay Community Board resolved to appoint a Moewai Road Land Development Committee and adopted the terms of reference for that Committee. This was completed in keeping with the Council's delegations.
- 2.5 The Moewai Road Land Development Committee was responsible for:
- *completing the purchase of the land;*
 - *recommending interim management/use of the land;*
 - *facilitating investigations into possible uses; and*
 - *liaison with Community Clubs and Organisations.*

Vendor of the Sherriff Block leases it back for grazing

- 2.6 The title for the Sherriff Block was transferred to the Council on 1 April 2001. The sale and purchase agreement provided:
- The Vendor to lease such parts of the property as the Purchaser [i.e. Council] may not immediately need to use for a five year term from possession date upon such terms and conditions negotiated.*
- 2.7 We were told that there was no written agreement or lease formally outlining the terms and conditions (as referred to in the sale and purchase agreement) negotiated between the vendor and the Council.
- 2.8 On 7 March 2003, a Council officer from the Mercury Bay Service Centre wrote to the vendor and outlined the following terms and conditions between the vendor

and the Council, effective from the purchase date and expiring on 1 April 2006 (recognising the terms and conditions of the lease started on 1 April 2001):

- The vendor “continues to graze the land as part of his farming operation”.
- The vendor “pays the rates”.
- The Council will notify the vendor “when the land is required to be used by the Council or its agents”.

2.9 The letter noted that the vendor had the right to graze two other lots of Council-owned land that are not part of the Sherriff Block; Lot 3 DPS 54407 – the Whitianga bike park land, and Lot 8 DPS 54407 – the district’s dog pound land. Grazing arrangements are considered to be the secondary use for both of these blocks of land.

2.10 The letter also stated that the Council was prepared to discuss continuing the current arrangements with a new owner of the vendor’s farm. We understand that this undertaking was obtained by the vendor because they were considering selling their farm and wanted to confirm that the grazing arrangement would continue for a new owner.

Mr Dirk Sieling takes over the lease for the Sherriff Block

2.11 Mr Sieling purchased the vendor’s farm on 30 May 2003. As part of the purchase, Mr Sieling took over the lease of the Sherriff Block.

2.12 On 7 April 2003, a Council officer from the Mercury Bay Service Centre wrote to Mr Sieling to advise him that the Council was preparing a formal lease between the Council and Mr Sieling for the Sherriff Block. The letter included the following terms and conditions for the lease of the Sherriff Block:

- *Term – 3 + 3 + 3 with a right of renewal each term.* [The first three-year term started on 1 April 2003.]
- *Review – The rental and term will be reviewed every three years.*
- *Rental – Shall be determined by valuations.*
- *The land shall continue to be farmed in a husbandlike manner.*
- *At the review period, Council may, in consultation with the lessee, take back some of the land that may be required for their purpose...*
- *During the term of the lease, should Council through agreement require land for short term periods... such access shall not be unreasonably withheld.*

2.13 No formal lease was prepared or signed. This was confirmed by all parties who were involved. However, Cr Sieling told us that he had verbally agreed to the terms and conditions with the Council at the time.

Attempts to formalise the lease for the Sherriff Block

- 2.14 Mr Sieling and his lawyer made requests to the Council on 5 May 2003 and 16 February 2005 for information about the status of the drafting of the lease.
- 2.15 Correspondence from the Council noted that drafting was in progress, and that the matter had been passed on to a Council officer based in the Council's Thames Office. All previous correspondence had been with the Council's Mercury Bay Office.
- 2.16 Mr Sieling kept in verbal contact with Council staff. He advised us during our inquiry that he was repeatedly told that the lease was being drafted.
- 2.17 There was a large amount of correspondence about the lease of the Sherriff Block. However, the correspondence between the Council and Mr Sieling ceased from March 2005 until the matter was raised again in the later part of 2007, when Mr Sieling was elected as a Councillor.
- 2.18 We understand that Mr Sieling continued to use the land for grazing during this period, on the basis that:
- There was no rental to be paid on the lease, as agreed by the previous vendor, until at the earliest 1 April 2006 (the renewal date).
 - The land shall continue to be "farmed in a husbandlike manner".

Rates not paid or asked for

- 2.19 Mr Sieling did not pay rates on the Sherriff Block during this period, nor was he sent any rates notices by the Council.
- 2.20 Mr Sieling asked the Council about the rates requirement. However, the Council officers he asked were not clear on whether rates needed to be paid because the land was owned by the Council and they would need to confirm its status as a reserve. The Council officers did not provide Mr Sieling with that confirmation.

Mr Sieling sub-lets the Sherriff Block for share farming

- 2.21 On 2 June 2006, Mr Sieling entered into a share farming lease with a third party. The lessee agreed to lease the Sherriff Block and another block of land held by Mr Sieling for a one-year term, with a right of renewal of two years. The lease provided for rental to be paid to Mr Sieling.

Proposal to use the Sherriff Block for music festivals

- 2.22 In the lead-up to the 2007 Local Elections, Mr Sieling was aware that Mr Echave was proposing to hold music festivals in Whitianga, and the preferred location was the Sherriff Block. He informed Mr Echave that he needed the Council's permission to hold the events on the Sherriff Block.
- 2.23 In September 2007, Mr Echave advised the Mercury Bay Community Board that he wanted to bring two music festivals to Whitianga (a New Year's Eve concert and a Blues Festival).
- 2.24 The Council granted permission for the two musical festivals to be held on the Sherriff Block. The New Year's Eve concert was later cancelled because of adverse weather. However, the Blues Festival occurred as planned.

Mr Sieling elected to Thames-Coromandel District Council

- 2.25 Mr Sieling was elected to the Council in the October 2007 local body elections.
- 2.26 He told us that when he was elected he again raised with the Council the matter of drafting a lease for the Sherriff Block, and asked for this to be dealt with as a matter of some urgency.
- 2.27 We note that Cr Sieling took steps to remove himself from discussions about the Sherriff Block in his role as a Councillor. For example, the minutes of a Mercury Bay Community Board workshop on 11 December 2007 to discuss possible options for the Mercury Bay multi-sport complex note that Cr Sieling declared an interest in this item, did not attend, and took no part in the discussions. We understand that this was because Cr Sieling was aware that the proposed location for the complex was the Sherriff Block.

Council responds to a new proposal to lease the Sherriff Block

- 2.28 On 25 February 2008, Mr Echave submitted a proposal by email to the Council to lease the Sherriff Block. Mr Echave did this on the understanding that the Sherriff Block was being leased on a month-by-month "grace and favour" basis by Cr Sieling. His understanding was based on advice from Council staff. Mr Echave's email also outlined the arrangements for a Blues Festival to be held in March 2008.
- 2.29 Council staff responded to Mr Echave's email on 29 February. The email addressed the proposal in two parts:
- the Blues Festival; and
 - the proposed lease of the Sherriff Block.

The Blues Festival

- 2.30 The email from Council staff noted that:
- the Blues Festival was to be treated as a “one off” event (outside the proposed lease submitted by Mr Echave);
 - a fee of \$40,000 was to be paid (and was paid) by Mr Echave’s company upon receipt of an invoice from Cr Sieling; and
 - the Council would not charge a fee for the Blues Festival event.
- 2.31 Correspondence between the Council and Mr Echave outlined that Cr Sieling would liaise with the sub-lessee of the Sherriff Block to provide compensation to the sub-lessee for loss of production suffered as a consequence of the Blues Festival.

Proposed lease of the Sherriff Block

- 2.32 The second part of the Council’s email response dealt with the proposed lease of the Sherriff Block. Council staff noted in the email to Mr Echave that he would be offered a lease for a period of one year with a right of renewal for two one-year periods, subject to the Council’s approval.
- 2.33 It also noted that Mr Echave would allow Cr Sieling to use the land for grazing during periods when there were no events taking place.
- 2.34 Mr Echave raised concerns about the agreement in his correspondence with the Council, specifically noting that the lease agreement was not tenable in the long term because the current share farming arrangement was a full production-aligned commercial dairy lease. Mr Echave’s proposal to hold events on the property could have conflicted with the intentions of the share farmer to maximise production.
- 2.35 We considered a series of emails that were sent between Mr Echave and the Council officer responsible for managing this process, and decided not to outline them in detail in this report. In our view, this email correspondence was not relevant to our inquiry.
- 2.36 In carrying out our inquiry, we have not set out in this report or considered the lease arrangements offered by Mr Echave. However, we note that during negotiations with Mr Echave, Council staff advised him that any future lease between him and the Council was subject to Council approval.

The Council's Service Delivery Committee considers options for the Sherriff Block

- 2.37 An agenda paper item for the public-excluded session of the Council's Service Delivery Committee of 14 May 2008 outlined Mr Echave's lease proposal and recommended four options for the Sherriff Block:
- do not lease the land;
 - lease the land to Mr Echave for the purpose of providing concerts;
 - lease the land to Cr Sieling for agricultural purposes; or
 - use the land for alternative unspecified outcomes.
- 2.38 In the agenda paper, Council staff recommended that the Service Delivery Committee approve a lease to Mr Echave. One condition of the lease agreement was for the lessee to allow Cr Sieling (or his representative) to graze the land during periods when there were no events taking place.
- 2.39 We note that some of the background information in the agenda paper was not accurate. For example, the agenda paper referred to the Sherriff Block arrangement with Cr Sieling as a "grace and favour" arrangement, and that he had been advised of the termination of this agreement in a letter on 1 April 2008.
- 2.40 However, the letter of 1 April 2008 to Cr Sieling had actually terminated arrangements for another block of land (Lot 8 DPS 54407, which is not the Sherriff Block). Not only were the lease terms and conditions wrong, but Council staff also consistently referred to and terminated the wrong lease.
- 2.41 The background information in the Service Delivery Committee agenda paper also noted that Cr Sieling had approached Council staff in November 2007 wishing to continue with the grazing arrangement on the Sherriff Block on a more formal basis. This was shortly after Cr Sieling's election to the Council.
- 2.42 The Council, in response to Cr Sieling's request, sought a valuation of the land in accordance with its leasing policy and revenue and financing policy. The valuation for agricultural purposes was obtained.

Cr Sieling's involvement in discussing the options for the Sherriff Block

- 2.43 As a Councillor, Cr Sieling received the full agenda papers for the Service Delivery Committee's meetings.
- 2.44 During the Service Delivery Committee meeting on 14 May 2008, which considered the Sherriff Block, Cr Sieling declared an interest in the matter. The minutes of the meeting confirm that he did not take part in discussing the matter.

- 2.45 Cr Sieling then made a presentation at the public forum part of the meeting, as a member of the public, advising the Service Delivery Committee that he had a lease on the Sherriff Block and wanted to continue this arrangement.
- 2.46 Cr Sieling also tabled a paper to the Committee, in which he noted his view that he had a lease with the Council and that, although not formalised, a letter (dated 7 April 2003) from the Council created both a moral and a clear legal obligation to commit to a lease (see paragraph 2.12).
- 2.47 Cr Sieling also noted that he disagreed with the Council's valuation of the land, and outlined his reasons.
- 2.48 During our discussions with Cr Sieling, he noted that he decided to speak at the public forum of the Service Delivery Committee because he felt it would have been inappropriate to discuss the matter in the public-excluded session. He was also of the view that discussing the matter in the public forum was the only way he could prevent his rights as a private citizen being overridden by the Council's actions. He knew that the Council had been provided with incorrect or incomplete information and believed that speaking publicly was his only option to correct the situation.

Cr Sieling indicates possible legal action over a Council decision to put the Sherriff Block “out for tender”

- 2.49 During the public-excluded session, the Service Delivery Committee resolved to put the Sherriff Block out for tender as soon as possible.
- 2.50 After the Service Delivery Committee meeting, Cr Sieling wrote to the Chief Executive, noting that the Committee's decision to put the Sherriff Block out to tender was a shock to him.
- 2.51 The letter notes that because he had purchased the vendor's farm, had in place an agreement (documented in the letter of 7 April 2003) to lease the Sherriff Block, and had subsequently contracted a share farmer, Cr Sieling felt he had no option but to seek an injunction and take legal action to protect his business and contractual obligations if the Service Delivery Committee's decision was ratified by the Council.
- 2.52 The lease of the Sherriff Block was also considered at a full Council meeting on 21 May 2008, where it was resolved that the matter be addressed by the Service Delivery Committee.

2.53 The Service Delivery Committee considered the matter further on 25 June 2008. In the Committee agenda paper it was noted that the Council had obtained a legal opinion as a result of Cr Sieling threatening legal action.

2.54 The legal opinion noted:

... from the materials and information we have received ... it appears to us that Council may be at risk of a claim brought by Mr Sieling for: a. specific performance of the 7.4.03 letter as constituting an agreement to grant a lease and/or b. a claim for damages if Mr Sieling suffers loss and can prove that loss.

2.55 Questions have been raised with us about the legality of these matters, including whether the letter to Cr Sieling of 7 April 2003 was a legal and binding contract to the Council and whether Cr Sieling was legally entitled to sub-let the Sherriff Block. We have not sought to form a view on these matters. It is not the Auditor-General's role to determine whether a council has acted lawfully in a particular situation. This is a matter for the courts.

Terms for lease of the Sherriff Block offered to Cr Sieling

2.56 The Service Delivery Committee resolved that, subject to checking the legal opinion it had received, and specifically considering previous non-payment of rates, a lease be entered into with Cr Sieling. It suggested the following terms:

- *Lease term 5 + 3 + 3 starting 1 April 2001.*
- *Rates paid from grazing occupancy of 1 April 2004 [sic – we note that the date should have been 2003].*
- *Lease rental Market Value respective from 1 April 2006.*
- *Payment to Council from Bluesfest.*

2.57 On 10 September 2008, Geoff Tizard of Curnow Tizard Limited, acting on behalf of the Council, emailed the Council to advise that he and Jim Glenn (Jim Glenn Valuers, acting on behalf of Cr Sieling) had met and recommended to their respective clients a settlement at an annual rental of \$19,000 plus GST. We note that the practice of each of the two parties involved in any rental negotiation obtaining a valuation to establish a market rental for land is common and good practice.

2.58 On 28 January 2009, the Council wrote to Cr Sieling and outlined the position reached in relation to leasing the Sherriff block. The following was outlined:

- Rates would be paid from the time of possession of land, being 1 April 2004 (again, we note that this date is in error, and should have read 2003). At the date of the letter it was noted that the Council had billed, and Cr Sieling had paid, rates up to June 2008.

- Rental to be paid for the period 1 April 2006 to 30 June 2008.
- Market rental from 1 July 2008 would be determined by valuation and Cr Sieling would sign a lease on that basis.

2.59 The Council now has a formal lease agreement in place with Cr Sieling for the Sherriff Block, all rates and water charges have been settled, and rental has been agreed to apply from 1 July 2008. The Council is yet to settle the final market-based rental for the 1 April 2006 to 30 June 2008 period with Cr Sieling.

Part 3

Our comments and views on the Council's management of the lease

- 3.1 In carrying out our inquiry, we noted that the Council did not have a formally documented lease agreement for the Sherriff Block with the original owner and vendor of the block, nor the subsequent owner (Cr Sieling) until earlier this year (2009). It was the Council's intention that the land be leased for grazing purposes. The terms and conditions of the arrangement were documented in the letter of 7 April 2003.
- 3.2 Our expectation, and the expectation of any ratepayer, would be for the lease of land to be formally documented as soon as possible after any agreement was negotiated. A formally documented lease agreement would define and protect the interests of the Council and the lessee.
- 3.3 We have not formed a view about whether it was appropriate for Cr Sieling to sub-let or benefit from a sub-letting agreement. If the Council had had a documented lease arrangement in place at the start of its lease with Cr Sieling, his ability to sub-let the land or not would have been clear.
- 3.4 In our view, it is clear that the lack of a formally documented lease resulted in confusion by Council staff about the status of any lease of the Sherriff Block and any negotiated terms and conditions. As a result, Council staff provided incorrect advice to the Council's Service Delivery Committee on 14 May 2008 and to Mr Echave about the status of the lease with Cr Sieling.
- 3.5 We expect Council staff to be in a position to provide Councillors with factual information to support Councillors in making fully informed decisions.
- 3.6 In reviewing the information provided to us, there was correspondence between Cr Sieling and a number of Council staff members about the status of the drafting of the lease. It was not clear if any one person was responsible for finalising the lease. The Council told us that during this time, many of the Council's functions were carried out by Community Boards and at Council service centres.
- 3.7 After the Council conducted a service delivery review in 2002, the administration and management functions of the Council were brought back to its centralised office in Thames. The lack of a formal lease, the Council restructure, and the resulting change in responsibilities are likely to have contributed to the confusion about the agreed terms and conditions and the status of the drafting of the lease.
- 3.8 We note that it was only because of Cr Sieling's intervention at the Service Delivery Committee meeting of 14 May 2008 that the Council sought legal advice to determine the status of its leasing arrangements for the Sherriff Block.

- 3.9 Further, as a result of there being no formal record of the agreed leasing arrangements, the Council was not in a position to regularly monitor arrangements and compliance with the agreed terms and conditions. We conclude that the Council did not adequately manage the Council's interest in the land as lessor. For example, one condition of the agreement for the lease of the Sherriff Block was the payment of rates and water charges on the land. These payments were not made until 2009.
- 3.10 We would also have expected that, before the end of the "rent free" period, Council staff would have had the systems in place to identify this, and to have considered future leasing arrangements for the land.
- 3.11 We have concluded that the Council and Cr Sieling have settled, or are in the process of settling, the rental and outstanding rates for the Sherriff Block, as outlined in the letter of 28 January 2009. The settlement is consistent with the original intent of the 7 April 2003 letter between the Council and Cr Sieling.
- 3.12 During our inquiry, we have not assessed whether the Council has lost money as a result of not taking up the economic opportunity to hold music festivals on the Sherriff Block, as proposed by Mr Echave. It is problematic to suggest that economic opportunity could only be gained by holding the music festivals on the Sherriff Block.
- 3.13 From discussions with the Council, we understand that there is a basic register of Council-owned land. However, the Council is continuing to work on improving the register. The Council is also looking at implementing a property strategy. We encourage the Council to prioritise such a register and implement processes to monitor such a register.
- 3.14 Furthermore, the Council should look to establish formal lease documentation for all Council-owned land.
- 3.15 We understand that the Whitianga bike park land and the dog pound land grazed by Cr Sieling are not subject to a formal written agreement. We recommend that a more formal agreement between the two parties be entered into.
- 3.16 We will follow these matters up with the Council in future audit engagements.

Part 4

Our comments and views on the handling of Cr Sieling's interest in the lease

- 4.1 It is important that any conflicts of interest are identified and managed appropriately, to ensure that fairness, transparency, and objectivity are maintained.
- 4.2 We note that Cr Sieling has a pecuniary interest in any Council or Community Board decisions about whether to proceed with the proposed development of a multi-sports park project, and about the selection of the site, because he leases a block of land that is one of the potential sites.
- 4.3 We consider that Cr Sieling's actions in declaring an interest and refraining from participating in discussions about the matter, were prudent.
- 4.4 Our guidance for members of local authorities about the law on conflicts of interest states that "having declared a pecuniary interest and left the formal confines of the meeting, you are entitled, as a private citizen, and consistent with the rights of any member of the public, to address comments to the meeting from that area of the room where the public is able to be present."
- 4.5 We also consider that in these situations it is prudent for a Councillor to discuss the matter with the chairperson of the Committee/Council before the meeting. The Chairperson and Councillor could then discuss mitigation options.
- 4.6 Cr Sieling told us that he had a brief discussion with the Chairperson of the Service Delivery Committee before the meeting on 14 May 2008, seeking confirmation that declaring a conflict of interest and going through the public forum was the proper option for him.
- 4.7 After this discussion and after considering our published guidance, Cr Sieling chose to speak at the public forum part of the Service Delivery Committee meeting.
- 4.8 During our inquiry, we considered the reasonableness of the administrative process followed by the Council and Cr Sieling for distributing Council agenda papers. The Council's administration systems did not adequately support the management of conflicts of interest, because Council staff did not consider whether to withhold agenda papers about the Sherriff Block from Cr Sieling. In this particular case, the Council's distributing of agenda papers made little practical difference because Cr Sieling, as lessee, already had the information concerned. In our view, however, the Council's procedures for distributing agenda papers should require staff to consider whether any Councillor has a conflict of interest in the matters to be discussed.