

GLAMORGAN SPRING BAY COUNCIL CODE OF CONDUCT

Complaint by Mr Peter McGlone against Councillor (former Mayor) Michael Kent

Determination made 23 December 2018

Local Government Act 1993

Code of Conduct Panel: Jill Taylor (Chairperson), Rob Winter (Legal Member) and Penny Cocker (Member)

1. SUMMARY OF THE COMPLAINT

On 22 August 2018, Mr Peter McGlone lodged a Code of Conduct Complaint (the Complaint) against then Mayor, Councillor Michael Kent.

Mr McGlone alleged that, as Mayor, Cr Kent breached Part 1, Decision Making, of the Local Government Model Code of Conduct endorsed by the Glamorgan Spring Bay Council on 19 May 2016. Specifically, Mr McGlone alleged that Cr Kent, by making several public statements in support of the Cambria project, demonstrated that he could not bring an open and unprejudiced mind to Council when considering the Cambria project, contrary to Clause 1 *Decision making*. Mr McGlone attached copies of ABC news articles and Cr Kent's article in the July 2018 edition of *SeaSpeak*, the Glamorgan Spring Bay Council's newsletter. Mr McGlone asserted that Cr Kent should not have made public statements supporting the Cambria project through those mediums.

The Glamorgan Spring Bay Council adopted the Model Code of Conduct in May 2016. Part 1 of that Code states:

1 Decision Making

A councillor is to bring an open and unprejudiced mind to all matters being considered in the course of his or her duties, so that decisions are made in the best interests of the community.

Further comment regarding this aspect is made subsequently in this decision.

The Chairperson of the Code of Conduct Panel (the Chairperson) advised that the proceedings would be audio recorded for the purposes of reference when completing the determination.

2. INVESTIGATION

The Chairperson conducted an initial assessment of the complaint and determined on 21 September 2018 that it should be further investigated and determined by a Code of Conduct Panel (the Panel) in accordance with section 28ZA(1)(e) of the *Local Government Act 1993* (the Act).

The Panel subsequently determined that it would hold a hearing into the matter.

The Panel received and considered the following documents prior to the hearing:

- Code of Conduct Complaint dated 22 August 2018 and an attached statement from Mr McGlone supporting his complaint, as well as:
 - Copy of ABC news item dated 30 April 2018
 - Copy of ABC news item dated 23 July 2018
 - Undated copy of document containing a Letter to the Editor by Mr Peter McGlone
 - Copy of page 1 of *Sea Speak* Glamorgan Spring Bay Council News, July 2018, containing an article by the then Mayor
 - Copy of article in *Newsfront* dated 3 July 2018

- Copy of Glamorgan Spring Bay's Model Code of Conduct endorsed by Council in May 2016
- Submission of the Respondent in response to the complaint provided by his legal representative, Mr David Morris dated 19 October 2018

3. SUMMARY OF HEARING

The hearing was convened on 28 November 2018 at Level 5 of the Executive Building 15 Murray Street Hobart. Both Mr McGlone and Cr Kent attended, with Cr Kent taking an oath and Mr McGlone making an affirmation prior to giving evidence.

The Chairperson outlined the substance of the complaint and the procedure the Panel would follow, including options available to the Panel if the complaint was upheld.

To begin, Mr McGlone was given the opportunity to speak to his complaint without interruption. By way of background, he explained that he takes a close interest in conservation matters that are dealt with by different Councils. He went on to say that there is generally some confusion by elected members in relation to the interpretation of 'bringing an open and unprejudiced mind' in the context of decision making.

In this instance, Mr McGlone said that he and Cr Kent appear to have a different interpretation. He added that he has watched the public debate on the Cambria project and became increasingly frustrated with Cr Kent's strong views in support of the project. Mr McGlone told the hearing that he had asked Cr Kent to recant during a presentation at a Council forum in July 2018. Cr Kent did not do this. Mr McGlone subsequently noticed a statement by Cr Kent in the Council newsletter that he considered was probably the most emphatic statement in support of Cambria, and shortly after this decided to make the Code of Conduct complaint.

Mr McGlone stated that by making strong clear statements of support for the planning action for the Cambria project, Cr Kent demonstrated that he did not have an open and unprejudiced mind. Mr McGlone claimed that the general understanding of prejudice is bias, and that bias is an 'inclination to a view'. Mr McGlone referred to Cr Kent's legal representative's letter, stating that he did not agree with some of the opinion contained in that advice, including other legal opinion quoted, as it differed to a general understanding by most people. One of the driving factors for Mr McGlone's complaint is that the Glamorgan Spring Bay Code of Conduct leaves the interpretation wide open as to what the principles mean and how they should be applied.

Mr McGlone indicated that he had framed his complaint on the provisions of the Model Code of Conduct that he accessed on the Council's website. This was confirmed as being the same as the Code possessed by the Panel and being referred to in the hearing.

Cr Kent was invited to ask questions of Mr McGlone's evidence but declined to do so.

Cr Kent was then invited to respond to the complaint. Cr Kent confirmed that on his instructions, his response had been made by his legal representative in the submissions dated 19 October 2018.

Cr Kent stated that he didn't want to add much to those submissions, except that in his view the role of a Mayor was to be 'active in the marketplace' and bring openness and transparency to issues that are before Council. In relation to the Cambria project, he felt it was his responsibility to let the community know that the property had been sold and there were 'investors/developers' wanting to develop the site. Cr Kent said that this project was likely to take 10 years to complete. He said it was important for the Mayor to present a balanced approach to development and felt that he had done so in this instance.

When questioned by the Panel, Cr Kent stated that the Mayor should be active in the community in advising of developments but at the same time keeping an open mind. Cr Kent added that the Cambria project was only a Special Area Plan (SAP) at this stage and, if approved, would be followed by development applications, referred to by Cr Kent thereafter as DAs. He said that until such time as a DA was received, he did not have any information to take a view one way or another.

Cr Kent confirmed that the contents of Mr Morris' letter conveys his (Cr Kent's) response to Mr McGlone's complaint

In his statement in the July edition of the Council's newspaper, Cr (then Mayor) Kent stated that 'he sometimes controversially supported projects'. The Panel questioned why he thought he was controversial. The Panel concluded by virtue of his response that he was referring to the fact that some projects were controversial, rather than him. During questioning by the Panel, Cr Kent said that it was often difficult to know when to comment on issues that Council had to deal with, but once the matter was in the public arena, he believed that, in the interests of transparency, the Mayor was obliged to provide a comment.

Mr McGlone was then offered the opportunity to question Cr Kent regarding his evidence. Mr McGlone stated that he agreed with Cr Kent's statement that people expected councillors to have a view. Mr McGlone then questioned Cr Kent as to whether it was appropriate for a councillor to say they generally support economic development rather than make a specific statement in support of a proposal before it goes to Council. Cr Kent responded by saying that there was an expectation by the community for the Mayor to express a view. He went on to say that he still had an open mind on the Cambria project as he has yet to see the DA.

Mr McGlone, who has followed this debate closely, then asked Cr Kent if he could cite examples where he has said he has kept an open mind, despite his clear support for the Cambria project. Cr Kent said he had difficulty recalling exact examples, but has made such statements at the last Council meeting and probably the one before.

Evidence before the Panel included an article from the July edition of *SeaSpeak* authored by then Mayor Kent, in which he acknowledged diversity of opinions that have, in some instances, resulted in improvements. He also indicated in that article that he was prepared to listen to constructive critics of the Cambria project, including others who may come forward in the future.

This was put to Mr McGlone for his response. Mr McGlone said that he did not see this as an emphatic statement of having an open mind, and stated that the only time for a councillor to make a statement was after it had been dealt by Council. Cr Kent responded by saying that the Special Area Plan had been dealt with by Council, and that was the current issue before Council.

Cr Kent was further questioned by the Panel as to what he would do to make sure that people understood that he retained an open mind on issues and could he provide any examples. Cr Kent said that he uses community consultation and the Council's newspaper to get his message across.

Mr McGlone then asked Cr Kent whether, having publicly supported the Special Area Plan he would feel any pressure if he were to then change his view when in Council. Cr Kent responded that he would not.

Mr McGlone was then asked to summarise his complaint.

He expressed concern about paragraph 43 of Cr Kent's lawyer's response to his complaint, which proposed that another complaint in relation to the same matter (Cambria project) should not be made by him for a period of 12 months. The Panel advised Mr McGlone that he should consider

the full wording of Section 28 (Z) (1) 3, which provides the panel with a discretion as to whether or not this power is to be exercised if a complaint is dismissed. Mr McGlone submitted that he did not wish the Panel to exercise its discretion and impose this provision if his complaint were to be dismissed.

Mr McGlone reiterated his concern that the Glamorgan Spring Bay Council should provide a more explicit definition of what constitutes 'open and unprejudiced' in the context of Part I of its Model Code of Conduct. He went on to say that he was aware that in some Councils this requirement is being interpreted differently, with some councillors even afraid to engage in community gatherings for fear of the allegation of having breached the Code of Conduct.

Mr McGlone reiterated that his complaint was based on his review of the material available on the Council's website; in particular its Model Code of Conduct, with a May 2016 date, which the panel noted only articulated clause 1 under Part I of the Model Code of Conduct, making no mention of Clauses 2, 3, and 4.

The Panel advised Mr McGlone that in relation to his expressed desired outcomes of his complaint the Panel did not have the power to grant his requests, and restated the specific powers the Panel has regarding imposing a sanction pursuant to S 28ZI .

Mr McGlone accepted this, but said that he felt a strong penalty should be imposed, as counselling seemed to him to be "soft".

4. DETERMINATION

The Panel determines that in relation to a breach of Part I of the Glamorgan Spring Bay Model Code of Conduct which states:

"1. Decision Making

A councillor is to bring an open and unprejudiced mind to all matters being considered in the course of his or her duties, so that decisions are made in the best interests of the community"

the complaint is dismissed.

The facts before the Panel clearly indicated that Cr Kent was acting in the 'course of his duties' when he made the comments alleged by Mr McGlone to put him in breach of the Model Code of Conduct.

Despite the panel understanding Mr McGlone's submissions regarding the meaning of the words 'an open and unprejudiced mind', in Part I of the Council's Model Code of Conduct, there is clear case law authority of particular relevance to the current complaint.

This is the decision of Zeeman J in *R v. West Coast Council; ex parte Strahan Motor Inn* (1995) 4 TasR 411, which has recently been referred to in the Local Government Code of Conduct Panel decision relating to a complaint made by Mr Graham Murray against Alderman Anna Reynolds (delivered on 22 November 2018)

In his decision His Honour stated at p 421:

Of relevance is the way in which local government councils are elected. Councillors are representatives of their community and elected by and from that community. It may be expected that they will support particular views as to what is in the best interests of the community and that often they will have strong personal views as to what ought to occur in the community. In one sense they may be expected to hold views which may be described as being biased. Councillors may be expected to hold particular views as to how they would wish their community to develop

and to discharge their duties as councillors by reference to those views... Mere fixed views as to particular matters which are relevant to the exercise of the discretion conferred by s51, even if strongly expressed, ought not of themselves to be seen as a disqualifying factor. By conferring the role of a planning authority on a municipal council, the legislature may be assumed to have been aware of the nature of such a council and in particular that it is constituted by elected councillors.

His Honour continued at p 425:

Expressions of opinion on the part of a member of a municipal council of a nature which would be sufficient to disqualify a member of a judicial tribunal from sitting on a particular matter may not be sufficient to disqualify a member of a municipal council. Councillors may be assumed to hold and to express views on a variety of matters relevant to the exercise of the functions of the council. Expressing such views is part of the electoral process. Provided that expressions of opinion do not go so far as to evince an intention to exercise a discretion conferred by statute without regard to the terms in which it is conferred or without being prepared to listen to any contrary argument, it ought not be taken to disqualify the councillor from participating in a relevant decision-making process.

The evidence before the Panel indicates that Cr Kent has previously expressed views that are capable of supporting a finding that he is in support of the Cambria Project. This view is clearly apparent within a number of the attachments to Mr McGlone's complaint.

Whilst not resiling from his statements that he is known to be 'strongly pro-development', it is Cr Kent's evidence that he made comments regarding the Cambria Project to bring it to the community's attention, as well as to essentially foster debate as to its nature and extent.

The panel has determined on the evidence before it, that there is evidence capable of supporting Cr Kent's position that at the date of the complaint he has not expressed opinions 'which go so far as to evince an intention to continue to support the Cambria project without being prepared to listen to contrary arguments'.

An example is within the fourth paragraph of the *SeaSpeak* article of July 2018, under the heading *A word from the Mayor*, where Cr Kent has stated:

"I have appreciated the diversity of opinion generated by these projects, and have welcomed the various submissions you have made to me both in writing and in discussions with you, as I have moved around the municipality. The counter arguments have not gone without consideration and have, in a number of aspects, improved on what has been delivered. I strongly believe in balanced developments as we do not want to destroy what has been created..."

There is no evidence that Cr Kent has made any decision in connection to the Cambria project without being prepared to listen to any contrary argument.

There is no evidence to demonstrate that at any time Cr Kent has held a view that is so demonstrably fixed that it is not open to being dislodged by reason or argument.

With the Panel determining that the complaint is dismissed on this basis, there is no need for it to deal with other of the legal issues raised in Mr Morris' letter, save for the submission to utilise S28ZI (3) if the complaint is dismissed, which states;

"If the code of conduct complaint or part of it is dismissed, the Code of Conduct Panel may determine the complainant may not make a further complaint in relation to the same matter for a period not exceeding 12 months unless the complainant provides substantive new information in the further complaint."

Whilst the Panel acknowledges it has the discretionary power to invoke this provision, it chooses not to do so in this instance on the basis that the Cambria Project is, in the words of Cr Kent, 'a long-term project with many development applications still to follow'.

It is therefore not unreasonable that during these processes, on a matter of such sensitive public interest, code of conduct provisions should remain available to the complainant if he considers there has been a breach of the Code of Conduct.

The Panel noted that any subsequent complaint from the complainant must be dealt with on its merits, and that any matter which is assessed as being frivolous or vexatious can be dismissed during the assessment process.

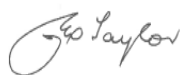
5. SUMMARY

The Panel acknowledges the power to invoke the provisions of Section 28ZI (3) and it chooses not to do so in this instance, on the basis that the Cambria Project is, in the words of Cr Kent "a long-term project with development applications still to follow". Therefore it is reasonable that during the development process of a matter of high public interest, Code of Conduct provisions should be available to any person who considers there has been a breach of the Code. The Panel further acknowledges that any subsequent complaint in relation to this matter may be dismissed if assessed as frivolous or vexatious.

The Panel supports the views expressed by Mr McGlone that the Glamorgan Spring Bay Council Model Code of Conduct, available on its website, requires review so as to provide a complete statement of all provisions of the Model Code of Conduct. The currently available version is headed as an 'Information Sheet' and states an expectation that the Model Code of Conduct "will be" endorsed at a given time (i.e. May 2016). This time has elapsed, but the public document has not been amended accordingly.

6. RIGHT TO REVIEW

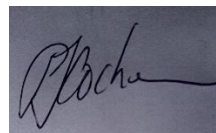
A person aggrieved by the determination of the Code of Conduct Panel is entitled under section 28ZP of the Act to apply to the Magistrates Court (Administrative Appeals Division) for a review of that determination on the grounds that the Code of Conduct Panel has failed to comply with the rules of natural justice.



Jill Taylor
Chairperson



Rob Winter
Legal Member



Penny Cocker
Member