

CODE OF CONDUCT PANEL REPORT
TASMAN COUNCIL COUNCILLOR CODE OF CONDUCT

(Ref C19482)

Complaint brought by the Cr Pamela Fenerty against Cr David Beard

Date of Determination: 26 November 2019

Code of Conduct Panel:

Lynn Mason (Chairperson), Gretel Chen (legal member), Penny Cocker (community member with experience in local government).

Summary of the Complaint

The complaint from Cr Fenerty was submitted to the Executive Officer of the Code of Conduct Panel (the Panel) on 16 October 2019.

The Chairperson of the Panel undertook an initial assessment of the complaint and on 25 October 2019 advised that part of it should be further investigated. The Panel investigated that part of the complaint which referred to alleged breaches of the Code of Conduct (the Code) in accordance with the Code adopted by Council on 27 March 2019, which was in force at the time of the alleged breaches.

The sections of the Code which Cr Fenerty alleged Cr Beard breached are:

Part 3 – Use of Office

1. *The actions of a councillor must not bring the Council or the office of councillor into disrepute.*

Part 7 – Relationships with community, councillors, and council employees

1. A councillor –
(a) *must treat all persons fairly; and*
(b) *must not cause any reasonable person offence or embarrassment;*

Part 8 – Representation

5. *A councillor's personal views must not be expressed publicly in such a way as to undermine the decisions of the Council or bring the Council into disrepute.*
6. *A councillor must show respect when expressing personal views publicly.*
7. *The personal conduct of a councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

The alleged breach of section 28 (2) (b) (iii) of the *Local Government Act 1993* (the Act) was dismissed on the grounds that the Code of Conduct Panel may only investigate alleged breaches of the Code.

The Complaint

* Section 28ZK (7) of the *Local Government Act 1993* requires that any person who receives a determination report must keep the determination report confidential until the report is included within an item on the agenda for a meeting of the relevant council. Failure to do so may result in a fine of up to 50 penalty units.

Specifically the complaint alleged that in debate on Item 8.1 at the Ordinary Council meeting on 25 September 2019, Cr Beard had described engineering design/drawings as 'just plain dumb', and that Cr Beard had described himself in that debate as having 'a background as a Senior Engineer'. Cr Fenerty was not present at the council meeting on 25 September 2019. Cr Fenerty attended the Council chambers on 26 September 2019. The complaint alleges that on that occasion Cr Fenerty received several staff complaints in the presence of the Acting General Manager. The complaint did not specify the nature or detail of those staff complaints.

Procedure

The Panel met on 6 November 2019 to consider the complaint. On 8 November 2019 the Panel received Cr Beard's response to the complaint, which was forwarded to Cr Fenerty for comment. Both parties were asked to make submission to the Panel on whether or not they would be disadvantaged if the Panel did not conduct a hearing into the matter, or whether they considered that the matter could be decided on the material provided to the Panel, or to which the Panel had access.

Cr Fenerty submitted that she wanted the Panel to consider a hearing. The Panel did not consider that Cr Fenerty's submission added materially to the evidence already provided relevant to the complaint, and Cr Beard submitted that he did not consider a hearing necessary. After considering both submissions the Panel determined that the matter could be decided by means of the written submissions already held, and examination of documents received, and that no disadvantage would accrue to either party if a hearing were not held.

Cr Fenerty and Cr Beard were also asked to make submission on sanction, in the event that the Panel upheld part or all of the complaint. Both submissions were considered by the Panel after being received on 21 November 2019.

Material considered by the Panel

- Complaint submitted by Cr Fenerty, dated 14 October 2019, 17pp, including attachments
 - Transcript from the audio recording of the Ordinary Council meeting, 25 September 2019, Item 8.1; and
 - Agenda for the Ordinary Council meeting, 25 September 2019, Item 8.1, pp 7-9; and
 - Facebook post headed 'David Beard Tasman Council', undated, shown as part of an email dated 26 September 2019, sender and recipient redacted.
- Response to the complaint from Cr Beard, 7 November 2019, 46pp, with attachments:
 - Agenda for the Ordinary Council meeting, 25 September 2019, Item 8.1, pp 7-11; and
 - Transcript from the audio recording of the Ordinary Council meeting, 25 September 2019, Item 8.1; and
 - The Tasman Council Customer Service Charter Policy – M016 2019 – 2021; and
 - Design Guidelines from IPWEA, published by LGAT; and
 - Two Facebook posts by David Beard, undated; and
 - Email from Cr Beard to Mayor Kelly Spaulding, cc Deputy Mayor Maria Stacey, 2 October 2019, subject *Meeting 25th September 2019*; and
 - Email from Mayor Spaulding to Cr Beard, cc Deputy Mayor Maria Stacey and the General Manager, Tasman Council, 30 September 2019, subject *Meeting 25th September 2019*; and
 - Facebook post from David Beard, Tasman Councillor, dated 24 October 2019; and

- Statutory Declaration from Deputy Mayor Maria Stacey, 6 November 2019, with attached statement, 2 pp; and
- Statutory Declaration from Cr Andrew Griffiths, 30 November (sic), 1 pp; and
- Statement from Cr Casey Garrett, 6 November 2019.
- Agenda and Minutes of the Ordinary Council meeting, 25 September 2019;
- Submission on hearing, Cr Fenerty, 15 November 2019, 2pp;
- Submission on hearing, Cr Beard, 13 November 2019, 1 p;
- Submission on sanction, Cr Fenerty, 21 November 2019, 1 p;
- Submission on sanction, Cr Beard, 21 November 2019, 1 p.

Determination

The Code of Conduct Panel dismisses the complaint against Cr Beard.

Reasons for the Determination

Alleged breach of Part 3 – Use of Office

1. The actions of a councillor must not bring the Council or the office of councillor into disrepute.

Cr Beard acknowledged that his choice of language, viz., *just plain dumb* was 'poor', but stated that the words did not refer to council officers. The transcript of the audio recording of the meeting records Cr Beard's use of the words *when I see something that is just plain dumb*, but does not attach them to any person or object. The Panel considers that these words may be considered injudicious, but accepts that they were uttered in the heat of debate, and that Cr Beard subsequently asked the Mayor to pass on his 'full support to staff' if the Mayor considered that was necessary.

Cr Stacey stated that she did not believe the words referred to any person. Cr Griffiths stated that he believed the words referred to the process which council had adopted in regard to Lyne Street. Cr Garrett stated that the words referred to the process, and were used to vent Cr Beard's frustration with the situation. All three councillors were present at the council meeting when the words were used. The Complainant was not present at the meeting and has relied on information garnered from other sources to judge the effect of the words used in debate.

The Panel determined that no evidence was provided to support the allegation that the words used by Cr Beard in the Council meeting brought the Council or the office of councillor into disrepute.

Alleged breach of Part 7- Relationships with community, councillors, and council employees

1. A councillor –

- (a) must treat all persons fairly; and*
- (b) must not cause any reasonable person offence or embarrassment;*

The Panel determines that no persons were treated unfairly by the use of the words *just plain dumb*, and in the context of a mover of a Notice of Motion closing debate on a contentious issue, no reasonable person should have been caused offence or embarrassment. The Panel received no direct evidence from any person that this had occurred, nor that any person considered that he or she had not been treated fairly.

Alleged breach of Part 8 – Representation

5. *A councillor's personal views must not be expressed publicly in such a way as to undermine the decisions of the Council or bring the Council into disrepute.*
6. *A councillor must show respect when expressing personal views publicly.*
7. *The personal conduct of a councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

The Panel received no evidence that Cr Beard had expressed his personal views publicly in a way which would undermine the decisions of Council, nor bring it into disrepute. The Panel considers that a councillor bringing forward a motion to change a course of action which has been proposed by council officers is not indicative of disrespect, but rather, part of the councillor's role to represent the interests of the community. No evidence was provided to support the allegation that the reputation of the Council had been adversely affected by Cr Beard's words or actions.

Right to Review

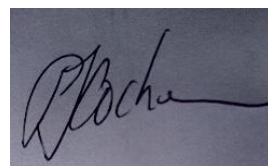
Under s28ZJ of the Act, a person aggrieved by the determination of the Panel is entitled to apply to the Magistrates Court (Administrative Appeals Division) for a review of the determination on the ground that the Panel has failed to comply with the rules of natural justice.



Lynn Mason
(Chairperson)



Gretel Chen
(Legal member)



Penny Cocker
(Community member with
experience in local government)