

CODE OF CONDUCT PANEL DETERMINATION REPORT*

DORSET COUNCIL COUNCILLOR CODE OF CONDUCT

Complaint brought by Cr Dale Jessup against Cr Wendy McLennan

Date of Determination: 2 July 2019

Code of Conduct Panel:

Lynn Mason (Chairperson), Penny Cocker (community member with experience in local government), Anthony Mihal (legal member)

Summary of the Complaint

The complaint from Cr Jessup was submitted to the Executive Officer of the Code of Conduct Panel (*the Panel*) on 29 March 2019. The Chairperson of the Panel undertook an initial assessment of the complaint and on 5 April 2019, determined that the whole complaint should be investigated and determined by the Code of Conduct Panel.

The Council adopted a revised version of the Code of Conduct (*the Code*) on 18 March 2019. The Panel investigated the complaint in accordance with the Code adopted by Council on 16 May 2016, which was in force at the time of the alleged breaches.

The sections of the Code which Cr Jessup alleged Cr McLennan breached are:

Part 1, Decision Making

- 1. A councillor must bring an open and unprejudiced mind to all matters being decided upon in the course of his or her duties, including when making planning decisions as part of the Council's role as a Planning Authority.*

Part 2, Conflict of Interest

- 1. When carrying out his or her public duty, a councillor must not be unduly influenced, nor be seen to be unduly influenced, by personal or private interests that he or she may have.*
- 5. A councillor must avoid, and remove himself or herself from, positions of conflict of interest as far as reasonably possible.*
- 6. A councillor who has an actual, potential or perceived conflict of interest in a matter before the Council must –*
 - (a) declare the conflict of interest before discussion on the matter begins; and*

* 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.

- (b) *act in good faith and exercise reasonable judgement to determine whether the conflict of interest is so material that it requires removing himself or herself physically from any Council discussion and remaining out of the room until the matter is decided by the Council.*

The Complaint

At the ordinary meeting of Dorset Council (*the Council*) on 19 November 2018, item 216/18, Cr Jessup proposed a motion which stated:

That Dorset Council unconditionally adopts the approach outlined by Peter Gutwein MP, Treasurer and Minister for State Growth in his recent letter received by Council proposing a compromise solution for future use of the North East rail corridor.

Cr Jessup stated that Cr McLennan declared an interest in this item, stated that it was not a pecuniary interest, remained in the meeting, and participated in debate on the motion and the subsequent vote.

Cr Jessup alleged that this constituted a breach of the Code on the grounds that:

- The organisations Launceston and North East Rail (LNER) and North East Residents and Farmers (NERAF) had publicly put forward very strong anti-North East rail trail and pro North East Heritage Rail positions;
- Cr McLennan held executive positions on both these organisations with interests directly relating to the motion at item 216/18;
- Cr McLennan had used social media to advocate support for Heritage Rail running from Scottsdale to Launceston before the Council meeting on 19 November 2018;
- Cr McLennan had spoken at several public meetings and on the media, advocating support for Heritage Rail;
- Cr McLennan's car carried a sticker saying, 'keep the northeast railway'.

Cr Jessup alleged that in his view, these factors meant that Cr McLennan could not bring an open and unprejudiced mind to the debate, given her previously stated position and her executive positions on LNER and NERAF.

Procedure (including the hearing)

Cr McLennan responded to the complaint on 16 April 2019. Cr Jessup was invited to provide a response to Cr McLennan's statement, and this was received by the Panel on 28 April 2019.

The Panel met on 10 May 2019 to consider the complaint and responses from Cr McLennan and Cr Jessup. At that meeting and again at the hearing, Ms Cocker informed other Panel members that she had worked with Cr Powell (witness for Cr McLennan) some 20-plus years ago through the Australian Education Union. The parties were informed and took no issue.

Following that meeting, the Panel requested information from Cr McLennan as follows:

- A copy of the Articles of Association of Launceston and North East Rail Association, including the objects of the Association;

- A copy of the Articles of Association of North East Residents and Farmers, including the objects of the Association;
- The number of members of each association or group;
- The position held within each organisation by Cr McLennan, her tenure in that office, and whether Cr McLennan still holds that position; and
- If an executive position is held by Cr McLennan, or was held on 19th November 2018, a statement of the duties expected of the bearer of that office.

The Panel determined to conduct a hearing as part of its investigation of the complaint.

The hearing was held on 10 June 2019. Cr McLennan called Cr Edwina Powell as a witness.

Cr Jessup told the Panel that he believed that by holding executive positions on two organisations with interests in the subject of debate at a council meeting, Cr McLennan had therefore a material interest in the item and should have left the room during the debate and vote. He said that if Cr McLennan had voted for the motion, she would have been going against the aims of those organisations, which was to maintain the north eastern rail corridor for the use of a railway, and that therefore her positions within those organisations would have been ‘severely compromised’.

Cr Jessup said that he had not approached Cr McLennan before the meeting to mention the possibility of a conflict of interest in item 216/18, and to his knowledge, neither had the Mayor or the General Manager.

In rebutting the complaint, Cr McLennan made the following points:

- Her position on the LNER committee gave her a complete understanding of the background to the motion and the potential impact on the citizens of Dorset;
- She considered that the matter of the use of the rail corridor should have been discussed by the Council at a workshop before the meeting where a decision was to be made, most particularly because the meeting on 19 November 2018 was the first meeting of a newly elected Council;
- She considered that there had been insufficient consultation with residents along the railway corridor;
- She believed that most of the Councillors were unaware that the Launceston City Council had decided in September 2018 to extend the railway line from Launceston to the Wyena border, and had relayed this information in a letter to the Dorset Council on 29 September 2018;
- She believed that most of the Councillors were unaware of the Legislative Council Inquiry into the North-East Railway Corridor (*announced on 8 October 2018*);
- She came to the meeting on 19 November 2018 with an open mind;
- She believed she was at the meeting to represent the community, and she was not there just to represent ‘the train people’;
- She believed that during the debate she had presented a balanced argument;
- She could have been convinced to vote for the motion had she heard an argument which showed her the value that a rail trail would bring to the community;
- She had declared her non-pecuniary interest;
- She had never received any remuneration from any rail organisation;

- She had been the public relations officer for Diesel Traction Tasmania Inc, trading as LNER, but that this was not an official position;
- She was a member of Diesel Traction Tasmania and she was a Board member, elected at the Annual General Meeting of the organisation, and this had also automatically made her a Board member and committee member of LNER;
- The Board meetings were held 'about twice a year';
- She did not believe that being on the Board of LNER gave her a conflict of interest;
- She was not and is not Vice-President of NERAF, only a member;
- She believed that the Code of Conduct was being used to silence her, and that the Dorset Council was trying to make her position (*as a Councillor*) as untenable as possible.

Material considered by the Panel

- Code of Conduct complaint submitted by Cr Jessup, with attachments:
 - Social media posts by Wendy McLennan dated 29 July 2018, 3 August 2018, 5 September 2018, 7 September 2018 and various undated posts;
 - An undated social media post by Wendy McLennan stating that 'The Dorset Council needs to go into Administration';
 - Item from 'The Examiner' newspaper, 25 September 2018, entitled 'Rail changes debated at council meeting';
 - Item from 'The Examiner' newspaper, 23 August 2018, entitled 'Leave the railway alone';
 - Minutes of the Council meeting on 19 November 2018;
- Legislative Council Information for Witnesses, 4 pp;
- Election material headed 'Wendy McLENNAN VOTE 1 Mayor and Councillor', 2 pp;
- A statement by Mr Stuart Bryce, Chairman, NERAF, 1 page;
- The Rules of Association of Diesel Traction Tasmania Inc, v4, 28/8/2018, 15 pp;
- The Rules of Association of North East Residents and Farmers Inc, unsigned, undated, 14 pp;
- Discussion notes taken by Cr Powell from a Mentoring Meeting, 2 pp;
- Letter from Peter Gutwein, MP, Treasurer and Minister for State Growth and Minister for Local Government, to Cr Greg Howard, Mayor, Dorset Council, undated, 2 pp;
- Letter from the General Manager, Launceston City Council, to Cr Greg Howard, Mayor, Dorset Council, dated 26 September 2018, 2 pp.
- Letter from Cr Greg Howard, Mayor, Dorset Council, to Ald Albert van Zetten, Mayor, Launceston City Council, dated 5 October 2018, 2 pp;
- Agenda and attachments for the Council meeting, 19 November 2018, 83pp;
- Recording of the Council meeting on 19 November 2018;
- Email from the General Manager, Dorset Council, to Crs McLennan and Powell, 5 February 2019, 1 page;
- Statutory Declaration from Cr McLennan, dated 14 April 2019, 4pp;
- Statutory Declaration from Cr Edwina Powell, dated 15 April 2019, 3 pp;
- Statutory Declaration by Cr McLennan, dated 22 May 2019, 1 page.

Determination

The Code of Conduct Panel upholds part of the complaint against Cr McLennan, and dismisses the remainder of the complaint. The Panel dismisses the complaint that Cr McLennan breached Part 1

(1) of the Code, and Part 2 (1), Part 2 (5), and Part 2 (6) (a) of the Code. The Panel upholds the complaint that Cr McLennan breached Part 2 (6) (b) of the Code.

Reasons for the Determination

Part 1, Decision Making

1. *A councillor must bring an open and unprejudiced mind to all matters being decided upon in the course of his or her duties, including when making planning decisions as part of the Council's role as a Planning Authority.*

The Panel dismisses this part of the complaint. The Panel did not receive any evidence that Cr McLennan failed to bring an open and unprejudiced mind to her consideration of item 216/18 on 19 November 2018. Cr McLennan had openly espoused a particular position regarding the preservation of the north east rail corridor as a Heritage Railway, but no evidence was provided to show that she was incapable of changing this view during the Council debate.

Part 2, Conflict of Interest

1. *When carrying out his or her public duty, a councillor must not be unduly influenced, nor be seen to be unduly influenced, by personal or private interests that he or she may have.*

The Panel dismisses this part of the complaint. The Panel received no evidence that Cr McLennan was unduly influenced by her personal or private interests in the matter.

5. *A councillor must avoid, and remove himself or herself from, positions of conflict of interest as far as reasonably possible.*

The Panel dismisses this part of the complaint. Cr McLennan did not avoid a declaration of her conflict of interest in item 216/18. The Panel finds that Cr McLennan, by her declaration of interest, removed herself from the conflict as far as reasonably possible.

6. *A councillor who has an actual, potential or perceived conflict of interest in a matter before the Council must –*

(a) declare the conflict of interest before discussion on the matter begins; and

The Panel dismisses this part of the complaint. Cr McLennan declared her conflict of interest before discussion on the matter began.

(b) act in good faith and exercise reasonable judgement to determine whether the conflict of interest is so material that it requires removing himself or herself physically from any Council discussion and remaining out of the room until the matter is decided by the Council.

The Panel upholds the complaint that Cr McLennan failed to exercise reasonable judgement before deciding that her conflict of interest was not so material as to require her to remove herself from the Council meeting room.

Conflict of interest arises when a person has an obligation to an organisation to promote the particular aims of that organisation, and at the same time, has an obligation to promote the aims of another organisation whose objectives conflict with that of the first organisation.

The Object and Purposes of Diesel Traction Tasmania Inc. include:

- (1) *To preserve, restore, and maintain rail equipment, and operate passenger rail services within the State of Tasmania.*
- (2) *To preserve, restore, and maintain, rolling stock, buildings and railway equipment for the furtherance of object (1).*

Cr McLennan was a Board member of Diesel Traction Inc and as such was obliged to promote the objects of the Association. At the same time she was a Councillor during a debate on a motion which, if successful, would have led to the removal of rail equipment in the State of Tasmania.

The Panel finds that while Cr McLennan acted in good faith and that her conflict of interest was not so material as to necessarily require her to remove herself physically from the Council discussion, she did not turn her mind to the conflicting obligations of the two organisations to which she belonged before deciding that she did not have a conflict of interest that would oblige her to remove herself from the debate. The Panel heard consistent evidence that Cr McLennan believed that while in the Council meeting her obligations towards Diesel Traction Inc did not need to be considered, and as a result, she did not take her position as a Board member of Diesel Traction Inc into account. The Panel finds that Cr McLennan failed to give adequate consideration to this circumstance prior to deciding how to respond to her conflict of interest and therefore failed to exercise reasonable judgement.

The Panel finds that in mitigation:

- Cr McLennan was attending her first Council meeting as an elected member; and
- She had by and large found the culture within the elected members of Council to be antagonistic and intimidating to herself as a new Councillor, and this may have led to reluctance to seek further advice from within Council; and
- She otherwise acted properly and in good faith.

Sanction

The Panel sought submissions from the parties as to what sanction if any it should impose if it upheld the complaint in full or in part.

Although the Panel upholds the complaint in relation to Part 2 section 6(b), in all the circumstances the nature of the breach is such that the Panel has determined not to exercise the discretion available to it under Section 28ZI(2) to impose on Cr McLennan one of the sanctions that are set out in that section. Accordingly, no sanction is imposed.

Right to Review

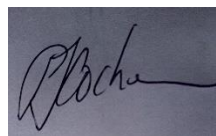
Under s28ZJ of the Act, a person aggrieved by the determination of the Panel is entitled to apply to the Magistrates Court (Administrative Appeals Division) for a review of the determination on the ground that the Panel has failed to comply with the rules of natural justice.



Lynn Mason
(Chairperson)



Anthony Mihal
(legal member)



Penny Cocker
(community member with
experience in local government)