

CENTRAL HIGHLANDS COUNCIL CODE OF CONDUCT PANEL DETERMINATION REPORT *

Complaint made by Cr Robert Cassidy against Cr Jim Allwright

Reference : c20666

Date of Determination: 25 August 2020

Code of Conduct Panel:

Lynn Mason (Chairperson), Kathy Schaefer (community member with experience in local government), Sam Thompson (legal member)

Summary of the Complaint

Cr Cassidy's complaint dated 29 May 2020 (the complaint) was referred to the Executive Officer of the Code of Conduct Panel (the Panel) on 3 June 2020. On 4 June 2020 the complaint was sent to the Chairperson of the Panel for assessment.

Pursuant to section 28ZA(1)(e) of the *Local Government Act 1993* (the Act), the Chairperson advised on 19 June 2020 that the whole of the complaint should be referred to a Panel for investigation and determination.

The complaint alleged that at the ordinary council meeting of the Central Highlands Council (the Council) held on 19 May 2020, Cr Allwright failed to declare or act on a conflict of interest in item 16.2, *Installation of Stock Grid Rotherwood Road*, and that Cr Allwright had, in addition, expressed personal bias before voting on the matter. Cr Allwright voted against the motion, which was defeated.

The Code of Conduct (the Code) in force at the time of the alleged breaches was approved by Council on 15 January 2019. The sections of the Code which Cr Cassidy alleged Cr Allwright 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.*
2. *A councillor must make decisions free from personal bias or prejudgement.*
3. *In making decisions, a councillor must give genuine and impartial consideration to all relevant information known to him or her, or of which he or she should have reasonably been aware.*
4. *A councillor must make decisions solely on merit and must not take irrelevant matters or circumstances into account when making decisions.*

PART 2 - Conflicts of interest that are not pecuniary

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.*
2. *A councillor must act openly and honestly in the public interest.*
3. *A councillor must uphold the principles of transparency and honesty and declare actual, potential or perceived conflicts of interest at any meeting of the Council and at any workshop or any meeting of a body to which the councillor is appointed or nominated by the Council.*

* 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.

4. *A councillor must act in good faith and exercise reasonable judgement to determine whether he or she has an actual, potential or perceived conflict of interest.*
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 and the nature of the interest before discussion of the matter begins; and*
 - b) *act in good faith and exercise reasonable judgement to determine whether a reasonable person would consider that the conflict of interest requires the Councillor to remove himself or herself physically from any Council discussion and remain out of the room until the matter is decided by the Council.*

The Complaint

The resolution moved by Cr Cassidy, at item 16.2 of the meeting of 19 May 2020, proposed that Council contribute up to \$2,000 towards the cost of installation of a stock grid on a public road. The request for financial assistance had been made by two private landowners. Cr Cassidy alleged that Cr Allwright *'unequivocally expressed a personal bias regarding paying for his own installation of a cattle grid on his farm, prior to a vote on the matter'*. Cr Cassidy also alleged that as Cr Allwright had voted first, his vote against the motion influenced other votes around the table, with the result that the motion was lost. Cr Cassidy stated in his complaint that Cr Allwright had a conflict of interest in the matter which he failed to declare prior to participating in the debate and voting on the motion.

Procedure

Cr Allwright was provided with a copy of the complaint on 19 June 2020 and was requested to provide a response to the Panel by 3 July 2020. The Executive Officer of the Panel received a response on 24 June 2020, but this was not attached to or part of a Statutory Declaration. The Panel requested that Cr Allwright provide a Statutory Declaration to accompany any specific response he might wish to make, and granted an extension of time until 10 July 2020. The response was received on 9 July 2020.

Cr Cassidy wrote to the Executive Officer on 1 July 2020. The letter was not attached to or part of a Statutory Declaration, and dealt principally with matters not relevant to the complaint.

On 10 July 2020, in accordance with section 28ZG(2)(a) and (b) of the Act, the Panel informed Cr Allwright that it was of a mind not to conduct a hearing into the complaint, and invited Cr Allwright to make submission on whether he would be disadvantaged if a hearing were not to be held. Cr Allwright was at the same time invited to make submission on what sanction he considered would be appropriate in the event that the Panel determined to uphold part or all of the complaint.

On 10 July 2020, in accordance with section 28ZG(2)(a) and (b) of the Act, the Panel informed Cr Cassidy that it was of a mind not to conduct a hearing into the complaint, and invited him to make submissions on whether he would be disadvantaged if a hearing were not to be held.

On 13 July 2020 Cr Cassidy made a further submission to the Panel in response to Cr Allwright's initial response to the complaint. Cr Allwright had raised allegations against Cr Cassidy in his response of 9 July 2020, and Cr Cassidy responded to those allegations. Those allegations were not relevant to the complaint, nor to the Code generally. The Panel has therefore placed no weight on Cr Allwright's counter allegations and Cr Cassidy's response to those allegations. The Panel confined its investigation to the matter of the Complaint.

On 20 July 2020 the Executive Officer received an email from Cr Cassidy which had no direct bearing on the matter of the complaint. This was provided to the Panel but none of the information therein was deemed relevant to determination of the complaint. The Panel therefore afforded it no weight.

On 22 July 2020 the Panel wrote again to Cr Allwright, inviting him to respond to Cr Cassidy's second Statutory Declaration (13 July 2020), and again inviting him to make submission on sanction in the event that all or part of the complaint were to be upheld. Cr Allwright provided his response to the Executive Officer on 23 July 2020.

The Panel met, via an online meeting platform, to consider the relevant material and evidence on 30 June 2020, 22 July 2020, and 30 July 2020.

Material considered by the Panel

- The Central Highlands Council Code of Conduct Policy, 15 January 2019;
- Audio recording of the Central Highlands Ordinary Council meeting, 19 May 2020;
- The Complaint against Cr Allwright, 29 May 2020;
- Letter from Cr Allwright to the Executive Officer, Code of Conduct Panel, 24 June 2020;
- Email from Cr Cassidy to the Executive Officer, Code of Conduct Panel, 1 July 2020;
- Statutory Declaration from Cr Allwright, 9 July 2020;
- Statutory Declaration from Cr Cassidy, 13 July 2020;
- Email from Cr Cassidy to the Executive Officer, 20 July 2020;
- Email from Cr Allwright to the Executive Officer, 23 July 2020.

Determination

Pursuant to section 28ZI (1)(b), the Code of Conduct Panel dismisses the complaint against Cr Allwright.

Reasons for the Determination

Alleged Breach of Part 1 of the Code

Part 1.1 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 determines that while Cr Allwright expressed his view about the proposed financial support from Council for private works on a public road, and based this view on his personal experience, insufficient evidence was provided to permit the Panel to conclude that Cr Allwright had closed his mind to further argument, had there been any, or that he exhibited prejudice in the statements he made in debate.

The Code requires that a councillor's mind be open to persuasion rather than foreclosed with respect to a particular matter. It does not require that a councillor must come to a meeting as a blank slate. Councillors are elected and have political functions. It is expected that a councillor may hold and espouse views, based on personal experience, about a particular matter.

Therefore, the Code of Conduct Panel dismisses this part of the complaint against Cr Allwright.

Part 1.2 A councillor must make decisions free from personal bias or prejudgement.

The Panel finds that Cr Allwright made his decision on how to vote based on his own experience in having paid for a similar installation himself at some time in the past. Cr Allwright took into account his personal experience. However, that is not prohibited by the Code. Rather, the Code prevents 'personal bias or prejudgement'.

Councillors are elected members with political functions. Their personal experience is not irrelevant. It is accepted, even desirable, that they take into account their personal experiences. The Panel understands Cr Allwright to have taken into account his personal experience as reasons for fairness and consistency in decision making.

The debate was truncated by Cr Cassidy's interjections and the Mayor's calling of a vote. Had this not occurred, Cr Allwright may have gone on to talk about the further reasoning, explained in his Statutory Declaration, and the Panel cannot therefore be satisfied that Cr Allwright's personal experience in installation of a private cattle grid on a public road was his only reason for voting against the motion. That the debate was truncated and Cr Allwright's contribution limited does not establish that Cr Allwright's vote was infected by personal bias or prejudice.

The Panel dismisses the complaint that Cr Allwright breached Part 1.2 of the Code.

Part 1.3 In making decisions, a councillor must give genuine and impartial consideration to all relevant information known to him or her, or of which he or she should have reasonably been aware.

The Panel is not persuaded that Cr Allwright did not give genuine and impartial consideration to the information before him or of which he should have been aware. No evidence was provided to indicate that Cr Allwright had deliberately ignored information provided to the Councillors. Council's debate with respect to this matter was short. However, there is no evidence that Cr Allwright failed to give genuine and impartial consideration to the little information before him, or of which he should have been aware.

The Code of Conduct Panel dismisses the complaint that Cr Allwright breached Part 1.3 of the Code of Conduct.

Part 1.4 A councillor must make decisions solely on merit and must not take irrelevant matters or circumstances into account when making decisions.

Cr Allwright based his decision to vote against the motion on the fact that he had not received a council subsidy when he installed a stock grid on a public road. The Panel does not accept that this was an irrelevant matter. Arguably, Cr Allwright should have taken into account *additional* matters and ensured that the debate was more fulsome, but he did not take into account *irrelevant* matters, and in the interests of consistency in the use of public funds for assistance in like matters, his argument is not without merit. The Mayor's chairing potentially compromised debate by all Councillors, including Cr Allwright.

The Panel dismisses the complaint that Cr Allwright breached Part 1.4 of the Code of Conduct.

Alleged breach of Part 2 of the Code

Part 2.1. 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 determines that as Cr Allwright's statements indicate that he had paid for his own grid installation sometime in the past, he did not have a direct or indirect interest in the outcome of this resolution. Council was debating a single issue, whether or not to assist in paying for a particular stock grid installation. This was not a debate on a Council policy which could affect Cr Allwright's private interests. As a result, the Code of Conduct Panel dismisses the complaint that Cr Allwright breached Part 2.1 of the Code of Conduct.

Part 2.2 A councillor must act openly and honestly in the public interest.

The Panel finds that there is no evidence that Cr Allwright failed to act openly and honestly, nor that he failed to act in the public interest. The Panel is not satisfied that voting against the motion (to subsidise a stock grid) was contrary to the public interest. During the debate, Cr Allwright was open about the fact that when he installed a stock grid, he did not receive a Council subsidy.

The Code of Conduct Panel dismisses the complaint that Cr Allwright breached Part 2.2 of the Code of Conduct.

Part 2.3 A councillor must uphold the principles of transparency and honesty and declare actual, potential or perceived conflicts of interest at any meeting of the Council and at any workshop or any meeting of a body to which the councillor is appointed or nominated by the Council.

The Panel finds that Cr Allwright did not have a conflict of interest in deciding how to vote on financial support for the installation of a stock grid for two parties unrelated to him and his interests. He therefore had no need to make such a declaration in the meeting.

The Code of Conduct Panel dismisses the complaint that Cr Allwright breached Part 2.3 of the Code of Conduct.

Part 2.4. A councillor must act in good faith and exercise reasonable judgement to determine whether he or she has an actual, potential or perceived conflict of interest.

The Panel received no evidence that Cr Allwright failed to exercise reasonable judgement in determining whether he had a conflict of interest in the issue. The Mayor asked him directly during debate whether he had a conflict of interest or not. It is therefore apparent that he had to consider the matter. There was no evidence before the Panel that Cr Allwright failed to act in good faith and exercise reasonable judgment in concluding that he did not have a conflict of interest. There was a sound basis for Cr Allwright to reach that view; see the application of Part 2.1 of the Code (above).

The Code of Conduct Panel dismisses the complaint that Cr Allwright breached Part 2.4 of the Code of Conduct.

Part 2.5. A councillor must avoid, and remove himself or herself from, positions of conflict of interest as far as reasonably possible.

Part 2.6. 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 and the nature of the interest before discussion of the matter begins; and*
- b) act in good faith and exercise reasonable judgement to determine whether a reasonable person would consider that the conflict of interest requires the Councillor to remove himself or herself physically from any Council discussion and remain out of the room until the matter is decided by the Council.*

For the reasons given above, the Panel finds that Cr Allwright had no conflict of interest to declare.

The Code of Conduct Panel dismisses the complaint that Cr Allwright breached Part 2.5 and Part 2.6 of the Code of Conduct.

Conclusion

Pursuant to section 28Z(1)(b) of the Act, the Panel dismisses the whole of the complaint.

The Panel finds that the conduct of the debate on item 16.2 at the Council meeting of 19 May 2020 was not such as to allow Councillors to hear differing points of view. When the motion was eventually moved and seconded, the Mayor immediately invited Cr Allwright to speak. He did so, against the motion. His debate against the motion could and should have included reference to matters beyond his personal experience, or at least, a more detailed explanation of the relevance of this experience to other landholders and to the ratepayers of Central Highlands. However, as stated above, he was interrupted several times, and the debate, such as it was, was cut short by the Mayor's calling the vote.

When the Mayor put the motion to the vote, asking each Councillor in turn for their vote, Cr Allwright was invited to vote first. Cr Cassidy alleged that this influenced other Councillors' votes, but there is no evidence that this was so. At no point was either the mover or the seconder invited to speak to the motion: Cr Allwright was the only speaker. This is contrary to good governance and is unfair to all Councillors.

The Panel notes that no Councillor moved a Procedural Motion¹ to try to prevent the matter from going to a vote before any other argument was heard. Councillors should also shoulder their responsibility to ensure that all sides are heard, enabling considered decisions made on the merits of the case in point. This includes Cr Allwright, particularly in his role as Deputy Mayor.

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)



Sam Thompson
(Legal Member)



Kathy Schaefer
(Community Member with
experience in local government)

¹ In accordance with the *Local Government (Meeting Procedures) Regulations 2015*, 20(1)(a), an appropriate Procedural Motion would have been *That the motion not now be put*.