

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.

Local Government Act 1993

CODE OF CONDUCT PANEL DETERMINATION REPORT

GLAMORGAN SPRING BAY CODE OF CONDUCT

Complaint brought by Ms Kathleen Ford against Councillor Cheryl Arnol

Code of Conduct Panel

- Rob Winter (Chairperson),
- Liz Gillam (Local Government Member)
- Frank Neasey (Legal Member)

Date of Determination: 13 March 2024

Content Manager Reference: C31347

Summary of the complaint

A code of conduct complaint was submitted by Ms Kathleen Ford (the Complainant) to the General Manager of the Glamorgan Spring Bay Council (GSBC) on 13 October 2023.

In the complaint it was alleged that Councillor Arnol (the Respondent) had breached the following parts of the GSBC's Model Code of Conduct (the Code) effective from 26 February 2019, in relation to a number of her actions at the GSBC meeting held on 18 April 2023, particularly her participation in and voting on a specific planning matter listed on the agenda of that meeting:

Part 1 Decision Making, and

Part 2- Conflict of interests which are not pecuniary.

Following receipt of the complaint, the Chairperson conducted an initial assessment of the complaint in accordance with the requirements of section 28ZA (1) of the *Local Government Act 1993* (the Act) and determined that the whole of the complaint should be investigated and determined by a Code of Conduct Panel (the Panel).

Having undertaken that initial assessment, the Chairperson determined that these allegations should be further investigated as they substantially related to a contravention of the Code as, if the allegations in relation to Part 1 and Part 2 of the Code were proven, they were capable of constituting a breach in relation to the Code.

A copy of the complaint was provided to the other members of the Panel appointed to investigate the complaint. The Complainant, the Respondent and the General Manager were notified of the outcome of the initial assessment by letter dated 17 November 2023.

Investigation

In accordance with section 28ZE of the Act, the Code of Conduct Panel (the Panel) investigated the complaint.

The Panel received a detailed written response from the Respondent under cover of a Statutory Declaration dated 27 November 2023.

On 12 December 2023, the Respondent's Statutory Declaration and written response were forwarded to the Complainant, seeking her response by 12 January 2024.

After being granted a short extension of time, the Complainant provided her response to the Respondent's Statutory Declaration on 22 January 2024, in a Statutory Declaration with attachments dated 19 January 2024.

In this correspondence the Complainant indicated that she was content for the Panel to determine the matter without the need for a hearing.

Subsequent to a Panel teleconference on 29 January 2024, the Respondent was provided with a copy of the Complainant's Statutory Declaration and attachments of 19 January 2024, and given seven days to provide any response, and to also indicate her attitude to the Panel determining the complaint without the need for a hearing.

On 30 January 2024, the Respondent indicating in writing that she did not wish to further comment on the Complainant's Statutory Declaration and attachments dated 19 January 2024, and that she was also content for the Panel to determine the complaint without the need for a hearing.

Pursuant to section 28ZG(2)(a) and (b) the Panel determined that the complaint could be investigated and determined without a hearing, as it was considered that neither the Complainant nor the Respondent would be disadvantaged if a hearing was not held and it was appropriate in the circumstances not to hold a hearing. Further, the Panel determined a hearing was unnecessary in the circumstances because the investigation could be adequately conducted by means of both written submissions and examination of documentary evidence.

As indicated previously in this determination, both the Complainant and the Respondent indicated that they were content for the Panel to determine the complaint without the need for a hearing.

Further it is plain from all of the material received from the Respondent that she denies being in breach of any clause of Part 1 or Part 2 of the Code and in fact calls for a dismissal of the complaint.

Material considered by the Panel

The following documents have been presented to the Panel to consider as evidence in this matter:

1. All material received with the Complainant's complaint.
2. Statutory Declaration from the Respondent dated 27 November 2023 including detailed written response to the complaint.
3. Statutory Declaration from the Complainant dated 19 January 2024 with attachments.
4. Letter Respondent to Panel dated 30 January 2024, responding to Complainant's Statutory Declaration of 19 January 2024.
5. GSBC Meeting Agenda and Minutes for council meeting 18 April 2023.
6. YouTube VDO of the GSBC meeting of 18 April 2023.
7. Letter Respondent to Chair of Panel dated 8 March 2024 in response to invitation to make submissions in respect of possible sanction.

Determination

Pursuant to section 28ZI (1) (a) of the Act, the Panel determines that Councillor Amol has breached the Code, and therefore the Panel upholds the complaint.

Reasons for determination

The factual basis for Ms Ford's complaint is not substantially in dispute, and the Panel finds the following facts:

- As at 18 April 2023, the Respondent was the Mayor of the GSBC.
- As at 18 April 2023, the Respondent was a financial member of the Friends of the Buckland Church (FOBC). The Respondent has disputed that she was an active member of the FOBC, but the Panel finds that as of 18 April 2023 the Respondent was an active member of FOBC. On her own evidence she was a regular attendee at FOBC meetings between September 2019 and November 2023. Further support for this finding is the Respondent's own evidence that she provided an "apology" when she was unable to attend a meeting.
- The Respondent remained in the Chair for the full GSBC Meeting on 18 April 2023.
- At the GSBC meeting on 18 April 2023, under Agenda item 1.6 Declaration of Interest or Conflict, the Respondent and two other Councillors, Cr Edwards and Cr Woods, made the following declaration with regard to Agenda item 4.2:

"I note that I have an interest in Agenda item 4.2, but it is my belief that any perceived conflict of interest is not of such materiality that it will affect my decision making when acting as a planning authority".

- Agenda item 4.2, detailed under the Planning Authority section of the meeting agenda, related to DA 2023/44 entitled "Change of use of Buckland Church- Sally Peak Road Buckland".
- The GSBC'S YouTube Channel recording of the meeting confirms that when this item on the agenda came on for debate the Respondent remained in the room, continued to chair the meeting, and voted in favour of the motion.
- On 27 April 2023, the Complainant emailed the Respondent seeking clarification of her declaration of interest of 18 April 2023 after the Complainant watched the YouTube recording of the meeting of that date.
- The Respondent replied to the Complainant's email of 27 April 2023 on 3 May 2023.
- On 15 May 2023 by email, the Complainant posed further questions to the Respondent regarding her declaration of interest, and other matters, arising out of the meeting of 18 April 2023.
- Later on the 15 May by email, the Respondent responded to the Complainant, and provided her with a copy of her "Declaration of Interest" which related to item 4.2 on the agenda for the meeting of 18 April 2023, and which stated under the heading "Details of Interest":

"I am a financial member of the Applicant the Friends of Buckland Church Incorporated. I declared a potential perceived conflict of interest in accordance with clause 6 (b) of the GSBC Model Code of Conduct and determined that any potential perceived conflict of interest was not of such materiality to affect my decision when acting as a planning authority".

Having considered the complaint, the material accompanying it, the other materials referred to in this determination and in accordance with the facts as found, the Panel has determined that the complaint is substantiated for the following reasons.

Part 2 of the GSBC Model Code of Conduct adopted on 26 February 2019 provides:

Part 2 – Conflict of Interests 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 interests 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.
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 him 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 him or herself physically from any council discussion and remain out of the room until the matter is decided by the Council.
7. This Part does not apply in relation to a pecuniary interest.

In both her oral declaration at the meeting of 18 April 2023 and her written Declaration of Interest as provided to the Complainant, in which the Respondent referred to her oral declaration, the Respondent spoke of a 'potential (or possible-'any') perceived conflict of interest'. In the Panel's view the Respondent had at the very least a potential or perceived conflict of interest in respect of the matter before the Council (item 4.2); in fact, the Panel is satisfied, for reasons which will be elaborated upon, that she had an actual conflict of interest (which was a non-pecuniary one).

Accordingly, the Panel is satisfied that the Respondent was clearly in breach of Clause 6(a), as although the Respondent purported to make a declaration of conflict of interest in respect of item 4.2 in the GSBC meeting of 18 April 2023 before it was debated, she did not, as required by clause 6(a), disclose the nature of the interest.

The use of the word "and" in clause 6(a) is clearly conjunctive, requiring the Respondent to declare both the conflict of interest "and" the nature of the interest.

The Respondent purported to meet the requirements of clause 6(a) in her Declaration of Interest document which she provided to the Complainant on 15 May 2023, in which she did make reference to her membership of the FOBC. However, any such declaration of the nature of the relevant interest was made subsequent to the discussion of and voting upon the relevant matter and was thus *post facto*.

The Panel does not follow the Respondent's rationale, in her response dated 27 November 2023, for not disclosing the nature of her interest before item 4.2 was debated and voted on at the meeting on 18 April 2023:

"I have always been of the understanding that, as the Council does not have parliamentary privilege in the Chamber in open meetings, elected members are only required to state that they have a conflict and then declare the nature in the register of declarations that is subject to the provisions of right to information disclosure."

This explanation clearly does not accord with clause 6 (a) of Part 2 of the Code and is indicative of a failure to understand its requirements.

The Panel notes the Respondent's contention in her letter to the Chair of 8 March 2024 that in fact she did disclose 'the nature of the interest' as required (at the meeting). The Respondent referred to the definition of 'nature' in the *Webster* dictionary, being 'basic quality, type or sort'. The Respondent said that by stating that she had a 'potential perceived conflict' she did in fact declare the nature of the relevant interest.

The Panel rejects this contention and finds that in the Respondent's statement at the meeting of 18 April 2023 that she had a 'potential perceived conflict of interest' in respect of item 4.2 on the Agenda she said nothing at all about the basic quality, type or sort of the relevant interest, but merely drew attention to a possible conflict of interest existing.

Further, the Panel notes the following extract from Page 67 of the *Good Governance Guide for Local Government in Tasmania*, published on the Department of Premier and Cabinet website, in relation specifically to non-pecuniary interests:

"Non-pecuniary conflicts of interest may arise if;

You are a member (not an office-bearer) of a club, organisation, or association likely to be impacted by the council decision."

Page 64 of the *Good Governance Guide for Local Government in Tasmania*, is also relevant and states:

"You may from time to time find you have a private interest (social, familial or financial) that may improperly influence (or be perceived to improperly influence) decisions that need to be made as an elected member. It is your responsibility to ensure that you do not put yourself in the situation where personal interests impact, or are perceived to impact, on your decision-making."

Before dealing with the remaining clauses of Part 2 of the Code and Part 1, the Panel refers to the High Court decision of *Isbester v Knox City Council* [2015] HCA 20 (footnotes omitted) which it considers is of relevance to this complaint. While that case dealt with the issue of apprehension of bias, the principles discussed are equally applicable to questions involving apprehended or "perceived" conflicts of interest.

From para 23 the High Court stated:

"23 How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised²². The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made²³ as well as to have knowledge of the circumstances leading to the decision²⁴.

24 The two cases referred to in the Courts below, *Jia Legeng* and *McGovern*, furnish examples of how the above-mentioned factors assume relevance to the question of what a fair-minded observer may reasonably expect as to the level, or standard, of impartiality which should be brought to decision-making by certain non-judicial decision-makers. Whether those factors assume particular relevance to a case such as the present, where the essential question concerns incompatibility of roles, or a conflict of interest, is another question."

And again, later in their Honours' judgement they stated:

"49 The majority reasons in *Ebner* should not be understood to exclude cases of the kind here in question from the application of the principle by the test there stated. The test directs attention, as a first step in cases where apprehended bias is alleged, to the critical question of the decision-maker's interest. The difference in the application of the test is that in cases like the present one that concern incompatibility of roles, once the interest is identified as one which points to a conflict of interest, the connection between that interest and the possibility of deviation from proper decision-making is obvious.

Conclusion and order

50 A fair-minded observer might reasonably apprehend that Ms Hughes might not have brought an impartial mind to the decision under s 84P(e). This conclusion implies nothing about how Ms Hughes in fact approached the matter. It does not imply that she acted otherwise than diligently, and in accordance with her duties, as the primary judge found⁴², or that she was not in fact impartial. Natural justice required, however, that she not participate in the decision and because that occurred, the decision must be quashed.

While Mr Justice Gageler did not join in the joint judgement, he did say:

“ Ms Hughes might have developed, as Ms Isbester's prosecutor, a frame of mind incompatible with the dispassionate evaluation of whether administrative action should be taken against Ms Isbester's interests in light of Ms Isbester's conviction. Ms Hughes' frame of mind might have affected the views she expressed as a member of the Panel, and the expression of those views might have influenced not only the recommendation made by the Panel, which included Mr Kourambas, but also the acceptance of that recommendation by Mr Kourambas in his capacity as delegate of the Council. Those are all possibilities which fairly arise from the established facts. There is nothing fanciful or extravagant about them. A hypothetical fair-minded observer with knowledge of all of the circumstances would be quite reasonable to apprehend them.”

From the decision it can be discerned that where there is an incompatibility of roles greater consideration must be given to procedural fairness and natural justice and there is greater potential for an apprehended or perceived conflict of interest, if not an actual conflict of interest, to arise.

The Panel considers this is a matter concerning the incompatibility of roles, the Respondent's relevant roles being on the one hand her active membership of FOBC, whereby it must be taken that she was interested in the relevant motion being approved, and her role as a member of the planning authority, in fact, the chair of it.

The Complainant's allegation of a conflict of interest (in fact an actual conflict of interest), draws attention to the Respondent's interest in seeing the motion approved. Once that interest is identified as one which (at the very least) points to an apprehension or perception of a conflict of interest, the connection is drawn between that interest and the possibility of a deviation from proper decision making. This becomes obvious. It matters not if the Respondent carried out her duties perfectly diligently, it is a question (at the very least) of apprehension or perception.

Although, it may be that the Complainant handled the debate regarding the matter, and the voting on it properly and fairly, the fundamental question was whether she should have been taking part in that process at all, by reason, at the very least, of an apprehended or perceived conflict of interest. As previously indicated, the Panel is satisfied that, owing to the irreconcilability of her competing roles in the matter, the Respondent had an actual conflict of interest, as the Complainant asserts.

Given her active membership of the FOBC as at 18 April 2023, and her inevitable interest in seeing the relevant motion passed, the Panel finds that the Respondent should have removed herself from the room when item 4.2 came on for debate.

Accordingly the Panel further finds the Respondent breached clause 6(b) of Part 2 of the Code, which involves an objective test, and required the Respondent to act in good faith, and exercise reasonable judgement to determine whether a reasonable person would consider that the relevant conflict of interest required the Respondent to remove herself from the debate regarding the DA for FOBC and remain out of the room until the matter was decided.

While she may have acted in good faith, the Panel finds that the Respondent failed to exercise the required reasonable judgment because had she done so, she would have determined that a reasonable

person would have considered that her actual conflict of interest required her to remove herself from the debate and remain out of the room.

As to the remaining clauses of Part 2 of the Code, in light of these findings, the Panel finds:

- The Respondent breached Part 2 clause 1 (at the very least) when a reasonable person, with knowledge of the Respondent's membership of FOBC, and her public duty when dealing with planning matters involving the FOBC, would see the Respondent as being unduly influenced by her personal or private interest, in particular her interest in the relevant motion being passed. It was the Respondent's duty to not be seen in this light. In any event in the Panel's view the Respondent would inevitably, even if unconsciously, have been unduly influenced in that matter.
- The Respondent has breached Part 2 clauses 2 and 3 as she was neither open in the public interest, nor transparent in her declaration of interest at the meeting of 18 April 2023. The Respondent did not disclose the nature of her interest until she made her declaration as provided to the Complainant on 15 May 2023 in response to the latter's request, and that declaration was made to the General Manager. The Panel does not find the Respondent acted dishonestly.
- Although the Panel does not find the Respondent acted in bad faith when she remained in the meeting when item 4.2 came on for debate, the Panel finds the Respondent breached Part 2, clause 4 as on the facts found, and for the reasons discussed, she did not exercise reasonable judgment to determine whether she had an actual potential or perceived conflict of interest.
- Based on its findings regarding Part 2 clause 6(b) above, the Panel finds that the Respondent was also in breach of Part 2 clause 5.

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 pre-judgement.
3. In making decisions, a councillor must give genuine and impartial consideration to all relevant information known to him or her or for 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.

In accordance with the Panel's findings of fact, and the finding that the Respondent should not only have declared the nature of her conflict of interest in respect of item 4.2, but also removed herself from that part of the meeting, the Panel further finds that the Respondent's presence during debate on the relevant motion and her voting for it inevitably (if unconsciously) brought a prejudiced, biased mind and one that lacked impartiality to the matters before her. To the extent she took into account her own personal interest in the motion, the Panel finds the Respondent took into account irrelevant matters.

Accordingly, the Panel finds that the Respondent was in breach of each clause of Part 1 of the Code.

Sanctions

Where a code of conduct complaint or part of it is upheld, the Panel may impose one or more of the sanctions referred to in section 28ZI (2) of the Act. These include cautioning or reprimanding the councillor; requiring the councillor to apologise to the complainant or other person affected by their behaviour; requiring the councillor to attend a counselling or training course; or suspending the councillor from office for a period of up to three months.

In her complaint, the Complainant did not seek the imposition of a sanction if the complaint, or any part of it was substantiated. She merely asserted "A finding that the Respondent breached the Code, to be published to all parties to the FOBC DA, including the representors, and rate payers generally" would be a sufficient 'sanction'.

It is the Panel's view that it is appropriate to impose a sanction as provided for by the Act. As indicated the Complainant does not seek an apology. There is little point ordering Councillor Arnol to undergo counselling or a training course. No doubt her involvement in the process of the complaint will have made her more acutely aware of the need to consider conflicts of interest more carefully. The Panel does not consider a suspension is at all warranted.

With her long experience in Local Government, and particularly as a Mayor, the Panel considers that a reprimand is an appropriate and sufficient sanction to impose on Councillor Arnol. It was considered that a mere caution was insufficient in the circumstances.

Explanatory note

The Respondent indicated in her response of 27 November 2023, that she considered the complaint to be frivolous and vexatious. This matter was considered by the Chair of the Panel in his initial assessment. For the sake of clarity, the Panel did not consider the complaint to be frivolous or vexatious.

Timing of the Determination

In accordance with section 28ZD (1)(a) of the Act, a Code of Conduct Panel is to make every endeavour to investigate and determine a code of conduct complaint within 90 days of the chairperson's determination that the (whole) complaint is to be investigated.

The Panel has been unable to determine the complaint within that 90 days period, owing to the intervention of the Christmas/New Year holidays, the Panel Members leave commitments, and the recent illness of the Chair, preventing preparation of the final determination report within 90 days.

Right to review

A person aggrieved by the determination of the Code of Conduct Panel, on the ground that the Panel failed to comply with the rules of natural justice, is entitled under section 28ZP of the Act to apply to the Magistrates Court (Administrative Appeals Division) for a review of that determination. In accordance with section 17 of the *Magistrates Court (Administrative Appeals Division) Act 2001*, an appeal must be lodged within 28 days of the date of notification of the determination.



Rob Winter
Chairperson



Frank Neasey
Legal Member



Liz Gillam
Member

DATE: 13 March 2024