

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

DEVONPORT CITY COUNCIL CODE OF CONDUCT PANEL

Complaint brought by Mr Graeme Nevin against Crs Rockliff, Laycock, and Perry

Code of Conduct Panel

- Lynn Mason (Chairperson),
- Sally Darke (Local Government Member)
- Steve Bishop (Legal Member)

Date of Determination: 14 July 2021

Content Manager Reference: C22110

Summary of the complaint

A code of conduct complaint was submitted by Mr Graeme Nevin to the General Manager Devonport City Council on 30 March 2021.

The Complaint alleged that at the 2020 Annual General Meeting of Devonport City Council (the Council), Councillors (Crs) Rockliff, Laycock and Perry had a conflict of interest in considering a motion calling for an enquiry into, and report on, matters pertaining to Providore Place, and failed to declare that interest in accordance with Part 2 of the Code.

The Code in force at the time of the alleged breaches was adopted by Council in January 2019. The section of the Code which Mr Nevin alleged Crs Rockliff, Laycock, and Perry breached is:

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 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.*
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.*
7. *This Part does not apply in relation to a pecuniary interest.*

Initial assessment

Mr Nevin's complaint was referred to the Chairperson for initial assessment on 20 April 2021.

Following receipt of the complaint, the Chairperson conducted an initial assessment of the complaint in accordance with the requirements of section 28ZA of the Act. Having assessed the complaint against the provisions of sections 28ZB and 28ZC of the Act, the Chairperson determined that:

- the complainant had made a reasonable effort to resolve the complaint. The Chairperson arrived at this conclusion considering that Mr Nevin had written to the councillors on several occasions seeking to resolve this matter prior to lodging his complaint;
- the complaint [or part of the complaint] substantially related to a contravention of the Devonport City Council's Code of Conduct, namely *Part 2 - Conflict of interests that are not pecuniary*
- the complaint should not be dismissed on the grounds that it was frivolous, vexatious or trivial. The reasons for this conclusion were that Mr Nevin had provided sufficient evidence to warrant further investigation of his complaint;
- there was no relevant direction under section 28ZB(2) or 28ZI of the Act that would apply to the complainant and the complaint.¹

Pursuant to section 28ZA(1)(e) of the *Local Government Act 1993* (the Act), the Chairperson determined on 12 May 2021 that the complaint should be referred to a Panel for investigation.

The complainant, respondent councillors and the General Manager were notified of the outcome of the outcome of the initial assessment by letter dated 12 May 2021.

The Complaint

Cr Rockliff is the Mayor of Devonport City Council. Cr Laycock is a past Mayor and long serving councillor, and Cr Perry has been a councillor since 2009.

The Annual General Meeting (AGM) of the Council was held on 9 November 2020. Mr Nevin moved a motion as follows:

DEVONPORT CITY COUNCIL 2020 ANNUAL GENERAL MEETING

That the Devonport City Council:

- 1. commission an enquiry and report;*
- 2. independent of council;*
- 3. with the report made public (apart from item A below)*

Regarding what has happened with Providore Place including reference to the following:

- A Whether DCC has any potential claim against any person or entity (other than the head lessee) concerning recovery of the Providore Place losses suffered by DCC?;*
- B Whether the 2016 councillors acted in good faith when granting the head lease in relation to Providore Place?;*
- C Why council granted a head lease with clauses protecting council's position absent?;*
- D Why did council not want any legal advice on the head lease?*

The complaint alleged that as Crs Rockliff, Laycock and Perry were all councillors in 2016, they had a conflict of interest in the motion being debated, and should have declared that interest and removed themselves from the room for the duration of the debate on that motion. The motion was given with due notice and was included

¹ Section 28ZB(2) and 28ZI of the Act enable the Chairperson or the Panel (as applicable) to issue a direction to a complainant in prescribed circumstances not to make a further complaint in relation to the same matter unless the complainant provides substantive new information in the further complaint.

in the agenda papers for the meeting; hence the councillors had sufficient time to consider the matter of actual, perceived, or potential conflict of interest prior to the meeting, and to seek advice if they deemed it necessary.

The complaint alleged that the councillors who were on Council in 2016 potentially had something to gain from the outcome of the motion. If the motion were lost, then there would be no possibility of investigation into whether they had acted in good faith in making decisions about Providore Place, or whether as a result of their 2016 decisions, the Council had potential claims against any person or entity in light of the losses subsequently suffered by the Council. Had the investigation taken place, with adverse findings for the 2016 councillors, this had the potential to adversely affect their reputations as councillors and leaders of the community.

All three councillors remained in the room while the motion was debated. Crs Rockliff and Laycock voted against the motion. Cr Perry did not appear to vote. In accordance with the *Local Government (Meeting Procedures) Regulations 2015*, abstention from voting at an ordinary council meeting is counted as a negative vote. Whether the Mayor considered that she could impose those meeting procedures on the AGM or not is not relevant to this Report. By his presence during the debate and failure to vote in favour of the motion, it may be deemed that Cr Perry, along with Crs Rockliff and Laycock, voted against the motion.

Investigation

The Panel met on 24 May 2021. On that day Mr Nevin was informed that no further information was needed from him at that time, and the Respondents were invited to provide their response to the complaint by 31 May 2021. The Panel received very similar or identical responses from all three councillors under cover of Statutory Declarations dated 28 May 2021.

On 1 June 2021 the Panel met to consider the responses and on 2 June 2021 the Panel wrote to Mr Nevin, inviting him to respond to the declarations made by the Respondents. Mr Nevin was also invited to make submission on whether he considered he would be disadvantaged if the Panel were to complete its investigation by written submissions or examination of documentary evidence, or both, without conducting a hearing. Mr Nevin responded, in a Statutory Declaration dated 8 June 2021, and included his submission that he did not consider he would be disadvantaged if a hearing was not held.

Mr Nevin's document of 8 June 2021 was sent to the Respondents. Additionally, the Respondents were asked to make submission on whether or not they considered that a hearing should be held, and also on what penalty, if any, should be imposed on each of them in the event that the Panel upheld part or all of the complaint.

The Panel received very similar or identical responses from Crs Rockliff, Laycock and Perry by Statutory Declarations dated 17 June 2021. These were sent to Mr Nevin on 18 June 2021. None of the Respondents considered that they would be disadvantaged if a hearing was not held. Mr Nevin was informed that the Panel did not consider that the 17 June 2021 submissions from the Respondents added any fresh information to what was already being considered by the Panel, and that therefore, the Panel did not expect any further response from him.

The Panel met on 28 June 2021 to conclude its investigation.

Material considered by the Panel

The Panel's investigation was based on the following documentation:

- The Devonport City Council Model Code of Conduct Policy, January 2019;
- The Complaint by Mr Nevin, 30 March 2021;
- The audio recording and minutes of the Council's Annual General Meeting, held on 9 November 2020;
- The responses to the Complaint provided by Statutory Declarations dated 28 May 2021;
- Statutory Declaration from Mr Nevin, 8 June 2021;
- The report of the Auditor-General No. 1 of 2019-2020, *Procurement in Local Government*; and
- Statutory Declarations from Crs Rockliff, Laycock and Perry, 17 June 2021.

The Respondents submitted that *as AGM business generally would relate to Councillor decision making, it is unreasonable and at times (depending on numbers) impossible to apply a conflict of interest expectation.*

The Panel disagrees with this view. The Code states the following regarding its application:

This Code of Conduct applies to a councillor whenever he or she:

- *conducts council business, whether at or outside a meeting;*
- *conducts the business of his or her office (which may be that of mayor, deputy mayor or councillor); or*
- *acts as a representative of the Council.*

The Panel finds that the conduct of the AGM is council business, and therefore, the Conflict of Interest provisions of the Code apply in that situation. Crs Laycock and Perry were conducting the business of their office as Councillors at the AGM, and the Mayor was conducting the business of her office as Mayor in chairing the AGM. The Code provisions regarding conflict of interest therefore apply to the AGM.

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 Crs Rockliff, Laycock and Perry had a personal interest in the outcome of the vote on the motion as put. As 2016 councillors any report on the issues surrounding Providore Place and the council decisions which led to those issues could have been damaging to the three councillors. Given the length of service of all three councillors, many of the AGM attendees would have been aware that they had been councillors in 2016, and could be affected by the outcome of any investigation.

Additionally, the question of conflict of interest affecting the 2016 councillors was raised by the Deputy Mayor, who declared an interest in the matter and left the room. There was therefore indisputably the perception by some of those in attendance of conflict of interest by the three Respondents. The Panel determines that in accordance with clause 6 of Part 2 of the Code, the Respondents should have declared the conflict of interest (whether actual, potential, or perceived) and in good faith, removed themselves from the room during the debate and vote.

The Respondents cited the report of the Auditor-General No. 1 of 2019-2020, *Procurement in Local Government*, stating that *the Auditor-General's Office (TAO) found nothing more than a small number of improvement recommendations for Council and the Local Government Division. There was no suggestion by the Auditor-General of any wrong-doing or and decisions made by Councillors that were 'not in good faith'.*

The Panel disagrees with the view that this statement adequately reflects the findings and recommendations in the TAO report that are pertinent to this complaint. The report was primarily investigating the procurement processes used by the Council in the Providore Place project. In its conclusion the report stated that in investigating audit criteria 3 (*Did DCC follow sound commercial and governance processes in entering into the Providore Place head lease?*) it found as follows:

DCC's governance and procurement processes for management of the Living City project were not effective as measured against audit criteria 3 due to DCC failing to follow sound commercial and governance processes before entering into the Providore Place head lease. This included failing to obtain independent legal advice prior to entering into the head lease and not adequately managing the relationship risk between DCC and P+i in entering into the head lease.

The Panel finds that this conclusion by the TAO indicates some concern about the manner in which the 2016 Council made its decisions. The Panel determines that the report's failure to comment on whether or not councillors acted in good faith does not allow the conclusion that therefore, the councillors did act in good faith in their 2016 decision making on Providore Place.

Sanctions

In accordance with section 28ZI (2) of the Act, the Panel may impose one or more sanctions on Cr Rockliff. The starting point is whether the Panel should impose a sanction. Given that Cr Rockliff is the Mayor of the

Council, and that she has had a previous complaint against her upheld by the Panel, the Panel is satisfied that it should. Pursuant to section 28ZI(2)(b), the Panel imposes a reprimand on Cr Rockliff.

In accordance with section 28ZI (2) of the Act, the Panel may impose one or more sanctions on Cr Laycock. The starting point is whether the Panel should impose a sanction. Given that Cr Laycock is a past Mayor of the Council, and has extensive experience in local government, the Panel is satisfied that it should. The Panel takes into consideration that Cr Laycock has had no previous complaints upheld against her. Pursuant to section 28ZI(2)(a), the Panel imposes a caution on Cr Laycock.

In accordance with section 28ZI (2) of the Act, the Panel may impose one or more sanctions on Cr Perry. The starting point is whether the Panel should impose a sanction. Given that Cr Perry is a long-standing elected member of the Council, the Panel is satisfied that it should. The Panel takes into consideration that Cr Perry has had no previous complaints upheld against him. Pursuant to section 28ZI(2)(a), the Panel imposes a caution on Cr Perry.

Pursuant to section 28ZI(2)(d), the Panel requires Cr Rockliff, Cr Laycock, and Cr Perry to undertake training in recognising and dealing with conflict of interest in the local government context. This training is to be undertaken prior to the next Annual General Meeting of the Council.

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



Lynn Mason
Chairperson



Sally Darke
Member



Steve Bishop
Member

DATE : 14 July 2021