

CODE OF CONDUCT PANEL REPORT*
DERWENT VALLEY COUNCIL COUNCILLOR CODE OF CONDUCT
Complaint brought by Ms Anne Salt against Deputy Mayor Jessica Cosgrove
(Ref : C19742)

Determination made on 23 February 2020

Code of Conduct Panel:

Lynn Mason (Chairperson), Graeme Jones (legal member),
Katherine Schaefer (community member with experience in local government),

Summary of the Complaint

The complaint from Ms Salt was submitted to the Executive Officer of the Code of Conduct Panel (the Panel) on 29 November 2019.

The Chairperson of the Panel undertook an initial assessment of the complaint and advised on 9 December 2019 that it should be referred to a Panel for investigation.

The Derwent Valley Council Code of Conduct (the Code) in force at the time of the alleged breaches was approved by Council on 21 March 2019. The sections of the Code which Ms Salt alleged Cr Cosgrove breached are:

PART 2 – CONFLICT OF INTERESTS THAT ARE NOT PECUNIARY

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*

* 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.

The Complaint

The complaint alleged that Cr Cosgrove, as the owner of the New Norfolk Market, was operating a business which had a direct link to the proponents of a number of applications which came to Council for approval at council meetings on 28 May 2019, 20 June 2019, and 15 August 2019. The direct link was alleged to be forged because of what the complainant called a 'close family' relationship between a stall holder at the New Norfolk Market, and the proponents of applications made by New Norfolk Distillery.

Cr Cosgrove received a fee from the stallholder to gain a stall at the Market. Cr Cosgrove failed to declare an interest in the applications brought to Council by New Norfolk Distillery. Ms Salt alleged that Cr Cosgrove knew of the link between the New Norfolk Distillery and Wild Valley Chocolates (the stallholder) prior to voting on the applications at the three council meetings cited in May, June, and August 2019.

Procedure

Cr Cosgrove was asked to provide a response to the Panel by 19 December 2019. On 20 December 2019 Cr Cosgrove emailed the Executive Officer to request an extension to the time for reply, citing family reasons. The *Local Government Act 1993* (the Act), section 28ZE (5) states that a request for extension of time is to be made before the time set for response has expired. On this occasion, the Panel determined that the circumstances described by Cr Cosgrove merited an extension of time, which was granted to 31 December 2019.

The Panel met on 7 January 2020 to consider the complaint and Cr Cosgrove's response, which had been forwarded to Ms Salt for comment. The Panel decided to request further information from Ms Salt to support her allegation that Cr Cosgrove knew of the family link between New Norfolk Distillery and Wild Valley Chocolates before the relevant votes were taken at the Council meetings held on 28 May 2019, 20 June 2019, and 15 August 2019. The Panel also invited Ms Salt to respond to Cr Cosgrove's statement in her response of 31 December 2019, that Ms Salt (then Cr Salt) had been 'extremely forceful' in trying to convince Cr Cosgrove to vote against the Distillery proponents' applications.

The Panel also asked Cr Cosgrove to tell the Panel when she became aware that the stallholder's son was involved in the New Norfolk Distillery applications, given that her response to the complaint stated that she became aware of the relationship between the stallholder and the Distillery proponent after the stallholder exhibited at the New Norfolk Market for the first time, and that she knew of this relationship when the New Norfolk Distillery development application (DA) was still to be considered by Council (at its Special Meeting on 28 May 2019).

The Panel also wrote to the Council's Acting General Manager, who had not been in that position at the time of the alleged incidents. The Acting General Manager was asked if there was any record of advice given to then Cr Salt regarding perception of conflict of interest, any record of conversation between the then General Manager and Cr Cosgrove prior to the meeting on 28 May 2019, and if any of the 84 representations received on the DA mentioned the stallholder's family by name, in such a way as to ensure that Councillors would know that that family was involved in the application.

The Panel met again on 22 January 2020 to consider the responses from Cr Cosgrove, Ms Salt, and the Acting General Manager. The Panel asked the Acting General Manager to send the 84 representations received on the DA to the Chairperson so they might establish whether any of the representations mentioned the relevant family name, and if so, how often this occurred.

Both parties were then 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.

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.

Ms Salt provided submission on sanction in her complaint. Cr Cosgrove was invited 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.

Material considered by the Panel

- Complaint submitted by Ms Salt, dated 26 November 2019, 9pp, including attachments:
 - Banjo's New Norfolk Market Facebook extract dated 21 May;
 - Banjo's New Norfolk Market Facebook extract dated 11 May; and
 - Banjo's New Norfolk Market Facebook extract dated 25 September.
- Response to the complaint from Cr Cosgrove, 30 December 2019, 3pp;
- Agenda and Minutes of the Special Council meeting, 28 May 2019;
- Audio recording of the Special Council meeting, 28 May 2019;
- Agenda and Minutes of the Ordinary Council meeting, 20 June 2019;
- Agenda and Minutes of the Ordinary Council meeting, 15 August 2019;
- Response from Ms Anne Salt, 10 January 2020, 5 pp;
- Response from the Acting General Manager, 13 January 2020, 2 pp;
- Further response from Cr Cosgrove, 20 January 2020, 1 p;
- 84 submissions to Derwent Valley Council regarding the Development Application submitted for New Norfolk Distillery, to be considered by Council on 28 May 2019;
- Submission on hearing and sanction from Cr Cosgrove 7 February 2020, 1 p;
- Submission on hearing from Ms Salt, 10 February 2020, 3 pp, and appendices:
 - Statutory Declaration from L Farrell, 11 February 2020, 1 p;
 - Facebook Post, 11 May, 2 pp;
 - Facebook Post, 16 May, 1 p;
 - Facebook Post, 21 May, 2 pp;
 - Statutory Declaration from D.T. Murch, 12 February 2020, 1 p;
 - Letter from Ms Salt (then Councillor) to the Director of Local Government, 21 May 2019, 1 p;
 - Statutory Declaration from A Nicholson, 11 February 2020, 1 p;
 - Notes taken by Ms Salt (then Councillor) for a meeting with the Acting General Manager, undated, 1 p;
 - Statutory Declaration from S. Strecker, 11 February 2020, 2 pp.

Determination

The Code of Conduct Panel upholds part of the complaint against Cr Cosgrove.

Reasons for the Determination

The Panel determined that Cr Cosgrove had no actual or potential conflict of interest in any of the items pertinent to the New Norfolk Distillery considered by Council at its meetings on 28 May 2019, 20 June 2019, and 15 August 2019. The Panel determines that Cr Cosgrove should have been aware of, and declared, a possible perception of conflict of interest at each meeting where the New Norfolk Distillery applications were debated and decided.

Alleged breach of Part 2 – Conflict of Interests that are not pecuniary

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 upholds this part of the complaint. While the Panel accepts that Cr Cosgrove acted transparently and honestly in accordance with her belief that she had no conflict of interest, nor could there be any perception of conflict of interest, she failed to declare that her business dealings with a member of the same family as the family involved in New Norfolk Distillery might have been perceived as a conflict of interest by members of the community.

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.*

And

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 Panel upholds this part of the complaint. The Panel accepts that Cr Cosgrove acted in good faith, but determines that Cr Cosgrove did not exercise reasonable judgement to determine whether she had a perceived conflict of interest. Cr Cosgrove's recollection of when she became aware of the family connection between the two relevant businesses (Wild Valley Chocolates and New Norfolk Distillery) was vague, but her statement of 30 December 2019 noted that she had realised the connection before the DA went to Council; i.e., before the Special Meeting on 28 May 2019, and therefore, before the subsequent meetings cited in the complaint.

In addition, several of the representations to Council on the DA to be considered on 28 May 2019 mentioned the family by name. The Panel determines that it is fair to consider that Cr Cosgrove read the representations diligently, and that the family name, being familiar to her, would have come to her notice and raised the possibility of perception of conflict of interest.

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 Cosgrove could not avoid the perception that she may have had a conflict of interest. It is reasonable for her to have continued to allow the stallholder to participate in the New Norfolk Market, given that the stallholder is one of many, and the weekly fee to Cr Cosgrove to be a stallholder is minor. The Panel determines that the reasonable course of action for Cr Cosgrove to have taken was to declare that there was a family connection between one of her stall holders and the family behind the Distillery project, but that she did not consider that the connection warranted her non-participation in matters pertaining to the Distillery.

Sanction

In accordance with section 28ZI (2) of the Act, the Panel may impose one or more of a number of sanctions on a councillor against whom a complaint has been upheld.

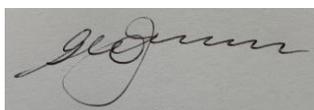
In the determination of this complaint, the Panel has decided that the minor nature of the breach does not warrant the imposition of any sanction. The Panel asks Cr Cosgrove to not only avoid actual and potential conflicts of interest, but to be aware of the possibility of perception of conflict, and to declare and act appropriately should such a conflict arise.

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



Graeme Jones
Legal member



Katherine Schaefer
Community member with experience in
local government