

Local Government Act 1993

**CODE OF CONDUCT PANEL DETERMINATION REPORT
CLARENCE CITY COUNCIL CODE OF CONDUCT**

Complaint brought by Alderman (Ald) Doug Chipman against Ald Richard James

Code of Conduct Panel

- Jill Taylor (Chairperson),
- Kathy Schaefer (Local Government Member)
- Sam Thompson (Legal Member)

Date of Determination: 21 June 2021

Content Manager Reference: C22022

Summary of the complaint

A code of conduct complaint was submitted by Alderman (Ald) Doug Chapman to the General Manager of the Clarence City Council on 22 March 2021.

The complaint alleges that Ald Richard James breached the Clarence City Council's Code of Conduct, which was adopted by the Council on 15 February 2019, during two separate interviews on ABC Radio Hobart programs viz., "Mornings" with Leon Compton and "Drive" with Lucy Breden on 10 February 2021.

The complaint relates to Ald James' public comments about two proposed developments within the Clarence City Council municipality. Those proposals were a new subdivision at Richardson's Road, Sandford, and a hospitality training school known as the Chambroad development at Bellerive. The Council had made decisions regarding those developments at its 9 February 2021 meeting. Ald James' public comments on "Mornings" and "Drive" related to those decisions.

The following are the Parts of the Code which Ald Chipman alleged Ald James breached:

- Part 7.1 (b) A councillor must not cause any reasonable person offence or embarrassment.*
- Part 8.1 When giving information to the community, a councillor must accurately represent the policies and decisions of the Council.*
- Part 8.2 A councillor must not knowingly misrepresent information that he or she has obtained in the course of his or her duties.*
- Part 8.5 A councillor's personal views must not be expressed publicly in such a way as to undermine the decisions of the Council or bring the Council into disrepute.*
- Part 8.7 The personal conduct of a councillor must not reflect, or have the potential to reflect, adversely on the reputation of Council.*

Initial assessment

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 having regard to an email that was sent by Ald Chipman to Ald James dated 16 February 2021, seeking an apology. Ald James advised orally at a Council workshop on 22 February 2021 that he would not apologise;
- the complaint substantially related to a contravention of Clarence City Council's Code of Conduct, namely Parts 7.1(b), 8.1, 8.2, 8.5 and 8.7;
- the complaint should not be dismissed on the grounds that it was frivolous, vexatious or trivial. The reasons for this conclusion were that evidence submitted to the Panel may, if taken at its highest, demonstrate that Ald James breached the Code of Conduct; and
- having made enquiries of the Code of Conduct Executive Officer, there was no relevant direction under section 28ZB (2) or 28ZI of the Act that would apply to the complainant and the complaint.¹

On this basis, the Chairperson determined to investigate the complaint.

The complainant, respondent councillor and the General Manager were notified of the outcome of the outcome of the initial assessment by letter dated 19 April 2021.

Investigation

The Panel met on 11 May 2021 to consider this complaint. The following documents had been presented to the Panel to consider as evidence in the matter:

- Ald Chipman's complaint and attachments, lodged under cover of a statutory declaration dated 22 March 2021,
- Ald James's response and attachments, sent under cover of a statutory declaration dated 2 May 2021, and
- Clarence City Council's Code of Conduct adopted on 15 February 2019.

On 13 May 2021, the complainant and respondent councillor were notified of the Panel's intention to proceed to determine the complaint without a hearing. Both parties were invited to provide any objection to this course of action. The reasons for such objections were to be in writing and submitted to the Panel within 10 business days. No objections were received. Ald Chipman and Ald James were also offered an opportunity to provide final submissions within the same timeframe. Additionally, Ald Chipman was asked to confirm he accepted the accuracy of the transcript submitted by Ald James of an excerpt of the Council meeting of 9 February 2021. Ald James was asked if he accepted the accuracy of a transcript, submitted by Ald Chipman, of the interviews that took place on 10 February 2021 with Leon Compton and Lucy Breden.

Both Ald Chipman and Ald James confirmed their acceptance of the respective transcripts. The Panel therefore proceeded on the basis that each transcript was accurate. Each party tendered a final submission; Ald Chipman's dated 25 May 2021 and Ald James' dated 26 May 2021.

The final submissions were included in the evidence considered by the Panel when it met on 2 June 2021 to determine the complaint. Pursuant to section 28ZG (3), the Panel considered this material and investigated the complaint without a hearing.

In evidence before it, the Panel noted that both these matters were discussed and motions carried by majority, thus making them decisions of Council. In respect of the planning application for 52 Richardsons Road, advice from Council Planning officers was that "the proposal is premature, and Council does not support an expansion of the UGB (Urban Growth Boundary) to include the land at

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.

52 Richardsons Road.....". Five councillors voted in favour of this motion and seven against. A revised motion was put to support the proposed expansion including 52 Richardsons Road. Seven councillors voted in favour of the amended motion and five against. Ald James voted against this revised motion.

In relation to the Chambroad project a motion was put to Council essentially rescinding a motion of its meeting on 21 December 2020 with other parts to the motion. This motion was lost as a result of the vote being deadlocked. The motion was put again with the following part omitted: - That Council -

"Acknowledges the challenges and circumstances that have confronted Chambroad and the University of Tasmania (UTAS) as a consequence of the global COVID-19 pandemic, and that the non-compliance with the agreed time limit for substantial commencement arises for reasons not within the reasonable control of Chambroad."

The motion was passed eight in favour and 4 against. Ald James voted against this motion.

In relation to the two planning decisions of Council on 9 February 2021, when interviewed by Leon Compton on the morning of 10 February 2021, Ald James stated that the Richardsons Road matter "was a mistake" and in respect to the Chambroad project that "Council had lost the land". The afternoon interview on 10 February 2021 with Lucy Broaden covered only the Chambroad project, where Ald James re-iterated the same sentiments that *"buy-back is gone it's no longer applicable"*. Ald Chipman's complaint is that Ald James had provided inaccurate and incomplete information and as a result had misled the public.

In both interviews, Ald James told the interviewers that *"the Mayor has washed his hands of the (Chambroad) matter"* as he does not plan to seek re-election next year.

The task of the Panel is to determine whether Ald James breached the Code of Conduct as alleged by Ald Chipman. It is not the Panel's role to consider the merits of the two developments, nor is it to assess the Council's decision making or public comment.

Determination

Pursuant to section 28Z(1)(c), the Panel upholds part of the complaint and dismisses the remainder. For the reasons outlined below, the Panel finds that Ald James breached Parts 7.1(b), 8.1 and 8.5 of the Code. The Panel finds that Ald James did not breach Parts 8.2 and 8.7, and therefore dismisses those parts of the complaint.

Reasons for determination

The Code of Conduct Panel considered the information provided by Ald Doug Chipman dated 22 March 2021 and 25 May 2021 and the responses by Ald Richard James dated 30 April 2021 and 26 May 2021, along with supporting statutory declarations. The Panel assessed this material against the parts of the Code that, according to the complaint, Ald James breached. The Panel's findings are as follows:

Part 7.1(b) – Must not cause any reasonable person offence or embarrassment.

In both interviews conducted on 10 February 2021 Ald James has made statement to the effect that *"the Mayor is not seeking re-election and has basically washed his hand of the matter"*. The Panel determines that Ald James has not provided any evidence to support this assertion. His language impugned the Mayor's professionalism and diligence in considering the issues before the Council. Such language was unjustified and inappropriate. It was likely to cause a reasonable person offence and/or embarrassment. In his response of 26 May 2021, Ald James accepted that he had caused the Mayor offence and embarrassment. The Panel determines that Ald James has breached Part 7.1(b) of the Code.

Part 8.1 When giving information to the community, a councillor must accurately represent the policies and decision of Council.

In relation to the 52 Richardsons Road development matter, Ald Chipman asserts that Ald James mislead ABC radio listeners by telling them that the Council had “made a mistake”. Ald Chipman claimed that Ald James had in fact relied on only part of the expert advice provide to the Council meeting of 9 February 2021 and ignored the balance of that opinion when making his statements on ABC radio. In his response to the complaint dated 30 April 2021, Ald James stated that he had “inadvertently” made comments that did not make it clear regarding the facts in this matter. He reiterated this claim in his final submission dated 26 May 2021. It is the Panel’s view that a reasonable person would expect an elected member of many years’ experience, as is Ald James, to be able to accurately reflect policies and decisions of Council when speaking publicly on Council matters.

In relation to the Chambroad planning matter, Ald Chipman claims that Ald James’ statements about the “buy-back being lost” were “manifestly wrong” and could “only be aimed at misleading the public”. Ald Chipman advised that Council had received advice from Senior Counsel that, unless agreed by the other party, a time extension could not be subject to conditions as they would amount to a breach of contract. The record of the meeting held on 9 February 2021 shows that these matters were the subject of debate and discussion. In fact, part of the resolution stated “*That Chambroad provides acknowledgement that the extension of time and conditions set out above do not alter the buy-back provisions...*” The Panel concludes that Ald James did not accurately reflect the policy and decision of Council in relation to this matter. The Panel determines that Ald James has breached Part 8.1 of the Code.

Part 8.2 A councillor must not knowingly misrepresent information that he or she has obtained in the course of his or her duties.

Whilst the Panel has determined that Ald James did not accurately reflect the policies and decisions of Council, there was insufficient evidence provided to prove that Ald James had knowingly misrepresented information. It was more the case that his presentation of facts was deficient in some part. In response to the complaint lodged by Ald Chipman, Ald James has stated that he may have inadvertently mis-stated facts, but that he did not knowingly do so. In the absence of any evidence to the contrary the Panel accepts Ald James’ statement in relation to this matter. The Panel determined that Ald James has not breached Part 8.2 of the Code.

Part 8.5 A councillor’s personal views must not be expressed publicly in such a way as to undermine the decision of the Council or bring the Council into disrepute.

Part 8.5 of the Code is disjunctive. It will be breached where a councillor’s views are expressed publicly in such a way as to:

- undermine the Council’s decision; or
- bring the Council into disrepute.

The Panel considers each limb separately. Dealing with the last one first, the Panel is of the view that Ald James’ statement in both ABC radio interviews did not bring the Council into disrepute, despite Ald James saying on each occasion that they (the Council) got it wrong. Councillors have political functions and councils often have to decide contentious or political issues. Expressing disagreement with the Council’s decisions did not bring the Council (as an institution) into disrepute.

The Panel then considered whether Ald James’ public statements undermined the Council’s decisions. For the following reasons, the Panel is satisfied that they did. The evidence presented by each party demonstrated that both planning matters were the subject of discussion and decision at the Council meeting held on 9 February 2021. In both instances motions were put and defeated. Amended motions were then put and carried (i.e., passed). Ald James had voted against both motions that were carried.

The Panel accepted Ald James' claim that he was expressing a personal view on both ABC radio interviews, that he did not make it clear that he was speaking out against a decision of Council, and that these views were his own. However, Ald James did not point in either radio interview to the fact that both matters were voted on in the majority and thus became a decision of Council. Instead, Ald James presented a one-sided and misleading (for the reasons given above) account of the decisions. It is customary in local government that once a matter is put to the vote the majority becomes Council decision. The Panel determines that Ald James has undermined Council decision in each of the two planning matters. The Panel, therefore, determines that Ald James has breached Part 8.5 of the Code.

Part 8.7 The personal conduct of a councillor must not reflect or have the potential to reflect adversely on the reputation of the Council.

This part of the Code relates to the personal behaviour of a councillor and how it may publicly reflect on the Council's reputation. Whilst it is possible for an elected member to adversely affect Council's reputation, the Panel determined that in this instance Ald James' personal conduct was not likely to affect Council's reputation. In a professional sense, it undermined the Council's decisions, but it was not behaviour that was embarrassing, illegal, disgraceful or otherwise falling below the standard expected of a member of public office. The reputation of the Council was not at stake on this occasion. The Panel determines that Ald James has not breached Part 8.7 of the Code.

Sanction

The starting point is whether any sanction should be imposed. Given the circumstances set out above - the public nature of the commentary by Ald James on ABC Radio on two occasions, the fact that Ald James is a councillor of some years standing and the offence and embarrassment that was caused to Ald Chipman - the Panel is satisfied that one should. The Panel determined that not only did Ald James breach Part 7.1 (b) of the Code in relation to his comments about Ald Chipman but also breached Parts 8.1 and 8.5 which relate to broader representation.

When the Panel wrote to Ald James on 13 May 2021 to advise that it did not intend to have a hearing, it also asked if he would like to comment on what, if any, sanctions should be imposed if all or part of the complaint was upheld". Ald James replied that he "provide a written apology as it seems my comments have caused him offence or embarrassment", meaning Ald Chipman.

Pursuant to section 28ZI(2)(c), Ald James is required to apologise to Ald Chipman and to his fellow councillors at the next Council meeting which is open to the public and at which both Ald James and Ald Chipman are present. Given Ald James' comments were made publicly it is proper that his apology be on the public record.

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



Jill Taylor
Chairperson



Sam Thompson
Legal Member



Katherine Schaefer
Member

21 June 2021