

CODE OF CONDUCT PANEL

HOBART CITY COUNCIL CODE OF CONDUCT

Complaint by Mr Graham Murray against Alderman Jeff Briscoe

Determination made 30 November 2018

Local Government Act 1993

Code of Conduct Panel:

Jill Taylor (Chairperson), Gretel Chen (Legal Member) and David Sales (Member).

Background

On 17 August 2018 a complaint was made by Mr Graham Murray against Alderman Jeff Briscoe alleging he had breached Parts 1 and 2 of the Hobart City Council's Aldermanic Code of Conduct. The complaint was forwarded to the Chairperson on 21 August 2018 to undertake an initial assessment. The Chairperson determined on 28 August 2018, that further investigation should be undertaken. A Panel was established to undertake this investigation.

Alderman Briscoe was advised of the complaint and invited to lodge a response. He submitted a response to Mr Murray's complaint by way of statutory declaration dated 19 September 2018.

On 24 September 2018, the Panel sought further information from Mr Murray specifically questioning the "decisions" made by Alderman Briscoe which, in his opinion breached the Code of Conduct. Mr Murray provided a response on 9 October 2018, a copy of which was provided to Alderman Briscoe for comment.

The Panel met on 23 October 2018 to consider the evidence provided by all parties. It concluded that in accordance with Section 28ZG 2 (b) a hearing was not necessary and determined the matter as described below.

Summary of the complaint

By letter dated 17 August 2018 the complainant, Graham Murray, submitted a Code of Conduct complaint against Hobart City Council Alderman Jeff Briscoe.

The complaint alleged that Alderman Briscoe had demonstrated prejudice and bias in decision making and a conflict of interest in relationships with opposition groups, *Residents Opposed to the Cable Car* and *Respect the Mountain*. The complainant drew the Panel's attention to the following provisions of the City of Hobart Aldermanic Code of Conduct, adopted on 9 May 2016:

PART 1 – DECISION MAKING

1. *An Alderman 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. *An Alderman must make decisions free from personal bias or prejudgment.*
3. *In making decisions, an Alderman 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. *An Alderman must make decisions solely on merit and must not take irrelevant matters or circumstances into account when making decisions.*

PART 2 – CONFLICT OF INTEREST

1. *An Alderman must act in good faith and exercise reasonable judgment to determine whether he or she has an actual, potential or perceived conflict of interest.*
2. *An Alderman must avoid, and remove himself or herself from, positions of conflict of interest as far as reasonable possible.*
3. *An Alderman who has an actual, potential or perceived conflict of interest in a matter before the Council must – a) declare the conflict of interest before discussion on the matter begins; and b) act in good faith and exercise reasonable judgment to determine whether the conflict of interest is so material that it requires removing himself or herself physically from any Council discussion and remaining out of the room until the matter is decided by the Council.*

Attached to the complaint were:

- A screenshot of Mt Wellington and a link to Change.org shared by Alderman Briscoe on 10 May (no year but presumably 2018) relating to an online petition to Carlton and United Breweries asking the company to say no to the use of its land *by those wishing to profit from such insensitive development on Mt Wellington*. The Complainant asserts that it is probable that Alderman Briscoe signed and then shared the petition with 1,700 Facebook followers. Alderman Briscoe has not admitted that that occurred;
- a Facebook post of Alderman Briscoe on 28 June (presumably 2018) and subsequently shared with the heading “Respect the Mountain – No Cable Car” calling on the Mt Wellington Cable Car Co to kiss the mountain good bye and abandon their doomed project;
- a Facebook post, apparently by Alderman Briscoe, on an unidentified date noting that he had made the request on ABC to the Mount Wellington Cable Car Co to kiss the mountain goodbye and abandon their doomed project;
- four screenshots of Alderman Briscoe attending an anti-cable car rally on May 6 (2018);
- a Facebook post from 23 August 2014 noting Alderman Briscoe’s attendance at a respect the mountain forum;
- a media release from Alderman Briscoe dated 31 August 2014 in relation to a successful motion put by him for Council to put a submission to the Wellington Park Trust to reject an amendment to zoning on Mt Wellington; and
- undated and unidentified excerpts from unknown sources relating to a development at The Springs and Alderman Briscoe allegedly accusing the Lord Mayor of bias in favour of a cable car proposal.

Investigation – Decision making

Part 1 - The decision-making complaints

In response to a request from the Panel for further details of the matter(s) he alleged Alderman Briscoe was deciding upon in the course of his duties the Complainant advised as follows:

- a) Parks and Recreation Committee meeting 9 August 2018 – Mount Wellington Cableway Company request for permission to undertake investigative Surveys; and
- b) Council meeting 20 August 2018 - Mount Wellington Cableway Company request for permission to undertake investigative surveys.

Council's Parks and Recreation Committee met on 9 August 2018. The minutes record that the Committee comprised five Aldermen, one of whom was Alderman Briscoe¹. The Committee considered a request by the Mount Wellington Cableway Company (MWCC) for permission to undertake investigative surveys. A report tabled before the Committee by the relevant Council officer noted that MWCC's application was to aid in the preparation of a planning application for an access road to a proposed cable-car base station².

The officer recommendation was that approval be granted to undertake non-invasive preliminary investigative works within a 50-metre-wide corridor on the southern slope of McRobies Gully. The officer report noted that should permission be granted for the investigative works, MWCC would need

- i) a determination by Council, as land owner, as to whether it wishes the construction of a road on its land to proceed; and
- ii) landlord consent by the General Manager,

in order to lodge a development application with Council. Presumably the officer was referring to the requirements of section 52(1B) of the *Land Use Planning and Approvals Act 1993*.

The minutes of the Committee meeting note that the following resolution, proposed by Alderman Briscoe, was passed unanimously³:

That in respect to any proposed cable car development that may be established in Wellington Park and noting the provisions of the Mount Wellington (Cable Car Facilitation) Act 2017, any public and operational land owned by the City, located on the foothills of Kunanyi / Mount Wellington and outside Wellington Park not be made available for the construction of an access road or any other infrastructure to support a cable car development.

The matter came before Council on 20 August 2018 and a motion was put in the same terms as those before the Committee on 9 August 2018. The motion was carried by seven votes to four. Alderman Briscoe voted in favour of the motion⁴.

The resolutions of the Committee and the Council demonstrated to MWCC that it was unlikely to meet either of the two pre-conditions necessary to lodge a development application with Council. That is, it was unlikely to obtain Council's agreement to the construction of a road on its land and unlikely to receive landlord consent. From one perspective, the resolutions provided clarity to MWCC and prevented it from expending the unnecessary funds and resources investigating a course that would not ultimately be open to it.

The first question to be addressed by the Panel is whether the resolution of the Committee on 9 August 2018 constituted a *decision* for the purposes of Part 1 of the Code of Conduct.

The Committee's functions are set out in its Terms of Reference. Under the Terms of Reference, the Committee's functions are limited to considering and making recommendations to Council in respect to *matters relating to the Wellington Park*⁵. Therefore, at its strongest, the motion passed by the Committee on 9 August was a recommendation to Council. Council was not bound to follow the recommendation.

¹ Parks and Recreation Committee minutes 9 August 2018.

² *Ibid.*

³ *Ibid.*

⁴ Council minutes 20 August 2018.

⁵ Clause 6.1(i)(f) *Terms of Reference Parks and Recreation Committee*

Having considered the Committee's Terms of Reference, and its functions, the Panel is not satisfied that the resolution of the Committee on 9 August amounted to a decision for the purposes of Part 1 of the Code of Conduct. It therefore dismisses the complaint so far as it relates to Alderman Briscoe's role on the Committee on 9 August 2018.

Consideration must then turn to the resolution passed by Council on 20 August 2018 and whether it amounted to a "decision" for the purposes of the Code of Conduct.

There is no definition of *decision* provided within the *Local Government Act 1993* or within the Code of Conduct. The relevant provisions of the Code of Conduct refer to decisions "including planning decisions" which makes it clear that they are designed to apply to a broader category of decisions than those simply connected with, for example, planning permit applications. It seems conceivable that the decision-making provisions of the Code of Conduct could apply to the making of Council resolutions of the type that was passed on 20 August 2018 but, for the reasons that follow, the Panel does not consider it necessary to resolve that question.

The Code of Conduct requires Aldermen, when making decisions, to have an open and unprejudiced mind; to be free from personal bias or prejudice; to give genuine and impartial consideration; to make decisions solely on merit; and not take irrelevant matters into account.

The materials put before the Panel indicate that prior to voting on the resolution Alderman Briscoe:

- had previously expressed the opinion that changes to the zoning on Mt Wellington should not occur;
- had shared a petition asking Carlton and United Breweries not to allow its land to be used by those wishing to profit from insensitive development on Mt Wellington;
- wanted the MWCC to abandon its cable car project;
- believed the cable car project had wasted "heaps" of community time and effort and was not viable after Cascade had refused the use of its land;
- had expressed the view that investors in the cable car should redirect their funds to more worthwhile projects for the community as a whole;
- had attended a no cable-car rally;
- had apparently expressed support for development at the Springs on an unidentified date in the past.

It is clear that some of the conduct relied on by the complainant occurred earlier than six months prior to the lodgement of the complaint. So far as matters of bias and pre-judgment are concerned, however, the relevant point in time for the Panel to consider is the point at which the impugned decision was made. Accordingly, evidence of opinions expressed, or conduct engaged in earlier could found the basis of a claim of bias at a later time. For that reason, the Panel is prepared to consider materials relating to things said and done by Alderman Briscoe prior to 17 February 2018.

In response to the complaint Alderman Briscoe provided the Panel with an opinion of Stephen Estcourt SC, as he then was, as to Council acting as a Planning Authority. The opinion has been most useful and has provided the Panel with a comprehensive analysis of pertinent case law up until May 2012, when the opinion was written.

Of particular relevance to the current case is a decision of Zeeman J in *R v. West Coast Council; ex parte Strahan Motor Inn* (1995) 4 TasR 411 where his Honour said at 421:

Of relevance is the way in which local government councils are elected. Councillors are representatives of their community and elected by and from that community. It may be expected that they will support particular views as to what is in the best interests of the community and that often they will have strong personal views as to what ought to occur in the community. In one sense they may be expected to hold views which may be described as being biased. Councillors may be expected to

hold particular views as to how they would wish their community to develop and to discharge their duties as councillors by reference to those views...Mere fixed views as to particular matters which are relevant to the exercise of the discretion conferred by s51, even if strongly expressed, ought not of themselves to be seen as a disqualifying factor. By conferring the role of a planning authority on a municipal council, the legislature may be assumed to have been aware of the nature of such a council and in particular that it is constituted by elected councillors.

His Honour went on at p425:

Expressions of opinion on the part of a member of a municipal council of a nature which would be sufficient to disqualify a member of a judicial tribunal from sitting on a particular matter may not be sufficient to disqualify a member of a municipal council. Councillors may be assumed to hold and to express views on a variety of matters relevant to the exercise of the functions of the council. Expressing such views is part of the electoral process. Provided that expressions of opinion do not go so far as to evince an intention to exercise a discretion conferred by statute without regard to the terms in which it is conferred or without being prepared to listen to any contrary argument, it ought not be taken to disqualify the councillor from participating in a relevant decision-making process.

The evidence before the Panel indicates that Alderman Briscoe has previously held, and may currently hold, a view that is not supportive of a cable car development on the pinnacle of Mt Wellington. He has expressed that view to the electorate and it has formed part of his political platform. There is no evidence to suggest that he has exercised any statutory discretion or made any decision in connection with any cable-car development without regard to relevant statutory terms or without being prepared to listen to any contrary argument. There is no evidence to demonstrate that at any relevant time Alderman Briscoe has held a view that is so *demonstrably fixed that (it is) not open to being dislodged by reason or argument*⁶.

The Panel is not persuaded that:

*A fair minded and informed member of the public might entertain a reasonable apprehension that the councillor was not open to persuasion on the matter in question because of the councillor's previous involvement in the issue in question.*⁷

Determination – Decision Making

By reason of the above the Panel dismisses the complaint relating to Part 1 of the Code of Conduct Decision Making.

Investigation – Conflict of Interest

Part 2 - Conflicts of interest

In response to a request from the Panel for further details of Alderman Briscoe's alleged conflict of interest the Complainant advised that the conflict was potential and perceived as a result of the following:

Alderman Briscoe has:

- Released a policy position after meeting with anti-cable car group;
- Written publicly to anti-cable car group to advise of publishing anti-cable car rhetoric;

⁶ (*Winky Pop Pty Ltd v. Hobsons Bay City Council* (2007) VSC 468 at (44)).

⁷ *Ibid.*

- Facilitated anti-cable car group with council activities;
- Publicly and personally attacked proponent;
- Attended anti cable-car rallies in May and August 2018;
- Actively supported and promoted anti cable-car lobbying of private business (Cascade);
- A relationship with spokesman behind anti-cable car group is undeclared; and
- Since 2014 demonstrated a fixed view and an unwillingness and/or inability to act fairly or impartially on matters associated with the cable.

Apart from the materials attached to the complaint there was no other evidence put to the Panel to substantiate the claimed conflict of interest.

The Code of Conduct provides that Aldermen are to ensure that personal or private interests do not influence, and are not seen to, influence the performance of his or her role and acting in the public interest. The Complainant alleges the existence of a potential and perceived conflict of interest as particularised above.

None of the allegations made, even if proven, would amount to a conflict of interest on the part of Alderman Briscoe. There is no material before the Panel to indicate that Alderman Briscoe has any personal or private interest that has or would or might influence his performance of his role or in acting in the public interest so far as matters associated with the MWCC are concerned.

Determination – Conflict of Interest

Accordingly, the complaint in relation to Part 2 Conflict of Interest is also dismissed.

Right to Review

A person aggrieved by the determination of the Code of Conduct Panel is entitled under section 28ZP of the Act to apply to the Magistrates Court (Administrative Appeals Division) for a review of that determination on the grounds that the Code of Conduct Panel has failed to comply with the rules of natural justice.



Jill Taylor
Chair



Gretel Chen
Legal Member



David Sales
Local Government Member

30 November 2018