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Local Government Act 1993

CODE OF CONDUCT PANEL DETERMINATION REPORT

DORSET CODE OF CONDUCT

Complaint brought by Mr Lawrence Archer against Councillor (Cr) Greg Howard

Code of Conduct Panel

- Jill Taylor (Chairperson),
- Elizabeth Gillam (Local Government Member)
- Sam Thompson (Legal Member)

Date of Determination: 23 March 2021

Content Manager Reference: C 21581

Summary of the complaint

A code of conduct complaint was submitted by Mr Lawrence Archer to the General Manager of the Dorset Council on 30 November 2020.

The complaint alleges that, on 30 September 2020, Cr Howard breached the following parts of the Dorset Council Councillor Code of Conduct, adopted by the Council on 15 April 2019.

PART 7 - Relationships with community, councillors and Council employees

1. *A councillor –*

(a) must treat all persons fairly; and

(b) must not cause any reasonable person offence or embarrassment; and

(c) must not bully or harass any person.

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:

- whilst the complainant did not make attempts to resolve the issue with Cr Howard, he put forward an explanation as to why he did not consider this to be an option for him. Mr Archer stated that the letter, which is the subject of the complaint, shows that Cr Howard had a disrespectful attitude towards him, and any approach to resolve the issue would be futile. As there appeared to be long-standing disagreement between Mr Archer and Cr Howard, this explanation was accepted by the Chairperson;
- the complaint substantially related to a contravention of Part 7.1 of Dorset Council's Councillor Code of Conduct, namely that Mr Archer was offended by Cr Howard's unfair treatment of him which caused offence and embarrassment;

- 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 by Mr Archer could demonstrate that Cr Howard may have breached the Code; 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 8 December 2020.

The Code of Conduct Panel was duly convened.

Investigation

The Panel based its investigation on the following documentation:

- Mr Archer's complaint dated 27 November 2020 together with attachments being copies of extracts from the North Eastern Advertiser newspaper dated 26 August 2020, 2 September 2020, 9 September 2020, 23 September 2020 and 30 September 2020;
- Mr Archer's statutory declaration signed on 30 November 2020;
- Cr Howard's written response sent under cover of a statutory declaration dated 8 January 2021;
- Mr Archer's statutory declaration dated 19 January 2021;
- Cr Howard's statutory declaration dated 27 January 2021; and
- Dorset Council's Councillor Code of Conduct adopted on 15 April 2019 (the Code).

In accordance with section 28ZG(2)(b) of the Act, the Code of Conduct Panel reached a tentative view that a hearing would be unnecessary in the circumstances because the investigation could be determined based on the written material provided and, in the Panel's view, neither party would be disadvantaged.

By letters dated 13 January 2021, the complainant and respondent councillor were notified of the Panel's intention to proceed to investigate the complaint without a hearing. Both parties were invited to provide any submissions to the contrary in writing within 10 business days. No submissions were received.

In accordance with section 28ZE of the Act, the Code of Conduct Panel met on 5 February 2021 to investigate and determine the complaint.

The Panel reviewed the series of letters and articles that appeared in Scottsdale's local newspaper, the *North Eastern Advertiser (the Advertiser)*, which Mr Archer attached to his complaint of 27 November 2020. The following is a description of these articles:

- 26 August 2020 – a letter to the editor by Mr Archer querying Council expenditure
- 2 September 2020 – an article entitled "Perspective on current matters" by Cr Howard that canvassed a number of matters including reference to a former councillor
- 9 September 2020 – a letter to the editor by Mr Archer commenting on Cr Howard's article of 2 September 2020
- 23 September 2020 – a letter to the editor by John Marik, the Council's Director, Corporate Services, responding to Mr Archer's letter of 9 September 2020
- 30 September 2020 – Cr Howard's letter to the editor referencing Mr Archer's tenure as a councillor on Dorset Council.

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.

Cr Howard's statutory declarations of 8 and 27 January 2021 contain some information not relevant to the complaint. In those declarations Cr Howard makes various allegations regarding the Code of Conduct process and the Chairperson's conduct. It is not necessary for those allegations to be addressed. The Panel's task is to investigate (sections 28ZE and 28ZH) and determine Mr Archer's complaint. This task is exercised independently of the Council and the State Government. In particular, the Panel must consider whether, on the evidence provided by Mr Archer and Cr Howard, Cr Howard breached the Code. That evidence is limited to the documents referred to above. The Panel's task is to assess the contents of the letters and articles (in the sense of Cr Howard's conduct in writing and sending them) against the Code. In doing so, the Panel has taken into account the parties' submissions in the statutory declarations identified above. Expressed differently, the Panel's task is limited to the dispute between Cr Howard and Mr Archer as particularised in Mr Archer's complaint.

The Code, which the Panel must apply, was adopted by the Council 15 April 2019. It is not for the Panel to assess the merits of the Code. Nor should the Panel form a view about the issue the subject of the articles (the Council's financial position). This determination report should be read with these principles in mind.

It is convenient to commence by noting the subject matter of the letters and articles that are the subject of the complaint. The material was in the nature of a debate occurring over some weeks and published in various editions of the *Advertiser*. The issue was Council's financial performance, its revenue and its expenses. It is evident from the letters and articles that this issue was the subject of community debate.

There was no dispute about the authenticity of the articles, photocopies of which were annexed to Mr Archer's statutory declaration. Nor was there any dispute about the authorship of each article. Mr Archer's complaint form specified the date of the incident as 30 September 2020. It follows that his complaint is about Cr Howard's letter to the Editor, published on 30 September 2020, regarding Mr Archer's tenure as a councillor. The Panel's sole task is to assess whether that letter breached Part 7.1 of the Code. The other articles and letters referred to above remain relevant in giving context to the letter of 30 September 2020. However, the Panel cannot determine whether those other articles and letters breached the Code.

The general tenor of the articles and letters suggests an escalation of the chain of communication, commencing with the letter to the editor from Mr Archer which reasonably queried Council expenditure. The tenor escalated in a letter to the Editor by Cr Howard, in which he used intemperate language which Mr Archer found to be offensive.

It is the Panel's view that it is reasonable for any ratepayer to question Council's financial situation and to do so in a public manner. However, Cr Howard in his article published on 2 September 2020, referred to "nonsensical ramblings of regular correspondents" and went on to connect this statement to "a former Dorset Councillor...". Whilst Mr Archer was not named it would have been clear to residents of the small Dorset community that Cr Howard was referring to Mr Archer. In the newspaper dated 9 September 2020, Mr Archer continued his questioning of the Council's financial situation. This resulted in a letter to the Editor published on 23 September 2020 by Mr Marik, Director, Corporate Services entitled "Financial Performance" in which he referred to Mr Archer. The Panel found it unusual for a Council employee to make such a public statement. The final item of this communication chain was the letter to the Editor by Cr Howard, published on 30 September 2020, raising questions about Mr Archer's behaviour.

It is the letter published on 30 September 2020 that prompted Mr Archer to lodge a Code of Conduct complaint against Cr Howard, stating that he found it to be "defamatory and disrespectful". It is this letter alone that is the subject of the complaint.

It is necessary to set out the letter in full:

MOTIVE OR INTENT

Dear Editor,

John Marik's letter from last week clearly showed up the very significant flaws in Lawrence Archer's previous correspondence to this paper regarding the finances of Council.

The question now being posed to me by Dorset residents is "Is Lawrence Archer financially illiterate or is he just deliberately and vindictively misrepresenting the truth in an attempt to tarnish the image of Council?"

I have my own opinion on that question, but I will leave it to the readers of the Advertiser to make up their own minds on the subject.

Archer's voting record when on Council where he voted against many of the very positive initiatives that Council has implemented (eg. Free swimming pool entry, scrapping of licence and lease fees for community groups and sporting clubs) certainly begs the question as to whether he was on Council for the right reasons.

Greg Howard,

Jetsonville

Cr Howard did not suggest that the *Advertiser* edited his letter. The Panel accepts that the words were Cr Howard's and that, by sending the letter, Cr Howard wished for it to be published. It is not necessary for the Panel to determine whether the heading 'MOTIVE OR INTENT', which was printed above the salutation, was written by Cr Howard or by the newspaper's editor. The Panel proceeds on the basis that it was not written by Cr Howard.

Cr Howard's statutory declaration of 8 January 2021, responding to the complaint, defended his letter of 30 September 2021. Cr Howard rejected Mr Archer's assertion that he "went beyond the bounds of robust political discussion". Cr Howard contended that posing questions about "Mr Archer's motives, actions and abilities" does not constitute a breach of the code of conduct.

Cr Howard referred to his free speech rights, suggesting that the investigation of the complaint was an infringement of those rights. He referred the Panel to a decision of the Magistrates Court of Tasmania (Administrative Appeals Division): *Howard v Code of Conduct Panel* [2019] TASMC (unreported, 18 July 2019, M/2016/3471), to which the Panel has had regard.

The Council is a deliberative polity. A councillor has political functions. Robust debate and commentary are to be expected (see sections 20, 25 and 28). The Panel should not too easily find a breach of the Code. The Panel should afford a councillor latitude in recognition of the deliberative and political nature of the Council and of councillors. These principles extend beyond what happens in the Council chamber. They apply to outside debate, such as the debate in the *Advertiser* newspaper. Those principles apply to the Panel's interpretation of the Code.

The Panel acknowledges Cr Howard's right to free speech. This is not; however, an unfettered right and as a public official, Cr Howard has certain responsibilities. In the Panel's view, Cr Howard's statement fails to acknowledge how the person in question is affected by such a public presentation of his views. The Panel accepts that Mr Archer was offended and embarrassed by Cr Howard's contentions and that such offence and embarrassment was reasonable.

Whilst Cr Howard's commentary about Mr Archer in the letter published on 30 September 2020, is posed as a question, the Panel concludes that a reasonable person would assume that was Cr Howard's assessment of Mr Archer. The Panel determined that Cr Howard's criticism of Mr Archer's motivation for being on Council was unfair and judgemental. In the Panel's view, the language used by Cr Howard in his letter of 30 September 2020 had moved from a robust debate about Council finances to a personal attack on Mr Archer. In that sense, the letter of

30 September 2020 fell into a different category to the earlier letters and articles that constituted the debate in the various editions of the *Advertiser*.

Determination

Pursuant to section 28ZI(c) of the Act, the Code of Conduct Panel upholds part of the complaint and dismisses the remainder. The Panel determines that Cr Howard breached Part 7.1(a) and (b) of the Code which was current at the time of the contravention on 30 September 2020. The Panel is not satisfied that Cr Howard breached Part 7.1(c) of the Code and dismisses this part of the complaint.

Reasons for determination

The Code of Conduct Panel based its determination on the information provided by Mr Archer, as outlined above, and the responses by Cr Howard dated 8 and 27 January 2021.

The Reasons for the Panel's determination are detailed below against the relevant Part of the Code.

Part 7.1 (a) – A councillor must treat all persons fairly

In considering whether Cr Howard treated Mr Archer fairly it is appropriate to consider 'fair' as defined in the Macquarie Dictionary which states "free from bias, dishonesty, or injustice". Considering the evidence before it, i.e., the communication trail exhibited in the *Advertiser*, the Panel considered that Cr Howard demonstrated a bias against Mr Archer in making suggestive comments about him which were published on 30 September 2020. Whilst Cr Howard posed a description of Mr Archer as a question in the letter, a reasonable person would have assumed that this was his personal view of Mr Archer. Furthermore, the Panel considered Cr Howard's questioning of Mr Archer's voting record on certain matters whilst a Dorset Councillor as unfair. The Panel acknowledges the right of elected officials to speak freely about issues, but this should be done in a fair and respectful manner. The Panel determines that Cr Howard has breached Part 7.1(a) of the Code of Conduct.

Part 7.1 (b) – A councillor must not cause any reasonable person offence or embarrassment

Mr Archer alleged that Cr Howard's letter to the editor published on 30 September 2020 was "defamatory and disrespectful". He further contends that because of Cr Howard's attitude towards him it would have been "futile" to attempt to resolve the matter informally. In viewing the series of related articles published weekly in the local *Advertiser* from 26 August 2020 to 30 September 2020, the Panel concludes that there has been an interchange of opinion between Cr Howard and Council staff and Mr Archer which escalated to an inappropriate commentary about Mr Archer in the letter published on 30 September 2020. Cr Howard's letter presented two alternatives – that Mr Archer was "financially illiterate" or that he was "deliberately and vindictively misrepresenting the truth". Such language, combined with impugning Mr Archer's motives, went beyond the bounds of robust debate. It went beyond a reasonable response to the previous correspondence. The Panel determines that Cr Howard has breached Part 7.1(b) of the Code of Conduct.

Part 7.1 (c) – A councillor must not bully or harass any person

It is the Panel's view that bullying and harassment occurs when a person or group are subjected to harm, intimidation or unwarranted and unwanted behaviour, over a period of time. There must be some repetition of behaviour. Whilst the Panel notes that there appears to be long standing disagreement over a period of time between Mr Archer and Cr Howard no evidence was presented to suggest that it constituted bullying or harassment as intended by the Code. The Panel dismisses the complaint in relation to Part 7(1)(c).

Sanction

Under section 28ZI (2) of the Act, the Panel may impose one or more sanctions on Cr Howard. On 10 February 2021, the Chairperson wrote to Cr Howard advising that part of Mr Archer's complaint had been upheld and inviting his submission in relation to what, if any, sanction should be imposed. Cr Howard responded on 22 February 2021 stating that he believed no sanction should be imposed and further stating that "I can guarantee that under no circumstances would I offer an apology to Mr Archer". The Panel, at this point, had not made any decision on sanction. The Panel notes that the fact that a councillor refuses prospectively to apologise does not mean that the Panel could not require the councillor to apologise pursuant to section 28ZI(2)(c). A councillor would be in breach of section 28ZM if she or he refused.

Section 28ZI (2) prescribes a descending hierarchy in terms of the severity of sanction. The starting point is whether any sanction should be imposed. The Panel is satisfied that it should.

The Panel takes into account that, on 16 February 2017, Cr Howard was cautioned in relation to a breach of the previous Code of Conduct applicable to the Council. Notwithstanding the passage of time and different subject matter, a more severe sanction is justified on this occasion. Pursuant to section 28ZL(2)(b) of the Act, the Panel strongly reprimands Cr Howard and reminds him of his responsibility as a public official in relation to public comment that may be offensive to others.

Timeframe for determination of complaint

Section 28ZD (1)(a) requires that a Panel is to endeavour to investigate and determine a complaint within 90 days of the Chairperson making the determination to investigate the complaint. In this instance, the initial assessment determination was made on 8 December 2020 and 90 days hence was 8 March 2021. The reason for exceeding the statutory time frame was largely due to the Christmas/New Year holiday period.

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 ground that the Code of Conduct Panel has failed to comply with the rules of natural justice.



Jill Taylor
Chairperson



Elizabeth Gillam
Member



Sam Thompson
Member

DATE : 23 March 2021