

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

HUON VALLEY COUNCIL CODE OF CONDUCT

Complaint brought by Mr Nathanael Elcock against Councillor Jennifer Cambers-Smith

Code of Conduct Panel

- Jill Taylor (Chairperson),
- Greg Preece (Local Government Member)
- Audrey Mills (Legal Member)

Date of Determination: 15 February 2024

Content Manager Reference: C31371

Summary of the complaint

A code of conduct complaint was submitted by Mr Nathanael Elcock to the General Manager, Huon Valley Council on 04 October 2023.

The complaint alleges that Councillor (Cr) Jennifer Cambers-Smith breached the following parts of the Code of Conduct relating to the Conduct of Councillors, reviewed in February 2023, at the Huon Valley Council meeting held on 26 July 2023.

PART 1 - Decision making

- 1. A Councillor 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. A Councillor must make decisions free from personal bias or prejudice.*
- 3. In making decisions, a Councillor 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. A Councillor must make decisions solely on merit and must not take irrelevant matters or circumstances into account when making decisions.*

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.*

PART 8 – Representation

- 4. A Councillor must clearly indicate when he or she is putting forward his or her personal views.*
- 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.*

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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 *Local Government Act 1993* (the Act). Mr Elcock provided some 170 pages of supporting documentation to his complaint. The attachments to Mr Elcock's complaint were an addendum to a report made under Section 35F of the Land Use Planning and Approvals Act 1993 (July 2023) and a copy of the Huon Valley minutes of the meeting held on 26 July 2023. At the initial assessment stage, the Chairperson assesses the complaint and supporting evidence relating to the alleged breaches of specific parts of the Code. Given the voluminous nature of Mr Elcock's attached documentation, the Chairperson wrote to him requesting clarification as to the precise pages in the attachments he asserts is evidence and to link that evidence to the relevant part of the Code.

On 13 November 2023 Mr Elcock submitted a more succinct document relating the information to the relevant parts of the Code he alleged Cr Cambers-Smith had breached. On receipt of this clarification from Mr Elcock, the Chairperson proceeded with the initial assessment.

Having assessed the complaint against the provisions of sections 28ZB and 28ZC of the Act, the Chairperson determined that:

- parts of the complaint, namely Parts 1.4, 7.1 (a) and (b), 8.4 and 8.5 of the Code be dismissed in accordance with section 28ZB (1) (b) on the basis that these parts of the Code do not substantially relate to a contravention of the Code based on the documentation supplied by Mr Elcock.
- the balance of the complaint should not be dismissed on the grounds that it was frivolous, vexatious or trivial. The reasons for this conclusion were that Mr Elcock alleged that comments Cr Cambers-Smith made at the meeting held on 26 July 2023 were biased towards people with an opposing view to her. He further alleged that Cr Camber-Smith had not given due consideration to all the material relating to the agenda item.
- the complainant had made a reasonable effort to resolve the complaint. The Chairperson arrived at this conclusion based on the fact that Mr Elcock had sought an apology from Cr Cambers-Smith which she refused to give.
- the balance of the complaint substantially related to a contravention of the Huon Valley Council's Code of Conduct relating to the conduct of Councillors, reviewed in February 2023 namely Parts 1.1, 1.2 and 1.3.
- the complaint does not disclose that an offence may have been committed or that it should more appropriately be dealt with by another person or authority.
- 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 Parts 1.1, 1.2 and 1.3 of Mr Elcock's complaint.

The complainant, respondent councillor and the General Manager were notified of the outcome of the initial assessment by letter dated 22 November 2023.

Investigation

In accordance with section 28ZE of the Act, the Code of Conduct Panel (the Panel) investigated the complaint.

Material considered by the Panel

The following documents and recording have been presented to the Panel to consider as evidence in this matter:

- Mr Elcock's complaint including attachments against Cr Cambers-Smith dated 4 October 2023

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.

- Mr Elcock's statement responding to a request for clarification by the Chairperson dated 13 November 2023
- Cr Cambers-Smith's response dated 12 December 2023
- Huon Valley Council's Code of Conduct for elected members reviewed on 1 February 2023
- The YouTube recording of the Huon Valley Council's meeting held of 26 July 2023

By letters dated 11 January 2024, 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 in writing within 14 days of date of advice as well as the opportunity to make any additional submissions. Cr Cambers-Smith advised on 11 January 2024 that she had no objection to the complaint being determined without a hearing and Mr Elcock provided the same advice on 17 January 2024. No further submissions were received by the Panel.

Determination

The Panel met by Zoom on 25 January 2024 to consider the evidence provided by the complainant and the respondent as well as the YouTube recording of the Huon Valley Council's meeting of 26 July 2023 and having regard to the relevant Parts of the Code.

Much of the documentation presented by the parties related to the detail of the planning issue that was the subject of debate at the Council meeting. The Panel's task was to focus on Mr Elcock's complaint, that is that Cr Cambers-Smith did not bring an open mind to the item being discussed at the meeting and that she was biased against Mr Elcock and members of the Huon Valley Zoning Association (HVZA). Mr Elcock alleged that Cr Cambers-Smith made defamatory comments regarding "*the legitimacy of the people who have written the submission*". He further claimed that she was prejudiced in that she was unable to respond to questioning by other councillors at the meeting and that she had a personal bias.

In her response to Mr Elcock's complaint, Cr Cambers-Smith claims that she has demonstrated "*a high degree of diligence and professionalism*" and has made a point of studying the Interim Planning Scheme and all other developments and reforms.

Item (10.013/23 a-e) on the agenda of 26 July 2023 included a motion for Council to provide a response to a request from the Planning Commission relating to submissions it had received from members of the Huon Valley municipality. The Planning Commission requested the Huon Valley Council to provide details of those submissions and Council's assessment of each of them. The motion was put and seconded, and the item was opened for discussion. It is Cr Cambers-Smith's contribution to that debate that Mr Elcock alleges she breached Part 1.1, 1.2 and 1.3 of the Code. In her response to the complaint, Cr Cambers-Smith said of the meeting, "*it was very difficult to follow, and it wasn't clear when we were being invited to talk for or against, so I just wanted to say my piece and get it on the record*". She added that her comments regarding the HVZA did not affect her judgement adding that she did agree with some of their statements.

In viewing the recording of the meeting, the Panel concluded that Cr Cambers-Smith presented in an articulate manner, providing substantive comment to support her position on the subject matter. She stated that her comments were based on research suggesting that some opponents may not have done so. Cr Cambers-Smith only named the opponents after being requested to do so by fellow-councillors. It was the Panel's view that during her presentation at the meeting, Cr Cambers-Smith spoke in a respectful manner whilst firmly stating her views. In the absence of any evidence to the contrary, the Panel concluded that Cr Cambers-Smith did have an open mind when discussing the matter before Council, but she had a different view on some aspects of the matter being debated. No evidence was presented that Cr Cambers-Smith was biased towards Mr Elcock and others with differing views.

As per section 28ZI of the Act the Code of Conduct Panel determines that Cr Cambers-Smith has not breached the Code of Conduct, and therefore the Code of Conduct Panel dismisses the complaint.

Reasons for determination

In relation to Part 1.1, Mr Elcock alleged that Cr Cambers-Smith did not bring an open and unprejudiced mind to the matter being discussed at the Council meeting of 26 July 2023. Mr Elcock alleged that Cr Cambers-Smith had a prejudiced mind when discussing, considering and then subsequently voting on the matter of Direction 39." In support of his assertion Mr Elcock stated, "*she was not able or willing to specifically point or*

comment when asked for clarification by another councillor". Cr Cambers-Smith stated in her response that she had researched the matter before Council and the Panel accepts that from time-to-time questions are put to elected members who are unable to answer them "on the spot".

It is apparent to the Panel that Cr Cambers-Smith and Mr Elcock have different opinions in relation to some aspects of matter before Council. That does not necessitate a breach of this part of the Code. In her response to Mr Elcock's complaint, Cr Cambers-Smith stated that she has put her views in a "respectful, rational and analytical discussion in council meetings".

After viewing the YouTube recording, the Panel concludes that a reasonable person would not support Mr Elcock's assertion that Cr Cambers-Smith demonstrated any bias against opponents to her view. The Panel dismisses this Part of the complaint.

Part 1.2 states that a councillor must be free from personal bias and prejudice in the decision-making process of Council. Cr Cambers Smith responded to a number of questions from another Councillor but did so in a respectful manner whilst expressing a view different to that held by Mr Elcock. Cr Cambers Smith then voted with all the other Councillors present for the motion and the minutes record that no Councillors voted against the motion. The Panel concludes that Cr Cambers-Smith did not show any personal bias or prejudice but rather exercised her right to vote in accordance with her conscience. The Panel accepts that Mr Elcock may have a view that Cr Cambers-Smith may be biased against him and others, but this view is not supported by evidence. In the Panel's opinion Cr Cambers-Smith simply has a different perspective on some matters to Mr Elcock. The Panel dismisses this part of the complaint.

In relation to the alleged breach of Part 1.3, Mr Elcock pointed to Cr Cambers-Smith's confusion between Submission 39 and Direction 39, indicating that she had not considered all relevant information. Cr Cambers-Smith refuted that, stating that she had researched each of the different representations and this formed the basis of her presentation at the meeting. There were two submissions, that Cr Cambers-Smith declared an interest in and left the meeting during those discussions. The Panel is satisfied that Cr Cambers-Smith had thoroughly prepared for discussion of this item at the Council meeting which was evidence by her presentation at the meeting. The Panel dismisses that part of the complaint.

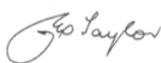
Timing of the Determination

In accordance with section 28ZD (1) a Code of Conduct Panel is to make every endeavour to investigate and determine a code of conduct complaint within 90 days of the chairperson's determination that the complaint is to be investigated.

The Panel has been unable to determine the complaint within 90 days, owing to extensions being granted, the intervention of the Christmas/New Year period and delays in availability of Panel members on occasions.

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. In accordance with section 17 of the *Magistrates Court (Administrative Appeals Division) Act 2001*, an appeal must be lodged within 28 days of the date of receipt of this determination.



Jill Taylor
Chairperson



Audrey Mills
Member



Greg Preece
Member

DATE : 15 February 2024