

CODE OF CONDUCT PANEL

DERWENT VALLEY COUNCIL CODE OF CONDUCT

Complaint by Mr Leonard Butterworth against Councillor (Cr) Anne Salt

Determination made 2 January 2019

Local Government Act 1993

Code of Conduct Panel:

Jill Taylor, (Chairperson), Richard Grueber, (Legal Member) and Rob Winter (Member)

1. Summary of the complaint

Mr Leonard Butterworth lodged a Code of Conduct Complaint (the complaint) dated 10 July 2018 against Cr Anne Salt. The General Manager of the Derwent Valley Council forwarded the complaint to the Code of Conduct Panel under cover of a letter dated 3 August 2018.

In his complaint, Mr Butterworth did not specify the actual parts of the Code of Conduct (the Code) which he alleged Cr Salt had breached. On 28 September 2018, in response to a request from the Panel to identify the relevant parts of the Code, Mr Butterworth alleged that Cr Salt contravened 1.1, 1.2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 3.1, 3.2, and 3.3 of the Derwent Valley Council's Councillor Code of Conduct, which was approved on 2 April 2017. Specifically, Mr Butterworth alleged that Cr Salt failed to declare a conflict of interest resulting from her involvement with the group known as "Friends of Willow Court" when Willow Court was discussed at a closed Council meeting on 21 June 2018 and in a Council meeting held on 29 July 2018.

The following is the relevant extract from the Derwent Valley Council's Councillor Code of Conduct:

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 prejudgement.*

PART 2 - Conflict of interest

- 1. When carrying out his or her public duty, a councillor must not be unduly influenced, nor be seen to be unduly influenced, by personal or private interests that he or she may have.*
- 2. A councillor must act openly and honestly in the public interest.*
- 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 before discussion on the matter begins; and*

- b) *act in good faith and exercise reasonable judgement 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.*

PART 3 – Use of Office

1. *The actions of a councillor must not bring the Council or the office of councillor into disrepute.*
2. *A councillor must not take advantage, or seek to take advantage, of his or her office or status to improperly influence others in order to gain an undue, improper, unauthorised or unfair benefit or detriment for himself or herself or any other person or body.*
3. *In his or her personal dealings with the Council (for example as a ratepayer, recipient of a Council service or planning applicant), a councillor must not expect nor request, expressly or implicitly, preferential treatment for himself or herself or any other person or body.*

2. Investigation

The Chairperson of the Code of Conduct Panel (the Chairperson) conducted an initial assessment of the complaint and determined on 3 October 2018 that it was to be investigated and determined by a Code of Conduct Panel (the Panel) in accordance with section 28ZA(1)(e) of the *Local Government Act 1993* (the Act).

A Panel was convened, met, and determined that it would hold a hearing into the complaint.

The Panel received and considered the following documents prior to the hearing:

- Code of Conduct Complaint dated 10 July 2018 including two attached pages:
 - One containing what appears to be legal extracts from Australia and USA
 - The second, copy of emails dated 29 June 2018 and 2 July 2018 between Mr Butterworth and Martyn Evans
- Copy of Derwent Valley Council's Councillor Code of Conduct approved on 2 April 2017
- Email from Mr Butterworth dated 28 September 2018 providing further information supporting his complaint
- Email from Mr Butterworth dated 9 October 2018
- Statutory declaration dated 24 October 2018 from Cr Salt with attachments:
 - Copy of minutes of closed Council meeting held on 21 June 2018
 - Copy of page 8 of Council minutes held on 21 June 2018 – Item 3 Pecuniary interest by members
 - Copies of minutes of Derwent Valley Council meetings held on 21 June 2018 and 29 July 2018
- Copies of minutes of closed Derwent Valley Council meetings held on 21 June 2018 and 29 July 2018.

3. Summary of Hearing

The hearing was convened on 29 November 2018 at the Derwent Valley Council Chambers, New Norfolk with both Mr Butterworth and Cr Salt attending.

The Chairperson outlined the substance of the complaint and the procedure the Panel would follow, including options available to the Panel if the Complaint was upheld.

Both Mr Butterworth and Cr Salt took an oath prior to giving evidence at the hearing.

At the commencement of the hearing, Mr Butterworth presented a document for the Panel and Cr Salt to sign. It was not clear on its face what the purpose of the document was. Mr Butterworth explained that it was an acknowledgment by the Panel that it was conducting the inquiry as an agent of the Council, not as a body established under the *Local Government Act*. It was not easy to understand the basis for this somewhat startling contention, which Mr Butterworth sought to support with vague references to the Constitution and changes to corporations law in the 1980s. As best the Panel can determine, his reasoning was that the Council was a private company with an Australian Business Number and not a corporation established by s19 of the *Local Government Act 1993*. This was because the State of Tasmania did not have the constitutional power to establish municipal councils because the *Commonwealth of Australia Constitution Act* (the Constitution) did not grant the power to states to establish municipal corporations, and because of the enactment of Commonwealth legislation regulating companies, commencing with the *Companies Act 1981* and the *Tasmanian Companies (Application of Laws) Act 1981*. Mr Butterworth appeared to have overlooked that the consequence of his submission, if correct, would be that Division 3A of the *Local Government Act* which deals with code of conduct matters and establishes the Code of Conduct Panel would be ultra vires, and the Panel would have no power to determine his complaint or impose any sanction on Cr Salt. His contention completely disregards the historical circumstances of federation and the vesting of powers in the Commonwealth under s51 of the Constitution and the saving of state powers under s107, as well as the interaction between the state and Commonwealth corporations legislation. A statutory tribunal, such as the Panel, can determine questions in respect to its jurisdiction (*Attorney-General of Tasmania v Stephen Peter Estcourt and the Wilderness Society Inc* [1995] TASSC 65 at [13]). The Panel is satisfied that the Derwent Valley Council is a Council within the meaning of the *Local Government Act*. It follows therefore that, Cr Salt as a councillor of this Council, falls within the provisions of the Code of Conduct requirements.

Mr Butterworth was advised that the Panel would proceed to hear the complaint lodged by him, despite his varying views. Furthermore, it was pointed out that Mr Butterworth has appeal rights under the *Local Government Act*.

The hearing then proceeded with Mr Butterworth invited to speak to his complaint. Mr Butterworth stated that the essence of his complaint was Cr Salt's involvement on the committee of the "Friends of Willow Court". He said that he had confirmed Cr Salt's involvement on this committee with then Mayor, Martyn Evans. Mr Butterworth acknowledged that he did not know exactly what occurred in closed council meetings but did know that funds distribution to various groups and committees occurred. He added that there was an item relating to Willow Court on the closed council agenda for 21 June 2018. Mr Butterworth concluded funds distribution to "Friends of Willow Court" committee could have been discussed. He said it was his opinion that Cr Salt had an opportunity to influence finances allocated to committees/community groups because she had not declared an interest.

Cr Salt asked Mr Butterworth to elaborate on what he meant by his statement "finances being discussed." He responded by saying that when Council goes into a closed session the allocation of funds is discussed and this is where Cr Salt has a conflict of interest. Cr Salt then referred to Mr Butterworth's email dated 9 October 2018 addressed to Helen Medhurst and asked what he meant by his comment "Cr Salt holds a financial business interest". Mr Butterworth re-iterated that as Cr Salt was a member of a sub-committee of Council, and Council makes payment to sub-committees, then she has a financial interest.

Mr Butterworth acknowledged that Cr Salt was attending her first meeting, but nevertheless, she should have known the requirements of declaring a conflict of interest.

The Panel asked Mr Butterworth which sub-committee he was referring to. He confirmed this as "The Friends of Willow Court". The Panel asked Mr Butterworth if his concern stemmed from the ability of a councillor, within a closed meeting, to direct more funding to their sub-committee at the expense of others and he agreed. When asked if it were more than this financial aspect, he said that councillors must make decisions free of personal bias.

When given the opportunity to respond to Mr Butterworth's complaint, Cr Salt questioned Mr Butterworth about where on the agenda financial funding was listed. Mr Butterworth acknowledged that he did not have direct access to the agenda of closed council meetings but knew that allocating funds was undertaken in such meetings. As Willow Court was listed on the agenda for the closed council meeting of 21 June 2018, he assumed that financial allocation to committees may well have been discussed and as Cr Salt had not declared an interest, she had a conflict.

Cr Salt stated that Mr Butterworth's code of conduct complaint referred to an expression of interest (EOI), and not funding. She felt that he had not satisfactorily answered her question. Mr Butterworth stated that irrespective of whether the EOI or financial funding were discussed, Cr Salt had a conflict of interest that she failed to declare.

The Panel acknowledged that Mr Butterworth had lodged his complaint on 10 July 2018 and asked him what evidence he had at that time, that Cr Salt had breached the code of conduct at the closed council meeting held on 21 June 2018. Mr Butterworth again explained he had only limited knowledge, and the Code of Conduct Panel's Executive Officer had requested him to provide additional information. Mr Butterworth confirmed that it was following this request, that he included information that Cr Salt had also breached the code of conduct at the meeting of 19 July 2018.

Cr Salt was then asked if she wanted to speak in response to Mr Butterworth's complaint against her. Cr Salt initially stated that she had only been requested in correspondence from the Panel's Executive Officer to respond to the complaint in relation to the meeting of 21 June 2018 and that in that correspondence there had been no mention of the meeting of 19 July 2018.

When asked by the Panel what is "Friends of Willow Court", Cr Salt responded by saying that it was a special committee of Council. When asked about her role on this committee, Cr Salt said that she was a volunteer as were others on the committee, but appointments were approved by the Council. When questioned further, she advised that she had been a councillor since April 2018 but had been a member of the Friends of Willow Court since 2012. Cr Salt said that she didn't see her role on the committee as a Council representative. Cr Salt said that she had sought clarification on matters where she thought there might have been a conflict of interest. The advice she received from senior management of Council was that it was up to her to determine this herself.

When asked by the Panel if the EOI was discussed at the closed council meeting of 21 June 2018, Cr Salt responded that a report back on the results of the EOI was an item on the agenda of 21 June 2018. She acknowledged that one of the EOIs had been from the "Friends of Willow Court" and that she had been involved in the preparation of that submission. When asked by the Panel whether she thought she may have a conflict of interest when the EOI was discussed, Cr Salt said that she had declared an interest in another item (regarding funding for attending the LGAT conference) as there were financial benefits to her, i.e. she had a pecuniary interest. She did not see that she had a pecuniary interest in the EOI and therefore, she did not have a conflict.

When questioned further by the Panel, Cr Salt said that members of the committee had been involved over several years when Council was discussing Willow Court as part of community consultation. She agreed that the committee did have an interest in the outcome of the EOI but not a financial one. Cr Salt said that she made a decision in the closed council meeting that she did

not have a conflict of interest as it was not a pecuniary interest. Cr Salt said that this opinion was based on her understanding of the code of conduct. When asked if councillors were members of any other committees of Council, Cr Salt said that she did not know.

When asked by Mr Butterworth whether Cr Salt had participated in the development of the EOI she said that she had. When asked by the Panel whether she discussed the EOI with other councillors in the closed meeting or simply voted, Cr Salt said she could not remember.

Cr Salt said that at the Council meeting held on 19 July 2018, she declared an interest in the item relating to Willow Court and did not vote but did not leave the room. Cr Salt also stated when questioned that she did not participate in any discussion.

Mr Butterworth said that at the meeting of 19 July 2018, standing orders were set aside to allow open debate, and Cr Salt read a statement on behalf of the "Friends of Willow Court" which was read into the minutes. Mr Butterworth said that Cr Salt took considerable time, estimated as seven minutes, and whilst she may not have voted, she did speak on behalf of the committee.

In presenting his evidence, Mr Butterworth focused on the financial aspect of committees discussed in closed council meetings. When asked by the Panel whether he believed Cr Salt still had a conflict of interest even if finances were not discussed, Mr Butterworth replied that he did.

In her summary, Cr Salt said that the letter she received requesting a response to the complaint clearly stated that it was in relation to the council meeting of 21 June 2018 and did not refer to the meeting on 19 July 2018. She went on to say that she had come to the Hearing prepared to discuss the 21 June 2018 and thought it was unfair to refer to the meeting of 19 July 2018. The Panel pointed out that there was reference to 19 July 2018 in Mr Butterworth's amended complaint. Cr Salt did acknowledge this. Cr Salt also acknowledged that she did read a statement into the meeting of 19 July 2018. Cr Salt said that the statement was prompted by the fact that Willow Court had not been heritage listed by the Commonwealth or State Government and was likely to be offered up for re-development.

4. Determination

The Panel determines the following in relation to the relevant parts of the Derwent Valley's Councillor Code of Conduct:

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 prejudgement.*

The Panel dismisses complaints under the two subsections of Part 1 on the basis that there was no evidence presented to the Panel that Cr Salt could not bring an open and unprejudiced mind to decisions nor that she was biased or prejudged in relation to Willow Court.

PART 2 - Conflict of interest

- 1. When carrying out his or her public duty, a councillor must not be unduly influenced, nor be seen to be unduly influenced, by personal or private interests that he or she may have.*
- 2. A councillor must act openly and honestly in the public interest.*
- 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 before discussion on the matter begins; and*
 - b) *act in good faith and exercise reasonable judgement 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.*

The Panel upholds the code of conduct complaint in relation to sub sections 3, 4, and 6. Cr Salt told the hearing that she has been a member of the “Friends of Willow Court” since approximately 2012, long before she was elected to Council in April 2018. Cr Salt’s opinion that she did not have to declare a conflict of interest in relation to Willow Court was based on the fact that she believed she did not hold a pecuniary interest. However, sub section 3 states that, in keeping with transparency and honesty, a councillor must declare actual, potential or perceived conflicts of interest at any meetings. Conflict of interest is not restricted to pecuniary interests. Clearly her involvement in the committee “Friends of Willow Court” over several years is an actual conflict of interest insofar as this matter is listed on any Council meeting agenda. As such Cr Salt should have declared her interest.

By limiting her consideration of potential conflicts to pecuniary interests and consequently failing to declare her interest she failed to exercise reasonable judgement contrary to sub-section 4.

Sub section 6 requires a councillor to remove themselves physically from the room during discussion. Cr Salt told the hearing that whilst she declared an interest on one occasion, and did not take part in discussion, she remained in the room whilst the matter was considered.

PART 3 – Use of Office

1. *The actions of a councillor must not bring the Council or the office of councillor into disrepute.*
2. *A councillor must not take advantage, or seek to take advantage, of his or her office or status to improperly influence others in order to gain an undue, improper, unauthorised or unfair benefit or detriment for himself or herself or any other person or body.*
3. *In his or her personal dealings with the Council (for example as a ratepayer, recipient of a Council service or planning applicant), a councillor must not expect nor request, expressly or implicitly, preferential treatment for himself or herself or any other person or body.*

The Panel dismisses complaints in relation to sub sections 1, 2 and 3 of Part 3. It is the Panel’s opinion that this Part of the Code of Conduct goes to more serious breaches of use of office such as corruption. On this basis there was no evidence produced that Cr Salt had performed her duties as a councillor in an improper or unauthorized manner.

5. Sanction

The Panel acknowledges that Cr Salt had only been a councillor for a short period at the time of the complaint. Nevertheless, it is beholden on councillors to inform themselves on the role and responsibilities of a councillor, including the code of conduct required. In this instance the Panel determines that Cr Salt should be issued with a caution in relation to this complaint.

6. 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
Chairperson



Richard Grueber
Legal Member



Rob Winter
Member