

**CODE OF CONDUCT PANEL REPORT**  
**GLAMORGAN SPRING BAY COUNCILLOR CODE OF CONDUCT**

Complaint brought by Mr Yon Kikkert against Cr Keith Breheny and Cr Rob Churchill

Date of Determination: 3 June 2019

Code of Conduct Panel: Lynn Mason (Chairperson), David Sales (community member with experience in local government), Richard Grueber (legal member)

**Summary of the Complaint**

The complaint from Mr Yon Kikkert was submitted to the Executive Officer of the Code of Conduct Panel (*the Panel*) on or about 6 February 2019, and following initial assessment by the Chairperson, Mr Kikkert, Crs Breheny and Churchill, and the General Manager of Glamorgan Spring Bay Council (*the Council*) were notified on 15 March 2019 that the complaint would be investigated by the Panel.

The Council adopted a revised version of the Code of Conduct (*the Code*) on 26 February 2019. The Panel investigated the complaint in accordance with the Code in force at the time of the alleged breaches.

The sections of the Code which Mr Kikkert alleged Crs Breheny and Churchill breached are:

*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.*
- 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 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 Complaint**

Mr Kikkert alleged that Crs Breheny and Churchill breached Parts 1 and 2 of the Code by failing to declare an interest in Planning Scheme Amendment AM2018/03, Cambria Estate (agenda item 3.7) at the ordinary council meeting on 27 November 2018. The basis for this allegation was:

- Both Councillors had made representations against the Draft Planning Scheme Amendment AM 2018/03, and that these representations constituted part of material which the council had to consider under s39 of the *Land Use Planning and Approvals Act 1993* (LUPAA);
- That these representations constitute apprehended bias on the part of the respondents;
- That Cr Breheny stated to council in debate on Item 3.7 that he acknowledged the conflict and legal advice to abstain from debate and voting, but declared that he would do so anyway;
- That the East Coast Alliance (ECA) was formed to oppose the Cambria development;
- That both Councillors had been members of the ECA prior to their election to Council, and Cr Breheny had been its Vice President;

- That public perception was that both men had stood for council to further ECA's objective of 'stopping the SAP'<sup>1</sup>;
- That there was a clear public perception that neither Councillor could be free from bias when making planning decisions regarding this proposal;
- That both Councillors ignored legal advice to absent themselves from the vote on Item 3.7;
- That Cr Churchill had an additional conflict of interest, in that his wife served as secretary to the ECA at the time of the meeting on 27 November 2018, and this could be seen by a reasonable lay person as a conflict for him;

## Procedure

Cr Breheny responded to the complaint on 25 March 2019. In summary, Cr Breheny made the following points:

- He became Deputy President of ECA upon its formation, in response to opposition to the SAP in the local community;
- In June 2018 he lodged a representation to Council, expressing his concern over an environmental issue relating to the proposal for a golf course in the Concept Master Plan associated with the SAP;
- During the election campaign (before the 2018 local government elections in Tasmania) he did not make any statement supporting or opposing the SAP;
- During the election campaign he deliberately maintained a strong desire to keep an open mind on the issue;
- He resigned from ECA as soon as he was elected to Council and has since had no formal contact with ECA;
- He did not solicit support from ECA during the election campaign;
- He did not accept that making a representation on the SAP should disqualify him from voting on the matter;
- He outlined his reasons for not declaring a conflict of interest during debate on the item at the council meeting of 27 November 2018;
- The decision he made to oppose the SAP at the meeting on 27 November 2018 was entirely on his assessment of the information presented to him in the (*Council*) meeting's agenda;
- He regarded the legal advice given to the General Manager as unsafe.

Cr Churchill responded to the complaint on 27 March 2019. In summary, Cr Churchill made the following points:

- In May 2018 he made a representation against the SAP;
- At the time he was a member of ECA;

---

<sup>1</sup> SAP: the Cambria Green Specific Area Plan

- He resigned from ECA on 2 November 2018, the day he was told that he had been elected to the Council;
- He made no statements regarding the SAP or the Cambria Green Concept Master Plan during the election campaign, and no references were made to Cambria Green in any printed or electronic material he used in the campaign;
- Since his election to Council he has consistently stated, when asked about his position, that he supports development appropriate to the East Coast, and that the decision of Council is to support the SAP;
- He and Cr Breheny were only two of eight individuals cited by ECA during the election campaign as ‘supporters of appropriate and sustainable development’;
- He has never been involved with the Freycinet Action Network (FAN);
- In the lead up to the meeting on 27 November, he gave serious consideration to the potential of conflict of interest;
- Between 7 November and 27 November, he read all 623 submissions which had been made to Council during the public consultation on the SAP, noting that over 600 of these opposed the SAP;
- Between 7 November and 27 November, he read the Council Planner’s submission in the form of the Section 39 Report, which formed part of the material provided to Councillors on 23 November 2018 for the meeting on 27 November 2018;
- At a planning training session for Councillors on 21 November 2018, Cr Churchill was told by the council planner, Mr Shane Wells, that he and two other Councillors would not be able to vote on the SAP at the council meeting;
- Cr Churchill asked to see the legal advice on which Mr Wells relied, but this was not provided at that time;
- The General Manager provided a redacted version of the legal advice at the behest of the Mayor on 22 November 2018;
- On 23 November 2018 the full legal advice was provided to the Councillors;
- Cr Churchill alleged that this gave little time for him to seek his own legal advice before the meeting on 27 November 2018;
- He noted that the legal advice had advised council management to make the advice available to the Councillors as soon as practicable, and that while Council had received the advice on 7 November, it was not provided to the Councillors until 23 November 2018;
- Cr Churchill considered that he was denied due process by council management in the withholding of the legal advice, and that this was crucial to his decision to vote on the SAP;
- During the council meeting on November 27 2018 he was open to opposing views from other Councillors voting in favour of the SAP, but did not hear any convincing arguments from those Councillors;
- He rejected the assertions made in the complaint that he was incapable of making an unbiased decision;
- He rejected the assertion that making a representation months before he decided to stand for Council would override the time and effort he undertook to

research and familiarise himself with all aspects of the Cambria Draft Amendment;

- He rejected the assertion that representation made in May 2018 should prevent him from voting against a proposal which he believed contained significant planning inconsistencies and which was of concern to many community members;
- He considered that Mr Kikkert's complaint was vexatious and part of sustained and public attempts to undermine both Cr Breheny and himself.

The Panel met on 15 April 2019 to consider the complaint and responses. As a result of this meeting, the Panel asked the General Manager to provide information regarding the provision of the legal advice obtained on 7 November 2018, and the process whereby it was given to Crs Breheny and Churchill. The Panel decided to conduct a joint hearing into the complaint against both Councillors at a date to be determined.

The responses provided by Crs Breheny and Churchill were given to Mr Kikkert, and on 17 April 2019 the Panel received his reply to those responses.

A hearing was conducted into the complaint on 20 May 2019.

During the hearing, Cr Breheny stated that if the matter were to come before Council again, he would not declare any conflict of interest in the issue. Cr Churchill said that he would seek his own legal advice on the matter before deciding his course of action.

When asked by the Panel why they had not accepted the legal advice provided by Page Seager to the General Manager and Planning Officer, the respondents said that they distrusted that advice because:

- They were not shown the brief which had been given to Page Seager;
- They were uncertain about the accuracy of the information given to Page Seager; and
- They distrusted the advice because of the reluctance of the General Manager to provide it to them as soon as practicable after 7 November 2018.

When asked by the Panel why they had not sought their own legal advice after 23 November, and before the meeting, the respondents said that the timing gave them only one working day (Monday 26 November) in which to act, and that the four days from 23 November to the 27 November were taken up with reading and considering a large agenda and associated reports, in order to prepare for their first meeting. (The agenda and reports were also provided on 23 November.)

## **Material considered by the Panel**

- Code of Conduct complaint submitted by Mr Kikkert on or about 6 February 2019;
- Response provided by Cr Breheny, 25 March 2019;
- Response provided by Cr Churchill, 27 March 2019;
- Further response provided by Mr Kikkert, 17 April 2019;
- Letter from the Acting General Manager, undated, regarding legal advice on potential conflict of interest in the matter of the Cambria Green SAP;
- The legal advice provided to councillors from Page Seager Lawyers on 7 November 2018;
- The live stream of the Council Meeting on 27 November 2018, and the Minutes of that meeting;
- The submissions on sanction in the event that all or part of the complaint were to be upheld by the Panel.

## **Determination**

The Code of Conduct Panel upholds part of the complaint against Crs Breheny and Churchill, and dismisses the remainder of the complaint.

- The Panel determines that Crs Breheny and Churchill did not breach Part 1 of the Code, Decision Making, and therefore dismisses this part of the complaint;
- The Panel determines that Crs Breheny and Churchill did not breach Part 2 of the Code, Conflict of Interest, clauses 1 and 2;
- The Panel determines that Crs Breheny and Churchill breached clauses 3, 4, and 6 of Part 2 of the Code, Conflict of Interest.

## **Reasons for the Determination**

### *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.*
- 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.*

The Panel determined that Crs Breheny and Churchill approached the council meeting on 27 November 2018 having researched the council documents available to them as part of the agenda as thoroughly as they were able. Both Councillors asserted that they

were aware of the need to bring an open mind to consideration of the matter, and the live recording of the meeting provides no evidence to the contrary.

The Panel therefore dismisses this part of the complaint.

### *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 neither heard nor saw any evidence that Crs Breheny and Churchill were unduly influenced by personal or private interests in considering the Cambria Green matter; nor that they acted less than openly and honestly in the public interest, as they saw it.

Neither Cr Breheny nor Cr Churchill declared an interest in Item 3.7 at the outset of the council meeting, and nor did either Councillor formally declare a conflict of interest at the commencement of debate on the item. Cr Breheny did, however, read a statement during the consideration of item 3.7 in which he expressly disclosed that he had made a representation to Council.

The Panel finds that by making representations during the public consultation on the *Cambria Estate, Planning Scheme Amendment (AM 2018/03)*, Crs Breheny and Churchill had a conflict of interest in voting on Item 3.7 (Planning Scheme Amendment, Cambria Estate, Swansea). In accordance with s39 of the *Land Use Planning and Approvals Act 1993*, these representations formed part of the information that Council was required to consider under s39.

The judgement of Zeeman J in *R v West Coast Council; Ex Parte Strahan Motor Inn (A Firm)* [1995] TASSC 47 (*Strahan Motor Inn*) at [33-37] is relevant to this complaint. In that case a councillor made a representation opposing a development application, in his own right as a private citizen. He then sat on Council for the determination of the application. His Honour recognised that councillors will, as part of the electoral process, hold and express views on matters relevant to the functions of the council. Doing so will not disqualify a councillor from participating in the decision-making process unless he or she evinces an intention to exercise a discretion without regard to the terms in which it is conferred or without considering any contrary argument. However, by making a formal representation the councillor made a representation which the council was by force of law required to consider before making a determination, and it was held that doing so inevitably created an apprehension of bias. Although this case does not involve a development application and Crs Breheny and Churchill were not members of Council at the time that their representations were made, the principle is applicable. They would be conflicted by having to judge impartially the value and relevance of material they themselves had provided to Council as interested community members.

The Panel therefore concludes that Crs Breheny and Churchill should have declared an actual conflict of interest at the Council meeting on 27 November 2018, and that they failed to exercise reasonable judgement in determining whether they had an actual or perceived conflict of interest. The Panel considers that their conflicts of interest were of such materiality as to require them to remove themselves from the meeting room and to take no part in the debate or vote on the item.

The Panel finds that by remaining in the meeting room and participating in the debate and vote on the item, Crs Breheny and Churchill breached clauses 3, 4, and 6 of Part 2 of the Code.

The Panel heard submissions from the complainant and the respondents on sanction. The Panel took into account three mitigating circumstances, viz.,:

- For both Councillors, this was their first council meeting, and neither had any previous experience as an elected member in local government;
- The Panel accepts that both Councillors genuinely believed that they did not have a conflict of interest in the matter; and
- Legal advice provided to the Council regarding possible conflict of interest was not provided to the respondents until four days before the council meeting, and only after intervention by the Mayor and the Director of Local Government.



## **Sanction**

The Panel has investigated concurrently a complaint into this matter, brought by a different complainant. The alleged breaches in the two complaints were almost identical, both regarding Decision Making and Conflict of Interest.

As a result of that investigation, Crs Breheny and Churchill have been cautioned and are required to undertake training in Conflict of Interest by 31 August 2019. Training in Conflict of Interest is to be organised by Council and provided by the Integrity Commission. The Panel recommends that this training be provided to all Glamorgan Spring Bay Councillors.

As these sanctions have already been imposed, the Panel imposes no further sanctions on Crs Breheny and Churchill as a result of this second complaint.

## **Right to Review**

Under s28ZJ of the Act, a person aggrieved by the determination of the Panel is entitled to apply to the Magistrates Court (Administrative Appeals Division) for a review of the determination on the ground that the Panel has failed to comply with the rules of natural justice.

Lynn Mason (chairperson)

Richard Grueber (legal member)

David Sales (community member with experience in local government)