

INTERNAL ARBITRATION PROCESS – WYNDHAM CITY COUNCIL

In the matter of an Application by Councillor Mia Shaw concerning
Councillor Robert Szatkowski

HEARING PURSUANT TO DIVISION 5 OF PART 6 OF THE LOCAL GOVERNMENT ACT 2020

Applicant:	Councillor Mia Shaw
Respondent:	Councillor Robert Szatkowski
Date of Hearing:	22 October 2021
Arbiter:	Matthew Evans

DETERMINATION

The Arbiter determined that the Respondent, Cr Robert Szatkowski, has breached the prescribed standards of conduct contained in **clauses 3.1 and 3.4** in the Wyndham City Council Councillor Code of Conduct and has made a finding of misconduct in respect of these breaches.

The Arbiter has made no finding in relation to the allegation in respect of **clause 3.2** in the Wyndham City Council Councillor Code of Conduct. As there had been no breach of the prescribed Standard of Conduct, the Application in relation to this clause is dismissed.

STATEMENT OF REASONS FOR DECISION

The Application

1. On the 6 July 2021, the applicant applied under section 143 of the *Local Government Act 2020* (the Act) for an arbiter to make a finding of misconduct against the respondent.
2. The Principal Councillor Conduct Registrar (the Registrar) examined the application under section 144 of the Act, and on the 9 August 2021, the Registrar appointed the Arbiter under sections 144 and 149 of the Act after forming the opinion that the application was not frivolous, vexatious, misconceived or lacking in substance and that there was sufficient evidence to support a breach of the Wyndham City Council Councillor Code of Conduct.

Jurisdiction of the Arbiter in relation to this Application

3. In the Application for an Internal Arbitration Process, five sections of the Wyndham City Council Councillor Code of Conduct, December 2020 ('Code of Conduct'), are listed as follows:
 - 3.1 *Treatment of others*
 - 3.2 *Performing the role of Councillor*
 - 3.4 *Councillor must not discredit or mislead Council or public*
 - 5.4 *External communications*
 - 5.7 *Council decision making. Councillors are committed to ensuring a high level of transparency in Council's decision-making processes.*
4. The Application sought a finding of misconduct against the respondent. 'Misconduct' is defined in section 3 of the Act as any breach by a councillor of the prescribed standards of conduct that are set out in Schedule 1 of the Local Government (Governance and Integrity) Regulations 2020. The prescribed standards of conduct are included in section 3 of the Code of Conduct.
5. The applicant listed five matters from the Council's Councillor Code of Conduct that she intended to rely upon, but only the first three of these are prescribed standards of conduct found in the 'Standards of Conduct' section in Council's Code of Conduct (clauses 3.1, 3.2 and 3.4), which are reflected in Schedule 1 – Standards of Conduct in the Regulations (clauses 1, 2 and 4).
6. The applicant also included two additional clauses from the Code of Conduct in the Application, being clause 5.4 'External Communications', and clause 5.7 'Council Decision Making'. Whilst these matters are important, they are not 'Standards of Conduct' found in Schedule 1 to the Regulations. Therefore, the Arbiter is unable to make any finding in relation to these two sections of Council's Code of Conduct.

The Hearings

7. On the 30 August 2021, the Arbiter wrote to the Council's Councillor Conduct Officer and the parties advising that a directions hearing would be held on 6 September 2021.
8. At the directions hearing on the 6 September 2021, directions were made for the filing and serving of documents on which the parties intended to rely at the hearing.
9. A hearing was set down for the 22 October 2021. After hearing submissions from the parties at the hearing, and considering the documents filed by them the Arbiter reserved his decision.

Allegations

10. The applicant alleges that the respondent made misleading, offensive, and insulting comments to a media organisation about an Amendment the applicant moved at a Wyndham Council Meeting on 29 June 2021.
11. The Amendment was to Item 6.2.1 relating to the 'Adopted Annual Plan & Budget 2021/22'. The relevant clause of the Amendment was part 21: *'That Council endorses the master plan of Soldiers Reserve, which is situated on the corner of Duncans Road and College Road, including the land and buildings on College Road, Werribee, at a cost of \$150,000'* (the Precinct Masterplan). The Amendment was lost¹.
12. Subsequently, an allegation that the applicant failed to declare a conflict of interest in this matter, and that the applicant took part in a council vote on the matter was reported on-line by a media organisation 'Bay939' ².
13. In addition, the same article refers to a complaint lodged with the Local Government Inspectorate', and reports that "The complaint seen by Geelong Broadcasters, which was not submitted by Cr Szatkowski, alleges Cr Shaw should not have been present in the Council Chamber when matters relating to Soldiers Reserve or the Werribee Districts Football Club were being discussed, let alone "moving a budget amendment to benefit her brother's interest".
14. The article reports that 'Fellow councillor Robert Szatkowski told Geelong Broadcasters Cr Shaw's amendment was rushed through without due diligence, such as checking for conflicts of interest".
15. It includes quotes from Cr Szatkowski including:

"Wyndham is a very big municipality and of all the projects that could have been expedited or fast-tracked, she chose that one' (referring to the applicant).

¹ https://councilpapers.wyndham.vic.gov.au/Open/2021/ORD_29062021_MIN_2656_AT.PDF (pages 24-26)

² Bay939 website 5 July 2021

“We (other councillors) went through a proper process and all of our requests were vetted against our conflicts of interest”

“For example, I campaigned on better footpaths, I didn’t say better footpaths out the front of my house”.

16. In relation to the quote in the article published on the Bay939 website that “We (other councillors) went through a proper process and all of our requests were vetted against our conflicts of interest” the respondent advised that he believes he was misquoted.
17. The applicant alleges that the respondent’s comments constituted a personal attack, which was in breach of a clause in the Standards of Conduct in the Regulations, specifically ‘**1 Treatment of others**’ (Clause 3.1 in the Code of Conduct), that includes the following requirement:

A Councillor must, in performing the role of a Councillor, treat other Councillors, members of Council staff, the municipal community and members of the public with dignity, fairness, objectivity, courtesy and respect...”

18. The applicant refers to the respondent’s quote ‘We (other councillors) went through a proper process and all of our requests were vetted against our conflicts of interest’ (which the respondent claims was a misquote) to suggest that the respondent was not fully aware of the conflict-of-interest provisions, obligations, and processes. In addition, the applicant alleges that the respondent did not make the appropriate inquiries in relation to his concerns about the alleged conflict of interest.
19. Therefore, the applicant alleges that the respondent was in breach of a clause in the Standards of Conduct in the Regulations, specifically ‘**2 Performing the role of Councillor**’ (Clause 3.2 in the Code of Conduct), which includes a requirement that “A Councillor must, in performing the role of a Councillor, do everything reasonably necessary to ensure that the Councillor performs the role of a Councillor effectively and responsibly”, including that the Councillor ‘diligently uses Council processes to become informed about matters which are subject to Council decisions’.
20. The applicant alleges that comments made to the media were “incorrect and misleading”, and that continuing to reiterate these points to a media outlet is misleading the public. Therefore, the applicant alleges that the respondent was in breach of a clause in the Standards of Conduct in the Regulations, specifically ‘**4 Councillor must not discredit or mislead Council or public**’ (Clause 3.4 in the Code of Conduct), which includes a requirement that “In performing the role of a Councillor, a Councillor must not deliberately mislead the Council or the public about any matter related to the performance of their public duties”.
21. The respondent made written and verbal submissions regarding the three allegations of a breach of the Standards of Conduct. Throughout his evidence and in response to each allegation, the respondent submitted that the Arbiter should dismiss the Application.

Findings of the Arbiter and Reasons

Standard of Conduct 1 Treatment of others' (Clause 3.1 in the Code of Conduct)

22. A fair-minded objective observer would read the respondent's comments in the Bay939 article, specifically:

"Wyndham is a very big municipality and of all the projects that could have been expedited or fast-tracked, she chose that one", and
"For example, I campaigned on better footpaths, I didn't say better footpaths out the front of my house"

and would likely infer that the alleged conflict of interest that was the subject of an investigation by the Local Government Inspectorate could in some way personally benefit the applicant or her family.
23. In addition, the comment that "...of all the projects that could have been expedited or fast-tracked, she chose that one" builds a narrative that if the applicant was successful in securing funding for the Precinct Masterplan this would have been at the expense of other worthy projects.
24. In his verbal evidence, the respondent acknowledged that he did not provide the best analogy to describe what was an alleged and unproven conflict of interest.
25. The respondent's analogy, comparing a councillor campaigning for 'better footpaths out the front of my house', and the applicant's support for funding for a Precinct Masterplan that included a reserve where a family member was an office holder of a sporting club, was not a fair or objective comparison, and amounted to the respondent pre-judging an allegation of serious misconduct in the public domain.
26. In the Application, the applicant described how she felt she had not been afforded natural justice because of the respondent's comments, and that these comments had subsequently contributed to the erosion of good working relationships between Councillors.
27. In his defence, the respondent has argued that it would be 'a dangerous precedent to make a finding that would gag a councillor from talking to the media', and that the criticism levelled at the applicant "is the nature of politics".
28. The Standards of Conduct to be observed by Councillors acknowledge that 'Nothing in the Standards of Conduct is intended to limit, restrict or detract from robust public debate in a democracy. So, while Councillors must always meet the Standards of Conduct, participation in vigorous debate of matters before Council for decision should not be viewed as being inconsistent with them.
29. Clause 5.4 of the Wyndham City Council Councillor Code of Conduct acknowledges that individual Councillors are entitled to express their personal opinions through the media. But respect for robust public debate does not negate the need for rules around how Councillors conduct themselves.

30. Each Councillor has signed the Code of Conduct, and Councillors have agreed that when speaking to the media, they will make it clear that their comments are their personal view and do not represent the position of the Council. In addition, the Code of Conduct seeks to ensure that such comments avoid being derogatory, offensive, or insulting of Council, Councillors, members of Council staff, members of the community and others.
31. A fair-minded objective observer would find that the respondent's comments breached the Standards of Conduct in the Regulations, specifically '**1 Treatment of others**' (Clause 3.1 in the Code of Conduct), as the respondent did not treat the applicant with dignity, fairness, objectivity, courtesy and respect when speaking with the media organisation. I find this Allegation to be established.

Standard of Conduct 2 Performing the role of Councillor' (Clause 3.2 in the Code of Conduct)

32. The applicant alleges that the respondent was in breach of the second Standard of Conduct 'Performing the role of Councillor' (Clause 3.2 in the Code of Conduct), which includes a requirement that "A Councillor must, in performing the role of a Councillor, do everything reasonably necessary to ensure that the Councillor performs the role of a Councillor effectively and responsibly", including that the Councillor 'diligently uses Council processes to become informed about matters which are subject to Council decisions'.
33. There was disagreement amongst the parties regarding the proper process for Council consideration of amendments to the Budget, and the appropriate notice that should be given to fellow Councillors. The applicant suggests that the respondent should have sought information on the Amendment and the respondent is critical of the applicant for not providing information in a timely manner. There was also disagreement in relation to the importance of the Code of Conduct.
34. The applicant also alleges that the respondent misunderstood and misrepresented the process for the 'vetting' and declaration of conflicts of interest, however in the hearing, the respondent sought to clarify the intention of his remarks in the media relating to this process.
35. Whilst there is a need for ongoing professional development training for all Councillors across the sector including the respondent, the respondent did demonstrate a reasonable understanding of Council processes. He should have been more diligent when investigating the nature of the applicant's alleged conflict, however in this instance the respondent's actions did not amount to a breach of the second Standard of Conduct 'Performing the role of Councillor' (Clause 3.2 in the Code of Conduct). No finding of misconduct is made in relation to this allegation.

Standard of Conduct 4 Councillor must not discredit or mislead Council or public (Clause 3.4 in the Code of Conduct)

36. The applicant alleges that the respondent was in breach of the fourth Standard of Conduct in the Regulations, specifically '**Councillor must not discredit or mislead Council or public**' (Clause 3.4

in the Code of Conduct), which includes a requirement that “In performing the role of a Councillor, a Councillor must not deliberately mislead the Council or the public about any matter related to the performance of their public duties”.

37. The applicant alleges that comments made to the media and published on the Bay939 website were “incorrect and misleading”. The respondent did not seek to articulate the logical connection in his analogy, comparing a Councillor campaigning for ‘better footpaths out the front of my house’, and the applicant’s support for funding for a Precinct Masterplan that included a reserve where a family member was an office holder of a sporting club.
38. As I have established in consideration of the alleged breach of Standard of Conduct 1 Treatment of others’ (Clause 3.1 in the Code of Conduct), this was not a fair or objective comparison, and amounted to the respondent pre-judging an allegation of serious misconduct in relation to a conflict of interest in the public domain.
39. In his verbal evidence, the respondent commented that “I don’t have a BA in journalism. This is my first term as Councillor. I think I’ve spoken to the media maybe twice.” Whilst there is evidence that the respondent has reflected on the importance of not providing public comments that are misleading, I do not accept that his series of comments on the applicant as reported on-line were ‘throw-away’ lines, but rather they were a disingenuous opportunity at political points scoring.
40. A fair-minded objective observer would find that such commentary was misleading, and I am comfortably satisfied that this Allegation has been established.

Conclusion

41. For the reasons set out above, I find that the respondent has failed to comply with the prescribed standards of conduct contained in Clauses 3.1 and 3.4 in the Code of Conduct.
42. Pursuant to section 147(1) of the Act I make a finding of misconduct in respect of the breach of clauses 3.1 and 3.4 in the Code of Conduct in the application for the reasons set out earlier.
43. I make no finding of misconduct in relation to the allegation in respect of clause 3.2 in the Code of Conduct, as there had been no breach of the prescribed Standard of Conduct 2 ‘Performing the role of Councillor’.

Sanction options

44. Under section 147(2) of the Act, after a finding of misconduct, the arbiter may do any one or more of the following—
- (a) direct the Councillor to make an apology in a form or manner specified by the arbiter;
 - (b) suspend the Councillor from the office of Councillor for a period specified by the arbiter not exceeding one month;
 - (c) direct that the Councillor be removed from any position where the Councillor represents the Council for the period determined by the arbiter;
 - (d) direct that the Councillor is removed from being the chair of a delegated committee for the period determined by the arbiter;
 - (e) direct a Councillor to attend or undergo training or counselling specified by the arbiter.

The Applicant's submission on sanction

45. By email on the 17 September 2021, the applicant outlined the desired sanctions if a finding of 'Misconduct' was made. The applicant is seeking a verbal apology at the next Meeting of Council. The apology is seeking to include reference to the respondent's breach of the Standards of Conduct and is not to refer to the unsubstantiated allegation or Local Government Inspectorate complaint.

The Respondent's submission on sanction

46. The respondent has made no submission in response to the applicant's email of the 17 September 2021. However, in his written submission circulated to the Arbiter and applicant on 30 September 2021, the respondent advises that he has "asked for some proposed wording that might satisfy Cr Shaw in the event there is a finding against me. This has not been forthcoming".

Conclusion on sanctions

47. As no finding has been made in relation to the allegation of a breach of the Standard of Conduct 2 Performing the role of Councillor' (Clause 3.2 in the Code of Conduct) I do not consider there to be a need to direct the respondent to attend or undergo training or counselling.
48. As the breaches of the prescribed standards of conduct contained in **clauses 3.1 and 3.4** in the Code of Conduct occurred in the public domain, it is fair and reasonable that the respondent makes a public apology to the applicant. This is consistent with the applicant's desired outcome in relation to these two allegations.

Order

49. My order to finalise this matter as a consequence of my decision is:

Pursuant to section 147(2)(a) of the Local Government Act 2020, the respondent Cr Robert Szatkowski, a Councillor of the Wyndham City Council, is hereby directed to make a verbal apology to Cr Mia Shaw in respect of his comments to the media organisation that are the subject of the finding of misconduct. The apology is to be made at the first Council meeting after the meeting of Council at which this decision is tabled under section 147(4) of the Act. At a minimum, the apology will:

- (a) be directed to Cr Mia Shaw;
- (b) reference the breaches of clauses 3.1 and 3.4 in the standards of conduct in the Wyndham City Council Councillor Code of Conduct contained in this decision;
- (c) make no reference to the unsubstantiated allegations referred to the Local Government Inspectorate in relation to Cr Mia Shaw referenced in this decision;
- (d) be unqualified and unconditional; and,
- (e) be reproduced in full in the minutes of the Council meeting at which it is made.

Other matters

50. The Wyndham City Council Councillor Code of Conduct provides an opportunity for facilitated discussion in relation to disputes between Councillors before it reaches a stage of requiring an Internal Arbitration process. This option was not pursued in this instance.