

LOCAL GOVERNMENT ACT 1993

SECTION 440I(2)(g)

**ORDER SUSPENDING COUNCILLOR JEFFREY NICHOLSON OF FORBES
SHIRE COUNCIL FROM CIVIC OFFICE FOR A PERIOD OF THREE MONTHS**

I, Tim Hurst, Deputy Secretary, Local Government, Planning and Policy, under delegation from the Secretary, Department of Planning, Industry and Environment, by **ORDER, direct** that Councillor Jeffrey Nicholson of Forbes Shire Council be suspended from civic office for a period of 3 (three) months (s.440I(2)(g)).

The period of suspension commences on 08 October 2019 and ends on 07 January 2020.

Dated: 26 September 2019



TIM HURST

Deputy Secretary, Local Government, Planning and Policy

Department of Planning, Industry and Environment

LOCAL GOVERNMENT ACT 1993

SECTION 440I

STATEMENT OF REASONS FOR TAKING DISCIPLINARY ACTION COUNCILLOR JEFFREY NICHOLSON – FORBES SHIRE COUNCIL

1. I, Tim Hurst, Deputy Secretary, Local Government, Planning and Policy, under delegation from the Secretary, Department of Planning, Industry and Environment having considered a Departmental Report prepared under section 440H of the *Local Government Act 1993* (the Act), am satisfied that Cllr Jeffrey Nicholson of Forbes Shire Council has engaged in misconduct within the meaning of section 440F of the Act and as a result, disciplinary action is warranted pursuant to section 440I of the Act.
2. I have determined, after considering Cllr Nicholson's submissions on penalty dated 20 May 2019, that he should be suspended for a period of 3 months, pursuant to section 440I(2)(g) of the Act.
3. The period of suspension is to commence on 08 October 2019 and finish on 07 January 2020.
4. A statement of reasons is to be made publicly available. (section 440I(6)).

RELEVANT LEGISLATION

5. "Misconduct" is defined under section 440F of the Act as any of the following:
 - (a) a contravention by the councillor of this Act or the regulations,
 - (b) a failure by the councillor to comply with an applicable requirement of a code of conduct,
 - (c) a failure by a councillor to comply with an order issued by the Departmental Chief Executive under this Division,
 - (d) an act of disorder committed by the councillor at a meeting of the council or a committee of the council,
 - (e) an act or omission of the councillor intended by the councillor to prevent the proper or effective functioning of the council or a committee of the council.
6. Section 440H(1) of the Act provides that the Departmental Chief Executive may conduct an investigation for the purpose of determining whether a councillor has engaged in misconduct.
7. Section 440H(5) of the Act provides that the Departmental Chief Executive may arrange for a departmental report to be prepared in relation to an investigation conducted under this section. The preparation of such a report is a prerequisite to a decision by the Departmental Chief Executive to take disciplinary action against the councillor.

8. Section 440I(1) provides that the Departmental Chief Executive may take disciplinary action against a councillor if satisfied that:
 - (a) the councillor has engaged in misconduct (whether on the basis of a department report or a report by the Ombudsman or Independent Commission Against Corruption), and
 - (b) disciplinary action is warranted.

9. Section 440I(2) authorises the Departmental Chief Executive to take one or more of the following disciplinary actions:
 - (a) counsel the councillor,
 - (b) reprimand the councillor,
 - (c) by order, direct the councillor to cease engaging in the misconduct,
 - (d) by order, direct the councillor to apologise for the misconduct in the manner specified in the order,
 - (e) by order, direct the councillor to undertake training,
 - (f) by order, direct the councillor to participate in mediation,
 - (g) by order, suspend the councillor from civic office for a period not exceeding 3 months,
 - (h) by order, suspend the councillor's right to be paid any fee or other remuneration to which the councillor would otherwise be entitled as the holder of the civic office, in respect of a period not exceeding 3 months (without suspending the councillor from civic office for that period).

THE MATTER

10. **Allegation 1: Failure to avoid or appropriately manage a conflict of interest at the meeting of Forbes Shire Council held on 15 June 2017**

It is alleged that Clr Nicholson failed to avoid or appropriately manage a conflict of interest on the occasion of the meeting of Forbes Shire Council held on 15 June 2017, in relation Council's consideration of a report on the Jemalong Regional Education Centre, and as such, breached clause 4.2 of the Council's code of conduct. A breach of the code is "misconduct" as defined in section 440F of the Act.

11. **Allegation 2: Use of position as a councillor to influence Council's General Manager to obtain a private benefit**

It is alleged that on 20 November 2017, Clr Nicholson used his position as a councillor to influence Council's General Manager, in the performance of his professional duties as General Manager. This occurred when he met with the General Manager and inquired about the calling for expressions of interest for the leasing or sale of a Council property known as "Karooia". It is alleged that he did this to obtain a private benefit for himself or somebody else, and as such breached clause 5.8 of the Council's code of conduct. A breach of the code is "misconduct" as defined in section 440F of the Act.

12. Allegation 3: Using his status and position as councillor in an attempt to obtain a private benefit

It is alleged that between 13 November 2017 and 20 November 2017, Clr Nicholson attempted to use his status and position as a councillor to obtain information about how Council's General Manager would deal with the leasing or sale of a Council property known as "Karooia". It is alleged that he did this to obtain a private benefit for himself or somebody else, and as such breached clause 5.9 of the Council's code of conduct. A breach of the code is "misconduct" as defined in section 440F of the Act.

13. Allegation 4: Use of council information obtained in his capacity as a council official for a private purpose

It is alleged that Clr Nicholson used Council information obtained in his capacity as a council official, (being a valuation of Karooia) for a private purpose, in that he had a conversation with his accountant to establish what his wife would be able to tender for the property. It is alleged that this conduct breached clauses 7.8 and 7.10 of the Council's code of conduct. A breach of the code is "misconduct" as defined in section 440F of the Act.

14. Allegation 5: Failing to act upon receipt of information about a matter in which he had a conflict of interests

It is alleged that Clr Nicholson received and retained an email from Council's Acting General Manager on 18 October 2017 with a header that indicated it was "STRICTLY CONFIDENTIAL", that had attached to it two documents containing information relating to a Council matter (being the possible leasing or sale of Karooia for use as a child care centre). It is alleged that this is a matter in which Clr Nicholson had a conflict of interest. It is alleged that Clr Nicholson took no action to advise the Acting General Manager of that conflict of interest or otherwise to return the information and as such breached clause 3.1 of the Council's code of conduct. A breach of the code is "misconduct" as defined in section 440F of the Act.

15. Allegation 6: Failing to act honestly in carrying out his functions under the Act

It is alleged that Clr Nicholson acted dishonestly on 20 November 2017 when he met with the General Manager and inquired about the calling for expressions of interest for the leasing or sale of a Council property known as "Karooia", and did not tell the General Manager that he (Clr Nicholson) had a conflict of interest in that matter, and as such breached clause 3.2 of the Council's code of conduct. A breach of the code is "misconduct" as defined in section 440F of the Act.

REASONS FOR RELEVANT DISCIPLINARY ACTION OF COUNCILLOR NICHOLSON UNDER SECTION 440I(2)(g) OF THE LOCAL GOVERNMENT ACT 1993

16. I have read and adopt the final Departmental Report and its annexures prepared under section 440H of the Act.
17. I have read Clr Nicholson's submissions on the issue of breach dated 20 May 2019.
18. Having regard to the "Facts", "Analysis" and "Findings" sections of the final Departmental Report and for the reasons set out in the "Analysis" section of the final Departmental Report, I found the evidence was to the requisite standard to prove the allegation that Clr Nicholson engaged in misconduct in relation to each of the allegations 1 through 6 as referred to in the final Departmental Report under the heading "Alleged Misconduct".
19. It is not appropriate that the matter be referred back to Council given the seriousness and relative complexity of the matter and the limited courses of action open the Council to deal with the matter.
20. I have decided not to refer the matter to NCAT and seek a higher penalty as Clr Nicholson did not contest the breaches following receipt of the draft departmental report and he apologised for his conduct.
21. However, it is important to deter council officials from engaging in such conduct and in this respect I have had regard to the specific and general deterrence objectives of the disciplinary schema.
22. I am also mindful of the effect certain sanctions such as suspension or disqualification might have to the people who elected Clr Nicholson (see *Mehajer v Office of Local Government* [2014] NSWSC 1804).
23. I have read the submissions on penalty from Clr Nicholson dated 20 May 2019. I also rely on Part 7 of the final Departmental Report titled 'Considerations in respect to possible disciplinary action'.
24. I have regard to previous decisions where the matter involved a failure to appropriately manage a non-pecuniary conflict of interest as detailed in the briefing note. Those decisions are:
 - *Director General, Department of Premier and Cabinet Re: Councillor Stephen Smith* [LGPIDT01/2013], in which the Tribunal upheld the decision of then Chief Executive, under delegation from the Director General, Department of Premier and Cabinet, to suspend the councillor for 1 month due to his failure to appropriately manage a significant non-pecuniary conflict of interest due to his employment.

- *Director General, Department of Premier and Cabinet Re: Councillor Hans Allgayer [LGPIDT02/2013]*, in which the Tribunal again upheld the decision of then Chief Executive, under delegation from the Director General, Department of Premier and Cabinet, to suspend the councillor for 1 month due to his failure to appropriately manage a significant non-pecuniary conflict of interest due to his employment.
- *The Office of Local Government v Councillor Pauling [2014] [NSWCATAD121]*, the Tribunal reprimanded the councillor for failing to adequately manage conflict of interest disclosure and management requirements. Clr Pauling incorrectly asserted that the nature of his conflict of interest was 'insignificant' and participated in the debate and the determination of motions.
- *Office of Local Government v Councillor Smith [2014] NSWCATOD 92*, the Tribunal suspended the councillor for 1 month due to his failure to appropriately manage a significant non-pecuniary conflict of interest due to his employment.
- *Meineke v Acting Chief Executive, Office of Local Government [2016] NSCATOD 135* and subsequently *(No 2) [2017] NSWCATOD 14*, the Tribunal upheld the A/Chief Executive's decision to suspend the councillor's remuneration for 3 months due to his failure to appropriately manage a significant non pecuniary conflict of interest due to a business relationship.

25. Taking all of this into consideration, I am of the opinion, the breach is serious and warrants the disciplinary action which I have decided to take. In doing so, I am mindful of the effect this may have on the people who elected Clr Nicholson. However, Council should not, because of this decision alone, be deprived of being able to conduct its business. The residents of Forbes Shire will have the opportunity to approach other elected representatives if they need assistance.

DATED: 26/9/19



Tim Hurst
Deputy Secretary, Local Government, Planning and Policy
Department of Planning, Industry and Environment