

LOCAL GOVERNMENT ACT 1993

STATEMENT OF REASONS FOR TAKING DISCIPLINARY ACTION UNDER SECTION 440I

COUNCILLOR KEVIN DUFFY – ORANGE CITY COUNCIL

1. I, Tim Hurst, Chief Executive, Office of Local Government, have considered a departmental report dated August 2018 (the departmental report) prepared under section 440H of the *Local Government Act 1993* (the Act) and a submission by Cllr Kevin Duffy dated 24 August 2018 about breach, and am satisfied that on 3 October 2016 he (Cllr Duffy) engaged in misconduct by engaging in an interaction with a Council employee contrary to clauses 6.2(c) and 6.7(a) of Orange City Council's adopted code of conduct; and
2. I have determined, after considering Cllr Duffy's submission on penalty dated 24 August 2018, that he should be reprimanded, pursuant to section 440I(2)(b) of the Act.

RELEVANT LEGISLATION

3. "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 under section 440,
 - (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.
4. 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.
5. 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.
6. 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.
7. 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

8. At about 5pm on 3 October 2016 it was alleged that Clr Duffy approached an Orange City Council (Council) employee outside a local supermarket and asked the employee, in words to the effect, '*who was doing the Mayor's Facebook page, Nick or you?*' The employee advised Clr Duffy in words to the effect '*it was with the Mayor with some assistance from the comms team.*' Clr Duffy replied in words to the effect '*he wouldn't know what to do.*'
9. It was alleged that the employee was not on the list of Council staff that councillors were permitted to contact in relation to Council matters and the subject matter discussed was not a matter that a councillor was permitted to raise with the employee.

REASONS FOR REPRIMANDING COUNCILLOR KEVIN DUFFY UNDER SECTION 440I(2)(b) OF THE LOCAL GOVERNMENT ACT 1993

10. I have determined Clr Duffy should be reprimanded, pursuant to section 440I(2)(b) of the Act after considering his submission on penalty dated 24 August 2018.
11. I considered the departmental report and a submission from Clr Kevin Duffy dated 24 August 2018 about breach, and having done so, I am satisfied that Clr Duffy, on 3 October 2016, engaged in misconduct by breaching clauses 6.2(c) and 6.7(a) of Council's code of conduct by engaging in an interaction with a Council employee.
12. I am satisfied Clr Duffy had an interaction with the employee as detailed in the departmental report and as outlined under the heading 'The Matter' above.

13. During the interaction, Clr Duffy sought information from the employee that pertained to a Council related matter and an individual and operational staff matter.
14. In seeking this information, Clr Duffy breached clause 6.2(c) of Council's adopted code of conduct as the employee was not an employee specified by Council's applicable policy and procedure as an employee from whom councillors were permitted to seek information in relation to Council related matters.
15. By approaching the employee to discuss individual and operational staff matters Clr Duffy breached clause 6.7(a) of Council's adopted code of conduct.
16. Clr Duffy is an experienced councillor, having been first elected in September 2004.
17. Clr Duffy has had multiple opportunities to acknowledge his conduct and express contrition and has not done so.
18. Clr Duffy had been reminded of his obligations in respect of interactions with employees prior to engaging in the alleged conduct, as recently as 21 July 2016.
19. By his own admission, Clr Duffy was fully aware of his conduct obligations in respect to interactions with Council employees.
20. I am guided by the New South Wales Civil and Administrative Tribunal's decision in *Office of Local Government v Shelley* [2018] NSWCATOD 103.
21. Publication of the determination on breach and sanction along with a statement of reasons will serve to remind other councillors of the public interest in maintaining high standards and serve to deter Clr Duffy and other councillors from engaging in similar conduct.

DATED: 7 November 2018



Tim Hurst
Chief Executive
Office of Local Government