BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2022] NZREADT 22

Reference No: READT 029/2019

IN THE MATTER OF	An appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**QQ** Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 1902)** First Respondent
AND	**NQ** Second Respondent

Tribunal:	D J Plunkett (Chair) C A Sandelin (Deputy Chair) G J Denley (Member)

Representation:

The appellant:	Self-represented
Counsel for the first respondent:	M Mortimer-Wang
Counsel for the second respondent:	G Dewar

SUBJECT TO NON-PUBLICATION ORDER

DECISION (COSTS)
Dated 25 October 2022

INTRODUCTION

[1] QQ (the appellant) was one of two owners of a residential property (the property) sold at auction, following an order of the High Court. The second respondent, NQ (the licensee), conducted the sale. The property had leaks and other defects.

[2] The appellant complained to the first respondent, the Real Estate Agents Authority (the Authority). He made a number of allegations against the licensee, notably that he did not disclose a particular leak. Complaints Assessment Committee 1902 (the Committee) decided to take no further action on his complaint. He appealed to the Tribunal. It dismissed the appeal in a decision issued on 7 September 2022.[1] The licensee now seeks costs from the appellant.

BACKGROUND

[3] The narrative leading to the complaint and its investigation by the Committee is set out in the earlier decision of the Tribunal and will only be briefly summarised here.

[4] The appellant owned a property with a co-owner. It had leaks and other defects.

[5] The licensee is a licensed salesperson under the Real Estate Agents Act 2008 (the Act). At the relevant time, he was engaged by [(the agency)].

[6] The appellant sought to buy the property, but was unable to reach agreement with the co-owner.

[7] Irreconcilable differences had arisen between the appellant and the co-owner, as a result of which mortgage payments were not made and a bank issued a notice of default. The High Court ordered the sale of the property and authorised a solicitor (the solicitor) to sell it. The solicitor appointed the licensee to market and auction the property, an agency agreement being signed on 9 February 2018.

[8] The appellant made it clear to the solicitor and the licensee that he was concerned the property would be marketed dishonestly without disclosure of the defects. The solicitor decided the property would be sold 'as is, where is' and various vendor warranties deleted, in order that prospective purchasers would be on notice to make their own inquiries.

[9] The appellant was living in part of the property. The solicitor wished to market it with vacant possession, following advice from the licensee. He required the appellant to

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[1] *QQ v REAA (CAC 1902) and NQ* [2022] NZREADT 18.

vacate the property, but the appellant declined to do so. Ultimately, it was marketed with the appellant still living in it.

[10] An unsuccessful bidder at the auction obtained a builder's report (11 May 2018). Under the heading "Disclosure of Defects by Real Estate salesperson", there was the comment, "A shower is leaking upstairs and has damaged the laundry and lounge ceilings downstairs".

[11] In the Particulars and Conditions of Sale by Auction, a number of the standard vendor's warranties and undertakings were deleted. The particulars also incorporated the following clause:

> **21.0 As is Where Is**
>
> 21.1 The parties agree that the Property is sold on an "as is where is" basis regardless of any warranty or representation to the contrary in this agreement whether express or implied.
>
> 21.2 In deciding to purchase the Property the purchaser has relied on its own judgement and not on any representation made by the vendor or by any person on the vendor's behalf. The purchaser will raise no objection to, or requisition in respect of, the Property, its condition or any matters affecting the Property.

[12] Disclosure forms notifying defects in the property were signed by prospective purchasers before bidding at the auction. Certain defects were disclosed. The bidders acknowledged having been:

> …told that there may be a leak in the upstairs bathroom from around the base of the shower that may cause a leak through the ceiling below.

[13] On 24 May 2018, the property was sold at auction for $465,000.

[14] On 28 August 2018, the appellant made a formal complaint against the licensee to the Authority, though as early as 16 February 2018 the appellant had been in contact with the Authority about his concern that the property would be marketed without disclosure of certain defects.

Decision of Complaints Assessment Committee 1902

[15] On 5 August 2019, the Committee issued a decision concluding it would take no further action.

[16] The Committee said that r 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) required the disclosure of known defects, but not hidden or underlying defects. The appellant thought that the listing price

of the property was too high and he was concerned that the licensee and the solicitor intended to market the property without disclosure of its defects. Instructions were communicated by the solicitor to the licensee who confirmed that he made sure that buyers were aware of the property's defects.

[17] The Committee found that the licensee had acted on the solicitor's instructions and made appropriate disclosures during the marketing of the property and in the auction documents, with clear written advice to prospective purchasers as to the property being sold 'as is where is' and that there would be no recourse in respect of the condition of the property. It found there was no breach of r 10.7.

[18] The Committee also dealt with the complaint that the licensee had not acted in good faith and dealt fairly with the appellant (r 6.2), based on him being asked to vacate the property during its marketing. The Committee noted that the condition of the property at the time of sale presented challenges. There were leaks and other defects requiring repair. The appellant was living in the property and he was reluctant to participate in the sale process. The licensee therefore advised the solicitor that if the property was vacant, cleaned out and staged with furniture, it would increase the sale potential.

[19] The Committee found that it was the licensee's professional duty to advise the solicitor how he thought the property should best be presented for sale. The Committee regarded the licensee's advice as standard in the circumstances.

[20] The appellant had also contended that he was wrongly blamed by the licensee for delaying the selling process by filing a complaint with the Authority. The Committee found no evidence that the licensee was a party to any such accusations against the appellant. Furthermore, the appellant alleged that he was blamed for delays in the settlement of the property. Again, the Committee found no evidence the licensee blamed the appellant for any such delays.

[21] The appellant also complained that he was wrongly charged cleaning costs, but the Committee found the evidence to show that the decision to clean the property was a matter decided between the solicitor, the purchaser's solicitor and the agent representing the purchaser. There was no involvement by the licensee.

[22] The Committee also dealt with the appellant's complaint about the licensee's marketing costs. It was alleged that not all of the marketing was carried out as promised and that it was incorrectly charged. The Committee found that as the licensee was acting for the solicitor and not the appellant, the licensee had no obligation to the appellant in respect of the agreed marketing costs.

APPEAL

[23] In his appeal to the Tribunal against the Committee's decision, the appellant challenged the conclusions on four allegations made in his complaint against the licensee:

1. The failure to disclose the lounge ceiling leak.

2. The requirement or request to vacate the property.

3. A false allegation that the appellant delayed—

   (a) the listing of the property, and

   (b) settlement.

4. Overcharging the marketing costs.

[24] The Tribunal issued a decision on 7 September 2022 dismissing the appeal.

[25] It was found by the Tribunal that the Committee did not expressly refer to the lounge ceiling leak in its decision. It dealt with the matter as a general allegation that the licensee had failed to disclose known defects.

[26] The Tribunal accepted there was a leak in the lounge ceiling and that the licensee knew about it. However, plainly he had disclosed the lounge leak to the failed bidder. That being the case, there was no reason to believe he would not have also disclosed it to other prospective purchasers with whom he dealt. Hence, there was no breach of r 10.7 or any other rule in respect of the lounge ceiling leak.

[27] As for the solicitor's requirement to vacate the property, the appellant had advanced a bad faith motive for the licensee's advice. He said it was to prevent him taking photographs of the lounge ceiling leak which he alleged the solicitor and licensee were not going to disclose to prospective purchasers. As the Tribunal had already found that the licensee did disclose the lounge ceiling leak to prospective purchasers, the appellant's contention as to the motive behind the request to vacate was rejected.

[28] Furthermore, the Tribunal agreed with the Committee that given the condition of the property and the background to the sale, the licensee appropriately recommended that the appellant vacate the property in order to achieve the best price. The licensee's recommendation was standard industry advice in the circumstances. It was found there

was no breach of r 6.2 or any other rule in respect of the licensee's advice to the solicitor that the appellant vacate the property.

[29] As for the appellant's complaint that he was wrongly blamed by the licensee for delaying the selling process by filing a complaint with the Authority, the Tribunal found that the appellant had not pointed to any evidence that the licensee accused him of that to any person. In respect of the delayed settlement, the Tribunal accepted it was delayed by a weekend and that this was attributed to the appellant but there was no evidence that the licensee blamed the appellant. The Tribunal found there was no breach of any professional obligation by the licensee in respect of the delays.

[30] Finally, as to the marketing costs, the evidence before the Tribunal was that the agency charged $2,705.00 (incl. GST) for marketing.[2] The appellant contended that the agency did not carry out some of the features or events mentioned in the marketing plan. This was dismissed by the Committee on the basis that the licensee had no obligations to the appellant.

[31] The Tribunal did not accept the Committee's finding that the licensee owed no obligation to the appellant as an owner. While the appellant was entitled to complain about the alleged overcharging of marketing costs, he had produced no corroborative evidence. There was no independent evidence of any professional wrongdoing by the licensee in relation to the marketing costs charged. For a reason which was therefore different from that of the Committee, the Tribunal agreed that no further action should be taken on that aspect of the complaint.

TRIBUNAL'S JURISDICTION TO AWARD COSTS

[32] The Tribunal's jurisdiction to award costs is set out in s 110A of the Act:

> **110A Costs**
>
> (1) In any proceedings under this Act, the Disciplinary Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
>
> (2) Without limiting the matters that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether, and to what extent, any party to the proceedings—
>
> (a) has participated in good faith in the proceedings:
>
> (b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:

[2] Agency's settlement invoice (29 May 2018) at 401 of the Authority's principal bundle.

(c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

(3)–(4) …

[33] In *Commissioner of Police v Andrews*, the High Court was concerned with the almost identical costs provision for proceedings before the Human Rights Review Tribunal (the HRRT).[3] The HRRT had declined to award costs in favour of the Commissioner of Police against the unsuccessful claimant. It had rejected the traditional civil litigation approach of 'costs follow the event', which had been the previous practice of the HRRT. It considered that was not fair and reasonable, given the nature of human rights claims.[4] Nor should the vulnerable and impecunious persons who were parties be deterred from accessing the HRRT.

[34] The High Court in *Andrews* considered that the HRRT was right to express caution about applying the conventional civil costs regime.[5] Statutory tribunals existed to provide simpler, cheaper and more accessible justice than ordinary courts and the imposition of adverse costs orders undermined the cheapness and accessibility of tribunals. The HRRT provided a forum through which potentially vulnerable individuals could challenge the exercise of state power.

[35] The High Court considered that the HRRT was the appropriate body to develop its approach to costs.[6] It was accepted by the Court that some claims should have cost consequences, but it did not follow that the cost consequences for all claims should be those that applied in civil litigation in the courts.[7] The past approach to costs had been the same regardless of the type of proceeding, but the High Court considered the cost consequences were not the same for each kind of proceeding.[8] It declined to interfere with the HRRT's decision.[9]

[36] The Tribunal considered its approach to costs in *Kooiman v Real Estate Agents Authority*.[10] It concerned an unsuccessful appeal in the Tribunal by a property owner (the complainant to the Authority). The successful licensees sought costs against the owner appellant.

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[3] *Commissioner of Police v Andrews* [2015] NZHC 745.
[4] At [49].
[5] At [61] & [63].
[6] At [71].
[7] At [65].
[8] At [67]–[68].
[9] At [71].
[10] *Kooiman v Real Estate Agents Authority (CAC 519)* [2019] NZREADT 11.

[37] The Tribunal was guided by *Andrews*, given the almost identical statutory provision.[11] It was accepted that it should be cautious in applying the conventional costs regime for civil litigation.[12] While some proceedings should have costs consequences, it did not follow that all should. Tribunals existed to provide simpler, speedier, cheaper and more accessible justice than the ordinary courts. It found that the imposition of adverse costs orders should not undermine the important advantages of tribunals over courts. Furthermore, because of the consumer protection focus of the Act, access to the Tribunal should not be unduly deterred. There was a need for a flexible approach.

[38] In *Kooiman*, the Tribunal found that the unsuccessful appellant had participated in good faith and had not delayed or obstructed the proceeding.[13] No costs were awarded.

[39] This was followed by the Tribunal in *Beatson*, another case where the successful licensees sought costs against the appellant.[14] The Tribunal relied on *Kooiman*. In a reference to the High Court decision in *Andrews*, it observed that the parties before the Tribunal in *Beatson* did not have the same poor financial characteristics as those before the HRRT and were not challenging alleged abuse of state power.[15] It further noted that the decision on costs in each case is discretionary and that it is not in every case that costs should follow the event.[16]

[40] In the *Beatson* case, the Tribunal had regard to what it described as the commercial flavour of the dispute (whether a commission should be paid, which had led to an action in the District Court).[17] The proceeding in the Tribunal was considered to have close parallels to conventional civil litigation. It was therefore reasonable to apply the same approach to costs, on the basis that the successful party should be awarded a contribution towards its actual cost. It ordered a contribution to, but not indemnity for, the actual costs incurred.[18]

[41] The quantum of costs in *Beatson* returned to the Tribunal.[19] In the second *Beatson* decision, the Tribunal said that the traditional approach that costs follow the event had been adopted. A successful party would be awarded a contribution towards party and party costs, unless an exceptional factor justified a departure from it. The

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[11] At [62].
[12] At [63].
[13] At [66].
[14] *Beatson v Real Estate Agents Authority (CAC 416)* [2019] NZREADT 45.
[15] At [28]–[29].
[16] At [32].
[17] At [32].
[18] At [34].
[19] *Beatson v Real Estate Agents Authority (CAC 416)* [2020] NZREADT 13.

Tribunal had to be assured that the costs charged were reasonable.[20] However, it was understandable that the costs in *Beatson* were high, as the allegations were serious and reputations were at stake.

[42] The Tribunal in *Beatson* considered that the High Court's arrangement for costs (category 2B) reflected a pragmatic view of fixing costs. It represented two-thirds of the rates charged by practitioners in the relevant category. While the actual costs were $27,000, the Tribunal found that costs of $12,500 would have been justified. It awarded $8,250, being two-thirds of that figure. In addition, actual and reasonable disbursements were allowed.

[43] The issue of costs in the Tribunal was also considered in *Cavanagh*.[21] The Tribunal had allowed an application for review by the licensee of the Registrar's decline of a licence, the Registrar not being satisfied the licensee was a fit and proper person to hold a licence. The Tribunal noted that none of the matters set out in s 110A(2) were applicable, nor was there any conduct on the part of the Registrar to justify increased costs.[22] Mr Cavanagh was nevertheless awarded costs on the basis that it was an appropriate case for costs to follow the event.[23] It accepted that the Registrar's public interest role was a relevant factor. In determining the appropriate amount, the Tribunal's starting point was the High Court costs regime (category 2B) with a reduction for the Registrar's public interest role.

SUBMISSIONS

Application from the licensee

[44] An application for costs was made by the licensee in submissions (23 September 2022).

[45] Counsel for the licensee, Mr Dewar, notes that the first allegation (the lounge leak) was framed as an accusation of proactive dishonesty. The appellant continued to promote the claim of dishonesty throughout, contending that the licensee proactively hid leaks. The second issue raised by the appellant related to advice given by the licensee to the solicitor that the property ought to be vacated. The licensee's conduct was entirely appropriate. The third issue, related to cleaning the property, also carried an allegation of dishonesty by suggesting that the invoice was fake. The Tribunal noted that this was

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[20] At [9] & [11].
[21] *Cavanagh v Registrar of the Real Estate Authority* [2021] NZREADT 47.
[22] At [31].
[23] At [32].

appropriately dealt with by the High Court. The final issue related to marketing costs where the Tribunal concluded there was no evidence of any wrongdoing by the licensee.

[46] It is accepted that awards of costs in the Tribunal are rare and that the presumption applicable to civil litigation, where costs follow the event, does not apply. However, this is a case in which costs are warranted on the facts.

[47] The first factor marking the case out as one in which an award of costs is justified, is the allegation of serious dishonesty.

[48] The second aspect marking out the case is that the appellant has demonstrably not suffered any compensatable loss of any kind, but has been motivated to seek money from the licensee and others. The appellant had been attempting to purchase the property from his co-owner at a price considerably less than that which was obtained. The appellant felt that the situation presented an opportunity to acquire the property at a reduced price as a result of its state of repair and had been thwarted by the litigation brought by his co-owner. He had lost a perceived financial advantage to himself and consequently had used the process to seek to recover money.

[49] The Tribunal should recognise the danger that the process can be weaponised to the extreme prejudice of industry participants like the licensee. Claimants can cynically exploit processes, not for the purpose of genuine complaints about alleged professional shortcomings, but rather to seek financial returns.

[50] The third aspect raised is that the process undertaken by the appellant is one of three employed by him to make claims before bodies which generally will not visit costs consequences on unsuccessful claimants. He has utilised the Tribunal's resources cynically rather than genuinely. He expects that his claims, although false and unreasonable, will not cost him anything while causing significant distress and cost to the licensee.

[51] In November 2018, the appellant brought a complaint against the solicitor, which was dismissed. He revisited this in the Disputes Tribunal filing a fresh claim against the solicitor and also the manager of the agency. The Disputes Tribunal dismissed the claim against the manager but has yet to hear the claim against the solicitor.

[52] The appellant has accordingly made it clear he wants money as an outcome. He has supported his claim with allegations of fraud and dishonesty against an innocent, hardworking licensee who conducted himself with the utmost integrity and has an unblemished and long career history. Allegations of dishonesty, and to be labelled a liar and a cheat, are serious attacks.

[53] It is accepted that the Tribunal's power to award costs under s 110A is exercised sparingly. However, it is not in any way fettered and the section particularly emphasises participation based on "good faith". It is submitted that the appellant's persecution of the complaint and the appeal had been in bad faith.

[54] The appellant has engaged in needless abuse and inexcusable conduct which has added to the difficulty and cost of the proceedings by making serious and baseless accusations of dishonesty against the licensee.

[55] The Tribunal must recognise that allegations of professional misconduct are never taken lightly by responsible practitioners. The licensee has an outstanding record in real estate and has never been the subject of any prior complaints. He has been obliged to obtain representation and to pay for it. The complaint was not about dereliction of duty or low-level negligence, but of actual dishonesty. *In Apostolakis v Attorney General no. 3 (Costs*),[24] the Human Rights Review Tribunal awarded costs against Mrs Apostolakis because there was no plausible basis for her claim and she had filed a number of other claims in the Tribunal which had been struck out as an abuse of process. It is submitted that the appellant's conduct exceeds by a very wide margin the threshold described in *Mather*.[25]

[56] The Tribunal ought to mark its displeasure and require the appellant to pay costs to the licensee. Such an award would stand as a warning to those who bring unreasonable and capricious claims of this type.

[57] While it is conceded that the Tribunal's costs approach is not directly analogous with that taken in ordinary civil litigation, there is no reason that costs on an indemnity basis could not be awarded. One of the principal grounds on which such costs are traditionally awarded is the improper pursuit of groundless allegations of fraud or dishonesty. Counsel notes a recent High Court decision in *PCL Trustees (No. 2)*.[26]

[58] The costs rendered by counsel to the licensee were $13,941, with further time of $3,400 to be billed (a total of $17,341).

[59] In a reply (14 October 2022) to the appellant's submissions, Mr Dewar submits that the appellant's application for costs against the licensee is based on an unsupportable contention of bad faith. In regard to the licensee's application for costs, it is submitted that it is not incumbent on a party seeking costs to actually prove bad faith.

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[24] *Apostolakis v Attorney General No. 3 (Costs)* [2019] NZHRRT 11.
[25] *Complaints Assessment Committee 2106 v Mather* [2021] NZREADT 54 at [61].
[26] *PCL Trustees (No. 2) Ltd v Pub Charity Ltd* [2022] NZHC 2278.

It is not the case that the licensee has to prove that the appellant knew he was being unreasonable when levelling baseless allegations of dishonesty against the licensee.

Submissions of the Authority

[60] In his memorandum (7 October 2022), Mr Mortimer-Wang said the Authority adopted a neutral position on costs.

Objection of the appellant

[61] In his submissions (2 October 2022), the appellant opposes an award of costs against him.

[62] The appellant primarily contests the Tribunal's findings in the earlier decision. He sets out what he regards as the errors. Such matters have already been determined by the Tribunal and it declines to revisit its conclusions.

[63] In response to the claim for costs, the appellant contends there is no basis to award costs against him. He strenuously denies any wrong motive or bad faith. He says he cooperated with the Tribunal, but was unsuccessful because of his lack of experience in "this path" and the genuine errors of the Tribunal.

[64] The appellant himself claims costs against the licensee, given what he says was the misconduct, bad faith and baseless allegations of the licensee. He seeks reimbursement of the overcharged marketing costs ($493), the cost of the appeal ($560) and an airfare for return travel to Australia in order to appear (remotely) in the appeal ($2,000). Additionally, he seeks unquantified compensation for his time, as well as for the inconvenience and stress he has suffered.

DISCUSSION

[65] The licensee contends the appellant has pursued the complaint and the appeal before the Tribunal in bad faith. It is contended that he has used the complaint and appeal process to recover the lost financial advantage that would have come about if he had been able to acquire the property at a reduced price from the co-owner.

[66] It is difficult for the Tribunal to understand the appellant's motive. His primary allegation has always been the concealment of the lounge ceiling leak, yet it should have been clear to the appellant from the communications to him from the solicitor and the licensee that it would be disclosed and was in fact disclosed. Furthermore, the property was sold on an 'as is where is' basis, so prospective purchasers were on notice to

undertake their own due diligence. Additionally, there is no basis on which the appellant could claim he suffered any loss from any concealment by the licensee (if true, which it was not).

[67] As difficult as it is to fathom the appellant's motivation, we accept that he pursued the complaint in good faith and not because he saw the process as an opportunity to recover any perceived financial loss. The allegations made against the licensee and the solicitor had no reasonable basis, but we find that he believed them to be true and continues to believe them to be true.

[68] This brings us to the principles applicable in relation to costs.

[69] In this Tribunal, there is no principle that costs follow the event. The licensee is not entitled to costs merely because he was successful. We have a discretion as to whether costs may be awarded to a successful party. The factors specified in s 110A(2) which will often justify an award, are not present in this case. The appellant did not lack good faith and he has not obstructed the Tribunal's process. Nonetheless, the Tribunal's earlier decisions on costs establish that it may award costs to a successful party, even where such factors are absent.[27]

[70] This is an appropriate case for costs to follow the event and be awarded to the successful licensee. This is because there was no reasonable basis for the appeal. That is particularly true of the dishonesty, fake document and bad faith allegations made by the appellant against the licensee. There was no proper basis for such allegations or the appellant's continued belief in them.

[71] The licensee is therefore entitled to a reasonable contribution towards his costs. In the absence of bad faith or obstruction by the appellant increasing the licensee's costs, the latter is not entitled to indemnity costs. The total costs of the licensee are $17,341, which we accept are reasonable having regard to the serious allegations against him. It is appropriate to award the licensee two-thirds of these costs ($11,560).

[72] There is no basis on which the appellant could be awarded costs against the licensee, whether having regard to the s 110A(2) factors or otherwise.

OUTCOME

[73] The appellant is to pay the licensee within 21 days of this decision the sum of $11,560 as a contribution towards his costs, pursuant to s 110A of the Act.

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[27] *Beatson*, above n 14 at [32], *Cavanagh*, above n 21 at [31]–[32].

[74] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

PUBLICATION

[75] In light of the outcome of this appeal and having regard to the interests of the parties and of the public, it is proper to order publication of the decision of the Tribunal without identifying the appellant, the licensee or the agency.

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D J Plunkett
Chair

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C A Sandelin
Deputy Chair

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G J Denley
Member