

Report - City of Marion  
Full investigation - *Ombudsman Act 1972*

Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Council member	Councillor David Speirs <sup>1</sup>
Council	City of Marion
Ombudsman reference	2014/02552
Date complaint received	14 March 2014
Issue	Whether Cr Speirs breached the conflict of interest provisions of the <i>Local Government Act 1999</i> and clause 3.13 of Part 3 of the Council Member Code of Conduct

### Jurisdiction

I received a complaint alleging a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (**the Code of Conduct**).<sup>2</sup> An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act.<sup>3</sup>

I consider that the complaint about Cr Speirs falls within this definition; and I am also satisfied that in relation to the complaint, Cr Speirs was 'engaged in the work of ... [the] agency' within the meaning of section 3 of the Ombudsman Act.

A complaint about the same matter was also made by the Chief Executive Officer (CEO) of the City of Marion (**the council**) having regard to Part 3 of the Code of Conduct which states that 'Alleged breaches of this Part made to a Council ... may be referred to the Ombudsman for investigation...'

I commenced an 'own initiative' investigation under section 13(2) of the Ombudsman Act.

### Investigation

My investigation has involved:

- assessing the information provided by the complainant
- assessing the information provided by the CEO

<sup>1</sup> Although Mr Speirs is no longer a member of the council I will refer to him in this report as Cr Speirs given that he was a council member at the time of the council meeting on 11 March 2014.

<sup>2</sup> The Code of Conduct was gazetted on 29 August 2013.

<sup>3</sup> Section 263A(4) Local Government Act; section 3, Ombudsman Act.

- seeking a response from Cr Speirs
- seeking a response from the council
- listening to an audio recording of the council's consideration of item Ref No GC110314R04
- considering the conflict of interest provisions of the Local Government Act
- considering the Code of Conduct
- providing the council and Cr Speirs with my provisional report for comment
- preparing this report.

### Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.<sup>4</sup> It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved  
...<sup>5</sup>

### Response to my provisional report

In response to my provisional report the council advised me, by letter dated 3 June 2014, that the council has considered my provisional report at a meeting on 27 May 2014 and that it supported my provisional views.

Cr Speirs did not provide a response to my provisional report.

### Background

1. Cr Speirs was elected as a council member to the Coastal Ward of the council in November 2010.
1. The development of the Hallett Cove Foreshore Final Master Plan (**the master plan**) originated in 2006 as a part of the Marion South Plan.
2. On 22 September 2009, the council adopted a Long Term Financial Plan (**the financial plan**). It has since been adopted by the council annually. The financial plan includes an allocation for the master plan.
3. At its meeting on 26 June 2012, the council considered and noted a report on the Hallett Cove Coastal Management Study. This management study was the result of a grant received from the Coastal Protection Board. The purpose of the study was to guide the council in its future planning and management of the foreshore at Hallett Cove beach. Following this, the council received funding from the former Department of Planning and Local Government to develop the master plan.<sup>6</sup>

<sup>4</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>5</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

<sup>6</sup> Letter from the CEO to the Ombudsman dated 14 April 2014.

4. On 26 June 2013 council members attended a forum which was held to give them an overview of the master plan and the final draft concepts.
5. In August 2013 a community engagement process was held in relation to the master plan.
6. In his August 2013 ordinary return, Cr Speirs declared that he was running as the Liberal candidate for the seat of Bright in the 2014 state election.<sup>7</sup> The council area is within the seat of Bright.
7. The master plan was finalised in November 2013.
8. The council lodged a funding application for the master plan with the Department of Planning, Transport and Infrastructure for the amount of \$1.7m. In mid-February 2014 the council was advised that the funding application had not been successful.
9. On 17 February 2014, Cr Speirs officially commenced his campaign for the state election.
10. As part of his campaign, Cr Speirs committed to 'revitalising Hallett Cove's foreshore'.<sup>8</sup> He publicly announced that 'a state Liberal Government [would] partner with the City of Marion to deliver a \$3.5 million upgrade [to the Hallett Cove foreshore]'.<sup>9</sup> He also publicly pledged \$1.7 million on behalf of the Liberal Party towards the Hallett Cove foreshore upgrade.<sup>10</sup>
11. At the council meeting on 11 March 2014 the council considered a motion about the master plan. Cr Connor moved the motion and Cr Speirs seconded the motion. The minutes record the following:

**Hallett Cove Foreshore Final Master Plan  
Ref No: GC110314R04**

Moved Councillor Connor, Seconded Councillor Speirs that Council:

1. Endorse the Hallett Cove Foreshore Master Plan
2. Endorse further investigation as to how commemorative elements of the master plan may be delivered by the 2015 ANZAC Centenary
3. Request a further report regarding prioritisation, staging and funding opportunities for the delivery of the master plan be brought to Council

7.51pm Councillor Speirs left the meeting

7.52pm Councillor Habib left the meeting

**Lost**

**Councillor Bouwens called for a division**

**Those For:** Councillors Bouwens, Allen and Connor

<sup>7</sup> Sections 64 to 67 and Schedule 3 to the Local Government Act require council members to disclose their private interests, such as the name of any political party of which the council member is a member, in primary and ordinary returns. This information is maintained on a Register of Interests by the CEO of the council.

<sup>8</sup> <http://davidspeirs.com.au/an-opportunity-to-serve/>, accessed on 17 March 2014.

<sup>9</sup> <http://davidspeirs.com.au/transforming-hallett-coves-foreshore/> as at 17 March 2014.

<sup>10</sup> <http://www.adelaidenow.com.au/news/south-australia-state-election-2014/liberal-candidate-and-marion-councillor-david-speirs-failed-to-declare-a-conflict-of-interest/story-fnl3k6uz-1226853072781> as at 17 March 2014.

**Those Against:** Councillors Pfeiffer, Campbell, Hutchinson, Hull, Verrall, Veliskou and Appleby

The motion was  
**Lost**

12. My office has listened to an audio recording of the consideration of this item at the 11 March 2014 council meeting. During the debate about the motion Cr Connor told the elected members that the Liberal Party had pledged to a partnering commitment of \$1.7 million for the project should they win the upcoming state election. This information had not been included in the documentation provided to the council members.
13. Cr Speirs did not vote in relation to the item. He left the meeting at 7.51pm, when the matter of the pledge was raised by Cr Connor, and returned to the meeting at 7.58pm, when the matter had concluded.
14. Cr Speirs did not declare a conflict of interest and no conflict of interest is disclosed in the minutes.
15. The CEO advised my investigation that 'during the course of the Council meeting, and after the matter of the pledge had been raised, Cr Speirs sought advice during the meeting by the way of text message to staff as to whether he should leave the meeting and was advised to do so.'<sup>11</sup>
16. The state election was held on 15 March 2014 and Cr Speirs won the seat of Bright.
17. Cr Speirs resigned from his position as a council member on 21 March 2014.
18. As some questions were raised at the council meeting as to whether Cr Speirs had a conflict of interest, the CEO sought legal advice. He was advised to refer the matter to this office under Part 3 of the Code of Conduct. He did so on 21 March 2014.

## Legislation

19. Section 63 of the Local Government Act provides for a code of conduct and that council members must comply with it.
20. Section 73(1) defines the circumstances in which an elected member has 'an interest in a matter' as follows:

### **73—Conflict of interest**

- (1) A member of a council has an interest in a matter before the council if—
  - (a) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or
  - (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a non-pecuniary detriment,

(not being a benefit or detriment that would be enjoyed or suffered in common with

<sup>11</sup> Letter from the CEO to the Ombudsman dated 14 April 2014.

all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons).

21. Section 74(1) provides:

A member of a council who has an interest in a matter before the council must disclose the interest to the council.

22. Section 74(2) provides:

A member in making a disclosure under subsection (1) must provide full and accurate details of the relevant interest.

23. Section 74(4) provides:

A member of a council who has an interest in a matter before the council must not:

- (a) propose or second a motion relating to the matter; or
- (b) take part in discussion by the council relating to that matter; or
- (c) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed; or
- (d) vote in relation to that matter.

24. Clause 3.13 of Part 3 of the Code of Conduct provides:

Council members must be committed to making decisions without bias and in the best interests of the whole community and comply with the relevant conflict of interest provisions of the Local Government Act 1999.

**Whether Cr Speirs breached the conflict of interest provisions of the *Local Government Act 1999* at the council meeting on 11 March 2014**

25. To decide whether Cr Speirs was in breach of the conflict of interest provisions of the Local Government Act, I must first be satisfied that he had an 'interest in a matter' in relation to the council decision on 11 March 2014, within the meaning of section 73(1). That is, I must be satisfied that he would receive a benefit or suffer a detriment, or would have a reasonable expectation of receiving a benefit or suffering a detriment of the type described in section 73(1). Such benefit or detriment should not be shared with all or a substantial proportion of ratepayers, electors or residents of the area, or some other substantial class of persons.
26. In the case of *Petrovski v Dolling*,<sup>12</sup> the SA District Court emphasised that the legislation is confined to the type of interest referred to in section 73 and 'not to conflicts of interest at large'.<sup>13</sup> The disclosure requirement in section 74 is confined to disclosure of the type of interest in a matter described in section 73.
27. Further, the court said that the question of whether a council's resolution gives rise to a section 73(1) interest, must be determined by a consideration of the actual terms of the resolution.<sup>14</sup> In addition, the test is that the council member 'would' receive a benefit or suffer a detriment or 'would have a reasonable expectation' of receiving a

<sup>12</sup> *Petrovski v Dolling* [2013] SADC 27 (5 March 2013).

<sup>13</sup> *Ibid*, [41].

<sup>14</sup> *Ibid*, [34].

benefit or suffering a detriment. Speculation about the consequences of the matter being decided in a particular manner is not sufficient.

28. The resolution proposed that the council endorse the master plan, and requested that a further report regarding prioritisation, staging and funding opportunities for the delivery of the master plan be prepared. In effect, the purpose of the motion was to continue with the progression of the master plan. Without the motion being passed it is reasonable to conclude that the master plan was not going to proceed, at least not at this time or in this form.
29. Cr Speirs denies that he had an interest in the matter. He has submitted as follows:
- As I initially saw this as an administrative motion, it didn't even cross my mind for one second that it would be construed as a conflict, so I seconded the motion, but I did not participate in any debate.<sup>15</sup>
30. Given that Cr Speirs had publicly included the master plan proposal as a part of his campaign, I consider that he ought to have turned his mind to the fact that his voting in relation to the master plan could have been a conflict of interest under the Local Government Act, or could have been perceived as a conflict of interest. The fact that he saw it as an 'administrative motion' that 'would be whole-heartedly endorsed by the council'<sup>16</sup> is not, in my view, a relevant consideration.
31. Further, Cr Speirs advised my investigation that 'all election candidates make promises to work with other tiers of government if elected', further stating that:
- In the 2014 election candidates from all political parties pledged funds for City of Marion-based projects which would all require the council to receive funding and deliver the projects. Many of these election promises were not part of the council's strategic priorities and had no commitment of additional funding from the council... As above, my actions were no different to other candidates who make funding pledges in the lead-up to elections. The foreshore masterplan was an uncontroversial project, with seemingly broad community and elected member support, being delivered as a part of an ongoing reserve and park upgrade which Marion has been undertaking for several years. In many ways this project was business-as-usual and the council had spoken to political candidates about contributing money to deliver a more ambitious project than council finances would allow. The fact that the masterplan had not yet been endorsed should not stop council seeking funding from other bodies, including state election candidates - in fact it is the very thing a proactive, strategic council should be doing.<sup>17</sup>
32. The CEO also advised my investigation that 'during State and Federal elections, many candidates make pledges for various community projects.'<sup>18</sup>
33. I am satisfied that Cr Speirs had an 'interest in the matter' within the meaning of section 73(1). Section 73(1) requires a council member to suffer or to have a reasonable expectation of suffering a detriment or benefit if the matter were decided in a particular manner. As a part of his state election campaign Cr Speirs had publicly stated that the development of the Hallett Cove foreshore was a priority for him, and that he pledged \$1.7m towards it on behalf of the Liberal Party if they were elected into government. In my view, it is reasonable to expect that the decision to endorse and proceed with the master plan would benefit Cr Speirs' campaign, as he had promised to pledge funds to the foreshore development and the decision to not proceed with the master plan could have lost him votes.

<sup>15</sup> Letter from Cr Speirs to the Ombudsman dated 14 April 2014.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Letter from the CEO to the Ombudsman dated 14 April 2014.

34. As such, in these circumstances, my view is that Cr Speirs had an 'interest in a matter' in relation to the decision within the meaning of section 73(1) of the Local Government Act and breached clause 3.13 of the Code of Conduct. Further, by failing to declare this interest, seconding a motion in relation to the matter, and apparently remaining in the room during some of the debate about the matter, Cr Speirs was in breach of section 74(1) and (4) of the Local Government Act, and acted in a manner that was contrary to law within the meaning of section 25(1) of the Ombudsman Act.


### Opinion

In light of the above, I consider that Cr Speirs breached the provisions of sections 74(1) and (4) of the Local Government Act and clause 3.13 of the Code of Conduct. In this way, Cr Speirs acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

### Final comment

Given that Cr Speirs is no longer a member of the council, I do not make any recommendation for the council to take any action against Cr Speirs.

I recommend that the council confirm to me in writing by 15 August 2014 that this report has been provided to a public meeting of the council.

A handwritten signature in black ink, appearing to read 'Megan Philpot', written in a cursive style.

Megan Philpot  
ACTING SA OMBUDSMAN

4 July 2014