

Report - City of Victor Harbor
Full investigation - *Ombudsman Act 1972*

Complainant	Ms Sarah Milosevic
Council member	Councillor Peter Charles
Council	City of Victor Harbor (the council)
Ombudsman reference	2015/10767
Date complaint received	17 December 2015
Issues	<ol style="list-style-type: none">1. Whether a member of the council's Development Assessment Panel (CDAP), Cr Charles, engaged in consultation outside of the CDAP process with parties on a proposed development application that was likely to be heard by the CDAP2. Whether Cr Charles gave advice to a third party on a development application after it had been lodged, outside of a CDAP meeting3. Whether Cr Charles directed a person who was a local government employee and/or attempted to influence that local government employee4. Whether Cr Charles failed to declare at the CDAP meeting on 10 November 2015 that he had engaged with the local government employee and a third party (neighbour of the applicant) in a manner that could bring into question his impartiality, and sat in assessment of the application.

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Section 56A(22) of the *Development Act 1993* provides that each council development assessment panel must have a public officer (who must not be a member of the panel) appointed by the council. Section 56A(24) provides that:

- (24) The functions of a public officer include ensuring the proper investigation of complaints about the conduct of a member of the relevant panel (but nothing in this section prevents a person making a complaint to the Ombudsman at any time under the Ombudsman Act

1972 or the public officer referring a complaint to another person or authority for investigation or determination).

The council's Chief Executive Officer, Mr Graeme Maxwell, (**the CEO**) as the public officer of the Council Development Assessment Panel (**the CDAP**) received a complaint from Ms Sarah Milosevic. The CEO forwarded the complaint to my Office for investigation.

The complaint alleges breaches of the Code of Conduct published by the Minister under section 21A of the Development Act (**the Code of Conduct**).

Section 56A(9) of the Development Act provides that the provisions of Chapter 13 Part 1 of the *Local Government Act 1999*, relating to the conduct of council members, extend to council development assessment panels and to members of council development panels as if a reference to a member of a council were a reference to a member of a council development assessment panel. 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.¹ Further, the Code of Conduct provides that nothing in the Code of Conduct prevents any person from making a complaint under the Ombudsman Act.

As such, allegations of breach of the Code of Conduct are within the jurisdiction of the Ombudsman.

Investigation

My investigation has involved:

- assessing the information provided by the council
- seeking a response from Cr Charles
- seeking further information from the council
- considering the Development Act
- considering the Code of Conduct published by the Minister pursuant to section 21A of the Development Act
- providing the council, the complainant and Cr Charles with my provisional report for comment, and considering their responses
- 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.² 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 answer³ to the question whether the issue has been proved
... .

¹ Section 263A(4) Local Government Act; section 3, Ombudsman Act.

² 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.

³ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Response to my provisional report

In response to my provisional report the council commented that it considered the report to be 'fair and well considered'. The council suggested that a time limit of three months be placed on Cr Charles to attend conflict of interest training.

The complainant did not provide a response to my provisional report.

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

Background

1. Cr Charles is a member of the City of Victor Harbor's Council Development Assessment Panel (**the CDAP**). The complaint alleges in effect that in this capacity, Cr Charles failed to comply with section 56A(7) of the Development Act and the Code of Conduct.
2. On 28 August 2015 Ms Milosevic and Mr Kluse submitted a development application (**the application**) to construct a proposed single storey detached dwelling (**the property**).
3. The application was determined to be a category 1 application, which would normally be assessed by council staff under delegation. However, the council's Development Assessment Panel Charter and Delegations Policy provides that a category 1 application may be referred to the CDAP if it is considered to be 'contentious and controversial', or 'potentially controversial'.⁴
4. On 22 October 2015 a neighbour to the property, Mr Rod Wood, telephoned Cr Charles to raise concerns about the proposed development. Mr Wood was concerned that the proposed setback of the property would impede on his ocean view. Cr Charles asked Mr Wood to send him an email.
5. Mr Wood emailed Cr Charles on 22 October 2015, including:

Dear Peter, Further to our recent conversation regarding the new house proposed for 12 Nevin Avenue Encounter Bay, we wish to submit the following information.

The land in question runs from Nevin Avenue through to Raminjeri Crescent. On the sea side of this land there is a house with an 8 metre setback built in the 90's. The other houses along the Crescent consist of 50's and 60's designs with setbacks mostly of 10 to 12 metres and more. All the properties have sweeping lawns and well maintained gardens fronting the Crescent.

...

We have viewed the plans in Council proposed for 12 Nevin Avenue and understand that the 6 metre setback has been rejected. The Council has sent a letter to the owners stating that they require minimum setback of 8 metres but we have been led to believe that there is a possibility that the Council may accept a 7 metre alternative.

We do not believe this is a good outcome as it is not keeping with other properties on this side of Raminjeri Crescent. The Victor Harbor development plan states a minimum setback of 6 metres but where this is not in keeping with surrounding properties, then a setback of up to 8 metres can be applied.

We are of the opinion that the 8 metre setback should be adhered to in this situation to keep within the character, distinctiveness and ambience of the area. Furthermore, because of the curve of the Crescent, the 8 metre setback will still give the new owners

⁴ Council Development Assessment Panel Charter and Delegations Policy, City of Victor Harbor, adopted by council 21 December 2009, last amended by council 24 March 2014. See 3) f) and g).

ample view of the sea without compromising their design and without compromising the neighbouring property much.

We trust you can bring this case to the attention of the Council Planning Officer and you can stress the need to adhere to the 8 metre setback for the new property.

6. On 22 October 2015, Cr Charles sent an email to Mr Ben Coventry, Manager of Planning and Building:

Please have a look at this proposal and consider imposing an 8mtr set back.
Please explain why if the set back is either 6 or 8 meters as to why 7 has been selected other than splitting the difference.
I have spoken at length with Rod and he has requested I plead his case.

7. Mr Coventry replied to Cr Charles on 26 October 2015, as follows:

Rod has spoken with all the Planning Staff about his concerns with the proposed development. He has been advised that the application is being assessed against the provisions of the Development Plan and that currently amended plans have been sought as the proposed setback of 6m is not supportable.

There are many factors that need to be considered in the assessment of the application including the adjoining development, development in the locality and the limitations of the block.

A potential setback of 7m has been discussed as this achieves some consistency with development in the locality but until the amended plans are submitted to Council it is not possible to undertake any further assessment. It should also be noted that this is a dual frontage allotment and under the provisions of the Development Plan the applicant could orientate their primary frontage towards Nevin Avenue and then build within 2m of the secondary frontage at Raminjeri Crescent. Fortunately they are orientating towards Raminjeri.

The concerns that have been raised are being taken into consideration with the assessment of the application.

8. Cr Charles replied to Mr Coventry by email on 26 October 2015, as follows:

Thanks Ben.
That's clear now.
Please will you convey any new information to Rod when it comes to hand, I don't believe he understands the Dual frontage bit either.
He is trying to hold on to the 60's and have his tiny slit of sea view.

9. Cr Charles had no further contact with Mr Wood.
10. It was considered that the application warranted referral to the CDAP due to the opposition of the neighbour towards the proposed development and the involvement of Cr Charles.
11. The application was considered by the CDAP at its meeting on 10 November 2015.
12. The agenda for the 10 November 2015 CDAP meeting was posted to the CDAP members, including Cr Charles, on 4 November 2015. Agenda item 4.3 of the 10 November 2015 CDAP meeting includes the following Report:

BACKGROUND

At lodgement the development application proposed a setback of 6m from the front of the dwelling to the primary frontage of Raminjeri Crescent. This was identified in the preliminary assessment as being inconsistent with the setback provisions of the

development plan and the applicant was advised that an increased setback would be required as a 6m setback could not be supported.

The applicant in discussions advised that the position of the dwelling has been designed to maximise the size of the rear yard and which has the secondary frontage to Nevin Avenue. An amended setback was discussed and amended plans with an increased setback of 7m have been submitted.

The proposed development has come to the attention of adjoining owners and concerns about the proposed setback have been expressed and received feedback from elected members. As a result the application is being put before CDAP for consideration on the front setback and the intent of the relevant provisions.

ASSESSMENT

...

In assessing the merits or otherwise of the application, the proposed development satisfies all relevant Development Plan provisions with the exception of the setback to the primary frontage which is discussed below:

...

In this instance the concerns that have been expressed about the proposed setback are related to the loss of coastal views and it is acknowledged that the adjoining dwelling to the west will loss [sic] a percentage of view towards the coast.

...I do not consider that an 8m setback is fundamental to ensure compatibility with the existing residential development however a 6m setback would be out of character.

The proposed dwelling will be positioned closer to Raminjeri Crescent than [sic] the adjoining dwellings however the impact on overall streetscape and amenity is considered to be acceptable. There will be some impact on peripheral views however this impact has been reduced by the proposed setback and the articulation to the dwelling. Overall the setbacks of the proposed dwelling are consistent with the requirements of the Development Plan.

13. The Report to the CDAP recommended that the CDAP resolve to grant the Development Plan Consent subject to a number of conditions which are not relevant to this investigation.
14. On 10 November 2015 a number of members of the CDAP, including Cr Charles, made a formal site visit to view the property as part of the assessment of the decision.
15. The minutes of item 4.3 of the 10 November 2015 CDAP meeting record:

5:39pm - K Shierlaw declared a conflict of interest on Agenda Item 4.3, as she knows the applicants and left the chambers.

4.3 Proposal: Single Storey Detached Dwelling

Location: No. 12 (Lot 279) Nevin Avenue, Encounter Bay

Applicant: P & S Kluske

LDA 15/0036	453/319/15 - No. 12 Nevin Avenue, Encounter Bay
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Moved: J Urquhart

Seconded: P Smith

That the Council Development Assessment Panel delegates to the Manager of Planning and Building authority to receive, accept and approve amended plans reflecting an increased front setback of the proposed dwelling.

CARRIED

16. Cr Charles did not declare at the CDAP meeting his prior involvement with the application. Whilst he did not contribute to the debate on the application, he voted in relation to the application.
17. Ms Milosevic wrote a formal letter of complaint to the CEO as the Public Officer of the CDAP about the conduct of Cr Charles in relation to his office as a member of the CDAP dated 17 November 2015, including:

...At the Council Development Assessment Panel Meeting held on Tuesday 10th November 2015 the Category 1 Planning Application for our new home at No 12 Nevin Avenue (Development Application 453/319/15) was considered.

In subsequent conversations with our neighbour Mr Rod Wood of 24 Island View Crescent, Mr Wood informed me that prior to the Panel meeting he had discussed our Planning Application and complained about the proposed setback of our home to Councillor Peter Charles, who is a member of the Council Development Assessment Panel. Mr Wood told me that he had firstly spoken with Ben Coventry, Manager of Planning and Building in regards to our planning application and because Ben had not given him the answer he wanted he went to Councillor Peter Charles to get something done about it.

My partner Mr Phillip Kluske attended the meeting of the Council Development Assessment Panel on Tuesday 10th November and witnessed Councillor Peter Charles remain in the Chamber for the discussion regarding our Planning Application and then vote on the decision.

...

Lastly, prior to Councillor Charles contacting Ben Coventry, myself and Phil Kluske had already had a meeting with Ben Coventry in regards to our planning application. We had compromised with Ben in regards to the set back and changed our plans from a 6m setback to a 7m setback. We believe that if Councillor Charles had not breached the code of conduct then our planning application would have been accepted with a 7m set back.

In light of all the evidence it would be very much appreciated if consideration could be made in regards to reversing a decision of the Council Development Assessment Panel, that we have a setback of 8m, and our planning application be accepted at the 7m setback to which we believe would have been done had none of this occurred.

18. The CEO advised Cr Charles of Ms Milosevic's complaint by letter dated 23 November 2015, and requested a response to the allegations from Cr Charles.
19. By letter dated 7 December 2015, Cr Charles provided a response to the allegations, including:

...On page one of her letter, Ms. Milosevic has made the following statement:-

"Mr Wood told me that he had firstly spoken with Ben Coventry, Manager of Planning and Building in regards to our planning application and because Ben had not given him the answer he wanted he went to Councillor Peter Charles to get something done about it."
(Page 1, paragraph 3, of letter from Ms. Milosevic dated 17th November 2015)

- The sentence above clearly confirms that I was approached (i.e. I didn't initiate contact with either Ms. Milosevic or Mr. Wood).
- After receiving a phone call "completely out of the blue" while I was driving to Goolwa on a business day, I thought I was fulfilling my obligation as a conscientious and compassionate Councillor by doing a great deal of attentive listening whilst Mr. Woods did a great deal of talking about his concerns. Subsequently, I attempted to make an appropriate response.
- I strongly emphasise that at the time of speaking to Mr. Woods (and shortly later when sending an email to the Manager of Planning and Building on 22nd October

2015 and as detailed below), I had no reason whatsoever to think this matter would be presented to CDAP.

- I indicate my preparedness to sign a statement confirming that the first I knew this matter was listed for consideration by CDAP was when I read the CDAP Agenda for the meeting to be held on 10th November 2015.
- I consider this to be an important point which I will elaborate later in my response.
- I remain unclear about the process and criteria that determines:-
 - which Development Applications are referred to CDAP and which are not:- and
 - how members of CDAP are advised (or perhaps more importantly, as I believe this case may have highlighted, the potential risk of members not somehow being advised) of which matters are likely to be forwarded to the panel prior to the Agenda being forwarded.
- I am not an experienced member of the panel but I felt, on the basis that 18 Sturt Street, Victor Harbor was not referred to CDAP, I had no reason to consider that a single story detached dwelling on a generously sized block of land at Encounter Bay would be referred to CDAP.
- I strongly refute any allegation that the (currently uncorroborated) statement attributed to Mr. Wood that “he went to Councillor Peter Charles to get something done about it” that “it” in my opinion could equally infer to getting something done about the concern Mr. Wood had that the adjacent vacant block of land (on the seaward side) was at imminent risk of being developed in a way that might negatively affect the sea view he enjoyed.
- ...
- I genuinely thought I was taking a fair and reasonable course of action but the whole experience has painfully hit home and caused me to consider that in future I may need to firstly ensure my own welfare is safeguarded before I endeavour [sic] try to be of service to concerned rate-payers.
- ...
- I voted on the decision because exactly a week earlier I had in a degree of detail, sought clarification from the Presiding Member (with support information provided by the Director of Planning and Regulatory Services), concerning the possibility of abstaining from certain votes and was conclusively advised that I was required to vote on each and every matter that was presented whilst I was in the Chamber.
- I remained in the Chamber throughout the proceedings associated with Agenda Item 4.3 at the CDAP meeting held on 10th November 2015 because it was my judgement that I did not have a conflict of interest.
- ...
- I believe the informal in-house email detailed above (that I felt obliged to send, following the phone call from Mr. Wood), was short and to the point, polite and respectful, fit for purpose and prior to receiving the entirely unexpected allegations from Ms. Milosevic, at no time was any suggestion made or any indication given to me to the contrary.
 - Please note the Email mentions the possibility of three different setback:- i.e. of 6 metres, 7 metres and 8 metres and as such I consider it to be essentially neutral.
 - I believe the Email contained a fair and reasonable request for information concerning clarification from senior planning staff with respect to why a 7 metre setback apparently seemed to have been preferred.

- The Email (detailed above) that I understand has been alleged to show I acted in breach of the Code of Conduct, elicited a prompt, polite and informative reply from the Manager of Planning and Building (with a copy to the Director of Planning and Regulatory Services) on Friday 23rd October without even the faintest hint that he (or they) considered I had attempted to direct or influence a local government employee.
- ...
- I'm interested to hear convincing reasons why it may be considered more improper or inappropriate for me in my capacity as a CDAP member to forward an Email to the Manager of Planning and Building, (whose department makes recommendations to CDAP and who attends CDAP meetings in an advisory capacity), concerning the possible setback of a proposed building (prior to my having any knowledge that the matter would be directed to the panel), than it was for Mr. Kluske and Ms. Milosevic to meet with the Manager of Planning and Building to discuss the possible setback for the same proposed building, or for Mr Wood to meet with the Manager of Planning and Building and discuss the possible setback for the same proposed building.
- ...
- I hereby state:-
 - that I did not consider I had an interest in the matter before the panel; and
 - that I did not consider I might reasonably be perceived to have an interest in the matter before the panel.
- ...
- I hereby state that I did not consider I had a personal interest which was in conflict with my public duty to act impartially and in accordance with the principles of the Act.
- ...
- I again highlight that until I received the Agenda of the CDAP meeting for 10th November 2015, (and please note that this was well AFTER the phone call from Mr. Wood and the Email to senior members of the planning staff), I had absolutely no idea the matter that was relevant to the subject of my Email would be listed for consideration by the CDAP.
- ...
- I clarify that I would most certainly **not** have spoken to Mr. Wood or Emailed senior planning staff AFTER I became aware the matter was to be referred to CDAP.
 - Under no circumstances was the communication in the Email in question proposed to be taken as a direction or an attempt to influence the conduct of the senior members of staff in any manner.
- ...
- I adamantly maintain that the phone call I received from Mr. Wood and the Email I forwarded to senior planning staff took place in a timeframe when I did not know the matter was likely to be heard by the panel.

...
The other nine persons in an official capacity at the meeting apparently also considered I did not have a conflict of interest because not one of them made any attempt to question my presence or advise me to consider (or reconsider) my continued presence in the Chamber.

...
I believe the informal in-house Email I made to senior planning staff was short and to the point, polite and respectful, fit for purpose and prior to receiving the entirely unexpected allegations from Ms. Milosevic, at no time was any indication given to me to the contrary.

In my Email to senior planning staff I believe I made a fair and reasonable request for information (clarification) with respect to a 6 metre, 7 metre and 8 metre setback and also requested clarification why a 7 metre setback apparently seemed to have been preferred.

If I am found to have acted with good intent yet quite unknowingly in an inappropriate or improper manner, I would have hoped someone within the entire Council administration

might have felt either inclined or obligated to draw such matters to my attention. No one did.

...

With respect to Development Application 453/319/15 I did not consider I had an interest and nor did I consider I had a personal interest which was in conflict with my public duty to act impartially and in accordance with the principles of the Act.

...

Relevant law

20. Section 56A(7) of the Development Act provides:

A member of a council development assessment panel who has a direct or indirect personal or pecuniary interest in a matter before the council development assessment panel (other than an indirect interest that exists in common with a substantial class of persons)—

- (a) must, as soon as he or she becomes aware of his or her interest, disclose the nature and extent of the interest to the panel; and
- (b) must not take part in any hearings conducted by the panel, or in any deliberations or decisions of the panel, on the matter and must be absent from the meeting when any deliberations are taking place or decision is being made.

Penalty: Division 4 fine.

21. Section 56A(8) of the Development Act provides:

Without limiting the effect of subsection (7), a member of a council development assessment panel will be taken to have an interest in a matter for the purposes of that subsection if an associate of the member has an interest in the matter.

22. Clauses 2.3 to 2.6 of the Code of Conduct provide:

Conflict of Interest

- 2.3 You must make all decisions impartially and in accordance with the requirements of the Act. You must recognise the importance of fully observing the requirements of the Act in regard to disclosure of financial interests and disclosure of any other interest which may affect your ability to fulfil your duties on a panel.
- 2.4 If you consider that you have, or might reasonably be perceived to have an interest in the matter before the panel, you must clearly state the nature of that interest in writing to the presiding member before the matter is considered.
- 2.5 If you consider that you have a personal interest which may be in conflict with your public duty to act impartially and in accordance with the principles of the Act, you must declare a conflict of interest as above.
- 2.6 If you have an interest in a matter, you must not partake in any of the assessment processes involving the matter. You must leave the room at any time in which the matter is discussed by the panel including during the hearing of any representations or during any vote on the matter. You must not vote on the matter and you must not move or second any motion or participate in any discussion through the consensus process.

23. Clause 2.8 of the Code of Conduct provides:

- 2.8 In your role as panel member, you must not (other than in accordance with the provisions of the Act):

- (a) Direct a person who is a local government employee to do or not to do anything in the person's capacity as a local government employee;
- (b) In the case of members of the Development Assessment Commission, direct a person who is a State government employee to do or not do anything in the person's capacity as a State government employee;
- (c) Attempt to influence the conduct of a person who is a local government employee in the person's capacity as a local government employee;
- (d) Approach or discuss with an applicant or representor any application which is either before the panel or will come before the panel at some future time, except during the course of a panel meeting where the application forms part of the agenda and the applicant or representor has a right to be heard by the panel; and
- (e) Except where required as part of the assessment of a particular decision such as a formal panel viewing of a development site, you should not enter a development site, even if invited by the land owner or a neighbouring property owner or any other person.

24. Clause 2.9 of the Code of Conduct provides:

- 2.9 You acknowledge that the assessment of development by the panel requires that you act impartially and limit yourself to assessing the application strictly in accordance with the Act. Panel members must determine whether or not to grant development plan consent by assessing the development against the provisions of the appropriate Development Plan without reference to extraneous matters but with due regard to relevant matters such as representations made in accordance with the provisions of the Act.

25. Clause 2.10 of the Code of Conduct provides:

- 2.10 You must not:
- (a) Engage in consultation outside of the panel process with any party on a proposed development application that is likely to be heard by the panel;
 - (b) Give advice to an applicant or other third party on a development application after it has been lodged outside of a panel meeting;
 - (c) Speak at a public meeting for or against a proposal where the purpose of the meeting is to discuss either a proposed development or a development application unless required by the Act;
 - (d) Express an opinion on a development application or a proposed development outside of a panel meeting; and
 - (e) Engage in any other act or omission which may give rise to a reasonable presumption that you have prejudged a development proposal or application.

Issue 1 - Whether Cr Charles engaged in consultation outside of the CDAP process with parties on a proposed development application that was likely to be heard by the CDAP

26. Clause 2.10(a) of the Code of Conduct provides that a CDAP member must not engage in consultation outside the panel process with any party on a proposed development application that is likely to be heard by the CDAP.

27. Mr Wood first contacted Cr Charles by phone on 22 October 2015. Mr Wood emailed Cr Charles on 22 October 2015. Cr Charles emailed Mr Coventry on the same date. Cr Charles had no further contact with Mr Wood. In my view this communication amounts to Cr Charles engaging in consultation within the meaning of clause 2.10(a) of the Code of Conduct.
28. Through his correspondence with Mr Wood and Mr Coventry, Cr Charles was aware that the development application had been lodged.
29. However, Cr Charles did not receive notification that the application was to be considered by the CDAP until he received the agenda papers for the CDAP meeting after they were sent in the post on 4 November 2015. Nevertheless, the question is whether Cr Charles should have foreseen that the proposed development application was likely to be heard by the CDAP.
30. Cr Charles has submitted that he had no reason to believe that the application would be referred to the CDAP, given that the application was a category 1 application, which would normally be assessed by council staff under delegation.
31. Cr Charles also submitted that he is 'unclear about the process and criteria' that determines which applications are referred to the CDAP and is 'not an experienced member of the panel.'
32. The CDAP members should be aware that the council's Development Assessment Panel Charter and Delegations Policy states that the CDAP is to determine any development applications which are contentious and controversial or potentially controversial and should always err on the side of caution.
33. In my view Cr Charles should have been aware that the application was potentially controversial, and as such likely to be determined by the CDAP, given that Mr Wood had contacted both Cr Charles and council staff to raise concerns about the setback.
34. As such, I consider that it can reasonably be concluded that Cr Charles could have foreseen that the application may have been likely to be heard by the CDAP when he discussed the proposed development with Mr Wood. Given this, I consider that Cr Charles breached clause 2.10(a) of the Code of Conduct.

Conclusion

In light of the above, my final view is that Cr Charles breached clause 2.10(a) of the Code of Conduct, and acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Issue 2 - Whether Cr Charles gave advice to a third party on a development application after it had been lodged, outside of a CDAP meeting

35. Clause 2.10(b) of the Code of Conduct provides that a CDAP member must not give advice to an applicant or other third party on a development application after it has been lodged outside of a panel meeting.
36. Whilst it is clear that Cr Charles assisted Mr Wood and emailed Mr Coventry on his behalf, I do not consider that there is sufficient evidence to conclude that Cr Charles gave advice to Mr Wood about the application.
37. The word 'advice' suggests that Cr Charles offered an opinion to Mr Wood about what he should do about the setback and the application. I do not consider that in assisting

Mr Wood by emailing Mr Coventry asking for an explanation and if he would consider an 8 metre setback, constitutes advice.

38. As such, I do not consider that Cr Charles breached clause 2.10(b) of the Code of Conduct.

Conclusion

In light of the above, my final view is that Cr Charles did not breach clause 2.10(b) of the Code of Conduct, and did not act in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Issue 3 - Whether Cr Charles directed a person who was a local government employee and/or attempted to influence that local government employee

39. It is alleged that Cr Charles, by contacting Mr Coventry on Mr Woods' behalf, breached clauses 2.8(a) and (c) of the Code of Conduct.
40. Clause 2.8(a) of the Code of Conduct provides that a CDAP member must not direct a person who is a local government employee to do or not to do anything in the person's capacity as a local government employee.
41. In my view, by emailing Mr Coventry and asking him to 'have a look at this proposal and consider imposing an 8mtr setback', Cr Charles was not 'directing' Mr Coventry to do something, in breach of clause 2.8(a) of the Code of Conduct.
42. Clause 2.8(c) of the Code of Conduct provides that a CDAP member must not attempt to influence a person who is a local government employee in the person's capacity as a local government employee.
43. In my view, by emailing Mr Coventry and asking him to 'have a look at this proposal and consider imposing an 8mtr setback', I consider that Cr Charles could reasonably be said to have been attempting to influence him, in breach of clause 2.8(c) of the Code of Conduct.

Conclusion

In light of the above, my final view is that Cr Charles breached clause 2.8(c) of the Code of Conduct, and acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Issue 4 - Whether Cr Charles failed to declare at the CDAP meeting on 10 November 2015 that he had engaged with the local government employee and a third party (neighbour of the applicant) in a manner that could bring into question his impartiality, and sat in assessment of the application

44. The first issue is whether the nature of Cr Charles' involvement with Mr Wood about the application was such as to require him to declare an interest at the CDAP meeting held on 10 November 2015.
45. Section 56A(7) of the Development Act requires that a CDAP member 'who has a direct or indirect personal or pecuniary interest in a matter before the council development assessment panel (other than an indirect interest that exists in common with a substantial class of persons)' must disclose that interest and must refrain from participating in CDAP deliberations on the matter. Section 65A(8) makes it clear that

CDAP member will be taken to have an interest if 'an associate of the member' has an interest.

46. I note also that the code of conduct published by the Minister under section 21A of the Act applies to a member of a CDAP, and states:
- 2.4 If you consider that you have, **or might reasonably be perceived to have an interest** in the matter before the panel, you must clearly state the nature of that interest in writing to the presiding member before the matter is considered. (my emphasis)
47. The first question is whether Cr Charles had a direct or indirect personal or pecuniary interest in the matter before the CDAP that he was required to disclose. Given that Cr Charles did not previously know the neighbours, and had nothing to gain from his attempts to assist them, I do not consider that he did have such an interest.
48. The second question is whether Cr Charles might 'reasonably be perceived to have an interest' within the meaning of the code of conduct. In my view, and in the factual situation as it is presented I consider that, given Cr Charles' involvement with the neighbours and that he had met with them and taken on their issue for them, that there was a reasonable perception that Cr Charles may have had an interest in respect of the application before the CDAP.
49. My conclusion is therefore that Cr Charles ought to have:
- advised the presiding member in writing that he might reasonably have been perceived to have an interest in the matter before it was considered by the CDAP, in accordance with clause 2.4 of the Code of Conduct
 - left the room when the matter was discussed and voted on by the CDAP in accordance with clause 2.6 of the Code of Conduct.

Conclusion

In light of the above, my final view is that Cr Charles breached clauses 2.4 and 2.6 of the Code of Conduct, and as such acted in a manner that was contrary to law, within the meaning of section 25(1)(a) of the Ombudsman Act.

Recommendation

To remedy this error, I make a recommendation under section 25(2) of the Ombudsman Act that the council require Cr Charles to attend training on conflicts of interest and on the Code of Conduct. Cr Charles is to undertake the training by 29 August 2016.

Comments

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by 5 September 2016 on what steps have been taken to give effect to the recommendation above; including:

- details of the action that has been commenced or completed
- relevant date of the action taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

Pursuant to section 263B(2) of the Local Government Act, if a council member fails to comply with a council requirement made as a result of an Ombudsman recommendation such as that above, the council member will be taken to have failed to comply with Chapter 5 Part 4 of the

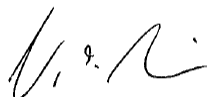
Local Government Act. In this event, the council is to ensure that a complaint is lodged against the member in the District Court.

I note that the complainant is seeking to have the decision of the CDAP in relation to the approved setback reversed and that it be reconsidered and approved with a 7m setback. I do not have jurisdiction to alter the decision of the CDAP. My investigation is only in relation to the conduct of Cr Charles.

By letter dated 23 November 2015, the CEO advised Ms Milosevic that he did not believe that the process which gave rise to her complaint under the Code of Conduct would void the decision to refer the matter to the CDAP for the following reasons:

- the council was justified in referring the matter to the CDAP
- the fact that Cr Charles was a part of the 'cause' for the application being referred to the CDAP does not void the decision to refer the matter to the CDAP
- whilst Cr Charles voted in relation to the application the decision of the CDAP was unanimous and, even if Cr Charles had declared a conflict of interest and abstained from voting, the unanimous decision of the remaining CDAP members would have been unlikely to have been any different
- the CDAP delegated to the Manager of Planning and Building the authority to receive, accept and approve amended plans in line with the setback discussions of the CDAP. If that decision was considered to be void, 'Mr Coventry would still be receiving, accepting and approving the application and would be hard pressed to vary the setback requirement favoured by the CDAP without new substantiating argument being introduced.'

The CEO advised Ms Milosevic of her options in relation to the application. I agree with the CEO's reasoning as set out above and his advice to Ms Milsoevic that her options are matters for consideration between herself and her partner (as the applicants) and the council.



Wayne Lines
SA OMBUDSMAN

6 June 2016