

Report
Preliminary investigation - *Ombudsman Act 1972*

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| Complainant | Mr Paul Deb |
| Agency | Department of Planning, Transport and Infrastructure |
| Ombudsman reference | 2012/10540 |
| Date complaint received | 20 December 2012 |
| Issues | Whether the department complied with its obligations in conducting consultation on the Inner Metropolitan Growth Ministerial Development Plan Amendment |

Jurisdiction

Mr Deb, the Chief Executive Officer of the City of Burnside (**the council**), complained on behalf of the council that the department breached the State-Local Government Relations Agreement in its conduct of the Inner Metropolitan Growth Project (**the IMG project**). His complaint followed a resolution passed by the council at its meeting held on 11 December 2012, in which it requested the CEO to ask me to investigate the matter.

Following consideration of the council's request, I decided to conduct a preliminary investigation of this complaint under section 18(1) of the *Ombudsman Act 1972*.

My investigation has been limited to a consideration of the administrative acts of the department. In particular, in my view the department's assessment of the extent of the City of Burnside's likely support for a Ministerial Development Plan Amendment (**MDPA**) amounts to a policy decision, and it is therefore outside my jurisdiction.¹ Further, the assessment was made with Ministerial knowledge and apparent endorsement.² On both bases, therefore, it is beyond the scope of my investigation and I refrain from expressing any view about its merit.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the department
- considering sections 22, 24, 26 and 30(1)(c) of the *Development Act 1993*
- considering the agreement titled *State-Local Government Relations: An Agreement between the State Government and Local Government in South Australia*, dated 9 February 2011, and the refreshed agreement signed on 17 May 2012
- meeting with relevant departmental officer to discuss the background to the complaint

¹ City of Salisbury v. Biganovsky (1990) 54 SASR 117

² See Minute to the Minister for Planning dated 25 July 2012, signed by the department's Deputy Chief Executive and Executive Director, Planning Reform and Projects, page 4, paragraphs 3 and 4.

- preparing a provisional report and sending it to the parties for comment
- preparing this final 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.³ 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 ...⁴

Responses to provisional report

The CEO advised me that the council resolved at a meeting held on 28 May 2013 that it has no further comment to make in relation to its complaint.

The department advised me by email dated 13 June 2013 that it did not intend to make any further comment.

Background

1. Since early 2010, the department has been progressing a number of projects to implement the 30-Year Plan for Greater Adelaide (**the 30-year plan**). One such project is the IMG project, which covers the land within 2.5 km of the Adelaide Parklands (excluding the City of Adelaide). This area has been allocated a target of 25,000 additional dwellings based on the 30-year plan.
2. The 30-year plan was endorsed and gazetted by the government in February 2010, pursuant to section 22 of the *Development Act 1993*.
3. The department has advised me that the IMG project commenced through discussion between the deputy secretary and the Chief Executive Officers of the 7 inner metropolitan councils (**the inner metropolitan councils**).⁵ It has stated that:

All the councils invited to participate in the project were initially approached by the department's Deputy CE John Hanlon. The approached (sic) were made in meetings to the respective Council CEOs.

It was in response to these initial meetings, where the councils indicated a willingness to work with the department on the inner metropolitan growth project that letters were then exchanged with the respective Council CEO's about their participation in the project. These letters went to Unley, Prospect, West Torrens, Norwood Payneham and St Peters Councils, Letters were not exchanged with non participating councils which included Burnside, Walkerville and Charles Sturt Councils.⁶

³ 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.

⁴ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

⁵ i.e. the Cities of Burnside; Charles Sturt; Norwood, Payneham and St Peters; Prospect; Unley and West Torrens; and the Town of Walkerville.

⁶ Email from a departmental officer to me, dated 7 May 2013.

4. Accordingly, on 5 August 2010, the department wrote to the Chief Executive Officers of the City of Norwood Payneham and St Peters, the City of Prospect, the City of Unley, and the City of West Torrens (**the participating councils**). Whilst I have not seen the department's letters, it appears from the participating councils' responses that the department invited the councils to participate in the IMG project, with a view to the preparation of an MDPA covering each council area.
5. The participating councils responded accepting the invitation; and in each case, outlining some views or conditions affecting their involvement.⁷ From this correspondence it appears to me that the City of Prospect agreed to the preparation of an MDPA, whilst the other councils preferred to progress their own complementary Development Plan Amendments (**DPAs**).
6. I understand that for differing reasons, the City of Charles Sturt and the Town of Walkerville elected not to participate in the IMG project. The department has also advised me that 'the City of Burnside never responded to [the initial] invitation'.
7. In December 2010 the Minister for Planning wrote to the inner metropolitan councils advising that they were required to prepare a Strategic Directions Report (**SDR**) by December 2011, and highlighted the requirement (under section 30(1)(c) of the Development Act) that an SDR should set out a council's priorities to implement the 30-year plan targets and reveal key policy issues. This process required councils to consult with their communities on future planning consistent with the directions of the 30-year plan.
8. At the same time as the councils were preparing their SDRs, the department prepared the Inner Metro Rim Structure Plan (**the structure plan**), which it has described⁸ as providing:
 - a strategic vision for the area based on directions of the 30-year plan
 - land use directions and the allocation of dwelling targets
 - guidance on the application of the South Australian Planning Policy Library for use in DPAs
 - assistance in the identification of future infrastructure needs based on identified dwelling targets.
9. The draft structure plan was prepared in collaboration with government agencies and the participating councils, and was endorsed by the Government Planning Coordination Committee (**GPCC**) on 6 September 2011. I have been advised that the structure plan was prepared for Cabinet endorsement, but by letters dated 8 September 2011, the department advised the participating councils that the structure plan had been deferred so that another initiative could be progressed as a priority.
10. On 1 June 2011 the department sent an email to the Chief Executive Officer of the City of Burnside (**the council**) inviting it to participate in the IMG project. This was followed by a meeting between representatives of the department and the council on 27 June 2011. I understand that at that meeting, the department advised the council that it was likely that an MDPA would be prepared to re-zone land in Burnside, and offered the council 'partnership in the MDPA process'.
11. The department provided further information to the council at a subsequent officers meeting on 6 July 2011, and on 19 July 2011 the department wrote to the council requesting comments on the structure plan. That letter also invited the council's 'participation into the proposed Ministerial Inner Metropolitan Growth DPA as part of the

⁷ Letters from the CEOs of the City of Norwood Payneham and St Peters dated 20 December 2010, the City of Prospect dated 31 August 2010, the City of Unley dated 19 August 2010, and the City of West Torrens dated 10 September 2010.

⁸ Minute to the Minister for Planning dated 25 July 2012, signed by the department's Deputy Chief Executive and Executive Director, Planning Reform and Projects.

Inner Metropolitan Growth Project Stage 1 Priority DPA's'. I understand that a similar letter was sent to the other inner metropolitan councils.

12. On 5 August 2011 the Minister for Urban Development, Planning and the City of Adelaide wrote to the mayor of the City of Burnside, advising that the Minister had initiated investigations pursuant to sections 24 and 26 of the Development Act for the drafting of an MDPA. The letter noted that the MDPA would implement the directions of the 30-year plan by seeking 'to investigate opportunities for medium to high density mixed use development, with a new urban form, along Greenhill Road and Fullarton Road for the parts framing the Park Lands'. The Minister also noted that the MDPA was part of a 'broader collaborative process' being undertaken with the participating councils.
13. On 2 September 2011 the department provided relevant officers from the council with an updated provisional draft MDPA, and on 6 September 2011 the departmental officers met with representatives of the council to discuss its concerns with the proposal.
14. On 29 September 2011 the mayor wrote to the Minister identifying the council's concerns with the proposed MDPA, and suggesting some alternative proposals for consideration and further discussion with the Minister.
15. On 21 December 2011 the department wrote to all the inner metropolitan councils, including the City of Burnside, advising that the development of the proposed MDPA had been paused whilst the department pursued other planning priorities.
16. In late May 2012 the department began a process of meeting with representatives of the participating councils to advise that the process for the MDPA was recommencing. Departmental officers also met with the other inner metropolitan councils, apparently at the initiative of the department, by late June 2012.
17. At the initiative of the City of Burnside, the department met with council representatives on 18 July 2012. At that meeting the council's request for a copy of the draft MDPA was refused but the department advised that the draft was largely unchanged from the provisional draft considered by the council in September 2011. The City of Burnside representatives advised the department that the council's views on the proposal were unlikely to have changed since the mayor's letter of 29 September 2011.
18. On 25 July 2012 the Minister agreed to provide a copy of the draft MDPA to the City of Prospect for comment.
19. At a further meeting on 3 September 2012, again initiated by the City of Burnside, the council advised that it supported a corridor rezoning provided the maximum permitted building heights were reduced. The department advised the council that its views on the building heights to be facilitated by the MDPA were not consistent with the 30 year plan objectives for the Park Lands Frame, and that they were also inconsistent with other inner metropolitan council DPAs furthering the same objective. The department again advised the council that the draft MDPA remained largely the same as the one provided to the council in September 2011; and again refused to provide a copy of the draft MDPA to the council.
20. By letter dated 6 September 2012 the City of Burnside requested the department to conduct a briefing for its elected members on the draft MDPA, prior to the commencement of public consultation. It appears to me that this request was denied, although it also appears that no written reply was given by the department.

21. On 27 September 2012 the department briefed the other inner metropolitan councils on the IMG project; discussed co-ordinated communications strategies in preparation for the release of the various DPAs for the IMG project; and provided the City of Prospect with a copy of the draft MDPA for comment.
22. The City of Burnside considered the matter at its meeting held on 13 November 2012, and passed a resolution in the following terms:

That, in relation to Council's recent dealings with the Department for Planning Transport and Infrastructure (DPTI) regarding the draft Ministerial Inner Metropolitan Growth Development Plan Amendment, the Chief Executive Officer write to the Minister for Planning:

1. setting out the correspondence between the DPTI and Council so far;
2. setting out the Council's complaints about being excluded from the process;
3. referring to the blatant unfairness of the DPTI's approach and its inconsistency with the State-Local Government Relations Agreement;
4. asking for
 - 4.1. an explanation of why this has occurred;
 - 4.2. a copy of the draft Ministerial Inner Metropolitan Growth Development Plan Amendment;
 - 4.3. the Minister's undertaking that he will not release the DPA on interim development control;
 and
5. asking the Minister for Planning for a reply to the substance of the letter within 14 days of the date of the letter, failing which Council will refer the matter to the Ombudsman.

That the substance of the letter be as attached to this motion/resolution.

23. The City of Burnside CEO wrote to the Minister in a letter dated 14 November 2013 (sic), and complained that the council had not received any reply to its letter of 29 September 2011; that it had not received notification that the draft MDPA was being progressed nor been provided with a copy of the draft MDPA; and that it had been treated differently in this regard to the City of Prospect.
24. By letter dated 3 December 2012 the department notified the council's CEO of the release of the MDPA for public 'and council' consultation pursuant to section 26(5a) of the Development Act, and sought the council's comment on the MDPA.
25. The City of Burnside considered the matter at its meeting held on 11 December 2012, and passed a resolution as follows:
 1. That the Report be received,
 2. The CEO write a letter to the Minister as follows:
 - 2.1 thanking the Minister for his detailed response, but expressing disappointment at the dismissive tone of the response.
 - 2.2 noting that Council had sent a letter on 29 September 2011 (copy attached) stating the following:
 - 2.2.1 That we believed that the residents of the City of Burnside would not support building heights of 10-12 storeys along Greenhill and Fullarton Roads.
 - 2.2.2 That we had identified that 4-5 storeys were a potential solution on these corridors and the shortfall of accommodation could be provided through other means within the City

2.2.3 That Council requests the opportunity to directly meet with the Minister to discuss its concerns and possible solutions.

3. Noting that in the 14 months since that letter, the only correspondence or request for meetings initiated by the Minister's Department to Council was to inform us – along with other Inner Rim councils – that the process had been paused in December 2011.

4. Noting that the City of Prospect, included with the City of Burnside as part of the Ministerial DPA – was given a copy of the Draft DPA which they considered in a workshop on 4 September this year and that no such courtesy was extended to the City of Burnside.

5. Stating that it is the intention of the Council to focus our attention to the provision of a comprehensive and informed response by the people of Burnside to the Consultation process established by the Minister in respect to the Ministerial DPA.

6. That the CEO refer the matter to the Ombudsman for investigation.

Whether the department complied with its obligations in conducting consultation on the Inner Metropolitan Growth Ministerial Development Plan Amendment

26. The department has provided me with a copy of legal advice which helpfully summarises the statutory process for Ministerial amendment of a development plan, as set out in section 26 of the Development Act. The advice states:

In summary, there are a number of steps that the Minister must take where he is considering an amendment to a Development Plan. For the purposes of this advice the relevant steps in the process are:

1. consider the advice of a person with prescribed qualifications prior to preparing a DPA - s26(3);
2. prepare a proposal to be called a DPA that complies with a number of specified requirements, including the conduct of investigations for the purposes of the amendment - s26(1);
3. undertake consultation in accordance with one of the processes specified in subsections (5)-(5b), and in accordance with the additional requirements in subsection (5c) - s26(4);
4. following consultation, the Minister may (but not must) seek the advice of the Advisory Committee on any proposed alterations to the amendment or on any other issue that should in his opinion be referred to the committee - s26(5d)
5. the Minister may then approve the amendment, alter the amendment and approve it as altered, decline to approve the amendment, or divide the amendment into separate amendments and approve one or more of those amendments, and either give further consideration to the remaining amendments, or exercise his other powers to alter and approve, or decline the remaining amendments - s26(8).

27. It appears to me that the steps outlined in the background above between the department and/or the Minister and the City of Burnside occurred during the course of preparing the MDPA (step 2 in the steps identified above). Further, I do not understand the council to be contending that there has been a failure to comply with the statutory process in the preparation of the MDPA. I will therefore not consider this aspect of the matter further.

28. On 9 February 2011, the then Premier and President of the Local Government Association entered into an agreement, which appears to me to have been intended to

govern state - local government relations in South Australia.⁹ A 'refreshed' agreement was signed by the current Premier and President on 17 May 2012.¹⁰ I consider that the actions about which the City of Burnside complains occurred primarily during the currency of the earlier agreement. I have therefore had particular regard to that agreement; but I note that the two agreements are substantially similar, though not identical.

29. I consider also that the fact that the agreements were signed by the Premier requires that state government departments and authorities should give effect to their terms.
30. The 2011 agreement outlines some overarching principles intended to 'confirm the relationship between State and Local Government as one based on mutual respect and a commitment to co-operative and productive work on issues of mutual importance'. In particular it provides:

The State Government commits to:

- (a) consulting with the Local Government Association, as the peak representative body of South Australian Councils, on issues affecting the local government sector as a whole in a timely manner;
- (b) consulting with individual or multiple Councils (or with the LGA on behalf of smaller numbers of Councils where those Councils and the LGA indicate that preference) on issues affecting specific individual communities or groups of communities;¹¹

31. I asked the department to provide me with an outline of how it perceived its responsibilities under the agreements, particularly in relation to the conduct of matters under the Development Act. In respect of the IMG project, it commented as follows:

The City of Burnside was invited to partner in the project along with other inner metropolitan councils from the outset, in August 2010. The four other councils within the project accepted this offer (Attachment IA). The City of Burnside never responded to this invitation.

The Inner Metropolitan Growth Project has two key elements, a Structure Plan and associated Development Plan Amendments (DPAs). The project is seeking to create a collaborative approach with the affected councils to implement the policies established in The (30 Year) Plan and applying them to the respective Development Plans.

In respect to the Inner Metropolitan Growth DPA, the Development Act 1993 prescribes certain obligations as part of the process. These include the Minister writes to affected councils when initiating a DPA process (Attachment 1 B), and then again when a DPA is released for consultation (Attachment 1C).

At the same time the Department also wrote to the Burnside Council's administration notifying the same, but also advising on the release of the Inner Metro Rim Structure Plan (Attachment 1 D).

It is considered that the statutory requirements pertaining to the DPA process under the Development Act 1993 have been met.

Over and above the statutory requirements the City of Burnside has been provided the opportunity to comment on draft Inner Metropolitan Growth DPA (and Inner Metro Rim Structure Plan), as outlined in the chronology provided in Attachment 2. In particular, the Department has:

- Provided draft copies of the Structure Plan and DPA

⁹ State-Local Government Relations: An Agreement between the State Government and Local Government in South Australia, 9 February 2011.

¹⁰ State-Local Government Relations: An Agreement between the State Government and Local Government in South Australia, May 2012, dated 17 May 2012..

¹¹ Clause 7(a) and (b).

- Invited the City of Burnside's cooperation both before and after the Minister's Inner Metropolitan Growth forum in May 2011
- Met with council staff six times to discuss various elements of the proposal.

At his Inner Metropolitan Growth Forum in May 2011, attended by elected members and senior staff from all inner metropolitan councils, the Minister also expressly stated his strong preference for a cooperative working arrangement with councils to implement The Plan, but also his preparedness to act if councils resisted The Plan's directions.

In respect to the delay of the project, the Department wrote to the administration of all the councils in December 2011, including the City of Burnside, advising that the Inner Metropolitan Growth Project had been paused so that the Creating a More Vibrant City initiative could be progressed as a priority (Attachment 1 E).

In mid 2012 the Department met with the officers from the partner councils with a view to recommencing the project. At this point the Department met with officers from the City of Burnside and provided a briefing on progress of the project and next steps (details of meetings contained in the Attachment 2 – Inner Metropolitan Growth Project / DPA Chronology).

The partner Councils that agreed to the project at the outset, have been working with the Department to progress this project. The Burnside Council didn't avail itself of the opportunity at the outset but notwithstanding this, the Department has provided information at key stages of the process. This is considered to have provided Burnside Council the opportunities (sic) be informed and provide its input. This is reflected in Burnside Council's letter of 29 September 2011, following Council's formal consideration of the draft Structure Plan and DPA.

The extended formal consultation process, from 4 December 2012 to 22 February 2013, has provided the Council another opportunity to make a submission on the DPA.

It is therefore the Department's view that the City of Burnside has been kept reasonably informed of the project, both over and above the requirements of the Development Act 1993 and reasonably to satisfy the non-statutory State-Local Government Relations Agreement.

Furthermore, the City of Burnside should be considerably well advanced in its own consideration of The Plan for its council area, given its responsibilities under the Development Act 1993.

32. In my view, it is significant that the City of Burnside did not respond positively to the initial departmental invitation, and hence did not receive the correspondence sent to the five participating councils on 5 August 2010. This correspondence invited the councils to participate in the IMG project, with a view to the preparation of an MDPA covering each council area. In the absence of a response from the City of Burnside, and in light of the agreement from the other participating councils, in my view it was not unreasonable for the department to assume that the City of Burnside did not wish to participate in the project on the terms sought by the department. I note that the City of Charles Sturt and the Town of Walkerville also elected not to participate in the process, for differing reasons.
33. I consider also that the background which I have set out above details reasonable subsequent efforts by the department to engage the City of Burnside in the process.
34. That said, I acknowledge that a new council was elected for the City of Burnside in November 2010. The possibility of the new council's participation was explored by a series of communications commencing with a departmental email to the CEO dated 1 June 2011, and culminating in the Minister's letter to the mayor, dated 5 August 2011. However, the mayor's response to the Minister, by letter dated 29 September 2011, indicated that the council was unlikely to take an entirely supportive view of the project, at least insofar as it affected the council's area.

35. As noted above, from December 2011 the department's preparation of the MDPA was delayed by other priorities until approximately May 2012. After that time, it is apparent that the consultation between the department and the City of Burnside occurred only at the instigation of the council. This may be contrasted with the access afforded to other councils, notably the City of Prospect, to which a draft of the MDPA was released on 25 July 2012. It was not until the draft MDPA was publicly released on 3 December 2012 that similar access was provided to the City of Burnside.
36. Over the period from May 2012 to December 2012, it appears to me that the department formed the view that because the City of Burnside was unlikely to support the anticipated form of the MDPA, there was little point in continuing dialogue. In my view, the department's assessment of the council's attitude amounts to a policy decision, and it is therefore outside my jurisdiction.¹² Further, it was made with Ministerial knowledge and apparent endorsement.¹³ On both bases, therefore, it is beyond the scope of my investigation and I refrain from expressing any view about its merit.

Opinion

In light of the above, my final view is that the department did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

My final view is that having regard to the circumstances of the case, continuing to investigate this issue is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

Ombudsman comment

It is unsatisfactory that there appeared to be a lack of meaningful dialogue between the department and the City of Burnside, culminating in a complaint to my office, about an issue which is plainly of significant consequence to the electors of both state and local government. Accordingly I sought the views of the department on how the impasse could be resolved, and encouraged it to re-engage with the City of Burnside.

In response, the department advised me on 7 May 2013 as follows:

The Minister for Planning wrote to Burnside Council on 12 March 2013 seeking agreement on a DPA program for the Council underpinned by a broader yield and housing diversity analysis. This will enable Burnside council to be at a similar position of other councils participating in the inner metropolitan project.

The department is meeting all the council staff on the DPAs in the Inner Metropolitan Growth Project. These meetings include Unley, Prospect, West Torrens, Norwood Payneham and St Peters Councils and Burnside Councils. A meeting was held on 24 April 2013 and [named officer], Burnside Council was in attendance. A follow up meeting will be held with all the councils in May 2013.

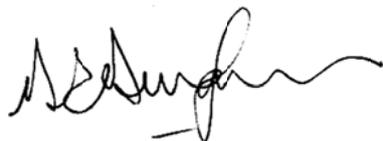
The department is also meeting with each individual councils (sic). These meetings are focussed on the respective individual issues of councils. Meetings have been held with Burnside Council staff, including [named officer] on 28 March and 23 April 2013. The meetings with [named officer] have sought to clearly capture the priorities for Council in the Inner Metropolitan Growth DPA but also how Council may respond to the Minister's letter dated 12 March 2013 so that an agreed planning program can be reached.

¹² City of Salisbury v. Biganovsky (1990) 54 SASR 117.

¹³ See Minute to the Minister for Planning dated 25 July 2012, signed by the department's Deputy Chief Executive and Executive Director, Planning Reform and Projects, page 4, paragraphs 3 and 4.

A meeting further meeting will now been arranged with Mr Paul Deb, CEO Burnside Council and Andrew Gear, Executive Director Statutory Planning to further this discussion.

I understand that the dialogue is now continuing, and I encourage both the department and the City of Burnside to engage constructively in considering the issue.

A handwritten signature in black ink, appearing to read 'Richard Bingham', with a long horizontal flourish extending to the right.

Richard Bingham
SA OMBUDSMAN

17 June 2013