

Report

Preliminary investigation - *Ombudsman Act 1972*

Complainant	Mr Brian Carr
Department/Agency	South Australian Small Business Commissioner
Ombudsman reference	2013/02350
Agency reference	SASBC-2013-012
Date complaint received	1 March 2013
Issues	Whether the Small Business Commissioner exceeded his jurisdiction by intervening in a land division application process under the <i>Development Act 1993</i>

Jurisdiction

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

Investigation

My investigation has involved:

- meeting with the complainant
- seeking, receiving and considering a response from the Small Business Commissioner
- receiving and considering a response from Mr James Miller of the council
- considering the *Small Business Commissioner Act 2011 (SBC Act)* and the *Development Act 1993*
- communicating about the issues of complaint with the Local Government Association of SA
- seeking the advice of the Crown Solicitor
- meeting with the Crown Solicitor's Office to discuss their views
- preparing my provisional report.
- providing the complainant and the council 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.¹ 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 ...²

Response to my provisional report

In response to my provisional report, the complainant advised that the council accepts my findings but remains of the view that the intervention of the Small Business Commissioner was inappropriate. The complainant commented:

- there is a comprehensive scheme for review of planning decisions which applicants should follow
- at no stage have council staff determined a position on the various proposal plans submitted by the applicant
- the applicant did not ask the council officers to put the proposal to the CDAP for a determination or seek an order from the ERD Court that a decision be made on the application
- that in this context, it is queried whether there was any 'dispute' between the parties.

I have considered the complainant's submissions, and they do not change my view.

The Small Business Commissioner did not make any submissions in relation to my provisional report.

Background

1. On 16 August 2012, Mr Michael Lohmeyer of Veska & Lohmeyer Pty Ltd on behalf of his client, Ms Georgina Crouch, lodged a land division application with the Light Regional Council (**the council**). It concerned a series of contiguous allotments located on Railway Terrace, Freeling (**the application**).
2. The land is located within the Residential (Freeling) Zone, and within the Historic Conservation (Freeling Residential) Policy Area of the relevant development plan. The zone and policy area objectives and principles of development control are concerned to preserve the historical character of the area.
3. The council had numerous discussions with Mr Lohmeyer and Ms Crouch; and Mr Lohmeyer tabled numerous plan variations for the council's consideration - none of which were considered satisfactory to the council's planning officers. It appears that the council's concerns largely related to heritage character, waste water disposal and private open space. After considerable discussion, the council officers expressed in principle support to an amended plan, at a meeting held on 5 December 2012.
4. However, these plans did not reflect the development that Mr Lohmeyer's client wished to proceed with; and so further plans were developed and lodged with the council. The council informed Mr Lohmeyer that these plans could not be supported for planning, waste control and heritage reasons. The council also expressed concerns that the changes went so far as to change the essential nature of the development sought, and

¹ 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.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

as such, required that a new application be lodged. Mr Lohmeyer then advised that he would be submitting an amended plan.

5. On 16 December 2012, a Senior Case Investigation Officer from the Office of the Small Business Commissioner emailed the council and advised that a complaint had been received from Mr Lohmeyer about the council:

Our office has been contacted by Michael Lohmeyer who owns and operates a business named Veska & Lohmeyer (surveying practice). He is currently working for a client, Georgina Crouch, who owns property within your Council District. Ms Crouch is seeking planning approval from your Council to subdivide her property and in the dealings Mr Lohmeyer has had with staff from your Planning Department he has encountered difficulties. He states that he has provided several alternative options for consideration but has not to date been successful in having them approved, and at times, has been given conflicting information.

The Office of the Small Business Commissioner is responsible for facilitating the resolution of disputes between small businesses and other businesses, including State and/or Local government bodies.

6. The email requested 'a briefing about this issue' from the council.
7. By email on 21 January 2013, Mr James Miller, General Manager - Development and Regulatory Services of the council, responded and advised of the history of the application. Mr Miller wrote that it was the council's opinion that Mr Lohmeyer's various plans were at variance with the key control provisions in the Development Plan, to such an extent that the planning officers could not recommend approval of the application to the council's delegate, the Development Assessment Panel (CDAP).
8. The Small Business Commissioner replied and advised the council that he wished to convene a meeting of the parties to discuss Mr Lohmeyer's grievance.
9. On 13 February 2013, the Small Business Commissioner and Mr Lohmeyer attended a meeting with Mr Miller and planning officers from the council. I understand that at that meeting, the Small Business Commissioner advised that his role is largely to resolve disputes with small businesses; and that if no resolution is reached, the disputing parties are offered formal mediation by a professional mediator. He also advised that four per cent of matters brought before him relate to local government matters, and that he had no expertise in planning, engineering and heritage related disciplines.
10. From the perspective of both the council and the Small Business Commissioner, it appears that there was no satisfactory outcome to the meeting.

The complaint

11. Mr Brian Carr, the Chief Executive Officer of the council, then complained to my office that the Small Business Commissioner exceeded his jurisdiction under the SBC Act by intervening in the council's processing of the application.
12. The complainant claimed, in effect, that:
 - the dealings relating to the application between Mr Lohmeyer and the council were not between Mr Lohmeyer's business, Veska & Lohmeyer and the council, but between Veska & Lohmeyer's client, Ms Crouch as the applicant in the land division, and the council. Ms Crouch is a private citizen, not a small business; and as such, any grievances she might have in her dealings about the council do not fall within the purview of the SBC Act

- the land division dealings were not about Veska & Lohmeyer's business as such and its business relations or 'dealings' with the council in the sense intended in the SBC Act
- in any event, the SBC Act does not anticipate intervention by the Small Business Commissioner in land use and planning issues, as there are appeal procedures specifically tailored for such matters in the Development Act, namely:
 - the Development Act establishes a process for the manner in which land use planning matters must be assessed
 - the council is an administrative body responsible for assessing land use proposals in accordance with the requirements of the Development Act
 - the Development Act anticipates that professional expertise is needed to assess land use applications
 - in the event that the CDAP refuses to grant consent, the applicant will (other than in the case of a *non complying* development) have a right of appeal to the Environment Resources and Development Court (**ERD Court**). In the event of an ERD Court appeal, a preliminary conference is held first, where all parties discuss possible compromises before a commissioner of the court, in order to resolve the matter without proceeding to a formal appeal.

Relevant law

13. The SBC Act operates *inter alia* to facilitate 'the continued viability and expansion of the small business sector in South Australia'.³ In introducing the bill into the House of Assembly, the Minister for Small Business commented that one of the principal roles of the Small Business Commissioner is:

...to provide [small] business operators who have limited bargaining power, time and resources with the ability to access a timely, low cost dispute resolution service designed to avoid the costly litigation processes that currently exist.

...

Small businesses often feel powerless when dealing with State and local government bodies. To this end, the Small Business Commissioner is given the function of assisting small businesses on request in their dealings with such bodies. It is envisaged that businesses would make use of existing mechanisms but that the Commissioner would become involved in instances where the provision of assistance would be useful and likely lead to a better outcome.⁴

14. The functions of the Small Business Commissioner are set out in section 5 of the SBC Act:

5—Functions

- (1) The functions of the Commissioner are—
- (a) to receive and investigate complaints by or on behalf of small businesses regarding their commercial dealings with other businesses and to facilitate resolution of such complaints through measures considered appropriate by the Commissioner such as mediation or making representations on behalf of small businesses; and
 - (b) **to assist small businesses on request in their dealings with State and local government bodies; and**
 - (c) to disseminate information to small businesses to assist them in making decisions relevant to their commercial dealings with other businesses and their dealings with State and local government bodies; and

³ Hon A Koutsantonis MP, Minister for Small Business, House of Assembly, Thursday 28 July 2011, Hansard, p 4777.

⁴ Ibid.

- (d) to administer Part 3A (Industry codes) of the *Fair Trading Act 1987* and the *Australian Consumer Law (SA)* to the extent that responsibility for that administration is assigned to the Commissioner under the *Fair Trading Act 1987*; and
- (e) to monitor, investigate and advise the Minister about—
 - (i) non-compliance with industry codes that may adversely affect small businesses; and
 - (ii) market practices that may adversely affect small businesses; and
- (f) to report to the Minister on matters affecting small businesses at the request of the Minister; and
- (g) to report to the Minister on any aspect of the Commissioner's functions at the request of the Minister or on the Commissioner's own initiative; and
- (h) **to take any other action considered appropriate by the Commissioner for the purpose of facilitating and encouraging the fair treatment of small businesses in their commercial dealings with other businesses or assisting small businesses in their dealings with State or local government bodies**; and
- (i) any other functions conferred on the Commissioner by or under this or any other Act. (my emphasis)

15. The Development Act provides for the processing of development (including land division) applications, and review and appeal rights in respect of those applications.

Whether the Small Business Commissioner exceeded his jurisdiction by intervening in a land division application process under the Development Act

16. The events set out in the Background above do not appear to be in dispute.

Statutory approval process in the Development Act

17. The Development Act specifically provides review rights in relation to procedural aspects of the planning assessment process. Further, appeal rights to the ERD Court are generally afforded to applicants (and in some cases, third parties) who are aggrieved by a decision in relation to the planning merits of a development application.
18. In addition, section 41 of the Development Act requires that a decision with respect to a planning application be made expeditiously, and in any event within the time frames specified in the Regulations. In the event that a council has not decided a matter within that time frame, an applicant has a right to apply to the ERD Court for an order that a decision be made within a fixed time.⁵
19. Further review options are available to an applicant who has concerns about the way that a council is dealing with an application. The Minister's code of conduct made under section 21A of the Development Act provides for a specific reporting mechanism where an applicant has concerns that a planning officer is not acting impartially, prejudging an application, or not complying with their duty to assess an application strictly in accordance with the Act.
20. At its simplest, an applicant applies for the development that they wish to proceed with and the council assesses that application in accordance with the requirements of the Development Act. An officer or body (such as the CDAP) with proper delegation makes a decision as to whether or not planning consent can be granted. If aggrieved by the council's processes or conduct, reviews are available to the applicant. If the council's

⁵ Development Act, section 41(2).

decision on the merits of the development is not favorable, the applicant will generally have an appeal right.

21. I contrast this statutory approval scheme with a conciliation or negotiation process. While I acknowledge that in the event of an appeal, the ERD Court will offer a conciliation process to the parties, the statutory assessment process itself does not require or contemplate that the developer and the council must agree on the merits of a particular development.
22. I also note that with respect to certain developments, the council is required to consult with a prescribed referral body. In some cases, the agreement of the referral body is required before the council can approve a development. The Small Business Commissioner is not a referral body for the purposes of the Development Act; and as such, his support is not relevant to the council's assessment of the development.

Interpretation of the SBC Act

23. The SBC Act makes no express mention of the Small Business Commissioner's power or function to intervene on behalf of small businesses in the development application process with local government councils.
24. The corollary is also true in that the Development Act does not prohibit parties from advocating on behalf of an applicant in the development application process. Nor does the SBC Act prohibit the Small Business Commissioner from intervening in development matters with councils on behalf of a small business.
25. Indisputably, sections 5(1)(b) and 5(1)(h) of the SBC Act are broadly drafted in their description of the Small Business Commissioner's functions. It appears to me from these provisions that the Small Business Commissioner is entitled to intervene in any dealings between small businesses and councils - whether the small business has a legislative or administrative right of review or appeal or other remedy under other legislation, and whether or not the small business is representing other parties (such as in this instance).
26. This is unlike the Ombudsman Act, for example, which prevents the Ombudsman from investigating a complaint where the complainant has a right of review or appeal elsewhere (unless it is not reasonable to expect that the complainant resort to that review or appeal).⁶

Advice from the Crown Solicitor's Office

27. Given the recent enactment of the SBC Act and the unusual event of a public sector body challenging the jurisdiction of another, I requested advice from the Crown Solicitor about the complaint.
28. The Crown Solicitor agreed with my view about the expansive wording in the SBC Act; and advised that the Small Business Commissioner had not exceeded his jurisdiction in advocating for Mr Lohmeyer in relation to the application.
29. However, the Crown Solicitor agreed that the issue was not without its problems:

⁶ Ombudsman Act, section 13(3).

The Ombudsman must not investigate any administrative act where—

(a) the complainant is provided in relation to that administrative act with a right of appeal, reference or review to a court, tribunal, person or body under any enactment or by virtue of Her Majesty's prerogative; or
 (b) the complainant had a remedy by way of legal proceedings, unless the Ombudsman is of the opinion that it is not reasonable, in the circumstances of the case, to expect that the complainant should resort or should have resorted to that appeal, reference, review or remedy.

The SBC Act is silent as to the Small Business Commissioner's intended role in responding to complaints in the context of an administrative process such as a land division application where:

- (a) reasonable minds may differ as to the correct application of the substantive planning principles in issue; and
- (b) there are clear avenues for a dissatisfied applicant to appeal or review any planning decision made by the Council.

In particular, the SBC Act contains no equivalent provision to s13(3) of the *Ombudsman Act 1972*, which would generally prevent the Ombudsman from investigating the administrative acts of a local council as part of a planning decision.

The use of the office of the Small Business Commissioner as an avenue of complaint may raise a perception that the individual has effectively obtained a form of review in a planning process that other legislation (the *Development Act*, the *Ombudsman Act*) has carefully limited to a particular process. It strikes me that all of the parties need to be conscious that the planning process is quite separate from this complaint ... ⁷

30. I agree with the Crown Solicitor's views. Given the review and appeal mechanisms in the Development Act, I also agree that it is easy to appreciate why the complainant may interpret that the Small Business Commissioner effectively offered another avenue of review for Mr Lohmeyer in relation to the council's position about the application.

Comment

31. It appears in this instance that the council's approach to assessing the application was to work with Mr Lohmeyer to arrive at a proposal that was acceptable to the parties before it was to be put to the relevant delegate for a decision. While there is much to commend this approach, I consider that it can unintentionally inhibit the effective and timely exercise of an applicant's review and appeal rights.
32. The 'dispute' that arose between the parties might have been avoided had the parties better observed the statutory process under the Development Act. I note in particular that Mr Lohmeyer had the option of asking that the planning officers put the application before the CDAP (with an adverse recommendation if there was no support) to see what decision the CDAP might make. If refused, he could then exercise his appeal rights. In the event of an appeal, the parties could undergo conciliation in the ERD Court; and if no conciliation could be reached, a determination on the merits of the development could be made by the ERD Court.
33. If the council had resisted this approach, Mr Lohmeyer had the option of exercising his rights under section 41 of the Development Act to apply to the ERD court for an order that the council make a decision on the application within a fixed time.
34. A balance has to be achieved between the council administration's desire to ensure that all development applications meet its satisfaction, and the right of an applicant to seek authorisation for the development it wants. This is particularly important when, as in this case, the council planner's role is limited to making a recommendation to the council's delegate (the CDAP). To achieve this balance, it is essential that communication with applicants is clear, and that the Development Act is properly followed.
35. In my view, the intervention of the Small Business Commissioner did not change and could not have changed the assessment process or the complaint, review and appeal

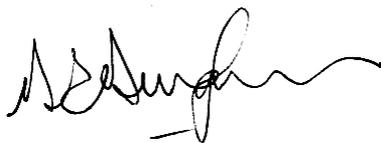
⁷ Advice of the Crown Solicitor's Office to Ombudsman dated 20 November 2013.

rights available to the parties under the Development Act. His influence was limited to that of an advocate for Mr Lohmeyer.

36. It is unfortunate that the parties apparently viewed his intervention as otherwise.

Opinion

In light of the above, my view is that the Small Business Commissioner did not exceed his jurisdiction under the SBC Act by intervening in the land division application process on behalf of Mr Lohmeyer. In this way, the Small Business Commissioner did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

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

Richard Bingham
SA Ombudsman

21 January 2013