

Final Report - Corporation of the Town of Walkerville
Preliminary investigation - *Ombudsman Act 1972*

Complainant	Ms Lucy Walendy
Council member	Councillor Margaret Graham-King
Council	Corporation of the Town of Walkerville
Ombudsman reference	2015/03721
Date complaint received	19 May 2015
Issues	<ol style="list-style-type: none">1. Whether Cr Graham-King breached clauses 3.4 and 3.6 of the Council Member Code of Conduct2. Whether Cr Graham-King breached section 62(4) of the <i>Local Government Act 1999</i>

Jurisdiction

The complaint alleges a breach of section 62(4) of the *Local Government Act 1999*.

I also determined to consider whether the complaint constitutes a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the Local Government Act (**the Code of Conduct**). 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

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

In this report I have determined to refer to a local resident as 'A'.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Cr Graham-King
- seeking a response from the council
- seeking more particulars from the complainant
- speaking to Mr Shane Keepence
- speaking to A

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

- interviewing Cr Graham-King
- considering the Local Government Act
- considering the Code of Conduct
- providing Cr Graham-King, the council, Mr Keepence and the complainant 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 answer to the question whether the issue has been proved ...³

Response to my provisional report

In response to my provisional report, the complainant responded, in summary, that:

- she disagreed with Cr Graham-King's statement, in her response to the complaint, that A was an 'acquaintance' and not a 'close friend'
- the fact that Cr Graham-King opposed the development suggests that elected members do not have to act in the interests of the council or the community if they are acting in a personal capacity
- 'elected members have a duty to serve the best interests of the people within the community they represent and to act honestly in good faith and to the best of their ability' at all times and that she agrees with my view that this should be encapsulated in the Code of Conduct
- the best interest of the community is served by elected members not having a predetermined position
- the consequences of the 'group think mentality' were significant for a number of people, including herself, as her property remained vacant for a further nine months and she had to reduce the rent, for Mr Keepence, who lost out on starting his business, for the council's reputation, and for the community, who she believes lost out on a business that she thinks would have been an asset to the street
- she agrees that the final report should be made public
- the council should give the community the opportunity to respond to the report.

I have not amended my report in response to the complainant's submission.

Cr Graham-King responded to my provisional report, in summary, as follows:

- she is pleased with my provisional assessment that she did not breach section 62(4) of the Local Government Act, and did not act in a manner that was unlawful within the meaning of section 25(1) of the Ombudsman Act
- she clarified that her husband's surname is 'Graham', not 'Graham-King'

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.

- she strongly opposes my description of the proposed business as a 'café', submitting that the Notice of Application indicated that New Roads Imports Pty Ltd had applied to the licensing authority for a licence with extended trading authorisation for a business to be known as the 'Cottage Bar'. Given that the license sought to sell and supply liquor for consumption on the premises and included extended trading hours, it was clear that the initial application was for a bar and the nature of the proposal was very much a wine bar. The proposal was not described as a 'cafe' until sometime later. She submits that, had the business been initially described as a café, and if it was in fact to be a café, then she does 'not consider that the residents would have been so concerned with the proposal.'
- my report includes that her husband submitted a Notice of Objection to the Liquor Licence Application but fails to mention that another local resident, who owns a house behind the property, also lodged an objection
- she submits that she did not 'participate' in the conciliation conference with the Liquor and Gambling Commissioner, she attended only to accompany her husband who was unwell and explained to those present that she was only an observer and was attending in a personal capacity to assist her husband
- whilst she is pleased that her name has been cleared, she is concerned about the disclosure of the final report on the grounds that disclosure will 'unreasonably impact on innocent parties that have been named in the report' and that 'disclosing the final report containing certain assertions about these parties would constitute undue hardship'
- she does not consider it is fair or reasonable in the circumstances, or in the public interest, for the names of persons such as A and her husband to be reported in the public domain
- she recommends that I give consideration to amending my recommendation that the final report be disclosed by the council at a public meeting of the council to a recommendation that it be dealt with in confidence by the council.

I am of the view that whether the business is referred to as a 'café' or a 'bar' has no impact on my findings. The fact remains that it was always intended to be a business that sold food as well as a range of boutique beers and wines. I note that it appears that the name was changed from 'The Cottage Bar' to 'The Cottage Café' because the Assistant Commissioner, at the 22 January 2015 conciliation conference, said that the term 'bar' was unacceptable for a restaurant licence. I have, however, amended my report to refer to the business as 'The Cottage'.

I have considered Cr Graham-King's submission in relation to the disclosure of my final report. In response, I have determined that the local resident referred to in my provisional report be referred to as A. I am not satisfied that the disclosure of this final report will cause undue hardship to Mr Graham, and remain of the view that it is in the public interest to disclose the report.

I have made some minor changes to my report, as I consider appropriate, in response to Cr Graham-King's submission.

The council responded by letter dated 9 February 2016 that it had no further comments to make in regard to this matter and acknowledged that I may require it to present the final report to a public meeting of the council within two ordinary meetings of the council, following receipt of the final report.

Mr Keepence did not provide a response to my provisional report.

Background

1. Cr Graham-King became an elected member of the council in November 2014. She is also a member of the council's Development Assessment Panel.
2. The complainant owns a property at 97-99 Walkerville Terrace, Walkerville (**the property**).
3. Cr Graham-King lives with her husband nearby to the property, on the other side of the road.
4. Cr Graham-King's business is located a few doors along from the property.
5. On 1 October 2014 the complainant placed the property for lease.
6. In mid-November 2014 the complainant was advised that New Road Imports Pty Ltd wished to lease the property (subject to a Liquor License being granted) to open a café/restaurant/bar with a range of local boutique beers and wines, to be named 'The Cottage Bar'. The proposed name was later changed to 'The Cottage Café' (**The Cottage**).
7. Mr Shane Keepence is the director of New Roads Imports Pty Ltd.
8. By letter dated 21 November 2014 Mr Keepence's architect submitted documents to the council for consideration for Planning Approval for the property.
9. The complainant entered into a Temporary Lease Agreement with New Roads Imports Pty Ltd. It was estimated that the Final Lease would be signed in mid January 2015 (subject to the granting of all approvals) and rent would commence in mid February 2015.
10. Mr Keepence applied for a Restaurant Liquor License.
11. On 16 December 2014 Mr Keepence sent out a Form 2 Notice of Application under the *Liquor Licensing Act 1997* to businesses and residents along Walkerville Terrace and Warrick Street, along with a personal explanation regarding the proposed business. He also put a notice in the window of the property.
12. On 18 December 2014 Cr Graham-King telephoned Mr Keepence. Mr Keepence, in his later complaint to the council, described the phone call as follows:

... The morning of 18/12/14 I received the first phone call from Margaret.

1. Margaret stated she was an elected member from the Walkerville Town Council, operated a law firm on the terrace (Graham-King Lawyers) and was a resident on Walkerville Terrace.
2. She first asked what type of business I planned to establish, to which I replied in detail.
3. She then informed me that she was calling on behalf of outraged and concerned community members that had come to her given her position as a councillor in Walkerville, even stating that all the elected members she had talked to were completely outraged by the possibility of a new licensed venue.
4. She too expressed she was extremely outraged about the idea, telling me about all the current problems with the Sussex and drunks loitering and drinking wine outside of her house, as she put it.

5. Margaret then told me, Walkerville was a community of very wealthy powerful people that normally get what they want.
 6. Her main anger was directed at a line written in my letter to the residents *“Thanks to the great support from Walkerville Town Council and their vision for the village, we believe Cottage, will be a welcome and collaborative addition to the prominent Terrace”* she informed me that the development plan for council was put together before she was elected without the knowledge of the community ensuing she would not adhere to it.
 7. I attempted to assure her that we were not bringing a boozier or front bar to the community and the place would be rather relaxed.⁴
13. On 22 December 2014 the council’s Manager Planning and Infrastructure sent a letter to residents and business owners in the area surrounding the property, advising that an application had been made for the property pursuant to the provisions of the *Liquor Licencing Act 1997* for:
 1. a restaurant license, and
 2. extended trading authorisation for Sunday 8:00pm to midnight.
 14. By letter dated 7 January 2015 the council advised Mr Keepence’s architect that Development Plan Consent had been approved for the property.
 15. On 7 January 2015 Cr Graham-King’s husband, Mr Neil Graham, submitted a Notice of Objection to the Liquor License Application. His objections to the Liquor License Application were listed as follows:

Unsuitable premises

77(f) Premises is too small resulting in drinking on street or in car park behind (next to residents)

Undue annoyance / disturbance

(g)(i) Over 100 residents live opposite at ‘The Watson’, 33 Warwick St with windows directly facing the premises as well as adjacent residents both in Walkerville Tce and Warwick St (houses).

(ia) Safety of children

(ii) Amenity

Insufficient car parking on a busy intersection affecting adjacent residents.

(petition attached)

16. Mr Graham attached a petition to his Notice of Objection to the Liquor License Application. The petition states:

NEW ROAD IMPORTS PTY LTD HAS APPLIED TO THE LICENSING AUTHORITY FOR A RESTAURANT LICENSE WITH EXTENDED TRADING AUTHORISATION IN RESPECT OF A BAR AND EATERY TO BE OPENED EARLY NEXT YEAR AT 07-99 WARWICK STREET, WALKERVILLE (THE OLD PEGGI WILLIAMS BOOK SHOP). THIS LIQUOR LICENCE HAS BEEN REQUESTED FOR SEVEN DAYS A WEEK FROM DAY-TIME TO MIDNIGHT.

WE THE UNDERSIGNED, ARE CONCERNED RESIDENTS AND BUSINESS OCCUPIERS OF WALKERVILLE, SOUTH AUSTRALIA WHO OBJECT TO THE GRANTING OF A RESTAURANT (LIQUOR) LICENCE TO NEW ROAD IMPORTS PTY LTD FOR THE FOLLOWING REASONS:

⁴ Letter from Mr Shane Keepence to the Walkerville Town Council CEO, dated 17 February 2015.

- That the position and nature of the proposed premises renders them unsuitable to be licenced under a licence of the kind to which the application relates. The premises is located next to a quiet residential area. The fear is that inebriated persons will hang out around or exit the premises, creating a noise and disturbing the peace of the residents and local business occupiers;
- That if the application was granted there would be undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the proposed premises to which the application relates would be likely to result;
- That the safety of welfare of children attending the local pre-school and primary schools in the vicinity of the premises to which the application relates would be likely to be prejudiced
- The amenity of the locality in which the premises or proposed premises to which the application relates are situated would be adversely affected in some other way.

17. Cr Graham-King is the first signatory on the petition; she signed it on 18 December 2014. She notes on the petition the following comment - 'don't want more disturbances on the Terrace.'
18. The petition provided to my investigation has 68 signatures in total, dated 18, 19, 20, 22 and 23 December 2014.
19. On 18 January 2015 Mr Keepence received a telephone call from a local business owner. In his later complaint to the council, Mr Keepence described the phone call as follows:

... Later that morning (18/12/14) I received a call from [the business owner], from [the business]

1. [the business owner] informed me that [A] had just paid him a visit.
2. During that phone call [the business owner] told me, [A] had been in and said [they were] there on behalf of the Councillor Margaret Graham-King.
3. [the business owner] went on to inform me of the intimidating nature of [A], basically demanding he signed a petition to stop Cottage from ever going ahead.
4. [the business owner] said that [A] had been standing over others in the community [and] may be able to convince a lot of people to sign. ...⁵

20. Mr Keepence submitted that shortly after the phone call from the first business owner he received a phone call from the owners of another local business. Mr Keepence described the phone call as follows:

- ...
19. Shortly after this letter went out I received a call from the owners of the [business name], [business owner] and [business owner].
20. [the business owner] later informed me that [A] had also been into her café on behalf of the councillor Margaret Graham-King to bully her into signing, I'm told [A] was yelling and abusing her in front of her staff and customers alike.

...⁶

21. The complainant says that she spoke to a number of business owners on Walkerville Terrace and 'discovered the following':

The Petitioner [A] had gone around the area stating that he was collecting signatures on behalf of Cr Margaret Graham-King. [A] rambled on about how the proposed venue would

⁵ Ibid.

⁶ Ibid.

create more crime, vandalism, graffiti in the area. Everybody was against it (rightly or wrongly people were left with the impression that Walkerville Council supported the petition). [A's] demeanour was rude persistent and demanding. It was pre Christmas it was busy some signed just to get [A] out the door. There was no outrage. In fact my overall impression from the people on the street was that it would be rather nice to have a venue like that the one proposed. Not everyone signed and were supportive of the venue. ...⁷

22. By letter dated 5 January 2015 one of the business owners sent a letter to the Liquor Licencing Commissioner, including the following:

...I am writing to inform the liquor licensing commissioner of my experience with Margaret Graham-King's representative.

I was approached in my restaurant by a [person] that informed me [s/he] was there representing the Walkerville councillor Margaret Graham-King and that he was gathering signatures to prevent the former book shop on Walkerville Terrace from obtaining a liquor licence, citing reasons that there is no parking and the premises will be trading after midnight.

When I explained to the [person], who's [sic] name I cannot recall, that I would not be signing [the] petition, [the person] became very aggressive and intimidating, raised [their] voice and stepped closer to me and said amongst other things "young people like you are the reason Australia has a drinking problem."

...

23. On or about 8 January 2015, Mr Keepence telephoned Mr Graham to discuss his concerns. Mr Graham advised Mr Keepence that he was unwell and they only spoke briefly.
24. That same day, Cr Graham-King telephoned Mr Keepence. Mr Keepence described the phone call as follows:

...Margaret called back a day later although this time she brought a battery of threats to the conversation.

1. First I offered to adhere the best I could to all of her concerns and stated I would be willing to adjust closing time to a reasonable hour, have staff patrols outside the venue after service to ensure patrons were moving quietly and quickly etc.
2. She wouldn't listen to any of it and when I asked would they ever agree to a Liquor License of any kind she said "no"!
3. I tried to explain that I believed there had been a serious misconception regarding the venue type.
4. Margaret (as she expressed to me) believed Cottage would attract petty crime and disturbance in the vicinity of her home so therefore continued to disregard and blatantly ignore my assurances that Cottage was intended to be a licensed café/restaurant and not a front bar/boozer/nightclub.
5. Once again she told me other elected members were outraged and now added that the community was willing to display signs outside the venue, that they were willing to go to the media and take whatever action necessary to stop the business.
6. Once again she informed me of the wealthy powerful nature of the community, that gets what it wants,⁸ and that she was acting on behalf of these people as a community leader...

⁷ Email from the complainant, Mrs Lucy Walendy, to the council CEO, dated 20 February 2015.

⁸ Ibid.

25. On 22 January 2015 Mr Keepence received a phone call from another Walkerville business owner. Mr Keepence described the phone call as follows:

...On 22/01/15 I got a call from the owner of [business], she informed me that [A] had been in her shop and they began to talk about Cottage, [A] then told her I was a Nazi, racist, IS supporter and government hater!....⁹

26. Mr Keepence further advised that 'a day later I spoke to a local resident, they had heard I was a Nazi' and that his 'girlfriend who lives in the Walkerville area had to reassure a local friend that I wasn't a violent bikie as she had heard I was.'¹⁰

27. On 23 January 2015 Cr Graham-King telephoned Mr Anthony Gatti, the council's Development Assessment Planner, to discuss the council's approval of the application for the property to operate as a restaurant. Following the telephone call, Mr Gatti emailed Ms Katrina Marton, council's General Manager, as follows:

I received a phone call from Councillor Graham-King querying council's approval of the approved restaurant at 99 Walkerville Terrace (the former Pegi Williams bookshop), during this phone call Councillor Graham-King queried a few provisions of the Development Plan and the concession of car parks. Councillor Graham-King then stated she was calling on behalf of her husband Ben [sic] Graham who she would ask would call me. I stated at this time that the provision of car parking spaces could be offset through the consolidated car parking spaces as per the Concept Plan within our development plan.

Ben [sic] Graham arrived at council and queried the following:

1. Why there was no public notification;
2. did administration give concession to the reduction in car parks; and
3. could council withdraw their decision.

My explanation was:

1. that it would not be legal for us to consult with the general public under the Development Act as it was classified as a Category 1 development
2. yes council did concede on a concession of car parks as a judgement call was made on the provisions of the zone and policy area and the required quantum of car parking; and
3. council could not withdraw their decision as planning decisions are final, however, we have evidence that the premises is not being used for its approved purpose then we would have to investigate further.

...

28. On 23 January, after receiving Mr Gatti's email, Ms Marton forwarded it to Ms Kiki Magro, the council's Chief Executive Officer (**the CEO**), with the following preamble:

Anthony came to see me post his discussion as he was uncomfortable particularly with the phone call from Cr Graham-King.

I asked for this summary for obvious reasons and now forward to you for information.

29. On 23 January 2015 Mr Keepence, Cr Graham-King and Mr Graham attended a conciliation conference with the Liquor and Gambling Commissioner.
30. The parties were unable to resolve the issues in dispute at the conciliation conference and the matter was adjourned for further conciliation to be conducted on 4 February 2015.

⁹ Ibid.

¹⁰ Ibid.

31. On 23 January 2015 Mr Keepence informed the Liquor Licensing Commissioner that he wished to withdraw the Liquor License Application.
32. Mr Keepence advised the complainant that he did not wish to go ahead with the lease 'as a Notice of Objection had been lodged against his License application.' The complainant says that:

...his lawyers had advised him cases like these usually result in long drawn out hearings unless some agreement could be negotiated with the objectors and despite his best efforts to do so he had been told in no uncertain terms that another licensed venue would not be allowed to move forward on the Terrace with threats of lawyers, media involvement and picketing outside the venue. ...¹¹

33. On 29 January 2015 the council received an email from a business owner alleging that Cr Graham-King 'was the driving force behind a petition circulated to prevent a business from opening'. The business owner's email includes:

...I'm writing as I have heard on the local grapevine that the application for a liquor license for "Cottage" at 97-99 Walkerville Terrace was unsuccessful. (I do hope I'm wrong!)

My concern is that it appeared to me the driving force behind this was a petition arranged by a councillor and I do hope this does not reflect Council's general position as thoughtful development and vibrancy to Walkerville is the only way that we will see the community move forward.

I was approached late last year by a [person] who walked straight into my business and said "I am here on behalf of Margaret the councillor and want you to sign a petition against the bar next door". I confirmed with [him/her] who "Margaret" was (Margaret Graham) and then said I would not sign. I was then told it would just bring drunks and a lot more graffiti to the town. When I asked if [s/he] had read the application or spoken to the applicant [s/he] said no.

Unfortunately even then I could see that the [person's] "direct" approach would probably make people sign just to get rid of the person - perhaps its once again the loud noise gets the result as I have heard from many, many people that were looking forward to such a development. ...

34. In a letter to the Messenger, published on 11 February 2015, Mr Graham wrote:

I note with alarm the push to extend small bar venues to suburbs, and the relaxing of regulations that will constrain objections to the Liquor and Licensing Authority. I have lived in the CBD (and) suffered from the incredible disorder caused by drinking patrons.

Suburban streets are not equipped to cope with bands of inebriated young people moving from venue to venue.

Even with the toilet and rubbish disposal facilities in the CBD, defecation, urination, vomit, rubbish and broken glass in the street is common.

Given the "pub crawl" culture, it is likely that we will see groups of marauding crawlers moving through once-peaceful suburbs.

The relationship between alcohol and drug-related violence is well documented.

The CBD provides a relatively small, well-defined area to be policed.

The dispersing of small bars will increase the policing task, and if past experience is any guide it will not be the proprietors of the proposed bars who will shoulder the financial burden of providing security.

NEIL GRAHAM,
Walkerville

35. By letter dated 17 February 2015 Mr Keepence made a complaint to the council concerning Cr Graham-King's conduct.

¹¹ Email from the complainant, Mrs Lucy Walendy, to the council CEO, dated 20 February 2015.

36. By email dated 20 February 2015 the complainant made a complaint to the council concerning Cr Graham-King's conduct.
37. On 10 March 2015 the council forwarded the complaints to the Local Government Governance Panel (**the LGGP**). The referral from the council alleged breaches of clauses 2.2, 2.3, 2.6, 2.8, 2.12, 2.13, 2.14, 3.4 and 3.6 of the Code of Conduct.
38. The LGGP considered whether Cr Graham-King had breached clauses 2.2, 2.3, 2.6, 2.8, 2.12, 2.13 and 2.14 of the Code of Conduct. The LGGP does not have jurisdiction to consider breaches of Part 3 of the Code of Conduct so it did not consider the allegations that Cr Graham-King had breached clauses 3.4 and 3.6.
39. The LGGP considered the complaint and, by letter to Mayor Raymond Grigg dated 18 March 2015, advised as follows:

My assessment of the information supplied in support of the alleged breach of the Code of Conduct is that Councillor Margaret Graham-King was not carrying out her function as a public officer in this matter. In my opinion, she as a person elected to the Council— was representing the interests of residents and ratepayers in obtaining information and advice on the matter on their behalf.

On that basis the Local Government Governance Panel will not undertake an investigation of the matter.
40. On 19 May 2015 the complainant contacted my Office and lodged a complaint alleging Cr Graham-King had breached section 62(4) of the Local Government Act.
41. By letter dated 22 June 2015 I advised Cr Graham-King that I had decided to conduct a preliminary investigation of whether she had breached section 62(4) of the Local Government Act, and that I also intended to consider whether the complaint constitutes a breach of Part 3 of the Code of Conduct.
42. Cr Graham-King provided a response to the allegations by letter dated 17 July 2015 (**Cr Graham-King's response**).
43. My Office interviewed Cr Graham-King under oath on 16 November 2015.

Relevant law

44. Section 62(4) of the Local Government Act provides:

A member of a council must not, whether within or outside the State, make improper use of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the council.
45. Clause 3.4 of Part 3 of the Code of Conduct provides:

Council Members must:

...

3.4 Not exercise or perform, or purport to exercise or perform, a power, duty or function that he or she is not authorised to exercise or perform.
46. Clause 3.6 of Part 3 of the Code of Conduct provides:

Council Members must:

...

3.6 Ensure that relationships with external parties cannot amount to interference by improper influence, affecting judgement, decisions and /or actions.

Whether Cr Graham-King breached clauses 3.4 or 3.6 of the Code of Conduct

47. Given that the referral of the initial complaint from the council to the LGGP included allegations that Cr Graham-King had breached clauses 3.4 and 3.6 of Part 3 of the Code of Conduct, I have considered whether Cr Graham-King breached clauses 3.4 or 3.6.

48. I note that the introduction to the Code of Conduct provides:

Council members must comply with the provisions of this Code **in carrying out their functions as public officials**. It is the personal responsibility of Council members to ensure that they are familiar with, and comply with, the standards in the Code at all times. [my emphasis]

49. This suggests that the Code of Conduct does not apply in situations where a council member is not carrying out their functions as a public official. I have previously expressed the view that this is a failing in the Code of Conduct. I consider that public officers should always act in a manner so as not to compromise the reputation or integrity of the office they hold.

50. This matter highlights a further issue with the Code of Conduct, being that it is difficult to reconcile this requirement in the Code's introduction with clause 3.4. In my view, if a council member is exercising or performing, or purporting to exercise or perform, a power, duty or function that he or she is not authorised to exercise or perform, it is likely that they could be doing so when they are not carrying out their functions as public officials. In any event, I do not consider there is evidence that Cr Graham-King purported to exercise a power, duty or function in this case.

51. Further, in my view, clause 3.6 of the Code of Conduct is not relevant. I understand the purpose of this clause is to address situations in which a council member has a close relationship with some external party such that it affects their decision making in the chamber.

52. As such, my final view is that Cr Graham-King did not breach clauses 3.4 and 3.6 of the Code of Conduct.

53. I consider that the conduct of Cr Graham-King that requires examination is the alleged assertion of the power she has as a result of her position as a council member; that is, using her position as a council member to exert influence on others in order to achieve a private outcome.

54. The role of a council member is to serve the interests of the community he/she has been elected to represent. I note Part 1 of the Code of Conduct, entitled Principles, which includes:

1. Higher principles - Overarching Statement

This part does not constitute separate enforceable standards of conduct.

Council members in South Australia have a commitment to serve the best interests of the people within the community they represent and to discharge their duties conscientiously, to the best of their ability, and for public, not private, benefit **at all times**. [my emphasis]

55. In accordance with the Code of Conduct's overarching statement, Cr Graham-King has a duty to serve the best interests of the people within the community she represents for public, not private, benefit at all times. However, this is not a separate enforceable standard of conduct. I consider that, whilst this principle is not enforceable, it is clearly

intended to act as a guide to the other parts of the Code of Conduct and should be considered by council members.

56. In my view, this principle should be encapsulated in an enforceable standard of conduct within the Code of Conduct. It should be clear to council members that they are to act in the interests of the community they have been elected to represent at all times, and that it is not appropriate for an elected member of council to inform members of the public that they are a member of council in order to assert their influence and power. However, I do not consider that any clauses of the Code of Conduct properly encapsulate such behaviour.
57. I also note that a council member has fiduciary duties. A fiduciary duty is an equitable duty to act in good faith for the benefit of another. The Local Government Association of South Australia 'Council Members' Guide' states:
- You must also be aware of your fiduciary duties. Fiduciary duty has been defined by the High Court of Australia as "the duty to act with fidelity and trust to another¹²." What this means is that you, as a member of a governing body, must act honestly, in good faith and to the best of your ability in the interests of the organisation (in this case, the Council). You must not allow conflicting interests or personal advantage to override the interests of the Council or the community.¹³
58. Whilst it may be that Cr Graham-King has not sufficiently considered the benefits of the establishment of The Cottage at the property for the public, and instead focused on her private interests in relation to the café, being the impact she thinks it would have had on her house and business, I am not able to be satisfied of this to the requisite standard of proof. I do note that Cr Graham-King had a strong personal view about this matter, and I accept that Mr Keepence believed that Cr Graham-King was using her position as a councillor to exert influence and, moreover, that her actions contributed to his decision to withdraw his liquor licence application.
59. I further note that had Cr Graham-King been involved in any council decisions relating to The Cottage she would have been required to do so without personal bias. However, Cr Graham-King has not been involved in any such decisions.
60. Given my views above in relation to clauses 3.4 and 3.6 of the Code of Conduct I consider that it is most appropriate to assess Cr Graham-King's conduct against section 62(4) of the Local Government Act.

Whether Cr Graham-King breached section 62(4) of the Local Government Act

61. I have considered section 62(4) of the Local Government Act, which provides that a council member must not make improper use of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or for another person or to cause detriment to the council.
62. In determining whether Cr Graham-King breached section 62(4) of the Local Government Act, I have considered Cr Graham-King's:
- 18 December 2014 telephone conversation with Mr Keepence
 - involvement in the Notice of Objection to the Liquor License Application and the conciliation
 - involvement with the petition
 - telephone conversation with Mr Keepence on or about 8 January 2015

¹² Baxt, R., 1998. Duties and Responsibilities of Directors and Officers, Australian Institute of Company Directors, page 23.

¹³ Local Government Association of South Australia, Council Members' Guide - your Guide to serving your community on council, updated 2014.

- telephone call to Mr Gatti, the council's Development Assessment Planner.
63. The elements to be satisfied are:
- whether Cr Graham-King made improper use of her position as a member of the council, and, if so,
 - whether she did so in order to gain, directly or indirectly, an advantage for herself or for another person.
64. To determine whether Cr Graham-King made improper use of her position as a council member, it is first necessary to establish whether she was purporting to be carrying out her functions as a public official.
65. I note that much of the evidence as to whether Cr Graham-King identified herself as a council member or was acting in a personal capacity is contradictory.

18 December 2014 telephone conversation with Mr Keepence

66. Mr Keepence has said that Cr Graham-King identified herself as an elected member of the council when she telephoned him on 18 December 2014. He confirms that she also identified herself as a business owner and resident.
67. Mr Keepence says that Cr Graham-King told him that she was contacting him:
- ... on behalf of outraged and concerned community members that had come to her given her position as a councillor in Walkerville, even stating that all the elected members she had talked to were completely outraged by the possibility of a new licensed venue. ...¹⁴
68. Given this, it could be that Cr Graham-King was purporting to act in her role as a council member.
69. However, Cr Graham-King provided the following information in her response to the complaint:

... Against this background, in response then to Mr Keepence's [sic] invitation, on 18 December 2014 I telephoned Mr Keepence [sic] to find out more about the proposed wine bar. I remember specifically being very polite and starting my conversation saying that I was a concerned resident and business owner in the vicinity and that there were many other residents and business owners, of who I was one, who were very concerned about the wine bar opening. That is, I made this telephone call in my personal capacity as a local resident and business owner.

I specifically recall advising Mr Keepence [sic] at the end of my conversation that it was only fair to let him know I was an elected member with the Council. However, I specifically confirmed with Mr Keepence [sic] that my telephone call that day was in my personal capacity, as a concerned resident and business owner. I did not use my position as an elected member during this telephone call, and I did not even advise Mr Keepence [sic] that I was an elected member until the end of the conversation. I specifically recall that I was very polite to him throughout my conversation. ...¹⁵

70. My investigating officer spoke to Mr Keepence on 10 August 2015. Mr Keepence advised my officer that Cr Graham-King identified herself as a member of the council at the start of the telephone conversation. He said that she told him "straight away" that she was a council member, and that this was why people were coming to her office to tell her their concerns about the café. Mr Keepence told my officer that Cr Graham-King had told him that she was not the only council member to be opposed to The Cottage. Mr Keepence

¹⁴ Letter from Mr Shane Keepence to the Walkerville Town Council CEO, dated 17 February 2015.

¹⁵ Letter from Cr Graham-King to the Ombudsman, dated 17 July 2015.

said that he subsequently spoke to another council member who told him that they were not opposed to The Cottage and did not believe any other council members were, except for Cr Graham-King.

71. When interviewed by my officers, Cr Graham-King advised that Councillor Graham Webster was also opposed to the café. I note that Cr Webster signed the petition.
72. Cr Graham-King has not denied that she made Mr Keepence aware that she was a member of council. However, Cr Graham-King has submitted that she did so as a courtesy and in order to let Mr Keepence know that she was acting in a personal capacity.
73. If I accept Mr Keepence's version, namely that Cr Graham-King said that "concerned community members" had come to her "given her position as a councillor" and that "wealthy powerful people [that] normally get what they want", I would find that Cr Graham-King breached section 62(4) of the Local Government Act. In my view, this would be the case even if Cr Graham-King also said that she was acting in her personal capacity. However, I am not able to establish to the requisite standard of proof that Cr Graham-King did say those things.
74. Accordingly, I am unable to establish to the requisite standard of proof that Cr Graham-King improperly asserted the power she has as a result of her position as a council member or was not acting in a personal capacity only in her conversation with Mr Keepence. As such, I am unable to find that Cr Graham-King made improper use of her position as an elected member of the council to gain, directly or indirectly, an advantage for herself or her husband, in relation to her telephone conversation with Mr Keepence on 18 December 2014.

Notice of Objection to the Liquor License Application and the conciliation

75. The Notice of Objection to the Liquor License was submitted to the Licensing Authority by Mr Graham. There is nothing to stop Mr Graham having a personal view and expressing it, and nothing to prevent him lodging such an objection. However, in such a situation, a council member must remain aware of their commitment to serve the best interests of the people within the community they represent.
76. Cr Graham-King submits that she only attended the conciliation conference because her husband was ill at the time and required her support. In her response to the allegations, Cr Graham-King submitted as follows:

...The Application stated that "any person may object to the Application by lodging a Notice of Objection in the prescribed form with the Liquor and Gambling Commissioner".

Neil was so concerned about the proposal that he lodged a Notice of Objection to the Application on or about 22 December 2014. Neil raised concerns regarding noise, disturbance and car parking in his objection, amongst other things...

I then recall that on 22 January 2015, as Neil was still very ill from food poisoning, I accompanied him to the Liquor Licensing Application hearing listed that day.

Neil was represented by a lawyer who specialised in the field of liquor licensing, Mr John Fitzpatrick. I am always very conscious to be careful to explain to people in what capacity I am attend [sic] matters, and I specifically recall advising Mr Fitzpatrick, Mr Keepance [sic] and Assistant Commissioner Jeanette Barnes (the Hearings Delegate) that I was only there to accompany Neil as he was unwell. I confirmed I was purely an observer and that I would

not be contributing in any way to the hearing. That is, I attended the liquor licensing hearing in a personal capacity to assist my husband...¹⁶

77. In her response to my provisional report, Cr Graham-King further advised that she did not participate in the conciliation conference, but only attended in support of her husband.
78. I am unable to establish to the requisite standard of proof that Cr Graham-King was involved in the Notice of Objection or was not acting in a personal capacity only in her attendance at the conciliation conference. As such, I am unable to find that Cr Graham-King made improper use of her position as an elected member of the council to gain, directly or indirectly, an advantage for herself or her husband, in relation to the Notice of Objection to the Liquor License Application and the conciliation.

Petition

79. On 20 August 2015 my investigating officer spoke with A on the telephone. A said that the petition was “all” A’s own “idea”, because A was concerned about the impact of a bar on the nearby elderly residents. My officer asked A if A had told people that s/he was collecting signatures on behalf of Cr Graham-King. S/he said that s/he had not said this, but that s/he had said s/he “was collecting signatures against the bar and that Cr Graham-King had the same views, and that she was a councillor.”

80. Cr Graham-King, in her response to the complaint, submitted:

... As so many local residents and business owners had approached both me and Neil with their concerns, Neil and [A] thought it would be a good idea to start a petition to determine how many people shared these concerns.

In terms of my “relationship” with [A], I would describe [A] as an acquaintance, but not a close friend of mine. As [s/he] is also a local resident, Neil and [sic] see [A] around from time to time, however we do not frequently socialise with [him/her] at all.

[A] volunteered to Neil, to take the petition to local residents and business owners as [A] felt very strongly that a wine bar should not be established at the property.

Although the petition was not my idea, I did sign it in my personal capacity as I felt strongly about the issue of a wine bar operating from the property. Councillor Graham Webster also signed the petition in his personal capacity. Of course, people were free to consider the petition and sign it if they felt strongly enough about the issue. There was no requirement that they do so.

I can absolutely say that **I did not** circulate the petition to anyone to sign, or pressure anyone to sign it and at **no time** did I ever expressly say, or even imply, to either Neil or [A] that I wanted them to act as my representative in circulating the petition.

Ultimately, I understand that the petition was signed by approximately 76 people, and in a small community like Walkerville, I would consider that to be a significant number of people who expressed concerns regarding the proposed wine bar. ...¹⁷

81. In my view there is not sufficient evidence to establish that A advised a number of people that s/he was acting on behalf of Cr Graham-King when s/he was collecting signatures for the petition against the granting of the Liquor License. However, it does appear likely that A used Cr Graham-King’s name in order to attempt to influence people.

¹⁶ Ibid.

¹⁷ Ibid.

82. If A was in fact acting on behalf of Councillor Graham-King, and she had instructed A to tell people that s/he was representing her as an elected member, Cr Graham-King could be found in breach of section 62(4).
83. Whilst it may be possible that Cr Graham-King had some involvement in the preparation of the petition, there is no evidence to establish that she instructed A to collect signatures on the petition, or to say that s/he was acting on her behalf. A was adamant that Cr Graham-King was not involved in any way with the petition. Cr Graham-King, when interviewed under oath, denied that she had any involvement in the petition, aside from adding her signature to it.
84. As such, I am not able to be satisfied to the requisite standard of proof that Cr Graham-King made improper use of her position as a member of the council to gain, directly or indirectly, an advantage for herself or for another person or to cause detriment to the council in relation to the petition.
85. It is also alleged that Cr Graham-King may have sought information from the council in her capacity as an elected member and used this information for her own advantage, given that the petition was commenced prior to the council having advised ratepayers that an application had been made to the Liquor Licensing Board. I have concluded that there is no evidence to support this allegation given that:
- Mr Keepence sent out the Form 2 Notice of Application under the *Liquor Licensing Act 1997* to businesses and residents, and posted the notice in the window of the property, on 16 December 2014, prior to the date of the petition, and
 - there is no evidence that Cr Graham-King had any contact with the council in relation to the property prior to her telephone call to Mr Gatti, the council's Development Assessment Planner, on 23 January 2015.

Telephone conversation with Mr Keepence on or about 8 January 2015

86. Mr Keepence has submitted that in his telephone conversation with Cr Graham-King on or about 8 January 2015 she again asserted her position as a council member, stating:

...

5. Once again she told me other elected members were outraged and now added that the community was willing to display signs outside the venue, that they were willing to go to the media and take whatever action necessary to stop the business.
6. Once again she informed me of the wealthy powerful nature of the community, that gets what it wants, and that she was acting on behalf of these people as a community leader.

...¹⁸

87. Cr Graham-King, in her response to the complaint, gave the following account of the telephone conversation:

... Again, I was polite to him and I completely deny the allegation he has previously made against me with regards to the nature or content of our telephone conversations. What he has alleged is just not my style of communicating with people over the telephone. I just simply would not speak to anyone in the manner that he has alleged. ...¹⁹

¹⁸ Letter from Mr Shane Keepence to the Walkerville Town Council CEO, dated 17 February 2015.

¹⁹ Letter from Cr Graham-King to the Ombudsman, dated 17 July 2015.

88. I am unable to establish to the requisite standard of proof that Cr Graham-King improperly asserted the power she has as a result of her position as a council member or was not acting in a personal capacity only in her conversation with Mr Keepence. As such, I am unable to find that Cr Graham-King made improper use of her position as an elected member of the council to gain, directly or indirectly, an advantage for herself or her husband, in relation to her telephone conversation with Mr Keepence on or about 8 January 2015.

Telephone call to Mr Gatti, the council's Development Assessment Planner

89. In her response to the complaint Cr Graham-King wrote the following account of her telephone call to Mr Gatti:

... Around the same time, my husband Neil who was still suffering the effects of food poisoning, asked me some questions about the planning process for the proposed wine bar, including the car parking requirements.

Given that a wine bar is quite a sensitive use in an area that includes private residences, I thought it was unusual that the change of use for the property itself, from a shop to a wine bar, had not been presented to the Council's DAP for consideration. The development application that had been submitted by the applicant for the change of use had been dealt with by the Council's planners.

After Neil's questions were raised with me, I reviewed the car parking provisions of the Walkerville Council Development Plan as they related to the property, and found that 16-17 car parks would be required for the proposed use as a wine bar with around 50 patrons, and only 5 car parks were provided on the site. I still have my notes of this research. A copy of these extracts from the Development Plan is **Attachment 8**.

As a result, on 23 January 2015 I contacted Mr Anthony Gatti, planner with the Council, to appraise [sic] him of the questions that I had been asked. I then asked Mr Gatti if it would be alright for Neil to contact him direct with these queries so that Neil could receive the clarification direct from him.

I was very polite to Mr Gatti during this conversation. At no time did he say he was uncomfortable, or advise me I should direct my enquiries elsewhere. My husband did subsequently contact Mr Gatti to ask the questions he had raised with me.

I have since received a redacted copy of an email Mr Gatti sent on 23 January 2015 to a person I now know to be Katrina Marton (from the letter received from the Governance Panel at **Attachment 1**). In this email Mr Gatti outlines our conversation and confirms that I advised him I was calling on behalf of a resident and asking if that resident could contact him direct. A copy of this email is **Attachment 9**.

Importantly, in making these follow up enquiries, I was not breaching the Code of Conduct as it applied to Development Assessment Panel members, as this was not a development application that was considered, or was going to be considered, by the DAP.

Rather, my enquiries with Mr Gatti were not made in my capacity as a DAP member, but as an elected member following up on concerns that had been raised with me by a resident, and facilitating a conversation between that resident and Mr Gatti. ...²⁰

90. I note the difficulties faced by council members when they have a personal interest in a matter concerning the council. In my view, Cr Graham-King should have been alert to the difficult position she was in and refrained from discussing the matter with Mr Gatti. However, whilst I acknowledge that the conversation made Mr Gatti uncomfortable, there is no evidence to suggest that Cr Graham-King attempted to influence him in any way.

²⁰ Ibid.

Conclusion

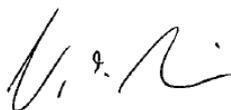
In light of the above, my final view is that the Cr Graham-King did not breach section 62(4) of the Local Government Act, and did not act in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.

Disclosure

The Ombudsman Act imposes certain obligations²¹ on my Office and others, including complainants, officers and members in the council, to keep information about my investigation confidential. However, if I consider that disclosure of that information is in the public interest, then I may authorise or require its disclosure.

In my opinion, there is a public interest in disclosure of my final reports under the Ombudsman Act. Therefore, I authorise disclosure of this final report by the council and request that it present it to a public meeting of the council within two ordinary meetings of the council following the receipt of the report.

In the event that the council does not present the final report to a public meeting of the council within two ordinary meetings of the council following the receipt of the final report, reason(s) for the inaction should be provided to me.



Wayne Lines
SA OMBUDSMAN

2 March 2016

²¹ *Ombudsman Act 1972*, section 26.