



OmbudsmanSA

Redacted Report

Full investigation pursuant to referral under
section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012*

Public Authority	[The Council]
Public Officer	[The Public Officer]
Ombudsman reference	2017/07620
ICAC reference	2018/000009
Date of referral	21 July 2017
Issues	<ol style="list-style-type: none">1. Whether [the Public Officer] committed misconduct in public administration by arranging section 51 clearance for a non-compliant development application lodged by a council employee2. Whether [the Public Officer] committed maladministration in public administration by arranging section 51 clearance for a non-compliant development application lodged by a council employee2. Whether [the Public Officer] committed misconduct in public administration by treating development applications submitted by council employees more favourably than those submitted by members of the public

Jurisdiction

This matter was referred to the Ombudsman by the Commissioner pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012 (the ICAC Act)*, as raising potential issues of misconduct and maladministration within the meaning of that Act (**the referral**). The person who reported the matter to the Commissioner (**the reporter**) is not identified.

Section 14B of the Ombudsman Act provides:

14B—Referral of matter by OPI or ICAC

- (1) If a matter is referred to the Ombudsman under the ICAC Act, the matter—
 - (a) will be taken to relate to administrative acts for the purposes of this Act; and
 - (b) must be dealt with under this Act as if a complaint had been made under this Act and—
 - (i) if the matter was the subject of a complaint or report under the ICAC Act —as if the person who made the complaint or report under that Act was the

- Complainant under this Act; or
- (ii) if the matter was assessed under that Act after being identified by the Commissioner acting on the Commissioner's own initiative or by the Commissioner or the Office in the course of performing functions under any Act—as if the Commissioner was the complainant under this Act.

- (2) In this section—
Commissioner means the person holding or acting in the office of the Independent Commissioner Against Corruption under the ICAC Act;

ICAC Act means [Independent Commissioner Against Corruption Act 2012](#);

Office means the Office for Public Integrity under the ICAC Act.

These issues concern alleged breaches by [the Public Officer] of Part 2 of the Code of Conduct for Council Employees (**the Code of Conduct**). Failure by a council employee to comply with Part 2 of the Code of Conduct constitutes misconduct. As a contravention of Part 2 of the Code of Conduct can constitute a ground for disciplinary action against the employee, including dismissal, under section 110(5) of the *Local Government Act 1999*, I have considered the alleged misconduct under section 5(3)(a) of the ICAC Act.

Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking a response from [Person A], at the council
- seeking a response from [the Public Officer] at the council
- seeking a response from [Person B], at the council
- seeking a response from [Person C], at the council
- considering the *Ombudsman Act 1972* (**the Ombudsman Act**), the ICAC Act, the *Development Act 1993* (**the Development Act**) the *Development Regulations 2008* (**the Regulations**) and the Code of Conduct
- preparing a provisional report, and seeking a response to that report from the interested parties
- 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.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

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.

Response to my provisional report

In response to my provisional report, [Person D] of the council, advised that although he did not wish to provide any comments in response to my provisional report, he intended to undertake an externally facilitated review of the council's section 51 clearance process.

[The Public Officer] did not provide a response to my provisional report.

Background

1. [Person B], (**the council**), lodged an application to subdivide his property, (**the property**) on 23 October 2014.
2. [Person B] was then granted planning and land division consent via a Development Decision Notice (**the notice**) dated 16 December 2014 from [the Public Officer] at the council, which was subject to 26 conditions that were imposed by both the council and the Development Assessment Commission (**DAC**). The conditions set out in the notice were as follows:

[Council] Conditions:

1. Development must take place and be maintained in accordance with the supporting documentation and amended plans, relating to Development Application [...] except as modified by any conditions attached to this Decision Notification.
2. A complete septic tank effluent drainage scheme, including allotment connection points, gravity drains, pump stations and rising mains to treatment plants for the project must be provided.
3. Where land is subdivided into individual allotments or units the Developer at his/her cost will pay to Council upon approval of land division a levy of \$2250 for each newly created allotment or unit that needs access to the existing CWNS Scheme. Such payment to be made before Council can issue approval for the issue of title.
4. The proposed roadway within the proposed division must be constructed of a 150mm min sub base a 150mm base and be paved or sealed with bitumen, tar or asphalt, or other approved material, to a minimum width of 8 metres (or an alternative approved width) and or be otherwise constructed in accordance with a suitably qualified engineer to the satisfaction of Council.
5. The design of all roads are to be carried out by a suitably qualified engineer and detailed drawings are to be submitted to Council for approval prior to construction commencing.
6. Footpaths, water-table, kerbing, culverts and drains to serve the proposed road as required by the Council, must be constructed in accordance with recognised engineering practice for the safe and efficient drainage of the land and for the safe and efficient disposal of storm water from the land.
7. A 1.2 wide paved footpath must be provided on both sides of each new road and must be constructed of a minimum of 65mm medium duty concrete pavers on a 125mm compacted quarry rubble base or as otherwise approved in accordance with plans and specifications approved by Council.
8. A storm water penetration point must be provided within the kerbing for each proposed allotment in suitable locations to the satisfaction of Council.
9. The manner of forming any proposed road, footpath, water-table, kerbing, culvert or drain must be in conformity with a road location and grading plan signed by a licensed

surveyor and approved by the Council prior to the commencement of the work.

10. A Common Effluent Drainage Scheme must be installed and provide all necessary drains, pumps, vents, inspection points, flushing points and the like, and a connection point for each proposed allotment in the proposed development. The design construction installation [sic] and interconnection of the scheme for gravity flows from adjacent schemes or land which may be developed in future must be designed by a suitably qualified engineer and be approved by the Health Department and Council.
11. All work must be carried out in a manner satisfactory to the Council and in conformity with detailed construction plans and specifications signed by a Chartered Professional Engineer and approved by Council, prior to the commencement of the work. The design shall generally be in accordance with relevant Australian Standards, technical codes of practice, approved guidelines, Council land division guidelines and Australian Road Rules, and generally meet good engineering practice.
12. Street name posts, furniture, lighting, trees and any proposed entry description structures and the like must be provided in such number and location in accordance with Council requirements.
13. Electrical power mains services must be installed and connected to each of the proposed allotments in accordance with recognised engineering practice and be placed underground, unless otherwise approved by Council. Street lighting must be provided in such number design [sic] and location approved by Council.
14. Telecommunication services are to be provided to each allotment in accordance with the minimum standards of the utility service provider.
15. A Common Effluent Drainage Scheme connection point must be installed and provide an independent connection point for each proposed allotment. The design construction installation [sic] and interconnection of the connection points to Council's existing scheme must be designed by a suitably qualified person and be approved by Council prior to installation.
16. Street trees must be planted on both sides of the proposed road(s) within the unsealed portion of the road reserve at a rate of 1 planting per primary street frontage and 2 plantings per secondary street frontage. The species and location of street trees must be approved prior to installation by Council.
17. New allotments must be constructed with a minimum finished surface level of 19.2 metres AHD unless otherwise approved by Council.
18. Roads shall have 100mm high mountable concrete kerbing on both sides unless otherwise negotiated and approved by Council.
19. All services including communications and electricity shall be placed underground to each allotment, to meet the requirements of the relevant services providers and Council.
20. All construction works shall be guaranteed for the period of 12 months from the date or practical completion. A bank guarantee whose value represents 5% of the total contract price shall be lodged with the Council prior to practical completion. The bank guarantee shall be held by the Council for the full 12 months guarantee period and shall be released when the Council is satisfied that there are no defect items outstanding.
21. Site management practices and all reasonable care shall be employed by the developer to minimise nuisance to adjoining owners and others from dust and noise. Dust generated by machinery and vehicular movement during site works, and any open stockpiling of soil or building materials at the site, must be suppressed by regular application of water, or a layer of paper mulch, to ensure that dust generation does not become a nuisance offsite.

22. The owner/applicant is to obtain the relevant application form from Council (application to install a septic tank system and/or application to alter a septic tank system) prior to commencing work on site in relation to the Community Wastewater Management System.
23. During any works or construction activities associated with the land division, the subject land must be managed in a manner as to prevent erosion and pollution of the subject site and the environment, including keeping the area in a tidy state and ensuring any waste materials are appropriately contained to ensure no pollutants (including excavation and fill material) enter the River Murray system. The preparation of a Soil Erosion and Drainage Management Plan or similar document may assist in complying with this condition.

Development Assessment Commission conditions

1. The financial and augmentation requirements of the SA Water Corporation shall be met for the provision of water supply (SA Water 90131/14). The necessary easements shall be granted to the SA Water Corporation free of cost.
 2. Payment of \$14,245 into the Planning and Development Fund (5 Allotment(s) @ \$2849/allotment). Payment may be made by credit card via the internet at www.edala.sa.gov.au, or by phone (8303 0724), by cheque payable to the Development Assessment Commission marked 'NOT NEGOTIABLE' and sent to GPO BOX 1815, ADELAIDE 5001 or in person at Level 5, 136 North Terrace, Adelaide.
 3. A final plan complying with the requirements for plans as set out in the Manual of Survey Practice Volume 1 (Plan Presentation and Guidelines) issued by the Registrar General to be lodged with the Development Assessment Commission for Land Division Certificate purposes.
3. On 25 May 2015 [the Public Officer] at the council, instructed [Person A], at the council, by email, to 'organise Section 51 clearance' for the subdivision. That same day, section 51 clearance was issued by the DAC, lodged at the Land Titles Office, and titles were issued.
 4. Under section 51 of the Development Act, applications for land division must be given clearance from the DAC to confirm that the DAC:

...is satisfied that the prescribed conditions as to development have been satisfied, or that the applicant has, by virtue of an entitlement under the regulations, entered into a binding agreement, supported by adequate security and, if the regulations so require, in a form prescribed by the regulations, for the satisfaction of any such condition.³
 5. The Development Act also sets out that:

...Before the Development Assessment Commission issues a certificate it may require the applicant, the council for the area in which the land is situated (if any), or any other person or body, to furnish it with appropriate information as to compliance with a particular condition, or to comply with any requirement prescribed by the regulations.⁴
 6. In order to submit a request for section 51 clearance, which is done online via the Electronic Land Division Lodgement (**EDALA**) Planning Portal, a box must be checked off by the person submitting the request confirming to the DAC that all conditions have been fulfilled or bonded.
 7. If the DAC is satisfied that the prescribed conditions, such as those imposed above in relation to [Person B's] application for subdivision, have been satisfied or bonded with

³ *Development Act 1993*, section 51(1).

⁴ *Development Act 1993*, section 51(2).

adequate security, the DAC will issue clearance in the form of a Certificate of Approval.

8. By seeking section 51 clearance from the DAC in relation to [Person B's] development application, the council effectively confirmed to the DAC that the conditions referred to above had been fulfilled to its satisfaction or that it had entered into a bonding agreement with the developer to protect the council in the event of non-compliance.
9. A consequence of issuing section 51 clearance where conditions have not been met or bonded, is that the council cannot then pursue the developer for non-compliance with those conditions, and may therefore be liable for the cost of ensuring they are fulfilled to the required standard under the Development Act and Regulations.
10. The reporter viewed the property on 4 June 2017 and noted that it appeared that a number of the conditions attached to [Person B's] development application, particularly those relating to the construction of public roads, had not been met.
11. The relevant conditions relating to the construction of public roads are conditions 4, 5, 6, 7, 8, 9, 11, 12, 16, and 20. Of those conditions, it was reported that as of 4 June 2017, condition 18 had been the only one complied with in full, and condition 12 had been fulfilled in part.
12. It is alleged by the reporter that [the Public Officer] arranged the request for section 51 clearance knowing that the conditions had not been met or bonded.

Response from [Person A]

13. My Office sought a response from [Person A] in order to clarify her role in organising section 51 clearance in relation to [Person B's] development application, and section 51 clearances submitted to the DAC by the council in general. [Person A] provided the following response by letter dated 4 September 2017:

The land division application (number [...]) was received by Council on 23 October 2014. The application was granted planning and land division consent by Council on 16 December 2014.

I was instructed by [the Public Officer] to arrange Section 51 (S51) clearance in relation to [Person B's] development application (subdivision) on 25 May 2015.

I received an email from [the Public Officer] advising me to issue the S51 clearance, the email did not contain any other details regarding whether the conditions had been met. I issued the S51 clearance on 25 May 2015 through EDALA (electronic development application lodgement and assessment system).

...My role in relation to organising Section 51 clearances for land divisions is to issue the clearance (essentially a tick box) on EDALA. The EDALA system is where Council receives new land division applications to assess, Council decision notifications for land divisions are uploaded and how Council issues a S51 clearance. I am responsible for downloading and uploading documents and information to/from the system.

14. [Person A] also provided the following response in regard to her knowledge of whether the conditions attached to [Person B's] application had been met at the time [the Public Officer] instructed her to arrange section 51 clearance:

...I was aware that at least one condition of approval had not been met before the clearance was given. It was in relation to a levy required to be paid for the creation of CWMS (effluent) connection points. I am responsible for requesting Council's finance officer to provide an invoice for the required levy to the applicant/s, which in this case I only actioned after I was asked to issue the clearance. The invoice was raised on the

same day as issuing the clearance (25 May 2015) and payment was receipted on 8 January 2016.

Requesting the invoice for this levy is usually triggered after Council receives an application for the installation of new/additional CWMS points, however in this case the nature of the installation meant that Council wasn't the approving authority. SA Health issued approval for the CWMS infrastructure on 13 February 2015.

Also, as I live in the same town and pass by the subject land on a daily basis, I could physically see that other conditions relating to general infrastructure had not been completed before the clearance was given.

In this case, I did not query the completion status of any other conditions as I had fulfilled the task I was responsible for and I had been instructed by my superior to issue the clearance.

Council does not have a formal procedure in regards to issuing a S51 clearance. In order to issue a clearance, there could be a combination of general checkpoints depending on the nature of the conditions attached to an approval, which can include the following:

- A request for clearance could be received either via notification through the EDALA system or directly from the applicant (land surveyor) or owner, usually via email.
 - In this case, I did not directly receive a request for clearance via EDALA or from the applicant/owner, I only received the instruction from [the Public Officer] to issue the clearance. I am not aware if or how [the Public Officer] received a request.
- If the conditions attached to an approval are minor, meaning there is no requirement for the applicant to conduct works on site or provide any further information to Council, [the Public Officer] would advise me to issue clearance. I could receive this instruction through a verbal discussion between the two of us or via email.
- The completion of more complex conditions, usually relating to infrastructure requirements, are assessed by council's [Person C]. The requirements of the applicant can vary from being requested to submit necessary plans/documents for approval prior to works commencing, or on some occasions council will request 'as constructed' drawings once completed. There may also be the need for a site inspection to determine compliance.

This correspondence is generally submitted to [Person C] directly and he would advise myself or [the Public Officer] (verbally or via email) once he was satisfied.

 - I cannot recall having any discussions with and did not receive any correspondence from [Person C] about the infrastructure conditions being satisfactorily completed.
 - I have no knowledge of any discussions that may have been held between [the Public Officer] & [Person C] about the conditions relating to infrastructure being satisfactorily completed.
 - There are no records on council's file related to this.⁵
- Sometimes agreements can be put in place between council and the developer to defer conditions (generally infrastructure related) until a certain percentage of the development has been completed, for example, the planting of street trees in a new residential area can be deferred until after the majority of houses (specifically driveways) have been constructed.
 - I am not aware of any such agreements in relation to [Person B's] subdivision.

⁵ [Person C] advised my Office by email dated 14 November 2017 that he could not recall whether he had been asked to provide advice in regard to whether any, or all of the conditions in relation to [Person B's] property had been met. [Person C] also stated that it was obvious that some of the conditions had not been met at the time section 51 clearance was granted.

The responsibility for ensuring that conditions under the Regulations had been met prior to the clearance being given is [the Public Officer's] however some conditions of approval are required to meet the satisfaction of other council officers, as described above. I am not aware of the details of any discussions between [the Public Officer] and [Person B] in regards to his application for subdivision.

I am not aware of [the Public Officer] treating applications submitted by council staff differently to those submitted by members of the public.

Response from [the Public Officer]

15. [The Public Officer] responded to the allegations and specific questions that were put to her by my Office, by letter dated 23 September 2017.
16. Regarding [the] understanding as to whether the conditions in relation to [Person B's] property had been complied with prior to submitting the application for Section 51 Clearance, [the Public Officer] submitted that:

...I was under the assumption that while some of the conditions had not been completed discussions and arrangements with [Person C] had been undertaken to schedule the infrastructure work once the majority of dwellings had been constructed. This (sic) made sense to undertake the infrastructure work due to builders at times being less than careful eg street trees and footpaths. It is not uncommon to do this and it can save a lot of money for both the applicant and the Council.

... I have undertaken a check of my records, the property file records and electronic (Synergy) records and there is no evidence of these conversations taking place or any written agreements, much to my own detriment. I am unaware if any records relating to any agreements put in place regarding the infrastructure delivery do in fact exist. I have also checked emails (both inbox and sent) and I have been unable to find any correspondence in relation to [Person B's] land division application.

...The decision was made to go ahead with the clearance as I felt that the conditions that were required to be met were infrastructure based. Therefore I needed to feel confident that [Person C] was alright with everything and I was led to believe there was an agreement being put in place to undertake these conditions once the majority of dwellings were constructed.

As with most land division applications I would leave infrastructure and waste water conditions to be checked off by the relevant officers as I don't believe I am suitably qualified to make those decisions eg quality of roads and CWMS connections.

...I undertake my duties with great care and while some human errors have occurred they have been rectified and subsequent actions have been put into place to make sure these do not occur again. It is clear that there has been a breakdown in record management and communication. However identifying these issues recent improvements that have been made not only in the assessment of applications but Council wide processes, which have included the use of development checklists when undertaking the assessments and an overhaul of record keeping standards to ensure more accurate and useful information is recorded in relation to customer service queries and development processes overall.

I can speak for myself and say that in regards (sic) to this matter I have at no time intentionally behaved in such a way that I have received any incentives to do any "favours". I also believe that no other staff benefitted from [Person B] and processing his land division application. That would also apply to any other application listed in the letter.

Poor record management and communication has let people down throughout this situation and I hope that recent changes will have a strong impact on record management and communication and move the organisation forward in a positive way.

17. My Office also sought a response from [the Public Officer] in regard to [Person B's] involvement, and any discussions she may have had with him, in regard to the clearance process. [The Public Officer] responded to those enquiries as follows:

...As I recall I had minimal conversations with [Person B] regarding the land division application or subsequent dwelling application. Land divisions are submitted by the surveyor and the majority of the time the building companies are the applicant for dwellings.

A brief conversation regarding the Clearance of the division I had with [Person B] was one that he wanted to acquire the Clearance for bank purposes. I did not go into much detail with him simply because his financial affairs are not my business or related to my work.

This is where I assumed that conversations and a possible agreement was entered into by [Person B] and Council regarding the delivery of conditioned infrastructure work.

Response from [Person B]

18. [Person B] responded to my notice of investigation by letter dated 23 October 2017.
19. Regarding his understanding of the conditions, and the requirement for them to be complied with prior to obtaining section 51 clearance, [Person B] submitted that:

...I was aware of and understood the conditions imposed by Council following receipt of the Decision Notice via our Surveyor -[Person E].

It was only after an enquiry to [Person E] asking if there was any update on the s51 clearance that I was made aware that the clearance would not be finalised until all conditions of the Council Decision Notice had been completed.

... [Person E] was engaged by my partner and me to undertake the entire approval process. I have attached the letter detailing the works to be conducted by our Surveyor and it clearly shows that he will undertake the entire process including planning clearances.

...The s51 clearance was submitted by the Surveyor following discussions with Council's Planning Officer. I was not privy to those conversations or aware when documents were submitted.

...Following my discussion with the Surveyor when he informed me that s51 clearance would not be provided until compliance with Council conditions had occurred, he suggested I inform the relevant staff about the delay to the outstanding conditions because I had been working closely with the contractors and knew more about the background and future timing than he did. He mentioned that the staff would determine how they would proceed.

20. In regard to the allegation that he had influenced staff to arrange section 51 clearance, knowing that the conditions had not been complied with, [Person B] submitted that:

...I spoke with the [the Public Officer], as an applicant to explain why the road could not be finished immediately as the contractor that started the work had left to undertake a large project in the Northern Territory but he would be back to complete the work in a few months and if it was delayed I would engage Scherer Contractors to complete the task.

We spoke about tree planting and I informed her that [Person C] suggested in almost all sub-division cases and in particular small ones, that it was better to plant the trees when all the driveway locations were known. This prevents additional costs to Council of having to remove trees at a later date because they were planted in the middle of a proposed driveway entrance.

The last condition was kerb and gutter and the crusher-dust footpath. I spoke about this with [Person C] and explained this was delayed because the same contractor who was completing the road had been engaged for this task.

...At no time did I ever direct or ask a staff member to arrange a clearance for me. My brief discussions with staff throughout the process have been detailed in [my response above] and in those discussions it was purely as an applicant.

At this Council we encourage applicants to be involved in the process as much as possible to ensure staff are provided with as much information as available to make informed decisions. Often the applicant is able to provide additional information that a builder or consultant is unsure/unaware of. We encourage and strongly advocate for prelodgement meetings and any contact throughout the process.

Due to my employment at Council I considered that would not be appropriate in this instance and that is why I had no involvement in the process except for updating staff about delays caused by a contractor obtaining a big job interstate.

Relevant law

21. Section 5(3) of the ICAC Act provides:

(3) *Misconduct in public administration* means—

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

22. Section 5(4) of the ICAC Act provides:

(4) *Maladministration in public administration*—

- (a) means—
 - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
 - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
- (b) includes conduct resulting from impropriety, incompetence or negligence; and
- (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

23. Section 109 of the Local Government Act provides:

109—General duty

- (1) An employee of a council must at all times act honestly in the performance of official duties.
- (2) An employee of a council must at all times act with reasonable care and diligence in the performance of official duties.

24. Section 110 of the Local Government Act provides:

110—Code of conduct for employees

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the employees of all councils.
- (2) The Minister must consult with any registered association that represents the interests of employees of councils before the regulation is made.
- (3) A code of conduct must not diminish a right or employment condition under an Act, award, industrial agreement or contract of employment.

- (4) Council employees must observe the code of conduct.
- (5) Contravention of or failure to comply with the code of conduct constitutes a ground for suspending, dismissing or taking other disciplinary action against the employee.

25. Clauses 2.1, 2.2, and 2.4 of Part 2 of the Code of Code of Conduct provides:

General behaviour

- 2.1. Act honestly in the performance of official duties at all times, as required by s109(1) of the *Local Government Act 1999*.
- 2.2. Act with reasonable care and diligence in the performance of official duties, as required by s109(2) of the *Local Government Act 1999*.
- 2.4. Act in a way that generates community trust and confidence in the Council.

26. Section 51 of the Development Act provides:

51—Certificate in respect of the division of land

- (1) Subject to any exclusion prescribed by the regulations, the following certificate is required in relation to a development that involves the division of land under this Act, namely a certificate from the Development Assessment Commission that it is satisfied that the prescribed conditions as to development have been satisfied, or that the applicant has, by virtue of an entitlement under the regulations, entered into a binding agreement, supported by adequate security and, if the regulations so require, in a form prescribed by the regulations, for the satisfaction of any such condition.
- (2) Before the Development Assessment Commission issues a certificate it may require the applicant, the council for the area in which the land is situated (if any), or any other person or body, to furnish it with appropriate information as to compliance with a particular condition, or to comply with any requirement prescribed by the regulations.
- (3) A certificate will be issued in the prescribed manner and form.
- (4) The Development Assessment Commission must, as soon as practicable after issuing a certificate under subsection (1) that relates to land within the area of a council, furnish the council with such information as the regulations may require.
- (5) The Development Assessment Commission may give a certificate under subsection (1) in relation to a particular stage of a development constituted by the division of land.
- (6) A certificate issued under this section will, unless extended by the Development Assessment Commission within the period prescribed by the regulations, lapse at the end of that prescribed period.

Whether [the Public Officer] committed misconduct in public administration by arranging section 51 clearance for a non-compliant development application lodged by a council employee.

- 27. As noted by [the Public Officer], it was clear that several conditions that had been imposed on [Person B's] development application had not been fulfilled at the time she arranged section 51 clearance with the DAC.
- 28. It appears, therefore, that [the Public Officer] arranged the clearance knowing the conditions had not been met, albeit with the belief that those conditions were likely to be fulfilled in the future.
- 29. [The Public Officer] also suggested that she was of the belief that [Person C] had arranged for [Person B] to enter into an agreement to fulfil those conditions once the houses that were due to be built on the property had been fully constructed. [The Public

Officer] was not, however, able to produce any records to reflect that [Person C] had assured her that an agreement was to be put in place, and she confirmed that such an agreement did not exist.

30. [Person C] could not recall being asked for advice in regard to whether the conditions had been met, nor could he recall whether there had been an arrangement or a specific timeframe for [Person B] to comply with the conditions.⁶
31. Whilst I am unable to establish with certainty whether such discussions between [the Public Officer] and [Person C] occurred, I consider that a *proposed* agreement is an irrelevant consideration as to whether it was appropriate for [the Public Officer] to arrange section 51 clearance knowing the conditions had not been fulfilled.
32. [The Public Officer] ought to have known that it was not appropriate to arrange section 51 clearance in the absence of a *completed* formal bonding agreement that she had herself sighted.
33. By arranging section 51 clearance, [the Public Officer] effectively confirmed (falsely) to the DAC that the conditions had been fulfilled or bonded. I understand this is reflected on EDALA, which is where requests for clearance are submitted, as once the request for clearance is submitted the EDALA portal states that 'Council's conditions/ requirements of development approval' have been met once clearance has been given.
34. As noted above, the effect of obtaining section 51 clearance is that the council cannot then pursue the developer for non-compliance with those conditions, and may therefore be liable for the cost of ensuring that the public road is constructed to the required standard under the Development Act and Regulations.
35. In light of the above, I will now consider whether [the Public Officer] breached any of the provisions under the Code of Conduct.

Duty to act honestly in the performance of official duties at all times

36. [The Public Officer] submitted to my Office that [the Public Officer's]:

...involvement in relation to the section 51 Clearance that was organised in connection with [Person B's] application for subdivision was that I was the Town Planner in charge of the assessment of the application and subsequently the Officer who signed off on the clearance.

37. This response from [the Public Officer] is consistent with [Person A's] response above that [the Public Officer] was responsible for ensuring that conditions had been met prior to arranging section 51 clearance with the DAC.
38. On that basis, I am satisfied that [the Public Officer] was performing 'official duties' and was required to act honestly in accordance with section 109(1) of the Local Government Act at the time she arranged clearance.
39. [The Public Officer] is a qualified Town Planner, who has by her own account assessed 'approximately 750 [development] applications' during her 3.5 years working for the council.⁷ As such, I expect that [the Public Officer] ought to have understood the effect of arranging section 51 clearance, in that doing so implied to the DAC that all conditions had been fulfilled or bonded.

⁶ Email from [Person C] to my Office dated 15 November 2017.

⁷ Letter from [the Public Officer] to my Office dated 23 September 2017.

40. [The Public Officer] was also aware of the conditions, having signed the notice to [Person B] alerting him to them, and knew that they had not been fulfilled or bonded at the time she arranged section 51 clearance.
41. Further, as noted above, I am also not satisfied that an informal discussion between [the Public Officer] and [Person C] is a valid substitute for sighting a proper bonding agreement. I am of the view that [the Public Officer] ought to have known that no financial guarantee was in place in the event that [Person B] did not comply with the conditions.
42. Therefore, in light of the above, I consider that [the Public Officer] knowingly and dishonestly arranged section 51 clearance in the absence of the conditions having been fulfilled or bonded, thereby misleading the DAC.
43. As such, I am of the view that [the Public Officer] did not act honestly in the performance of her official duties as required by section 109(1) of the Local Government Act, and on that basis breached clause 2.1 of the Code of Conduct.

Duty to act with reasonable care and diligence in the performance of official duties

44. As set out above, I am satisfied that [the Public Officer] was performing 'official duties' by arranging section 51 clearance.
45. I will now consider whether she fulfilled her duty to act with reasonable care and diligence in relation to the performance of that duty in accordance with section 109(2) of the Local Government Act.
46. [The Public Officer] stated that she relied on [Person C's] assurance that [Person B] would enter into an agreement with the council to ensure that the conditions would be met.
47. Whilst I cannot ascertain whether such an assurance by [Person C] was offered, I consider that relying on a yet to be finalised agreement, or in the absence of one altogether, was in breach of her duty to act with reasonable care and diligence in the performance of her official duties.
48. I consider that [the Public Officer's] failure to exercise care and diligence was of a serious nature, given the risk her actions presented to the council if [Person B] were to not comply with the conditions after section 51 clearance had been granted.
49. As such, I am of the view that [the Public Officer] failed to act with reasonable care and diligence as required by section 109(2) of the Local Government Act, and on that basis breached clause 2.2 of the Code of Conduct.

Duty to act in a way that generates community trust and confidence in the Council

50. [The Public Officer's] actions placed the council in a position of facing a significant risk of becoming responsible for the cost of ensuring that the public road adjacent to [Person B's] property is constructed to the required standard under the Development Act and Regulations.
51. By placing the council at such a risk, and making a false representation to the DAC, I consider that [the Public Officer] acted in a way that would likely erode community trust and confidence in the council if the community were to have knowledge of her actions.
52. I am unable to establish whether [the Public Officer's] actions were motivated by the fact that she worked with [Person B]. However, I consider it is likely that the public

would perceive this to have been a contributing factor in [the Public Officer's] actions, thereby further compounding the negative effect of her actions on the community's trust and confidence in the council.

53. Therefore, I am persuaded that [the Public Officer] breached Clause 2.4 of the Code of Conduct.

Opinion

In light of the above, my view is that [the Public Officer] breached clauses 2.2, 2.3 and 2.4 of Part 2 of the Code of Conduct, in addition to section 109 of the Local Government Act, and therefore committed misconduct in public administration for purposes of section 5(3)(a) of the ICAC Act.

My view is that [the Public Officer's] actions were therefore contrary to law for the purposes of 25(1)(a) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that the council consider taking disciplinary action against [the Public Officer].

Whether [the Public Officer] committed maladministration in public administration by arranging section 51 clearance for a non-compliant development application lodged by a council employee.

54. Pursuant to section 5(4) of the ICAC Act, a public officer commits maladministration in public administration in circumstances where his or her conduct has resulted in the 'irregular and unauthorised use of public money';⁸ the 'substantial mismanagement of public resources'; or has involved 'substantial mismanagement in or in relation to the performance of official functions'.⁹
55. In the present circumstances, while [the Public Officer] potentially exposed the council to a degree of financial risk, it does not appear that [the Public Officer's] actions have resulted in the irregular and unauthorised use of public money, or the substantial mismanagement of public resources.
56. I have considered, however, whether [the Public Officer's] conduct involved 'substantial mismanagement in or in relation to the performance of official functions'
57. As I have previously set out in my report above, I consider that [the Public Officer] was performing 'official duties' in relation to the section 51 clearance. I am therefore also satisfied that [the Public Officer] was performing 'official functions' for the purposes of section 5(4)(a)(ii) of the ICAC Act.
58. I must now consider whether her conduct in performing those functions involved 'substantial mismanagement', noting that the ICAC Act provides that mismanagement in the context of maladministration in public administration:
- (b) includes conduct resulting from impropriety, incompetence or negligence; and
 - (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.¹⁰

⁸ *Independent Commissioner Against Corruption Act 2012*, section 5(4)(a)(i).

⁹ *Independent Commissioner Against Corruption Act 2012*, section 5(4)(a)(i).

¹⁰ *Independent Commissioner Against Corruption Act 2012*, section 5(4)(b) and (c).

59. [The Public Officer] instructed [Person A] to arrange clearance, knowing that many of the conditions had not been met. In doing so, I consider that [the Public Officer's] conduct constituted mismanagement resulting from impropriety in the performance of her official functions.
60. Further, [the Public Officer] exposed the council to considerable financial risk by potentially causing it to be liable for satisfactory completion of the unfulfilled conditions referred to in paragraph 11 above. As such, I am also satisfied that the mismanagement was 'substantial' for the purposes of section 5(4)(a)(ii) of the ICAC Act.

Opinion

In light of the above, my view is that [the Public Officer's] committed maladministration in public administration for purposes of section 5(4)(a)(ii) of the ICAC Act.

Whether [the Public Officer] committed misconduct in public administration by treating development applications submitted by council employees more favourably than those submitted by members of the public.

61. The referral of this matter to my Office raised the general suggestion that [the Public Officer] may have treated other development applications submitted by council staff more favourably than those submitted by members of the public.
62. Although [the Public Officer] indicated in her letter to my Office that she has previously dealt with other applications by council staff, there is no evidence from the reporter to suggest that any of those applications had been dealt with inappropriately. As noted above, [Person A] also stated that she was not aware of applications submitted by council staff being treated more favourably by [the Public Officer].
63. On that basis, I do not consider that further investigation in regard to this issue are necessary or justifiable in the circumstances.

Opinion

I consider 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.

Summary and Recommendations

In light of the above, my views are that [the Public Officer]:

- breached clauses 2.2, 2.3 and 2.4 of Part 2 of the Code of Code of Conduct in addition to section 109 of the Local Government Act, and therefore committed misconduct in public administration for purposes of section 5(3)(a) of the ICAC Act
- acted contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act
- committed maladministration in public administration for purposes of section 5(4)(a)(ii) of the ICAC Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act:

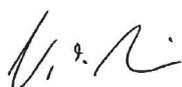
1. that the agency consider taking disciplinary action against[the Public Officer].

In accordance with section 25(4) of the Ombudsman Act, I also require that the agency report to the Ombudsman on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

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

I have sent a copy of my report to the Minister for Local Government as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

11 January 2018