

Report - City of Charles Sturt
Full investigation - *Ombudsman Act 1972*

Council member	Mayor Angela Evans & Councillor Robert Randall
Council	City of Charles Sturt
Ombudsman reference	2016/01306
Date complaint received	12 February 2016
Issues	<ol style="list-style-type: none">1. Whether Mayor Evans made an administrative error under section 25(1) of the Ombudsman Act by accepting a motion without notice from Councillor Robert Randall at the council meeting on 10 March 20152. Whether Mayor Evans committed a breach of Part 3 of the Code of Conduct for Council Members by accepting a motion without notice from Councillor Robert Randall at the council meeting on 10 March 20153. Whether Councillor Robert Randall made an administrative error under section 25(1) of the Ombudsman Act by contravening the Guiding Principles contained in Regulation 4 of the <i>Local Government (Procedures at Meetings) Regulations 2013 (SA)</i>

Jurisdiction

Issues 1 and 3 are within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Issue 2 alleges a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999 (the Code of Conduct)*.¹ 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.²

The complaint came before my Office by way of a referral from Mr Paul Sutton, Chief Executive Officer of the City of Charles Sturt (**the council**). The original complainants are Mr Geoffrey Reed, Ms Heather Sawyer and Ms Judy Packer who lodged a complaint with Mr Sutton on 8 December 2015 (**the original complaint**).

¹ The Code of Conduct was gazetted on 29 August 2013.

² Section 263A(4) Local Government Act; section 3, Ombudsman Act.

I understand that the complaint about Mayor Evans was initially referred to the Local Government Association Governance Panel (**the panel**). The panel assessed the complaint and advised Mr Sutton by letter dated 21 December 2015 that there was no breach under Part 3 of the Code of Conduct and the matter was referred back to the council.

Mr Sutton approached my Office because he was advised by Ms Marjorie Schulze OAM, Chairperson of the panel, that the panel has no jurisdiction to consider matters under Part 3 of the Code of Conduct. Ms Schulze advised the council that the matter ought to be referred to Ombudsman SA for investigation as my Office has jurisdiction to investigate alleged breaches of Part 3 of the Code of Conduct. As a result, Mr Sutton referred the complaint to my Office on 12 February 2016.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Mayor Evans
- seeking a response from the council
- seeking more particulars from Mayor Evans
- considering the provisions of the Code of Conduct, the City of Charles Sturt Code of Practice for Meeting Procedures (**Code of Practice**) and the *Local Government (Procedures at Meetings) Regulations 2013 (SA)* (**the Procedures at Meetings Regulations**)
- preparing a provisional report and providing it to the parties for comment
- seeking a response from Mayor Evans to submissions on the provisional report provided by Ms Packer
- 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.³ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...⁴

Response to my provisional report

The council responded suggesting an alternate remedy to the proposed recommendation in my provisional report. Mr Sutton stated:

... an alternate and more practicable remedy may be that the member seeking to move a motion that causes deviation from meeting procedures include in the motion the reason as to why it should be considered. That is, in the above case the mover make out the case for its urgency. This would ensure transparency in terms of the issue, for those other members of council voting on the motion as well as for the record via the minutes. This is seen as better than an individual

³ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

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

member or the Mayor endeavouring to record contemporaneous notes during the meeting which is not possible or practical in a meeting environment.

Ms Packer responded to my provisional report stating:

- her belief that the responses received from Mayor Evans are ‘revisionist and selective with the facts in a way to construct a defense of her actions’
- although four possible pathways were considered by the Coast Park Project Reference Group (CPPRG), only one option, Option 1 was endorsed and the other three options were rejected by the CPPRG
- despite the CPPRG only recommending option 1, all four options were presented to the community during the consultation process
- the CPPRG challenged this at the time and received a response from Mr Craig Daniel, Manager Urban Projects for the council, that a mistake had been made but since the mail outs had gone to print it was too late to change but would be changed in the council minutes
- the change to the minutes never occurred, and, according to Ms Packer, this ‘was the first indication of a systemic approach to widen the options considered and recommended by the CPPRG’
- the consultation process and final survey provided little quality information to clearly identify much beyond that the preferred option was Option 1
- an unnamed senior executive with ‘extensive knowledge of designing and interpreting market research for business and government concluded that the survey was flawed both in design and interpretation’
- that senior executive concluded:
 - a. The design of the survey was highly questionable
 - b. The interpretation of the data was flawed
 - c. Option 1 was preferred by a small majority
 - d. Many of the comments quoted were qualitative and repetitive and hence could not provide any basis for a decision
 - e. There is no evidence that the survey had been prepared by a qualified researcher
- several respondents pointed out to the council that the way survey results were interpreted was skewed, but this was never brought up at the council meeting and was not considered by the council
- at the ‘Speak Out’ meetings in October 2014 a guarantee had been made by the former Mayor Kirsten Alexander that strong support for a ‘do nothing’ option would be considered
- a petition of more than 400 signatures by one group supporting no path at all had been submitted to the council and was recorded in the council minutes, but had been completely factored out of the final report on the path
- the facts outlined above do not support a view that the Guiding Principle that ‘procedures should be fair and contribute to open, transparent and informed decision making’ were followed
- prior to the council meeting on 23 February 2015, and after the agenda had been published, the following was highlighted to council staff:
 - 1) The costings were wrong and this was pointed out and acknowledged by a senior Council employee but was not tabled at the meeting - even though that same employee committed by E-mail to table it. See APPENDIX B.
 - 2) As mentioned above the way in which the survey had been constructed and interpreted was without a doubt open to question. See APPENDIX A.
- prior to the council meeting, the council members could be seen having a pre-meeting in one of the side conference rooms
- the council meeting went ahead with no discussion and no debate and the motion was passed as noted

- the CPPRG had recommended that it stay engaged in an advisory role, but was disbanded (in Ms Packer's view, this was because the CPPRG was speaking 'inconvenient truths' about what the community would like to see)
- the disbanding of the CPPRG seems to indicate that the council had little regard to Guiding Principle that 'procedures should encourage appropriate community participation in the affairs of the council'
- arguably, the council decision at the 10 March 2015 council meeting to 'revoke' the previous decision to write to the State Government objectively seeking its views and replacing it with a decision to write to the government subjectively supporting a view should be viewed as a significant departure rather than a decision that 'enhanced' the former decision
- that is, 'seeking' advice is significantly different to 'recommending' a course of action
- since the council had at its 24 February 2014 meeting endorsed the creation of the Tennyson Dunes Reserve, and passed the proposed plan which contained the statement that 'it is the State Governments[sic] position that the continuation of the Coast Park path will not be through the dunes and alternative routes should be considered' then the council by voting to provide 'linking access for all Coastal path users from Grange to Semaphore Park' was revoking an earlier decision and explicitly arguing for a path through the Tennyson Dunes Reserve
- the motion without notice was 'provocative and controversial' and there was no need for urgency, which can only be attributed to the Mayor and Deputy Mayor's desire to achieve their goals without that change from 'seeking direction' to 'recommending a direction' being exposed
- Cr Randall had and still has a well known history of wanting only one solution to the Coast Park Path, which was Option 2 (Ms Packer provided various documents to support that assertion)
- Cr Randall's support of Option 2 was well known to Mayor Evans and she would have been aware that accepting the motion without notice would be provocative and controversial
- Mayor Evans' decision to allow the motion without notice to proceed was 'more than naïve, more likely collusion but in any event a poor decision' and she should have considered these factors along with the lack of attendants at the 10 March 2015 meeting (as opposed to the 23 February 2015 meeting) when deciding to adopt the controversial motion
- The broader community viewed Mayor Evans' decision as 'deceitful and secretive and plain wrong'
- my report did not sufficiently answer the question of the basis on which Cr Randall and Mayor Evans proceeded to change their minds from 'objectively writing to the State Government seeking its advice to subjectively advocating for Option 2'
- Mayor Evans was misleading in her response as to whether the motion 'enhanced' the previous decision noting that:
 - the options recommended by the CPPRG deliberately recommended the path did not traverse the Tennyson Dunes Reserve in any way, shape or form and detoured around that Reserve
 - Minister Hunter's previous correspondence to the council made clear that the continuation of the Coast Park Project would not be through the Dunes
 - upon reviewing the survey data in the Consultation Report which formed part of the agenda for the 23 February 2015 meeting there are many conclusions not highlighted in the official summary including:
 - When asked how Option 1 could be improved only 40(3.6%) of those surveyed indicated it should continue through the Tennyson Dunes.
 - When Option 2 is considered 127(11.5%)[sic] respondents stated that the path should continue through the Tennyson Dunes.

- no matter which side of the debate the survey participants came down on, one of the clear conclusions is that the vast majority did not want the path to traverse the Tennyson Dunes Reserve; this same question was high profile in both the CPPRG meetings and the Speak Outs and was front and centre in all discussions
- Mayor Evans' decision was inconsistent with the Guiding Principles in Regulation 4 of the Procedures at Meetings Regulations, particularly (a), (b) and (d)
- Mayor Evans justified the motion without notice as urgent despite the next meeting being only 13 days later, noting also that there had been approximately 650 days of consultation prior to this point
- Mayor Evans' accepting the motion as urgent breached the Guiding Principles in Regulation 4 of the Procedures at Meetings Regulations, particularly (a), (b) and (d), as well as clause 3.13.2 of the Code of Practice
- Cr Randall also breached the Guiding Principles.

My investigation sought a response from Mayor Evans to certain specific issues raised in Ms Packer's letter.

In relation to the issue of the difference between writing to the State Government objectively seeking its views and writing to the State Government subjectively supporting such a view, Mayor Evans responded:

At the meeting of Council on 23 February 2015 [sic] resolved that the Mayor write to the Premier of South Australia seeking the Government's clear and unambiguous preferred path alignment for the Coast Park shared use path between Grange and Semaphore Park noting options 1 and 2 (CL Minutes 10/03/15).

At the meeting of Council on 10/03/15 a Motion Without Notice was received from Cr Randall which also sought the Government's preferred path alignment for the Coast park shared use path between Grange and Semaphore, emphasising Council's decision to proceed with options 1 and 2 and an additional option.

The decision made by Council on 10/03/15 enhanced the decision made by Council on 23/02/15. It did not revoke the decision.

As directed by Council on 10/03/15, I sent to the Premier a letter (17/03/2015) referencing the three possible shared path alignments. The alignments are known as Option 1, Option 2 and a third option described in the Motion Without Notice as: "...the upgrade of the existing pathway through the Tennyson Dune System in a way that minimises any impact upon existing flora and fauna, linking access for all coast path users from Grange to Semaphore Park".

In the letter, I go on to state, "Council is keen to pursue this option (the upgrade of the existing pathway) with Government support", followed by the affirmation that Council was seeking a clear view on the Government's preferred pathway alignment before Council could finalise its view on the future of this section of Coast Park. These statements reflect the position of Council expressed during the debate and the motion was carried with a clear majority.

In relation to the issue of whether by voting for the motion to provide for 'linking access for all Coastal path users from Grange to Semaphore Park' the council was revoking its earlier decision and explicitly arguing for a path through the Tennyson Dunes Reserve, Mayor Evans responded:

In Minister Hon Ian Hunter's letter dated 20/11/13, he signalled the intention of the State Government was (as the owner of the land) to dedicate the Tennyson Dunes as a Coastal Conservation Reserve.

On the 23/02/2015, Council resolved that the Mayor write to the Premier of South Australia seeking the Government's clear and unambiguous preferred path alignment for the Coast Park shared use path between Grange and Semaphore Park noting options 1 and 2 (CL Minutes 10/03/15).

At the meeting of Council on 10/03/15 a Motion Without Notice was received from Cr Randall which also sought the Government's preferred path alignment for the Coast Park shared use path between Grange and Semaphore, emphasising Council's decision to include with options 1 and 2, an additional option.

The decision made by Council on 10/03/15 enhanced the decision made by Council on 23/02/15. It did not revoke the decision.

As to whether Council was "explicitly arguing for a path through the Tennyson Dunes Reserve" calls for speculation. It is clear that Council believed one other path alignment was a valid option warranting the consideration of the Minister.

In relation to the issue of whether the fact that Cr Randall had been publically in support of an Option 2 path alignment should have been known to Mayor Evans, and taken into consideration when deciding to accept the motion without notice, Mayor Evans responded:

When considering a Motion Without Notice, the Chair is guided by the Local Government (Procedures at Meetings) Regulations 2013, part 4 - Guiding Principles.

In relation to the fact that the options recommended by the CPPRG deliberately recommended that the path did not traverse the Tennyson Dunes Reserve in any way, in line with the request of Minister Hunter, Mayor Evans responded:

The CPPRG:

- Is an advisory body established by CCS to provide advice and community input into the Coast Park, Grange to Semaphore Park project.
- Has no power or authority, whether by delegation, agency or otherwise to exercise any function, right, duty of power of CCS or any other statutory body, whether under statute[sic] or other law, as a landowner or in any other capacity.
- Is not a decision making body and it is not required that a consensus always be reached amongst members on issues discussed, however where consensus is achieved it be considered as part of Council's decision making process.

(CL Report 08/09/14 - Item 6.139 Coast Park - Grange to Semaphore Park - Including Presentation, Appendix B - Agreed Terms of Reference, Coast Park Project Reference Group Feedback Report, September 2014, p54).

Council provided the State Government with alignment options that have more or less been equally supported by the community and share a similar capital cost (Item 6.31). To proceed with any one of the three options depended on the Government's clear and unambiguous preferred path alignment for the Coast Park and financial support of the cost.

Having considered those responses, my view remains as set out in my provisional report.

I have considered the council's suggested change to my proposed recommendation. While I agree that a requirement for the person moving a motion to include a reason for urgency in the motion itself may facilitate the process, given that the Mayor must ultimately determine whether to accept the motion, my view remains that it would be good administrative practice for the Mayor to record the reasons for her decision. That said, I have clarified the recommendation to make clear that it relates to decisions of the Mayor under Regulation 12 of the Procedures at Meetings Regulations.

Background

1. Coast Park is a State Government initiative which, when finished, will extend along the metropolitan coastline from North Haven to Sellicks Beach. The final section of Coast Park to be constructed is the 4.8km section running from Grange to Semaphore Park.
2. The Coast Park Project Reference Group (CPPRG) was established in December 2013 to partner with council staff and design consultants in a collaborative design process

and reach agreement on four possible pathway alignments. The four possible pathway alignment options were as follows:

1. CPPRG Preferred option being a 1.5m wide low grade path on the western side of properties for pedestrians, disabled and children on bikes and cyclists along a combination of Seaview and Grange Roads
 2. Beachfront - 3m wide path to the west of properties
 3. Seaview Road/ Military Roads
 4. Military Road.
3. These options were endorsed by council and community consultation was held from 29 September to 7 November 2014. Community consultation included consultation with a community reference group, social media, advertisements in the Messenger, an article in the council column, Port Road banners and signs along the coast. The outcome of the consultation was the identification of two possible shared path alignments that had more or less been equally supported by the community and share a similar capital cost.
4. As the Coast Park is a State Government initiative, the council sought clear direction from the Government on its preferred solution given community sentiment, cost estimates and project risks, the details of which were presented in a report to council on 23 February 2015 (Item 6.31). Council made the following resolution:
- a. That the Coast Park Speak Out #2 consultation results, as presented in Appendix A, be received and noted.
 - b. That the Coast Park Project Reference Group be sent a letter of thanks for their work on the project and advised that the Project Reference Group will be disbanded having achieved their original objectives within the Terms of Reference.
 - c. That council write to the Premier of South Australia seeking a whole of government view on their preferred path alignment, their funding commitment including long term asset maintenance, feedback in relation to the Draft Community Land Management Plans - Coastal Land, clarification in relation to dedications (refer Item 6.32 in this Agenda) and any other relevant consideration to ensure Coast Park as envisaged in either Option 1 or Option 2 can be constructed.
 - d. That to assist the Government in forming a clear view and funding strategy a copy of this Council report, Appendix A, Appendix C and any other relevant information as requested by the Government be included.

Moved Councillor Tullio, Seconded Councillor Scheffler
The motion was carried unanimously.

5. On 10 March 2015, a motion without notice, Item 9, was received from Councillor Robert Randall. The motion was worded as follows:
- a. That the letter being written to the Premier by the Mayor as resolved on the 23rd February in Item 6.31 Coast Park - Grange to Semaphore Park, also indicate that Council supports the Government's vision of building a multi-use path along the coast from Sellicks Beach to North Haven.
 - b. That the council requests that consideration be given to the upgrade of the existing pathway through the Tennyson Dune system in a way that minimises any impact upon existing flora and fauna, linking access for all Coastal Path users from Grange to Semaphore Park.

Moved Councillor Randall, Seconded Councillor T Wasylenko.
The Motion was carried.

6. Cr Randall's explanation for the motion at that time was that:

The notice of motion was important so that the Mayor understood the new council's view regarding the coast path before she wrote to the Premier as required by a motion moved at the previous meeting of Council.⁵

7. In response to council's resolution, a letter dated 17 March 2015 was sent to the Premier seeking the State Government's clear and unambiguous preferred path alignment for the Coast Park shared use path between Grange and Semaphore Park.

Relevant law

8. Section 63 of the Local Government Act provides:

63—Code of conduct for members

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils.
- (2) Council members must observe the code of conduct.

9. Clause 3.2 of Part 3 of the Code of Conduct provides that:

Council members must ... Perform and discharge their official functions and duties with reasonable care and diligence at all times ...

10. Regulation 4 of the Procedures at Meetings Regulations provides that:

The following principles (the "Guiding Principles") should be applied with respect to the procedures to be observed at a meeting of a council or a council committee:

- (a) procedures should be fair and contribute to open, transparent and informed decision-making;
- (b) procedures should encourage appropriate community participation in the affairs of the council;
- (c) procedures should reflect levels of formality appropriate to the nature and scope of responsibilities exercised at the meeting;
- (d) procedures should be sufficiently certain to give the community and decision-makers confidence in the deliberations undertaken at the meeting.

11. Regulation 12 of the Procedures at Meetings Regulations relevantly provides that:

- (3) A motion the effect of which, if carried, would be to revoke or amend a resolution passed since the last general election of the council must be brought by written notice of motion.

...

- (5) Subject to the Act and these regulations, a member may also bring forward any business by way of a motion without notice.
- (6) The presiding member may refuse to accept a motion without notice if, after taking into account the Guiding Principles, he or she considers that the motion should be dealt with by way of a written notice of motion.

12. Clause 3.13.2 of the City of Charles Sturt Code of Practice for Meeting Procedures (**Code of Practice**) provides that:

The Principal Member has determined that in a Council meeting, only motions relating to matters of urgency will be considered without notice. All such motions are to be put in writing and given to the Presiding Member at the beginning of the meeting. The Presiding

⁵ Letter dated 29 April 2016.

Member will then determine whether he or she is prepared to accept the motion for consideration at that meeting.

Whether Mayor Evans made an administrative error under section 25(1) of the Ombudsman Act by accepting a motion without notice from Councillor Robert Randall at the council meeting on 10 March 2015

13. The original complaint alleges that, at the council meeting on 10 March 2015, without any prior notice to residents, Mayor Evans wrongly allowed Deputy Mayor Councillor Randall to move a motion without notice that effectively reversed council's previous position with respect to the Coast Park Project.
14. The original complaint raised the following specific issues:
 - the motion was not included in the agenda published for the meeting, despite being a 'radical and significant switch' from the motion adopted at the previous meeting
 - the motion was accepted as a motion without notice. This prevented local residents from being present at the debate and also prevented residents from contacting Councillors with their concerns about the motion before the matter was voted on
 - the complaint alleges that the Mayor and Cr Randall contravened the Guiding Principles as prescribed in part 1, Regulation 4 of the Procedures at Meetings Regulations, in particular:
 - (a) procedures should be fair and contribute to open, transparent and informed decision-making;
 - (b) procedures should encourage appropriate community participation in the affairs of the council;
 - ...
 - (d) procedures should be sufficiently certain to give the community and decision-makers confidence in the deliberations undertaken at the meeting.
15. I must consider whether or not the Mayor has acted in error in accepting the motion without notice from Councillor Robert Randall at the council meeting on 10 March 2015. This question turns on a consideration of whether or not the Mayor has acted in a manner that is consistent with the requirements of Regulation 4 and Regulation 12 and Clause 3.13.2 of the Code of Practice.

Did the motion revoke or amend an earlier resolution of council?

16. Regulation 12(3) provides that a motion the effect of which, if carried, would be to revoke or amend a resolution passed since the last general election of the council must be brought by written notice of motion. The relevant question is, therefore, whether the motion of 10 March 2015 revoked or amended the resolution of 23 February 2015.
17. My Office put this question to Mayor Evans by way of letter dated 23 February 2016. Mayor Evans considered that the motion without notice 'enhanced' the previous decision providing an additional option for the Minister's consideration. In her view, it did not revoke or rescind the previous decision.⁶
18. For completeness, I asked Mayor Evans to confirm the meaning of the word 'enhanced' in this context.⁷ Her response was as follows:

The motion without notice:
Part 1 - is a general statement of no tangible consequence

⁶ Email dated 26 February 2016.

⁷ Letter dated 11 April 2016.

Part 2 - enhances the earlier resolution by providing another option while still ensuring the dune system is protected by minimising impact on the dunes, flora and fauna. At the same time it also will provide continuous access for the community from Grange to Semaphore Park as part of the greater path from Sellicks to North Haven.⁸

19. According to the complainants, the motion without notice represented a 'radical and significant switch' from the position adopted at the previous meeting. During my investigation, my Office asked Mayor Evans to comment on the complainants' statement that:

..the effect of [Cr Randall's] motion was for Council to write to the State Government advocating for a path alignment in accordance with (or very similar to) Option 2, an outcome that was not supported by the Coast Park Path Reference Group (CPPRG) nor by a majority of residents ...⁹

20. Mayor Evans responded as follows:

The Community engagement relating to the Coast Park Path from Terminus to Third involved the Coast Park Project Reference Group (PRG) which met from December 2013 to January 2015. The PRG developed 4 options in accordance with their terms of reference.

The process to arrive at the four options is well documented in Council reports. The four options were then put to a broader Community Engagement Process - Speak Out #2 and there was a clear preference for either Option 1 or Option 2 - with very little separating the two.

In total 1,529 people participated in the Community Engagement process seeking feedback regarding the 4 options.

Option 1 was the preferred option of the Coast Park Project Reference Group (identified in reports and communications).

While people were not specifically asked to comment about a path through the Tennyson Dunes Conservation Park (as this is land owned by the Minister), the most popular unprompted repeated themes during the consultation included (from pg 13 of Council report of 23/2/15):

- * Coast Park should be on the coast
- * Coast Park should continue through the dunes
- * concerns with Coast Park on Military Road
- * Coast Park is for all - not just local residents
- * reject options - prefer no coast park
- * concerns with Coast Park on Seaview Road

Both option 1 and 2 had the Coast Park path directed around the Tennyson Dunes Conservation Park as per the Minister's request. Both options have the potential to connect to a path through the Tennyson Dunes Conservation Park if the Minister determines that this is possible. Ultimately the decision relating to the Tennyson Dunes Conservation Park is that of the Minister.¹⁰

21. The Mayor's submission is corroborated by the supporting documentation provided by the council, namely the *Coast Park - Speak Out #2 Consultation Feedback Report* dated January 2014, which notes on page 1 that:

Option 1 ... and Option 2 ... received similar levels of support with community members. On a scale of 1 to 5 both options averaged a low 3. Option 3 and 4 received low ratings.

⁸ Letter dated 29 April 2016.

⁹ Email dated 3 June 2016.

¹⁰ Email dated 3 June 2016.

22. Given the original complainants' allegations, I considered the council's letter to Premier Jay Weatherill dated 17 March 2015. The letter, inter alia, quotes the council's resolution from the meeting on 10 March 2015 at Item 9, and then immediately follows with a statement that 'Council is keen to pursue this third option with Government support'. It was not clear to me, on the face of that letter, which third option the letter referred to. As a result of the lack of clarity in the supporting documentation provided by the council, my Office again reverted to the council for more information. The following is the relevant extract from my Office's exchange with the Mayor. My Office's question was reproduced in the response from the Mayor and appears italicised.

*In reference to the letter from the council to Premier Jay Weatherill dated 17 March 2015, please confirm which path alignment option is referred to in the sentence 'Council is keen to pursue this **third** option with Government support [emphasis added]' and discuss whether this 'third option' is different to Options 1 and 2 as outlined in your letter to the Ombudsman dated 29 April 2016.*

In the context of the letter from Council to the Premier of 17 March 2015, this refers to the Motion passed at the meeting of 10 March 2015 and in particular:

'2. That the council requests that consideration be given to the upgrade of the existing pathway through the Tennyson Dune System in a way that minimises any impact upon existing flora and fauna, linking access for all coastal path users from Grange to Semaphore Park.'

The land being referred to in 2 above is the land owned by the Minister for the Environment as the Tennyson Dunes Conservation Park which the Minister had previously requested Council not to construct a shared path through (letter from Minister to Council 20/11/2013, received by Council 2/1/14 and subsequent letter of 22 January 2014, received by Council 24/1/2014).

When Council undertook consultation in relation to the Options for the alignment of Coast Park during 2013-2015, the shared path alignment went around the Tennyson Dunes Conservation Park (land owned by the Minister) to satisfy the 2013/14 request of the Minister.¹¹

23. I am satisfied, on the basis of the Mayor's responses, that the complainants' allegations that the motion without notice represented a 'radical and significant switch' from the position adopted at the previous meeting, and that the effect of the letter to the Premier was that the Council appeared to advocate for the less popular Option 2, are unfounded.
24. I consider that the relevant effect of the first resolution on 23 February 2015 was that council resolved to write to the Premier seeking, amongst other things, a whole of government view on their preferred path alignment for the Coast Park in terms of either Option 1 or Option 2. I understand that both Option 1 and Option 2 path alignments were designed with the intention of the Coast Park being directed around the Tennyson Dunes Park.
25. I consider that the effect of the motion without notice was simply that the council resolved to write to the Premier and ask that consideration be given to the upgrade of the existing pathway through the Tennyson Dune system in a way that minimises any impact upon existing flora and fauna.
26. Mayor Evans has told my investigation that the motion 'provides a view of the matter from the perspective of the Council without dismissing the previous two options'.¹² I understand that the practical effect of the 23 February 2016 resolution is not inconsistent with the 10 March 2015 motion. I consider therefore that the motion did not revoke or amend an earlier resolution of council, and as such Regulation 12(3) is not applicable.

¹¹ Email dated 3 June 2016.

¹² Letter dated 29 April 2016.

Did the Mayor comply with Regulation 4?

27. Regulation 4 provides that the Guiding Principles, described above, should be applied with respect to the procedures to be observed at a meeting of a council or a council committee. The Guiding Principles as prescribed in Regulation 4 of the *Local Government (Procedures at Meetings) Regulations 2013* (SA), in particular:
- (a) procedures should be fair and contribute to open, transparent and informed decision-making;
 - (b) procedures should encourage appropriate community participation in the affairs of the council;
 - ...
 - (c) procedures should be sufficiently certain to give the community and decision-makers confidence in the deliberations undertaken at the meeting.
28. As part of my enquiries, my Office sought a number of responses from the council. On 26 February 2016, Mayor Evans provided an initial response to the complaint, which I paraphrase below:
- Cr Randall contacted Mayor Evans by telephone and email on 9 March 2015 to advise that he intended to put a motion without notice to the council meeting on 10 March 2015. This was after the deadline for receiving items for publication in the agenda
 - Mayor Evans did not consider the motion to be a new item because it had been considered at the previous council meeting on 23 February 2015 at item 6.31. In this way, Mayor Evans considered that the facts and information relating to the motion were at the forefront of the councillors' mind.¹³
29. Mayor Evans also asserted that:
- Cr Randall identified the motion without notice and sought the agreement of the Mayor on the motion without notice prior to the meeting thereby meeting council's meeting procedures.¹⁴
- This response gives the impression that the Mayor appears to not have understood the full extent of the procedural requirements of the council's Code of Practice and the regulations. It was only upon further specific questioning by my Office that the Mayor directly addressed the other relevant procedural requirements, such as the application of the Guiding Principles and the issue of urgency.
30. Mayor Evans also provided the following submissions as evidence that she applied the Guiding Principles when deciding to accept the motion without notice proposed by Cr Randall:
- (a) *Procedures should be fair and contribute to open, transparent and informed decision-making;*
The meeting was a public meeting, no decision was made prior to the meeting, the matter had been dealt with at the previous meeting and information about the matter was available to councillors [sic] at that time.
 - (b) *Procedures should encourage appropriate community participation in the affairs of the council;*
The council was aware of, through community consultation and deputations, the community's position in regard to each of the options to be considered by the Minister.

¹³ Email dated 26 February 2016.

¹⁴ Email dated 26 February 2016.

(d) *Procedures should be sufficiently certain to give the community and decision-makers confidence in the deliberations undertaken at the meeting.*

Meeting procedures were followed in considering the motion without notice. As well, through previous debates and community feedback the upgrade of the existing pathway through the Tennyson dune system in a way that minimises any impact upon existing flora and fauna, was known to Council.¹⁵

31. I accept that Mayor Evans did turn her mind to, in particular, clauses (a), (b) and (d) of the Guiding Principles. I consider that the fact that the matter had been dealt with at a previous meeting, the motion was heard at a public meeting, and the council had already undertaken extensive community consultation on the matter indicates that in accepting the motion, Mayor Evans turned her mind to the application of the Guiding Principles pursuant to Regulation 4.
32. I am however mindful of the fact that Mayor Evans has not provided any contemporaneous record of her rationale for making the decision to accept the motion at the time, including her application of the Guiding Principles. Despite this, I consider that in any event the decision to accept the motion without notice was consistent with the application of the Guiding Principles and according to the facts at the time, and as such I am satisfied that Mayor Evans' submissions address the concerns raised in the original complaint.
33. On balance, and in light of the fact that I have found that the motion did not revoke or amend a previous motion, I am satisfied that Mayor Evans' decision to accept the motion was not contrary to the Guiding Principles.

Did the Mayor comply with the Code of Practice?

34. Clause 3.13.2 of the Code of Practice provides that:

The Principal Member has determined that in a Council meeting, **only motions relating to matters of urgency will be considered without notice** [my emphasis]. All such motions are to be put in writing and given to the Presiding Member at the beginning of the meeting. The Presiding Member will then determine whether he or she is prepared to accept the motion for consideration at that meeting.

35. The relevant question was whether it was reasonably open to the Mayor to determine that the motion related to a matter of urgency. Mayor Evans advised my investigation that:
- I considered the motion without notice to have urgency as Council had earlier resolved to write to the Premier on this matter and by deferring the motion (to give notice) to the following meeting would have meant that the resolution from Council would not have been actioned for a substantial amount of time.¹⁶
36. Mayor Evans said that 'had the matter been deferred it would be considered on 23 March, 2015.'¹⁷ Mayor Evans has not indicated whether or not there was a particular deadline or other time limitation at play which could be impacted by the delay. In the absence of any further context and supporting evidence, I do not consider that a resulting delay of 13 days is conclusive evidence that the motion needed to be put forward as a matter of urgency.
37. I consider therefore that Mayor Evans has acted in breach of Clause 3.13.2 of the Code of Practice by considering the motion in circumstances where it did not relate to a matter of urgency.

¹⁵ Email dated 26 February 2016.

¹⁶ Letter dated 29 April 2016.

¹⁷ Email dated 3 June 2016.

Opinion

In light of the above, I consider that, in breaching clause 3.13.2 of the Code of Practice, Mayor Evans acted in a manner that was wrong, within the meaning of section 25(1)(g) of the Ombudsman Act.

Recommendation

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that council review its Code of Practice with a view to including a provision requiring contemporaneous documentation of the rationale for any decisions made by the Principal Member to accept a motion without notice noting especially an explanation of the relative urgency of the matter.

Whether Mayor Evans committed a breach of Part 3 of the Code of Conduct for Council Members in accepting a motion without notice from Councillor Robert Randall at the council meeting on 10 March 2015

38. The original complaint did not stipulate which part of the Code of Conduct Mayor Evans had allegedly breached. My Legal Officer sought clarification from Mr Sutton in this regard. Mr Sutton's response was as follows:

As you would be aware this complaint was initially considered by the LG Governance panel. The chair of that panel, Marjorie Schulze assessed this against the mandatory code and the Local Govt Act and Meeting Procedures.

She determined that the actions taken were in line with the meeting procedures and as such there was no case to answer.

However, the LG Panel's scope is restricted to level 2 (behavioral) [sic] breaches. Hence the panel withdrew that assessment and suggested to council it be referred to you.

I believe the only area of the code that the actions may impinge is;

2.2. Act in a way that generates community trust and confidence in the council

But also note that I believe the actions taken are compliant with the act and the meeting procedures.¹⁸

39. My finding that Mayor Evans acted in breach of clause 3.13.2 of the Code of Practice demonstrates that Mayor Evans did not perform her official duties in this regard with reasonable care and diligence. On the basis of the evidence before me, and in consideration of my finding of error on the part of Mayor Evans in accepting the motion without notice, I consider that Mayor Evans' conduct amounted to a breach of Part 3.2 of the Code of Conduct.

Opinion

In light of the above, I consider that Mayor Evans breached clause 3.2 of Part 3 of the Code of Conduct and section 63 of the Local Government Act. In this way, Mayor Evans acted in a manner that appears to be contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I do not consider it necessary to make any recommendations in relation to this breach.

¹⁸ Email dated 9 March 2016

Whether Councillor Robert Randall made an administrative error under section 25(1) of the Ombudsman Act by contravening the Guiding Principles contained in Regulation 4 of the *Local Government (Procedures at Meetings) Regulations 2013 (SA)* by proposing a motion without notice to be considered at the council meeting on 10 March 2015.

40. The original complaint alleges that Cr Robert Randall contravened the Guiding Principles by proposing a motion without notice to be considered at the council meeting on 10 March 2015.
41. I do not consider that, by merely proposing a motion without notice, Cr Randall would be bound by the Guiding Principles. Regulation 4 provides that the Guiding Principles should be applied with respect to the procedures to be observed at a meeting of a council or a council committee. The relevant procedure in this matter, in my view, is the decision of whether or not to accept the motion without notice. The discretion to accept or decline that motion rests with the Mayor according to Regulation 12(6).
42. In any event, I do not consider that there is any evidence to suggest that Cr Randall acted in a manner that was inconsistent with the Guiding Principles.
43. In light of my assessment above and on the basis of the evidence available, it appears that Cr Randall has not acted in a way that is unlawful, unreasonable or wrong within the meaning of the Ombudsman Act.

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.

Conclusion

In light of the above, I consider that Mayor Evans:

- breached clause 3.13.2 of the Code of Practice by considering the motion in circumstances where it did not relate to a matter of urgency, and in so doing, acted in a manner that was wrong, within the meaning of section 25(1)(g) of the Ombudsman Act
- breached clause 3.2 of Part 3 of the Code of Conduct and section 63 of the Local Government Act. In this way, Mayor Evans acted in a manner that appears to be contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act

In light of the above, I consider that Cr Randall has not acted in a way that is unlawful, unreasonable or wrong within the meaning of the Ombudsman Act, and therefore continuing to investigate this issue is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

I recommend under section 25(2) of the Ombudsman Act that council review its Code of Practice with a view to including a provision requiring contemporaneous documentation of the rationale for any decisions made by the Principal Member to accept a motion without notice noting especially an explanation of the relative urgency of the matter.

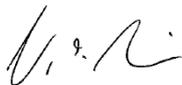
Final comment

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by 18 November 2016 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.



Wayne Lines
SA OMBUDSMAN

20 September 2016