

Final Report

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

Public Authority	Town of Gawler
Public Officer	Councillor Jim Vallelonga
Ombudsman reference	2018/07022
Agency reference	2018/004285
Date of referral	29 June 2018
Issues	Whether Cr Vallelonga committed misconduct in public administration by breaching clauses 3.1, 3.15 and/or 3.16 of the Code of Conduct for Council Members by placing a bid on land for which he had knowledge of details of the land and the reserve price, by virtue of a confidential report tabled at a council meeting.

Jurisdiction

This matter was referred to the Ombudsman by the Independent Commissioner Against Corruption (**the Commissioner**) pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (**the ICAC Act**), as raising a potential issue of misconduct within the meaning of that Act (**the referral**).

The referral was based on a report to the Office for Public Integrity (**the OPI**) by this Office.

Section 14B of the *Ombudsman Act 1972* 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.

The issue concerns alleged breaches by Councillor Jim Vallelonga of clauses 3.1, 3.15 and 3.16 of the Code of Conduct for Council Members (**the Code of Conduct**). Failure by a council member to comply with Part 3 of the Code constitutes misconduct. As a contravention of Part 3 can constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered these matters under section 5(3)(a) of the ICAC Act.

As a breach of the Code amounts to a breach of section 63(2) of the Local Government Act, and as a matter referred to me under the ICAC Act is taken to relate to administrative acts for the purposes of the Ombudsman Act, I have considered whether Cr Vallelonga's conduct appears contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

I have decided to undertake this line of inquiry on my own initiative pursuant to section 263A(3) of the Local Government Act and section 13(2) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking and receiving a response from Cr Vallelonga
- seeking and receiving a second response from Cr Vallelonga
- considering
 - the ICAC Act
 - the Ombudsman Act
 - the Local Government Act
 - the *Local Government (General) Regulations 2013*
 - the Code of Conduct
- providing the parties with my provisional report for comment
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

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

I provided my tentative views to the parties by way of my provisional report dated 18 December 2018. I requested any submissions on my provisional views to be provided by 11 January 2019.

To date, I have not received a response from any of the parties.

In light of the above, my view remains as set out in my provisional report.

Background

1. The Town of Gawler (**the council**) held a council meeting on 26 September 2017. The meeting's agenda included item 15.2, titled 'Road Closure and Divestment of Land at Krieg Road, Evanston Park'.
2. A report was tabled for agenda item 15.2 (**the report**). The report concerned the divestment and subsequent sale of council owned portions of land on Krieg Road, Evanston Park. One of those portions of land was Krieg Reserve (Allotment 500, Volume 5166, Folio 75 Deposited Plan 6799) located at Lot 500 Krieg Road, Evanston Park (**Lot 500**).
3. The report revealed that on 25 July 2017 the Minister for Local Government approved a proposal to revoke the community land classification attached to Krieg Reserve at Lot 500. The report sought that:

The Council finalise the revocation process by resolving to revoke the community land status of the Reserve... and upon doing so, authorise the [Chief Executive Officer] to sell the reserve in accordance with the Council's divestment strategy.
4. The report also sought:

Councils approval to engage a local real estate agent to proceed with the divestment of CT 5166/75, Deposited Plan 6799 [Lot 500], with the reserve price set at the independent market value (\$250,000) as included in the attachments.
5. Cr Vallelonga was provided with a copy of the report at the council meeting.
6. The council ordered pursuant to sections 90(2) and 90(3) of the Local Government Act that agenda item 15.2 be discussed in confidence. The council also ordered pursuant to section 91(7) of the Local Government Act that the minutes relevant to agenda item 15.2 and the report are confidential.³
7. The rationale for the confidentiality orders was that:

...the present matter relates to expected market price of Council owned properties on Krieg Road, Evanston Park. The disclosure of this information could reasonably be expected to be commercially advantageous to potential purchasers as it provides an indication of anticipated purchase price and would prejudice the Council's negotiating position.
8. The council also considered that disclosure of that information would be contrary to public interest, as the prevailing public interest in this matter is the council's ability to achieve the highest and best sale price for the properties.

³ The report remains the subject of confidentiality orders, however on 22 May 2018 the council resolved to release the minutes pertaining to the discussion of agenda item 15.2.

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9. Cr Vallelonga declared a perceived conflict of interest in relation to agenda item 15.2. Cr Vallelonga's Declaration of Interest Form stated:
- Friend has an interest in the property.
10. Cr Vallelonga has since advised my Office that his nephew had an interest in purchasing two of the properties, Lot A and Lot B. Upon further enquiries from my Office, Cr Vallelonga further clarified that his nephew is his friend, and he did not think that it mattered that he had referred to his nephew as a 'friend', and he considered that what was important was that he declared the interest.
11. Cr Vallelonga managed the perceived conflict of interest by vacating the council chamber whilst item 15.2 was discussed by the council.
12. The council subsequently resolved to revoke the community land classification of Krieg Reserve, and authorised the Chief Executive Officer of the council to:
- Implement the divestment strategy for [Lot 500] as outlined in [the report] by way of public auction or tender for a sum of not less than the independent market valuation identified in [the report]...
13. On 11 May 2018 an auction was held for the sale of Lot 500. Cr Vallelonga attended the auction and registered as a person interested in participating at the auction.
14. Prior to the commencement of the auction, Cr Vallelonga approached Rebecca Howard, Team Leader for Property and Procurement at the council, who was present at the auction, seeking her permission to bid. Ms Howard permitted Cr Vallelonga to bid at the auction.
15. Cr Vallelonga placed two bids on Lot 500 during the auction, being the first bid of \$120,000 and the third and highest bid of \$150,000.
16. Cr Vallelonga's bid was unsuccessful on the basis that his bid did not meet the council's reserve price for Lot 500, which was \$250,000.
17. It is alleged that Cr Vallelonga had utilised confidential information contained within the report, being the reserve price of Lot 500, when he placed two bids on Lot 500 at the auction on 11 May 2018.
18. I informed Cr Vallelonga of my preliminary investigation on 17 September 2018, and sought his response to the allegation. Cr Vallelonga provided a response by email.
19. In relation to the allegation that he had knowledge of the reserve price due to the information contained in the report, Cr Vallelonga stated the following:
- that he disagreed that he had information about the reserve price, as the reserve price was never disclosed at the meeting on 26 September 2017, nor at any other council or committee meeting that he has attended
 - the figure that was provided with the confidential agenda and attachment in regard to Lot 500, was an estimated market valuation
 - he has re-read the attachments that have been referred to, from the meeting on 26 September 2017, and he cannot find any reference to a reserve price for Lot 500; the attachments talk about valuations and possible market prices but do not refer to any reserve prices.
20. In relation to a query as to why Cr Vallelonga placed two bids on the Lot 500, Cr Vallelonga stated the following:

- that he regularly buys, develops, and sells land and property
 - that the real estate agent for the sale of Lot 500 brought the sale of land to his attention, and invited him to register and bid at the auction
 - that he first had an interest in the sale of Lot 500 when he was contacted by the real estate agent, which was around the time that the real estate agent was preparing for and marketing the auction
 - that he did not know the reserve price for Lot 500
 - that he reviewed market valuations and the market at the time of auction. He offered the first bid at \$100,000 to commence the bidding, with the knowledge that bidding commences at a lower price and then continues to rise depending on how many bidders are interested in the land
 - that he placed the bids on behalf of his family trust/business.
21. I sought a further response from Cr Vallelonga after directing him to the section of the report which stated ‘Councils approval to engage a local real estate agent to proceed with the divestment of CT 5166/75, Deposited Plan 6799 [Lot 500], with the reserve price set at the independent market value (\$250,000) as included in the attachments.’ Cr Vallelonga replied that he honestly thought that the figures mentioned were only ever the possible market valuations or the Valuer General valuations, not reserve prices.
22. I also sought a further response from Cr Vallelonga as to why the bidding prices that he stated for Lot 500 differed from the prices that had been provided to me during the course of my investigation. Cr Vallelonga responded that once the auction had concluded, he did not think about the auction any further, and moved onto many more business matters. Cr Vallelonga also stated that without checking the auctioneer’s records, the figures that he had provided my Office were his recollection of the bidding figures.
23. In response to a query as to whether he utilised information from the report when placing the bids for Lot 500, Cr Vallelonga replied that he did not utilise information from the report. He also stated that whenever he prepares for an auction, he looks at the property, checks the selling prices of properties within the area, asks the real estate agent about likely prices, he reviews potential development costs, and conducts his own site valuations.
24. In relation to Cr Vallelonga’s conversation with Ms Howard prior to the auction, Cr Vallelonga stated that he noticed Patricia’s presence at the auction as she had attended the auction on behalf of the council. Cr Vallelonga stated that he had asked Patricia a question to the effect of “am I allowed to bid at this auction?”, to which Cr Vallelonga stated that Patricia replied words to the effect of “it’s open to the public and you are also a member of the public”.⁴

Relevant law/policies

25. 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

⁴ The information that has been provided to this Office suggests that the council employee who was present at the auction on 11 May 2018 was Rebecca Howard. It is not clear why Cr Vallelonga has referred to a person named ‘Patricia’ as being the relevant person from the council to whom he had a conversation with prior to the auction.

- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.
26. Section 63 of the Local Government Act and Regulation 7 of the Local Government (General) Regulations provide for the Code of Conduct; and compliance by council members is mandatory.
27. Clause 3.1 of the Code of Conduct provides that council members must:
- Act honestly at all times in the performance and discharge of their official functions and duties.
28. Clause 3.15 of the Code of Conduct provides:
- Council members must not use Council resources, including services of Council staff, for private purposes, unless legally or properly authorised to do so, and payments are made where appropriate.
29. Clause 3.16 of the Code of Conduct provides:
- Council members must not use public funds or resources in a manner that is irregular or unauthorised.

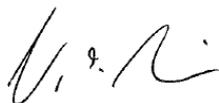
Whether Cr Vallelonga breached clauses 3.1, 3.15 or 3.16 of the Code of Conduct for Council members by placing a bid on land for which he had knowledge of details of the land and the reserve price of the property, by virtue of a confidential report tabled at a council meeting

30. As part of Cr Vallelonga's reply to my Office, he advised that he thought that the figures mentioned within the report did not reveal the reserve price. I find this position inconsistent with the information noted above at paragraph 4. Whilst I acknowledge that the reserve price was yet to be confirmed, the report's recommendation was clearly to set the reserve price at the market valuation of \$250,000.
31. Regardless, I am not satisfied on the information before me that Cr Vallelonga breached clauses 3.1, 3.15 or 3.16 of the Code of Conduct. Specifically, even if it could be reasonably expected that Cr Vallelonga did have prior knowledge of the reserve price for Lot 500, I do not consider there to be evidence that Cr Vallelonga's bidding at the auction on 11 May 2018 would suggest:
- that he failed to act honestly at all times in the performance and discharge of his official functions and duties as a council member, particularly as Cr Vallelonga's bidding at the auction was not part of his official functions
 - that he had used council resources, including the service of council staff, for a private purpose, or
 - that he had used public funds or resources in a manner that is irregular or unauthorised.
32. I make this finding based on the following observations:
- there was a lapse of time of approximately 8 months between the report being tabled at the council meeting and the subsequent auction of Lot 500
 - the reserve price for Lot 500 was yet to be confirmed by a real estate developer
 - Cr Vallelonga has stated that his decision to place a bid on Lot 500 occurred only after he was contacted by the real estate agent, as the agent was preparing for and marketing the auction
 - Cr Vallelonga bid significantly below the reserve price and ultimately was not successful at the auction

- there is no indication that Cr Vallelonga acted dishonestly when speaking with Ms Howard prior to the auction, as he had indicated that he intended to participate at the auction, and he was not participating at the auction in an official capacity
 - there is no suggestion that Cr Vallelonga used the resources of the council, including the services of council staff, when participating at the auction
 - even if Cr Vallelonga had been successful at the auction, it is not clear that Cr Vallelonga had used council resources (ie information) for a private purpose, or in a manner that is irregular or unauthorised.
33. I also note that Cr Vallelonga's original bidding figures are inconsistent with other information received by my Office. Cr Vallelonga has stated that he provided a response based on his memory of his bidding, which given the passage of time, appears plausible.
34. By way of comment, whilst I do not consider that Cr Vallelonga has breached the Code of Conduct, I have concerns that he bid on a property that was owned by the council, in circumstances where he should have known that the sale of that property had been considered by the council. I also note that the council resolved to make the report confidential as the information within the report could prejudice the council's negotiation position, and impede the council's ability to achieve the highest and best sale price for the properties.
35. I consider that an elected member bidding on property owned by the council, in circumstances where he or she is privy to information about that property by virtue of their position as an elected member, is ill advised and has the potential to undermine public confidence in the council. I make this comment noting that as public officers, elected members are required to exemplify absolute transparency and honesty and avoid any perception of impropriety.

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, given the unlikelihood of collecting sufficient evidence to support a finding of error.



Wayne Lines
SA OMBUDSMAN

18 January 2019