

## **Sections 21A and 56A(24) of the *Development Act 1993* (the Act)**

### **21A—Codes of conduct**

- (1) The Minister may adopt—
  - (a) a code of conduct to be observed by members of the Development Assessment Commission; and
  - (b) a code of conduct to be observed by members of regional development assessment panels; and
  - (c) a code of conduct to be observed by members of council development assessment panels established by councils; and
  - (d) a code of conduct to be observed by officers of relevant authorities or other agencies who are acting under delegations under this Act.
- (2) The Minister may vary a code of conduct, or adopt a new code of conduct in substitution for an existing code of conduct, in operation under subsection (1).
- (3) Before the Minister adopts or varies a code of conduct under this section, the Minister must take reasonable steps to consult with—
  - (a) the Environment, Resources and Development Committee of the Parliament; and
  - (b) the LGA.
- (4) If the Minister adopts or varies a code of conduct under this section, the Minister must —
  - (a) publish a notice of the adoption or variation in the Gazette; and
  - (b) ensure that a copy of the code of conduct (as adopted or varied) is kept available for inspection by members of the public, without charge and during normal office hours, at an office or offices specified in the regulations.

### **56A—Councils to establish development assessment panels**

- (24) The functions of a public officer include ensuring the proper investigation of complaints about the conduct of a member of the relevant panel (but nothing in this section prevents a person making a complaint to the Ombudsman at any time under the *Ombudsman Act 1972* or the public officer referring a complaint to another person or authority for investigation or determination).

## **Code of Conduct**

### **Section 21A of the *Development Act 1993***

This Code has been adopted pursuant to the provisions of the *Development Act 1993* as a Code of Conduct to be observed by Members of the Development Assessment Commission, Members of Regional Development Assessment Panels, Members of Council Development Assessment Panels and delegates.

In order to foster the respect of applicants, representors and the community, panel members and delegates must uphold the highest standards of behaviour and ensure that they act in accordance with the provisions of the Act at all times.

This Code is binding on all panel members and delegates exercising their powers and functions as members of a panel or as a delegate.

This Code must be read in conjunction with the Act.

## **1. Interpretation**

**Act** means the Development Act 1993.

**closed meeting** means a panel meeting, or a part of a panel meeting where the public is excluded in accordance with the Act :

**Code** means a code of conduct established under section 21A of the Act.

**confidential information** includes but is not limited to:

- (a) information derived from a document marked by the presiding member to clearly show that the information in the document is confidential or not to be disclosed;
- (b) information you acquired in a closed meeting ; and
- (c) any other information which would be considered confidential and not generally available to members of the public

**delegate** means a person who is authorised to act as a delegate under sections 20 or 34(23) of the Act but does not include a panel member.

**disclosure of financial interest** means disclosing a pecuniary interest as set out in Schedule 2 of the Act.

**interest** has the same meaning as in Section 56A (7)&(8) of the Act

**Minister** means the Minister responsible for the administration, from time to time, of the Act.

**panel** means an assessment panel as defined in Schedule 2 of the Act.

**panel information** means information that is disclosed at a panel meeting or in the course of a panel member's duties.

**panel member** means a person who is a member of a panel under the Act.

**presiding member** means a panel member appointed as presiding member under the Act.

**public officer** means a person appointed as a public officer under the Act .

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## 2. Panel Member Behaviour

### Panel information

- 2.1 As a panel member, you hold a position of trust and must not misuse or derive undue benefit from your position. As such, you must treat panel information appropriately by:
- (a) Not using information gained by virtue of your membership of the panel for any purpose than to exercise your role as a panel member;
  - (b) Respecting the panel's procedures in relation to public comments and communications with the media;
  - (c) Not releasing confidential information;
  - (d) Ensuring that you take care and maintain the integrity and security of confidential documents or information in your possession, or for which you are responsible; and
  - (e) Recognising that information may be subject to the requirements of the Privacy Act 2000 and abiding by the principles of that legislation.

*However, nothing in this Code prevents you from disclosing information:*

- 2.2 At a closed meeting;
- (a) To the extent specified by the panel and subject to such other conditions as the panel determines;
  - (b) That is already in the public domain; or
  - (c) If the disclosure is required by law.

### **Conflict of Interest**

- 2.3 You must make all decisions impartially and in accordance with the requirements of the Act. You must recognise the importance of fully observing the requirements of the Act in regard to disclosure of financial interests and disclosure of any other interest which may affect your ability to fulfil your duties on a panel.
- 2.4 If you consider that you have, or might reasonably be perceived to have an interest in the matter before the panel, you must clearly state the nature of that interest in writing to the presiding member before the matter is considered.
- 2.5 If you consider that you have a personal interest which may be in conflict with your public duty to act impartially and in accordance with the principles of the Act, you must declare a conflict of interest as above.
- 2.6 If you have an interest in a matter, you must not partake in any of the assessment processes involving the matter. You must leave the room at any time in which the matter is discussed by the panel including during the hearing of any representations or during any vote on the matter. You must not vote on the matter and you must not move or second any motion or participate in any discussion through the consensus process.
- 2.7 If an interest has been declared by any member of the panel, the presiding member must record the nature of the interest in the minutes of meeting.

### **Relations with State/local government employees and applicants/representors**

- 2.8 In your role as panel member, you must not (other than in accordance with the provisions of the Act):
  - (a) Direct a person who is a local government employee to do or not to do anything in the person's capacity as a local government employee;
  - (b) In the case of members of the Development Assessment Commission, direct a person who is a State government employee to do or not do anything in the person's capacity as a State government employee;
  - (c) Attempt to influence the conduct of a person who is a local government employee in the person's capacity as a local government employee;
  - (d) Approach or discuss with an applicant or representor any application which is either before the panel or will come before the panel at some future time, except during the course of a panel meeting where the application forms part of the agenda and the applicant or representor has a right to be heard by the panel; and
  - (e) Except where required as part of the assessment of a particular decision such as a formal panel viewing of a development site, you should not enter a development site, even if invited by the land owner or a neighbouring property owner or any other person.

## **Development Assessment Conduct**

- 2.9 You acknowledge that the assessment of development by the panel requires that you act impartially and limit yourself to assessing an application strictly in accordance with the Act. Panel members must determine whether or not to grant development plan consent by assessing the development against the provisions of the appropriate Development Plan without reference to extraneous matters but with due regard to relevant matters such as representations made in accordance with the provisions of the Act.
- 2.10 You must not:
- (a) Engage in consultation outside of the panel process with any party on a proposed development application that is likely to be heard by the panel;
  - (b) Give advice to an applicant or other third party on a development application after it has been lodged outside of a panel meeting;
  - (c) Speak at a public meeting for or against a proposal where the purpose of the meeting is to discuss either a proposed development or a development application unless required by the Act;
  - (d) Express an opinion on a development application or a proposed development outside of a panel meeting; and
  - (e) Engage in any other act or omission which may give rise to a reasonable presumption that you have prejudged a development proposal or application.
- 2.11 In regard to attendance of a public meeting as set out in point 2.10 (c) above, you must inform the panel that you have attended such a meeting and confirmed that you have not made representations to the meeting, discussed the matters raised at the meeting with any person or given an indication as to the merits of a particular development application or proposed development application outside of a panel meeting.

*Note* that nothing in this Code prevents you from properly seeking clarification or comment from staff members prior to or during the discussion of any matter in a panel meeting.

## **Public Comment**

- 2.12 Only the presiding member or another person determined by the panel is permitted to speak publicly to the media and address the public on behalf of the panel. No other panel member may make comment to the media or the public in relation to any matter before the panel or any decision of the panel.

### 3. Breaches of the Code, Complaints and Sanctions (Panel Members)

3.1 You have an obligation to act honestly and diligently as a panel member. You should report any instances of suspected breach of the Act, this Code or any other misconduct by other panel members immediately to the public officer in writing and refrain from discussing those matters at future panel meetings.

3.2 Upon receipt of this information the public officer may:

- (a) Seek legal advice; and/or
- (b) Require an investigation into the allegations by an appropriate person; and/or
- (c) Refer the matter to the police; and/or
- (d) Take any other action which the public officer deems appropriate and which accords with the Act.

*Note that nothing in this Code prevents you, or any other person from making a complaint under the Ombudsman Act 1972.*

3.3 Where an investigation is undertaken in accordance with this Code, the person to whom the allegation of misconduct relates must be given by the public officer:

- (a) Full particulars of the alleged misconduct in advance of the investigation (at least 7 days prior to the date of the meeting at which the complaint will be investigated);
- (b) An opportunity to respond to the allegations; and
- (c) The right to have a representative attend any hearing with them (including legal counsel).

3.4 Where an allegation of misconduct is made out, the Minister (in regard to the Development Assessment Commission), the relevant Councils (in regard to a Regional Development Assessment Panel) and the relevant Council (in regard to a Council Development Assessment Panel or a Regional Development Assessment Panel) may:

- (a) Remove the person from the panel;
- (b) Suspend the person from the panel for a period of time; or
- (c) Take any other reasonable action deemed appropriate.

## 4. Delegate Behaviour

- 4.1 In order to foster the respect of applicants, representors and the community, delegates must uphold the highest standards of behaviour and ensure that they act in accordance with the provisions of the Act at all times.

### Development application information

- 4.2 As a delegate, you hold a position of trust and must not misuse or derive undue benefit from your position. As such, you must treat development application information appropriately by:
- (a) Not using information gained by virtue of your role as delegate for any purpose than to exercise that role;
  - (b) Not releasing confidential information;
  - (c) Ensuring that you take care and maintain the integrity and security of confidential documents or information in your possession, or for which you are responsible; and
  - (d) Recognising that information may be subject to the requirements of the *Privacy Act 2000* and abiding by the principles of that legislation.

### Conflict of Interest

- 4.3 You must make all decisions impartially and in accordance with the requirements of the Act. You must recognise the importance of fully observing the requirements of the Act in regard to disclosure of any interest which may affect your ability to fulfil your duties as a delegate:
- (a) If you consider that you have, or might reasonably be perceived to have an interest in the matter before you as delegate, you must clearly state the nature of that interest in writing and must not proceed to exercise your delegation; and
  - (b) If you consider that you have a personal interest which may be in conflict with your public duty to act impartially and in accordance with the principles of the Act, you must declare a conflict of interest as above and must not proceed to exercise your delegation.

### Development Assessment Conduct

- 4.4 You acknowledge that the exercising of a delegation by you in relation to the assessment of development requires that you act impartially and limit yourself to assessing an application strictly in accordance with the Act. Delegates must determine whether or not to grant development plan consent by assessing the development against the provisions of the appropriate Development Plan without reference to extraneous matters but with due regard to relevant matters such as representations made in accordance with the provisions of the Act.

4.5 You must not:

- (a) Exercise a delegation to make a decision on an application for development plan consent, or issue an instruction in relation to the exercise of a delegation held by another person, where you have assisted the applicant in the preparation of the application, to the extent that it leads to an expectation that if the applicant followed this advice you would grant delegated consent to the application;
- (b) Speak at a public meeting for or against a proposal where the purpose of the meeting is to discuss either a proposed development or a development application where you hold a delegation other than to outline process and/or requirements of the Act or Regulations or, unless required by the Act; and
- (c) Engage in any other act or omission which may give rise to a reasonable presumption that you have prejudged a development proposal or application.

## **5. Breaches of the Code (Delegates)**

5.1 Breaches of this code by a delegate are to be reported to either the chief executive of the relevant council or the chief executive of the relevant government department. The responsible chief executive will take the appropriate action as required.

**Hon. Paul Holloway M.L.C**  
**Minister for Urban Development and Planning**

**Dated:**        /   /



## Code of Conduct Section 21A of the Development Act 1993

### Cr Kerry Complaint – Investigation Process

#### Overview

1. Engage independent person with expertise in ‘planning and development’ matters to undertake the investigation.
2. Independent person to review the allegations made out in the letter of complaint. Review to include initial discussion with the complainants.
3. Provide interim report advising on whether the matters raised in the complaint are substantive, thereby warranting further investigation.
4. Should the complaint warrant further investigation, preparation of full particulars of the alleged misconduct to be provided to the Elected Member concerned.
5. A response in writing to be sought from the Elected Member within 7 days as required by Section 3.3(a) of the Code of Conduct.
6. Following consideration of written response, advice to be provided as to whether any further investigation is needed.
7. Undertake any further investigation as required including meeting with the Elected Member as required by Section 3.3(a) of the Code of Conduct. Such meeting to allow the Elected Member the opportunity to further respond to the allegations, noting that the Elected Member may choose to have a representative attend the meeting with them (including legal counsel).
8. Report outlining the outcomes of the investigation, together with advice as to whether the allegations of misconduct are made out. If the allegations are made out, this report will be forwarded to Council for consideration as to an appropriate response.

#### Chronology of Events:

29/4/2015	Complaint received
18/5/2015	Mr Byrt engaged to undertake preliminary review of matter to advise on whether matters raised in complaint are substantive
1/6/2015	Initial report provided by Mr Byrt advising that complaint warrants further investigation, and recommending response being sought from Cr Kerry
5/6/2015	Letter forwarded to Cr Kerry advising of complaint, and seeking his response to the matters raised
18/6/2015	Cr Kerry forwarded his response to the matters raised
19/6 – 17/7	Mr Byrt investigation undertaken including meeting with relevant persons and Cr Kerry with a support person present
20/7/2015	Interim report provided by Mr Byrt finding no demonstrable breach of various elements of the complaint, and seeking further comments from Cr Kerry regarding other elements of the complaint.
21/7/2015	Advice to Cr Kerry regarding the findings outlined in the interim report and seeking his further response within 1 month as requested by Cr Kerry
18/8/2015	2 week extension of time sought and provided to Cr Kerry to respond

23/8/2015	Response received from Cr Kerry. Request was made to meet with Mr Byrt
31/8/2015	Meeting with Cr Kerry, his support person, Mr Byrt and Ms Jarrett. Final comments sought from Cr Kerry
2/9/2015	Cr Kerry forwarded final comments in response to the findings of the investigation. The comments raised various questions regarding the appropriateness of the original complaint and whether or not statutory declarations should be sought from the original complainants outlining their complaint.
September – October	Cr Kerry on six weeks leave
21/10/2015	Advice received that statutory declarations not necessary
10/11/2015	Proposed Council report

27 October 2015

Ms Kathy Jarrett,  
City of Marion.

### Final Report – DAP Member complaint

Dear Ms Jarrett,

I provide this Final Report in response to the Consultancy brief from you as Public Officer of the Council's Development Assessment Panel dated 12 May 2015.

I provided an Initial Report dated 1 June 2015, and an Interim Report dated 20 July 2015, and subsequent to that I have received and considered further written and verbal submissions from Cr Nick Kerry the detail of which you have.

I last met Cr Nick Kerry on 31 August 2015 when he was accompanied by a support person at which meeting I again raised with him differences of recall about facts and discussed with him my written Interim Findings, giving him the opportunity to comment about and respond to those Interim Findings as is required for due process.

That meeting was essential but did not result in a finalisation of the inquiry at that time because Cr Nick Kerry raised concerns about process and he also raised a legal question about the status of the evidence gathered in the inquiry.

You subsequently sought legal advice on the issues raised by Cr Nick Kerry and as a consequence of that advice which was only recently received I have been asked to proceed to finalise the inquiry which I now do in this Final Report.

Cr Nick Kerry has accepted the Outcome of the inquiry regarding those Allegations which cannot be maintained – see summary below.

I am satisfied that I have completed all necessary enquiries notwithstanding Cr Nick Kerry's stated objections which he is entitled to maintain but given the legal advice you have received need not cause any further enquiries to be made.

I set out below the relevant provisions of the Code of Conduct as they relate to the allegations, namely:

1. **Clause 2.3** which requires of every Member to "make all decisions impartially and in accordance with the requirements of the Act";
2. **Clause 2.8(d)** which requires of every Member to "not approach or discuss with an applicant or a representor any application which is either before the Panel or will come before the Panel at some future time, except during the course of a Panel meeting where the application forms part of the agenda and the applicant or representor has a right to be heard by the Panel";
3. **Clause 2.9** which requires of every Member to "act impartially and to limit yourself to assessing an application strictly in accordance with the Act";
4. **Clause 2.12** which requires of every Member except the Presiding Member or unless otherwise authorized by the DAP not to "speak publicly to the media";
5. **Clause 3.1** which requires of every Member to "act honestly and diligently"; and,
6. **Clause 4.1** which requires of every Member to "uphold the highest standards of behavior and ensure that they act in accordance with the provisions of the Act at all times".

I turn now to the elements of the complaint seriatim. I repeat the initial assessment of each allegation tested against the Code of Conduct, I provide relevant detail of the Response from Cr Nick Kerry. I set out my findings and outcome for each allegation. My findings are all determined on the balance of probability.

I should add that while I have stated the essence of the Response to each allegation I have not detailed below the entire content of Cr Nick Kerry's Response to each allegation because that Response contains irrelevant material and counter assertions which are not under investigation.

**Allegation 1.**

The member in question regularly attends meetings having not read the agenda, in fact on at least one occasion he has brought the clearly unopened agenda envelope to the meeting.

**Assertion 1.**

The essential assertion is that the member in question has not adequately prepared for DAP meetings since his appointment in 2014 evidenced primarily by his general behavior at each meeting demonstrating a lack of preparation and no in-depth understanding of the relevant planning issues as outlined in the agenda and papers, culminating on 15 April 2015 when the said member arrived at the DAP meeting with the agenda and papers in a sealed envelope which he proceeded to open at the table at the beginning of the meeting. This assertion maintains a breach of the Code of Conduct on two grounds, namely, **Clause 3.1** by not acting "honestly and diligently" and **Clause 4.1** by not upholding the "highest standards of behaviour" expected of all DAP members.

Response from Cr Nick Kerry.

In essence Cr Nick Kerry rejects the allegation stating that the complainants made a mistake in that he says he brought other unopened mail to the meeting impliedly saying that the DAP agenda papers were not removed from an unopened envelope at the beginning of the DAP meeting.

**Finding on Allegation 1.**

In addition to the very clear recollections of the complainants and DAP member Phil Smith who sat adjacent to Cr Nick Kerry at the said meeting and whose recollection I find compelling, I find that Cr Nick Kerry did open the large sealed envelope containing the DAP agenda and he removed the DAP agenda papers for that meeting in the meeting room prior to or at the start of the meeting. It follows that it is a fair and reasonable assumption by the complainants that Cr Nick Kerry attended the said meeting without having read the agenda papers in preparation for that meeting.

**Outcome re Allegation 1.**

There is a basis to find that Cr Nick Kerry did breach the Code of Conduct on two grounds, namely, **Clause 3.1** by not acting "honestly and diligently" and **Clause 4.1** by not upholding the "highest standards of behaviour" expected of all DAP members.

**Allegation 2.**

The member in question has sought the opinion of other members about their attitude towards the meetings being closed in part to the public and on hearing that they support the maintenance of this operating procedure has threatened at least one member with removal from the panel.

**Assertion 2.**

This assertion has two elements.

The first element essentially challenges the right of the member in question to seek the opinion of other DAP members about their attitude towards the DAP meeting being closed in part to the public to consider the outcome of applications. I find that such an assertion cannot be maintained as a breach of the Code of Conduct because it is surely the right of any person to question a DAP member about such opinion.

The second element asserts that the behavior outlined in the first element above, is followed by behavior antagonistic to any other DAP member who supports the maintenance of the current practice of the DAP in closing the meeting to the public to determine the outcome of an application, coupled with threatening such DAP member with removal from the panel. Notwithstanding that the said member has no power himself to remove any person from the DAP such antagonistic and threatening behavior is asserted to be a breach of the Code of Conduct on two grounds, namely, **Clause 3.1** by not acting "honestly" and **Clause 4.1** by not upholding the "highest standards of behaviour" expected of all DAP members.

**Response from Cr Nick Kerry.**

Cr Nick Kerry accepted the Finding regarding the first element of the Allegation and in relation to the second element of the assertion and allegation, Cr Nick Kerry denies that he has ever threatened any DAP member as alleged maintaining (correctly) that he personally has no power to remove a DAP member.

**Finding on Allegation 2 – first element.**

The first element cannot be maintained for reasons stated above.

**Outcome re Allegation 2 - first element.**

There is no basis to find a breach of the Code of Conduct as alleged in Allegation 2 - first element.

**Finding on Allegation 2 - second element.**

The second element was reinforced by DAP member Phil Smith who maintains that Cr Nick Kerry did on several occasions (unspecified dates) act antagonistically as asserted in the Complaint to any DAP member who supported the practice of closing the DAP meeting (in part) for decision making, and Phil Smith maintains that on at least one occasion in reaction to Phil Smith vocally supporting that DAP practice, Cr Nick Kerry said in effect that while he could not remove Phil Smith from office he, Cr Nick Kerry, could cause a reduction in Phil Smith's remuneration, and Cr Nick Kerry asked or suggested that Phil Smith resign. I find that the evidence from three DAP members regarding this allegation is compelling and believable and that this alleged behavior is totally consistent with the endeavors of Cr Nick Kerry to achieve the outcome of a completely open DAP meeting for which he had been advocating since before his election to Council and membership of the DAP.

**Outcome re Allegation 2 - second element.**

There is a basis to find that Cr Nick Kerry breached the Code of Conduct on one ground, namely, **Clause 4.1** by not upholding the "highest standards of behaviour" expected of all DAP members.

**Allegation 3.**

The member in question has expressed the view that one criteria for assessment of future applicants for membership of the panel should be that they support the opening of the full meeting of the panel to the public.

**Assertion 3.**

This assertion challenges the right of the member in question to express a view about criteria for assessment of future applicants for DAP membership. Notwithstanding that expressing such a view at a DAP meeting may be seen as inappropriate given the majority decision of DAP regarding such procedure. I find that such an assertion cannot be maintained as a breach of the Code of Conduct because it is surely the right of any person to hold and express such opinion.

**Response from Cr Nick Kerry.**

Cr Nick Kerry accepts the Finding.

**Outcome re Allegation 3.**

There is no basis to find a breach of the Code of Conduct as alleged in Allegation 3.

**Allegation 4.**

The member in question has expressed a view at a recent meeting that there is a need for 'new blood' on the panel.

**Assertion 4.**

This assertion challenges the right of the member in question to express a view about the need for "new blood" on the panel. Notwithstanding the lack of courtesy and lack of prudence in such behavior at a DAP meeting, I find that such an assertion cannot be maintained as a breach of the Code of Conduct because it is surely the right of any person to hold and express such opinion.

**Response from Cr Nick Kerry.**

Cr Nick Kerry accepts the Finding.

**Outcome re Allegation 4.**

There is no basis to find a breach of the Code of Conduct as alleged in Allegation 4.

**Allegation 5.**

The member in question received hand-written notes from a member of the public gallery during a panel meeting (who he had presumably had prior dealings) and then read directly from these notes supporting a specific application.

**Assertion 5.**

This assertion maintains that at the DAP meeting held on 10 December 2014 the member in question inappropriately received hand written notes from a member of the public present in the public gallery and interested in one item and that he read from those notes to advance an argument regarding the application. This assertion maintains a breach of Code of Conduct on three grounds, namely, **Clause 2.3** which requires of every Member to "make all decisions impartially", **Clause 2.8(d)** which requires of every Member to "not approach or discuss with an applicant or a representor any application which is either before the Panel or will come before the Panel at some future time, except during the course of a Panel meeting where the application forms part of the agenda and the applicant or representor has a right to be heard by the Panel", and **Clause 4.1** which requires of every Member to "uphold the highest standards of behavior and ensure that they act in accordance with the provisions of the Act at all times".

**Response from Cr Nick Kerry.**

Cr Nick Kerry does not deny that the incident occurred but he maintains that he did not do anything wrong, in particular he says that out of courtesy he received and merely read aloud a written statement he had received from a member of the public present at the meeting and who was a representor.

**Finding on Allegation 5.**

I find that the incident did occur as asserted and I find that Cr Nick Kerry did not understand the lack of propriety in doing what he did as alleged and find also that Cr Nick Kerry did not appreciate his role and responsibilities.

**Outcome re Allegation 5.**

I conclude that Cr Nick Kerry did inadvertently breach the Code of Conduct **Clause 2.8(d)** which requires of every Member to "not approach or discuss with an applicant or a representor any application which is either before the Panel or will come before the Panel at some future time, except during the course of a Panel meeting where the application forms part of the agenda and the applicant or representor has a right to be heard by the Panel", and **Clause 4.1** which requires of every Member to "uphold the highest standards of behavior and ensure that they act in accordance with the provisions of the Act at all times" but I conclude that the said breach was of such a minor nature it does not require any action by the Council, rather what may be of greater benefit is for Cr Nick Kerry to be educated regarding his DAP role and responsibilities under the law.

#### **Allegation 6.**

The member in question asked another member whether she intended to re-apply for membership as an independent member and when that member replied that they had not decided, informed her of ways in which she could influence his decision, such as his preference for wine, where he could be taken for dinner etc.

#### **Assertion 6.**

The assertion maintains that the member in question inappropriately had the following conversation with DAP member Jenny Newman immediately preceding the DAP meeting on 4 March 2015, namely:

**Nick Kerry** "Are you going to re-apply to be on the DAP?"  
**Jenny Newman** "Oh I haven't really decided yet. I do enjoy it. I probably will."  
**Nick Kerry** "Well you know I'm on the selection panel!"  
**Jenny Newman** "Oh yes?"  
**Nick Kerry** "I do like a good bottle of wine. You might want to take me out and wine and dine me to make sure you get back on. Ha ha."  
**Jenny Newman** "Mmmm I don't think so."

The assertion maintains that the conversation is a breach of the Code of Conduct on two grounds, namely, **Clause 3.1** by not acting "honestly" and **Clause 4.1** by not upholding the "highest standards of behaviour" expected of all DAP members.

#### **Response from Cr Nick Kerry.**

Cr Nick Kerry does not deny that the conversation took place as asserted but maintains that the conversation was jocular and not serious nor was it a threat or an attempt to bribe or in any way behave improperly.

#### **Finding on Allegation 6.**

The assertion is supported by DAP member Phil Smith who witnessed the conversation, but Phil Smith supports Cr Nick Kerry in maintaining that the conversation was jocular and not serious. However, Phil Smith also maintains that the conversation as led by Cr Nick Kerry was inappropriate and improper even as a jocular conversation. I find accordingly.

#### **Outcome re Allegation 6.**

There is a basis to find that Cr Nick Kerry did breach of the Code of Conduct on one ground, namely, **Clause 4.1** by not upholding the "highest standards of behaviour" expected of all DAP members.

#### **Allegation 7.**

When another member was giving an opinion about an application, the member in question suggested that the member was being influenced by the fact that the development was located in his ward, thereby suggesting that he was acting impartially.

#### **Assertion 7.**

The assertion is that the member in question made an inappropriate allegation against another DAP member suggesting that the other DAP Member was inappropriately influenced in decision making at a DAP meeting. The assertion maintains a breach of the Code of Conduct, namely, **Clause 4.1** which requires of every Member to "uphold the highest standards of behavior".

#### **Response from Cr Nick Kerry.**

Cr Nick Kerry denies that he improperly stated or inferred that another DAP member had a "conflict of interest" nor that the DAP member was "inappropriately influenced" in decision making at DAP maintaining that he merely asked a question of fact about the proposed development being in the said members Ward.

**Finding on Allegation 7.**

I have conflicting evidence from the DAP members about what exactly was said on this occasion and while I find that there was an occasion when something was said or asked about a development in a particular Ward, I am not satisfied that Cr Nick Kerry did do as has been alleged.

**Outcome re Allegation 7.**

There is no demonstrable breach of the Code of Conduct as alleged in Allegation 7.

**Allegation 8.**

The member in question communicated with a member of the media regarding his opinion about whether the panel should be open to the public, a matter that had been discussed by the Panel in confidence.

**Assertion 8.**

The assertion is that the member in question briefed a journalist from the local Messenger Newspaper about the question of whether the hearing of the DAP should be open to the public without authority from the DAP to do so, contrary to the Code of Conduct, namely, **Clause 2.12** which requires of every Member except the Presiding Member or unless otherwise authorized by the DAP not to "speak publicly to the media".

**Response from Cr Nick Kerry.**

Cr Nick Kerry absolutely denies the allegation. Cr Nick Kerry does not deny that over time he had direct communication with members of the media but he denies and breach of the Code of Conduct as alleged.

**Finding on Allegation 8.**

While there is ample evidence that Cr Nick Kerry had communicated with the media since before his election to Council and after his membership of DAP there is insufficient evidence that he breached the Code of Conduct as alleged.

**Outcome re Allegation 8.**

There is no demonstrable breach of the Code of Conduct as alleged in Allegation 8.



**Summary.**

I conclude that there has been no demonstrable breach of the Code of Conduct as set out in Allegations 2 (first element), 3, 4, 7 and 8 and for Allegation 5 there is an acceptance of the finding and an agreement with Cr Nick Kerry that there is no need to proceed further.

I conclude that there is a basis for finding a breach of the Code of Conduct for Allegations 1,2 (second element), and 6 for reasons set out above.

However, I add that while the behaviours complained about do in my findings provide a basis for finding various breaches of the Code of Conduct these behaviours are at the lowest end of the scale of inappropriate behaviours and they reflect more a lack of experience and understanding by Cr Nick Kerry rather than any deliberate flouting of the Code of Conduct.

In addition I add that from my observations during the inquiry it is apparent that while Cr Nick Kerry may disagree with some of the "factual" findings he now does understand the implications of his "alleged behaviours" from a Code of Conduct perspective – even if he disputes that his "alleged behaviours" may amount to a breach of the Code of Conduct as I have found. This process has been one of enlightenment for Cr Nick Kerry whom I am sure has learned about expected behaviours and Code of Conduct implications, and as such there is arguably no need to take the matter any further other than reporting the outcome to the Council.

Accordingly, I refer the matter to you as Public Officer to determine what (if anything) need now be done by way of referral to Council.

Yours sincerely,

Ted Byrt.



Ted Byrt  
Executive Director  
Byrt Corporate Advisory<sup>®</sup>