HWL EBSWORTH
LAWYERS

Our Ref: JC:JMR:80803

16 February 2009

The General Manager
Wyong Shire Council
DX 7306
WYONG NSW

Attention: Martin Johnson

Dear Sir

Councillor access to Developers

Introduction

We refer to your request for advice regarding the appropriateness of Councillors meeting separately or collectively with developers.

In that regard, we have been specifically asked to consider situations where such meetings take place where development applications by those developers have been lodged with Council, but have not yet been considered or determined.

We are further instructed to address our advice to private meetings between Councillors and developers. In other words, meetings that are not advertised nor generally known to the public.

We have also been asked to deal with this question from both a legislative perspective, that is, as provided by statute, as well as from a broader perspective, that is, as it concerns public perception and questions of openness and accountability. In any event, such questions obviously arise, having regard to Council's Code of Conduct.

Summary of Advice

There is no legislative prohibition on Councillors meeting privately with developers who have development applications before Council that have not been considered or determined.

However, there is a likelihood that such meetings may be a significant factor in a Court making a finding of apprehended bias in respect of the Councillors involved, a finding which may in turn produce a result that the validity of any decision finally made may be set aside (*McGovern v Ku-ring-gai Council* [2008] NSWCA 209).

Brisbane
Melbourne
Norwest
Sydney

ABN 37 246 549 189

Further, it appears to us that such actions are likely to be in breach of Council's Code of Conduct.

The more prudent manner of avoiding the possibility of a finding of apprehended bias, or a breach of Council's Code of Conduct, is to either entirely refuse to privately meet with any developer until at least Council's assessment report has been finalised and circulated, or at the very least, ensure that any meeting with developers is held in public, with appropriate notification to affected members of the public before any such meeting to allow for general attendance.

Local Government Act

Section 440(3) of the *Local Government Act* 1993 (**LG Act**) provides that Council must adopt a Code of Conduct that incorporates the provisions of the Model Code of Conduct described by the *Local Government (General) Regulation* 2005 (**Regulation**).

Section 440(5) provides that Councillors, members of staff and delegates of a Council must comply with the applicable provisions of the Council's adopted code, except where there is an inconsistency with the Model Code.

We have been provided with Council's Code of Conduct adopted on 22 October 2008.

Since Council's Code has been made and adopted by it, it cannot be said to have legislative status, notwithstanding the requirement at Section 440 of the LG Act that Councillors must comply with its applicable provisions.

There are no other specific provisions in the LG Act or Regulation, or elsewhere in statute, that prevent or restrict Councillors from conducting private meetings with developers. However, we return to the Code of Conduct later in this advice after first dealing with the common law position of apprehended bias and pre-judgment.

Apprehended Bias and Pre-Judgment

At common law, the Courts have determined and applied a series of principles to decision making by Government.

These legal principles include a right to natural justice (or procedural fairness) and an obligation upon the decision maker to have regard only to relevant considerations.

Of particular importance in considering a question asked of us is the legal principle dealing with bias. That principle in effect provides that a reasonable apprehension of bias will exist where:

> *" a fair minded lay observer might reasonably apprehend the decision maker might not bring an impartial mind to the exercise of the power."*

However, the test is said to have a "flexible quality". It is not the case that elected members of government, including local Councillors, are to be held to the same standard as, for example, judges. In other words, the operation of the test must take into account "the diversity of functions, including the broadly political and those of an administrative" nature that is inherent in local government.

In *McGovern*, the applicants challenged the grant of consent by Ku-ring-gai Council to a neighbour's development application on the basis of, amongst other things, that the conduct of two Councillors in publicly indicating support for the application prior to determination created a reasonable apprehension of bias in favour of the developer.

In grappling with the application of the principle to Councillors, having regard to the nature and role of local government, the NSW Court of Appeal sought to draw a distinction between, on the one hand, arriving at a conclusion that an application should be approved prior to a final decision and, on the other hand, becoming an advocate for the development application or not being open to persuasion.

The Court in that case, after considering the evidence, formed the view that the conduct of the Councillors was not such so as to amount to a reasonable apprehension of bias, having regard to the application of that principle to local government Councillors.

In finding that the two relevant Councillors had adequately discharged their obligations at law, the Court observed that both Councillors had formed their views after consideration of the information available to them, "particularly the report by Council officers".

It is possible to extrapolate from that finding that a conclusion of apprehended bias is more likely to be made in a local government context where a position has been taken prior to consideration of the Council staff assessment. That is not to say that a Councillor is not entitled to disagree with the findings and recommendations contained within such a report, but rather that consideration of the report, prior to expressing a firm view, is indicative of a mind that is still ultimately open to persuasion.

We are of the view that where a Councillor or Councillors meet privately with a developer who has lodged an application with Council, and that application has not yet been considered, then a significant step has been taken to raising in the mind of the fair minded lay observer an apprehension that that Councillor or Councillors might not bring an impartial mind to the exercise of power.

This is not to say that Councillors cannot inform themselves regarding the application, however a notified open public meeting would, in our view, be less likely to be a cause for concern. Section 232(2) does provide for the role of a Councillor as an elected person to, among other things, "facilitate communication between the community and the Council", however in our view this envisages a far broader, open and transparent process than private developer meetings.

There is some conflicting authority in the Courts as to whether, having made a finding of apprehended bias, the decision ultimately made should still be set aside, where a person or persons

identified as unimpartial has had no effect on the actual outcome. For example, in *McGovern*, even if the votes of the two impugned Councillors were set aside, the remaining Councillors still voted, by majority, to approve the development application.

It is however clear that if the decision ultimately made turned upon the vote of the Councillor who has been found to be biased, then the decision will be set aside, with a whole range of other consequences arising.

Code of Conduct

Council's adopted Code of Conduct contains certain key principles, and then moves to specific standards of conduct.

In our view, the following key principles are relevant in considering whether or not Councillors should convene private meetings with developers with development applications before Council.

Those relevant key principles include:

> *"4.1* ***Integrity*** *– You must not place yourself under any financial or other obligation to any individual or organisation that might reasonably be thought to influence you in the performance of your duties.*
>
> *4.3* ***Selflessness*** *– You have a duty to make decisions in the public interests.*
>
> *4.4* ***Impartiality*** *– You should make decisions on merit in accordance with your statutory obligations when carrying out public business.*
>
> *This means fairness to all, impartial assessment, merit selection and recruitment and in purchase and sale of Council's resources; considering only relevant matters.*
>
> *4.5* ***Accountability*** *– You are accountable to the public for your decisions and actions and should consider issues on their merits, taking into account the views of others. This means recording reasons for decisions, submitting to scrutiny, keeping proper records, establishing audit trails.*
>
> *4.6* ***Openness*** *– You have a duty to be as open as possible about your decisions and actions, giving reasons for decision in restricting information only when the wider public interest clearly demands. This means recording, giving and revealing reasons for decisions, revealing other avenues available to the client or business; when authorised; offering all information; and communicating clearly.*
>
> *4.7* ***Honesty*** *– You have a duty to act honestly. You must declare any private interest relating to public duties and take steps to resolve any conflicts arising in such a way that protects the public interest."*

Although there is some scope for debate, it appears to us that the intended spirit of the above principles will seem to generally preclude Councillors meeting privately with developers who have lodged development applications with Council.

Our view is reinforced by the standards of conduct that are contained in Part 2 of the Code of Conduct.

In particular we note the following provisions:

> *"6.5 You must consider issues consistently, promptly and fairly. You must deal with matters in accordance with established procedures, and in a non-discriminatory manner.*
>
> *6.8 You must ensure that development decisions are properly made and that parties involved in the development process are dealt with fairly. You must avoid any occasion for suspicion of improper conduct and development assessment process.*
>
> *6.9 In determining development applications, you must ensure that no action, statement or communication between yourself and applicants or objectors conveys any suggestion of willingness to provide improper concessions or preferential treatment."*

Of considerable importance in relation to clauses 6.8 and 6.9 above is that Councillors must be always *perceived* to be acting fairly and impartially. It may indeed be the case that no improper conduct, improper concessions or preferential treatment (to use the wording of the Code of Conduct) is taking place in private meetings. Nonetheless, the Code is directed at where grounds for suspicion of such matters has arisen or where a suggestion of such matters has been conveyed.

It is clearly the case that closed door meetings are much more liable to convey such suggestions, or arouse such suspicions. We also note the identified role of a Councillor under s232 of the *Local Government Act* 1993 which envisages a broader role in the development process, for example: to play a key role in the creation and review of Council's policies and objectives and criteria relating to the exercise of the Council's regulatory functions.

Conclusion

For the above reasons, we are of the view that, generally speaking, Councillors meeting privately with developers who have a development application before Council that has not yet been considered or determined is likely to amount to breach of Council's Code of Conduct.

Such actions also significantly raise the spectre of a successful finding of apprehended bias on the part of Councillors involved, such that any final decision may be open to challenge in the Court, particularly if at the relevant time no Council officer's report on the proposal has been presented to the Councillors.

We trust the above is of assistance. Should you have any queries, please do not hesitate to contact John Cole or Jeff Reilly of this office.

Yours faithfully
HWL Ebsworth

John Cole
Partner

Writer: Jeff Reilly | (02) 9334 8642 |
E-mail: jeff.reilly@hwlebsworth.com.au
Postal: GPO Box 5408 Sydney, New South Wales 2001
Address: Level 14, Australia Square, 264-278 George Street, Sydney, New South Wales 2000
Facsimile: 1300 369 656 (Australia) | +61 3 8615 4301 (International)
DX: DX 129 Sydney