

*Local Government Act 1989*

IN THE MATTER OF THE CITY OF MANNINGHAM  
and  
IN THE MATTER OF APPLICATIONS TO A COUNCILLOR CONDUCT PANEL

BY:

**COUNCILLOR DAVID ELLIS  
COUNCILLOR GRACE LA VELLA and  
COUNCILLOR STEPHEN MAYNE**

**Applicants**

CONCERNING:

**COUNCILLOR FRED CHUAH**

**Respondent**

**REASONS FOR DECISION OF THE COUNCILLOR CONDUCT PANEL**

**The Applications**

*Background*

1. There are three applications before the Panel, each alleging that Cr. Chuah has engaged in conduct in breach of the Councillor Code of Conduct of the City of Manningham (“the Code”). The Code, in its present form, was adopted by the Council of the City of Manningham (“Manningham”) on 24 November 2009<sup>1</sup>.
2. On 25 February 2010 Cr. David Ellis made application for a Councillor Conduct Panel to be convened. Then, on 6 April 2010 Cr. Grace La Vella requested that a

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<sup>1</sup> In final submissions to the Panel, Cr. Chuah submitted that the Panel had no jurisdiction to deal with a complaint against him in respect of any conduct that pre-dated the adoption of the Code. A report by council officers to the Council on 24 November 2009 stated that the then existing Code had to be amended in order to comply with requirements introduced by amendment to the *Local Government Act 1989*. Prior to the adoption of the current Code, a former Code of Conduct applied to both Councillors and Staff, and was to be found in the Manningham Policy Manual, Section 1 – Governance. The former policy appeared to have been adopted on 16 May 2006 and was most recently reaffirmed by a resolution on 29 July 2008 at which time certain amendments were made.

Panel be convened, proposing that her application be dealt with in the course of Cr. Ellis' application. On 16 April 2010 Cr. Stephen Mayne also made application to become a party to Cr. Ellis' and Cr. La Vella's applications. The Panel determined to treat each application as a separate application and to join them for hearing. No objection was taken by Cr. Chuah to his course.

3. At all material times Cr. Fred Chuah was Manningham's Deputy Mayor and was the President of the Chinese Community Social Services Centre Inc. ("CCSSCI"). CCSSCI operates the *On Luck Chinese Nursing Home* ("On Luck") located within the City of Manningham.
4. Stated shortly, the applicants focus upon the role of Cr. Chuah in seeking and obtaining planning permission with respect to a proposal to extend On Luck. The extension proposed was a precursor to an application by CCSSCI to the Australian Department of Health and Ageing ("DHA") to increase the number of nursing home beds from 60 to 180.
5. It is to be noted that On Luck is located in a "green wedge" zone in which a "nursing home" is a prohibited use. It is said by the applicants that Cr. Chuah's conduct in respect of the planning application placed in him in breach of the Code. Further, the applicants contend that, in furtherance of CCSSCI's plans to enlarge On Luck, Cr. Chuah has acted inconsistently with his obligations under the Code and the *Local Government Act 1989* ("the LGA"). Here, the allegation is that he used his position on Council to improve the position of CCSSCI with respect to its application to the DHA by preventing another nursing home from obtaining planning permission. It is also said that Cr. Chuah acted contrary to his statutory and Code obligations in seeking to position CCSSCI to take over the operation of the Council's own nursing home, the Manningham Centre Association ("MCA").
6. The Panel notes that at the Directions Hearing held on 31 March 2010 Cr. Chuah informed the Panel that a complaint as to potential breaches of conflict of interest

provisions of the LGA was the subject of an investigation by a Municipal Inspector. The existence of an investigation was confirmed in the written submissions, dated 25 June 2010, of counsel who sought leave to represent Cr. Chuah. A copy of a letter from a Municipal Inspector addressed to Cr. Chuah was provided to the Panel by counsel. At the time of writing, the Panel has not been advised that the investigation has been concluded.

### **The jurisdiction of the Panel**

7. The *Local Government Amendment (Councillor Conduct and other Matters) Act 2008* was assented to on 18 November 2008 (“the Amending Act”). Part 3 of that Act – entitled “Councillor Conduct Amendments” – commenced upon assent. Section 76C(1) of the LGA, as substituted by the amending Act, required councils to develop and approve a Councillor Code of Conduct for the council within 12 months of the commencement of section 15 of the Amending Act, that is, by 18 November 2009. Manningham adopted its Code on 24 November 2009.
8. The Amending Act established certain councillor conduct principles which are now found in sections 76B and 76BA of the LGA. Section 76 of the LGA provides that a Councillor Code of Conduct is taken to include the Councillor conduct principles set out in the LGA<sup>2</sup>. A Councillor Code of Conduct is defined in s. 3 of the LGA to mean “the code of conduct developed by a council under s.76C”. Accordingly, the Councillor Conduct Principles are to be taken to be incorporated into the Code adopted by Manningham on 24 November 2009. They are not, therefore, incorporated into any form of the Code as it stood prior to 24 November 2009.
9. The jurisdiction of the Panel has the following relevant features. First, under section 81B, the Panel may determine whether or not a Councillor has engaged in misconduct. “Misconduct” is defined in s. 81A of the LGA as follows:

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<sup>2</sup> The Councillor Conduct Principles are set out later in these Reasons for Decision

*misconduct* by a Councillor means—

- (a) conduct by a Councillor that is in breach of the Councillor Code of Conduct; or
- (b) the failure of a Councillor to comply with a direction of a Councillor Conduct Panel where the Panel has not made a finding of misconduct against the Councillor

Secondly, the Panel may, under the same section, authorize the making of an application to VCAT for a finding of serious misconduct. “Serious misconduct” is defined in s.81A of the LGA and applies where a councillor has failed to comply with a direction of a Panel following a finding of misconduct [para. (a)]; failure of a councillor to cease conduct found by a Panel or VCAT to be misconduct or serious misconduct [para (b)]; and engaging in conduct that contravenes the Councillor conduct principles after a finding of misconduct or serious misconduct had been made. Paragraph (d) is to the following effect:

- (d) conduct by a Councillor that contravenes
  - (i) the Councillor conduct principles; and
  - (ii) section 76E or 77.

10. Of the provisions referred to in para. (d) of the definition of serious misconduct, section 76E relates to conduct involving the improper direction or influence of council staff and section 77 refers to the release by a Councillor (or former Councillor) of confidential information. There is no allegation against Cr. Chuah that there has been any prior breaches of the Code or any of the matters referred to in paras. (a) to (c) inclusive of the definition. Neither is there any allegation that he has engaged in conduct in breach of either ss. 76E or 77. As subparagraphs of para. (d) of the definition (i) and (ii) are cumulative, there is no foundation for the Panel to refer any matter to VCAT. It follows that the Panel is unable to accede to Cr. Ellis’ and Cr. La Vella’s request to refer the subject matter of their applications to VCAT.
  
11. In the Panel’s view, the only matter that we may consider is whether Cr. Chuah has engaged in “misconduct” as defined in s.81A.

## **Dispute Resolution Procedures**

12. The LGA in effect encourages councillors to participate in dispute resolution processes as an alternative to commencing an application to a Councillor Conduct Panel – see particularly s. 81C(c). No such process has been embarked upon with specific reference to the complaints made by the applicants. The reasons given to the Panel for this are the following.
13. Cr La Vella, in her submission dated 6 April, 2010 it states: “I do not wish to go before internal mediation or dispute resolution for the reason this matter is not regarded as a dispute between individual Councillors but goes more fundamentally to the appropriateness of the course of action Cr. Chuah has chosen to pursue on behalf of On Luck, opposed to the correct Council Planning process.”
14. In Cr Chuah’s original submission dated 31 March, 2010 it states that the internal dispute resolution should have been utilised whilst in response Cr Ellis reiterates his original position “this is not a matter amenable to internal dispute-resolution or mediation, being based not on any personal disagreement between Cr. Chuah and myself but on process, actions and omissions by Cr. Chuah that involve his dealings with people both within and beyond the authority of Manningham Council”<sup>3</sup>
15. In the circumstances the Panel considered it appropriate to proceed to hear and determine the applications.

***Can the Panel consider conduct occurring before the adoption of the Code?***

16. Various claims of conflict of interest are alleged against Cr. Chuah by the applicants. The conduct is alleged to involve conflicts of interest occurring prior to the adoption of the Code by the City of Manningham. Cr. Chuah submits that the Panel is unable to consider conduct that occurred prior to the adoption of the

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<sup>3</sup> Cr. Ellis, 15 April, 2010 – RE: Cr Chuah’s written submission/responses to Manningham Councillor

Code, on 24 November 2009. In part, this submission draws upon a conclusion reached by the Panel at para. 33 of its decision on procedural matters made on 13 August 2010.

17. The Councillor Code of Conduct, at para. 12.5 (part 12 being entitled “Dispute Resolution Process”) is in the following terms:

12.5 If the dispute relates to an apparent offence under the Local Government Act it should be referred to the Minister for Local Government and not the subject of an application to a Councillor Conduct Panel”.

18. The provision in cl. 12.5 does not purport to oust the jurisdiction of the Councillor Conduct Panels. It does not preclude conflict of interest issues being considered by the Panel when they are raised. Indeed, if the Code had that effect, it might be thought inconsistent with the LGA because s.81O of that Act is as follows:

**81O Breach of Act by Councillor**

- (1) This section applies if it appears to a Councillor Conduct Panel that a Councillor has committed an offence under this Act.
- (2) A Councillor Conduct Panel must by notice in writing notify the Secretary that a Councillor appears to have committed an offence under this Act as soon as the Panel becomes aware of the apparent offence.

19. That cl. 12.5 was not intended to have this effect is confirmed by cl. 2.2 of the Code which incorporates the general principles of councillor conduct found in s. 75BA of the LGA, the first of which requires councilors to “avoid conflicts between his or her public duties as a councillor and his or her personal interests and obligations”.

20. In any event the conduct which has been focused upon by the applicants in this proceeding is conduct which occurred in December 2009 – the issues with respect to the Park Orchards Nursing Home application and decisions made in respect of the Manningham Centre Association. The third matter which, at least in the view of the applicants, that may have given rise to a conflict of interest is the question concerning the planning application with respect to the extension of On Luck

Nursing Home.

21. The effect of cl. 2.2 of the Code is that the Panel has jurisdiction to inquire into matters in which a conflict of interest is alleged, for the purpose only of determining whether there has been a breach of the Code. Breach of the conflict of interest provisions may also give rise to a breach of the LGA, and these are breaches which may attract a criminal penalty. A breach of the Code may attract a civil remedy, not a criminal penalty. There is no reason in law or practice why these two pathways cannot exist simultaneously.
22. Subject to the discussion that commences in para. 19 hereof, it is the Panel's view that the complaints with respect to the Park Orchards Nursing Home application and the Manningham Centre Association, as well as any conflict of interest issues that may arise with respect to the On Luck matter may be considered by the Panel.
23. As noted above, Division 1A of Part 4 of the LGA commenced upon assent of the Amendment Act. The "Primary principles of Councillor Conduct" and the "General Councillor conduct principles" enacted by the Amendment Act respectively became sections 76B and 76BA of the LGA. As noted above, the Councillor conduct principles are required to be incorporated in the Councillor Code of Conduct.<sup>4</sup>
24. An application may be made under the LGA in to VCAT by the Secretary to the Local Government Department cases where gross misconduct is alleged. The Councillor conduct principles contained in ss.76B and 76C became operative on and from 18 November 2008 and accordingly applied to the conduct of Councillors from that date. Thus, a breach of those principles at any time after 18 November 2008 would have been capable of founding an application to VCAT in circumstances where gross misconduct was alleged by the Secretary.

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<sup>4</sup> s.76C(3)(a)

25. The position is different with respect to simple “misconduct”. The Principles were required by para.76C(3)(a) to be included in the Councillor Code of Conduct, but they are also in effect incorporated by reference. This is because sub-section 76C(7) states that, on and from the commencement of s. 15 of the Amendment Act “a Councillor Code of Conduct is taken to include the Councillor conduct principles”. The Code of Conduct referred to in the sub-section is the Code developed by a Council under s.76C.<sup>5</sup>
26. Because of the statutory incorporation into all Codes of the Councillor Conduct Principles, it would seem to the Panel to be anomalous if it were intended that only conduct arising after the adoption of a Councillor Code of Conduct could constitute “misconduct” that was justiciable by a Panel, but that any conduct occurring after the commencement of Part 4 of the LGA which could be characterized as serious misconduct and gross misconduct could be subject to a proceeding in VCAT.
27. Section 1 of the Amendment Act described a purpose of the Act to:
- (i) further provide for standards of conduct for Councillors and to provide for arrangements to deal with Councillor misconduct;
  - (ii) redefine what constitutes a conflict of interest and specify further duties with respect to the disclosure of conflicts of interest
  - .....
  - (iii) provide for increased transparency in the decision-making processes of Councils
28. The Minister’s Second Reading speech<sup>6</sup> explains that the purpose of the Bill for the Amendment Act was to “support and enhance the democratic and accountable nature of the [local government] sector” and to insert principles of councillor conduct in the Act that describe the standards of conduct that councillors are required to uphold, but it otherwise provides very little assistance as to the interpretation of the provisions under consideration here.
29. The general principles of statutory interpretation applicable to this question are

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<sup>5</sup> S.3, LGA

discussed in Pearce and Geddes.<sup>7</sup> In the Panel’s opinion the operation of the Amendment Act (and Part 4 of the LGA) should be understood as a manifestation of the principle explained in *Robertson v. City of Nunawading* [1973] VR 819 at 842:

‘The other statement, that of Dixon, J. is as follows:-

“The general rule of the common law is that the statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.”

It is to be observed that this principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and does not more than that: *Maxwell on Interpretation of Statutes*, 12<sup>th</sup> ed., pp. 216-7. The principle is concerned with the case where the enactment would apply to these antecedent facts and circumstances in such a way “as to impair an existing right or obligation” or “as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.’

30. The position under the LGA is that the standards of Councillor conduct are expressly formulated by the Act in ss.76B and 76C. Those provisions operated from the commencement of the Amendment Act and were binding upon councillors. Other than in respect of gross misconduct, no procedure was available to deal with a complaint alleging simple misconduct until the adoption of the Code. Nevertheless, the statutory principles – incorporated by force of the Act itself in the Code – satisfies the Panel that conduct in breach of those principles, occurring prior to the adoption of the Code, may be taken into account by a Panel constituted in accordance with the Act.
31. The Panel is therefore satisfied that it has jurisdiction to consider, in determining whether or not Cr. Chuah has engaged in misconduct facts and circumstances that arose after the commencement of Part 3 of the Amendment Act may be taken into account.

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<sup>6</sup> Richard Wynne, MP, Minister for Local Government, 12 September 2008, Hansard , page 3643

## Standard of Proof

32. Although not bound by the rules of evidence, the Tribunal will apply the principles set out in section 140(2) of the *Evidence Act 2008* in weighing the evidence in this matter. Those principles are of similar import to the well-known passage of Dixon, J. in *Briginshaw v. Briginshaw* (1938) 60 CLR 336.

## Town Planning Issues: The *On Luck Chinese Nursing Home*

33. On Luck is situated in what is commonly described as “green wedge” land, as noted above, a “nursing home” is a prohibited use under the Manningham Planning Scheme (“the Planning Scheme”). On 5 March 2004 Amendment C39 to the Planning Scheme came into force. The amendment required Ministerial approval and was sought by CCSSCI for the specific purpose of allowing the establishment of On Luck. The capacity of the nursing home then envisaged was 60 beds.
34. The history of On Luck is set out in the Minutes of the Special Meeting of Council held on 10 February 2010<sup>8</sup>. The Minutes note that in 2001 CCSSCI was granted Approved Provider status for residential care and in 2002 was allocated 60 high care places and provided with a capital grant of \$1.1m to establish the On Luck Chinese Nursing Home.
35. The Minutes also record the history of the use and development of the subject land, noting (among other things) that various amendments to the Manningham Planning Scheme were made to give effect to certain environmental considerations. One consequence of which was that the subject land became situated within a green wedge, with the consequence that a “nursing home” became a prohibited use within the zone. The Minutes go on to note that on 4 March 2004 the Minister for Planning approved amendment C39 to the Planning

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<sup>7</sup> D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, Fifth Ed., Butterworths 2001.

<sup>8</sup> City of Manningham, Special Meeting of the Council, 10 February 2010, Item 4 “On Luck Nursing Home

Scheme which had the effect to allow the use of nursing home, for the benefit of On Luck, which was permitted to establish a 60 bed nursing home.

36. CCSSCI planned to extend the capacity of On Luck by an additional 120 beds to a total of 180 beds. Consequently a further amendment to the Planning Scheme was required. An approach was made by CCSSCI to the Minister. Negotiations with the DPCD were clearly under way by 18 September 2009 and a formal request for Ministerial intervention was made on 17 December 2009. The application was subsequently granted, and Amendment C88 was approved by the Minister on 11 March 2010.<sup>9</sup> The Explanatory Report prepared by the DPCD in support of the amendment stated that:

*“CCSSC is now seeking Commonwealth Government approval for a further 120 beds as an extension to the existing nursing home. To help secure that approval CCSSC seeks to demonstrate that planning approval has been given. The current Incorporated Document does not include any provisions that would enable an amendment to the Development Plan to be considered, and as such a further planning scheme amendment is required to enable consideration to be given to the proposed 120 bed extension.”*

37. It will later be necessary for the Panel to examine the process by which Amendment C88 was obtained by CCSSCI.

#### *The allegations*

38. The complaints against Cr. Chuah have been formulated in different ways by each of the applicants. Councillor Ellis stated the following concerns in his Application made on 25 February 2010:

“Cr. Chuah’s application to amend the planning scheme was at no stage brought before Council or any meeting of councillors, nor was his intention to apply to the minister made known to Council or fellow councillors either formally or informally;

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(Amendment C88)”

<sup>9</sup> Email to CCP Registrar from Jason Close, DPCD dated 13 September 2010 attaching a “Chronology of Events – On Luck Nursing Home”.

Put simply: Cr. Chuah chose to avoid notice or scrutiny by Manningham Council in order to engineer a change to the Manningham Planning Scheme to benefit his organisation. This would appear to be a clear breach of the Code of Conduct.”

39. Cr. Ellis’ further concern was that Cr. Chuah had on various occasions not declared a conflict of interest nor absented himself from voting on matters relevant to other nursing homes, an issue which was said to arise because of the nature of competitive tendering for nursing home bed licences.
  
40. Councillor La Vella, in her application dated 6 April 2010, specifically stated her application was “...based on the same reasons and the same concerns as outlined in the application submitted by Cr. David Ellis, attached.”
  
41. Councillor Mayne’s application to the Panel was in the form of a submission dated 16 April 2010. Cr. Mayne’s concerns were that:
  - Cr. Chuah had been working on plans to expand On Luck, by means of Ministerial intervention and amendment, without informing all councillors, and that a formal application to the Minister had been made without reference to councillors;
  - Cr. Chuah may have had a conflict of interest in voting to reject an application for a nursing home in Park Orchards;
  - Cr. Chuah misled the councillors with respect to the policy of bed allocations by the Commonwealth by asserting that there was a pool of nursing home beds that were “Chinese specific” and that CCSSCI’s application would not, by implication, disadvantage general applications for beds.
  - Cr. Chuah had made or supported attacks upon the administration of the Manningham Centre Association (“MCA”) which had, or were likely to have, the effect of undermining the standing or viability of the MCA.

*The breaches of the Code alleged by the applicants*

42. Councillors Ellis and La Vella, in their applications, identify the following provisions of the *Local Government Act 1989* (“LGA”) which they say have been breached by Cr. Chuah.

- section 76B:

*It is a primary principle of Councillor conduct that, in performing the role of a Councillor, a Councillor must:*

- (a) *act with integrity; and*
- (b) *impartially exercise his or her responsibilities in the interests of the local community;*
- (c) *not improperly seek to confer an advantage or disadvantage on any person.*

- section 76BA:

*In addition to acting in accordance with the primary principle of Councillor conduct specified in section 76B, in performing the role of a Councillor, a Councillor must -*

- (a) *avoid conflicts of interest between his or her public duties as a Councillor and his or her personal interests and obligations;*

43. Whilst Cr. Mayne did not make reference to specific provisions of the Act or the Code in his application, the substance of what he put in that application is such as to raise the same issues for consideration as Crs. Ellis and La Vella. However Cr. Mayne does specifically ask the Panel to refer the conflict of interest issues he identifies to the Victorian Civil and Administrative Tribunal. As the Panel has already noted, there is no legal basis for doing so.

44. In view of the way in which the submissions of Cr. Ellis and Cr. Mayne developed during the hearings before the Panel, it is convenient at this point to set out the following further paragraphs of section 76BA, the General Councillor Conduct Principles.

[I]n performing the role of a Councillor, a Councillor must -

- (b) *act honestly and avoid statements (whether oral or in writing) or actions that will or are likely to mislead or deceive a person;*
- (c) *treat all persons with respect and have due regard to the opinions,*

- beliefs, rights and responsibilities of other Councillors, Council staff and other persons;*
- (d) *exercise reasonable care and diligence and submit himself or herself to the lawful scrutiny that is appropriate to his or her office;*
  - (e) *endeavour to ensure that public resources are used prudently and solely in the public interest;*
  - (f) *act lawfully and in accordance with the trust placed in him or her as an elected representative;*
  - (g) *support and promote these principles by leadership and example and act in a way that secures and preserves public confidence in the office of Councillor*

45. Councillors Ellis and La Vella also rely on the following provisions of the Code:

- 3.2.1 *Being honest in all dealings with the community, with other councillors and with Council staff;'*
- 3.2.2 *Always acting with impartiality and in the best interest of the community as a whole*
- 4.1. *We are committed to making all decisions impartially and in the best interests of the whole community and acknowledge that effective decision-making is vital to the democratic process and an essential component of good governance, Accordingly:*
- 4.1.1 *We will actively and openly participate in the decision-making process, striving to be informed to achieve the best outcome for the community*

### **The Conflict of interest issues**

46. Various matters are raised with the Panel and in respect of each it is alleged that Cr. Chuah had a conflict of interest and acted in breach of his obligations thereto. Two matters – those with respect to the Park Orchards Nursing Home and the Manningham Centre Association – are clearly advanced by the applicants as matters in which it is said that the conduct of Cr. Chuah gave rise to conflict of interest issues. The third is less clearly a matter of conflict of interest as properly understood, but we note it here for completeness. This is the claim with respect to the conduct of Cr. Chuah in connection with the extension of the On Luck Chinese Nursing Home.

#### *Park Orchards Nursing Home*

47. A planning application, PL08/019996, for use and development of a 91 bed nursing home came before Council on 15 December 2009, referred to as the Park Orchards proposal. That date, notably, coincides with the processes undertaken by CCSSCI to promote the extension of On Luck and to make application for Ministerial approval for re-zoning. It was two days before the application for Ministerial approval of the Planning Scheme Amendment was sought. The Park Orchards proposal had the support of Council officers.
48. The allegations with respect to the Park Orchards matter are that Cr. Chuah voted against the proposal and sought the support of other Councillors with whom he was aligned to do likewise.<sup>10</sup> Although the complaint is, in part, that Cr. Chuah used his influence with factional allies to defeat the application, the gravamen of the complaint is that Cr. Chuah himself had a conflict of interest. In particular, it is said that, in order to bolster his own case with the DHA he sought to use his position on the Council to eliminate a competitor from competition with CCSSCI for valuable nursing home bed licences.
49. The Park Orchards applicants subsequently appealed to VCAT against the refusal of a permit, and were successful. As to the merit of the Park Orchards proposal it is worth noting the observations of VCAT in *Park Orchards Aged Services Property Pty Ltd v Manningham CC & Ors*<sup>11</sup>:

IS THERE A NEED FOR AN AGED CARE FACILITY IN PARK ORCHARDS?

6. Is an aged care facility needed in Park Orchards? The applicant thinks so, council thought that a smaller facility is appropriate, and some of the resident submitters thought that it is not required.

7. The Municipal Strategic Statement in the Manningham Planning Scheme (*'the scheme'*) notes that in 2006, 22.5 percent of the municipality's residents were aged 60 years and over. It is projected that by 2031, this will increase to 38,292 residents or 28 percent of the population of Manningham. Manningham has a higher proportion of people aged over 70 years than metropolitan Melbourne. By 2031, there is expected to be a significant increase in the percentage of persons aged over 70+ years. The 70+ age group, being the age group most needing supported accommodation, is expected to double between 2003 and 2019. Whilst many aged residents will

<sup>10</sup> See Cr. Mayne's submissions dated 16 April 2010 at page 6

<sup>11</sup> [2010] VCAT 1476 (7 September 2010), Member G. Rundell (citations omitted).  
At <http://www.austlii.edu.au/au/cases/vic/VCAT/2010/1476.html>

continue to live independently in their homes, an increasing number will need to move into supported accommodation.

8. Council's aged care policy forecasts that an additional 1,000 aged care places will be needed over the next 25 years. At an average size of approximately 90 beds, Manningham will need in the order of 11 additional aged care facilities. Since 2005, the commonwealth government has recognised this growing need and the eastern region of Melbourne, including Manningham has had the highest allocation of commonwealth funded aged care beds.

9. It was submitted by the residents that the Park Orchards community is relatively young and many of the older residents are leaving and being replaced by younger households. It was also put that Park Orchards is a small community of approximately 1250 households. A large residential aged care facility would provide more beds than would be needed by residents of Park Orchards, particularly if only a small proportion of residents would eventually move into the facility.

10. Some of the future residents of this facility might be the aged relatives of households who live in Park Orchards. Those residents and their aged relatives may find it convenient to have their aged relatives living nearby. Older people living in the wider locality including Ringwood, Warrandyte, Warrandyte South and Wonga Park would be likely to be interested in moving to this facility. Given the forecasts that indicate substantial growth in the number of frail aged people, I have little doubt that there would be a demand for this facility.

11. The tribunal has found that need is a relevant but not determinative factor. In *DeNova v Manningham CC* the tribunal commented that:

If need for a facility or service can be demonstrated that may in certain cases, weigh in favour of a proposal. Need however will rarely be a decisive factor.

12. Other tribunal decisions have given weight to the need for aged accommodation. Such accommodation is seen to be for people who are somewhat vulnerable, and who deserve to live with comfort and dignity. Aged people should have options to remain in the areas in which they have lived, and be able to live in supported accommodation close to family and friends. It is best to provide these housing options in most residential areas to enable people to age in place, rather than having to move to unfamiliar places.

13. I am satisfied that there will be many more frail, older people who will need supported accommodation in Manningham and Park Orchards. Planning policies encourage the development of aged care facilities to meet current and forecast needs, and to enable older people to age in place. I do not think that a greater level of justification is needed beyond a general proposition that this community is ageing and more facilities are required. It is not for planning to determine the balance of demand and supply at a fine grain level.

14. I give some weight in this matter that there is a need for additional aged care facilities in Manningham. These facilities need to be relatively large developments as operational and compliance requirements and consumer preferences make smaller aged care facilities less viable. They therefore need larger sites, and well located sites are often difficult to find and secure. Whilst an aged care facility may be needed, it must also demonstrate that it meets the usual planning considerations of compliance with planning policy, can be a good neighbour, integrate and comfortably fit into the neighbourhood. In my view, it is these considerations that decide this case.

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#### WHAT ARE MY CONCLUSIONS FROM THE ABOVE CONSIDERATIONS?

80. On balance and considering the entirety of the planning policy framework, I conclude that the proposal is acceptable as:
- The facility is needed in the Manningham and Park Orchards area.
  - The use is appropriate in a low density residential zone. It is a good location for an aged care facility given its proximity to the neighbourhood activity centre.
  - It will have a larger built form than seen in the area, however this is acceptable because it is a necessary facility that requires a larger form, and it is in a part of Park Road that also has a more intensive built form.

- The two storey scale, siting, setbacks and materials of the new building are acceptable in heritage and neighbourhood character terms
  - The dominant trees are retained, the Monterey pines are recognised, and there will be substantial replacement planting.
  - The perimeters will be well screened.
  - Most of the chalet is retained, including part of the western façade that is a prominent visual façade to Park Road.
  - The rear wings are non contributory or less significant and their removal will not diminish the heritage values of the front building.
  - It provides a sustainable use of a heritage building, and enables some continued community involvement in the building.
  - The provision of car parking is adequate.
  - Park Road can readily accommodate the additional traffic, and sightlines are adequate.
  - It will provide adequate amenity for its residents, visitors and the staff.
  - Sewer can be provided to the land ahead of its use.
50. The fact that a VCAT Member sitting in the Planning List overturns a Council’s decision does not necessarily lead to any inference that the decision of the Council was made for an improper purpose or was unreasonable, however the reasons given by the Tribunal demonstrate that the Park Orchards proposal had planning merit. In particular, the Tribunal’s discussion with respect to need, demonstrates the existence of a general need for nursing home beds in the municipality, quite apart from any need for Chinese-specific nursing home beds.

*Manningham Centre Association*

51. The Manningham Centre Association (“MCA”) is a not-for-profit association conducted within the City of Manningham with Council representation and participation in the management of the Centre. MCA appears to have first commenced operation in 1985 and conducts two residential aged care facilities.
52. In particular the concern voiced by Cr. Mayne related to a proposal supported (if not promoted) by Cr. Chuah and voted upon by him to conduct an independent review of the Centre and to allocate a budget of \$150,000 for that task. One of the purposes of the proposed review was to consider “options for future management” of MCA. This, in Cr. Mayne’s view, was to “open the possibility of a public tender for management rights” in respect of which CCSSCI could potentially be a

tenderer.<sup>12</sup>

53. Notably, voting on the resolution for an independent review of MCA took place on 15 December 2009. Cr. Chuah seconded the motion and voted in favour.
54. Cr. Mayne says that he asked Cr. Chuah to give a commitment that On Luck or CCSSCI would never tender for the management of the MCA facilities. Cr. Chuah declined to give that commitment, on the basis that he could not do so on behalf of the whole CCSSCI Board. Cr. Mayne's submission is that, in circumstances where Cr. Chuah could not give that undertaking, he should not have participated in the vote on the independent review of the administration of MCA. The Panel notes that, subsequently, the motion adopted on 15 December 2010 was rescinded and, as expressed by Cr. Mayne, a less intrusive form of review was instituted.
55. The evidence before the Panel discloses that on certain other occasions – that is other than with respect to the Park Orchards Nursing Home and MCA – Cr. Chuah has indicated the existence of a conflict of interest and has acted appropriately<sup>13</sup>. For instance, it is recorded at Item 9.1 of the Minutes of the Council meeting on 29 September 2009 that:

Cr. Fred Chuah declared a conflict of interest in this item as he is the Chairman of On Luck Chinese Nursing Home situated in Tindals Road, Donvale, which is in close proximity to the Mathews land under consideration<sup>14</sup>. Cr. Chuah left the Council Chamber at 7:45 pm and took no part in the discussion or voting on this item. Cr. Chuah returned to the Council Chamber following the voting of this item.

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<sup>12</sup> Cr. Mayne's submissions 16 April 2010 at page 8.

<sup>13</sup> It is noted that Council has a process in place for registering Conflicts of Interest that include a protocol that on receipt of a Councillors declaration a Council officer is required to sign and date the declaration form. It is noted that within the registered conflicts of interest sighted by the Panel, on two occasions of Cr. Chuah registering a Conflict of Interest declaration that this protocol was not adhered to by Council officers.

<sup>14</sup> This was a significant planning matter – a subdivision of approximately 20 ha requiring a planning scheme amendment.

*The On Luck Chinese Nursing Home*

56. This matter is discussed more fully later in these Reasons. In reality it is a matter in which the concern is an alleged by-passing of the Council and failure to inform Council of CCSSCI's development plans for On Luck.

**Councillor Chuah and Ms. Kim Au**

57. At all relevant times, Councillor Chuah was the President of CCSSCI and his wife Ms. Kim Au, was the Chief Executive Officer of CCSSCI.

58. A document provided to the Panel by Cr. Chuah, dated 20 August 2010 signed by David Yong, Vic President of CCSSCI, states that Cr. Chuah currently receives the following benefits, described as "honoraria" in recognition of Cr. Chuah's contributions to CCSSCI, and did so as at 15 December 2009:

- a payment of \$16,000;
- a payment made via the Centre's credit card "to the amount authorized";
- one international conference per year and one national conference per year;
- a mobile telephone;
- use of a Toyota Altise belonging to the Centre.

59. A document entitled "Honorary for CCSSCI Board Members" was provided to the Panel by Ms. Au. This document states that the level of payment to Cr. Chuah depends upon the level of responsibilities and participation and identifies that matters that may be considered in assessing the level of payment. It is further stated that, in respect of the President his honorarium of \$16,000 for 2008 is on the basis that he is to spend not less than 19 hours per week on average at the Centre and/or On Luck "attending to the duties of the President and Chairman" and that the honorarium is to be arranged as a credit card to the amount authorised.

60. Other documents provided to the Panel by Ms. Au include a copy of an

“Individual Employment Agreement” between herself and CCSSCI dated 10 March 2009, pursuant to which Ms. Au is to receive a salary of \$110,000 plus statutory superannuation. She is also entitled to a bonus of \$15,000 subject to attainment of key performance outcomes. A Memorandum dated 17 July 2010 signed by Mr. David Yong states that the performance bonus is to be decided by the CEO Review Committee; she is entitled to a mobile telephone and use of a Toyota Echo belonging to the Centre; she has a CCSSCI credit card which is stated not to be “an additional reward item”. The Memorandum states that as at 15 December 2009 this arrangement constituted the remuneration package applicable to Ms. Au.

61. The Panel notes that Ms. Au’s employment agreement requires her to report to the Executive Committee of the Board of Management and that, reporting to her are the “Middle Management Team” and the Director of Nursing, On Luck Chinese Nursing Home. A document entitled “CEO Performance Targets 2007/200” as provided to the Panel by Ms. Au. No document setting out the Performance Targets for 2008/2009 or 2009/2010 was provided to the Panel.
62. The Panel is satisfied that Cr. Chuah directly, and by virtue of his relationship with Ms Au, is a person who by s.79 of the LGA was required disclose a conflict of interest with respect to the development of the On Luck Chinese Nursing Home.

### **Proposed Extension to the On Luck Chinese Nursing Home**

#### *Decision making and procedural timelines of the development*

63. The town planning issues with respect to the proposed extension to the On Luck Chinese Nursing Home have been noted above at para. 29 and following. Some information was provided to the Panel by Ms. Au to demonstrate aspects of the decision-making process with respect to the proposed extension and the obtaining of Ministerial approval.

## Processes within CCSSCI

64. The Minutes of CCSSCI's Board of Management in the period July to November reveal the following<sup>15</sup>:

- **23 July 2009** the President reported that he and the CEO proposed to meet with John Henry (architect) “to have further discussions on the architectural plan for the On Luck extensions”.
- **20 August 2009** the President reported that he had met up with David Hodge of the State's Planning Department at a function and invited him to a meeting on 18 September 2009 “to discuss the extension of On Luck Chinese Nursing Home.” The President also proposed the collection of signatures to lobby the Prime Minister for more residential care places and community care packages for the Chinese-speaking community and were to meet Anna Burke MP on 21 August 2009 “to seek her advice”. The CEO Report noted that the President, Ms. Au and Angela Ng attended a feedback session with the Department of Health and Ageing on 6 August 2009 and that “strategies for lobbying include the plan for meetings with the Hon Anna Burke and the Assistant Director of the Victoria Office of Department of Health and Ageing”. Under “Other Business”, reference was made to various fundraising events with respect to On Luck.

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<sup>15</sup> Minutes of several meetings of the Board of CCSSCI were provided by Ms Au, as CEO of CCSSCI to the Panel under cover of a letter dated 15 September 2010 on a confidential basis. The letter stated that the documents were provided strictly for the Panel's viewing and that the applicants not be permitted to view or be provided with a copy of any document. The minutes provided dealt with some matters relevant to the Panel's inquiry. Consequently, on 5 October 2010 the Registrar wrote to CCSSCI enclosing a summary of passages from the Minutes to which the Panel proposed to refer in its decision. On 8 November 2010 Mr David Yong, Vice President of CCSSI, wrote to the Registrar expressing concern about the dissemination of the information provided to the Panel on a confidential basis, given that a document provided to the Panel by CCSSCI had apparently found its way into the public domain. Mr Yong did also noted that some of the information provided was “commercial in confidence” and asked the Panel to take into account potential prejudice to CCSSCI if the summary of the Minutes was published. The Panel acknowledges Mr Yong's concern to maintain confidentiality though he did not expressly decline to allow the Panel to include its summary in its Reasons for Decision. Nevertheless, the Panel has sought to protect the interests of CCSSCI in compiling the summary of relevant matters, and reminds the parties that directions with respect to maintaining the confidential nature of the Panel's proceedings were given at the Directions Hearing on 31 March 2010 and were refreshed on other occasions.

- **17 September 2009** Business Arising from the Minutes refers to the approval and tabling of a petition. The President's report notes that a media conference was held on 12 September 2009 to promote a fund-raising event and that a meeting with Mr. David Hodge is planned for 18 September 2009 to discuss the extension of On Luck. The CEO reported that a meeting had been held with Anna Burke MP on 21 August 2009. The CEO reported networking at an Aged Care Standards Accreditation Agency Stakeholders function on 31 August 2009.
- **15 October 2009** The President reported that he and Ms. Au had a meeting with Mr. David Hodge "to seek his advice on the planning process and application of the On Luck extension." Further discussion occurred with respect to the collection of signatures for the petition and it was noted that Anna Burke MP had agreed to present the petition on 17 November 2009.  
The President reported that he and Ms. Au had developed a proposal to provide services for members of the Chinese-speaking community within another municipality.
- **26 November 2009** The President reported on the Board of Management trip to Canberra to deliver the petition and meet with the office of the Minister for Ageing.

65. No minutes of subsequent Board meetings were provided to the Panel. Ms. Au advised that no Board meeting was held in December 2009. The Panel finds it surprising that the Minutes of the Board contain so few references to the process embarked upon by CCSSCI with respect to the negotiations with the DPCD, their use of architects and town planners and the actual or potential role of the City of Manningham in the planning process. Nor is there any evidence of a decision to seek Ministerial intervention. These processes appear to have been conducted without any formal record by the Board. Similarly, there is no evidence in the Minutes of an attempt to acquaint the Council with the work and planning that was under way.

## **CCSSCI's approach to obtaining planning approval for the On Luck extension**

### *Communication with the Department of Planning and Community Development*

66. Information provided to the Panel by Mr. Jason Close<sup>16</sup> of the Department of Planning and Community Development is that his first recorded contact with CCSSCI was on 18 September 2009, but he states that it was possible that CCSSCI may have made contact with other areas of DPCD. The Panel understands from Mr Close's document that plans submitted by CCSSCI were dated 29 July 2009, and a further set of what he described as "preliminary plans" were provided by the CCSSCI's consultant on 23 December 2009 following a request by Manningham. Mr. Close's understanding was that no plans were submitted on either 3 or 11 December 2009.
67. As noted above, the minutes of CCSSCI Board record that a meeting, albeit apparently informal, occurred on 20 August 2009 with Mr. Hodge of DPCD.

### **Communication with officers of Manningham**

68. The earliest contact with any officers of Manningham is that which occurred in mid-2009. Mr. Molan, Director Planning and Environment, agreed<sup>17</sup> that at that time Cr. Chuah had asked him about the process for extending the nursing home and that if he had been asked he would have advised Cr. Chuah that a Planning Scheme amendment was required and that it would need to be approved by the Minister for Planning.
69. In the same document, Mr. Molan noted that a proposal to extend On Luck had been discussed at a Statutory Planning Regional Services Update meeting on 20

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<sup>16</sup> See note 8 above.

<sup>17</sup> In a Memorandum dated 18 August 2010 provided to the Panel

October 2009. But Mr. Molan suggests that there was, at that time, no formal proposal in existence.

70. On 3 December 2009 Ms Lydia Wilson, Manningham CEO, attended a presentation at On Luck. She was the only officer to attend, but present also was Cr. Pick, the Mayor, and Cr. Chuah, Ms. Au and Mr. Jason Close from the DPCD. The next involvement of council officers was their attendance at a meeting at the offices of the DPCD on 11 December 2009. That meeting was attended by Ms Wilson, Mr. Molan, Cr. Pick, Cr. Chuah, Mr. David Hodge, Mr. Jason Close from DPDC, Ms. Au, and Andrew Clarke a planning consultant for CCSSCI.
71. The subsequent history reveals that an application for Ministerial approval was made on behalf of CCSSCI and that very tight time frames were set or acceded to by the DPCD for the process. A fairly full account of activity from 18 September 2009 is set out in the attachment to Mr Close's Memorandum. It is sufficient for present purposes to note the following dates:
- 17 December 2009 CCSSCI's consultant makes request for Ministerial intervention;
  - 23 December 2009 plans were provided to Council by CCSSCI's consultant;
  - 15 January 2010 DPCD seeks the views of the Council on the application;
  - 28 January 2010 Council seeks an extension of time to 10 February 2010;
  - 1 February 2010 DPCD grants extension of time;
  - 10 February 2010 Council planners provide comments on the proposal;
  - 11 March 2010 Minister approves the Planning Scheme amendment;
  - 18 March 2010 Amendment Gazetted.
72. The objections to the urgency of this process were several. They included that the Council's views were sought at a time when substantial numbers of staff and

Councillors were on vacation; and that the time offered (even though extended) was insufficient to provide a proper consideration of the proposal. Further during the process, there was lobbying of the DPCD and its Minister by State and Federal Members of Parliament, and expressions of concerns about the proposal by, amongst other, Cr. Ellis.

73. It may be noted that Ms Au, in a document submitted to the Panel, stated in reference to the meeting with the DPCD that: “At the meeting, various issues including the tight time frame of the anticipating Aged Care Approvals Round, the urgency of and benefits of On Luck’s extension and the choice of Planning Authority (Manningham City Council vs. Minister for Planning)”.<sup>18</sup>

### **Information given to Councillors**

74. A central complaint made by the applicants is that no steps were taken by Cr. Chauh to apprise Councillors of the proposal - let alone afford them an opportunity - to have input. This is particularly the case with respect to Cr. Ellis, as On Luck is located within the Mullum Mullum Ward - the Ward which he represents.
75. It was also noted that in Cr La Vella’s submission to the Panel, dated 6 July, 2010 that Cr La Vella had “no prior knowledge of the On Luck intention to expand the facility or the application to the Minister for an amendment” until a letter from Jane Monk, Acting Director State Planning Services was included in the Councillors Information Package dated 22 January, 2010.<sup>19</sup>
76. Cr. Chuah told the Panel that he had invited all Councillors to a presentation or fund-raising evening in respect of the On Luck development. A written submission on behalf of Cr. Chuah stated “[a]ll Councillors of Manningham City

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<sup>18</sup> 24 March, 2010 - Attachment C - The Role and Involvement of Manningham City Council in the Determination of Planning Process and Planning Authority used for On Luck Nursing Home’s Extension),

<sup>19</sup> Exhibit 2 of Councillor La Vella’s submission dated 6 July, 2010.

Council were personally invited and invitations were distributed prior to a SBA meeting” to a fundraiser at the Box Hill Town Hall on 1 August 2009 where preliminary architectural drawings on the On Luck Stage 2 Extension were presented. All three applicants denied that they had been invited to the fundraiser and specifically contradicted Cr. Chuah’s statement at the hearing that he personally handed invitations to all Councillors prior to an SBS meeting. The evidence of the 3 applicants, and the absence of any formal notification to the Council administration of the fundraiser, leads the Panel to conclude that Cr. Chuah did not invite all councillors to the fundraiser nor personally hand invitations to the applicants or any of them. Instead, it appears that Cr.Chuah invited only Councillors he considered to be his supporters.

#### **Council Officers knowledge and concerns as to the Proposal**

77. It was reported in Mr. Molan’s Memorandum dated 18 August 2010 that the first time that he learnt that the proposal to extend the On Luck nursing home had been discussed at a regional meeting of DPCD with Statutory Planning Officers of the City of Manningham on the 20<sup>th</sup> of October 2009 was when he received an invitation to a meeting with DPCD on the 8 December 2009.
78. The Panel found that the delay in reporting the discussion regarding the expansion of the On Luck nursing home at a Regional DPCD meeting with Manningham Planning officers to the Director of Planning & Environment and to the CEO contributed to the delay in informing Council in a timely way and may have prejudiced the Council’s ability to properly assess this significant planning application at an executive level.
79. Before the Panel, in response to questions from the Panel, Mr. Molan suggested that the Council’s Policy regarding Major Planning applications that it was not consistently applied and that the process of consultation and engagement with

Councillors and Council varied from the policy.

80. The Minutes of the 10 February 2010 Special Meeting of Council record what were said to be “officer” concerns about the proposal<sup>20</sup> and are noted below<sup>21</sup>. The recommendation put to Council by the officers was adopted by the meeting, the recommendation being:
- (A) acknowledge that Manningham’s population is ageing and that there is a need for additional nursing home beds;
  - (B) draw attention to a number of issues raised by Council in relation to the original proposal in 2004 that were not adequately addressed by the Department of Planning and Community Development (DPCD) in the approval of the Development Plan;
  - (C) advise DPCD of its concern about the planning process and tools being proposed
  - (D) endorse the officer comments as outlined in Attachment 1.

### **The 2009 – 2010 Aged Care Approvals Round**

81. The commencement of the 2009 – 2010 Aged Care Approvals Round (“ACAR”)

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<sup>20</sup> Item 4, section 2.6

<sup>21</sup> The following summary is extracted from the Minutes. The full text of the officers’ views is set out in an Attachment to the Minutes.2.6.1:  
 “There are a number of outstanding matters relating to the initial development, particularly in relation to the construction plan for roadworks and drainage, which will be further compounded by the new development. These matters should be resolved prior to DPCD considering the new proposal.2.6.2Planning process. A more transparent process would be to rezone the land to a Special Use Zone as was followed with the Donvale Christian School. An upper limit on the number of beds should have been included within the Schedule to the zone. The incorporated document should not be used as a means to enable the Minister for Planning to amend the Development Plan in the future without requiring a further planning scheme amendment.2.6.3 The proposal substantially intensifies the use and development of the site which is inconsistent with the Rural Conservation Zone and objectives for the Green Wedge under *Melbourne 2020*. The proposal sets a precedence [sic] to intensify or expand other non-conforming uses within the Green Wedge, such as the Calvary Bible College.2.6.4. The specific conditions placed in the Incorporated Document should limit the expansion of the existing use by placing an upper limit on the maximum number of beds. The document in its current form does not provide certainty for Council or surrounding residents about the future development of the site.2.6.5. The Development Plan should seek to ensure that Ecologically Sustainable Design outcomes are achieved and that an integrated approach is undertaken in relation to siting, topography, landscaping and that the amount of earthworks is minimized.2.6.6A detailed traffic and car parking assessment is required.2.6.7. The current building does not have a formal point of

was notified in capital city and regional newspapers by DHA on 30 January 2010. Application kits were available from 1 February 2010 and applications closed on 15 March 2010.

82. Ms Au told that Panel that the times at which a new ACAR was notified varied, but that she had anticipated that one was due at about the end of 2009 or early 2010. Given the apparent level of lobbying engaged in by CCSSCI it is not surprising that Ms Au and CCSSCI was able to make a judgment about the likely timing of the 2009 – 2010 ACAR round. The Panel infers that that appreciation was a significant factor in determining the timing of the On Luck planning application. Again, it is surprising to the Panel that a matter of this significance did not find its way into the Minutes of the Board of CCSSCI.
83. Ms Au provided the Panel with a copy of the ACAR documentation and for the 2009 – 2010 round and of the application dated 14 March 2010 submitted by CCSSCI.
84. What appears from that documentation is that for the whole of Victoria there are 375 places earmarked for special needs groups, identified as people from non-English speaking backgrounds or people who are homeless or at risk of being homeless. The “key issues” identified with respect to the non-English speaking group are persons of Chinese, Croatian, Indian, Spanish and Sri Lankan language groups. It is clear that there is no special allocation for “Chinese” over any of the other language groups. There is no specific Chinese pool as was asserted by Cr. Chuah to Councillors.
85. The ACAR documents also show that, in respect of the whole of the Eastern Metropolitan Melbourne (covering Manningham, Monash and Yarra Ranges municipalities) there is an allocation of 230 places. Within the Eastern Metropolitan region there is are special needs groups identified – people from non-English speaking backgrounds, specifically Greek; and people who are

veterans. Again, no reference to a Chinese-specific pool.

86. CCSSCI's application, so far as it concerned high care nursing home beds, was expressed to be for "120 high care places – Chinese specific in all regions" and said to be towards implementation of CCSSCI's 5 year plan.<sup>22</sup>
87. The significance of obtaining planning approval prior to or the making of an application for bed licences in an ACAR round is confirmed by the reference at para. B.13.1 of CCSSCI's application. There it is stated:

New Green Wedge legislation commenced then which further delayed us until in February 2004, we obtained a planning scheme amendment from the State Minister for Planning which exempted us from the Manningham Planning Scheme and allowed us to build On Luck. We will no longer have these impediments as all existing infrastructures can now be utilized and our application to the State Department of Planning has been approved already for our Stage 2 Extension.

### **Conflict of Interest Issues**

88. Councillor Chuah informed the Panel that allegations that he had breached the conflict of interest provisions of the LGA were under investigation by a municipal Inspector. At the time of writing, no advice has been provided to the Panel as to whether or not the complaints have been determined. Nor has the Panel been specifically informed as the content of the complaint or the matters under investigation.

### **CONSIDERATION**

89. Cr. Chuah has claimed that he is not a Councillor and Deputy Mayor at all times. He says that he is also President of CCSSCI and holds other community positions<sup>23</sup>. What is of concern to the Panel is that Cr. Chuah may not appear to

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<sup>22</sup> See section A4 of the CCSSCI ACAR application.

<sup>23</sup> Notably, in a communication from CCSSCI to the Panel it was stressed that the Panel should, in summarizing the Minutes of the Board, refer to Cr. Chuah as the "President".

appreciate that, as Deputy Mayor, he wears that mantle at all times and it is only because of his status as Councillor and Deputy Mayor that the issues as to conflict of interest may arise. However, in the Panel's view, Cr. Chuah does understand what circumstances may give rise to a conflict of interest. Examination of the minutes of various meetings of the Council shows that on numerous occasions Cr. Chuah has declared a conflict of interest and refrained from participation in a vote, one of which has been noted above. This gives rise to our concern that, when the occasion demands, Cr. Chuah may elect not to declare an interest. The Panel will consider this matter further below.

*The On Luck Development*

90. In December 2009 CCSSCI was attempting to implement plans to substantially develop the On Luck site to incorporate 120 nursing home beds. It needed two things to achieve this end. First, it needed planning approval for the development. Secondly, it needed an allocation of a further 120 high care bed licences from the DHA. CCSSCI believed that its case for the additional bed licences would be enhanced if it had first obtained planning approval as appears from the comment in CCSSCI's ACAR application noted earlier.
91. The Panel accepts that there is a present and growing need for high care nursing home places for Chinese-speaking citizens and we accept that CCSSCI and Cr. Chuah were highly motivated to attain that end.
92. Because an amendment to the Manningham Planning Scheme was required for the further development of On Luck, and because this was a matter wholly within the authority of the Minister, it was inevitable that an application would have to be made to the Minister.
93. The Panel accepts that Ms. Au believed, and that the state of mind of CCSSCI may be taken to have been the same as hers, that its case for an additional

allocation of 120 nursing home beds would have been advanced by having planning approval for that use and development. That occasioned some urgency on the part of CCSSCI to progress its application. It is not for the Panel to attempt to second-guess CCSSCI as to how best it might satisfy the requirements of the DHA, but it is clear that in its ACAR application CCSSCI made some play of the fact that their application for an extension had been approved by the Minister.<sup>24</sup>

94. To accept, as the Panel necessarily does, that it was only the Minister who might approve a further amendment to the Manningham Planning Scheme, does not of itself mean that CCSSCI and Cr. Chuah had no obligation to consult with the Council. If it can be regarded as consultation, all that was offered by CCSSCI was a tour and presentation on 3 December 2009. It hardly amounted to consultation. The next involvement of the Council was the attendance of officers at a meeting with the Department about a week later. What then occurred swiftly was lodgment of an application to the Minister and the imposition of limited and unrealistic time constraints upon Council officers to examine the plans and have input into the conditions under which the development should meet. In effect, the Council was sidelined during the process. Ms Au contended, in her evidence to the Panel, that the Council had had six weeks to consider the proposal as notified by the DPCD. That may be true, but in the circumstances of this application is brief, particularly in view of the length of time that the proposal had been in development.
95. Cr. Chuah claims that, when he had contact with council officers over the On Luck development, he did so whilst wearing his CCSSCI hat. Thus, it seems, when he approached Mr. Molan to ask what might be the correct planning process, he wore his On Luck hat. When he attended the presentation on 3 December 2009 and that on 11 December 2009 he says that he also did so in his capacity as President of On Luck, not as a member of the council. The Panel

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<sup>24</sup> CCSSCI ACAR application, section B134.2

does not accept that such a distinction is maintainable in the circumstances.

96. Did Cr. Chuah have an obligation, in his capacity as Councillor and Deputy Mayor to inform councillors of the On Luck development proposal? Cr. Chuah in effect relied upon his conversation with Mr. Molan as justification for CCSSCI approaching the Minister directly and not proceeding further with the Council<sup>25</sup>. That conversation, he says, was in his capacity of President of CCSSCI. Thereafter, he says, CCSSCI acted upon that advice.
97. Be that as it may, the question remains whether or not Cr. Chuah had an obligation to more fully inform Council and individual Councillors of the proposed development.
98. Cr. Chuah is the beneficiary of what has been described as an “honorarium”, the various components of which have been noted above. The honorarium consists of remuneration and other benefits payable in respect of work done by Cr. Chuah on behalf of CCSSCI. Part of this work includes the negotiation of bed licences, the making of representations to politicians and public servants, and the promotion and implementation of the plans for the On Luck development.
99. The primary role of Councillors as expounded in the Code is to provide leadership for the good governance of Manningham. This includes 1.1 - taking into account the diverse needs of the local community in decision-making; 1.6 - fostering community cohesion and other matters.
100. The Council also has a policy with respect to the processing of major developments, a policy which requires the involvement of council officers and Councillors at an early stage. Cr. Chuah must be taken to have been aware of this policy. He must also be taken to have been aware that input would be sought

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<sup>25</sup> This is but one example of Cr. Chuah’s attempt to avoid responsibility. Another is his claim that he acted on advice from the Council’s Executive Manager, Governance, Mr. Goldsworthy, that he did not have a conflict of interest. Whilst Mr. Goldsworthy denied having provided such advice (and the Panel notes that the Code specifically states that decisions as to conflicts are wholly for the Councillor personally) the Panel is concerned that Cr. Chuah too readily shifts responsibility away from himself.

from the DPCD into the development and that the Council officers would need time and a reasonable opportunity to consider the proposal – particularly since not all the requirements imposed at the time of the establishment of On Luck in 2002 had been complied with at the time of the 2009 application to the Minister.

101. Cr. Chuah must have recognized that the extension to On Luck proposed by CCSSCI would be contentious, if only because the use was a prohibited use in the green wedge and the size of the development would necessarily create community interest, if not concern. Cr. Ellis represented the Mullum Mullum Ward in which On Luck was located. It was, in the Panel's view, at the very least incumbent upon Cr. Chuah to apprise Cr. Ellis of the proposal but we consider that he was obliged also to brief the full Council.
102. This is because the Primary Principle of Councillor Conduct contained in s. 76B the LGA requires that a Councillor impartially exercise his or her responsibilities in the interests of the local community. In the circumstances, Cr. Chuah, by refraining from bringing the application to Council in a timely way or at all placed him in the position of acting in the interests of CCSSCI, and – because of his association with CCSSCI and his wife's association, was acting in his personal interests.

*Park Orchards Nursing Home and Manningham Centre Association*

103. It is notable that during the period in which Cr. Chuah and CCSSCI were actively promoting an increase in bed licences with respect to On Luck, Cr. Chuah was voting against the Park Orchards Nursing Home proposal. He was also seconding and supporting motion that may have had the effect of proposing the outsourcing of management of the Council's own nursing home facilities in circumstances where his Board was apparently pursuing an arrangement to embark on further ventures with respect to the provision of aged care services for members of the Chinese-speaking community.

104. These circumstances combined give rise to concerns which support the apprehension of the applicants that Cr. Chuah sought to take over the operation of the MCA's nursing homes – an apprehension fostered by his statement to Cr. Mayne that he could not give any undertaking that CCSSCI would not move to take over management of MCA because that was a matter for the CCSSCI Board. It does seem to the Panel that, if Cr. Chuah was unwilling or unable to give such an undertaking, he should have declared a conflict of interest and not seconded or participated in the vote on the resolution. Whilst in this case, the existence of a possible conflict of interest was contingent upon a decision being made by CCSSCI to apply to take over the management of MCA, in the Panel's view Cr. Chuah was confronted with a conflict of interest which he ought to have declared and acted accordingly.
105. With respect to the Park Orchards Nursing Home, the Panel notes that the outcome of the VCAT appeal recognized the need for further nursing home beds in Manningham. We note that the officers of Manningham supported the proposal but were overruled by the Council. Council's reason for rejecting the Park Orchards proposal is not articulated, but what is clear is that Cr. Chuah voted against the proposal. The Park Orchards Nursing Home would have been a competitor for nursing home beds at the time that Cr. Chuah voted against planning approval for Park Orchards, he and CCSSCI were in the process of planning an application for bed licenses at that stage it was not known that the DHA would be creating an ethnic specific pool for Victoria. This matter is noted further below. The Panel is satisfied that Cr. Chuah, because of his involvement in On Luck and CCSSCI had a conflict of interest and ought to have refrained from participation in the vote on the Park Orchards application.
106. Considerable costs were no doubt occasioned to the City of Manningham in conducting its case in VCAT. Likewise, the applicant for the Park Orchards permit would have incurred substantial costs in conducting its appeal to VCAT. These are matters which would be of concern to the Panel should it be established

that Cr. Chuah procured the Council decision to reject the Park Orchards application in order to favour CCSSCI's proposal with respect to On Luck.

107. The Panel explained earlier in these Reasons that it proposed to adopt the test set out in subsection 140(2) of the *Evidence Act 2008*. That being so, we do not consider that the evidence now available to the Panel satisfies us that Cr. Chuah sought and obtained the support of certain other Councillors to procure the rejection at Council level of the Park Orchards application and has therefore acted in breach of the Code.
108. The Panel takes the same view with respect to the complaint in connection with the MCA. We are not satisfied on the evidence that a conflict of interest is demonstrated to a sufficient level for the Panel to regard the conduct of Cr. Chuah as being in breach of the Code insofar as it applies with respect to conflicts of interest.
109. Before leaving the conflict of interest issues, the Panel is of the view that it should act under s. 81O of the LGA to refer the matters concerning Park Orchards Nursing Home and the MCA to the Secretary to the Department of Local Government for investigation. The Panel will make available to the Secretary the papers provided to the Panel for the purposes of its hearing.

#### **Cr. Chuah's subsequent dealings with the Council**

110. The Panel is satisfied that Cr. Chuah told the Council that he derived no financial benefit from On Luck and that he sought that Councillors would understand this to mean that he received no remuneration from his role as President. He made that statement in a meeting of Council that was open to the public. The Panel does not accept, as Cr Chuah later contended before the Panel, that he intended to convey to the Council that he would receive no financial benefit from an extension in the number of nursing home beds.

111. In his submission to the Panel dated 31 March 2010 Cr. Chuah stated, at para. 2.4 “I volunteer my services to CCSSCI and receive no honorarium or stipend for my involvement as its President”<sup>26</sup>. That statement is plainly wrong, and was retracted on Cr. Chuah’s behalf by counsel who appeared for him at an early stage of the proceeding. It was put that Cr. Chuah had not read the document he provided to the Panel on 31 March 2010, the document having been prepared by his solicitor. It might generally be assumed that the statement made in the submission was consistent with the instructions given by Cr. Chuah to his solicitor. For that reason, and in light of Cr. Chuah’s attempt during the hearing to reconstruct or explain the statements made to the Council on 30 March 2010, the Panel finds that Cr. Chuah intended to convey to Council and to the persons attending the meeting that he derived no remuneration in respect of On Luck.
112. Further, the Panel is satisfied that Cr. Chuah told the Council that the nursing home beds that were sought by CCSSCI were from a “Chinese specific” pool and not from a general pool of nursing home bed licences. The material before the Panel demonstrates that there is and was no “Chinese specific” pool of bed licences. The Panel is satisfied that Cr. Chuah made this statement with a view to persuading the Council that the CCSSCI was not in competition with any other nursing home for bed licences and that a grant of licences to CCSSCI would not impact upon any other applicant.
113. Paragraph 76B(b) of the LGA requires that a Councillor “act honestly and avoid statements (whether oral or in writing) or actions that will or are likely to mislead or deceive a person”. Paragraph 76B(d) requires a Councillor to “exercise reasonable care and diligence and submit himself or herself to the lawful scrutiny that is appropriate to his or her office.”
114. In the opinion of the Panel, the statements by Cr. Chuah as to remuneration or benefits received by him from On Luck were untrue and were made by him with

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<sup>26</sup> Cr Chuah’s original submission dated 31 March, 2010, Exhibit 2 Response to Councillor David Ellis’ Application to convene a Councillor Conduct Panel.

the intention to mislead and deceive Councillors and the public.

115. With respect to the statements made by Cr. Chuah as to the existence of a pool of Chinese-specific bed licences, the Panel notes that at the time CCSSCI lodged its application in the 2009-2010 ACAR round its claim was to participate in the allocation of places for specific NESB groups – but also for financially and socially disadvantaged persons. At the time Cr. Chuah voted against the Park Orchards application, the ACAR had not been released. He and CCSSCI would not have known that there was to be a Victoria-wide allocation of places for certain NESB groups. In the circumstances, it is reasonable to suppose that Cr. Chuah perceived the Park Orchards applicant as a competitor for valuable places.
116. The Panel is of the view that, the statements made by Cr. Chuah to Council as to a “Chinese specific” allocation were misleading and deceptive. The Panel is satisfied that Cr Chuah’s statement as to the existence of a Chinese-specific pool of nursing home beds was intended to give the impression to Councillors and the members of the public in attendance that the expansion of the On Luck Chinese Nursing home was not in competition with any other applicant for nursing home bed licences.
117. In respect of both matters the Panel finds that Cr. Chuah is in breach of cl. 2.2 of the Code and paragraph 76B(b) of the LGA.

### **Cr. Chuah’s conduct in relation to the On Luck Planning Approval**

118. The Panel has already stated its view that Cr. Chuah’s apparent acceptance that he has virtual separate personalities as President of CCSSCI and Councillor and Deputy Mayor of the City of Manningham is erroneous. It appears to the Panel that, whether genuinely held or not, this inability to recognize his separate roles has led to Cr. Chuah committing breaches of his obligations with respect to the City of Manningham and the offices within Manningham to which he was democratically elected.
119. The Councillor Code of Conduct goes some way to identify the obligation to

which elected members of councils must subscribe or be taken to have subscribed. The Introduction to the Code identifies the primary role of the council as "...to provide leadership for the good governance of Manningham. The role of the council also includes:

- 1.1 acting as a representative government by taking into account the diverse needs of the local community in decision making.

120. Under the heading "Councillor Behaviours" (cl. 3 of the Code) is found the following:

- 3.2.1 Being honest in all dealings with the community, with other councilors and with Council staff
- 3.2.2 Always acting with impartiality and in the best interests of the community as a whole

121. Under the heading "Council decision making" (cl. 4 of the Code) is found the following:

We are committed to making all decisions impartially and in the best interests of the whole community and acknowledge that effective decision-making is vital to democratic process and an essential component of good governance.

122. The complaint with respect to Cr. Chuah is that, though President of CCSSCI, he was also a Councillor and Deputy Mayor. The development proposed for On Luck was a dramatic further intrusion into a green wedge area of the municipality. It was undoubtedly a development of a truly significant kind. It was a development that had an impact upon the environmental values within the City. It was a matter of great public interest – of considerable significance to the entire community.

123. In the Panel's view, because of the significance of the development, it was incumbent upon Cr. Chuah to bring the proposal at an early stage to the Council. The fact that some aspects were shown to the Chief Executive Officer, the Mayor and possibly other, selected, Councillors does not relieve Cr. Chuah of his obligation, consistently with the principles expounded in the Code set out above, to bring the development in a meaningful way to the Council as a whole. It is of especial significance that Cr. Chuah failed to bring the development to the notice

of Cr. Ellis, who had perhaps a more immediate need than other councillors, as the development was to take place in the Ward that he represented.

## **CONCLUSION AND RECOMMENDATION**

124. The Panel has found that Cr. Chuah, contrary to the Code of Conduct of the City of Manningham has:
- (a) engaged in conduct intended to mislead and deceive other Councillors with respect to the remuneration he received from CCSSCI; and
  - (b) engaged in conduct intended to mislead and deceive other Councillors with respect to the existence of a Chinese-specific pool of nursing home beds;
  - (c) failed to bring to the notice of the Council, when he had an obligation to do so, the proposal for the development of the On Luck Chinese Nursing Home.
125. Accordingly the Panel finds in respect of each matter (a) to (c) that Cr. Chuah has engaged in misconduct within the meaning of s.81A of the LGA.
126. Having regard to the powers of the Panel contained in subsection 81J(2) of the LGA the Panel has determined to require Cr. Chuah to formally apologise to the Council at a meeting of Council which is open to the public and to do so at the meeting to be held on in respect of each of the findings set out at paragraph 117. The form of the apology will be a matter for Cr. Chuah but should include a specific apology to Cr. Ellis, being the representative of Mullum Mullum Ward, for failing to advise him in a timely way of the proposed development of the On Luck Chinese Nursing Home.
127. Cr. Mayne submitted that the Panel should direct the suspension of Cr. Chuah from council duties for the period of 3 months. Whilst the Panel regards the conduct of Cr. Chuah as constituting a significant breach of his obligations as a Councillor, in the Panel's view the breach is not such as to warrant his

suspension.

128. Having considered the circumstances of this case the Panel makes the following recommendations to the Council:

- a. That the reporting mechanisms be improved between the planning department and the Director and CEO to ensure that significant planning matters are brought to the attention of the Director and CEO in a timely manner in order to inform and aid Councils decision making capacities on significant planning matters.
- b. That the Council policy with regard to significant developments be reviewed in order to enhance consultation and engagement processes with Council in order to improve Council's knowledge and decision making capacities.
- c. The Panel recommends that a governance procedure be developed to register Councillors' interests in planning applications and planning scheme amendments within the Municipality that is open to viewing by all Councillors.

Dated: 29 November 2010

PETER HARRIS  
Chairperson

JENNY FARRAR  
Member