

Cr Stephen Mayne's submission to Councillor Conduct Panel hearings into Manningham deputy mayor Fred Chuah

Friday, April 16, 2010

Dear Panellists,

Please accept this letter as my formal application to be a party to the Councillor Conduct Panel hearing triggered by Manningham councillor David Ellis in relation to the conduct of Manningham deputy mayor Cr Fred Chuah over the On Luck Chinese Nursing Home.

The reason this submission has been lodged after the original mediation on March 31 is that my concerns were significantly elevated by events at the March 30 council meeting, when the On Luck issue was debated for three hours. This included Cr Chuah's first public comments and explanations about the process. I then left for a 9 day family holiday to Queensland on April 2 and have only now had the time to put together this substantial submission.

I have seen Cr Ellis's submission and agree with many of the sentiments but wish to provide my own separate formal submission and then appear before the panel and be privy to any relevant documentation.

My first knowledge of any proposal to expand the On Luck Chinese Nursing Home in Donvale was when the deputy mayor told me at a meeting we held on December 3 at Carlucci's restaurant in Templestowe Village.

I later learned, this was the same day Cr Chuah had a tour of the On Luck facility with Manningham CEO Lydia Wilson, Mayor Charles Pick, Fred Chuah's wife Kim Au, the CEO of Chinese Community Social Services Inc (CCSSI) and Jason Close from the Department of Planning and Community Development (DPCD).

I requested the meeting with Cr Chuah principally to ask him to stand for mayor at the forthcoming council AGM on December 8 and tell him that he would have majority support.

As was explained in the attached Crikey story (Exhibit 1) published on December 9, the council had become highly factionalised and dysfunctional under the Labor-led faction put together by mayor Charles Pick. I felt Cr Chuah was the most appealing of the 5 member ruling faction to be mayor.

However, Cr Chuah explained that he would be too busy to be Manningham mayor in 2010 given that he needed to spend time over the next 12 months getting the plans approved to expand On Luck.

We then had a discussion about various mayoral scenarios after I said that if Fred did not stand I would be a candidate for mayor on the basis that we definitely needed a change.

Fred said that he would vote for me ahead of all other possible mayoral contenders, but when asked about a decision between Pick and myself, he said: "I'd need to sleep on that."

It was at this point that it was apparent that Cr Chuah's refusal to support Cr Downie, Cr Reid or Cr McMillan meant that Cr Pick was the only viable candidate for mayor in 2010 amongst the ruling 5-member faction.

However, over the ensuing 4 days it only became apparent that Cr Pick was a confirmed candidate for mayor minutes before the councillors met for a private ballot at 6pm on December 7.

Despite the "sleep on it" comment, I wasn't able to raise Cr Chuah again before December 7 and was a little surprised on the night when he rose to formally propose Cr Pick for mayor again and specifically mentioned his ability to get things done with the state government as the reason for supporting him for a second term.

Having lost the ballot 5-4, as an olive branch to the minority group I proposed a change of deputy mayor but the ruling group was resolute that Fred Chuah would continue for a second term as deputy mayor.

It seemed that the five councillors who now so passionately defend On Luck's chosen path to expansion had indeed resolved to retain control over the council for themselves. This raises the obvious question as to whether any informal arrangements were made to support the On Luck expansion by the deputy mayor who was the swing vote in delivering a second term to mayor Charles Pick.

Given the mayor's 70 days of public silence over the issue up until his declaration of support for On Luck at the March 30 council meeting, I believe any discussion or commitments he had with Cr Chuah about the On Luck expansion should be explored by the panel.

Fred Chuah's involvement at On Luck and issues around officer support

Whilst I knew he was non-executive chairman of the On Luck board, Cr Chuah told me at the December 3 meeting that he effectively ran the centre, although he was grooming someone to step up to take over more of the management role.

Cr Chuah also said that he'd discussed the appropriate planning tool for the expansion with Paul Molan, Manningham's director of planning, who suggested On Luck go straight to the state government. I did not sense this was imminent.

I have a lot of respect for Paul Molan and found this very surprising and doubted very much that such advice would have been given in a formal or written sense, especially without any reference to all councillors.

However, I didn't express any opinion at the time as I didn't know the history of the centre, had never been inside it and as a relatively new councillor was still coming to grips with the whole planning process and restrictions in the green wedge.

Given all the rancour and disharmony which unfolded over the days after the mayoral election there also wasn't really an opportunity to discuss the On Luck issue with Paul Molan.

However, I was sufficiently disturbed by Cr Chuah's comment, and suspicious about a potential deal between the mayor and deputy mayor over support for On Luck, that I chose to gently put the expansion plans on the public record in the December 9 Crikey story in the following terms:

In an attempt to head off the Labor factionalism, approaches were made to Fred Chuah, the most reserved and respected member of the group, urging him to stand for mayor in 2010 as a compromise candidate to heal the divisions. However, Chuah's got big plans in 2010 to try and dramatically expand the well-run Chinese nursing home he operates in the green wedge. In the absence of Chuah running, I decided to put the hand up as a genuine independent aiming to bring the nine councillors back together while also working more hospitably with our high-quality management team led by CEO Lydia Wilson.

The response to this controversial story in Crikey talking about "Labor factions" and internal ructions was interesting and insightful. At a meeting with Charles Pick at a bar in Doncaster called The Pavillion on the afternoon of Friday, December 11, the mayor told me that the worst thing I'd done in the Crikey story was reveal On Luck's plans to expand the centre because this was not public. It seemed that secrecy was paramount.

The Crikey story made no reference to any direct approach to the state government and as it turns out, the Mayor had attended a meeting at DPCD discussing planning for the On Luck expansion earlier that same day. He did not disclose his attendance at that meeting when we met on the afternoon of December 11 but he certainly seemed to have a strong view that my revelation in Crikey was sensitive information which should not be made public. This raises the obvious question: when did the mayor of Manningham propose to tell all councillors that he was working with the deputy mayor to have the planning minister change Manningham's planning scheme?

The other interesting reaction to the Crikey disclosure of On Luck's plans was from Cr Graeme McMillan who, at a meeting of councillors in late December, described my comments about the deputy mayor as "disgusting".

All I had done was disclose the intention to expand “the well run nursing home”, which is hardly a disgusting attack. It then came as a great surprise to later have Cr McMillan criticise complaints from councillors who claimed to have been in the dark on the basis that “everyone knew about it” because it was on page one of *The Manningham Leader* on July 1 and there was a fundraiser for the expansion held on August 1 last year to which all councillors were invited.

I don’t recall the invitation to the fundraiser, attended by Cr Graeme McMillan and Cr Meg Downie who each contributed \$100 to the cause, where concept plans were apparently displayed on a big screen in front of hundreds of people.

Similarly, I flew out to Singapore with my daughter on July 2 and never saw *The Manningham Leader* article first published on July 1. The first I knew about any expansion plans was from the deputy mayor at our December 3 meeting but I had not idea that it was imminent and meetings were already occurring.

My knowledge of what happened at that December 11 meeting with the department’s Jason Close and David Hodge attended by the mayor, Fred Chuah acting as On Luck President, Paul Molan and Lydia Wilson was largely derived from the answers given to a question I asked the mayor at the February 23 council meeting which is attached as Exhibit 2.

Paul Molan’s response certainly appeared to contradict Cr Chuah’s claim that he had recommended approaching the minister directly when he said the following:

Mr Mayor and councillors, the only thing that I can add, is that we were not briefed in any way before that meeting with the department. We met in there and heard about the expansion proposal for the first time. At that meeting we informed the Chinese community’s planning consultant, well they were sort of instructed by the department to prepare the amendment documentation, we said we were happy to receive that documentation and provide commentary on it, they provided that to us just prior Christmas, and before we had time to even provide feedback to them, we received the notice from the department itself, saying they have finalised the documentation and asking for our commentary on it within a very short period of time. To which the chief exec then responded saying there was insufficient time, and requesting further time, so it could be considered by council.

Whilst Fred Chuah told me of general plans to expand in 2010, I was very surprised and disappointed to learn that the formal application for a ministerial amendment was lodged on January 4 without any notice to all councillors.

And it was only after a subsequent tour of the facility and briefing of councillors that I discovered the true scale and implications of what was proposed: a \$15 million-plus tripling of a facility to create Manningham’s largest nursing home located in the green wedge, where nursing homes are a prohibited use. Given the enormity of this exercise, Cr Chuah should have informed all councillors about his plans immediately after he was first elected in November 2008.

What the panel should explore

After listening to Cr Chuah's responses at the March 30 council meeting (see full transcript at Exhibit 3) and further examining the bed licences system, it is my opinion that the deputy mayor had a clear conflict of interest in voting against the competing 91 bed Park Orchards nursing home proposal at the December 15 council meeting.

After three months of silence, this is how Cr Chuah responded on March 30:

Cr Mayne: just a clarification on the deputy mayor's earlier comments about the competition issues around bed licences. We've heard from a number of councillors about the sanctity of this document, the Explanatory Report from the Minister and the department, about how this changes everything, this means we can go to the minister, what is in here is very very important, and I would like to quote from it...

"The CCSSI is seeking Commonwealth government allocation of an additional 120 high care residential aged care places to expand the existing On Luck Chinese Nursing Home. Allocation of places is highly competitive. With 1,490 residential aged care places to be allocated in the 2009-10 period and 230 places in the Eastern Metropolitan Region. The focus for allocation of places for non-English speaking backgrounds and/or veterans and facilities providing high care, dementia services and respite care."

Now I don't think that sits with the earlier comments, that this is the State government saying it is highly competitive process, and I'm just interested in this argument that you are making, that it was okay to vote against other competing nursing home applications, most notably in Park Orchards.

Cr Chuah: I will answer that very clearly once-and-for-all. Nursing home beds are classified mainly in several ways, classified differently. In the 2009-10 aged care funding round, which is current, there is a pool of nursing home beds, of 375 beds if I am not mistaken, specifically for NESB, note example: Chinese, Croation and so forth. Then you got so-called people claiming I have problems with Park Orchards, saying that there is a conflict of interest. But Park Orchards doesn't realise that we applied the 120 beds to that pool, and not the Manningham pool of 280. It is a separate pool of nursing home beds so there is no conflict.

In an earlier answer to Cr Ellis on March 30, Cr Chuah actually made a more forceful claim in the following terms:

Cr Chuah: It is important that we all know that we are not competing against anybody. We single ourselves out as Chinese specific, and we are not getting the beds of non-Chinese specific. There is a special pool for Chinese specific people. That is what we are looking for. Our obligation is just for that. To tell the people that there is a contrast, a competition against other people is a lie. It's misleading to the community.

As it turns out, there appears to be no special pool for Chinese people and there isn't even a special pool for NESB proponents. And even if there was such a pool, how did Cr Chuah know that Park Orchards wasn't going to apply for that pool and cater for Manningham's large Greek, Korean, Iranian, Italian or Indian community?

At their presentation to councillors on February 9, the On Luck team clearly stated that an applicant's prospects of success in any bed licence bid is strongly improved if they have planning approval for the facility. This was the main reason given for the pressure cooker time frame because bed licence applications had to be in by March 15 and On Luck needed as much planning certainty as possible by that time.

However, there was an apparent inconsistency because the public advertisements for bed licence applications appeared on January 30 in major newspapers – 26 days after On Luck's application for a ministerial amendment was lodged.

When questioned on this point at the February 9 briefing, On Luck's planning consultant observed that CCSSI CEO Kim Au has good connections in the industry and therefore had an inkling that the advertisements were coming.

Given that there are only 230 bed licences available in 2010 for the Eastern region (comprising Manningham, Maroondah and Yarra Ranges), it is clear that if Park Orchards had support from a majority of councillors on top of the officer recommendation, they would have been a stronger competitor for these scarce licences. The Federal department's website clearly states that there is only one pool of bed licences although it does flag that some preference in 2010 will be given to CALD groups, veterans, dementia sufferers and the like.

Despite all their protestations about the social needs for frail aged people with On Luck, the 5 councillors which are members of Cr Chuah's faction and supportive of his approach all voted against the competing Park Orchards proposal and against the officer recommendation.

I believe there is a serious question about the integrity of this vote, which was defeated 7-2 despite support from the officers.

Ratepayers are now likely to spend about \$20,000 fighting the application at VCAT where our prospects are slim because Manningham council has refused six different nursing home applications over the past decade which were then overturned by VCAT (see Exhibit 4). These were arguments I made at the December 15 council meeting but they fell on deaf ears as the Park Orchards proposal was voted down.

The mayor has since told me that he would potentially vote differently on the Park Orchards proposal if he had his time again and I believe the panel should investigate whether Cr Chuah spoke to or influenced any of his factional colleagues to vote against the Park Orchards proposal.

I believe the panel should consider referring the question of a conflict of interest over the Park Orchards vote to VCAT and also consider whether the Park Orchards proponent should be invited to resubmit their application to council for another vote, not including the deputy mayor.

Major attacks on Manningham's own nursing home

My concern about Cr Chuah's influence over councillor voting on the Park Orchards proposal is heightened by the experience we've had over council's own nursing home facility run by the Manningham Centre Association.

I've attached the transcript of questions I was asked by Cr Ivan Reid at the March 30 council meeting which related to the MCA as Exhibit 5. The key element was as follows:

Cr Mayne: I've also been extremely bemused that there have been these continuing attacks all year, on our own nursing home, the Manningham Centre Association, and the only reason I joined that board was to try and bring a bit of peace. After what I felt were all these extraordinary attacks on our own nursing home, and I must say that I have been flabbergasted to discover, whilst that was going – undermining our own nursing home - there was this secret process going on around a private nursing home. I found that process to be particularly disturbing, and I joined the board, in part, to try and get a better understanding of what was going on in council's very well run, excellent nursing home over 25 years, that was first opened by Hazel Hawke in 1985. To this day I remain confused why all those who so support this particular other nursing home, are so against council's own nursing home.

The attacks on the MCA were primarily driven by Cr Graeme McMillan, but they were quietly supported by Cr Chuah who had credibility with other councillors given his knowledge of the industry.

Cr McMillan, Cr Chuah and myself were the three council representatives on the Manningham City Council audit committee in 2009. This was the key committee which Cr McMillan used to wage his campaign to have the financials of MCA, an incorporated association run by a group of community volunteers with some council representation on the board, consolidated in council's annual statements on the grounds that it is a "controlled entity" under Australian accounting standards.

Cr Chuah voted with Cr McMillan on various contentious audit and council meeting debates related to consolidation and broader issues to do with the future of the MCA.

As the campaign rolled on to undermine and malign the MCA and we spent more time on this issue than any other in 2009, Cr Chuah vehemently resisted suggestions that he might have a conflict of interest. His response was blunt to people who suggested this could be raised publically: "I will sue you."

I didn't believe that Cr Chuah had a conflict of interest when the audit committee was debating whether to commission PwC, the firm where Cr McMillan used to work as an auditor, to prepare an independent report on the question of consolidating MCA.

However, as the debate wore on and the scope of the attacks broadened, I do believe there was a conflict of interest.

Mayor Charles Pick regularly claimed that Cr Chuah had legal advice declaring there was no conflict of interest, but when he showed me this one time, it amounted to about three paragraphs of advice from a solicitor who was a Pick family friend and it only related to the audit committee deliberations on consolidation.

I believe the panel should ask Cr Chuah to provide the panel with a copy of this legal advice. This is because after endless mediation sessions and discussion, the final resolution on MCA for the December 15 council meeting read as follows:

MOVED: REID
SECONDED: CHUAH

(A) Council resolves to proceed with an independent review of the Manningham Centre in line with the principles of continuous improvement. In doing so, Council undertakes to enter into meaningful and genuine ongoing discussion with the MCA Board, to resolve upon a consultancy brief for the review.

(B) Council confirms the components of the review of the Manningham Centre as:

- 1. Charitable Status**
- 2. Financial and Operational Performance**
- 3. Options for future management**
- 4. Governance Review**

The components of the review of options will not consider the sale of the land currently occupied by the Manningham Centre.

(C) Council authorise the consultancy for the clarification of the charitable status of the Manningham Centre Association Incorporated to proceed immediately.

(D) Up to \$150,000 be allocated as part of the mid-year budget review to enable officers to implement the consultancies listed in part (B) of the recommendation.

PUT and CARRIED

DIVISON: A Division having been demanded the Council divided as follows:

FOR (5): Councillors Reid, Chuah, Downie, Macmillan and Pick

AGAINST (4): Councillors La Vella, Mayne, Gough and Ellis

The Motion was declared CARRIED

It is very clear that the consultant's brief to consider "options for future management" would open the possibility of a public tender for management rights. In this situation, CCSSI could potentially be a tenderer.

So here was the deputy mayor, 4 days after meeting with the DPCD to discuss a Ministerial Amendment to facilitate On Luck becoming the biggest nursing home in Manningham, voting against a rival nursing home application in Park Orchards and, later the same night, voting to spend up to \$150,000 on a sweeping and hostile review of council's own nursing home operation which would potentially lead to management of the facilities being opened to public tender.

I privately asked the deputy mayor to give a commitment that On Luck or CCSSI would never tender to manage MCA's two residential facilities and he declined on the basis that he couldn't make such a commitment on behalf of the entire board.

When I complained to the mayor about his support of Cr McMillan's ongoing campaign against the MCA, he repeatedly described the contentious December 15 recommendation as: "Fred Chuah's resolution".

In other words, it was Fred Chuah who was encouraging the ruling faction to pursue what the independent MCA board considered was an extremely hostile and unwelcome council intervention. Indeed, Cr McMillan had remarked to councillors that the MCA board should be spilled and the management contract potentially terminated early before its expiry in June 2011.

What was even more baffling is that MCA is chaired by former Manningham mayor Bill Larkin, who was Fred Chuah's running mate at the 2008 council elections. When CCSSI was first looking to expand its services into residential care, MCA offered its premises for a period before On Luck was built so programs could be delivered.

Clearly there was some breakdown in relations between councillors, officers and Fred Chuah when the green wedge was proclaimed in 2003 with a specific amendment prohibiting nursing homes.

Council withdrew its earlier support for the On Luck nursing home proposal on Tindals Rd in Donvale and then CCSSI successfully lobbied for a Ministerial Amendment to get its original project up. It was telling at the speech delivered by Fred Chuah at the opening (see Exhibit 6) on April 27, 2007, that no one from Manningham City Council was mentioned in a long list of official guests, including councillors from three other municipalities. And it was very clear from this extract of the speech that expansion was coming:

OLCNH will always require the support of the three levels of Government and we enjoyed the close liaison with the respective government offices and we will continue to seek their cooperation and advice in the interests of the welfare of the Chinese aged. This comes to the question - Where to from here? The Chinese Aged population among the Victorian community is among one of the fastest growing groups in the coming years. 60 beds are just the start and it will not meet the needs and demands. The number of Chinese Victorians aged 65+ as of 2006 is estimated at 9440 and this will increase to a projected number of 22408 by 2021, an increase of 137%. Ideally, this establishment should be expanded and we at the Centre will carefully conduct a feasibility study into doing so. We will do the hard yakka! We will continue to seek the advice from the Governments in our forward planning. We will strive to seek, to find and not to yield.

Whilst Cr Chuah's determination "not to yield" is admirable at one level, it clearly has clashed with his duties as deputy mayor of Manningham, the responsible authority for any expansion of the facility.

In terms of Cr Chuah and Cr McMillan's campaign to shake up the MCA board, which in 2009 included three former Manningham mayors, the December 15 resolution was originally passed 5-4 after 90 minutes of very hostile debate.

As it turned out, I put in a rescission motion against the 5-4 MCA vote the day after the December 15 council meeting and then the mayor engaged with the MCA board over the summer break and we unanimously passed a far less intrusive review (see Exhibit 7) at the February 2 council meeting. On January 20 it seemed peace would return to council, but then on January 22 we learnt all about the On Luck process and it has been fractious and dysfunctional again ever since.

Stepping out of the On Luck board room

Whilst it is arguable the panel does not have jurisdiction to sanction the chairman of a private body, I would finally like to draw your attention to the issue of whether Cr Chuah should have declared a conflict of interest and left the room when the CCSSI board was deliberating about which planning tool to use for the On Luck expansion. In my view, this exchange from the March 30 council meeting is alarming:

Cr Ellis: did it not occur to you to notify, being our Deputy Mayor, to notify your fellow councillors of what you were doing and to let us in to your plans?

Cr Chuah: I don't believe it is council's duty to question whatever I do outside council business.

Cr Ellis: councillor Chuah, do you not consider an application to change Manningham's planning scheme to be council business?

Cr Chuah: I don't think I should respond to that because as you know, there will be further inquiry into my conduct tomorrow, courtesy of your and Geoff's (sic) innovation....

And later...

Cr Chuah: I am not doing it as councillor. Now a lot of people aren't aware of the fact that all the time, all the time, when these amendments went through, I wasn't acting as deputy mayor. Any other meetings I attended wasn't as the deputy mayor, I was the president of the centre. I went in there as the president of the centre, and we got proof of it – we got written proof of it that I went in there as the president of the centre, not as deputy mayor. Some people decided to say 'no you are always deputy mayor'. Now you cannot be deputy mayor 24 hour. I know some people do say that, yes, ok, but not me. In a sense I have many roles. If you are in a particular role in a particular meeting, you act in that capacity. Now I don't believe I create a precedent, as I am not applying for the amendment – the board is. Alright, and please bear in mind that we do have expert advice before the board decided to take that stand. It is not something we do blindly – we are professional. The name on that application is Mr Andrew Clarke,

For this argument about it being the board and not Fred Chuah to be sustainable, then surely the President of the centre would have had to excuse himself from any deliberations about the planning tool to use. Far from doing that, it was Cr Chuah, his wife and the planning consultants they hired who did most of the lobbying and presenting to the state government.

And how can a deputy mayor argue that working to get the Planning Minister to change Manningham's planning scheme, something which has only happened about 4 times in the green wedge since the 1970s, is "outside council business". Especially when he is accompanied to meetings with the state government by the very mayor he has just used his swing vote to deliver a second term to on the basis that he is in the Labor Party and therefore has the connections necessary to deliver outcomes.

A deputy mayor is always the deputy mayor whenever it involves important council matters. If there are conflicting interests, he should withdraw from both processes.

Yours Sincerely

Cr Stephen Mayne

TIMELINE

July 1: front page article in *The Manningham Leader* about plans to expand On Luck.

August 1: On Luck fundraising campaign dinner attended by Crs McMillan and Downie.

December 3: first site visit to On Luck with mayor, CEO, Fred Chuah and DPCD representative. Fred Chuah and Stephen Mayne meet separately to discuss mayoralty.

December 7: councillors meet privately to vote on 2010 mayor and Cr Chuah gives speech proposing mayor Pick serve a second term and specifically mentions his contacts with the state government and ability to achieve outcomes for Manningham.

December 8: council AGM held with the leadership team of Pick-Chuah re-elected.

December 9: story in Crikey mentions On Luck's plans for big expansion in 2010.

December 11: morning meeting held with DPCD in city with both mayor and deputy mayor attending. Afternoon meeting between mayor and Stephen Mayne where Crikey reference discussed but no mention of DPCD meeting.

December 15: public council meeting where proposal recommended by officers for 91 bed nursing home in Park Orchards was voted down 7-2, with all five members of the Pick-Chuah faction voting against officer recommendation. The meeting later became extremely fractious during a 90 minute debate over the future of council's nursing home run by MCA.

January 4: formal application to Minister lodged with no reference to all councillors.

January 22: all councillors finally advised of planned Ministerial amendment through regular weekly InfoSum update.

January 30: advertisements appear for 2010 bed licence applications with deadline for applications revealed as March 15.

February 2: On Luck expansion first discussed at public council meeting after urgent notice of motion by Cr David Ellis. Outcome was a different motion unanimously supported calling for a private briefing and tour of the facility before a special council meeting to consider a report by the officers.

February 9: site tour and briefing from On Luck to all councillors.

February 10: special council meeting unanimously endorses officer report expressing concern about planning process.

February 23: council unanimously passes motion calling on all private land owners to respect council's planning processes.

March 30: mayor finally breaks silence on issue and speaks in favour of On Luck's approach, using casting vote 3 times to determine the outcome of three On Luck motions.