

A guide for councillors, constituents and other interested parties

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Lobbying local government councillors

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Introduction

In this brochure, the term “lobbying” is used to cover those types of communication between local government councillors and the community that include representations to councillors by special interest groups, by individuals with a direct interest in a council decision and by advocates acting on behalf of others.

Lobbying is common in local government. The most common form occurs when a group or individual makes direct contact with a councillor in an attempt to influence a council decision. Councillors are lobbied over such issues as:

- development matters
- the upgrading of local facilities, including playgrounds and sporting amenities
- revenue decisions, including the setting of business, mining, farming or special rates.

The Commission’s view is that appropriate lobbying of councillors is normal. In many cases lobbying is part of the democratic process and is an acceptable feature of the relationship between citizens and their elected representatives.

Section 232(2) of the *Local Government Act 1993* also makes it clear that councillors have a representative role in considering the views of constituents and communicating with them. Section 232(2) states:

(2) *The role of a councillor is, as an elected person:*

- to represent the interests of the residents and ratepayers
- to provide leadership and guidance to the community
- to facilitate communication between the community and the council.

Section 79C of the *Environmental Planning and Assessment Act 1979* (EP&A Act) also makes it clear that relevant views of members of the public are applicable to the merit assessment of development applications.

Interactions with community members are also a way for councillors to obtain information that may be relevant to their decision-making. In development matters, for example, the Land and Environment Court has made it clear that where council determines a development application, councillors should not rely exclusively on council officers to consider all matters relevant to the determination but must also consider the relevant matters themselves.¹

Inappropriate lobbying

It is in the public interest that lobbying is fair and does not undermine public confidence in impartial decision-making. Lobbying is a two-way process between councillors and lobbyists. Occasionally a lobbyist can try to improperly influence a councillor’s decision-making. Councillors should take care that their duty to consider issues fairly and properly is not compromised by participating in lobbying practices that are outside the bounds of appropriate or lawful behaviour.

It is not possible to define every type of activity that could constitute inappropriate or unlawful lobbying. Generally, however, inappropriate or unlawful conduct on the part of someone lobbying a councillor usually involves an attempt to obtain preferential consideration or treatment based on factors other than the merits of a matter.

Examples of inappropriate or unlawful conduct by councillors that could occur during the lobbying process include:²

- accepting undisclosed payments or benefits whilst making a decision that affects the gift giver’s interests
- accepting a political donation in return for the favourable exercise of discretion during decision-making. Ideally, councillors should keep the lobbying and fundraising activities in which they are involved quite separate to avoid even the perception that a political donation could influence their decision-making

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- granting access to a particular individual or group while *unreasonably* denying similar access requested by another party. The Commission is, however, mindful of the fact that the part-time nature of councillors' work can impose time constraints on their ability to meet all requests for meetings
- fettering discretion by giving undertakings to an interested party prior to considering all the information relevant to a decision. Councillors are under a particular obligation to give real consideration to all mandated matters when dealing with statutory powers such as section 79C of the EP&A Act
- acting in a manner that exceeds the role of a councillor as defined in section 232 of the Local Government Act as a result of being lobbied. An example could be directing council staff over the content of any advice or recommendation on a council matter as a result of being lobbied by a third party³
- disclosing confidential information whilst being lobbied
- being unduly influenced by factors that are irrelevant to the merits of the matter under consideration.

Councillors who are lobbied over council matters by close friends, associates or relatives should also consider whether the nature of their relationship with the proponent and the impact of the matter on the proponent's interests give rise to a pecuniary or non-pecuniary interest. In such cases, councillors should manage the matter in accordance with the provisions of the Local Government Act (in the case of a pecuniary interest) and the DLG Model Code of Conduct (in the case of a non-pecuniary interest).

Transparency

Councillors work in a unique environment which is often characterised by:

- a lack of time during business hours to attend to council matters
- a likelihood of chance encounters with people who have an interest in council matters
- limited availability of resources such as support staff
- high community demand for accessibility.

The Commission acknowledges that this environment can make it difficult for councillors to avoid informal discussions with constituents who seek to lobby them. It would also be unnecessarily onerous and impractical to require councillors to avoid such contact, especially for routine and non-controversial matters.

Nevertheless, councillors should exercise judgement when deciding whether to be involved in private meetings with people seeking to influence a council decision. Suspicions of inappropriate lobbying can occur when lobbying is not open to public scrutiny. Regardless of whether such suspicions are justified, they still have the potential to undermine public confidence in council decision-making and adversely affect a councillor's reputation.

Transparency is a useful means of governing accountability and perceptions of fairness in lobbying processes. There are a number of ways councillors can help ensure transparency whilst being lobbied. These include:

- documenting meetings with proponents
- generally conducting meetings in official locations such as council premises
- having other people present during meetings
- inviting applicants who have approached them for a meeting to discuss a significant development to write to council seeking a meeting with all councillors and relevant staff
- providing copies of information presented during lobbying meetings to council officers for consideration and assessment (if required), distribution to other councillors and filing as part of council's records
- asking people who have requested a meeting to put their arguments in writing
- making a declaration at a council meeting about lobbying activities they have been engaged in that are not part of council's formal processes.

Councillors can consider these options in situations where it would be beneficial to have some form of record about what transpired between themselves and a proponent. Examples include matters where complaints of preferential treatment have already been made, or in matters involving individuals who have been the subject of complaints of preferential treatment in the past.

Late submissions

Most councils invite public participation, by way of lobbying, by interested parties when called upon to determine development applications. Codes and practices intended to control and manage the process vary from council to council. Some prohibit accepting submissions later than two days before the meeting at which the development application is to be determined. Others invite submissions (mostly oral) at the meeting at which the development application is to be determined.

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It goes without saying that councils, in the discharge of their planning discretion, are entitled to develop appropriate codes of practice. It is, however, the law that a body discharging a public function is not entitled to adopt a code or practice which has the effect of precluding receipt of relevant matters for consideration.

On the other hand, councils are entitled to regulate, in a general way, how to deal with submissions and the like and they are entitled to discourage or prohibit manipulative lobbying practices – both by those who support the development and those who oppose it.

Councils must discharge their public function fairly and impartially. But what amounts to fairness and impartiality varies according to the circumstances of the case.

When dealing with lobbying in the context of determining development applications, a council must first ask whether the received submission should be entertained (and bearing in mind that it must be relevant to the development application applied for and may not be significantly different from it). The next is to determine how it should be managed and in this regard issues of significance and fairness would need to be addressed.

Tendering

The lobbying of councillors by tenderers about the outcome of a tender process is an exception to the principle that lobbying is permissible. In other words, lobbying of councillors by tenderers is normally NOT permissible. The conditions which govern tender processes are based on a request for tender (RFT). RFTs usually contain statements prohibiting proponents from approaching councillors (and council officers not nominated as contact people) during a tender process.

RFTs also contain selection criteria for choosing a successful tenderer. Most selection criteria are based on objective technical and pricing issues and do not involve a 'political' dimension or subjective decisions. Tender processes also typically do not include mechanisms for community feedback. Community views on issues like the decision to undertake a tender process, and in what form, are typically sought prior to the issuing of an RFT.

Further information

Further information can be obtained by contacting the Commission on (02) 8281 5999 or toll free on 1800 463 909 (for callers outside metropolitan Sydney).

Further information can also be obtained from the DLG Model Code of Conduct available from the DLG website at www.dlg.nsw.gov.au.

Endnotes

- ¹ In *Centro Properties Limited v. Hurstville City Council & Anor* (2004) NSW LEC 401, McCellan CJ advised (at 55), "In the absence of the delegation of the decision-making function to an officer, the corporate body must itself consider the issues relevant to the development application before it. It may be informed about those issues by the council officer's report which may not, and often will not, disclose all of the information considered by the officer and his or her complete reasoning processes." There may be cases where councillors need to make some enquiry to discharge their obligation to consider relevant matters and this may entail communicating with affected/interested parties.
- ² Many of the examples referred to in this section also contravene the provisions of the Department of Local Government's Model Code of Conduct.
- ³ Section 352 of the Local Government Act also makes it clear that a member of staff is *not* subject to direction by council or an individual councillor as to the content of any advice or recommendation.

Caveat on use of this brochure

This publication provides readers with advice, guidance and/or recommendations regarding specific governance issues.

The advice relates to what the Commission considers at the time of publication to be best practice in relation to these issues. It does not constitute legal advice and failure to implement the advice, guidance and recommendations contained herein would not necessarily constitute corrupt conduct, which is defined in the *Independent Commission Against Corruption Act 1988*.

Councils are welcome to refer to this publication in their own publications. References to and all quotations from this brochure must be fully referenced.

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