

## Agenda Report for Decision

**Meeting Date: 24 November 2022**

<b>Item Name</b>	Codes of Conduct Guidance Material
<b>Presenters</b>	Chelsea Lucas, Jessica Koop and Ben Sieben
<b>Purpose of Report</b>	Decision
<b>Item Number</b>	5.1
<b>Strategic Plan Reference</b>	N/A
<b>Work Plan Reference</b>	N/A
<b>Confidentiality</b>	Not Confidential (Release Immediately)
<b>Related Decisions</b>	SPC Agenda Report – Item 5.2 – Complaint regarding a Council Assessment Panel Member – 15 September 2022

### Recommendation

It is recommended that the State Planning Commission (the Commission) resolves to:

1. Approve the designation of this item as Not Confidential (Release Immediately).
2. Endorse the guidance material produced by Planning and Land Use Services (PLUS) at **Attachment 1** to assist the Commission, Assessment Panel Members, Accredited Professionals, Infrastructure Scheme Coordinators, and Joint Planning Board Members in determining whether a conflict of interest exists in a matter before them.

### Background

On 15 September 2022, the Commission considered a complaint made against an Assessment Panel Member, alleging a breach of the *Assessment Panel Members – Code of Conduct* (the Code of Conduct).

At that meeting, there was discussion about the adequacy of the conflict of interest and bias provisions within the Code of Conduct. In addition to finalising the complaint, the Commission also resolved to:

- Note that PLUS will return to the Commission with advice regarding Code of Conduct guidance and related matters.

## Discussion

Under Schedule 3 of the *Planning, Development and Infrastructure Act 2016* (the Act), the Minister for Planning (the Minister) has adopted the following codes of conduct:

- State Planning Commission Members – Code of Conduct
- Assessment Panel Members – Code of Conduct
- Accredited Professionals Scheme – Code of Conduct
- Infrastructure Scheme Coordinators – Code of Conduct
- Joint Planning Board Members – Code of Conduct.

Other than the Commission's Code of Conduct (which contains provisions within the Act itself), all other codes contain similar provisions regarding the disclosure and management of conflicts of interest.

In order to provide further guidance on these provisions, thought was given to either incorporating additional information in the codes or providing a separate document with guidance material. It should be noted that only the Minister is able to amend the codes and, before doing so, must consult with the Environment, Resources and Development Committee and the Local Government Association of South Australia. In any event, PLUS ultimately considered that separate guidance material is more appropriate considering the nature of the additional information (**Attachment 1**).

Following the Commission's meeting on 15 September 2022, feedback on the operation of the Code of Conduct (for Assessment Panel Members) was sought internally from within PLUS. There was, however, no significant recommendations for change or amendments suggested.

The guidance material produced by PLUS has been drafted in a broad manner, so it applies to all codes of conduct established under Schedule 3 of the Act. At a high level, the guidance material seeks to clarify the following:

- Who needs to have an interest for a conflict to arise.
- What a direct or indirect personal or pecuniary interest is.
- The difference between actual, potential and perceived conflicts.
- Questions to consider in determining whether a conflict exists.
- How to manage a conflict of interest.
- What acting in the 'public interest' means.

Subject to the Commission's endorsement of the guidance material, it will be published on the PlanSA website alongside the existing codes of conduct.

## Attachments:

1. Codes of Conduct – Guidance Material (#19389428).

Prepared by: Ben Sieben

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Endorsed by: Chelsea Lucas

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Date: 2 November 2022

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# Codes of Conduct – Guidance Material

## Introduction

Under Schedule 3 of the *Planning, Development and Infrastructure Act 2016* (PDI Act), the Minister has adopted the following codes of conduct:

- State Planning Commission Members – Code of Conduct;
- Assessment Panel Members – Code of Conduct;
- Accredited Professionals Scheme – Code of Conduct;
- Infrastructure Scheme Coordinators – Code of Conduct; and
- Joint Planning Board Members – Code of Conduct.

The codes of conduct (which are available on the [PlanSA website](#)) set out standards of conduct and professionalism that are to be observed by these entities in the performance of their duties under the PDI Act.

While there are provisions within the PDI Act that govern the management of conflicts of interest for State Planning Commission members, the remaining entities listed above have provisions within their respective code of conduct (the Codes) that require the disclosure and management of conflicts of interest, as well as provisions requiring them to act in the public interest and avoid bias.

Under the PDI Act and the Codes, a direct or indirect personal or pecuniary interest must be appropriately disclosed and managed. The existence of a conflict of interest is something that needs to be determined on a case-by-case basis, with this guidance material having been produced to assist entities with that assessment.

It is noted that conflict of interest obligations on entities under the PDI Act and the Codes operate alongside any other obligations that an entity may have under other legislation. For instance, an elected member who sits on an assessment panel also has obligations under the *Local Government Act 1999* (see [Elected Members on Assessment Panels Fact Sheet](#)).

## Associate and close personal relationships

A conflict of interest may exist where an entity has a direct or indirect personal or pecuniary interest in a matter. All entities above (other than accredited professionals) are automatically taken to have an interest in a matter if an associate (within the meaning of section 3(7) of the PDI Act) has an interest in the matter. Under section 3(7) of the PDI Act, an associate includes any of the following:

- a relative;

- a spouse or domestic partner;
- a body corporate in which you, or any of the above, have an interest exceeding 10% of its capital; and
- a trustee of a trust to which you, or any of the above are a beneficiary.

While the Accredited Professionals Scheme – Code of Conduct does not expressly provide that an interest of an associate also gives rise to an interest for an accredited professional, this does not mean that an accredited professional will not have a conflict of interest in this scenario.

Although not expressly mentioned in the PDI Act or the Codes, other close personal relationships could still give rise to a conflict of interest (for example business partners, housemate, intimate relationship, close personal friend). In determining whether a conflict of interest exists, consideration should also be given to whether a close personal relationship exists.

## **Direct or indirect personal or pecuniary interest**

### **Direct or indirect**

A direct interest is an interest where the entity will receive the benefit. Career advancement or the assessment of a matter where a company the entity owns (or has shares in) will receive a benefit are examples of possible direct conflicts.

An indirect interest is an interest where the entity does not stand to benefit directly, but a person or other entity connected to them will gain a benefit (or suffer a loss). An indirect interest may arise where an associate or close personal relation stands to benefit (or suffer a loss).

### **Personal or pecuniary**

An interest in a matter could be either a financial (pecuniary) interest or a non-financial interest. A pecuniary interest is one where an entity, their associate or a person to whom they have a close personal relationship with stands to gain a financial or monetary benefit.

A non-financial conflict of interest is one that does not involve a financial benefit for the entity. A non-financial conflict may arise when the entity receives benefits such as career advancement, enhancement of personal reputation, or advancement (or loss) of some other personal interest.

## **Actual, potential or perceived**

An actual conflict of interest arises when an entity has a direct personal or pecuniary interest in a matter that is being considered, whereas a potential conflict of interest is one which may arise in the future.

A perceived conflict of interest arises when it could appear to a reasonable person that an entity's personal interests could influence or impact the performance of their public duty. A conflict of interest is more likely to be perceived when the interest itself is indirect.

The management of perceived conflicts of interest can be more difficult than the management of actual conflicts of interest. The disclosure of a perceived conflict of interest does not make it an actual conflict, but it helps remove any perception of bias or influence and maintains public confidence in the decision-making process.

In determining whether a potential or perceived conflict may be present, an entity should consider whether a 'reasonable person' would consider that a conflict could exist.

## **Class of persons**

Where an interest of an entity is shared with a significant proportion of other community members, a conflict of interest may not arise. This consideration is of particular importance where an entity is in a smaller community or regional area, where it is more likely that an interest will be shared with a significant proportion of other community members.

An entity should exercise caution in determining whether their interest is shared with a 'significant proportion' of other community members, with a larger proportion providing greater certainty that a conflict does not exist. It is also important to note that the interest of the entity should not exceed the interest of the other community members.

## **Questions to consider in determining whether a conflict exists**

The following are questions that an entity should consider in determining whether they declare a conflict of interest in relation to a particular matter.

1. Do I, or an associate, have a direct or indirect personal or pecuniary interest in the matter?
2. Does someone I have a close personal relationship with have a direct or indirect personal or pecuniary interest in the matter?
3. Is my interest (or the interest of my associate) greater than a significant proportion of other community members?
4. If an interest does exist, is there a way I could influence the decision on the matter?
5. Will my involvement negatively affect the community's trust in the decision?
6. Will the decision have a big impact on me, an associate or someone I have a close personal relationship with?
7. How certain is the benefit to be gained or loss to be suffered? Is it guaranteed or just a remote possibility?
8. Will my decision be consistent with decisions made by other entities in similar circumstances?

9. Where a gift has been received by an entity, how long ago was the gift received and what was the value of the gift?

If after considering the above questions, an entity is unsure whether they have a conflict of interest, it may be appropriate to exercise caution and declare a conflict of interest. Legal advice may be sought to assist in determining whether a conflict of interest exists.

An entity must remind themselves that the test is not whether they are an honest and impartial person, but it is whether a reasonable and fair-minded person might perceive that their interests could be favoured by exercising their duties and responsibilities in the circumstances. Perception is an important consideration when identifying conflicts of interest, and the reasonable person test should always be considered when seeking to identify the existence of conflicts of interest.

An assessment manager appointed to an assessment panel established under the PDI Act may be required to provide advice and guidance to assessment panel members in relation to governance and probity matters, including conflict of interest matters (see [Assessment Managers Fact Sheet](#)).

## Managing conflicts of interest

Managing a conflict of interest maintains the honesty and integrity of the decision-making process to ensure the public has confidence that the final decision was made impartially and without prejudice. If an entity declares a conflict of interest, they must:

- disclose the nature and extent of the interest; and
- not take part in any further consideration or assessment of the matter.

This would include not taking part in hearings, workshops briefings or other meetings where the matter is discussed. A person who declares a conflict of interest should not attempt to influence the decision of those who will ultimately decide the matter.

Once a conflict has been declared, there is an ongoing requirement that an entity will not take part in any further consideration or assessment of a matter (unless circumstances change and there is no longer a conflict of interest). This is particularly relevant where a panel may consider a matter across multiple meetings.

## Examples of conflicts of interest

While the existence of a conflict of interest is something that needs to be determined on a case-by-case basis, the following are examples of conflicts of interest that may arise where:

- an entity could gain financially from business dealings, programs or services associated to a matter they are considering;
- an associate of an entity could gain financially from business dealings, programs or services associated with a matter they are considering;
- an assessment panel member has a close personal relationship with a person who is providing advice to the assessment panel;

- an accredited professional or assessment panel member has previously been involved in a development proposal through alternative employment, and is now responsible for the assessment of that proposal;
- a joint planning board is appointing an assessment panel, and a member of the joint planning board is an associate of (or has a close personal relationship with) an applicant; or
- an infrastructure scheme coordinator has a close personal relationship with an entity assisting to provide the required infrastructure.

## **Acting in the public interest**

The Codes require that an entity must act in a manner that promotes or protects the public interest. Acting in the public interest means that the outcomes of any decision-making process are in the public interest (which may ultimately conflict with personal interests), as well as the processes and procedures followed in reaching that outcome.

An entity acting in the public interest may require any of the following:

- applicable legislation is adhered to (eg PDI Act, *Local Government Act 1999* etc);
- applicable Codes of Conduct are complied with;
- principles of procedural fairness are followed;
- decisions are made fairly and impartially;
- conflicts of interest are declared and appropriately managed; and
- transparency over the process involved in reaching the final outcome.

## **Bias**

The Codes also provide that an entity should have regard to any affiliation, disposition or any material, pecuniary or other interest that would lead to a reasonable apprehension that they may be biased in carrying out any aspect of their role under the PDI Act.

Bias may result from the relationship between two parties that may lead one of those parties to make a decision (whether conscious or unconscious) that will favour the other party. A bias decision may be made where an entity has a direct or indirect conflict of interest that has not been appropriately disclosed and managed.