

Decision-maker's Title: **LOCAL GOVERNMENT STANDARDS PANEL**
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 35 of 2010 (DLG 20100206)
Heard: Determined on the documents
Considered: 2 March 2011; 6 April 2011
Coram: Mr B. Jolly (Presiding Member)
 Councillor C. Adams (Member)
 Mr J. Lyon (Member)

Complaint SP 35 of 2010

Complainant: (Cr) Michelle STUBBS

Council member complained about: **Councillor Donald YATES**

Local Government: **Town of Bassendean**

Regulation alleged breached: **Regulation 7(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007***

FINDING AND REASONS FOR FINDING

DEFAMATION CAUTION

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SUMMARY OF FINDING

The Panel found that Councillor Yates has committed a breach of regulation 7(1)(a).

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FINDING AND REASONS FOR FINDING

Preliminary and procedural matters

1. The matters mentioned in **Attachment A** are incorporated here as if set out in full.

[Note: As mentioned in paragraph 7 of Attachment A, the information before the Panel in relation to this matter is the information and documents described in the table under the heading 'Available information' in that Attachment. These documents are referred to in these Reasons, in italics within square brackets, by the relevant Doc ID in the table for the relevant document – e.g. [*Doc B2*] refers to the document that is Doc ID B2 in the table. Pages in a document described in the table are similarly referred to below by the relevant page/s number followed by the relevant Doc ID – e.g. [*pp3-4Doc B2*] refers to pages 3 - 4 of Doc ID B2.]

Allegation of minor breach made in the complaint

2. Councillor Stubbs' allegation of minor breach made in the complaint is as follows:

Councillor Stubbs alleges that on 9 March 2010 Councillor Donald Yates contravened regulation 7(1)(a) by making improper use of his office as a council member to gain directly or indirectly an advantage for a Ms C McGregor (Ms McGregor) – in that he sent an email to 8 of his fellow Town Councillors, in which he made comments on or in regard to an application by Ms McGregor to have the R coding of her property at 12 Thompson Road, Bassendean increased from residential R25 to R40.

Details of the advantage intended by Councillor Yates to be gained directly or indirectly by Mrs McGregor, as alleged by Councillor Stubbs:

The spot rezoning of 12 Thompson Road, Bassendean increased from residential R25 to R40 is of considerable financial benefit to Ms McGregor.

(the subject allegation)

Facts – the context of the subject allegation

3. On the available information the Panel is reasonably satisfied (i.e. satisfied to the degree required by the Briginshaw principles¹) and accordingly finds, that the facts that are relevant in this matter are as set out in **Attachment B**, which may be conveniently summarised as follows:

Councillor Yates lives at 10 Thompson Road, Bassendean. Ms C McGregor (Ms McGregor) lives next-door at 12 Thompson Road, Bassendean. Ms McGregor sent to the Town her written request for a spot rezoning of 12 Thompson Road from Residential R25 to R40 (Ms McGregor's spot rezoning request).

Before Ms McGregor's spot rezoning request was first considered by Council, at the Ordinary Council Meeting (OCM) on 19 January 2010, Councillor Yates disclosed that he had a proximity interest in the matter, and left the meeting while the matter was discussed and voted on. Council's resolution was that it deferred the matter "*until a recommendation is received from the Planning Commission.*"

¹ See paragraphs 9(4), 9(5) and 9(6) of Attachment A.

Ms McGregor then wrote to the Town, expressing her *“wish for Council to have the opportunity to immediately reconsider favourably my request for rezoning from R25 to R40”*. The proposed reconsideration and the Officer Report on it appeared in the agenda for the OCM held on 9 March 2010 (the March 2010 OCM). Ms McGregor’s spot rezoning request was not supported by the Town’s planning staff for the reasons given in the Officer Report.

On 9 March 2010, some hours before the March 2010 OCM, Councillor Yates sent to his fellow Councillors an email (the email complained about) containing information and comments in relation to Ms McGregor’s spot rezoning request. The text of the email complained about reads:

“In the **Local Planning Manual** guidelines as issued by the WA Planning Commission (Mar 2010), on page 41, section 4.5.9 it says

“If the local government does not make a determination on an application within the prescribed period, usually 60 days..., it is deemed to have been refused. The local government can still make a decision but deemed refusal provides an avenue for review by the State Administrative Tribunal”

In the case of the deferral motion passed related to Mrs McGregor’s property of 12 Thompson Rd, to a higher R40 coding on January 18 2010, it means that before the next scheduled ordinary council meeting on March 23 2010, she may **start appeal proceedings against the Town of Bassendean**, no doubt at some considerable cost to the Town.

If the same deferral action had been suggested against Avril White and the Kress family, then there could have been **multiple SAT appeals that the Town might have to fund**, in some attempt to delay the inevitable.

A way forward

The Council has the opportunity to pass the re-presented motion related to Mrs McGregor’s property for her immediate and long term security, at the March 9 2010 council meeting, demonstrating awareness of the WAPC’s Development Policy 1.6 of January 2006 and multiple other State Government policies related to higher TOD densities around commuter railway stations.

Sincerely
Don

Donald YATES
Councillor of Bassendean
08 9379 9479”
[Italics and bold emphases as supplied]

At the March 2010 OCM, before Ms McGregor’s spot rezoning request was again considered by Council, Councillor Yates disclosed that he had a proximity interest in the matter, and left the meeting while the matter was discussed and voted on.

General views in relation to regulation 7(1)

4. Attachment C sets out general views and material in relation to regulation 7(1), which the Panel hereby adopts for the purposes of its dealing with the subject allegation.

Issues arising in dealing with the subject allegation

5. On the available information and in the light of the views and material set out in Attachment C, it is the Panel's view that the issues which arise in relation to the subject allegation are:

- (1) In effect, as advised in Bundle # 02 [Doc G2] attached to the Presiding Member's Notice of Complaints to Councillor Yates, dated 20 December 2010 [Doc G1] - namely:
 - (a) did Councillor Yates commit the alleged conduct?
 - (b) if issue (a) is answered in the affirmative, was that conduct (the relevant conduct) a use of Councillor Yates' office of a Council member?
 - (c) if issue (b) is answered in the affirmative, viewed objectively, was the relevant conduct an improper use of Councillor Yates' office of a Council member?
 - (d) if issue (c) is answered in the affirmative, in committing the relevant conduct did Councillor Yates believe that the intended result would be to gain directly or indirectly an advantage for Ms McGregor?
- (2) If issue (d) mentioned in paragraph 6(1) above is answered in the affirmative, does the relevant conduct contravene *The Criminal Code* section 83?

Councillor Yates' response to the subject allegation

6. The Panel notes that, as mentioned in paragraph 6 of Attachment A, Councillor Yates' response to the subject allegation consists of: his email of 31 January 2011; a 7-page document signed by him, dated 25 January 2011; and copies of two documents published by the Western Australian Planning Commission (the WAPC): "Development Control Policy 1.6", dated January 2006; and "Planning Bulletin 102/2010", dated November 2010 [Doc H]. (Councillor Yates' response). It is also noted that Councillor Yates' response did not include a copy of the "Local Planning Manual", dated March 2010, published by the WAPC.

7. Councillor Yates' particular response to the subject allegation (i.e. the contents of Councillor Yates' 7-page document signed by him, dated 25 January 2011) is reproduced in **Attachment D** (Councillor Yates' particular response to the subject allegation).

Issues in dispute in dealing with the subject allegation

8. In view of Councillor Yates' particular response to the subject allegation, the issues that he disputes, or which otherwise are live, in relation to the subject allegation are the 5 issues identified in paragraph 5 above.

Did Councillor Yates send the email complained about?

9. The Panel notes that Councillor Yates' particular response to the subject allegation commences with his statement that "Councillor Sam Piantaodsi [sic] died on Thursday March 4 2010. The email I sent out on March 9 2010 was to only 7 Councillors and the CEO." In the Panel's view the email that Councillor Yates is referring to is the email that is complained about in this matter. That view is consistent with the information that Councillor Stubbs has provided in this matter to the Panel. Accordingly, on the available information the Panel is reasonably satisfied that on 9 March 2010 Councillor Yates committed the alleged conduct – i.e. that on 9 March 2010 he sent the email complained about to 7 of his fellow Town Councillors and to the Town's CEO.

Was Councillor Yates' sending of the email complained about a use of his office?

10. The Panel notes that the email complained about: was 'signed' by Councillor Yates in his capacity as 'Councillor of Bassendean'; was sent to 7 of his fellow Town Councillors and to the Town's CEO; and was in relation to an item of business at a Council meeting that was shortly thereafter due to come before Council. Accordingly, on the available information the Panel is reasonably satisfied that Councillor Yates sending of the email complained about to 7 of his fellow Town Councillors and to the Town's CEO was a use by Councillor Yates of his office of Council member.

Viewed objectively, was Councillor Yates' sending of the email complained about an improper use of his office?

11. The Panel notes that:

- (1) Section 5.65(1) requires a council member who has an interest (as defined in section 5.60), which includes a proximity interest (as defined in section 5.60B), in any matter to be discussed at a council or committee meeting that will be attended by the member, must disclose the nature of the interest in the required way before the matter is discussed at the meeting. A contravention of section 5.65 is a serious breach as defined in section 5.105(3).
- (2) However, by virtue of subsections 5.63(1) and 5.63(2), section 5.65 does not apply to a council member who has any of a number of interests in a matter. **In these Reasons, the term 'disclosable section 5.60 interest' refers to an interest, as defined in section 5.60, that is not a 'non-disclosable' or 'disclosure-exempt' interest identified in either of subsections 5.63(1) or 5.63(2) or in regulation 21 of the *Local Government (Administration) Regulations 1996*.**
- (3) Section 5.67(b) requires a council member, who has made a disclosure under section 5.65 in respect to a matter to be discussed at a council or committee meeting, to *not* participate in, or be present during, any discussion or decision making procedure relating to the matter, unless, and to the extent that, the council member is allowed to do so under section 5.68 or 5.69. A contravention of section 5.67 is a serious breach as defined in section 5.105(3).

- (4) In the Panel's view:
- (a) the words "participate in" in section 5.67(b) mean participate directly (i.e. personally) and do not include any type of participation by proxy; and
 - (b) this view in (a) last above is supported by:
 - (i) the provisions of section 2.10(d), which reads "A councillor ... (d) participates in the local government's decision-making processes at council and committee meetings".; and
 - (ii) the provisions of section 5.68.
- (5) On the available information, at the January 2010 OCM, when Ms McGregor's spot rezoning request was about to be put before Council, Councillor Yates disclosed that he had a proximity interest in the matter (i.e. he made a disclosure under section 5.65) and left the meeting in compliance with his obligation pursuant to section 5.67. Accordingly, in the Panel's view, he did not participate directly in any of the discussions or the decision making procedure relating to the matter, and did commit a contravention of section 5.65 or 5.67.

Functions and responsibilities of a council member

12. In the Panel's view the issue of what, viewed objectively, is 'improper use' of the office of council member, is to be determined according to the particular functions and responsibilities of the council member whose conduct is impugned. **Attachment E** sets out general views and material on the functions and responsibilities of a council member, which the Panel hereby adopts for the purposes of its dealing with the subject allegation.

Panel's views on issue

13. In light of the general views and material respectively set out in Attachment C and Attachment E, it is the Panel's views that:

- (1) At 9 March 2010 the expected and required standards of conduct of Councillor Yates as a Council member were those flowing from the fiduciary obligations owed by him as a Council member to Council (or, the Town) as varied or complemented by the Act (which includes all regulations, including the Regulations, made under it), the common law and the Town's code of conduct.
- (2) As mentioned in the passages from *Treby and Local Government Standards Panel* reproduced in paragraph 2 of Attachment B (omitting authorities and citations): "... *impropriety may arise in a number of ways. It may consist of an abuse of power, that is, if a councillor uses his or her position in a way that is inconsistent with the discharge of the duties arising from that office or employment. ... Alternatively, impropriety will arise from the doing of an act which a councillor knows or ought to know that he has no authority to do.*"
- (3) The extracts set out in **Attachment F**, being extracts from Mr Jason Banks' *Report of the Inquiry into the conduct of Councillor Eoin Martin of the City of Stirling*, dated 29 August 2000, are relevant, by analogy, to this matter.

- (4) **Generally, it is not an improper use of his/her office of council member for a council member to lobby or attempt to influence his/her fellow councillors as to the outcome on a matter to be discussed or considered by the council (or any of its committees) if the council member's expression of the argument or reasons for that outcome do not contravene: (a) the fiduciary obligations owed by him/her to his or her council (or, to his/her local government); or (b) the expected and required standards of conduct of a council member.**
- (5) The purpose of sections 5.65 and 5.67 taken together is that, except where allowed under section 5.68 or section 5.69, if a council member has a disclosable section 5.60 interest in a matter to be discussed at a council or committee meeting – which 'interest' includes a proximity interest in the matter – it is unlawful (and, thus, inconsistent with the discharge of the functions of the office of council member) for him/her to participate in, or be present during, any of the discussions or the decision making procedure relating to the matter if he/she attends the meeting.

In other words, a council member who has a disclosable section 5.60 interest in a matter is proscribed from using the 'front-door approach' (i.e. at a formal meeting), to participate in, or be present during, any discussion or the decision making procedure relating to the matter, until such time as the council or relevant committee's decision on the matter has been made.

- (6) Where:
- a council member has a disclosable section 5.60 interest in a matter to be discussed at a council or committee meeting; **or**
 - a council member makes a disclosure of an interest pursuant to section 5.65 in a matter to be discussed at a council or committee meeting **and**
 - the interest is not one that is so trivial or insignificant as to be unlikely to influence the council member's conduct in relation to the matter; **and**
 - the interest is not one that is common to a significant number of electors or ratepayers;

then, from the earlier of:

- the time he/she is aware or ought to be aware that he/she has the interest; and
- the time he/she makes a disclosure of the interest pursuant to section 5.65,

until such time as the council or relevant committee's decision on the matter has been made, it is inconsistent with the discharge of the functions of the office of council member for the council member to directly or indirectly lobby or attempt to influence his/her fellow councillors or committee members in relation to the matter.

In other words, in the circumstances above-described in this paragraph 13(6), it is inconsistent with the discharge of the functions of the office of council member for a council member to use or endeavour to use the 'back-door approach' to participate in the discussions or the decision making procedure relating to the matter, until such time as the council or relevant committee's decision on the matter has been made.

(7) Where

- a council member has a disclosable section 5.60 interest in a matter to be discussed at a council or committee meeting; **or**
- a council member makes a disclosure of an interest pursuant to section 5.65 in a matter to be discussed at a council or committee meeting **and**
- the interest is not one that is so trivial or insignificant as to be unlikely to influence the council member's conduct in relation to the matter; **and**
- the interest is not one that is common to a significant number of electors or ratepayers;

then it is inconsistent with the discharge of the functions of the office of council member for the council member to circulate or provide persuasive material to council, that does not form part of the records of council and is not submitted to council through regular means, and relates to a matter on the agenda.

(8) A corollary of the contents of paragraph 13(6) above is that from the time that a council member (Member A) becomes aware that:

- (a) a councillor or committee member (Member B) has disclosed an interest pursuant to section 5.65, or has indicated that he/she has a disclosable section 5.60 interest, in a matter to be discussed at a council or committee meeting; **and**
- (b) that interest is not one that is so trivial or insignificant as to be unlikely to influence Member B's conduct in relation to the matter; **and**
- (c) that interest is not one that is common to a significant number of electors or ratepayers;

it is inconsistent with the discharge of the functions of the office of council member for Member A to participate in or act on any communication with or on behalf of Member B in relation to the matter, until such time as the council or relevant committee's decision on the matter has been made.

(9) As mentioned in paragraph 28 of Attachment E, the essential features of the fiduciary obligations owed by a council member to his or her council (or, to his/her local government) may be summarised as:

- (a) an obligation to act in good faith – i.e. the council member must in his or her dealings act in good faith in what he or she considers to be the best interests of the council;
- (b) an obligation to exercise powers conferred on the council member only for the purposes for which they were conferred – i.e. for "proper purposes";
- (c) the no conflict rule – i.e. a council member cannot have a personal interest (i.e. a financial interest) or an inconsistent engagement with a third party where there is a real and sensible possibility of conflict; and
- (d) the no profit rule – i.e. a council member cannot obtain an advantage for himself/herself or others from the property, powers, confidential information or opportunities afforded to the member by virtue of his or her position.

- (10) As mentioned in paragraph 29 of Attachment E, in relation to a council member's obligation to act in good faith, the term 'in good faith' refers to a state of mind that embraces:
- (a) an honest and conscientious approach²; and
 - (b) an absence of intent to seek unconscionable advantage³; and
 - (c) a belief that all is being regularly and properly done.⁴
- (11) As mentioned in paragraph 30 of Attachment E, the fiduciary obligations owed by a council member to their council are the paramount obligations of a councillor by virtue of the fact that council members are representatives of their community and elected by and from that community.
- (12) As mentioned in paragraph 31 of Attachment E, the fiduciary obligations owed by a council member to their council take precedence notwithstanding that:
- (a) it may be expected that council members will support particular views as to what is in the best interests of the community and that often they will have strong personal views as to what ought to occur in the community;
 - (b) council members may be expected to hold particular views as to how they would wish their community to develop and to discharge their functions as council members by reference to those views;
 - (c) council members may be assumed to hold and to express views on a variety of matters relevant to the exercise of the functions of the council; and
 - (d) by virtue of the political nature of the processes they are involved in as representatives of their community, as recognised under the Act, council members can obtain input from numerous sources and bring their own opinion to bear on matters for council decisions.
- (13) By virtue of a council member's obligation of fidelity or loyalty to his/her council, where a council member takes it on himself/herself to make a remark, comment, observation, statement or suggestion, or to give advice, to a fellow councillor in relation to any matter of an impending council or committee meeting – particularly where the matter concerned has been or is the subject of a report or advice from the Administration of his/her local government, or legal advice in relation to the matter – the council member has an obligation to ensure that:
- (a) any statement of fact he/she mentions or relies on is substantially true; and
 - (b) any such remark, comment, observation, statement or suggestion he/she makes or gives is made or given 'in good faith';
 - (c) any such advice he/she gives is substantially true and is given 'in good faith'; and
 - (d) his/her conduct is not a use of his/her position in a way that is inconsistent with the discharge of the duties arising from his/her office of council member.

² *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 (6 February 2004), an appeal that involved consideration of the term 'in good faith' in s 18D of the *Racial Discrimination Act 1975 (Cth)*, per French J (as he then was) at [90] – [91].

³ *ibid*

⁴ *Cannane v J Cannane Pty Ltd (In Liquidation)* [1998] HCA 26; 192 CLR 557; 153 ALR 163; 72 ALJR 794 (7 April 1998) per Kirby J at [101]

14. Having regard to the found facts mentioned in paragraph 6 of Attachment B, it is the Panel's views that:

- (1) An ordinary person, without any knowledge of planning matters, would understand from a plain reading of paragraph 4.5.9 of the Local Planning Manual, within itself and in the context of part or chapter 4 of such manual, that the word 'application' used in such paragraph 4.5.9 could only be a reference to a development application.
- (2) A council member having obligations in planning matters has a responsibility to be aware that ultimately, as a matter of law a local government may only amend a local planning scheme with the approval of the Minister for Planning.⁵
- (3) The Local Planning Manual is a guide only. It did not amend or change the Town's local planning scheme – i.e. the Town of Bassendean Local Planning Scheme No. 10 – and accordingly did not change the Town's local planning scheme's provisions regarding the respective prescribed periods before a development application (or, an application for planning approval) is deemed to be refused where the local government does not make a determination on the application within the relevant prescribed period.
- (4) A council member having obligations in planning matters has a responsibility to be aware that, as a matter of law, if Council decides to refuse or fails to approve an application from a resident for a spot rezoning of a particular residential property, that decision or failure to approve is not appealable to and is not reviewable by the State Administrative Tribunal (the SAT).
- (5) In light of the contents of paragraphs 14(1), 14(2), 14(3) and 14(4) above, the contents of the first 4 paragraphs in the Town's CEO's email in response to the email complained about were and are correct – noting for ease of reference that those contents read:

"What you have advised councillors is serious misinformation suggesting that Council may face some sort of action if your advice is not followed.

Appeal rights relate to applications for planning consent under the Scheme and not to requests to amend the Local Planning Scheme.

Ms McGregor does not have any appeal rights against Council decision to defer consideration of the request, or to Council's failure to support the request if that is what Council resolves.

To suggest that Council will have to face the SAT if it does not approve an application for a spot rezoning is simply not true."

⁵ See section 75 of the *Planning and Development Act 2005*.

- (6) In light of the contents of paragraphs 14(1), 14(2), 14(3) and 14(4) above, Councillor Yates was wrong in his comments or advice in the email complained about when:
- (a) he suggested in effect that 'section 4.5.9' of the Local Planning Manual applied to a spot rezoning 'application' (more accurately, a request); and
 - (b) he advised the legal position was that if Council did not approve Ms McGregor's spot rezoning 'application' at Council's meeting later on 9 March 2010, then by the next scheduled ordinary Council meeting on 23 March 2010, Ms McGregor may start appeal proceedings against the Town.
- (7) In light of the contents of paragraphs 14(1), 14(2), 14(3) and 14(4) above, Councillor Yates' particular response to the subject allegation is wrong where he claims, in substance or effect, that the true position in this matter is a view or position that is contrary to those contents.

15. On the available information, it is the Panel's views that:

- (1) When Councillor Yates sent the email complained about to 7 of his fellow Town Councillors and to the Town's CEO:
- (a) he was aware that at the January 2011 OCM he had:
 - (i) disclosed a proximity interest in relation to Ms McGregor's spot rezoning request (the relevant proximity interest); and
 - (ii) left the meeting temporarily, while Council considered and voted on Ms McGregor's spot rezoning request; and
 - (iii) when at the meeting, not participated in, and had not been present during, any discussion or decision making procedure relating to the matter;
 - (b) the relevant proximity interest was not one that was so trivial or insignificant as to be unlikely to influence his conduct in relation to Ms McGregor's spot rezoning request;
 - (c) the relevant proximity interest was not one that was common to a significant number of electors or ratepayers;
 - (d) he was aware of the contents of the March 2010 Officer Report;
 - (e) he was aware that at the Council meeting later that day he would be required by law to:
 - (i) disclose a proximity interest in relation to Ms McGregor's spot rezoning request; and
 - (ii) leave the meeting temporarily, while Council considered and voted on that request; and
 - (iii) not participate in, and not be present during, any discussion or decision making procedure relating to that request;
 - (f) he was aware that the eventual purpose of Ms McGregor's spot rezoning request was that:
 - (i) if it was successful, she would then be in an advantageous or favourable position to make a development application to add a proposed residence on such land separate to the existing residence on it; and
 - (ii) if the said development application was approved, she would dispose of the proposed residence at a profit; and

- (g) viewed objectively, he was:
 - (i) acting in the performance or discharge of the functions of his office of Council member, in that he was representing the interests of a resident of the Town's district, Ms McGregor, which is a function of a Council member pursuant to section 2.10(a); and
 - (ii) lobbying or attempting to influence, and was putting pressure on, his 7 fellow councillors in relation to Ms McGregor's spot rezoning request.
- (2) For the reasons mentioned in paragraphs 12 to 14, and 15(1), above it is the Panel's view that Councillor Yates' conduct in sending the email complained about to 7 of his fellow Town Councillors and to the Town's CEO, viewed objectively, was a use of his position in a way that was inconsistent with the discharge of the functions of his office of Council member.
- (3) Further, on the available information, when Councillor Yates sent the email complained about to 7 of his fellow Town Councillors and to the Town's CEO, viewed objectively, he breached his fiduciary obligation owed to Council (or, to the Town) to act in good faith in what he considers to be the best interests of Council (or, the Town) in that at that time, viewed objectively, he did not act in good faith – i.e. his state of mind did not embrace:
 - (a) an honest and conscientious approach; and
 - (b) an absence of intent to seek unconscionable advantage; and
 - (c) a belief that all was being regularly and properly done.

16. For the reasons mentioned in paragraphs 12 to 15 above – the Panel is reasonably satisfied that Councillor Yates' sending of the email complained about on 9 March 2010 to 7 of his fellow Town Councillors and to the Town's CEO, viewed objectively, was an improper use of his office as a Council member.

Did Councillor Yates believe that the intended result would be to gain directly or indirectly an advantage for Ms McGregor?

17. The Panel notes that:

- (1) On the available information, the eventual purpose of Ms McGregor's spot rezoning request was that:
 - (a) if it was successful, she would then be in an advantageous or favourable position to make a development application to add a proposed residence on such land separate to the existing residence on it; and
 - (b) if the said development application was approved, she would dispose of the proposed residence at a profit.
- (2) In the email complained about, Councillor Yates states or suggests "a way forward", that *"The Council has the opportunity to pass the re-presented motion related to Mrs McGregor's property for her immediate and long term security, at the March 9 2010 council meeting, ..."*.

- (3) In Councillor Yates' particular response to the subject allegation, he claims or asserts the following, relevantly:

"In my email of March 9 2010, I suggested that the Council had the opportunity to reconsider the re-presented motion as a way of resolving the issue without the large legal expense and embarrassment of exposure because of a poor understanding of Development Control Policy 1.6 as published in January 2006, by staff and councillors, which may result in State Appeals Tribunal (SAT) appeal, which the Town could quite easily lose.

My email was intended to inform councillors that the rules had changed.

Further, my email also described that the January 19 2010 deferring motion passed by council could be regarded as a refusal and so the 60 day prescribed period, as per the new Local Planning Manual Guidelines, was no [sic] applicable, with an 'actionable date' of March 20, which would be before the next OCM of March 23 2010."

...

"The intention of my actions was to inform councillors of the changes in the WAPC's New Planning Manual guidelines (of March 4 2010) and to alert councillors that the motion passed on Jan 19 2010, may be in non-compliance with WAPC's Planning Control Policy 1.6 related to TOD developments (of Jan 2006) and such implications."

...

"My email was not intended to apply influence onto any councillor, but rather to explain the consequences of their actions of voting for a deferment on January 19 2010, (where I did NOT participate), and the new actionable date of March 20, (as per the new Local Planning Manual Guidelines)."

...

"As an active member of the Audit and Risk Committee, the intention was not to see the Town's limited resources being used in matters like "defending the indefensible" [sic] before the State Appeals Tribunal.

By making councillors aware of various state legislation that may apply in the situation of Mrs McGregor, (that had not been previously presented by the Officers of the Town in full), the aim was for a better informed council, to help in their deliberations, in which I would not be present."

18. As mentioned in paragraph 5 of Attachment C, the term 'advantage' in regulation 7(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable. In the Panel's view, the available information gives rise to a reasonable and definite inference, which is the only reasonable inference which is open on a consideration of all of the available information, that notwithstanding Councillor Yates' claims or assertions to the contrary, when he sent the email complained about his intention and belief was that the intended result would be to gain directly or indirectly an advantage for Ms McGregor – that advantage being a state, circumstance, opportunity or means specially favourable to Ms McGregor.

19. For the reasons mentioned above – in particular in paragraph 18 above – the Panel is reasonably satisfied that when Councillor Yates' sent the email complained about on 9 March 2010 to 7 of his fellow Town Councillors and to the Town's CEO, he believed that the intended result would be to gain directly or indirectly an advantage for Ms McGregor.

Was the sending of the email complained about, conduct that contravenes The Criminal Code section 83?

Section 83(a) of the Criminal Code

20. On the available information the Panel is not reasonably satisfied that Councillor Yates' conduct – in sending the email complained about on 9 March 2010 to 7 of his fellow Town Councillors and to the Town's CEO – was conduct that contravenes section 83(a) of the Criminal Code, on the basis that Councillor Yates' said conduct does not appear to involve him having acted upon any Council confidential knowledge or information obtained by reason of his office of Council member.

Section 83(b) of the Criminal Code

21. On the available information the Panel is not reasonably satisfied that Councillor Yates' conduct – in sending the email complained about on 9 March 2010 to 7 of his fellow Town Councillors and to the Town's CEO – was conduct that contravenes section 83(b) of the Criminal Code, on the basis that Councillor Yates' does not appear to have a financial interest, directly or indirectly, in Ms McGregor's spot rezoning request.

Section 83(c) of the Criminal Code

22. Paragraphs 15 to 40 of Attachment C set out general views and material in relation to what conduct of a local government council member contravenes *The Criminal Code* section 83(c), which the Panel hereby adopts for the purposes of its dealing with the subject allegation.

23. As mentioned in paragraph 22 of Attachment C, in considering the meaning of the term "*the functions of his office*" in section 83(c) of the Criminal Code, it appears from relevant authorities⁶ that the term '*the functions of his office*' in section 83(c) of the Criminal Code, as that term applies to the office of council member, includes:

- (a) the functions of a council member, as a member of the council, as set out in section 2.7;
- (b) where a council member is also the mayor or president, the additional functions set out in section 2.8;
- (c) the functions of a council member, as set out in section 2.10;
- (d) the things done or omitted by a council member in an official capacity;
- (e) any act or omission that is incidental to the carrying out of the functions and proper actions which the office of council member authorises;

⁶ *Canadian Pacific Tobacco Co. Ltd. v Stapleton* [1952] HCA 32; [1952] HCA 32; (1952) 86 CLR 1 per Dixon CJ at p 6; *Herscu v R* [1991] HCA 40; (1991) 173 CLR 276 (21 October 1991) per Mason CJ, Dawson, Toohey and Gaudron JJ at [10], and Brennan J at [5]; *State of Tasmania v Johnston* [2009] TASSC 60 per Evans J at [38] – [39]; *DPP v Zierk* [2008] VSC 184 (30 May 2008) per Warren CJ at [18] – [19]

- (f) the situation where a council member performs a function which, by virtue of the office of council member, it is his/hers to perform, whether or not it can be said that he/she is legally obliged to perform that function in a particular way or at all; and
- (g) the wielding of influence in a matter or activity that:
 - (i) by virtue of the office of council member, is a matter or activity such that the council member wields influence or is in a position to wield influence; or
 - (ii) without limiting the generality of (g)(i) immediately above, cannot be undertaken without an authorisation from the council member's local government; or that is by way of a commercial dealing with that local government.

24. As mentioned in paragraph 40 of Attachment C, it appears that, until the matter is the subject of a judicial determination to the contrary, it is not unreasonable to conclude, as the Panel hereby concludes, that for the purposes of regulation 7(2) the conduct of a council member contravenes section 83(c) of the Criminal Code where it meets the elements described in that paragraph.

25. On the available information the Panel is not reasonably satisfied that Councillor Yates' conduct – in sending the email complained about on 9 March 2010 to 7 of his fellow Town Councillors and to the Town's CEO – was conduct that contravened section 83(c) without him having a reasonable excuse, on the basis that prior to the Panel giving these Reasons the contents of the Banks Report do not appear to have been widely disseminated in local government in WA.

26. On the available information the Panel is not reasonably satisfied that Councillor Yates' conduct – in sending the email complained about on 9 March 2010 to 7 of his fellow Town Councillors and to the Town's CEO:

- (a) was a deliberate abandonment of a particular duty or function of his office of Council member; or
- (b) was a deliberate perversion of the proper performance of a particular function of his office of Council member; or
- (c) was a deliberate corruption of the proper performance of a particular function of his office of Council member.

27. In light of the contents of paragraphs 25 and 26 above, the Panel is not reasonably satisfied that Councillor Yates' conduct in sending the email complained about on 9 March 2010 to 7 of his fellow Town Councillors and to the Town's CEO, is or was conduct that contravenes section 83(c) of the Criminal Code.

Panel finding on the subject allegation

28. On the available information, for the above reasons and as required by section 5.110(2), the Panel is reasonably satisfied (i.e. satisfied to the degree required by the Briginshaw principles), and hereby finds, that on 9 March 2010 Councillor Donald Yates committed a breach of regulation 7(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007* in that he made improper use of his office as a Council member to gain directly or indirectly an advantage for an immediate next-door neighbour of his, a Ms C McGregor, when he sent an email to his fellow Town Councillors giving wrong advice to them, and inappropriately lobbying or attempting to influence and putting pressure on them, in relation to a request by Ms C McGregor to the Town of Bassendean to have the R coding of her property at 12 Thompson Road, Bassendean increased from residential R25 to R40 (the matter), knowing that he had a proximity interest in the matter, and knowing that he was precluded from participating in the discussions and the decision making procedure relating to the matter when it was before the Town's Council later on that date.

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

Attachment A

PRELIMINARY AND PROCEDURAL MATTERS

References to sections and regulations, and the term “viewed objectively”

1. In the body of these Reasons (which include each of the Attachments to them), unless otherwise indicated:
 - (a) a reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations), and a reference to a section is a reference to the corresponding section of the *Local Government Act 1995* (the Act); and
 - (b) the term ‘viewed objectively’ means “as viewed by a reasonable person” (the reference to a reasonable person being a reference to a hypothetical person with an ordinary degree of reason, prudence, care, self-control, foresight and intelligence, who knows the relevant facts).

Details of the complaint

2. Mr Bob Jarvis (the Town’s CEO), the Chief Executive Officer of the Town of Bassendean (the Town), in his capacity as the Town’s Complaints Officer (the Complaints Officer), has sent to the Panel a formal complaint (the complaint) made by Councillor Michelle Stubbs (Councillor Stubbs, or, the complainant) about alleged conduct of Councillor Donald Yates (Councillor Yates), a current member of the Town’s Council (Council). The complaint consists of a 4-page *Complaint of Minor Breach* dated 29 July 2010 [Doc B1] and its attachments [Doc B2], [Doc B3] and [Doc B4].

Material subsequently provided by the Complaints Officer

3. For the purpose of helping the Panel to deal with the complaint, the Complaints Officer was sent a letter [Doc C] requesting him to provide certain information in relation to the complaint, and other complaints made by Councillor Stubbs about alleged conduct of Councillor Yates (the other complaints). The Complaints Officer responded by his letter dated 15 October 2010 [Doc D] - the relevant part of which to this complaint being his response in bold number 1 on page 1.

Panel to afford procedural fairness to the council member complained about

4. The Panel is required by the common law to afford procedural fairness (or, natural justice) to the council member complained about in a complaint before it, according to the circumstances of the matter. The importance of procedural fairness has been explained as follows:

“It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. ‘When something is obvious’, they may say, ‘why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.’ Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.”⁷

⁷ *John v Rees* [1970] Ch 345 per Megarry J at 402

Identifying / clarifying allegations of minor breach

5. To afford procedural fairness to Councillor Yates, by a letter dated 5 October 2010 Councillor Stubbs was requested, among other things, to clarify her allegations in the complaint and in the other complaints, and to provide further information in this matter. [Doc E] is a copy of that letter and the Attachments A, B and D referred to in it. Councillor Stubbs responded with her letter dated 16 September 2010 and its attachments. [Doc F1] is a copy of pages 1, 2 and 3 of that letter (being the pages of it that are relevant to the complaint). [Doc F2], is the attachment to [Doc F1] that is relevant to the complaint.

Councillor Yates' formal response sought and received

6. To afford procedural fairness to Councillor Yates, on or about 20 December 2010 the Presiding Member sent a *Notice of Complaint* [Doc G1] to him advising, among other things, the allegation of minor breach that the Panel will consider in this matter and inviting him to respond to the allegation. Councillor Yates responded by sending to the Panel: his email of 31 January 2011; a 7-page document signed by him, dated 25 January 2011; and copies of two documents published by the Western Australian Planning Commission (the WAPC): "Development Control Policy 1.6", dated January 2006; and "Planning Bulletin 102/2010", dated November 2010 [Doc H].

Available information

7. The information before the Panel in relation to this matter (the available information) is described in the following table:

Doc ID	Description
A	Copy of (1-page) letter from Mr Bob Jarvis, the Complaints Officer (the Complaints Officer) and Chief Executive Officer (the CEO) of the Town of Bassendean (the Town), dated 2 August 2010.
B1	Copy of (4-paged) Complaint of Minor Breach No. SP 35 of 2010, dated 29 July 2010 (the complaint).
B2	Copy of a (4-page) printout of an email of 17 January 2010 from Cr Donald Yates (Cr Yates) to the CEO and to his fellow Town Councillors.
B3	Copy of (1-page) document headed "23 FEBRUARY 2010".
B4	Copy of (1-page) printout of an email of 9 March 2010 from Cr Yates to the CEO and 7 of his fellow Town Councillors (the email complained about).
C	Copy of (5 pages) letter and attachments from the Presiding Member to the Complaints Officer, dated 5 October 2010 – the relevant part in Attachment B to this letter being paragraph 1.
D	Copy of (4 pages) letter from the Complaints Officer, dated 15 October 2010 – the relevant part to this complaint being his response in bold number 1 on page 1.
E	Copy of (7-pages) 2-paged letter, and its Attachments A, B and D, from the Presiding Member to Cr Stubbs, dated 5 October 2010 – such Attachment D being the particular relevant Attachment to this letter in relation to the complaint.
F1	Copy of (3-pages) pages 1, 2 and 3 of an 11-page letter from Cr Stubbs, dated 16 November 2010 – such pages being the particular relevant part of this letter in relation to the complaint.

F2	Copy of (3-page) Attachment L to <i>[Doc F1]</i> .
F3	Copy of (1-page) the confirmed minutes of the Town's Ordinary Council Meeting held on 19 January 2010 in relation to item 10.14 at the meeting, as accessed on 16 December 2010 from the Town's website www.bassendean.wa.gov.au
F4	Copy of (3-page) the confirmed minutes of the Town's Ordinary Council Meeting held on 9 March 2010 in relation to items 9.1 and 9.2 at the meeting, as accessed on 16 December 2010 from the Town's said website.
G1	Copy of (4-page) Presiding Member's <i>Notice of Complaints</i> to Cr Yates, dated 20 December 2010 [N.B. The bundle of documents numbered 02 attached to this Notice, is the bundle relevant to the complaint.]
G2	Copy of (19-page) cover page, and pages 1 to 18 (both inclusive) of the bundle of documents numbered 02 attached to <i>[Doc G1]</i> . The remainder of the documents that are part of this bundle are copies of <i>[Doc A]</i> to <i>[Doc F4]</i> .
H	Copy of (25-page) response of 31 January 2011 from Cr Yates – being copies of: <ul style="list-style-type: none"> • a (1-page) printout of his email of that date • a (7-page) document signed by Cr Yates, dated 25 January 2011 • a (9-page) "Development Control Policy 1.6", dated January 2006, published by the WA Planning Commission (the WAPC) • a (8-page) "Planning Bulletin 102/2010", dated November 2010, published by the WAPC
I1	Copy of a (61-page) "Local Planning Manual", dated March 2010, published by the WAPC, obtained from the WAPC's website www.planning.wa.gov.au on 17 February 2011.
I2	Copy of (8-page) pages 1 to 8 of the agenda for the Town's Ordinary Council Meeting held on 9 March 2010, obtained on 18 February 2010 from the Town's said website.
I3	Copy of (7-page) pages 1 to 7 of the Minutes of the Town's Ordinary Council Meeting held on 9 March 2010, obtained on 22 February 2010 from the Town's said website.

Standing of the subject allegation

8. The Panel notes that:

- (1) The complaint is in the form approved by the Minister for Local Government and was made within time.
- (2) There is an allegation made in the complaint that Councillor Yates, a member of the Council at the time of the alleged incident, has committed a minor breach as defined under section 5.105(1)(a).
- (3) The subject allegation is that a breach of regulation 7(1) has occurred. Regulation 7(1) is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 7(1) is a minor breach. Regulation 7(1) is contravened by a breach of regulation 7(1)(a) or 7(1)(b).

Panel's role - duty to make finding - required standard of proof

9. The Panel notes that:

- (1) Broadly, the Panel is a statutory decision-maker that is required to adjudicate on complaints made in writing, in a form approved by the Minister, that give certain details including the details of the contravention that is alleged to have resulted in the breach.
- (2) Under the Act and the common law the Panel: has no power or duty to carry out any investigation in relation to any complaint before it; and has no power to compel any information to be provided to it.
- (3) Clause 8 of Schedule 5.1 of the Act requires the Panel's members to have regard to the general interests of local government in Western Australia.
- (4) The Panel is required to make a finding as to whether the breach alleged in the complaint occurred [section 5.110(2)]. In order for the Panel to make any finding that any minor breach has been committed by a council member, the finding is to be based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur [section 5.106].

This level or standard of proof is the same as in ordinary civil legal proceedings where it is referred to as being a preponderance of probabilities (or, the balance of probabilities).

- (5) The Panel is aware that when it makes a finding of a minor breach, the finding is a serious matter as it may affect individuals personally and professionally.

Accordingly, in determining whether on the evidence the standard of proof - on the balance of probabilities - has been satisfied, the Panel recognises that 'the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the [determining body]'⁸.

Each of these 'considerations' applies in complaint proceedings against a council member. These 'considerations' are referred to in these Reasons as 'the Briginshaw principles'.

- (6) As the High Court of Australia has expressed the position, the significance of *Briginshaw*⁹ is that the seriousness of the matter and of its consequences does not affect the standard of proof but goes to the strength of the evidence necessary to establish a fact required to meet that standard. So much reflects a conventional perception that (relevantly) local government council members do not ordinarily engage in improper conduct generally and in circumstances where to do so is likely to render them liable to a punitive sanction.¹⁰

⁸ *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J in at 362

⁹ *ibid*

¹⁰ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

- (7) The following passage (without the authorities) from the High Court's decision in *Bradshaw v McEwans Pty Ltd*¹¹ is relevant in complaint proceedings against a council member:

"The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise." [Underlining added]

¹¹ (1951) 217 ALR 1 at 5

Attachment B

FACTS - THE CONTEXT OF THE SUBJECT ALLEGATION

The facts that are relevant in this matter are as follows:

1. On 18 December 2008 Councillor Yates was elected as a member of the Council (the Council) of the Town of Bassendean (the Town) for a term expiring in October 2011.
 - [p1Doc D]
2. At all times relevant in this matter Councillor Yates was, and is currently: an elected member of the Council.
 - [Doc B1]
3. At all times relevant in this matter:
 - (a) Councillor Yates resided at and had an interest in the land known as 10 Thompson Road, Bassendean;
 - (b) a Ms C McGregor (Ms McGregor) resided at and had an interest in the land known as 12 Thompson Road, Bassendean (Ms McGregor's property);
 - (c) the land known as 10 Thompson Road, Bassendean and the land known as 12 Thompson Road, Bassendean adjoined each other and had a common boundary;
 - (d) a residential design code of R25 was a low density code; and
 - (e) a residential design code of R40 was a medium density code, requiring less minimum site area per dwelling (m²) than a residential design code of R25.
 - [p2Doc B1]; [Doc I2]
4. Councillor Yates attended at the Town's Ordinary Council Meeting held on 19 January 2010 (the January 2010 OCM).
 - [Doc F3]
5. **At the January 2010 OCM:**
 - (a) item 10.14 was a request from Ms McGregor, as the owner/applicant, for the Council to increase the Density Code of Ms McGregor's property from Residential R25 to R40 (Ms McGregor's spot rezoning request);
 - (b) immediately before Ms McGregor's spot rezoning request was considered by the Council, **Councillor Yates disclosed that he had a proximity interest in the matter**, and left the meeting at 10.02pm;

- (c) the Officer Recommendation in relation to Ms McGregor's spot rezoning request was:

"That:

1. *Council advises the owner of lot 2; No 12 Thompson Road Bassendean that:*
 - a) *the Town of Bassendean is not prepared to initiate a Scheme Amendment to increase the density code of lot 2; 12 Thomson Road, Bassendean, to R40 as such a proposal does not accord with Council's adopted Local Planning Strategy;*
 - b) *Initiating a Scheme Amendment without adequate planning justification is likely to set an undesirable precedence for other land owners;*
 - c) *Council will consider the zoning of the individual property in a future review of the Scheme in connection with the remainder of the sub precinct;*
- and*
2. *The Manager Development Services be requested to prepare a report on the processes and cost to either review or amend the Local Planning Scheme No. 10 to introduce higher density codes around the Town's train stations."*

- (d) the Council's resolution in relation to Ms McGregor's spot rezoning request was:

"That Council defers this item until a recommendation is received from the Planning Commission."

- (e) Councillor Yates then returned to the meeting at 10.06pm.

- *[Doc F3]*

6. In the first week in March 2010 the Western Australian Planning Commission issued its user guide publication "Local Planning Manual" (the Local Planning Manual), in which:
- (a) the preamble, on page 2, states:

"These guidelines have been prepared to provide information and advice to local governments and others who are involved in preparing local planning strategies, schemes and amendments as well as those using and administering local planning schemes. Included among the users of schemes are not only developers and local government, but also members of the community who have an interest in the planning of their local areas."

- (b) the 4th part or chapter, which commences on page 31, is headed "Application of local planning schemes";
- (c) section 4.5, which commences on page 38, is headed "Approval process";

- (d) paragraph 4.5.1, on page 38, reads:

“The flowchart on the following page illustrates the major steps in the application and approval process, starting from the identification of the zoning of the proposed development site and culminating in the decision of the local government and possible review by the State Administrative Tribunal.”

- (e) page 39 includes the said flowchart;

- (f) paragraph 4.5.9, on page 41, deals with development applications, is headed “Determination of applications”, and reads:

“The decision on the application may be to approve it, with or without conditions or to refuse it. Approval may also be limited to a specified part or aspect of the proposed development, and does not have to be for the complete development to which the application relates. Any conditions of approval must be fulfilled in order to comply with the scheme.

If the local government does not make a determination on an application within the prescribed period, usually 60 days (or 90 days in the case of an advertised application), it is deemed to have been refused. The local government can still make a decision but deemed refusal provides an avenue for review by the State Administrative Tribunal, as explained below.”

- (g) in Appendix 5.6 Frequently asked questions, questions 14, 15 and 16 and the respective responses to them are as follows:

“14. What can I do if I am dissatisfied with a condition imposed on my approval?

Under the Act, any applicant who is dissatisfied by a decision of the local government which involves the exercise of discretion may seek a review of that decision by the State Administrative Tribunal. An exercise of discretion may involve refusal of an application or the imposition of one or more conditions of approval. An application for review by the Tribunal must be made in accordance with the State Administrative Tribunal legislation, and is to be made within 28 days of the decision. Under some local planning schemes, provision has been included for a review by the Council of decisions made under delegated authority.

15. What can I do if I want the zoning of my land changed?

*There is no formal procedure for seeking a change to the zoning of land, although most local governments will consider requests for re-zoning were they are well founded. An alternative to a change in the base zoning of land include the designation of an additional uses, which may allow for one or more additional uses to those already provided for under the base zoning. In either case, **an amendment to the scheme would be required, and the decision to initiate amendments rests with the local government.***

16. *What can I do if I don't agree with a proposed zoning or re-zoning?*

*At the time of a scheme review or advertised amendment to a local planning scheme there is an opportunity to make submissions (which may include an objection) on any aspect of the scheme, and this includes the zoning of land, irrespective of its ownership. Any submissions received are required to be considered by the local government in making its recommendation to the Minister, and will also be considered and reported on by the Commission in its advice to **the Minister who has responsibility for the final approval of the scheme or amendment.***

[Bold emphases added]

- [p2Doc I1]; [pp31-41Doc I1]; [pp59-60Doc I1]

7. **A local government's local planning scheme is the only place that contains the provisions regarding the respective prescribed periods before an application for planning approval is deemed to be refused where the local government does not make a determination on the application within the relevant prescribed period.**
8. The subject of item 9.2 in the agenda for the Town's Ordinary Council Meeting held on 9 March 2010 was to consider Ms McGregor's request for the Council to reconsider her spot rezoning request. In the agenda, the Officer Report (the March 2010 Officer Report) on that item reads, relevantly for present purposes:

"9.2 Request for Council to Increase the Density Code of Lot 2 (No. 12) Thompson Road, Bassendean from Residential R25 to R40, Owner/Applicant: Ms C McGregor (Ref: A55279 – Brian Reed, Manager Development Services)

...

Correspondence has recently been submitted by Ms McGregor which is reproduced below. The correspondence was copied to all Councillors and the Minister for Planning:

"....

I wish for Council to have the opportunity to immediately reconsider favourably my request for rezoning from R25 to R40 because:

1. *As per WAPC Development Control Policy 1.6, published in January 2006, and in accordance with the State Planning Policy Strategy and Statement of Planning Policy 3 Urban Growth and Settlements (SPP3) that supports higher residential densities around public transport nodes, and the **policy objectives are:***

(A) *To ensure the optimal use of land within transit oriented precincts, on both private and public land, in development patterns where **diversity of lot sizes leading to higher residential densities, within transit oriented precincts is to be encouraged, and***

(B) *That Local Government aligns its planning to WAPC Development Control Policy 1.6 (of Jan 2006) **as no special recommendation is required from the Planning Commission in these matters.***

2. In the Town of Bassendean Scheme No 10, in the section *THE AIMS OF THE SCHEME* (1.6.b), "The aims of the Scheme to encourage housing stock that provides **for a variety of lifestyle choices**, for a range of socio economic and age groups", and that is what I wish to achieve with my residential coding change from R25 to R40.

3. Again, in the Town of Bassendean Scheme No 10, in the section *ZONES AND USE OF LAND* (4.2.1),

in section 4.2.1.c "to recognise the role of Bassendean as a middle metropolitan area, and therefore facilitates... **increase in population growth**, and in section 4.2.1.d "to make provision for housing types that respond to the demands of an ageing population".

The Planning Commission will not make a recommendation, as there is no need according to the WAPC Development Control Policy 1.6, so the reason to defer consideration of the rezoning appears not to be valid and has not been since January 2006. This should have been explained to those councillors considering motion 10.14 at the ordinary council meeting on January 19 2010.

Going further, **my request to be rezoned from R25 to R40 is modest.**

According to transit oriented development policies, as my property shares a common border with the railway reserve at the transit oriented development Success Hill Station, then a rezoning of R100 or more could meet the stated policies of the WAPC in such matters and **I was only seeking an upgrade to R40, as part of my wishes for another potential neighbour and more personal security.**

Thankyou for your attention. I will not be personally at the Council meeting when this is reconsidered but I will have a representative there."

...

The original request for the increase in density is reproduced below:

"As previously indicated, I believe that my property should have an increased zone classification from the current R25, being so close to the Success Hill Station.

Existing block size 601 sqm

Existing frontage: 21.64m

Existing home; 167 sqm plus 33sqm carport and 10sq m entrance

Suggested R40

Green block 1: 401 sqm with existing 167 + 55 + 10 sqm home, 8m setback & 13.2m frontage

Green block 2; 200 sqm with 98 sqm, part 2 storey new home, 4m setback and 7.64m frontage

With an average block size of 500 sqm, this exceeds the minimum average 250 sqm with an R40 zoning.

The original home is only 9 years old and has high efficiency instant gas hot water, roof insulation throughout and other appropriate window treatments.

The proposed new home located to the north of the existing home will not be a battleaxe design It will have doubled glazed windows, roof insulation, solar hot water and a 5000 litre water tank, with water collection from the roof, The setbacks of the proposed 2 storey home will not block the winter sun to the existing southern property windows etc. The main 2 storey part of the proposed new building will shade the carport roof of the existing home.

Both the existing and proposed home are not positioned on known clay so storm water containment on the property will be taken care of with appropriate soak wells, as now.

At this time, there are already three 2 storey residences, with about 4 metre setbacks in Thompson Road, of the total 9 homes and 4 units in the street, I do not believe that another 2 storey residence will seem out of place with the recent home developments in Thompson Road.”

The request is discussed further in the comment section below.

COMMENT

The property is located in sub precinct C1 of the Local Planning Strategy. A plan showing the precincts is included in the attachments section of the agenda.

An extract from the Local Planning Strategy relating to the Precinct C is reproduced below:

3.5.1 Overview

This precinct is rather large and as such has been divided into three sub precincts. Precinct C1 is located on the south of the railway line, and includes land bounded by the Railway Line, North Road, Hyland Street, Shackleton Street and Cyril Street This sub precinct also includes land surrounding the Town Centre. Precinct C2 lies to the south of sub precinct C1 and is generally bounded by Bassendean Parade, Ashfield Flats, hardy [sic] road and Fisher Street. Sub precinct C3 lays to the north of the Railway line and is generally bounded by Iolanthe Street, Walter road East, Rugby Street and the Industrial Area to the south.

The housing within this precinct is characterised by older but well maintained homes, predominantly of a good quality with many homes spanning almost the entire width of the property frontage. Particularly in the eastern part of the precinct towards the Swan River there is evidence of interspersed group housing developments.

Although predominantly the lot sizes within this precinct comprise 1000m², there are a number of street blocks where subdivision has occurred with lot sizes of 400m² — 600m² in area. Under Local Planning Scheme No. 3 this precinct was allocated for Residential zoning with a coding of R20, and the grouped housing sites were zoned R25.

....

3.5.3 Objectives

To retain Housing Precinct C as predominantly a single residential housing area in the short to medium term.

To make provision for a limited number of larger housing lots, ripe for development to be redeveloped for medium density housing in a manner that does not undermine the integrity of the precinct as a single residential area.

To make provision for Council to allow the development of corner lots to a maximum density of R25.

3.5.4 Strategies — Housing Precinct C

- *Apply a Residential zone with a coding of R20 to the entire precinct, with the following exceptions:*

...

The southern side of Nurstead Avenue, and the area around Thomson Road and Lamb Street where a density code of R25 will be applied,

...

The current request to change the zoning of the property represents a request for Council to initiate a spot rezoning of the property in isolation from the rest of the precinct. Generally spot rezonings are not favoured.

...

The Manager Development Services cannot identify a sound planning reason why Council should contemplate increasing the density code of this particular property in advance of the rest of the sub precinct.

...

If Council does indicate support for the proposed amendment, Council should consider this in the context of precedence for other landowners throughout the Town, who may have sufficient land to accommodate additional dwellings if the density code were to be changed.

If Council wishes to support the request, it could move the following motion:

That Council:

1. Invites the owner of Lot 2; No 12 Thompson Road, Bassendean, to prepare Scheme Amendment documents in a for suitable to the Town of Bassendean, increasing the density code of the property being increased from Residential R25 to R40;
2. Advises the applicants that all costs in relation to the Scheme amendment are to be met by the applicant in accordance with the Town's Schedule of fees and charges; and
3. Advises the applicant that whilst Council is prepared to support the proposal in principle it should not be assumed that the necessary Scheme amendment will be finalised.

The request is not supported by planning staff for the reasons given in this report. It should be noted that at its meeting held on 23 February 2010, Council resolved to commence a review of its density codes throughout the Scheme area during the 2010/11 financial year and engage a consultant for this purpose (subject to funds being allocated in the Budget).

...

OFFICER RECOMMENDATION – ITEM 9.2

That:

1. Council advises the owner of Lot 2; No 12 Thompson Road, Bassendean, that:
 - a) the Town of Bassendean is not prepared to initiate a Scheme Amendment to increase the density code of lot 2; 12 Thomson Road, Bassendean, to R40 as such a proposal does not accord with Council's adopted Local Planning Strategy;
 - b) Initiating a Scheme Amendment without adequate planning justification is likely to set an undesirable precedence for other land owners; and
 - c) Council has resolved to commence a review of its density codes throughout the Scheme area during the 2010/11 financial year and engage a consultant for this purpose (subject to funds being allocated in the Budget)."[Bold emphases as supplied]

- [Doc I2]

9. At 2.19pm on 9 March 2010 (i.e. some hours before the Town's Ordinary Council Meeting held on that date) Councillor Yates sent the email complained about to 7 of his fellow Town Councillors and the Town's CEO.

- [Doc B4]

10. At 3.47pm on 9 March 2010 (i.e. before the Town's Ordinary Council Meeting held on that date) the Town's CEO responded to the email complained about by sending an email to Councillor Yates and to 7 Town Councillors. The text of the Town's CEO's email reads:

"Dear Don

What you have advised councillors is serious misinformation suggesting that Council may face some sort of action if your advice is not followed.

Appeal rights relate to applications for planning consent under the Scheme and not to requests to amend the Local Planning Scheme.

Ms McGregor does not have any appeal rights against Council decision to defer consideration of the request, or to Council's failure to support the request if that is what Council resolves.

To suggest that Council will have to face the SAT if it does not approve an application for a spot rezoning is simply not true.

On the subject of guidelines, I refer to the Local Government Guidelines on Dealing with Developers April 2006:

I quote: "The Council is the decision maker with the role of of [sic] the professional staff to report on all those issues, and to provide advice, in a full, free and frank manner, The Council body needs to be assured that the decisions it makes are well informed, in accordance with all appropriate and relevant considerations and can stand later scrutiny whether in the courts or by the public."

and

"The integrity of a local government will be improved where the role of the professional staff in assessing an application is clearly separated from Council's role of determining the application."

and

"Elected members must not when lobbied commit their vote on the proposal. Members may offer support or otherwise but as decision makers they are obliged to consider all relevant facts, including the debate at the meeting, prior to making their decision. Elected members who commit their vote may be faced with claims of perceived bias."

The Director General of the Department of Planning has stated that planning decisions should be considered after having received a professional officer's report, and the guidelines go one step further with "prior to a final decision being taken, professional staff should be given the opportunity to comment on any additional matters raised during the meeting".

Regards"

- [Doc F2]

11. Councillor Yates attended at the Town's Ordinary Council Meeting held on 9 March 2010 (the March OCM).

- [p3Doc I3]

12. **At the March 2010 OCM:**

- (a) item 9.2 was a request from Ms McGregor that the Council reconsider her spot rezoning request;
- (b) immediately before item 9.2 was considered by the Council, **Councillor Yates disclosed a proximity interest in the matter**, and left the meeting at 7.35pm;
- (c) a motion in the terms of the Officer Recommendation was moved, and was lost 2/3 (Crs Brinkworth and Stubbs having voted in favour of the motion, and Crs Gangell, Pule and Lewis having voted against the motion);

- (d) Council's resolution on the matter (carried 3/2 – with Crs Gangell, Pule and Lewis having voted in favour of it, and Crs Brinkworth and Stubbs having voted against it) was *“that Council:*
- 1. Invites the owner of Lot 2; No 12 Thompson Road, Bassendean, to prepare Scheme Amendment documents in a form suitable to the Town of Bassendean, increasing the density code of the property from Residential R25 to R40;*
 - 2. Advises the applicant that all costs in relation to the Scheme amendment are to be met by the applicant in accordance with the Town's Schedule of fees and charges; and*
 - 3. Advises the applicant that whilst Council is prepared to support the proposal in principle it should not be assumed that the necessary Scheme amendment will be finalised.”; and*
- (e) Councillor Yates then returned to the meeting at 7.40pm.
- *[pp5-7Doc 13]*

Attachment C

General views and material in relation to regulation 7(1)

Relevant legislation

Regulation 7 reads:

- “(1) A person who is a council member must not make improper use of the person’s office as a council member —*
- (a) to gain directly or indirectly an advantage for the person or any other person; or*
 - (b) to cause detriment to the local government or any other person.*
- (2) Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.*

Elements

The elements of a breach of regulation 7(1) are:

- a person who is a council member committed the alleged conduct
- the member’s conduct was a use of the member’s office as a council member
- viewed objectively, the member’s conduct constituted making improper use of the member’s office as a council member
- the member committed the conduct with the intention and belief that the intended result would be both or either to gain directly or indirectly an advantage for the member or any other person and/or to cause detriment to the local government or any other person
- the member’s conduct is not conduct that contravenes section 5.93 of the Act or section 83 of The Criminal Code.

‘use of office’

1. Section 83 of the *Criminal Code* [see regulation 7(2)] makes reference to a public officer who “acts in the performance or discharge of the functions of his office”, whereas regulation 7(1) refers only to “use of the person’s office”. Improper conduct falling short of being in the performance or discharge of a council member’s office is caught by regulation 7 so long as it involves the use of office.

'improper use of office '

2. In *Treby and Local Government Standards Panel*¹² the then Deputy President of the State Administrative Tribunal (the SAT), Judge J Pritchard (as she then was) said at [26] – [33], as to the term 'improper use' in regulation 7(1):

“The word 'improper' is used in reg 7(1)(b) as an adjective to describe the use of a councillor's office. The term 'improper' is not defined in the LG Act [i.e. the Local Government Act 1995] or the Regulations [i.e. the Local Government (Rules of Conduct) Regulations 2007], and the regulation has not been the subject of any judicial determination in Western Australia.

According to the Shorter Oxford English Dictionary, the meaning of 'improper' includes 'unsuitable' and 'inappropriate'. It is clear that the meaning of the word 'improper' cannot be considered in isolation, but rather will take its flavour from the surrounding context, which includes an assessment of what is involved in role of a councillor, and, in the case of [the Mayor applicant], what is also involved in the role of a mayor, according to the LG Act and the Regulations, and the instruments made thereunder. The role of a councillor includes representing the interests of electors, ratepayers and residents of the district, providing leadership and guidance to the community in the district, and participating in the council's decision-making processes at council and committee meetings: s 2.10(a), (b) and (d) of the LG Act. The role of a mayor includes presiding at meetings in accordance with the LG Act, providing leadership and guidance to the community in the district, and speaking on behalf of the local government: s 2.8(1)(a), (b) and (d) and s 2.8(2) of the LG Act.

...

*The meaning of the word 'improper' in the context of provisions similar to reg 7(1)(b) was considered in *Chew v The Queen* (1992) 173 CLR 626 (*Chew*), *R v Byrnes* (1995) 183 CLR 501 (*Byrnes*) and *Doyle v Australian Securities and Investments Commission* (2005) 227 CLR 18 (*Doyle*). In *Chew* and *Byrnes* the Court considered s 229(4) of the Companies (South Australia) Code while in *Doyle* the Court construed s 232(6) of the Corporations Law (Cth). Each provision prohibited an officer or employee of a corporation from making improper use of his or her position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation. Although s 229(4) created a criminal offence, and s 232(6) is a civil penalty provision, the observations of the Court are highly relevant to the construction and application of reg 7(1)(b), given the similarity between its terms and s 229(4) and s 232(6). In view of these authorities, the following conclusions can be drawn in relation to the meaning and application of the term 'improper use of the person's office' within the context of reg 7(1)(b) of the Regulations.*

¹² [2010] WASAT 81

First, impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the [councillor] by reasonable persons with knowledge of the duties, powers and authority of his position as a councillor and the circumstances of the case: Chew at 634 (Mason CJ, Brennan, Gaudron and McHugh JJ) and at 647 (Toohey J); Byrnes at 514, 515 (Brennan, Deane, Toohey and Gaudron JJ); Doyle at [35] (the Court).

Secondly, impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent: Chew at 640, 641 (Dawson J); Byrnes at 514, 515 (Brennan, Deane, Toohey and Gaudron JJ) and at 521 (McHugh J).

Thirdly, impropriety may arise in a number of ways. It may consist of an abuse of power, that is, if a councillor uses his or her position in a way that is inconsistent with the discharge of the duties arising from that office or employment: cf Byrnes at 521 (McHugh J). Alternatively, impropriety will arise from the doing of an act which a councillor knows or ought to know that he has no authority to do: cf Byrnes at 514, 515 (Brennan, Deane, Toohey and Gaudron JJ); Doyle at [37] (the Court).

Fourthly, in the case of impropriety arising from an abuse of power, a councillor's alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power will be important factors in determining whether the power has been abused: Chew at 640, 641 (Dawson J); Byrnes at 514, 515 (Brennan, Deane, Toohey and Gaudron JJ) and at 521 (McHugh J).

Fifthly, a councillor's use of his or her office can be improper even though it is for the purpose or with the intention of benefiting the Council: Chew at 634 (Mason CJ, Brennan, Gaudron and McHugh JJ); Byrnes at 521, 522 (McHugh J)."

The standards of conduct that are expected of a member of a local government

3. In *Treby and Local Government Standards Panel*¹³ Judge Pritchard (as she then was) said at [87] - [91], on the standards of conduct that are expected of a member of a local government:

"Counsel for the intervenor submitted that the standards of conduct that would be expected of a member of a local government can be discerned from the fiduciary obligations which council members owe to their councils and in a range of statutory and non-statutory instruments, including the LG Act itself, and the codes of conduct, local laws as to conduct, and regulations which the LG Act contemplates may be made to regulate the conduct of members of local governments. Counsel for the intervenor pointed to a variety of such instruments, including s 2.10 of the LG Act, reg 3 of the Regulations, the Standing Orders, including standing order 11.9, and Pt 2 of the Code of Conduct which relates to the conduct of councillors during debates. In relation to [the Mayor applicant], counsel for the intervenor submitted that as the Mayor,

¹³ [2010] WASAT 81

[the Mayor applicant] was subject to additional expectations in terms of standards of behaviour, reflected in s 2.8(1) of the LG Act and in the expectation that a mayor, as the chair of council meetings, will remain impartial: Gifford, The Western Australian Council Meetings Handbook (3^d ed, 1976) at 23; see also Arcus v Castle and Wellington Hospital Board [1954] NZLR 122 at 129.

...

Counsel for the intervenor submitted that a failure to comply with any of the provisions he had identified would constitute a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of his position as a councillor and the circumstances of the case, and would therefore suggest an improper use of that office. I accept those submissions.

In the present case, Senior Member Parry concluded that the remarks made by the applicants constituted a breach of Standing Order 11.9 of the Standing Orders. That supports the conclusion that in making the remarks the applicants engaged in an improper use of their office as councillors.

In addition, the nature of the remarks made by the applicants constituted a clear failure to treat [the 3 Councillors concerned] with respect and fairness, and thereby constituted a failure to meet the standard of behaviour for councillors reflected in reg 3(1)(g) of the Regulations. Regulation 3 sets out general principles to guide the behaviour of council members. Although those general principles are for the guidance of council members, it is not a rule of conduct that those principles be observed: reg 3(2) of the Regulations. However, in my view, that does not detract from the fact that those principles provide an indication of the standards which can reasonably be expected of councillors. The contravention of reg 3(2) therefore also supports the conclusion that in making the remarks the applicants engaged in an improper use of their office as councillors."

4. Accordingly, the required standards of conduct of council members are in essence those flowing from the fiduciary obligations owed by a council member to his or her council (or local government) as varied or complemented by the Act (which includes all regulations, including the Regulations, made under it), the common law, and any relevant code of conduct.

'advantage'

5. The term 'advantage' in regulation 7(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.

'detriment'

6. In *Treby and Local Government Standards Panel*¹⁴ Judge J Pritchard (as she then was) said in relation to the meaning of 'detriment' in regulation 7(1)(b):

"I accept the submission of counsel for the intervenor that the ordinary and natural meaning of the word 'detriment' is loss or damage done or caused to, or sustained by, any person or thing: Shorter Oxford English Dictionary.

The meaning of 'loss' is the 'diminution of one's possessions or advantages; detriment or disadvantage involved in being deprived of something, or resulting from a change in conditions', while 'damage' means 'loss or detriment to one's property, reputation etc' and 'harm done to a thing or person' Shorter Oxford English Dictionary.

A contravention of reg 7(1)(b) does not depend on actual detriment being suffered by a person: cf Chew at 633 (Mason CJ, Brennan, Gaudron and McHugh JJ). However, it must be established that the councillor believed that the intended result of his or her conduct would be that the other person would suffer detriment: cf Chew at 634 (Mason CJ, Brennan, Gaudron and McHugh JJ).

...

In my view, therefore, the word 'detriment' in reg 7(1)(b) should be given its ordinary and natural meaning."

7. In *Ryan and Local Government Standards Panel*¹⁵ the then President of the SAT, Judge J A Chaney (as he then was) agreed with the Panel's previously expressed view on the same matter that "the term 'detriment' [in reg 7(1)(b)] is to be constructed widely, and includes a financial or a non-financial loss, damage, or injury, of any state, circumstance, opportunity or means specially unfavourable. Accordingly, 'detriment' may include a tendency for others to think less favourably of a person, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment."

intention - 'to gain an advantage or to cause detriment'

8. The High Court of Australia case of *Chew v The Queen*¹⁶ ('Chew') considered s. 229(4) of the *Companies (Western Australia) Code*, which read: "An officer or employee of a corporation shall not make improper use of his position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation." In *Chew*, Mason C.J., Brennan, Gaudron and McHugh JJ concluded at [8] that "to" in s. 229(4) should be read as "in order to", and said, at [9] and at [12]:

"Once, as a matter of interpretation, the conclusion is reached that "to" means "in order to", s. 229(4) expressly declares purpose to be an element of the offence and purpose, in the context of that sub-section, is the equivalent of a specific intention."

¹⁴ [2010] WASAT 81 at [94] - [96] and [103]

¹⁵ [2009] WASAT 154 at [31]-[32].

¹⁶ [1992] HCA 18; (1992) 173 CLR 626

...

*In the course of argument, it was suggested that it was not necessary to establish that an accused person perceived that the alleged advantage or detriment was an advantage or detriment. We do not read the provision in that way. **Once one concludes that there is a purposive element in the offence, it is necessary to establish not merely that the accused intended that a result should ensue, but also that the accused believed that the intended result would be an advantage for himself or herself or for some other person or a detriment to the corporation.*** [Bold emphasis added]

9. Chew is authority in Western Australia for the following propositions:

- (1) The proper interpretation of "to" in regulation 7(1) is "in order to", and thus regulation 7(1) on its face reads: "A person who is a council member must not make improper use of the person's office as a council member: *[in order to]* gain directly or indirectly an advantage for the person or any other person; or *[in order to]* cause detriment to the local government or any other person."
- (2) Regulation 7(1) expressly declares purpose to be an element of the offence, and purpose in the context of that regulation, is the equivalent of a specific intention.
- (3) When considering whether a breach of regulation 7(1) has occurred, it is the subjective purpose or the specific intent of the council member with which the Panel is concerned.

The test for establishing a Council member's specific intent

10. The noun 'motive' means an emotion prompting an act. It is the emotion which gives rise to a person's intention. In this sense motive is entirely distinct from intention (or purpose) which embraces, in addition to the end, all the necessary consequences of an action including the means to the end and any consequences intended along with the end.¹⁷
11. A person's subjective intention and state of mind can be inferred in all the circumstances.¹⁸
12. The test for establishing that a Council member had the necessary subjective purpose or specific intent in order for him/her to be culpable (i.e. guilty, blameworthy or responsible) for a breach of regulation 7(1), is whether or not the evidence demonstrates that it is more likely than not that in committing the relevant conduct the member believed that the intended result of such conduct would be both or either: to gain directly or indirectly an advantage for the member or any other person; and/or to cause detriment to the local government or any other person.

¹⁷ *Hyams v DPP* [1974] UKHL 2 per Lord Hailsham of St. Marylebone, at p.7.

¹⁸ See the lengthy discussion on this issue by Kirby J in *Cutter v R* [1997] HCA 7; (1997) 143 ALR 498; (1997) 71 ALJR 638 (29 April 1997).

13. The member's belief mentioned in paragraph 12 above may be inferred from both or either of the member's motives and/or the other circumstantial evidence, if such inference is more likely than not the only reasonable inference to be drawn from such motives and/or such circumstantial evidence, as the case may require.¹⁹

What conduct contravenes *The Criminal Code* section 83(c)

14. Section 83 of the Criminal Code is headed 'Corruption' and reads, relevantly:

"Any public officer who, without lawful authority or a reasonable excuse:

- (a) acts upon any knowledge or information obtained by reason of his office ...;*
- (b) acts in any matter, in the performance or discharge of the functions of his office ..., in relation to which he has, directly or indirectly, any pecuniary interest; or*
- (c) acts corruptly in the performance or discharge of the functions of his office*

...,

so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 7 years."

Section 1(1) of *The Criminal Code* (the Criminal Code) reads, relevantly:

"(1) In this Code, unless the context otherwise indicates —

...

*The term "**public officer**" means any of the following —*

...

- (d) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law;*

(Underlining added)

Three alternative limbs or circumstances

15. The 3 alternative limbs or circumstances under which the conduct of a council member must fall within for that conduct to contravene section 83 of the Criminal Code, are:

- (1) [*Pursuant to section 83(a) of the Criminal Code*] Where a council member, without lawful authority or a reasonable excuse, acts upon any knowledge or information obtained by reason of his/her office, so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person.
- (2) [*Pursuant to section 83(b) of the Criminal Code*] Where a council member, without lawful authority or a reasonable excuse, acts in any matter, in the performance or discharge of the functions of his/her office, in relation to which he/she has, directly or indirectly, any pecuniary interest, so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person.

¹⁹ *ibid.*

- (3) [Pursuant to section 83(c) of the Criminal Code] **Where a council member, without lawful authority or a reasonable excuse, acts corruptly in the performance or discharge of the functions of his/her office, so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person.**

NOTE: The following only addresses the issue of what conduct of a local government council member contravenes section 83(c) of the Criminal Code.

s. 83(c) - Elements

16. On the face of section 83(c) of the Criminal Code, it appears that the elements of conduct contrary to section 83(c) of the Criminal Code are that:
- a public officer
 - without lawful authority
 - without a reasonable excuse
 - in performing or discharging any of the functions of his/her office
 - acts corruptly
 - so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person.

s. 83 – ‘public officer’

17. A council member falls within paragraph (d) of the definition of the term “public officer” in section 1(1) of the Criminal Code – i.e. a description that specifically includes a council member. Accordingly: a council member is a “public officer” for the purposes of section 83 of the Criminal Code; and a contravention of that section is a serious breach as defined in section 5.104(3).

s. 83 – ‘without lawful authority’

18. In his reasons in *The State Of Western Australia v Burke [No 3]*²⁰ (*Burke No.3*) Murray J set out the elements of the offence of corruption, as that offence is defined by s 83(c) of the Criminal Code. In *Burke No.3* Murray J said, relevantly at [74]:

In my view, the concept of 'lawful authority' is, in relation to s 83 of the Code, precisely that which I have discussed above in relation to s 81 of the Code. In other words, lawful authority is that which is described by s 31 of the Code. Criminal responsibility is negated if the act was done in execution of the law or in obedience to the order of a competent authority, which the accused was bound by law to obey, unless the order given was itself manifestly unlawful. [Underlining added]

²⁰ [2010] WASC 110

19. However, it appears that it will be a rare occasion (if at all) that a council member will be in a situation where his /her conduct is excused on the basis that the conduct was:
- (a) in execution (or, carrying out) of the law; or
 - (b) in obedience to the order of a competent authority which he/she is bound by law to obey.

s. 83 – ‘without a reasonable excuse’

20. It is well established that what constitutes a "reasonable excuse" depends upon the circumstances of the individual case and the purpose of the provision to which the defence of "reasonable excuse" is an exception: *Taikato v The Queen*²¹ (*Taikato*) On a broad interpretation of section 83 of the Criminal Code its purpose appears to be the prosecution of public officers for corrupt conduct, and the deterrence and prevention of corrupt conduct by public officers. Accordingly, in the light of *Taikato* and that purpose, it appears that the term ‘without a reasonable excuse’ in section 83 is likely to have a narrow operation.

s. 83(c) – ‘the functions of his office’

21. In relation to section 2.10, which is headed ‘Role of councillors’, it appears that:
- (a) by the use of the term *such other functions* in section 2.10(e) it may be properly inferred that the matters identified in the preceding ‘paragraphs’ (a), (b), (c) and (d) of that section are also ‘functions’ of a councillor (a council member);
 - (b) by virtue of the definition of ‘function’ in section 5 of the *Interpretation Act 1984* (the Interpretation Act), the matters identified in paragraphs (a), (b), (c) and (d) of section 2.10 are *specific* functions and responsibilities of a council member; and
 - (c) it would be more accurate if the heading of section 2.10 was ‘Functions and responsibilities of council members’.
22. In considering the meaning of the term “*the functions of his office*” in section 83(c) of the Criminal Code, it appears from relevant authorities²² that the term ‘*the functions of his office*’ in section 83(c) of the Criminal Code, as that term applies to the office of council member, includes:
- (a) the functions of a council member, as a member of the council, as set out in section 2.7;
 - (b) where a council member is also the mayor or president, the additional functions set out in section 2.8;
 - (c) the functions of a council member, as set out in section 2.10;
 - (d) the things done or omitted by a council member in an official capacity;
 - (e) any act or omission that is incidental to the carrying out of the functions and proper actions which the office of council member authorises;

²¹ (1996) 186 CLR 454 per Brennan CJ, Toohey, McHugh and Gummow JJ at 464

²² *Canadian Pacific Tobacco Co. Ltd. v Stapleton* [1952] HCA 32; [1952] HCA 32; (1952) 86 CLR 1 per Dixon CJ at p 6; *Herscu v R* [1991] HCA 40; (1991) 173 CLR 276 (21 October 1991) per Mason CJ, Dawson, Toohey and Gaudron JJ at [10], and Brennan J at [5]; *State of Tasmania v Johnston* [2009] TASSC 60 per Evans J at [38] – [39]; *DPP v Zierk* [2008] VSC 184 (30 May 2008) per Warren CJ at [18] – [19]

- (f) the situation where a council member performs a function which, by virtue of the office of council member, it is his/hers to perform, whether or not it can be said that he/she is legally obliged to perform that function in a particular way or at all; and
- (g) the wielding of influence in a matter or activity that:
 - (i) by virtue of the office of council member, is a matter or activity such that the council member wields influence or is in a position to wield influence; or
 - (ii) without limiting the generality of (g)(i) immediately above, cannot be undertaken without an authorisation from the council member's local government; or that is by way of a commercial dealing with that local government.

s. 83(c) – ‘acts corruptly’

- 23.** In considering the meaning of the term “*acts corruptly*” in section 83(c) of the Criminal Code, it appears from relevant authorities²³ that when used in reference to an office, the term may be ambiguous in that it may refer to:
- (a) any improper use of the office, no matter how slight, in the performance or discharge of any function of the office; or
 - (b) only a use of the office that is ‘a dereliction of duty’, or ‘a perversion’ or ‘a corruption’ of the proper performance of one or more of the functions of the office’.
- 24.** In the case of a council member, if the term ‘acts corruptly’ in section 83(c) of the Criminal Code means ‘*any improper use of the office*’ in the performance or discharge of any function of the office, then:
- (1) The only interpretation of regulation 7(1) that appears consistent with that meaning is such that it would read: *A person who is a council member must not [act corruptly when performing or discharging any function of the office of council member]; in order to gain directly or indirectly an advantage for the person or any other person; or in order to cause detriment to the local government or any other person.*
 - (2) However, it appears that the result of the interpretation mentioned in paragraph 24(1) above would be, with reference to a council member and his/her office, that:
 - (a) there is considerable if not complete overlap between the conduct prescribed by regulation 7(1), a contravention of which is a ‘minor breach’, and the conduct prescribed by section 83(c) of the Criminal Code, a contravention of which is a crime (or, an indictable offence) and a ‘serious breach’; and
 - (b) regulation 7(1) may be repugnant²⁴ to section 83(c) of the Criminal Code.

²³ *The State of Western Australia v Burke [No 3]* [2010] WASC 110 per Murray J at [74]; *Willers v The Queen* (1995) 81 A Crim R 219; *R v Tkacz* [2001] WASC 391 per Malcolm CJ at [36] – [40].

²⁴ The term ‘repugnancy’, in the present context, contemplates that a regulation on the topic concerned can be made, but the form which it takes contradicts the provisions of another law.

25. In *Re Suatu Holdings Pty Limited v Australian Postal Corporation*²⁵ Gummow J said:

"... in general, where legislation of the same legislature is under consideration, the Courts have tended to eschew the application of any "covering the field" doctrine derived from federal constitutional law. In Goodwin v Phillips (supra) at 10, Barton J. spoke in terms of "repugnancy". In Butler v Attorney-General (Victoria) (supra), Kitto J., earlier in his judgment, at 280 had approached the question by asking whether the two statutes "could stand together", and Fullagar J. (276) spoke of "contrariety", Taylor J. (at 285) spoke of "direct conflict", and Windeyer J. (at 290) asked whether the two statutes were clearly and indisputably contradictory, displaying such repugnancy that they would not be reconciled. Again, in Travinto Nominees Pty. Ltd. v Vlattas (supra) at 34, Gibbs J., in discussing the decision in Breskvar v Wall (supra), described that case as one in which it was held that the two statutes in question "could stand together".

26. Sections 5.104(1), (3) and (4) read:

"(1) Regulations may prescribe rules, to be known as the rules of conduct for council members, that council members are required to observe.
(3) The rules of conduct may contain provisions dealing with any aspect of the conduct of council members whether or not it is otherwise dealt with in this Act.
(4) Regulations cannot prescribe a rule of conduct if contravention of the rule would, in addition to being a minor breach under section 5.105(1)(a), also be a serious breach under section 5.105(3)."

27. The Regulations were prescribed pursuant to section 5.104 after the applicable legislation²⁶ was passed by Parliament. They were then scrutinised by the Joint Standing Committee on Delegated Legislation; and not disallowed by Parliament during the relevant disallowance period. Accordingly, while there is no Parliamentary speech or debate that might indicate the purpose or object underlying regulation 7, it appears that Parliament – by virtue of its delegation to the Joint Standing Committee on Delegated Legislation of its function of scrutiny of delegated legislation, and by virtue of the fact that that regulation 7 was not disallowed by Parliament: (a) did not intend that regulation 7(1) would be contradictory of section 83(c) of the Criminal Code; and (b) did intend that regulation 7(1) and section 83(c) of the Criminal Code *"could stand together"*. Indeed, the terms of regulation 7(2) indicate that result, when considering the respective application of regulation 7 and section 83(c) of the Criminal Code.

28. Section 18 of the Interpretation Act stipulates that:

"In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object."

²⁵ [1989] FCA 60 (10 March 1989) at [59]

²⁶ the Local Government (Official Conduct) Amendment Act 2007

29. Section 83(c) of the Criminal Code is a provision contained in the Code of Criminal Law set forth in the Schedule to the *Criminal Code Act 1913*. The purpose or object underlying it appears to be that it is a general provision that relates, relevantly, to the improper use of office by any 'public officer' (which term, as defined in section 1(1) of the Criminal Code, includes a council member) for the purpose of gaining a benefit/advantage or causing a detriment. Contravention of Section 83(c) of the Criminal Code is a serious breach under section 5.105(3)
30. Regulation 7 is a rule of conduct under section 5.104(1), made after section 83(c) of the Criminal Code came into force, and is delegated legislation under the Act. The purpose or object underlying it appears to be that it is a special provision that relates to the improper use of office by a council member for the purpose of gaining a benefit/advantage or causing a detriment.
31. In the case of a council member, it appears that if the term 'acts corruptly' in section 83(c) of the Criminal Code is interpreted as 'any improper use of an office' in the performance or discharge of any function of the office then that interpretation overlooks section 8 of the Interpretation Act, which requires that regulation 7 (a written law as defined in section 5 of that Act) must be considered as always speaking and, being expressed in the present tense, that it must be applied to the circumstances as they arise, so that effect may be given to every part of regulation 7 according to its true spirit, intent, and meaning.
32. In light of the foregoing, it appears that it is not an unreasonable view that the term 'acts corruptly' in section 83(c) of the Criminal Code, in so much as it refers to the quality of the act or omission which is said to be corrupt, does not refer to any improper use of the office, no matter how slight, in the performance or discharge of any function of the office – rather, it refers to a use of the office, in the performance or discharge of any function of the office, that is 'a dereliction of duty', or 'a perversion' or 'a corruption' of the proper performance of the function concerned of the office'.

'a dereliction of duty'

33. In *Hargreaves and Local Government Standards Panel*²⁷ Judge J Chaney (Deputy President) (as he then was) said:

"The *Oxford English Dictionary* online defines dereliction as 'implying a morally wrong or reprehensible abandonment or neglect; chiefly in the phrase dereliction of duty'. The *Macquarie Dictionary* defines dereliction as 'culpable neglect, as of duty'. ... While the same words are used in relation to forsaken or abandoned ships or other objects, the expression 'dereliction of duty' carries with it, in my view, notions of blameworthy conduct."

²⁷ [2008] WASAT 300 at [19].

'a perversion of the proper performance of one or more of the functions of the office'

34. The following definitions appear in the Shorter Oxford English Dictionary (6th ed) in relation to the word 'perversion' and some of its grammatical forms:

"perverse adjective

1 Turned away from or against what is right or good; wicked. **b** Obstinate or persistent in error or wrongdoing.

2 Of a person, action, etc.: going against or departing from what is reasonable or required; wayward, petulant, peevish, untoward. **b** Of a thing or event: adverse, unpropitious.

3 a Contrary to the accepted standard or practice; incorrect; wrong. **b** Of a verdict: against the weight of evidence or the direction of the judge on a point of law."

"perversion noun

1 The action of perverting someone or something; the state of being perverted; turning aside from truth or light; diversion to an improper use; (a) corruption, (a) distortion; a perverted or corrupted form of something.

2 Preference for an abnormal form of sexual activity; sexual deviance. Also, (an) abnormal or deviant sexual activity or behaviour."

"pervert verb

I verb trans. Turn upside down; upset. overthrow; ruin.

2 Divert from the proper course, use, aim, etc.; misuse, misapply; willfully misconstrue.

3 spec. Turn (a person. the mind, etc.) away from right belief, opinion, or action; lead astray; corrupt.

4 Turn aside, deflect. rare (Shakes.).

II verb intrans. **5** Deviate from the tight path; apostatize."

"pervasive adjective (a) tending to turn awry or distort; (b) having the character or quality of perverting someone or something. **perverted adjective** (a) that has been perverted; (b) exhibiting or practising perversion."

'a corruption of the proper performance of one or more of the functions of the office'

35. The following definitions appear in the Shorter Oxford English Dictionary (6th ed) in relation to the word 'corrupt' and some of its grammatical forms:

"corrupt adjective

[ORIGIN Old French, or Latin *corruptus* pa. pple of *corrumpere* destroy, mar, bribe, formed as COR- + *rumpere* break]

1 Depraved; infected with evil; perverted.

2 Turned from a sound into an unsound condition; infected with decay; mouldy, rotten; rotting. *arch.*

3 Influenced by bribery; perverted from fidelity.

corrupt practice spec. any of various illegal practices (as bribery, personation) in connection with elections (usu. in *pl.*)."

"corruptly adverb. corruptness noun."

"corrupt verb.

[ORIGIN from the adjective.]

I verb trans. **1** Render morally unsound; destroy the moral purity or chastity of; defile.

- 2 Make mouldy or rotten; turn from a sound into an unsound condition; contaminate, infect, *arch*.
- 3 Induce to act dishonestly or unfaithfully; bribe.
- 4 Pervert the text or sense of (a law etc.] for evil ends.
- 5 Mar, spoil in quality. Now *rare* or *obsolete*.
- 6 **a** Destroy the purity of (a language) or the correctness of (a text); unconsciously or accidentally alter (a word of a language).
- II verb intrans.** 7 Putrefy, rot; decompose, *arch*.
- 8 Undergo moral decay; degenerate.
- 9 Cause corruption; destroy moral purity.”
- “corruption noun**
- 1 Putrefaction; decay, esp. of a dead body. Formerly also more widely, decomposition of any kind, of organic or inorganic substances.
- 2 Moral deterioration; depravity; an instance or manifestation of this.
- 3 A corrupting influence; a cause of deterioration or depravity.
- 4 Perversion of a person’s integrity in the performance of (esp. official or public) duty or work by bribery etc.
- 5 Evil nature; anger, temper. Now *dial*.
- 6 Decomposed or putrid matter; pus. *obsolete exc. dial)*”

36. In light of the contents of paragraphs 23 to 35 above it appears that, when used in reference to ‘an office’, the term ‘acts corruptly’ in section 83(c) of the Criminal Code refers to a use of the office that is not merely an improper use of the office, but rather is:
 - (a) a deliberate abandonment of a particular duty or function of the office; or
 - (b) a deliberate perversion of the proper performance of a particular function of the office; or
 - (c) a deliberate corruption of the proper performance of a particular function of the office.
37. Alternately to the contents of paragraph 36 above, if they are wrong at law, in light of the contents of paragraphs 23 to 35 above, if a council member were accused of committing a contravention of section 83(c) of the Criminal Code then it appears that, by virtue of regulation 7, the term ‘acts corruptly’ in that section, in so much as it refers to the quality of the act or omission which is said to be corrupt, is to be read down to refer to a use of the office that is not merely an improper use of the office, but rather is:
 - (a) a deliberate abandonment of a particular duty or function of the office; or
 - (b) a deliberate perversion of the proper performance of a particular function of the office; or
 - (c) a deliberate corruption of the proper performance of a particular function of the office.
38. It appears that either of the interpretations of the term ‘acts corruptly’ as mentioned respectively in paragraphs 36 and 37 above appears to be consistent with the general law and does not appear to lead to a repugnancy between regulation 7(1) and section 83 of the Criminal Code on the basis that they can stand together and operate cumulatively so that a council member is obliged to observe each of them.

s. 83 – ‘so as to gain a benefit or cause a detriment: part of the concept of corruption’

39. In *Burke No.3*²⁸, Murray J said:

“Relevantly for present purposes, s 83 [of the Criminal Code] makes it an offence for a public officer to act corruptly in the performance or discharge of the functions of his office or employment, ‘so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person’. It has been held that the words, ‘so as to’, show that the gaining of a benefit or causing a detriment are to be interpreted purposively.

There is no need for the prosecution to establish that any person received an improper benefit from the performance of the corrupt act or that any person was caused improperly to suffer a detriment from the performance of that act. It is necessary, however, before it will be held that the accused has acted corruptly, for it to be proved that he acted for the purpose of gaining an improper benefit for, or causing an improper detriment to, any person: Rompotis v The Queen (1996) 18 WAR 54 per Malcolm CJ at 59.”

What conduct of a local government council member contravenes section 83(c) of the Criminal Code

40. In light of the contents of paragraphs 15 to 39 above in this Attachment it appears that, until the matter is the subject of a judicial determination to the contrary, it is not unreasonable to conclude that for the purposes of regulation 7(2) the conduct of a council member contravenes section 83(c) of the Criminal Code where he/she:

- without a reasonable excuse
- in performing or discharging a function of his/her office of council member
- acts in a way that is not merely an improper use of the office, but rather is:
 - a deliberate abandonment of a particular duty or function of the office; **or**
 - a deliberate perversion of the proper performance of a particular function of the office; **or**
 - a deliberate corruption of the proper performance of a particular function of the office;
- for the purpose of gaining a benefit, whether pecuniary or otherwise, for any person, or for the purpose of causing a detriment, whether pecuniary or otherwise, to any person.

²⁸ *The State of Western Australia v Burke [No 3]* [2010] WASC 110 at [74].

Attachment D

Councillor Yates' particular response to the subject allegation (i.e. the contents of Councillor Yates' 7-page document signed by him, dated 25 January 2011)

"[The subject allegation is repeated here]

[The issues identified in paragraph 5(1) in the body of these Reasons are repeated here]

Response:

1. Councillor Sam Piantaodsi died on Thursday March 4 2010.
The email I sent out on March 9 2010 was to only 7 Councillors and the CEO.
2. The substance of my email raises the following 3 key points:
 - A. New local Planning Manual Guidelines released March 4 2010
 - B. Problems of deferral motion passed Jan 19 2010. (Cr Yates not present)
 - C. A strategy to resolve the issue
- 2.A The **new Local Planning Manual Guidelines** was release [sic] on Thursday March 4 2010 by the WA Planning Commission. (5 days before Mar 9).

On page 41, section 4.5.9, it says

'If the local government does not make a determination on an application within the prescribed period, usually 60 days ... it is deemed to have been refused. The local government can still make a decision but deemed refusal provides an avenue for review by the State Administration Tribunal'

This part of my email was to inform Councillors that 5 days before March 9 2010, on March 4 2010, the rules related to the outcomes provisions of planning applications HAD CHANGED, including:

- (i) If a determination is not made with 60 days, then the application is deemed to have been refused, and
- (ii) The previous 90 days prescribed period was now 60 days.

This was no attempt to make *'improper use of his office as a council member to gain directly or indirectly an advantage for a Mrs C McGregor'* but rather to inform councillors that the rules applicable to everyone had changed.

- 2.B The email makes reference to **problems of the deferral motion passed** (Jan 19 2010) related to Mrs McGregor's property of 12 Thompson Rd, to a higher R40 coding on January 19 2010, it means that before the next scheduled ordinary council meeting on March 23 2010, she may start appeal proceedings against the Town of Bassendean, no doubt at some considerable cost to the Town.

The motion passed at the January 1920100CM was:

TOWN OF BASSENDEAN - MINUTES

ORDINARY COUNCIL MEETING HELD EN THE COUNCIL CHAMBER, 48 OLD PERTH RD, BASSENDEAN, TUES, 19 JANUARY 2010, AT 7.OOPM

OCM1-25/01/10

COUNCIL RESOLUTION - ITEM 10.14

MOVED Cr Piantadosi, Seconded Cr Collins, **that Council defers this item until a recommendation is received from the Planning Commission.**

CARRIED 4/3

Crs Piantadosi, Brinkworth, Pule and Collins voted in favour of the motion. Crs Gangell, Stubbs and Lewis voted against the motion.

Cr Yates returned to the Chamber, the time being 10. 06pm.

At the Feb 9 2010 OCM, the CEO made mention of 'Development Control Policy 1.6' in relation to the consideration of the Ashfield Precinct Plan.

On or about Feb 13 2010, I researched and found the WAPC Document 'Development Control Policy 1.6', dated January 2006. (See attachments)

Development Control Policy 1.6 relates to **TOD** Transit Oriented Development with the following related points....

In section 4.2.1 it states that *'Residential development should be encouraged close to transit facilities giving places an individual identity within the urban fabric.*

In section 4.2.3 it states that *'Densities should be increased through a subdivision pattern which allows for the progressive intensification of activities'*

In section 1, Policy Approach, it states that *'This approach places much of the emphasis for the detailed delivery of transit related development outcomes upon local government ... under the guidance provided by this WAPC Policy'.*

The problems with the Cr Piantadosi deferral motion of Jan 19 2010

- (i) No action until *'a recommendation is received from the Planning Commission'* but there would never be such a recommendation because as the increased coding application already was aligned with Development Control Policy 1.6.

- (ii) For Cr Piantadosi to propose such a motion at the Jan 19 2010 OCM, it seems to suggest that he was informed by a person or persons as to a possible way to delay the consideration for a higher coding indefinitely by requesting a deferment until a recommendation is received, knowing that NO recommendation from the WAPC would be made.

C. A strategy to resolve the issue

In my email of March 9 2010, I suggested that the Council had the opportunity to reconsider the re-presented motion as a way of resolving the issue without the large legal expense and embarrassment of exposure because of a poor understanding of Development Control Policy 1.6 as published in January 2006, by staff and councillors, which may result in State Appeals Tribunal (SAT) appeal, which the Town could quite easily lose.

My email was intended to inform councillors that the rules had changed.

Further, my email also described that the January 19 2010 deferring motion passed by council could be regarded as a refusal and so the 60 day prescribed period, as per the new Local Planning Manual Guidelines, was no [sic] applicable, with an 'actionable date' of March 20, which would be before the next OCM of March 23 2010.

My email was not intended to apply influence onto any councillor, but rather to explain the consequences of their actions of voting for a deferment on January 19 2010, (where I did NOT participate), and the new actionable date of March 20, (as per the new Local Planning Manual Guidelines).

- 3. The CEO responded to my March 9 2010 email with his own email that was circulated to councillors. It contained substantial errors.

"Dear Don

What you have advised councillors is serious misinformation suggesting that Council may face some sort of action if your advice is not followed.

Appeal rights relate to applications for planning consent under the Scheme and not to requests to amend the Local Planning Scheme.

Ms McGregor does not have any appeal rights against Council decision to defer consideration of the request, or to Council's failure to support the request if that is what Council resolves.

To suggest that Council will have to face the SAT it'll does not approve an application for a spot rezoning is simply not true.

- (i) My email did not contain 'serious misinformation'
- (ii) Appeal rights are contained in the new Planning Manual Guidelines that were issued March 4 2010. Maybe the Town staff were not aware of what is contained in the new applicable manual?
- (iii) Deferring her application does trigger a prescribed SAT appeal process.

The balance of the CEO'S email of March 92010:

On the subject of guidelines, I refer to the Local Government Guidelines on Dealing with Developers April 2006:

I quote: "The Council is the decision maker with the role of of [sic] the professional staff to report on all those issues, and to provide advice, in a full, free and frank manner. The Council body needs to be assured that the decisions it makes are well informed, in accordance with all appropriate and relevant considerations and can stand later scrutiny whether in the courts or by the public,"

and

"The integrity of a local government will be improved where the role of the professional staff in assessing an application is clearly separated from Council's role of determining the application."

and

"Elected members must not when lobbied commit their vote on the proposal. Members may offer support or otherwise but as decision makers they are obliged to consider all relevant facts, including the debate at the meeting, prior to making their decision. Elected members who commit their vote may be faced with claims of perceived bias."

The Director General of the Department of Planning has stated that planning decisions should be considered after having received a professional officer's report, and the guidelines go one step further with "prior to a final decision being taken, professional staff should be given the opportunity to comment on any additional matters raised during the meeting".

- (iv) The advice be [sic] given by staff was not correct and had the potential to detract from the matters being considered by Council.
 - (v) My email of March 92010 was informative, and did not seek a commitment from Councillors BEFORE the March 92010 OCM to declare their voting position. The CEO is in error in inferring this in his email response of the same day.
4. Making improper use of his office as a council member to gain directly or indirectly an advantage for Mrs C McGregor.

See Planning Bulletin 102 (Nov 222010) in the attachments

The WAPC introduced a new provision 'Section 76 of the Planning and Development Act 2005' to overcome the planning short comings of Local Government. See 76.1.a and the underlined text where the Minister can override the decisions of Local Government and direct changes to Planning Schemes to what 'ought to be adopted'. The Planning Bulletin 102 also underlines this text because of its importance.

In July 2005, the previous CEO of the Town of Bassendean, Gary Evershed, participated in the conference *TOD - Making it happen*.

His paper discussed the Bassendean Town Centre Revitalisation Program and included 800m radius circles around the 3 railway stations, including Success Hill Railway Station.

With Mrs McGregor's property adjoining the Success Hill railway station, there is ONLY THE ACCESS RAMP on railway reserve land that separates her property from the rail lines. According to all TOD studies published, her property should have a coding in the order of R100 or higher.

In the subsequent Hames Sharley Town Area Strategy material, released early in 2007, the property owned by Mrs McGregor was indicated to be in the R100 zone.

When the Bassendean Town Plan Scheme 10 was gazetted in June 2008, after some 12 or more years in the drafting and development by the Town Planner Mr Reed and other, the property was only zoned R25, and totally out-of-sync with the TOD State Government planning direction to encourage and promote higher densities for such land that had evolved over the previous four years, and now seven years.

It is for the above reasons that the WAPC has introduced Section 76 rulings to override Local Government decisions to what 'ought to be adopted'.

5. Direct or indirect advantage with regards Mrs McGregor

When a councillor votes, quite often there are 'winners and losers'. Indeed, there is rarely an ordinary council meeting where the vote may grant a direct or indirect advantage in some form, And in the matter of Mrs McGregor, I excused myself from the Council Chambers and did not participate or vote on many occasions.

Recent examples of possible Councillor 'direct or indirect' advantage:

Jan 25 2011: Council considered and passed a motion not to demolish an old toilet block at Pt Reserve at a cost of \$57,000, but rather to use \$10,000 of cash-in-lieu funds to be paid to a local canoe group to establish onsite canoe storage where there is none on 5km of Swan River foreshore.

This could be seen as creating an advantage for canoe users, and then going further, if the canoe club charged rents to store canoes, then this would compound the 'advantage test' as the club also would be receiving an advantage.

Jan 25 2011: Council considered and passed a motion to extend the Sparx Child Care leases. This could be perceived as creating an advantage for the Child Care Early Learning Centre.

Jan 18 2011: At a special meeting, Council considered and passed a motion to donate \$4000 to 3 groups to assist in the natural disaster Emergencies. This included \$1000 paid to the Swan Districts Football Team giving them a direct advantage to gain from the public relation benefits of participating in the Queensland flood cleanups.

And there are so many other examples

6. Addressing the allegations.

(A) *Did Cr Yates commit the alleged conduct on March 9 2011 namely the improper use of his office as a council member?*

No. The intention of my actions was to inform councillors of the changes in the WAPC's New Planning Manual guidelines (of March 4 2010) and to alert councillors that the motion passed on Jan 19 2010, may be in non-compliance with WAPC's Planning Control Policy 1.6 related to TOD developments (of Jan 2006) and such implications. It was not an 'improper use of my office'.

(B) *If issue (A) is answered in the affirmative, was that conduct a use of Councillor Yates' office of a Council member?*

No

(C) *if issue (B) is answered in the affirmative, viewed objectively, was that conduct an improper use of Council/or Yates' office of a Council member?*

No.

(D) *if issue (C) is answered in the affirmative, in committing that conduct did Council/or Yates believe that the intended result would be to gain directly or indirectly an advantage for Mrs McGregor?*

No. As an active member of the Audit and Risk Committee, the intention was not to see the Town's limited resources being used in matters like "defending the indefensible" [sic] before the State Appeals Tribunal.

By making councillors aware of various state legislation that may apply in the situation of Mrs McGregor, (that had not been previously presented by the Officers of the Town in full), the aim was for a better informed council, to help in their deliberations, in which I would not be present."

Attachment E

General views and material on the functions and responsibilities of a council member

Declaration of office

1. When a person makes the required declaration of office pursuant to section 2.29(1) after he/she has been elected as a council member, he/she declares that he/she takes that office upon himself/herself and will duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the local government's district according to the best of his/her judgment and ability, and that he/she will observe the Regulations.

An undertaking of significant public obligations

2. An individual undertakes significant public obligations when he/she becomes a member of the council of a local government. Those obligations are inseparable from the position: he/she cannot retain the honour and divest himself/herself of the obligations. This means that he/she can not effectively divest himself/herself of the character of a council member in any of his/her dealings in or with respect to a matter that has come before him/her as a council or committee member.

A council member's 'obligation of fidelity' to council

3. When a person makes the said required declaration of office he/she voluntarily takes on an obligation of fidelity²⁹ or faithfulness, owed to the council as the governing body of the local government, to unfailingly and strictly adhere to the terms of the declaration. Other aspects of this obligation are mentioned in paragraphs 32 to 39 below.

Personal interest or concern not to prejudice obligations

4. The effective discharge of a council member's obligations is for the member to determine. However, the Act and the common law do not approve or support the creation of any position of a council member where his/her personal interest or concern contravenes or is prejudicial or may lead him/her to act prejudicially to any of his/her council member obligations.

²⁹ Each of the nouns 'fidelity', 'fealty' and 'loyalty' denote faithfulness. *Fidelity* refers to the unfailing fulfilment of one's duties and obligations and strict adherence to vows or promises. *Fealty*, once applied to the obligation of a tenant or vassal to be faithful to his feudal lord and defend him against all his enemies, now refers to the faithfulness that one has pledged to uphold: e.g. *swore fealty to the laws of that country*. *Loyalty* refers to a steadfast and devoted attachment that is not easily turned aside: e.g. *loyalty to an oath*.

The role of the council

5. The role of the council of a local government is set out by section 2.7.³⁰ It is noted that, by virtue of that section and the definition of the term ‘function’ in section 5 of the *Interpretation Act 1984*, it is the role of the council to govern the local government’s affairs and to be responsible for the performance of the local government’s functions, powers, duties, responsibilities, authorities and jurisdictions.

The role of a councillor

6. The ‘role’ of a councillor is set out in section 2.10, which reads:

“A councillor -

- (a) represents the interests of electors, ratepayers and residents of the district;*
- (b) provides leadership and guidance to the community in the district;*
- (c) facilitates communication between the community and the council;*
- (d) participates in the local government's decision-making processes at council and committee meetings; and*
- (e) performs such other functions as are given to a councillor by this Act or any other written law.”* [Underlining added]

However, it appears that:

- (a) by the use of the term *such other functions* in section 2.10(e) it may be properly inferred that the matters identified in the preceding ‘paragraphs’ (a), (b), (c) and (d) of that section are also ‘functions’ of a councillor (a Council member);
 - (b) by virtue of the definition of ‘function’ in section 5 of the *Interpretation Act 1984*, the matters identified in paragraphs (a), (b), (c) and (d) of section 2.10 are a council member’s specific functions and responsibilities; and
 - (c) it would be more accurate if the heading of section 2.10 was ‘Functions and responsibilities of councillors’.
7. By virtue of sections 2.7 and 2.10 the role of a councillor is divided into two broad categories – as a member of the local government’s governing body, the council, and as an elected person.
8. Elected members constitute a local government’s council. The most basic obligation of councillors is to govern and to vote on matters. They are responsible for: observing and implementing section 2.7; ensuring the needs and concerns of their community are addressed; and communicating the policies and decision of the council to their community.

³⁰ Section 2.7 of the Act reads:

“(1) The council –

- (a) governs the local government's affairs; and*
 - (b) is responsible for the performance of the local government's functions.*
- (2) Without limiting subsection (1), the council is to –*
- (a) oversee the allocation of the local government's finances and resources; and*
 - (b) determine the local government's policies.”*

A councillor's role and functions under s. 2.10(a), (b) and (c)

9. Generally, a council member (which term embraces an elector mayor and an elector president) will carry out his or her role and functions under section 2.10 by observing and implementing section 2.7 of the Act and ensuring the needs and concerns of his or her community as a whole are addressed.
10. Generally, at a minimum there are 4 means by which a council member will carry out his/her functions under section 2.10(a), (b) and (c), and in so doing will observe and implement section 2.7 – namely:
 - (a) by reading the papers and otherwise preparing for council meetings and applicable committee meetings;
 - (b) by attending at such meetings, making any required disclosure of interest, and constructively and actively participating in the local government's decision-making processes at such meetings;
 - (c) representing his/her local government at organised events and on outside bodies as agreed and reporting back on their activities as appropriate; and
 - (d) where appropriate, by acting as an intermediary or conduit in communications between, on the one hand, electors, ratepayers and residents of his/her local government's district, and, on the other hand, his/her council.
11. A council member represents the interests of all electors and residents, and not merely the interests of any special group or groups who may have helped get the member elected, no matter how valid the issues of any such group may be.
12. The representational role of a council member does not mean that he or she has an obligation to support all suggestions made. A council member has an obligation only to consider the varying views of the community, and then make judgments about actions.
13. In councils that operate under a ward system³¹ a council member has both an obligation to present the views and needs of electors in his/her ward *and* an obligation to consider the good of the local government's district as a whole when making a decision.
14. On the proviso that it does not contravene any of his/her council member obligations, a council member may represent the interests of a particular elector, ratepayer or resident of the district on occasions such as special appeals, or reviews of decisions not made by or at the delegation of his/her local government.

³¹ A ward system in a local government's district occurs when the district is divided into sections (or wards) for electoral purposes.

15. The responsibilities of a council member include:

- developing and maintaining effective working relationships with officers and other members of the council to promote the council's objectives
- assisting in the scrutiny of all council policies, objectives and activities
- taking part in the council's regulatory duties as appropriate, by making objective decisions, based on the evidence available
- keeping up-to-date with all developments affecting the district of his/her local government and the council, including government policies and prospective legislation
- keeping up-to-date with the corporate priorities of the council, its policies and procedures and to read the relevant paperwork prior to participating in any meeting
- observing the expected standards of behaviour of a council member
- maintaining the highest standards of conduct and ethics, particularly by seeking to serve the community without personal gain and to show respect for fellow council members, staff and the public
- participating in training and development for council members according to personal need and the needs of the council.

16. A council member's role or function as an elected representative provides an essential link between the community and council and, accordingly, in observing his/her functions and responsibilities under section 2.10(a), (b) and (c), subject to the contents of paragraph 38 below, a council member may:

- support local partnerships and organisations
- deal with constituent enquiries about aspects of council business
- explain council policy
- encourage community participation and citizen involvement in decision-making
- listen to the needs of local people and take their views into account when considering policy proposals and in decision-making
- pass on electors' views, support initiatives, report complaints and problems he/she perceives, by informing the CEO or raising such matters in council meetings
- communicate with the community via a newsletter, e-mail or website, *on the proviso that the contents of any such communication do not contravene any of his/her council member duties or obligations.*

17. A consequence of the roles of a councillor set out in section 2.10(a), (b) and (c) and his/her obligation of fidelity to the council, is that where a council member takes it on himself/herself to make public statements, comments or remarks about both or either of the affairs of his/her local government and/or any acts or omissions of another council member, the council member has an obligation to ensure that any statement of fact he/she mentions or relies on is substantially true, and that his/her comments or remarks are not made or delivered with malice. The term 'malice' "embraces ill-will, spite and improper motive"³² and the term 'spite' refers to an intention to annoy, hurt, or upset.

³² *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 137.

18. A council member provides leadership and guidance to the community by, for example, highlighting possible courses of action or directions which could be followed; putting forward options or ideas; and presenting arguments or possible solutions to a problem at community forums and meetings of council or its committees.
19. While a council member has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a), (b) and (c) – is subject to (i.e. subordinate to) the member's duty to abide by the provisions of the Act and its regulations, any applicable code of conduct and the procedures and decisions of his/her local government.
20. The Act does not impose upon a council member any right to conduct himself/herself in a manner that is contrary to the relevant provisions of the Act or its regulations, or the standards of conduct expected of a person in that position, or the council's responsibility for the performance of the local government's functions.
21. A council member may, in observing his/her responsibilities under section 2.10(a), (b) and (c), campaign on local issues, championing the causes that further the interests, quality of life and development of the community.
22. Council members are required to provide leadership and guidance to the community. This is especially important when communities face challenges, particularly in the event of catastrophes caused by flood or fire, for example.
23. In order to facilitate communication between the community and the council, council members are required to ensure local people are informed about: services in the area; decisions that affect them; and the reasons why decisions are taken by the council.
24. Council members have a responsibility to represent the broad needs and wishes of the whole community in making decisions about the provision of services and the allocation of resources.
25. Council members may hold particular views on certain issues, and may consider their views to have been endorsed by the community that elected them. However, councillors must attempt to find a balance between the obligation to represent the interests of individual constituents and the need to make decisions on behalf of the whole community.
26. Council members are required to display leadership and integrity to help ensure that the decisions they make as a member of the governing body are in the best interest of all the community.
27. A part of a council member's role is to review council's policies. If a council member considers that a policy needs changing he/she needs to debate this in a full meeting of council or at an applicable committee meeting.

A council member's fiduciary obligations to the council

- 28.** A fiduciary relationship exists between a council member and their council as the governing body of the local government. The essential features of the fiduciary obligations owed by a council member to his or her council (or, to the local government) may be summarised as:
- (a) an obligation to act in good faith – i.e. the council member must in his or her dealings act in good faith in what he or she considers to be the best interests of the council;
 - (b) an obligation to exercise powers conferred on the council member only for the purposes for which they were conferred – i.e. for “proper purposes”;
 - (c) the no conflict rule – i.e. a council member cannot have a personal interest (i.e. a pecuniary interest) or an inconsistent engagement with a third party where there is a real and sensible possibility of conflict; and
 - (d) the no profit rule – i.e. a council member cannot obtain an advantage for himself/herself or others from the property, powers, confidential information or opportunities afforded to the member by virtue of his or her position.
- 29.** [*Acting ‘in good faith’*] In relation to a council member’s said obligation to act in good faith, the term ‘in good faith’ refers to a state of mind that embraces:
- (a) an honest and conscientious approach³³; **and**
 - (b) an absence of intent to seek unconscionable advantage³⁴; **and**
 - (c) a belief that all is being regularly and properly done.³⁵
- 30.** The fiduciary obligations owed by a council member to their council are the paramount obligations of a councillor by virtue of the fact that council members are representatives of their community and elected by and from that community.
- 31.** The fiduciary obligations owed by a council member to their council take precedence notwithstanding that:
- (a) it may be expected that council members will support particular views as to what is in the best interests of the community and that often they will have strong personal views as to what ought to occur in the community;
 - (b) council members may be expected to hold particular views as to how they would wish their community to develop and to discharge their duties as council members by reference to those views;
 - (c) council members may be assumed to hold and to express views on a variety of matters relevant to the exercise of the functions of the council; and
 - (d) by virtue of the political nature of the processes they are involved in as representatives of their community, as recognised under the Act, council members can obtain input from numerous sources and bring their own opinion to bear on matters for council decisions.

³³ *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 (6 February 2004), an appeal that involved consideration of the term ‘in good faith’ in s 18D of the *Racial Discrimination Act 1975 (Cth)*, per French J (as he then was) at [90] – [91].

³⁴ *ibid*

³⁵ *Cannane v J Cannane Pty Ltd (In Liquidation)* [1998] HCA 26; 192 CLR 557; 153 ALR 163; 72 ALJR 794 (7 April 1998) per Kirby J at [101]

The council is a collegiate body and decision-maker

- 32.** The council of a local government is *an organised body of people performing certain common functions and sharing special privileges*. Accordingly: (a) the council of a local government is a *collegiate* body and a *collegiate* decision-maker, with its members voluntarily elected by willing eligible electors from the community for whom they make decisions; and (b) the council's members are a group of colleagues.³⁶

The council is a team

- 33.** The council of a local government is also *a cooperative unit of people linked in a common purpose* – namely, the fulfilment of the council's role pursuant to section 2.7. Accordingly, a local government's council is a team, and each council member is a member of the team.

The situation of a council substantially mirrors that of Cabinet

- 34.** In comparison to the State Government situation, the situation of a council of a local government substantially mirrors that of Cabinet. While council members are elected, in local government there is no equivalent of Parliament. The Act does not recognise that political parties³⁷ have any part to play in local government in Western Australia.³⁸
- 35.** Also, the Act does not recognise any group of council members being or acting as a political 'Opposition' to the local government concerned. In particular, the concept of an official opposition would be contrary to the intent of the Act.

Appropriate criticism expected, before local government decision made

- 36.** Council members, as the members of a collegiate body and a team, are expected, where appropriate and in an appropriate forum, to *appropriately* criticise the views of their fellow councillors on a matter, *until such time as the local government has made its decision on the matter*.

³⁶ By virtue that the term 'collegiate' has a secondary meaning derived from a secondary meaning of *college*: a body of equals (a group of colleagues).

³⁷ For present purposes, the term 'political party' is used to refer to an organisation of like-minded people which aims to develop policies and endorse candidates to contest elections with a view to forming government.

³⁸ This is unlike the Act's respective equivalent Acts in New South Wales and Queensland, where a person standing for the office of council member is permitted to be endorsed for the office by a registered political party.

A council member's 'obligation of fidelity' to his/her local government's decisions

- 37.** A council member, as a member of a collegiate decision-maker, the council, and as an obligation of the office of council member, has an obligation of fidelity (or loyalty) to his/her local government's decisions (particularly those made by its council), irrespective whether:
- (a) the decision was made at a regularly held meeting of the council or a relevant committee; or
 - (b) the council member was present when the decision was made; or
 - (c) the council member voted for or against the decision; or
 - (d) the council member agreed or not with the decision or the reason or any of the reasons for the decision; or
 - (e) the decision was made, under delegation, by his/her local government's CEO or another staff person.
- 38.** However, there are situations when a council member's obligation of fidelity (or loyalty) does not apply – for example, without limiting other examples:
- Where a matter before a council or a relevant committee meeting is in relation to a motion or a notice of motion to revoke or change a decision of the council or the committee.
 - When a council member has doubt about the facts or lawfulness of a proposed or actual process or decision by council, a relevant committee or otherwise by or on behalf of the local government.³⁹
- 39.** It is imperative that council members accept that a consequence of their obligation of fidelity to council is that whenever they are acting in their capacity as a council member or are otherwise using their office of council member in relation to a decision made by the council while they are a council member, they are required to adhere to and actively observe and carry out all of the functions, responsibilities and obligations that they have as a council member.

Treating others with respect

- 40.** The expected and required standards of conduct of a council member (which term embraces an elector mayor and an elector president) include treating others with respect.⁴⁰
- 41.** The Macquarie Dictionary defines 'respect', relevantly, as 'to show esteem, regard, or consideration for' and 'to treat with consideration; refrain from interfering with'.

³⁹ In this situation, it is appropriate that the member: bring the matter to the attention of council by lodging an appropriate notice of motion; and, if council fails to deal with the notice of motion in a lawful manner or in a way that is not satisfactory to the member, to report the matter to the appropriate agency as the case requires.

⁴⁰ *Treby and Local Government Standards Panel* [2010] WASAT 81 per Judge J Pritchard (as she then was) at [87] - [91].

- 42.** Western Australia is the most culturally diverse State in Australia. Over half a million people, or more than a quarter of the population of Western Australia (27%), were born overseas. People from more than 200 countries live, work and study in Western Australia, speaking as many as 270 languages and identifying with more than 100 religious faiths.⁴¹
- 43.** On the basis that Western Australia is a multicultural society, and that mutual respect for each other is an integral part of our shared culture and is an important underlying principle of multiculturalism and democracy, the following views are appropriate in relation to the issue of how a person will demonstrate failure to be respectful of another person or to treat the other person with respect:
- (1) Except where and to the extent that the law allows or does not prohibit or prevent Person A from committing any act or omission to the contrary, Person A will fail to be respectful of Person B, and will fail to treat Person B with respect, if Person A fails to keep his/her ego and own sense of self-esteem and self-worth in sufficient check so as:
 - (a) to give recognition of the value and worth of Person B as a fellow human being on an equal footing with Person A irrespective of any difference between them; and
 - (b) to refrain from interfering with the entitlement of Person B to the recognition, enjoyment and exercise of any human right or fundamental freedom in the political, economic, social, cultural or any other field of life.
 - (2) The term 'difference' in paragraph (1)(a) immediately above is a wide term that embraces any disparity, differentiation or difference between Person A and Person B based on or in relation to any: title; office; position; standing; rank; status; age; sex; bodily appearance, characteristic or alteration; race; colour; descent; national origin; ethnic origin; religion or religious faith or belief; malfunction, malformation or disfigurement of body, or any bodily disability; disorder, illness or disease that affects the body or any thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or any mental disability; of Person A or Person B.
 - (3) Except where and to the extent that the law allows or does not prohibit or prevent Person A from committing any act or omission to the contrary, the circumstances where Person A will demonstrate failure to be respectful of Person B, and failure to treat Person B with respect, include:
 - (a) where Person A treats Person B merely as a means to something (because to do so values Person B as less than an end in himself or herself);
 - (b) where Person A shows contempt for Person B (because to do so denies that Person B has any worth) – noting that the term 'contempt' in this context refers to the feeling or attitude with which one regards another person as worthless;

⁴¹ The WA Office of Multicultural Interests website at http://www.omi.wa.gov.au/omi_role.asp, as accessed on 25 January 2011.

- (c) where Person A treats Person B with arrogance (because to do so is a demand that Person B value Person A more highly than Person B values himself or herself) – noting that the term ‘arrogance’ in this context refers to an offensive exhibition of assumed or real authority;
- (d) where Person A makes false statements, comments or remarks that are likely to cause others to think less favourably of Person B, or which otherwise defames Person B generally, or in a particular way;
- (e) where Person A ridicules or mocks Person B – noting that:
 - (i) the term ‘ridicule’ in this context refers to two cases – namely: when a third person is or third persons are present or in the vicinity, the saying of words or the display of any action or gesture for the purpose or intent of causing contemptuous laughter at the other person; and to deride or make fun of Person B; and
 - (ii) the term ‘mock’ in this context refers to two cases – namely: ridiculing Person B by mimicry of action or speech; and scoffing or jeering at Person B’s action or speech;
- (f) where Person A makes a distinction, exclusion, restriction or preference about or against Person B based on any: title; office; position; standing; rank; status; age; sex; bodily appearance, characteristic or alteration; race; colour; descent; national origin; ethnic origin; religion or religious faith or belief; malfunction, malformation or disfigurement of body, or any other physical disability; disorder, illness or disease that affects the body or any thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or any other mental disability of Person B; and
- (g) where Person A interferes in the entitlement of Person B to the recognition, enjoyment and exercise of any human right or fundamental freedom in the political, economic, social, cultural or any other field of life.

A council member’s voluntary restriction on their conditional ‘right’ of freedom of speech

- 44. A private citizen has a right of free speech (i.e. speech without adverse legal consequences) that is conditional on such lawful limitations as are applicable at the time – e.g. under the respective laws relating to defamation and disorderly conduct through speech.
- 45. Relevantly, the common law relating to defamation that is applicable in WA accepts that there is an implied freedom of political communication under the Commonwealth *Constitution* and accordingly:
 - (a) each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters affecting the people of Australia;
 - (b) the interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege, and those categories are now recognised as protecting a communication made to the public on a government or political matter; and

- (c) discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level.⁴²
- 46.** However, when a council member makes the required declaration of office before acting in that office:
- (a) the member declares that they take that office upon themselves to duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the local government's district (and not of any of its wards in particular) according to the best of their judgment and ability, and that they will observe the Regulations; and
 - (b) by making that declaration the member voluntarily restricts themselves as to the extent that they are able to lawfully express themselves on many matters; and
 - (c) the member is expected to observe standards of conduct that may restrict what he or she can write or say, and these restrictions where applicable may be perceived as limiting the implied freedom of political communication under the Commonwealth *Constitution*.
- 47.** In *Treby and Local Government Standards Panel*⁴³, the then Deputy President of the State Administrative Tribunal, Judge J Pritchard (as Her Honour then was) considered the issue of whether or not regulation 7(1)(b) of the Regulations should be read down having regard to the implied freedom of political communication under the Commonwealth *Constitution*, and concluded that in her view that regulation is reasonably appropriate and adapted to the legitimate end of facilitating the proper consideration and determination of council business, in a manner which is compatible with the system of government established under the *Constitution*, and that accordingly there was no warrant to give that regulation a more limited operation than its ordinary and natural meaning suggests.

⁴² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571.

⁴³ [2010] WASAT 81 at [43] – [59].

Attachment F

Extracts from the *Report of the Inquiry into the conduct of Councillor Eoin Martin of the City of Stirling*

Mr Jason Banks' *Report of the Inquiry into the conduct of Councillor Eoin Martin of the City of Stirling*, dated 29 August 2000, (the Banks Inquiry Report) was tabled in the Legislative Assembly on 20 September 2000 as Tabled Paper No. 251. The Inquiry examined both the conduct of Councillor Martin and the practices and procedures of the City of Stirling surrounding his conduct.

Extract 1

In the Banks Inquiry Report, the following appears at [301] – [306]:

“7.2.1. Pre-meeting dinner

During the course of the inquiry evidence was received from a number of sources in relation to the City of Stirling's pre-meeting dinner. From this evidence it is understood both the council and senior staff of the city come together for dinner and then council proceeds to the chamber and conducts its meeting.

This process has been examined by the inquirer as a result of the evidence of Cr Ham to the effect:

- he had a discussion with Cr Martin at the pre-meeting dinner on the evening of 19 October 1999, in which Cr Martin discussed with him matters relating to an item on that meeting's agenda, being the approval of the building licence on Lot 67; and
- following this conversation, Cr Ham moved a motion that the building licence on Lot 67 be approved at the lower level of 0.3.

The potential for the decision making process of council to be affected by the pre-meeting dinner is apparent from the evidence of Cr Ham. This is particularly problematic when an elected member, who holds an interest in an item, is able to discuss the item with other councillors immediately prior to the meeting. The evidence of Mayor Vallelonga, that he is unaware of items from the agenda being discussed at the dinner, highlights the need for a protocol to properly govern the conduct of elected members at such dinners.

Allowing an informal meeting of decision-makers immediately prior to the decision making process can give rise to the perception that discussion, and perhaps even decisions in relation to items, occur prior to the meeting. Indeed, in this matter, the problem is greater than mere perception. A specific instance of pre-meeting discussions of an agenda item has been identified.

Moreover, council does not appear to have considered the issue of elected members, who hold an interest in a matter, having unrestricted access to the rest of the elected body in an informal setting. The minutes of the City of Stirling record many instances in which elected members have disclosed an interest and left the chamber, however no control has been exercised over them being given the opportunity to discuss the same items with elected members immediately prior to the meeting.

Briefing sessions and their value to decision makers are not in issue but they should be conducted in a manner that ensures the process is free from both actual and perceived adverse impact on the decision making process.

Recommendation 9.

The City of Stirling amend it's Code of Conduct to make it improper for elected members or officers, who hold a financial or other personal interest in an agenda item, to discuss that item with the other elected members at gatherings of Council prior to a meeting at which that agenda will be presented."

Extract 2

In the Banks Inquiry Report, the following appears at [312] – [315]:

"7.2.2 Mud Maps

The transcript of the meeting of Council on 19 October 1999, recorded Cr Italiano making reference to a "mud map". During the course of the inquiry further evidence was received in relation to "mud maps". It is apparent that from time to time, documents circulate in the council chamber that do not form part of the council record in relation to the information provided to elected members for the purpose of making a decision.

The presence of such material has the capacity to affect the decision making of elected members. This is evident from the fact the material is even referred to during council debate. As this material does not form part of the minutes of council, all the information upon which council may have based its decision can't be reviewed. All information comprising the material on which council's decision is based should form part of the minutes.

In addition, the ability to submit unrecorded information to councillors has the potential to be abused. For example, an elected member may make points or arguments in a document and present this to council for their consideration in a matter. The same elected member may be required to disclose an interest and leave the meeting. This has the effect of enabling the elected member to contribute to the decision making process without being present thus defeating the purpose for which the financial interest provisions of the *Local Government Act 1995* (Act) were enacted.

Accordingly, control needs to be exercised over the documents placed before council that comprise the information upon which their decisions are made. This is for two reasons: firstly to provide an accurate record of all the information and; secondly, to prevent elected members from defeating the financial interest provisions of the Act.

Recommendation 11.

The City of Stirling amend its Code of Conduct to make it improper for documents that do not form part of the records of Council, from being used in the decision making process, and to prevent elected members providing unrecorded information in matters in which they later disclose an interest.

Extract 3

In the Banks Inquiry Report, the following appears at [337] – [340]:

“7.4.1 Did Cr Martin act improperly (initial representation)?

It has been established from the evidence of Cr Martin himself, that when handing the letter to Mr J. Warwick, he did not believe the City of Stirling would require Mr Warwick to comply with his representation, being a restriction on the maximum height of the finished floor level of dwellings on Lot 67.

Cr Martin has given evidence to the inquiry to the effect that he was not acting in his capacity as all elected member of the City of Stirling when he approached Mr Warwick. This does not mean his conduct should be evaluated against those standards applied to developers or adjoining owners generally. Though Cr Martin may be of a view he is not acting as a councillor, he remains a councillor of the City of Stirling at all times during his term of office.

The office of an elected member is not a discretionary one that can be relinquished when inconvenient and reclaimed when convenient to the holder. The office is carried with the individual all times. The attempt to make a distinction between private and official capacity is even more difficult when that person has any dealings with, or performs an act, that could be construed as being done on behalf of the city. In application, the test of impropriety is not restricted to instances when an elected member is acting in an "official capacity". It is more likely propriety will be in question when the role of an elected member is secondary to some other personal interest or action.

In this instance, the principal issue is whether it is proper for an elected member to represent to a party that the city, of which they are a member, will enforce a requirement advantageous to the member, when the member does not believe the city will. It is reasonable to expect standards of acceptable conduct by elected members would not include attempting to mislead ratepayers. Though Cr Martin may believe he was acting in a personal capacity, a representation by him that the city will enforce a particular condition has the capacity to carry more weight by virtue of his office.

Finding 2.

- *Accordingly, I find that in about July 1999, Cr Martin, the owner of Lot 36 Gribble Rd, acted improperly by using his office of councillor to gain an advantage to himself by representing to Mr J. Warwick, the owner of an adjoining lot, that the City of Stirling would require the height of the finished floor level not to exceed the top of the retaining wall while knowing that the City would impose no such requirement.*

Extract 4

In the Banks Inquiry Report, the following appears at [348] – [358]:

7.4.3 Did Cr Martin act improperly (council dinner)?

It can be established from the evidence of Cr Ham, that on the evening of 19 October 1999, Cr Martin discussed with him matters concerning the finished floor level of the proposed dwelling on Lot 67. Cr Ham has given evidence this discussion took place prior to the council meeting, at an informal dinner gathering of councillors and executive officers.

There is no verbatim record of the conversation between Cr Ham and Cr Martin. However, the impact of the discussions can be inferred by Cr Ham's actions. From the transcript of the meeting it is apparent Cr Ham had decided to move a specific motion in relation to this matter prior to hearing any debate on the issue. This motion was different from the recommendation of the principal building surveyor and identified a specific floor height. It gave effect to the condition contained in the acting manager of planning's letter of 20 October 1998, namely, the FFL be the same as the top of the retaining wall.

The fact that Cr Martin spoke to Cr Ham and Cr Ham moved a specific motion, which gave effect to Cr Martin's wishes give rise to an irresistible inference that Cr Ham's motion was influenced by his conversation with Cr Martin.

In determining whether Cr Martin's conduct is improper, the principal questions are, having regard for all the circumstances, is it proper for an elected member:

- to discuss an item from the meeting agenda with another elected member immediately prior to that member being required to consider that matter; and
- when the member engaging in the discussion, is required to disclose an interest in the matter, as required by the financial interest provisions of the *Local Government Act 1995* (the Act).

The inquirer is of the view the above actions are improper for a person holding the position of an elected member and they have occurred in this instance.

Finding 4.

- *Accordingly, I find that on 19 October 1999, Cr Martin acted improperly by using his office of councillor and the access it gave him to other councillors to discuss the matter of the finished floor level of Lot 67 Gribble Rd with Cr Ham at council's pre-meeting dinner, with the effect of influencing Cr Ham to move a motion to his advantage as the owner of the adjoining lot knowing he was required to disclose a financial interest in the matter at the council meeting immediately following the dinner.*

7.4.4 Did Cr Martin act improperly (mud map)?

It is evident that at the meeting of 19 October 1999, Cr Martin provided the elected body with a diagram (*mud map*) depicting the impact the FFL of Lot 67 would have on his adjoining lot. Cr Martin gave evidence to the effect that he created this diagram to rebut a diagram being circulated by Cr Italiano.

The transcript of the meeting on 19 October 1999 records Cr Italiano making reference to Cr Martin's mud map: *I can see where Councillor Ham's coming from. Unfortunately, I was given a mud map, if you like, at 7 o'clock this evening trying to explain to me the overlooking possibilities.*

It is apparent from the available evidence the diagram purported to display the adverse impact the increased finished floor level (FFL) of Lot 67 would have on Lot 36. It is not unreasonable to classify such a document as having the capacity to provide an illustrative argument as to why the FFL for Lot 67 should be reduced. One of the principal objectives of the financial interest provisions of the Act is to prevent elected members who have an interest in a matter, participating in discussion of the matter.

Although the diagram (mud map) is not available for examination, it is apparent at least Cr Italiano thought it had some persuasive value, requiring him to address it during debate. Such persuasive value has the capacity to defeat the intent of the financial interest provisions and enable an elected member who is prohibited by law from being present during the debate, to indirectly influence the decision making process of council. The impact of such material is not easily measured, however council did vote in a manner consistent with Cr Martin's interest.

In determining whether Cr Martin's conduct is improper, the principal questions are, having regard for all the circumstances, is it proper for an elected member:

- to provide persuasive material to council, that does not form part of the records of council and is not submitted to council through regular means, and relates to a matter on the agenda; and
- when the member circulating the document, is required to disclose an interest in the matter, as required by the financial interest provisions of the *Local Government Act /1995* (the Act).

The inquirer is of the view the above actions are improper for a person holding the position of an elected member and they have occurred in this instance.

Finding 5.

- *Accordingly, I find that on 19 October 1999, Cr Martin acted improperly by using his office of councillor to provide, immediately prior to a meeting, information to other councillors that related to the effect on his adjoining lot of the finished floor level of Lot 67 Gribble Rd with the view of influencing the decision of the meeting, knowing that he was required to disclose a financial interest in the matter at the meeting.*

Decision-maker's Title: **LOCAL GOVERNMENT STANDARDS PANEL**
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 35 of 2010 (DLG 20100206)
Heard: Determined on the documents
Considered: 2 March 2011; 6 April 2011 and 11 May 2011
Coram: Mr B. Jolly (Presiding Member)
 Councillor C. Adams (Member)
 Mr J. Lyon (Member)

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Complaint SP 35 of 2010**Complainant: (Cr) Michelle STUBBS****Council member complained about:****Councillor Donald YATES****Local Government:****Town of Bassendean****Regulation found breached:****Regulation 7(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007***

DECISION AND REASONS FOR DECISION

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.

FINDING OF MINOR BREACH

In dealing with the subject complaint the Panel has made a finding of minor breach (herein, the Finding) - namely, that on 9 March 2010 Councillor Yates committed a breach of regulation 7(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007* in that he made improper use of his office as a Council member to gain directly or indirectly an advantage for an immediate next-door neighbour of his, a Ms C McGregor, when he sent an email (herein, the relevant email) to his fellow Town Councillors giving wrong advice to them, and inappropriately lobbying or attempting to influence and putting pressure on them, in relation to a request by Ms C McGregor to the Town of Bassendean to have the R coding of her property at 12 Thompson Road, Bassendean increased from residential R25 to R40 (the matter), knowing that he had a proximity interest in the matter, and knowing that he was precluded from participating in the discussions and the decision making procedure relating to the matter when it was before the Town's Council later on that date.

SUMMARY OF DECISION

The Panel's decision was to deal with the said minor breach (herein, the subject Minor Breach) pursuant to section 5.110(6)(b)(i), by ordering that Councillor Yates be publicly censured as specified in the attached Minute of Order.

DECISION & REASONS FOR DECISION

References to sections and regulations

1. In these Reasons, unless otherwise indicated a reference to a section is a reference to the corresponding section in the Act, and a reference to a regulation is a reference to the corresponding regulation in the Regulations.

Procedural fairness matters

2. The Panel notes that through its Presiding Member it has given to Councillor Yates: notice of the Finding (herein, the notice of finding); a copy of the Panel's *Finding and Reasons for Finding* in this matter (herein, the Reasons for Finding); and a reasonable opportunity for Councillor Yates to make submissions about how the subject Minor Breach should be dealt with under section 5.110(6)⁴⁴.

Councillor Yates' submissions

3. Councillor Yates has responded to the notice of finding and the Reasons for Findings by his email of 19 April 2011 (herein, Councillor Yates' submissions), the contents of which can be summarised as:

- (a) he denies that he gave wrong advice in the relevant email;
- (b) he attempts to re-agitate issues which as a matter of substance have already been determined or commented on by the Panel in the Reasons for Finding; and
- (c) he states that if the Panel does not dismiss the complaint, he will take appropriate legal action.

Panel's comment in relation to Councillor Yates' submissions

4. In relation to Councillor Yates' submissions the Panel notes that:

- (1) As mentioned in paragraph 14(4) of the Reasons for Finding, it is the Panel's view that a council member having obligations in planning matters has a responsibility to be aware that, as a matter of law, if Council decides to refuse or fails to approve an application from a resident for a spot rezoning of a particular residential property, that decision or failure to approve is not appealable to and is not reviewable by the State Administrative Tribunal (the SAT).
- (2) In other words, at law a local government's refusal of a person's request for the spot rezoning of his/her property is not capable of being appealed to or reviewable by the SAT.

⁴⁴ Section 5.110(6) reads:

"The breach is to be dealt with by —

(a) dismissing the complaint;

(b) ordering that —

(i) the person against whom the complaint was made be publicly censured as specified in the order;

(ii) the person against whom the complaint was made apologise publicly as specified in the order; or

(iii) the person against whom the complaint was made undertake training as specified in the order; or

(c) ordering 2 or more of the sanctions described in paragraph (b)."

- (3) Councillor Yates' submissions indicate his refusal to acknowledge that he gave advice in the relevant email that is contrary to the law mentioned in paragraphs 4(1) and 4(2) above.
- (4) There is nothing in Councillor Yates' submissions that warrants the Panel rescinding the Finding.

The general interests of local government in WA

5. The Panel notes that pursuant to clause 8(6) of Schedule 5.1 to the Act each of its members is to have regard to the general interests of local government in the State.

Panel's views in relation to the Finding

6. The Panel views any breach of regulation 7(1) in a most serious manner on the basis that:

- (1) The core of a breach of regulation 7(1) is the council member's making an intentional improper use of his/her office – which is a significant public office – for the purpose of gaining directly or indirectly an advantage for himself/herself or any other person, or for the purpose of causing detriment to his/her local government or any other person.
- (2) It is a statutory function and responsibility of a council member to provide leadership and guidance to the community in his/her local government's district. [See section 2.10(b)]
- (3) A breach of regulation 7(1) inevitably leads to the conclusion that the council member concerned has failed to provide good leadership and guidance to the community in his/her local government's district.

Panel's views on how the subject Minor Breach should be dealt with under section 5.110(6)

Councillor Yates' antecedents

7. The Panel notes that:

- (1) At the time of the signing of these Reasons, Councillor Yates has previously been found under Part 5 Division 9 of the Act to have committed two minor breaches, one of which is the subject Minor Breach.
- (2) The other minor breach was found by the Panel in its dealing with Complaint No. SP 34 of 2010. The Panel's finding in that matter was that on 5 September 2009 Councillor Yates committed a breach of regulation 8 by using a Town resource (namely, the boundary fence of Bassendean Oval) to place or cause the placement of 4 banners on it, for the purpose of the interests of the beneficiaries and other persons associated with the brand "Fresh Faces, New Directions", without such use and such purpose being authorised under the Act or by the Council or the Town's Chief Executive Officer.
- (3) The other minor breach referred to in paragraph 7(2) is being dealt with by the Panel pursuant to section 5.110(6)(a) by dismissing the complaint.

Is a public censure appropriate?

8. A public censure of the kind ordered by the Panel is a significant sanction. It involves a high degree of public admonition of the conduct of the council member concerned.⁴⁵

9. The Panel acknowledges that when it makes an order that a Notice of Public Censure be published, the Notice is to be published by the local government's CEO at the expense of the local government, which is a significant expense.

10. On the information available to the Panel when it made the Finding, it is the Panel's view that Councillor Yates' offending conduct in this matter was that:

- (a) he sent the relevant email to his fellow Town Councillors giving wrong advice to them, and inappropriately lobbying or attempting to influence and putting pressure on them, in relation to Ms McGregor's request to have the R coding of her property at 12 Thompson Road, Bassendean increased from residential R25 to R40 (herein, the matter); and
- (b) when he sent the relevant email to his fellow Town Councillors he knew that he had a proximity interest in the matter, and he knew that he was precluded from participating in the discussions and the decision making procedure relating to the matter when it was before the Town's Council some hours later.

11. In light of the contents of paragraphs 4, 5, 6, 8, 9 and 10 above, it is the Panel's view that Councillor Yates' said offending conduct in this matter warrants the making of an order that he be publicly censured for having committed that conduct.

Is a public apology appropriate?

12. In the Panel's view a public apology of the kind ordered by the Panel is also a significant sanction, as it too involves a high degree of public admonition of the conduct of the council member concerned.

13. In the Panel's view the circumstances that will in almost all occasions deserve the sanction of a public apology to another person include those where a council member's offending conduct is or conveys a slight or a personal attack on the other person.

14. In this matter, it is the Panel's view that Councillor Yates' said offending conduct in this matter was not a personal attack on any person.

15. In light of the contents of paragraphs 4, 11 and 14 above, it is the Panel's view that it is not appropriate to deal with the subject Minor Breach by also making an order that Councillor Yates apologise publicly generally or to any person.

Is training appropriate?

⁴⁵ *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) (as Her Honour then was) at [107].

16. The Panel notes that its consideration of how a breach should be dealt with under section 5.110(6) must embrace the issue of whether or not it is appropriate for the Panel to order that the council member concerned undertake such training as it may specify.

17. After due consideration of the information available to the Panel when it made the Finding (including Councillor Yates' responses to the then subject allegation), and Councillor Yates' submissions, it is the Panel's view that it is not appropriate that the Panel make an order that he undertake training so as to not repeat his said offending conduct in this matter..

Is a dismissal of the complaint appropriate?

18. In light of the contents of paragraphs 4 and 11 above, it is the Panel's view that it is not appropriate to deal with the subject Minor Breach by dismissing the complaint.

Panel decision

19. Having regard to: the Reasons for Finding; Councillor Yates' submissions; the reasons above; and the general interests of local government in Western Australia, the Panel's decision on how the subject Minor Breach is dealt with under section 5.110(6) is that, pursuant to subsection (b)(i) of that section, it orders that Councillor Yates be publicly censured as specified in the attached Minute of Order.

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Brad Jolly (Presiding Member)

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Carol Adams (Member)

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John Lyon (Member)

NOTICE TO THE PARTIES TO THE COMPLAINT

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) hereby gives notice that:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint **and** the person complained about each have the right to apply to the State Administrative Tribunal (the SAT) for a review of the Panel's decision in this matter. In this context, the term "decision" means a decision to dismiss the complaint or to make an order.
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction **must be made within 28 days** of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004* (SAT Act) section 20(1).
- (3) The Panel's *Reasons for Finding* and these *Reasons for Decision* constitute the Panel's notice (i.e. the decision-maker's notice) given under the SAT Act section 20(1).

Note:

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
 - "(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
 - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

 - (a) by delivering the document to him personally; or
 - (b) by post in accordance with section 75(1); or
 - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
 - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."

Attachment

Decision-maker's Title: **LOCAL GOVERNMENT STANDARDS PANEL**
Jurisdiction: Complaints of minor breach by local government council members
Act: *Local Government Act 1995*
File No/s: SP 35 of 2010 (DLG 20100206)
Heard: Determined on the documents
Considered: 2 March 2011; 6 April 2011 and 11 May 2011
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint SP 35 of 2010

Complainant: (Cr) Michelle STUBBS

Council member complained about: Councillor Donald YATES

Local Government: Town of Bassendean

Regulation found breached: Regulation 7(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007*

MINUTE OF ORDER

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Donald Yates, a member of the Council of the Town of Bassendean, be publicly censured as specified in paragraph 2 below.
2. Within the period of 29 days to 43 days from the day following the date of service of this Order on him, the Chief Executive Officer of the Town of Bassendean arrange the following Notice of Public Censure to be published, in no less than 10 point print:
 - (a) as a one-column or a two-column display advertisement in the first 15 pages of "The West Australian" newspaper; and
 - (b) as a one-column or a two-column display advertisement in the first 15 pages of the "Eastern Suburbs Reporter" newspaper.

NOTICE OF PUBLIC CENSURE

The Local Government Standards Panel (the Panel) has made a finding that on 9 March 2010 **COUNCILLOR DONALD YATES, a member of the Council of the Town of Bassendean**, committed a breach of regulation 7(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007* in that he made improper use of his office as a Council member to gain directly or indirectly an advantage for an immediate next-door neighbour when he sent an email to his fellow Town Councillors giving wrong advice to them, and inappropriately lobbying or attempting to influence and putting pressure on them, in relation to a request by the neighbour to the Town of Bassendean to have the R coding of the neighbour's property in Thompson Road, Bassendean increased from residential R25 to R40 (the matter), knowing that he had a proximity interest in the matter, and knowing that he was precluded from participating in the discussions and the decision making procedure relating to the matter when it was before the Town's Council later on that date.

The Panel censures Councillor Yates for this breach of regulation 7(1)(a).

**LOCAL GOVERNMENT
STANDARDS PANEL**