

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 14 of 2010 (DLG 20100124)
Heard: Determined on the documents
Considered: 26 August 2010
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint No. SP 14 of 2010
Complainant: (Cr) Irene TAN
Council member complained about: Cr Richard Maxwell (Max) HIPKINS
Local Government: City of Nedlands
Regulations alleged breached: Regulations 7(1)(a), 7(1)(b) and 6(2)(b)

FINDINGS AND REASONS FOR FINDINGS

DEFAMATION CAUTION

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SUMMARY OF FINDINGS

The Panel found that:

- On 25 March 2010 Councillor Hipkins committed a breach of regulation 7(1)(a) in that he made improper use of his office of Council member to gain directly or indirectly an advantage for Ms Grace by voluntarily giving evidence for Ms Grace in a SAT review against the City's decision in a matter.
- Councillor Hipkins did not commit a breach of regulation 7(1)(b), or a breach of regulation 6(2)(b), as alleged by Councillor Tan.

BACKGROUND AND PROCEDURAL MATTERS

The material in **Attachment A** is incorporated here as if set out in full.

AVAILABLE INFORMATION

The information before the Panel in relation to this matter (the available information) is the information and documents described in the table under the heading 'Available information' in **Attachment A**. These documents are referred to below, 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.

FINDINGS AND REASONS FOR FINDINGS

Conduct complained about

1. In the complaint, as supplemented by her letter of 20 May 2010 [Doc D1], Councillor Tan alleges that Councillor Hipkins' conduct in this matter (the conduct complained about) was that:

- (1) On 25 March 2010 Councillor Hipkins voluntarily gave evidence for a Ms Margot Grace (Ms Grace) in a matter (DR 372 of 2009) before the State Administrative Tribunal (SAT) – the matter being Ms Grace's application for a SAT review (the SAT Review) of a decision by the Council to refuse a development approval application made by her to use the Feast Café premises (Feast Café) as a café/restaurant with 48 seats (the development application).
- (2) In his Witness Statement dated 3 March 2010 [Doc B3] (the Witness Statement) and in giving the evidence that he gave for Ms Grace in the SAT review, Councillor Hipkins made the following false claims about Council's dealings with the development application:
 - (a) Councillor Hipkins' statements in paragraphs 6(d) and 6(e) of the Witness Statement are in direct contradiction to a letter dated 23 November 2010 (sic, 2009) [Doc B5] (sent by email and fax) to Councillors by the owner of the shopping centre (Pamela Lampropoulos aka Pamela Kikiros), where the availability of car bays was confirmed; and
 - (b) Councillor Hipkins' statements in paragraph 6 of the Witness Statement are in direct contradiction to his email of 25 November 2009 (sent at 6.47pm) [Doc B4] to the City's CEO where he stated "There was no discussion on the matter last night" and "There was no discussion on the substantive motion."

Allegations of minor breach made in the complaint

2. Councillor Tan's allegations of minor breach made in the complaint, as supplemented by her letter of 20 May 2010 [Doc D1], are as follows, in a reasonably concise form:

- (1) **[allegation (1):]** *That by committing the conduct complained about, and in giving the actual evidence that he gave in the SAT Review, Councillor Hipkins contravened regulation 7(1)(a) in that he made improper use of his office as a Council member to gain an advantage for Ms Grace.*

Particulars of advantage intended to be gained for Ms Grace, as alleged by Cr Tan:

- (i) *The use of Councillor Hipkins' position to give greater credibility to the Witness Statement, and thus gain an advantage for Ms Grace.*
- (ii) *To enhance the financial viability of the café to Ms Grace's financial advantage or benefit.*
- (iii) *To discredit the Council and undermine the City's case in the SAT Review, and thus gain an advantage for Ms Grace.*

- (2) **[allegation (2):]** *That by committing the conduct complained about, and in voluntarily giving the actual evidence that he gave in the SAT Review, Councillor Hipkins contravened regulation 7(1)(b) in that he made improper use of his office as a Council member to cause detriment to the City, Councillor Michael Sommerville-Brown (Councillor Sommerville-Brown) and Councillor Tan.*

Particulars of detriment intended to be caused to the City, as alleged by Cr Tan:

- (i) *To discredit the Council and undermine the City's case in the SAT review.*
(ii) *Undue concern to the City's residents.*

Particulars of detriment intended to be caused to each of Councillor Sommerville-Brown and Councillor Tan, as alleged by Cr Tan:

Undue and unnecessary stress on them in their capacity as the representatives of the City having the conduct of the hearing of the SAT Review on its behalf, due to the fact that Councillor Hipkins did not advise the Council of his intent to act as a witness for Ms Grace, and that Councillors Sommerville-Brown and Tan were only made aware that they would be contesting their own Deputy Mayor at the hearing when officially notified by SAT on 16 March 2010, less than 10 days before the hearing itself.

- (3) **[allegation (3):]** *That by committing the conduct complained about, and in giving the actual evidence that he gave in the SAT review, Councillor Hipkins contravened regulation 6(2)(b) in that he disclosed information that he acquired at a closed meeting, which was not information he derived from a non-confidential document.*

Particulars of information disclosed by Cr Hipkins, as alleged by Cr Tan:

The statement, remark or comment that "[T]he majority of Councillors took no notice of my arguments and voted to approve the revised conditions."

Particulars of closed meeting where such information was acquired by Cr Hipkins, as alleged by Cr Tan:

That part of the Ordinary Council Meeting held on 24 November 2009 that related to Item 13.5 (No. 71B - Lot 371 – Princess Road, Nedlands (Proposed Café/Restaurant)(File No. PR3/71).

Factual background

3. On the available information the Panel is satisfied there is evidence from which it may be concluded, and from which the Panel has concluded, that it is more likely than not that the relevant background and material facts of this matter are as follows:

- (1) Councillor Hipkins has been a Council member since 28 February 2008, and has also been the City's Deputy Mayor since about October 2009. [p1Doc B3] When he was last elected as a Council member in October 2009, and when he was elected as the City's Deputy Mayor, he made a Declaration of Office which said, relevantly:

"[I] ... having been elected to the office of [councillor / deputy mayor] of the City of Nedlands, declare that I take the office upon myself and will duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the district according to the best of my judgment and ability, and will observe the Local Government (Rules of Conduct) Regulations 2007."

- (2) The operation of the Feast Café commenced in about August 2009. Ms Grace applied to the City for development approval to operate a café in one of the tenancies of Nedlands Village. Ms Grace nominated a total of 48 seats for the café, of which 32 would be indoors and 16 outside on the footpath. Historically, the subject tenancy had been used as a deli, and then as a café with a total of 15 seats, in accordance with a development approval granted by the City.
[p3Doc F]
- (3) The Council advertised the development application and received 16 submissions from members of the community, of which seven were in support and nine in objection to the proposal. [p4Doc F]
- (4) The development application was considered by the City's Council Committee at its meeting on 11 August 2009. At this meeting, *when it was open to members of the public*: the Committee considered an administration report dated 30 July 2009 that was not a confidential report, addressed those submissions and discussed concerns about car parking issues; the report recommended that the development application be approved subject to a maximum of 30 seats, indoors and outdoors, rather than the 48 sought; Councillor Hipkins was present; he was the seconder of the motion that the administration's recommendation to the Committee be adopted; and that motion was carried 5/3 (with Councillor Hipkins voting in favour of it). [Doc J1] and [Doc J2]
- (5) The development application was presented to the Council on 1 September 2009, with the administration's said recommendation. The Council, however, granted approval subject to a condition limiting the number of seats to 15. In effect, the Council's decision was a refusal of the application, given that there was an operative development approval for the use of the site as a restaurant with 15 seats. [p4Doc F]
- (6) Ms Grace applied for the SAT Review in accordance with s 252(1) of the *Planning and Development Act 2005 (WA)*. [p4Doc F] Then, on 9 November 2009, Ms Grace sent an email to Councillor Hipkins and other Councillors seeking assistance in the SAT Review. [p2Doc H1]
- (7) Prior to 1 September 2009, and since, it was and is a City policy (the City's Representation Policy) that if:
 - a person (the applicant) applies for development approval from the Council;
 - the Council votes against or inconsistently with an officer recommendation in relation to a proposed Council resolution;
 - the resulting Council decision is reviewable by the SAT; and
 - the applicant applies to the SAT for it to review that decision;

then two of the Councillors who voted for the motion would have the carriage and conduct of the City's case in the resulting SAT review.

- (8) Following mediation in the SAT Review, the Council was invited to reconsider its decision in accordance with s 31 of the *State Administrative Tribunal Act 2004 (WA)*, which it did at its meeting on 24 November 2009. The City revoked its earlier decision and imposed a decision granting development approval, subject to conditions. In particular, the Council limited the approval to one year, limited the number of seats to 25, limited the hours of operation to 8 am to 5 pm Monday to Saturday, and required Ms Grace to enter into an agreement with the service station, which is located on the north-western corner of the intersection of Princess Road and Dalkeith Road, Dalkeith, enabling two car bays at the service station to be used for the purposes of the café. [p4-5Doc F]
- (9) Prior to Council's meeting on 24 November 2009, the City's CEO caused to be sent to the City's Councillors, among other things, a copy of a written administration report dated 5 November 2009 (the Confidential Administration Report) [Doc D6] on the development application (being proposed item 13.5 at such meeting). This report was background-marked "CONFIDENTIAL" on each page.
- (10) At its meeting on 24 November 2009 when the Council revoked its earlier decision and imposed a new decision approving the development application subject to conditions (the November 2009 conditional approval): Council did so when the meeting was closed to members of the public; and its resolution was carried 7/6 on the casting vote of the presiding member (with the 6 Councillors against including Councillor Hipkins). [Doc D5]
- (11) On 24 November 2009 the City's CEO sent an email [Doc B4] to the City's Councillors, the text of which reads:

"In regards to the confidential item last night Item 13.5 Feast Café this item was a confidential item as it is a current SAT matter. The discussions on the item held behind closed doors remains confidential. The only part that will be made public is the final decision. This has been verbally relayed to the applicant today. The matter is still a SAT matter and the applicant (appellant) has the choice of vacating the SAT matter and operating within the decision (and conditions) of last night's Council decision or continuing with the matter at the Tribunal.

The applicant has been advised today that the approval of last night is the only current and valid approval for the café at 71b Princess Road, this has also been confirmed today from McLeods and the SAT but they can continue with the matter at the SAT.

Please ensure that the discussion held last night on the matter remain confidential."

- (12) Councillor Hipkins response to the City's CEO's said email of 24 November 2009, was to send his email of 25 November 2009 to the City's CEO and the other Councillors [Doc B4], the text of which reads:

"There was no discussion on the matter last night. A substantive motion was moved, there was a successful amendment, then there was a put motion. There was no discussion on the substantive motion.

I hold a different view to McLeods. Last night's decision was part of mediation negotiations and has no other status. I agree the Applicant has the option of accepting Council's offer and withdrawing the application for review or continuing with the matter at the Tribunal."

- (13) Ms Grace was dissatisfied with the November 2009 conditional approval, and desired the SAT Review to finally determine the matter. On 30 November 2009 Councillor Hipkins was asked by Ms Grace if he was prepared to speak on her behalf at a hearing before the SAT on 8 January 2010 in relation to the development application. [p2Doc H1] That hearing did not eventuate. In mid-February 2010 Councillor Hipkins was asked by Mr Ken Adam (Mr Adam), Ms Grace's advocate in the SAT Review, to meet and discuss Ms Grace's application. That meeting occurred on 25 February 2010 at which time Councillor Hipkins confirmed that he would appear at the hearing in the SAT Review as an 'expert witness' and would prepare a witness statement for that purpose. [p2Doc H1]
- (14) Prior to the hearing in the SAT Review:
- (a) the City engaged Allering & Associates to represent it in the hearing of the SAT Review - with Councillor Sommerville-Brown and Councillor Tan (as the City's representatives) having the carriage and conduct of the City's case in the SAT Review, in accordance with the City's Representation Policy;
 - (b) Councillor Hipkins provided the Witness Statement to Mr Adam;
 - (c) a copy of the Witness Statement was provided to Councillor Tan;
 - (d) Councillor Tan advised the City's CEO that Councillor Hipkins had provided the Witness Statement to Ms Grace for use by her in the SAT Review;
 - (e) the City's CEO sent his email of 19 March 2010 [Doc B6] to Councillor Hipkins – the text of which read:

"I have had it drawn to my attention that you have submitted a witness statement counter to Council's position in respect to the matter regarding the Feast café which is currently before SAT.

If this is the case then you may well have contravened Council's Standing Orders which states (in part)

8.4.1 No member of the Council or Committee is to reflect adversely upon a decision of the Council or Committee except on a motion that the decision be revoked or changed.

While I have not seen your witness statement, it is difficult to imagine that any position contrary to that agreed to by Council could be maintained without at least implied criticism. You are, whether you like it or not, bound by Council's decision. That is the way a Democracy works.

Further, the Local Government Rules of Conduct state in Part 2 (clause 7.1) a person 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; ...*
- b. to cause detriment to the local government or any other person.*

Should you have referred to yourself as a Councillor or as Deputy Mayor in your witness statement as has been suggested to me, you may well be regarded as having contravened this clause also.

Councillor, I am aware that you often seek your own counsel on these matters and I urge you to do so again. If, after doing so, you are of the opinion that you may have inadvertently contravened either of the above, you may wish to withdraw your statement.

*Please be assured that I am not trying to deny you your rights in respect to this matter. As CEO (and personally) I have no position one way or the other on it. I am merely attempting to save you any possible embarrassment should any official complaint be made; I am sure that you will also respect that I am bound to report any occurrence where I believe that a transgression **may have** taken place.*

Could you please advise me, therefore, of what action you may take - if any - now that it has been drawn to your attention Should you choose not to do so, I feel obliged to draw this to the attention of Council.” [Bold emphases supplied]

- (f) Councillor Hipkins’ response to the City’s CEO’s said email of 19 March 2010 was his email of 24 March 2010 to the City’s CEO [p6Doc B7] – the text of which read, relevantly:

“Your email could be construed as bullying and harassment.

As you seriously suggesting that a contrived interpretation of Council’s Standing Orders should constrain SAT’s determination of an appropriate outcome of the matter? This smacks of yet another example of not wanting to achieve a satisfactory planning outcome but to impose Council’s will.

I am tempted to forward your email to the SAT to see what they make of it.

I am amazed that you could write such an email without first seeing my statement. As it happens, my view on the matter closely corresponds to administration’s original advice to Council when the matter was first considered - which is not surprising given that professional planners, considering a matter objectively, will come to similar conclusions.

Your lack of understanding of the role of an expert witness at a SAT hearing astounds me.

...

My witness statement merely reported on Council decisions and my involvement at the meetings I attended. It is a matter of public record that I voted against a decision of Council. My statement documented the reasons for my voting. The information I presented could have been reported by any person attending the meetings and inspecting the minutes of those meetings. As a qualified and experienced urban planner, I gave my expert opinion on how the appeal could be satisfactorily resolved.

On the occasions the matter was considered by Council I had no association with the applicant. I now have a professional relationship with the appellant, who deserves the best possible advice to ensure a fair and just outcome is obtained. I am a planning consultant and have frequently appeared before the SAT. Should the matter return to Council, which is unlikely, I will declare an interest.

You have said that referring to myself as a Councillor and Deputy Mayor may have made improper use of my position to advantage a person and that may cause detriment to the local government. I cannot see how my involvement in a planning appeal, even if it was successful, would cause detriment to the local government. Appeals going against local governments are a common enough occurrence. I cannot be guilty of any offence by stating I hold the position of Deputy Mayor. That is a fact that cannot be denied. Councillors Tan and Somerville-Brown also submitted statements for the Respondent (Council) and referred to themselves as Councillors. Are they using their positions as Councillors to disadvantage a person and that may cause detriment to the local government?

I do not propose to take any action now that you have drawn this matter to my attention. I will continue my involvement with the appeal. I have no objection to Councillors being made aware of my actions and have copied this email to them.

Should you wish to “expose” this matter in open Council, the result would be to draw further attention to the strained working relationship between Councillors and administration, which would do nobody any good, least of all yourself, who has the unenviable responsibility of achieving an harmonious working relationship between Councillors and staff.”

[Underlining supplied]

(15) Paragraphs 1 to 7, 24 and 28 of the Witness Statement [Doc B3] read:

- “1. My full name is Richard Maxwell Hipkins. I am known as Max Hipkins.*
- 2. I am a town planner and architect by training, with over 40 years’ experience.*
- 3. Between 1997 and 2000 I held the position of Executive Director of Environmental Services at the City of Nedlands, responsible for the City’s Planning, Building and Health Services.*
- 4. I was elected as a Councillor to the City of Nedlands in 2008 and, after re-election in 2009, currently hold the office of Deputy Mayor.*
- 5. I reside at 36 Minora Road, Dalkeith and have done so since 1997. I am very familiar with the locality of the Feast Café, which I frequently pass moving to and from my home.*
- 6. At the Ordinary Council Meeting of the City of Nedlands on 24 November 2009 I participated in discussion that resulted in a revised approval for Feast Café. I argued that in my professional opinion, the approval recommended in the Chief Executive Officer’s report was unnecessarily restrictive:*
 - (a) Condition 2a)i), limiting approval to one year for such a use was unusual, would create uncertainty and would constrain investment in the business;*
 - (b) Condition 2a)ii), specifying a maximum of 25 seats would result in a very small business, and put its viability at risk;*
 - (c) Condition 2a)iii), limiting hours of operation, once again, was unusual for such a use, and took no account of the likely different opening hours of a café and adjacent shops to spread the demand for car parking bays;*
 - (d) Condition 2a)iv), requiring an agreement for two car bays to be provided in a nearby service station, while useful, would have inherent legal difficulties. The owner of the service station has previously applied to Council for re-zoning, making longevity of the use uncertain;*

(e) Condition 2c), requiring two on-site car bays to be available to café patrons, was likely to be beyond the powers of the applicant to satisfy. I pointed out that unless use of the two car bays was included within the lease documents for the Feast Café, they were probably already being used by someone else.

7. The majority of Councillors took no notice of my arguments and voted to approve the revised conditions. I voted against the motion.

....

24. My professional opinion is that the number of seats for the Feast Café should be in the range of 30 to 50 seats, not necessarily at the lower end of the range. The relatively small size of the premises occupied by Feast and the adjoining area available for outdoor tables will be self-limiting. My view compares with the 30 seats, without further conditions, recommended by administration to the Council Committee meeting of 11 August 2009.

...

28. In summary, my professional opinion is that the Feast Café could operate successfully from its existing premises with 40 seats and no further conditions of approval.”

(16) In Senior Member Mr D R Parry’s Reasons for Decision of the Tribunal¹ in the SAT Review, he said, at [40] – [44]:

“Ms Grace also relied on evidence from Councillor Max Hipkins, who is a town planner by profession and also the Deputy Mayor of the City. Councillor Hipkins expressed the opinion that the number of seats at the Feast Café 'should be in the range of 30 to 50 seats, not necessarily at the lower end of the range', and that the Feast Café 'could operate successfully from its existing premises with 40 seats and no further conditions of approval'.

Councillor Hipkins based his evidence largely on a review of other approvals for restaurants, including cafés, in the local government area and a survey of certain of those. In relation to the review of other approvals, evidence presented on behalf of the City by Councillor Irene Tan indicated that for five of the seven approvals referred to by Councillor Hipkins, there is available off-street parking in the form of Council car parks as well as on-street parking. The sixth approval referred to by Councillor Hipkins was granted in 2005 on the basis that, in Council's determination, 'there was adequate on-street parking available within the immediate locality which would cater for any shortfall of on-site car parking'. The final approval related to a site on Stirling Highway where there is available car parking. As suggested by Mr Allering, Stirling Highway is an entirely different environment from the Nedlands Village, which is an isolated commercial property in an otherwise residential and indeed low density residential precinct.

Importantly, each of the examples of approvals referred to by Councillor Hipkins are distinguishable. That is not to say, however, that discretion is not available in this case, as it was in each of those cases. However, discretion needs to be exercised having regard to the particular circumstances of the case.

Materially, there is no car park in the locality of Nedlands Village and there is an historical shortfall in the provision of on-street parking in the area adjoining and adjacent to the commercial precinct.

The survey undertaken by Councillor Hipkins was a single survey on a single day, and cannot form the basis of a considered assessment.”

¹ Grace and City of Nedlands [2010] WASAT 53

- (17) Councillor Hipkins applied to and requested the City to grant him financial assistance for legal advice in relation to the complaint and the Panel's dealing with it. In the light of the administration's report on his application not recommending it be granted, on 22 July 2010 Councillor Hipkins sent an email [Doc I] to the other City Councillors in an effort to persuade them to grant him such assistance at the Council meeting on 27 July 2010. This email is of note because of the following extracts taken from it:

"The request is a simple one seeking the City to carry legal fees for a matter I was involved with while a Councillor, in accordance with Council Policy."

...

"Also under "Discussion" [in the administration's report], it is stated "*In addition to the above, Cr Hipkins has previously advised of the professional relationship he has with the appellant to the SAT appeal to which this complaint relates.*" While this is irrelevant to the Policy, to clarify any misunderstanding, **when I advised I had a professional relationship with the appellant, I had an arms-length business relationship, supplying my services pro bono, in my role of representing the interests of electors, ratepayers and residents of the City, as required by the LG Act.**" [Bold emphasis added.]

Councillor Hipkins' response to the subject allegations

4. Councillor Hipkins' response to the subject allegations (Councillor Hipkins' response) is a letter from his solicitors, Hardy Bowen Lawyers, dated 14 July 2010 [Doc H1]. The relevant submissions in this letter are reproduced in **Attachment B**.

Order of dealing with the allegations of minor breach

5. The Panel deals with the allegations of minor breach mentioned in paragraph 2 above by: first considering together allegation (1), allegation (2) and Councillor Hipkins' response to them; and then considering together allegation (3) and Councillor Hipkins' response to it.

PANEL'S DEALING WITH ALLEGATION (1) AND ALLEGATION (2)

6. Allegation (1) is as mentioned in paragraph 2(1) above. Allegation (2) is as mentioned in paragraph 2(2) above. 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).

Views for the purposes of dealing with allegation (1) and allegation (2)

7. **Attachment C** sets out views, including the Panel's general views, and material in relation to regulation 7(1). The Panel adopts those views and that material for the purposes of its dealing with allegation (1) and allegation (2).

Issues arising in dealing with allegation (1) and allegation (2)

8. In the light of the views and material set out in **Attachment C**, it is the Panel's view that the following issues arise in dealing with allegation (1) and allegation (2):

- (1) Was Councillor Hipkins a Council member on 3 and 25 March 2010?

- (2) If issue (1) is answered in the affirmative, did Councillor Hipkins voluntarily (i.e. without any compulsion at law):
 - (a) provide the Witness Statement to Ms Grace for use by her at the SAT Review; and
 - (b) give witness evidence, on behalf of Ms Grace, in the SAT Review?
- (3) If issue (2) is answered in the affirmative, was such conduct a use of Councillor Hipkins' office as a Council member?
- (4) If issue (3) is answered in the affirmative, viewed objectively, was such conduct an improper use of Councillor Hipkins' office as a Council member?
- (5) If issue (4) is answered in the affirmative, in committing the relevant conduct did Councillor Hipkins believe that the intended result would be both or either: to gain directly or indirectly an advantage for Ms Grace; and/or to cause detriment to any one or more of the City, Councillor Sommerville-Brown and Councillor Tan?

Issues in dispute in relation to allegation (1) and allegation (2)

9. The Panel notes that:

- (1) In Councillor Hipkins response [*Doc H1*] he:
 - (a) admits, does not dispute or indicates that there is no dispute in respect of, some of the several issues identified in paragraph 8 above, namely:
 - (i) that he was a Council member on 3 and 25 March 2010, and at all other relevant times in this matter; and
 - (ii) that his conduct in this matter (Councillor Hipkins' conduct in this matter) was that he voluntarily provided the Witness Statement to Ms Grace for use by her at the SAT Review, and that he voluntarily gave witness evidence, on behalf of Ms Grace, in the SAT Review (although he maintains that he gave such evidence as an expert witness); and
 - (b) does not appear to contend that other issues arise in relation to allegation (1) or allegation (2).
- (2) Accordingly, the issues in dispute in relation to allegation (1) and allegation (2) are confined to issues (3), (4) and (5) identified in paragraph 8 above (noting that a sub-issue is whether or not Councillor Hipkins gave such evidence as an expert witness, and, if so, what effect (if any) that such position has in relation to such allegations).

Was Councillor Hipkins' conduct in this matter a use of his office as a Council member?

10. On the available information, it is the Panel's view that Councillor Hipkins' conduct in this matter was a use of his office as a Council member, because:

- (1) Although Councillor Hipkins has recently claimed that he gave his evidence in the SAT Review in accordance with his Councillor role pursuant to section 2.10(a) (in that he was representing the interests of electors, ratepayers and residents of the City), it is the Panel's view that when he provided the Witness Statement to the SAT and gave evidence during the SAT Review for Ms Grace as an 'expert' witness, particularly without any financial remuneration or reward, his motives were more than likely that:
 - (a) he disagreed with the Council's November 2009 conditional approval of the development application;
 - (b) in his view, his involvement with the development application in his capacity as a Council member was concluded;
 - (c) in his view, he then had a 'professional' relationship with Ms Grace, who he believed deserved his best possible advice to ensure a fair and just outcome was obtained; and
 - (d) he believed that the intended result of his evidence would be an advantage for Ms Grace because, in his view, his evidence would assist the SAT to reach the same conclusion as he had – i.e. that the correct and preferable decision on the development application was that the number of seats for the Feast Café should be 30 or more, and that no conditions as to car parking bays should be imposed as the Feast Café was more like a lunch bar than a restaurant.
- (2) In paragraphs 6 and 7 of the Witness Statement Councillor Hipkins refers to events in relation to the development application, in which he participated as a Council member.
- (3) In stating his credentials in the Witness Statement, Councillor Hipkins said: *"I was elected as a Councillor to the City of Nedlands in 2008 and, after re-election in 2009, currently hold the office of Deputy Mayor."*

Was Councillor Hipkins' conduct in this matter an improper use of his office as a Council member?

11. In the High Court of Australia case of *Chew v The Queen*² ('*Chew*') the statutory provision under consideration was 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."

² [1992] HCA 18; (1992) 173 CLR 626

The Panel notes that 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 then said, at [9] and relevantly at [10]:

"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."

...

"It follows that we do not agree with the respondent's contention, accepted by Murray J. in the Western Australian Court of Criminal Appeal, that s. 229(4) is satisfied by a willed act performed by an officer or employee of a corporation which can be categorized as an improper act and which in fact gains an advantage or causes a detriment within the terms of the sub-section. ..."

12. In regard to Councillor Hipkins' submissions in relation to allegation (1) and allegation (2), on the available information and in the light of the views, including the Panel's general views, and material in relation to regulation 7(1) set out in **Attachment C**, it is the Panel's views that:

- (1) In relation to the submissions/statements made in paragraphs 10 to 12 of Councillor Hipkins' response – in particular, the statement *"Conversely, if there has been an improper use of office then the question will be whether any advantage or detriment has been occasioned as a consequence"* – with respect to Hardy Bowen's differing view, it appears to the Panel that the reasoning behind such statements is the same as or similar to the said contention that was accepted by Murray J. in the Western Australian Court of Criminal Appeal in *Chew*, but which was not agreed with by the High Court.
- (2) On the Panel's view mentioned in paragraph 12(1) above, each of the other submissions/statements in Councillor Hipkins' response that is to the effect that Councillor Hipkins did not breach regulation 7(1) because of both or either that Ms Grace did not in fact gain any advantage and/or that the City or any other person did not in fact suffer any detriment as a consequence of his evidence, is misconceived and incorrect at law.
- (3) In the event, for the reasons in paragraph 15 below and in paragraphs 6(10) to 6(15) in **Attachment C**, even if: Councillor Hipkins believed his evidence in the SAT Review would be or was expert evidence; or such evidence was treated by the SAT as expert evidence; either of such circumstances is not relevant to the Panel's dealing with allegation (1) or allegation (2).

The expected and required standards of conduct of Councillor Hipkins

13. On the available information and in the light of the views, including the Panel's general views, and material in relation to regulation 7(1) set out in **Attachment C**, it is the Panel's view that at 3 and 25 March 2010 the expected and required standards of conduct of Councillor Hipkins as a Council member were those flowing from the fiduciary obligations owed by him as a Council member to Council (or the City) as varied or complemented by the Act (which includes all regulations, including the Regulations, made under it), the common law, the City's code of conduct, and Council's decisions and policies.

14. Attachment D sets out various clauses of the City of Nedlands Code of Conduct (as adopted by Council on 22 April 2003, first amended in October 2004 and further amended on 13 September 2005) (the City's Code of Conduct). In the Panel's view, the expected and required standards of conduct of Councillor Hipkins as a City Council member, and as the City's Deputy Mayor, at 3 and 25 March 2010 included the due observance of the clauses reproduced in Attachment D.

15. On the available information and in the light of the views, including the Panel's general views, and material in relation to regulation 7(1) set out in **Attachment C**, it is the Panel's view that:

- (1) An individual undertakes significant public duties when he/she becomes a member of the council of a local government. Those duties are inseparable from the position: he/she cannot retain the honour and divest himself/herself of the duties. 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 member or as a member of any of the council's committees.
- (2) The effective discharge of a council member's duties is necessarily left to the member's conscience and, in many cases, the judgment of his/her electors. 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 is in breach of or is prejudicial or may lead him/her to act prejudicially to his/her fiduciary obligations or duties owed to his/her council as the governing body of the local government.
- (3) Councillor Hipkins' conduct in this matter contravened his fiduciary obligations or duties owed by him to the Council as the City's governing body, as follows:
 - (a) he contravened his duty to act in good faith, in that when he gave such evidence he did not act bona fide in what he considered to be the best interests of the Council; and
 - (b) he contravened the no conflict rule, in that he had an inconsistent engagement with Ms Grace where there was plainly a conflict between her interests and the City's interests in the SAT Review.
- (4) The contraventions mentioned in paragraphs 15(3)(a) and (b) above occurred whether or not: the evidence and opinions expressed by Councillor Hipkins when he gave such evidence were truthful, relevant and based on his honest professional opinions as a town planner; or that he gave such evidence as an expert witness.

16. In relation to Councillor Hipkins' claim that he gave his evidence in the SAT Review in accordance with his Councillor role pursuant to section 2.10(a) in that he was representing the interests of electors, ratepayers and residents of the City, it is the Panel's view that:

- (1) As mentioned in paragraphs 6(5), (6) and (7) in **Attachment C**:
 - (a) while a councillor has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a) and (c) – is subject to (i.e. subordinate to) the councillor'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;
 - (b) the Act does not impose upon a councillor any right to conduct himself/herself in a manner whilst representing the interests of the members of the community, or during the facilitation of communication between the community and council, 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; and
 - (c) a councillor will carry out his or her role and functions under section 2.10 by observing and implementing section 2.7 and ensuring the needs and concerns of his or her community are addressed.
- (2) Broadly, there are 4 means by which a council member will carry out his/her functions under section 2.10(a), (b) and (c) – 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 participating in the local government's decision-making processes at such meetings;
 - (c) representing his/her local government at organised events; 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.
- (3) In the event, Councillor Hipkins' conduct in this matter was in the interests of Ms Grace (although she may be a City elector, ratepayer or resident) and was not in the interests of the electors, ratepayers and residents of the City.

In committing the relevant conduct did Councillor Hipkins believe that the intended result would be both or either: to gain directly or indirectly an advantage for Ms Grace; and/or to cause detriment to any one or more of the City, Councillor Sommerville-Brown and Councillor Tan?

17. It is the Panel's view that:

- (1) As mentioned in paragraph 7 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.
- (2) As mentioned in paragraph 10(1) above, it is the Panel's view that when he provided the Witness Statement to the SAT and gave evidence during the SAT Review for Ms Grace as an 'expert' witness without any financial remuneration or reward, his motives were more than likely that:
 - (a) he disagreed with the Council's November 2009 conditional approval of the development application;
 - (b) in his view, his involvement with the development application in his capacity as a Council member was concluded;
 - (c) in his view, he then had a 'professional' relationship with Ms Grace, who he believed deserved his best possible advice to ensure a fair and just outcome was obtained; and
 - (d) he believed that the intended result of his evidence would be an advantage for Ms Grace because, in his view, his evidence would assist the SAT to reach the same conclusion as he had – i.e. that the correct and preferable decision on the development application was that the number of seats for the Feast Café should be 30 or more, and that no conditions as to car parking bays should be imposed as the Feast Café was more like a lunch bar than a restaurant.

18. In the Panel's view, the only reasonable inference which is open on a consideration of all of the available information is that when Councillor Hipkins provided the Witness Statement to the SAT, and when he gave evidence during the SAT Review, his intention and belief was that the intended result would be to gain directly or indirectly an advantage for Ms Grace.

Contraventions of the City's Code of Conduct

19. On the available information, and on the basis of its views mentioned in paragraphs 6 to 18 above, the Panel is satisfied that Councillor Hipkins' conduct in this matter also constitutes contraventions of the City's Code of Conduct, as follows:

- (a) a contravention of clause 9.1(a) of the City's Code of Conduct, in that Councillor Hipkins' conduct in this matter was a failure by him to act properly and in accordance with the requirements of the law and the terms of the City's Code of Conduct;

- (b) a contravention of clause 9.2 of the City's Code of Conduct, in that Councillor Hipkins' conduct in this matter was a failure by him to represent and promote the interests of the community as a whole; and
- (c) a contravention of clause 11.2 of the City's Code of Conduct, in that Councillor Hipkins' conduct in this matter was a failure by him to not allow his business activities as a town planning expert witness to engage in a form of work that placed him in a conflict of interest with his role and responsibilities to the City.

20. The Panel notes that:

- (1) Paragraphs 6(10), (11) and (12) of **Attachment C** set out views and material on a council member's duty of loyalty to his or her local government's decisions (particularly those made by its council) because the council is a collegiate decision-maker.
- (2) Clause 9.9 of the City's Code of Conduct mentions only one aspect of the collegiate nature of Council – i.e. that the collegiate nature of decision making under the existing system of local government means that a member's decision making function may only be exercised in properly constituted forums and collectively by Council resolution.
- (3) While Councillor Hipkins' conduct in this matter was, strictly speaking, not a breach of clause 9.9 of the City's Code of Conduct, it was in the Panel's view a breach of his duty of loyalty to his Council.

Panel findings on allegation (1) and allegation (2)

21. On the available information, on the basis of its views mentioned in paragraphs 6 to 20 above, and as required by section 5.110(2), the Panel's findings in relation to allegation (1) and allegation (2) are that:

- (1) On 25 March 2010 Councillor Hipkins committed a minor breach by breaching regulation 7(1)(a) in that he made improper use of his office of Council member to gain directly or indirectly an advantage for Ms Grace by voluntarily giving evidence for the applicant, Ms Grace, in the SAT Review against the City's decision in that matter.
- (2) In the circumstances of this matter, Councillor Hipkins did not commit a breach of regulation 7(1)(b) as alleged by Councillor Tan in allegation (2).

PANEL'S DEALING WITH ALLEGATION (3)

Relevant legislation & previous views

22. Allegation (3) is as mentioned in paragraph 2(3) above. Regulation 6(2) is a rule of conduct under section 5.104(1) and, in accordance with section 5.105(1)(a), a contravention of regulation 6(2)(a) or 6(2)(b) is a minor breach.

Issues arising in dealing with allegation (3)

23. In the Panel's view, the following issues arise in dealing with allegation (3):

- (1) Was Councillor Hipkins a Council member on 3 and 25 March 2010?
- (2) If issue (1) is answered in the affirmative, did Councillor Hipkins acquire information at a City council meeting on 24 November 2009 as to both or either of how and/or why each of the Councillors present voted in *relation to Item 13.5 (No. 71B - Lot 371 – Princess Road, Nedlands (Proposed Café/Restaurant)(File No. PR3/71) ('the information')*?
- (3) If issue (2) is answered in the affirmative, was the City council meeting closed to members of the public under section 5.23(2) at the time Councillor Hipkins received the information?
- (4) If issue (3) is answered in the affirmative, did Councillor Hipkins disclose the information on both or either of 3 and/or 25 March 2010?
- (5) If issue (4) is answered in the affirmative:
 - (a) was the information derived by Councillor Hipkins from a document that was not marked by the City's chief executive officer to clearly show that the information in the document was not to be disclosed;
 - (b) was the information disclosed only to the extent specified by the council and in accordance with such conditions as the council determined; and
 - (c) was the information already in the public domain when it was disclosed?

Councillor Hipkins' submission in relation to allegation (3)

24. In Councillor Hipkins' response, his submission in relation to allegation (3) [p10Doc H1] is that the Witness Statement does not contain any information "*derived from a confidential document*" or "*information ... acquired at a closed meeting*", on the basis that:

- (a) his dissenting vote in respect of the conditions imposed on Ms Grace's planning application is evidenced in the public minutes of the Council meeting held on 1 September 2009;

- (b) the express and reasonable inference to be drawn from reading the minutes of the Council meeting held on 24 November 2009 is that any dissenting views that he had were dismissed by the majority of councilors – and his statement in paragraph 7 of the Witness Statement restates this;
- (c) it follows from the above that such statement cannot be confidential information, as it is a restatement of his dissenting views, which were views accessible within the public domain; and
- (d) the allegation is not made out against him as such statement was not confidential information but was a statement of fact reasonably capable of being inferred from documents in the public domain, namely minutes of the Council meeting held on 1 September 2009.

Panel view on allegation (3)

25. The Panel notes that:

- (1) As mentioned in paragraph 3(4) above, the development application was considered by the City's Council Committee at its meeting on 11 August 2009, and that at this meeting, *when it was open to members of the public*: the Committee considered an administration report dated 30 July 2009 that was not a confidential report, addressed those submissions and discussed concerns about car parking issues; the report recommended that the development application be approved subject to a maximum of 30 seats, indoors and outdoors, rather than the 48 sought.
- (2) In relation to the events concerning the development application behind closed doors at Council's meeting on 24 November 2009, the publicly available confirmed minutes of the meeting [*p5Doc D5*] record the following:

*"A confidential report was circulated separately to Councillors prior to the meeting.
ADOPTION – The motion was put and*

*CARRIED 7/6
ON THE CASTING VOTE OF THE PRESIDING MEMBER
(Against: Crs. Argyle Hipkins Bell Binks Tyson & Collins)"*

26. On the available information, it is the Panel's view that:

- (1) It is a material fact to the consideration of allegation (3) that the information in the said administration report dated 30 July 2009 has been information in the public domain since 11 August 2009.
- (2) By virtue of that material fact, any such information that was included in the later Confidential Administration Report dated 5 November 2009 remains information in the public domain.
- (3) Councillor Hipkins' said submission in relation to allegation (3) has merit.

- (4) Councillor Hipkins' statement in the Witness Statement, that "[T]he majority of Councillors took no notice of my arguments and voted to approve the revised conditions", was information already in the public domain, or was information that could reasonably be inferred from information already in the public domain, when it was disclosed.

Panel finding on allegation (3)

27. On the available information, and on the basis of the matters and its views mentioned respectively in paragraphs 25 and 26 above, and as required by section 5.110(2), the Panel finds that in the circumstances of this matter Councillor Hipkins did not commit a breach of regulation 6(2)(b) as alleged by Councillor Tan.

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

Attachment A

BACKGROUND AND PROCEDURAL MATTERS

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

1. In these Reasons, unless otherwise indicated:

- (1) A reference to a regulation is a reference to the corresponding regulation of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations), a reference to a section is a reference to the corresponding section of the *Local Government Act 1995* (the Act), and a reference to the Department is a reference to the Department of Local Government.
- (2) 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 Graham Foster, the Chief Executive Officer (the City’s CEO) and the Complaints Officer (the Complaints Officer) of the City of Nedlands (City), has sent to the Panel a complaint dated 31 March 2010 (the primary complaint) made by Councillor Tan about alleged conduct of Councillor Hipkins, a current member of the City’s Council (the Council). The primary complaint consists of a 2-page *Complaint of Minor Breach* dated 31 March 2010 [Doc B1], a 4-page report by the complainant [Doc B2] and its attachments being [Doc B3], [Doc B4], [Doc B5], [Doc B6], [Doc B7], [Doc B8] and [Doc B9].

Identifying / clarifying allegations of minor breach

3. By a letter dated 12 May 2010 [Doc C] Councillor Tan was requested to clarify her allegations and provide further information in this matter. Councillor Tan responded with her letter dated 20 May 2010 [Doc D1], her (2-page) *Complaint of Minor Breach* dated 20 May 2010 [Doc D2] (the supplementary complaint) and [Doc D3] to [Doc D7] – noting that Councillor Tan in fact provided the whole of the agenda and the minutes from which [Doc D4] and [Doc D5] are respectively taken.

4. In these Reasons, the primary complaint and the supplementary complaint are considered together and are collectively referred to as ‘the complaint’.

Preliminary matters

5. The complaint is in the form approved by the Minister for Local Government and was made within time. There is an allegation made in the complaint that Councillor Hipkins, 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).

Councillor Hipkins' response sought and received

6. On 24 June 2010 the Presiding Member sent a *Notice of Complaint [Doc G]* to Councillor Hipkins advising him, among other things, of the 3 allegations of minor breach that the Panel will consider in this matter and inviting him to respond to those allegations. Councillor Hipkins responded by a letter from his solicitors, Hardy Bowen Lawyers [*Doc H1*] to [*Doc H4*].

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 the City's Complaints Officer, Mr Graham Foster, dated 20 April 2010.
B1	Copy of (2-page) Complaint of Minor Breach dated 31 March 2010 (Complaint 14/2010) – the attachments to it being [<i>Doc B2</i>] to [<i>Doc B9</i>].
B2	Copy of (4-page) <i>report by the complainant</i> .
B3	Copy of (11-page) Attachment A to Complaint 14/2010 – being a copy of a witness statement dated 3 March 2010 by Cr Hipkins in SAT matter DR 372-2009.
B4	Copy of (1-page) <i>Attachment B to Complaint 14/2010</i> – being copies of the following emails: an email of 25 November 2009 from Cr Hipkins to his fellow City Councillors; an earlier email of 25 November 2009 from Cr Hipkins to the City's CEO and his fellow City Councillors; and an even earlier email of 25 November 2009 from the City's CEO to the City's Councillors.
B5	Copy of (6-page) <i>Attachment C to Complaint 14/2010</i> – being a copy of a letter dated 23 November 2009 from a Ms Pamela Lampropoulos to the City's CEO
B6	Copy of (1-page) <i>Attachment D to Complaint 14/2010</i> – being a copy of an email of 19 March 2010 from the City's CEO to Cr Hipkins.
B7	Copy of (8-page) <i>Attachment E to Complaint 14/2010</i> – being a copy of a 5-page annotated copy of an email of 24 March 2010 from Cr Hipkins to the City's CEO (with the bulleted points being Cr Tan's comments or remarks on the preceding unbulleted statement/s by Cr Hipkins); a copy of that email; and a copy of an email of 19 March 2010 from the City's CEO to Cr Hipkins.
B8	Copy of (4-page) <i>Attachment F to Complaint 14/2010</i> – being a copy of pages 17 – 20 of the minutes of the City's Ordinary Council Meeting held on 1 September 2009.
B9	Copy of (4-page) <i>Attachment G to Complaint 14/2010</i> – being a copy of pages 71 and 72 of the minutes of the City's Ordinary Council Meeting held on 24 November 2009; and a copy of an email of 17 March 2010 from Cr Tan to the City's CEO.
C	Copy of (9-page) letter (and attachments) to the complainant, Cr Tan, dated 12 May 2010, requesting clarification of her allegations and more information.
D1	Copy of (3-page) letter from the complainant, dated 20 May 2010 – the attachments to it being [<i>Doc D2</i>] to [<i>Doc D7</i>].

D2	Copy of (2-page) <i>Complaint of Minor Breach</i> dated 20 May 2010 (Complaint 14A/2010)
D3	Copy of (1-page) Complainant Details Form
D4	Copy of (1-page) page 55 of the Agenda for the City's Ordinary Council Meeting held on 24 November 2009.
D5	Copy of (6-page) pages 5, 12, 13, 14, 71 and 72 of the minutes of the City's Ordinary Council Meeting held on 24 November 2009.
D6	Copy of (22-page) document headed "Council Meeting 24 November 2009 Confidential Minutes No. 71b (Lot 371) Princess Road, Nedlands (Proposed Café/Restaurant)".
D7	Copy of (6-page) letter from Cr Tan to the Department of Local Government, dated 20 May 2010.
E	Copy of (23-page) the City's Code of Conduct - adopted by Council on 22 April 2003, first amended in October 2004 and further amended on 13 September 2005.
F	Copy of (17-page) Reasons for Decision of the Tribunal in <i>Grace and City of Nedlands</i> [2010] WASAT 53 (being the decision in SAT matter DR 372 of 2009).
G	Copy of (20-page) Presiding Member's Notice of Complaint to Cr Hipkins, dated 24 June 2010.
H1	Copy of (10-page) letter from Hardy Bowen Lawyers, solicitors for Cr Hipkins, dated 14 July 2010 – its annexures being [Doc H2] to [Doc H4].
H2	Copy of (8-page) Statutory Declaration dated 13 July 2010, made by Pamela Denise Kikiros.
H3	Copy of (2-page) SAT publication titled ' <i>A guide for experts giving evidence in the State Administrative Tribunal</i> '.
H4	Copy of (4-pages) pages 17-20 of the minutes of the City's Ordinary Council Meeting held on 1 September 2009.
I	Copy of (1-page) printout of an email of 22 July from Cr Hipkins to the City's other Councillors. [Note: <i>Due to its date, a copy of this document was not included with the available information sent to Cr Hipkins with [Doc G].</i>
J1	Copy of (16-page) Administration report dated 30 July 2009, and headed "D51.09 No. 71b (Lot 371) Princess Road, Nedlands – Proposed Café/Restaurant (File No. PR3/71) (Melvista Ward)".
J2	Copy of (4-pages) pages 3, 4, 6 and 7 of the minutes of the City's Council Committee Meeting held on 1 September 2009.

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

8. 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 it 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].
- (5) 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).
- (6) 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.

Attachment B

Relevant parts of the text of the letter [Doc H1] from Hardy Bowen Lawyers, solicitors for Councillor Hipkins, dated 14 July 2010

- “10. The key to the interpretation and application of [regulation 7(1)] is the phrase “improper use”; in other words, without improper use of a person’s office, there can be no breach of the Regulation. Conversely, if there has been an improper use of office then the question will be whether any advantage or detriment has been occasioned as a consequence.
11. It may be argued that the advantage or detriment referred to in paragraphs (a) and (b) of Regulation 7(1) is a necessary corollary of improper use. In our submission, that is not so as there may be many circumstances where persons gain advantages or detriments are suffered as a consequence of the actions of a person as a Council Member but which are entirely consistent with a proper discharge of that person’s responsibilities.
12. For example, refusing an application for development approval may be construed as causing a detriment to the applicant in that case but no adverse consequence can flow in accordance with Regulation 7(1) unless and to the extent that a member of the Council in exercising their rights to make that decision did so as a consequence of the improper use of that person’s office as a Council Member.
13. What constitutes improper use of a position was considered by the High Court in *R v Byrnes* (1995) 183 CLR 501, and adopted by the SAT in *Ryan and Local Government Standards Panel* [2009] WASAT 154 (*‘Ryan’*). There, it was noted that the expression called for an objective test of impropriety and that:
- “Impropriety does not depend on [the] alleged offenders consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the possession of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case”.*
14. The SAT went on to consider the concept of detriment and agreed with the observations of the Standards Panel as to the meaning to be given to that term (at [31]), namely:
- “the term “detriment” 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”*
15. In *Treby and Local Government Standards Panel* [2010] WASAT 81 (*‘Treby’*) the SAT was asked to consider again the meaning of the phrase ‘improper use’ in Regulation 7(1)(b). At [27] the SAT noted that the term may include ‘unsuitable’ and ‘inappropriate’ but that in addition, the phrase will take its flavour from the surrounding contexts, including an assessment of what is involved in the role of a Councillor.

16. In *Treby* the relationship between a council member and his or her council was categorized [sic] as being fiduciary in nature, with the SAT observing as follows:

“In order to carry out that role, in a manner which facilitates the proper consideration and determination of council business, it is important that a mayor, as chairperson of a council meeting, remain impartial in his or her conduct of that meeting. That does not mean that a mayor is not permitted to express his or her own views about items of council business. It does, however, mean that a mayor should treat all councilors fairly, not show particular favours to council members, and should not resort to personal attacks on fellow councilors”

Response to Allegations 1 and 2

17. It is accepted that our client provided a witness statement to the SAT and gave evidence during the SAT Review.
18. It is denied that our client, in giving evidence before the SAT, made false claims about the Council's dealings with the development approval application for the following reasons:
- (a) in response to the assertion that our client's statements in paragraphs 6(d) and 6(e) of his witness statement are in direct contradiction to a letter dated 23 November 2010 (sic, 2009), we refer to the attached statutory declaration (Annexure 1) made by Ms Pamela Kikiros denying that she ever confirmed that two car bays were available on site; and
 - (b) in response to the assertion that our client's statements in paragraph 6 of his witness statement are in direct contradiction to his email of 25 November 2009 (sent at 6:47pm) to the City's CEO, it is accepted that there is some conflict between the contents of that email and our client's witness statement, however it is submitted that the email was sent without proper consideration of the language being used, whereas the witness statement was prepared and reviewed under oath – simply put, the email is incorrect.
19. It is denied that our client, in giving evidence before the SAT, made an improper use of his office as a Council Member for the following reasons:
- (a) it is accepted that clauses 9.1(a), 9.1(b), 9.1(c), 9.1(d), 9.2, and 9.5(b) of the City's Code of Conduct which require councillors to act and behave with propriety, impartiality, honesty and to promote the interests of the community are relevant to these allegations, however we submit that our client's conduct in providing a witness statement to and giving evidence before the SAT is not in conflict with any of these required standards of behaviour as the evidence and opinions expressed by our client were truthful, relevant and based on his honest professional opinions as a town planner;
 - (b) our client's conduct in providing a witness statement to and giving evidence before the SAT was in no way disrespectful or derogatory towards any other person, as was the basis for the finding of improper purposes in the SAT decisions of *Treby* and *Ryan*;

- (c) clauses 11.1 and 11.2 of the City's Code of Conduct require councilors to avoid any actual or perceived conflict or incompatibility between their personal or business interests and the impartial fulfilment of their public or professional duties, however our client's conduct in providing a witness statement to and giving evidence before the SAT was on the basis of acting as an expert town planning witness;
- (d) it is a function of the role of the SAT to ensure that evidence, when given by experts, is provided on the basis that the expert is discharging professional obligations to the SAT rather than acting in a partisan manner for a party to the proceedings before it and this is demonstrated in the SAT brochure entitled '*A guide for experts giving evidence in the State Administrative Tribunal*' (Annexure 2), which provides that:
- *An expert witness has an overriding duty to assist the Tribunal impartially on matters relevant to the expert's area of expertise.*
 - *An expert witness's paramount duty is to the Tribunal and not to the party engaging the expert.*
 - *An expert witness is not an advocate for a party.*
- (e) our client's relationship with Ms Grace is confined to that of an expert witness engaged for the purposes of the SAT Review and our client's reference to the relationship being 'professional' (see email from Max Hipkins to Graham Foster dated 24 March 2010 sent at 4:13pm) reflects this and describes that relationship as 'at arms length', distinct from a personal relationship or any relationship from which our client could be said to have derived any benefit or interest;
- (f) it follows that:
- (i) there can be no actual or perceived conflict of interest arising out of our client preparing a witness statement for and giving evidence to the SAT, as the very function of our client role's as an expert witness is to remain completely impartial;
 - (ii) no 'greater credibility' can be given to our client's witness statement by reference to his election as a Councillor and subsequently, Deputy Mayor, as he was providing evidence in his capacity as a town planning and architectural expert, not as a representative of the Council or the City; and
 - (iii) as a consequence of the above, our client's conduct in providing a witness statement to and giving evidence before the SAT does not offend clause 9.9 of the City's Code of Conduct, which requires our client to recognise the collegiate nature of decision making under the local government and to accord legitimacy and authority to Council's decisions and, further, while clause 9.9 of the Code of Conduct requires our client to respect the ultimate decision that was made by the Council, it does not require our client to change his view so as to agree with the decision and it does not preclude him from giving impartial expert evidence based on over 40 years of planning experience;

- (g) our client's evidence provided no advantage to Ms Grace as applicant as is evidenced by the manner in which the SAT expressly:
- (i) distinguished, and took marginal notice of, our client's assessment of other approvals for restaurants and cafés in the City of Nedlands (see paragraph 42 of the SAT decision in the SAT Review, Annexure F in the bundle of documents provided by [the Panel's Presiding Member]);
 - (ii) discounted entirely the survey of the cafés undertaken by our client (see paragraph 43 of the SAT decision in the SAT Review, Annexure F in the bundle of documents provided by [the Panel's Presiding Member]);
 - (iii) relied upon the shortfall of car parking to determine that the proposed development would adversely affect the amenity of the surrounding area, as is evidenced from paragraphs 60 and 61 of the SAT decision in the SAT Review (Annexure F in the bundle of documents provided by [the Panel's Presiding Member]), which read as follows:

I have given careful consideration to the exercise of discretion in the circumstances of this case, and although I have found that the Tribunal has not been satisfied in relation to a 48 seat café, I consider that there is capacity to exercise discretion in relation to car parking to a limited extent in relation to the site, due to the provision of a local amenity, and the attraction of some local custom to the site that would not travel by car.

It is true that some local custom is also contemplated by the existing historical shortfall in car parking provision. However, in my view it is appropriate to exercise a limited discretion to increase the number of seats independently of the historical shortfall to reflect local custom and, as I have said, the local amenity that is obviously created by this use.

- (h) in light of paragraph (g), it is submitted that the outcome arrived at by the SAT would have been the same if another expert planning witness had been asked to give evidence, that is, our client's evidence did not procure any increase in the number of seats beyond that which the Council of the City approved on 24 November 2009;
- (i) in light of the paragraphs above, it is submitted that our client's conduct in providing a witness statement to and giving evidence before the SAT did not:
- (i) derive any financial benefit or advantage to Ms Grace; or
 - (ii) discredit the Council of the City or undermine the Council's case, the Council being ably represented by its agent, Mr Steven Allarding (from Allarding & Associates), two local residents, Ms Amanda Butterworth, an expert town planner, and Councillors Tan and Sommerville-Brown;

20. We reiterate paragraph 19 in response to the allegations regarding detriment suffered by the City and/or Councillors Tan and Sommerville-Brown.

21. In particular it is to be noted that at no stage during the SAT Review proceedings or in his witness statement did our client expressly state that the Council's decision of 24 November 2009 was manifestly incorrect. In his witness statement, our client:
- (a) refers to the Council's decision as being "unnecessarily restrictive";
 - (b) observes that car parking requirements in respect of approvals for restaurants and cafés have been reduced;
 - (c) records that he voted against the conditions proposed at the meeting of 24 November 2009; and
 - (d) provided his expert planning comment and opinion.
22. There is nothing in our client's witness statement that would cause detriment to the City and Councillors Tan and/or Sommerville-Brown within the meaning of that word as described in *Ryan*.
23. It is common for decisions taken by local governments to be challenged and reviewed before the SAT and for those decisions to be set aside. That this occurred as a consequence of Ms Grace challenging the Council's decision of 24 November 2009 together with the evidence provided by our client in his witness statement, does not have the effect that his conduct in some way caused detriment to the City consistent with the meaning of that word as described in *Ryan*.
24. Equally, the fact that decisions of local governments are challenged and reviewed and set aside can not be said to cause undue concern to the City's residents. This is because residents have an ability (albeit limited) to voice their concerns by seeking to give evidence on behalf of and in support of the position (and arguments) advanced by a local government. This is what occurred in this matter, with the City's case relying significantly on the evidence of two local residents, Mr Robert Stewart and Mr Steve Calderwood, each of whom gave evidence on traffic congestion and parking issues.
25. The assertion that Councillors Tan and Sommerville-Brown "contested their own deputy mayor" is rejected for the reason that our client's evidence, as an expert planner, was contested by Ms Amanda Butterworth, an expert town planner, who gave the following evidence (see paragraph 38 of the SAT decision in the SAT Review - Annexure F in the bundle of documents provided by [the Panel's Presiding Member]):

It is considered that a restaurant with a total capacity of 48 seats will exacerbate the parking issue and result in the potential for parking to extend further into the Residential area.... It is considered that a café with 48 seats, together with the other uses that presently exist at Nedlands Village that the traffic and parking will not be satisfactorily able to be accommodated within the existing streets without adversely affecting the amenity of the adjacent residential locality.

26. As is evidenced from paragraphs 60 and 61 of the SAT decision in the SAT Review (Annexure F in the bundle of documents provided by [the Panel's Presiding Member] and paragraph 19(f)(iii) above) it was this evidence (and that of the local residents) that constrained the SAT's decision and the extent to which it could exercise its discretion and not any of the evidence given by our client.
27. The SAT, by virtue of section 27 of the *State Administrative Tribunal Act 2004*, conducts its review of local government decisions by way of a hearing *de novo*; i.e. a fresh hearing not confined to matters that were before the local government (as decision maker) involving the consideration of new material, whether or not it existed at the time the decision was made, in order to produce the correct and preferable decision.
28. It would be inconsistent with the functions of the SAT, and thus inconsistent with the purposes of section 252(1) of the *Town Planning and Development Act 2005* (WA), if the fiduciary obligations outlined in *Treby* prevent a council member from expressing "*his or her own views about items of council business*" before the SAT as he or she expressed when the decision was originally made, particularly where those views:
 - (a) are expressed by that councilor acting in the role of an expert witness; and
 - (b) are publicly known.
29. We reiterate paragraphs 19 to 21 in response to the allegations that our client acted contrary to his fiduciary obligations.

...

Response to Allegation 3

32. Our client's witness statement provided to the SAT contained no information "*derived from a confidential document*" or "*information ... acquired at a closed meeting*"
33. Our client's dissenting vote in respect of the conditions imposed on Ms Grace's planning application is evidenced in the public minutes of the Council meeting held on 1 September 2009 (see Annexure 3).
34. The express and reasonable inference to be drawn from reading the minutes of the Council meeting held on 24 November 2009 is that any dissenting views that our client had were dismissed by the majority of councilors.
35. Our client's statement in paragraph 7 of his witness statement restates this.
36. It follows from the above that our client's statement in paragraph 7 of his witness statement cannot be confidential information, as it is a restatement of our client's dissenting views, which were views accessible within the public domain.

Conclusion

37. Our client denies all three allegations made against him for the reasons set out above.
38. The first and second allegations are not made out against our client as it cannot be demonstrated that his conduct was for an improper purpose. Even if such an improper purpose could be established, it cannot be shown that our clients conduct was for the sole or dominant purpose (in either motive or intent) of gaining a financial advantage, in causing detriment to or discrediting any person. Our client's conduct was solely for the purposes of fulfilling his obligations as an expert planning witness to assist the SAT impartially on matters relevant to his area of expertise, namely the application of the car parking requirements under the City of Nedlands Town Planning Scheme No 1.
39. The third allegation is similarly not made out against our client as the statement made by him in his witness statement was not confidential information but was a statement of fact reasonably capable of being inferred from documents in the public domain, namely minutes of the Council meeting held on 1 September 2009."

Attachment C

Views and material on regulation 7(1) of the *Local Government (Rules of Conduct) Regulations 2007*

Relevant legislation

1. 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.”*

[Note: Section 5.93 prescribes the offence and penalty for improper use of (confidential) information. *The Criminal Code* section 83 prescribes the crime and penalty for corruption.]

use of office

2. The Panel notes that 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”. Accordingly, it is the Panel’s view that 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'

3. In *Treby and Local Government Standards Panel*³ 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),

³ [2010] WASAT 81

(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.

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

4. In *Treby and Local Government Standards Panel*⁴ Judge Pritchard 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, [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* (3rd 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.”

5. In the Panel’s view, 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, any relevant code of conduct, and his or her council’s decisions and policies.

⁴ [2010] WASAT 81

6. In the Panel's view, the role, responsibilities, empowerment and limitations of a council member include the following:

(1) The role of the council of a local government is set out by section 2.7, which 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.”

(2) Thus, by virtue of section 2.7 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.

(3) Section 2.10 defines the role of a councillor:

- “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.”

(4) Elected members constitute a local government's council. They are responsible for observing and implementing section 2.7 and ensuring the needs and concerns of their community are addressed.

(5) While a councillor has responsibility under the Act to his/her constituents, this responsibility – particularly the responsibilities under section 2.10(a) and (c) – is subject to (i.e. subordinate to) the councillor'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.

(6) The Act does not impose upon a councillor any right to conduct himself/herself in a manner whilst representing the interests of the members of the community, or during the facilitation of communication between the community and council, 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.

(7) A councillor will carry out his or her role and functions under section 2.10 by observing and implementing section 2.7 and ensuring the needs and concerns of his or her community are addressed.

- (8) The essential features of the fiduciary relationship, and the fiduciary duties, owed by a council member to his or her council as the governing body of the local government may be summarised as:
- (a) a duty to act in good faith – i.e. the council member must in his dealings act bona fide in what he 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 or others from the property, powers, confidential information or opportunities afforded to the member by virtue of his position.
- (9) Those fiduciary duties are the paramount duties of a councillor by virtue of the fact that councillors are representatives of their community and elected by and from that community, and take precedence notwithstanding that:
- (a) a councillor, when acting in his capacity as a private citizen, has a conditional right of free expression – i.e. that right is subject only to any lawful restrictions on the right of free speech;
 - (b) it may be expected that councillors 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;
 - (c) councillors may be expected to hold particular views as to how they would wish their community to develop and to discharge their duties as councillors by reference to those views;
 - (d) councillors may be assumed to hold and to express views on a variety of matters relevant to the exercise of the functions of the council;
 - (e) a councillor’s expression of such views is part of the electoral process;
 - (f) by virtue of the political nature of the processes they are involved in as representatives of their community, as recognised under the Act, councillors can obtain input from numerous sources and bring their own opinion to bear on matters for council decisions; and
 - (g) it is expected councillors will have views about the matters before council and express those views in a way which in a tribunal or court context could or would be considered biased, as this reflects the nature of the decision-making process undertaken by councils.
- (10) The council of a local government is an organised body of people performing certain common functions and sharing special privileges. Accordingly, the council of a local government is a collegiate decision-maker, with its members voluntarily elected by willing eligible electors from the community for whom they make decisions.
- (11) As a member of council, the member’s ‘*obligation of fidelity*’ to council includes a duty or obligation of loyalty (i.e. to be loyal): to council’s decisions made lawfully at a regularly held council meeting; and to a relevant committee’s decisions made lawfully at a regularly held committee meeting.

- (12) A council member's duty of loyalty to his or her local government's decisions (particularly those made by its council) exists irrespective whether: the member was present when the decision was made; the member voted for or against the decision; the member agreed or not with the decision or the reason or any of the reasons for the decision. However, there are situations when this duty of loyalty does not apply – for example, without limiting other examples:
- (a) when a matter before a council meeting 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; and
 - (b) 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 – in which case, it is appropriate that the member:
 - (i) bring the matter to the attention of council by lodging an appropriate notice of motion; and
 - (ii) 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.
- (13) A council member's duty of loyalty to his or her local government's decisions will be subordinated in the public interest of the due administration of justice where:
- (a) there are current or pending proceedings (whether legal, civil or administrative proceedings) in relation to any one or more of his or her local government's decisions (relevant proceedings); and
 - (b) the member is or proposes to be a party, or has any direct or indirect interest in a party or a proposed party (related party), to the relevant proceedings for the purpose of disputing any one or more of his or her local government's decisions and for the determination of the dispute as to his or her and/or such other party's legal rights and liabilities; or
 - (c) any other person (i.e. any person other than his or her local government or any related party) (unrelated party) who or which is a party to the relevant proceedings gives or serves on the member a summons or a subpoena to be a witness in the relevant proceedings.
- (14) However, a council member will contravene his or her fiduciary duties to his or her council (or, his or her local government) if:
- (a) an unrelated party requests the member to give evidence, on behalf of the unrelated party, in any relevant proceedings and the member accedes to the request; or
 - (b) the member offers or volunteers to give evidence, on behalf of an unrelated party, in any relevant proceedings; or
 - (c) the member voluntarily attends the relevant proceedings and voluntarily gives evidence on behalf of an unrelated party.
- (15) In expressing its views in (13) and (14) immediately above, the Panel does so with some hesitation bearing in mind the law relating to contempt of court – however, the Panel is satisfied that those views are not inconsistent with that law, as those views:
- (a) do not restrict or hinder a council member's access to the courts of criminal or civil jurisdiction for the determination of disputes as to his or her or any related party's legal rights and liabilities;

- (b) do not prevent a council member from giving evidence under a summons or a subpoena to be a witness in any relevant proceeding;
- (c) do not restrict the evidence that a council member might give in any relevant proceeding;
- (d) do not usurp the function of any court to decide any proceeding or matter before it according to law; and
- (e) otherwise do not pose a real risk of interference with the administration of justice.

'advantage'

7. In considering the meaning of the term 'advantage' in regulation 7(1)(a), the Panel notes that the definitions of the noun 'advantage' in the Shorter Oxford English Dictionary (6th ed) include: "*a favouring circumstance; something which gives one a better position ... benefit; increased well-being or convenience ... pecuniary profit*". In the light of these definitions, and the below views on 'detriment', it is the Panel's view that 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'

8. In *Treby and Local Government Standards Panel*⁵ Judge Pritchard said at [94] – [96] and [103], as to the meaning of 'detriment' in regulation 7(1)(b) of the Regulations

"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."

⁵ [2010] WASAT 81

9. In *Ryan and Local Government Standards Panel*⁶ 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'

10. The High Court of Australia case of *Chew v The Queen*⁷ ('*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."

...

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]

11. Accordingly, in the Panel's view, *Chew* appears to stand as 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.

⁶ [2009] WASAT 154 at [31]-[32].

⁷ [1992] HCA 18; (1992) 173 CLR 626

The test for establishing a Council member's specific intent

12. In criminal law proceedings under the traditional common law, the guilt or innocence of a person relied upon whether they had committed the crime, *actus reus*, and whether they intended to commit the crime, *mens rea*. Put simply, *mens rea* refers to the mental element of the offence that accompanies the *actus reus*. In some jurisdictions in Australia the terms *mens rea* and *actus reus* have been superseded by alternative terminology – e.g. the elements of all federal offences are now designated as "fault elements" (*mens rea*) and "physical elements" (*actus reus*).

13. It is not always possible to prove directly the state of mind of a person involved in a particular event or activity. Often, in criminal proceedings, there will be no direct evidence of the *mens rea* (or subjective intention) with which an accused performed the act complained of. But that will not prevent a jury or trial judge from being able to be satisfied beyond a reasonable doubt that the accused acted with such an intent. A person's subjective intention and state of mind can be inferred in all the circumstances.

14. In *Cutter v R*⁸ Kirby J said the following (relevantly, and without references to authorities):

"..., there was no real dispute either in this Court, or in the Courts below, about the governing principles. The first category concerns those principles which govern the trier of fact in drawing inferences as to the intention of an accused person. ...

As to the rules governing the determination of the intention of an accused person, it was not contested that the Crown bore the onus of establishing beyond reasonable doubt that the appellant intended to kill the constable when he stabbed him. Although the English courts, for a time, pursued a flirtation with a doctrine of presumed intention - such that an accused person was taken to intend the natural and probable consequences of his or her acts - that approach was rejected by this Court. It insisted that the inquiry must be addressed to the so-called "subjective" state of mind of the accused rather than the "objective" state of intention which the law attributed to the accused upon the basis of the objective facts. The foundation for the rule upheld by this Court is the fundamental principle that, statutory exceptions apart, intention must go with the act in order to constitute the crime.

Where, as in the case of s 283(1) of the Code, intention is an element of the offence, there must be proof of a specific intent of the kind charged. Mere recklessness towards, or foresight of the likelihood of, such harm occurring without such a specific intent is not sufficient. The Crown accepted that the law on offences of specific intent in Western Australia was settled. The trier of fact had to be satisfied, to the requisite standard, as to the subjective intent of the accused.

However, because the accused is ordinarily entitled to remain silent, putting the prosecution to the proof of the crime alleged, a practical problem is commonly presented in the proof of intention where the accused gives no direct evidence, or believable evidence, as to the intention at the relevant time. Intention cannot be proved as a fact. The only course open to the trier of fact (judge or jury) is to draw inferences as to the accused's intention at the relevant time from the facts proved in the evidence. As Kennedy J observed in this case:

⁸ [1997] HCA 7; (1997) 143 ALR 498; (1997) 71 ALJR 638 (29 April 1997)

"The intention with which the applicant acted resided ... in the mind of the applicant himself, and any finding of an intention to kill was necessarily a matter of inference from the facts."

The same thought appears, but with emphasis upon the criminal standard of proof, in what Dixon J said in *Martin v Osborne*:

"If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation."

It has been repeatedly pointed out, by reference to this dictum, that the task of the trier of fact is not to evaluate competing hypotheses and to consider whether they are equally open to acceptance or whether one is "'more consistent' as if there could be degrees of consistency". In *Plomp v The Queen*, Dixon CJ explained, citing his own earlier words in *Martin v Osborne*:

"This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed".

In *Shepherd v The Queen*, Dawson J (with the concurrence of Mason CJ, Toohey and Gaudron JJ) remarked:

"[Intention] is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."

It is important to draw a distinction between the intention of the accused and his or her motives, desires, wishes or hopes in doing the act alleged to constitute the crime charged. Attempts have been made to define the meaning of "intent" or its derivatives. However, the better view is that the word, being one of ordinary acceptation, should not be defined but should be left to the trier of fact without elaboration as to its meaning. The only exception is a case where some element in the evidence suggests the need for elucidation, so as to draw the distinction between intention, on the one hand, and the accused's motives, desires, wishes, hopes, reasons or expectations, on the other.

Clearly enough, where there is no direct evidence to which the trier of fact can safely resort, so as to draw an inference as to the "subjective" intention of the accused, the principal focus of attention will ordinarily be the facts surrounding the alleged offence.

...

In *Shepherd v The Queen*, Dawson J had earlier said:

"[T]he guilt of the accused must be established beyond reasonable doubt and ... [the trier of fact] must entertain such a doubt where any other inference consistent with innocence is reasonably open on the evidence."

15. On the distinction between 'motive' and 'intention', in the House of Lords case *Hyams v DPP*⁹ Lord Hailsham of St. Marylebone said, at p.7:

"It has been pointed out more than once that "motive" has two distinct but related meanings. I do not claim to say which sense is correct. Both are used, but it is important to realise that they are not the same. In the first sense "motive" means an emotion prompting an act. This is the sense in which I used the term when I said that the admitted motive of the appellant was jealousy The motive for murder in this sense may be jealousy, fear, hatred, desire for money, perverted lust, or even, as in so called "mercy killings", compassion or love. In this sense motive is entirely distinct from intention or purpose.

It is the emotion which gives rise to the intention and it is the latter and not the former which converts an *actus reus* into a criminal act.

...

It is, however, important to realise that in the second sense too, motive, which in that sense is to be equated with the ultimate "end" of a course of action, often described as its "purpose" or object", although a "kind" of intention", is not co-extensive with intention, 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."

16. It is also noted that an intentional act may involve multiple aspects, only one of which evinces a primary intention, while the others are indicative of secondary intentions. For example, a council member may have a particular result in mind (e.g. to gain an advantage for someone) in making improper use of his/her office even though he/she accepts that such act is also likely to result in detriment to his/her local government. The latter result, though perhaps regrettable to the council member, would be a secondary intention in that it is a likely effect willingly accepted. Equally, a council member may intend an act to cause detriment to someone in making improper use of his/her office even though he/she accepts that such act is also likely to result directly or indirectly in an advantage for him/her or someone else. Here, the advantage is a secondary intention in that it is a likely effect willingly accepted.

17. In view of the above material in this Attachment, it is the Panel's views that:

- (1) 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.
- (2) That belief 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.

⁹ [1974] UKHL 2

- (3) If it is established that a Council member has made improper use of his/her office and his/her intention in doing so was both 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, it may be appropriate that the relevant conduct is the subject of two Panel findings of minor breach – i.e that a breach of regulation 7(1)(a) has occurred, and that a breach of regulation 7(1)(b) has occurred – although any sanction under section 5.110(6) for such breaches may possibly be imposed on the basis that only one minor breach has occurred, noting that:

- (a) in *Treby and Local Government Standards Panel* Judge Pritchard said at [124] – [126]:

“The conclusion that a sanction should be imposed for the minor breaches raises for consideration whether separate sanctions should be imposed in respect of each minor breach by the applicants. That issue arises, in particular, because of the similarities between the provisions which the applicants contravened, and because the evidence which established each minor breach was the same.

In the criminal context, the general principle in Western Australia is that if the evidence necessary to establish two offences is identical, an offender should not be punished twice for the same conduct: cf s 11 of the *Sentencing Act 1995* (WA) and *Plenty v Bargain* [1999] WASCA 67 at [69] - [72] (McKechnie J.); cf *Pearce v The Queen* (1998) 194 CLR 610 at 623 (McHugh, Hayne and Callinan JJ).

In the present case, although standing order 11.9 and reg 7(1)(b) contain some similar elements, they are not identical, but the evidence which was relied upon to establish each breach - namely the transcript of the Special Meeting - was the same. Counsel for the intervenor accepted that if this was a criminal case, then s 11 of the *Sentencing Act 1995* (WA) would apply. Although the minor breaches are not criminal offences, the same general principle which is applied in the criminal context should be applied in determining the appropriate sanction in this case. In my view, it would therefore be inappropriate to impose a sanction for each minor breach in this case.”

and

- (b) section 11(1) of the *Sentencing Act 1995* (W.A.) provides that:

“If the evidence necessary to establish the commission by a person of an offence under the law of this State is also the evidence necessary to establish the commission by that person of another such offence, the person may be charged and convicted of each offence but is not to be sentenced for more than one of the offences.”

Attachment D

Various clauses of the City of Nedlands Code of Conduct

(as adopted by Council on 22 April 2003, first amended in October 2004
and further amended on 13 September 2005)

- “9.1 Councillors ... are to:
- (a) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code of Conduct;
 - (b) perform their duties impartially and in the best interests of the City of Nedlands and the community, uninfluenced by fear or favour;
 - (c) act in good faith (ie honestly, for the proper purpose and without exceeding their powers) in the interests of the City of Nedlands and the community; and
 - (d) ensure that any comments they make are pertinent to the business of the City of Nedlands and are not made maliciously or without regard to whether they represent the truth.
- 9.2 Councillors shall represent and promote the interests of the community as a whole, while recognising their special duty to their ward constituents.
- 9.5 Councillors ... will:
- ...
- (b) observe the highest standards of honesty and integrity, and avoid conduct which may depart from these standards;
- 9.9 Councillors ... shall recognise that the collegiate nature of decision making under the existing system of local government means that a member's decision making function may only be exercised in properly constituted forums and collectively by Council resolution. Decisions made by the Council shall at all times be accorded their legitimacy and authority by Councillors
- 11.1 Councillors will ensure that there is no actual or perceived conflict or incompatibility between their personal interests, the impartial fulfilment of their public or professional duties, and either their personal interests or those of close associated persons.
- 11.2 Councillors ... are not to allow businesses or business activities in which they have an interest (excludes any interest which is solely the ownership, an interest in the ownership or an entitlement to ownership of shares in a publicly listed company) to engage in any form of work directly with Council or in any other way that may place them in a conflict of interest with their role and responsibilities to the City of Nedlands.
- 13.1 Councillors ... shall not use confidential information to gain improper advantage for themselves or for any other person or body.

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 14 of 2010 (DLG 20100124)
Heard: Determined on the documents
Considered: 26 August 2010 & 21 October 2010
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint No. SP 14 of 2010
Complainant: (Cr) Irene TAN
Council member complained about: Cr Richard Maxwell (Max) HIPKINS
Local Government: City of Nedlands

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

The Panel has made findings (the findings) in relation to Complaint No. SP 14 of 2010 that include one finding of minor breach – namely, that on 25 March 2010 Councillor Hipkins committed a minor breach by breaching regulation 7(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) in that he made improper use of his office of Council member to gain directly or indirectly an advantage for Ms Margot Grace by voluntarily giving evidence for her in her application to the State Administrative Tribunal for a review of the decision by the City of Nedlands to refuse a development approval application for the use of the Feast Café premises in the Nedlands Village shopping centre as a café/restaurant with 48 seats (the present breach) .

SUMMARY OF DECISION

The Panel's decision on how the present breach is dealt with under section 5.110(6) of the *Local Government Act 1995* (the Act) was that, for the following reasons, pursuant to subsection (b)(i) of that section, it ordered that Councillor Hipkins be publicly censured as specified in the attached Minute of Order (being Attachment A).

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 Hipkins: notice of the findings (the notice of the findings); a copy of the Panel's Reasons for Findings in this matter (the Reasons for Findings); and a reasonable opportunity for him to make submissions about how the present breach should be dealt with under section 5.110(6).

Councillor Hipkins' response and submissions

3. By his letter of 29 September 2010 Councillor Hipkins has responded to the notice of findings and the Reasons for Findings, and has made such submissions. The text of his letter reads:

"I refer to your letter of 10 September 2010. In response to the request for submissions in relation to an appropriate penalty, having regard to the findings of the Panel, I submit that the finding of the Panel in relation to the appearance at the State Administrative Tribunal ought to be categorised as a breach which is at the lower end of the scale.

As was emphasised by me before the Panel, and which appears to have been accepted by the Panel in its findings, my motivation was to assist in achieving the correct and preferable decision for the whole of the community.

Of the penalty options available to the Panel, I submit that the appropriate penalty is that requiring training. I say this for the following reasons:

- i) no personal profit or gain was involved;*
- ii) the Panel found my actions did not discredit the Council or cause detriment to the City or fellow Councillors;*
- iii) unlike the situations in the Treby and Hargraves cases to which you have referred, no individual has been prejudicially affected by my conduct;*
- iv) training could focus on the distinction between the role and functions of an elected member on the one hand and discharge of separate professional responsibilities on the other – a difference that became blurred and where my transgression occurred.*

I am possibly in the unique position of having various professional qualifications relevant to local government, where I have had a career, including within the Planning Department at the City of Nedlands. I need to have a clear understanding of where my inputs are appropriate in different circumstances."

(Councillor Hipkins' submissions)

Panel's views how the present breach should be dealt with under section 5.110(6)

4. In regard to Councillor Hipkins' submission that the present breach "*ought to be categorised as a breach which is at the lower end of the scale*", the Panel does not agree with that submission, on the basis that:

- (1) A breach of regulation 7(1) is a significant matter and will in almost all occasions deserve the sanction of a publicly censure – not only as a reprimand aimed at reformation of the offending council member and prevention of further offending acts, but also as a measure in support of the institution of local government and those council members who properly observe the standards of conduct expected of them.
- (2) At the time the present breach occurred, Councillor Hipkins was the City of Nedlands' Deputy Mayor (as he is currently), as well as being a member of the Town's Council, and accordingly was in a senior leadership position in the City's affairs.
- (3) On 19 March 2010, some 6 days prior to Councillor Hipkins committing the present breach, in his email of that date¹⁰ to Councillor Hipkins, the City's CEO, relevantly for present purposes:
 - (a) advised: "*While I have not seen your witness statement, it is difficult to imagine that any position contrary to that agreed to by Council could be maintained without at least implied criticism. You are, whether you like it or not, bound by Council's decision.*"
 - (b) alerted Councillor Hipkins to the possibility that his giving evidence for the applicant in the relevant SAT review might be a breach of regulation 7(1); and
 - (c) advised: "*Councillor, I am aware that you often seek your own counsel on these matters and I urge you to do so again. If, after doing so, you are of the opinion that you may have inadvertently contravened either of the above, you may wish to withdraw your statement.*"

*Please be assured that I am not trying to deny you your rights in respect to this matter. As CEO (and personally) I have no position one way or the other on it. I am merely attempting to save you any possible embarrassment should any official complaint be made; I am sure that you will also respect that I am bound to report any occurrence where I believe that a transgression **may have** taken place.*

Could you please advise me, therefore, of what action you may take - if any - now that it has been drawn to your attention Should you choose not to do so, I feel obliged to draw this to the attention of Council." [Bold emphasis supplied]

¹⁰ [Doc B6] referred to in the Panel's *Reasons for Findings* in this matter, the text of which is reproduced in paragraph 3(14)(e) of those *Reasons for Findings*.

- (4) On 24 March 2010, the day prior to Councillor Hipkins committing the present breach, in his email of that date¹¹ to the City's CEO, Councillor Hipkins, said, relevantly for present purposes, in response to the City's CEO's said email of 19 March 2010 to him:

"I am amazed that you could write such an email without first seeing my statement. As it happens, my view on the matter closely corresponds to administration's original advice to Council when the matter was first considered - which is not surprising given that professional planners, considering a matter objectively, will come to similar conclusions.

...

My witness statement merely reported on Council decisions and my involvement at the meetings I attended. It is a matter of public record that I voted against a decision of Council. My statement documented the reasons for my voting. The information I presented could have been reported by any person attending the meetings and inspecting the minutes of those meetings. As a qualified and experienced urban planner, I gave my expert opinion on how the appeal could be satisfactorily resolved.

On the occasions the matter was considered by Council I had no association with the applicant. I now have a professional relationship with the appellant, who deserves the best possible advice to ensure a fair and just outcome is obtained. I am a planning consultant and have frequently appeared before the SAT. Should the matter return to Council, which is unlikely, I will declare an interest.

You have said that referring to myself as a Councillor and Deputy Mayor may have made improper use of my position to advantage a person and that may cause detriment to the local government. I cannot see how my involvement in a planning appeal, even if it was successful, would cause detriment to the local government. I cannot be guilty of any offence by stating I hold the position of Deputy Mayor. That is a fact that cannot be denied. ...

I do not propose to take any action now that you have drawn this matter to my attention. I will continue my involvement with the appeal. I have no objection to Councillors being made aware of my actions and have copied this email to them.

Should you wish to "expose" this matter in open Council, the result would be to draw further attention to the strained working relationship between Councillors and administration, which would do nobody any good, least of all yourself, who has the unenviable responsibility of achieving an harmonious working relationship between Councillors and staff."

- (5) It is the Panel's view that:

- (a) on the most conservative view available Councillor Hipkins made a serious misjudgment, on each occasion, when he as an individual Council member: agreed to meet with Mr Adam, Ms Grace's legal representative in the subject SAT review; attended at a meeting with Mr Adam to discuss Councillor Hipkins involvement in that review; and provided his witness statement to Mr Adam; and

¹¹ [p6Doc B7] referred to in the Panel's *Reasons for Findings* in this matter, the relevant text of which is reproduced in paragraph 3(14)(f) of those *Reasons for Findings*.

- (b) when Councillor Hipkins attended at and voluntarily gave evidence for Ms Grace in the subject SAT review he was fully aware of the advice of the CEO as to the ramifications of that course of conduct.

5. The Panel does not agree with Councillor Hipkins' submission that it "*appears to have been accepted by the Panel in its findings, [that his] motivation was to assist in achieving the correct and preferable decision for the whole of the community*", and in this respect observed as follows:

- (1) As mentioned in paragraphs 10(1) and 17(2) of the Panel's Reasons for Findings, the Panel's conclusion, relevantly, was that Councillor Hipkins' "*motives were more than likely that:*
 - (a) *he disagreed with the Council's November 2009 conditional approval of the development application;*
 - (b) *in his view, his involvement with the development application in his capacity as a Council member was concluded;*
 - (c) *in his view, he then had a 'professional' relationship with Ms Grace, who he believed deserved his best possible advice to ensure a fair and just outcome was obtained; and*
 - (d) *he believed that the intended result of his evidence would be an advantage for Ms Grace because, in his view, his evidence would assist the SAT to reach the same conclusion as he had – i.e. that the correct and preferable decision on the development application was that the number of seats for the Feast Café should be 30 or more, and that no conditions as to car parking bays should be imposed as the Feast Café was more like a lunch bar than a restaurant."*
- (2) Regulation 7(1) is not directly concerned with the motives of an alleged offending council member (i.e. the emotion or emotions that prompt or give rise to an act) – rather, it concerns itself with the issue of whether that member had the necessary *specific intention*.

6. In relation to Councillor Hipkins' submission that he did not make any financial gain in relation to his giving evidence for Ms Grace in the relevant SAT review, the Panel accepts such claim on its face. However, it is the Panel's view that the lack of any such gain is not a mitigating factor in this matter, and that it was fortuitous that he did not receive any such gain on the basis that:

- (1) By virtue of regulation 7(2), the Panel has no power to make a finding that a council member has committed a breach of regulation 7(1) if the relevant conduct is such that it contravenes section 5.93 or *The Criminal Code* section 83.
- (2) By virtue of section 83 of *The Criminal Code*, a local government council member who, without lawful authority or a reasonable excuse: acts upon any knowledge or information obtained by reason of his office; 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 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 the crime known as 'corruption' and is liable to imprisonment for 7 years.

- (3) If the available information provided to the Panel in this matter had indicated that it was more likely than not that, in relation to his giving evidence for Ms Grace in the relevant SAT review:
- (a) he acted upon any knowledge or information obtained by reason of his office of Council member; and
 - (b) Councillor Hipkins had made a financial gain;

that indication would most likely be an important consideration as to whether or not, in the Panel's view, that Councillor Hipkins may have contravened section 83 of *The Criminal Code*.

7. The Panel notes that Councillor Hipkins' submission does not address or make any reference or submission in relation to his 3 contraventions of the City's Code of Conduct, as mentioned in paragraph 19 of the Reasons for Findings.

8. The Panel does not agree with Councillor Hipkins' submission that the appropriate sanction for the present breach is an order that he undertake training on the distinction between the role and functions of an elected member on the one hand and the discharge of separate professional responsibilities on the other hand. Rather, it is the Panel's view:

- (1) That Councillor Hipkins acknowledgement of the distinction mentioned above is indicative of his new understanding of his duties as a council member.
- (2) As mentioned in paragraph 15(1) in the Reasons for Findings, that:

"An individual undertakes significant public duties when he/she becomes a member of the council of a local government. Those duties are inseparable from the position: he/she cannot retain the honour and divest himself/herself of the duties. 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 member or as a member of any of the council's committees."

- (3) As mentioned in paragraph 15(2) in the Reasons for Findings, that:

"The effective discharge of a council member's duties is necessarily left to the member's conscience and, in many cases, the judgment of his/her electors. 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 is in breach of or is prejudicial or may lead him/her to act prejudicially to his/her fiduciary obligations or duties owed to his/her council as the governing body of the local government."

- (4) What is required of Councillor Hipkins in this instance is not formal training – rather it is for him:
- (a) to take on board the Panel’s general views on regulation 7(1), particularly in relation to the role, responsibilities, empowerment and limitations of a council member, as set out in the Reasons for Findings;
 - (b) to accept that whenever he is acting in his capacity as a Council member, *or when he is approached to act or he is contemplating or considering acting in any capacity (other than as a Council member) in relation to a decision made by the Council while he is or was a Council member or which he is otherwise bound to observe*, he is required to steadfastly adhere to and actively observe and carry out all of the legal duties and ethical duties that he has or had as a Council member, as the matter requires; and
 - (c) to act accordingly.

9. The Panel notes that Councillor Hipkins has not previously been found under Part 5 Division 9 of the *Local Government Act 1995* to have committed any minor breach.

10. The Panel also notes that in Councillor Hipkins’ submissions: he does not dispute any of the findings, reasons or contents in the Reasons for Findings; and he has not demonstrated or shown any remorse or contrition to the Panel for his conduct in this matter.

11. In the Panel’s view:

- (1) 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.¹² While a public censure has that character or effect it is aimed at reformation of the offending council member and prevention of further offending acts.
- (2) An order that Councillor Hipkins apologise publicly for his actions in this matter does not appear to be an appropriate sanction or part of the appropriate sanction for the present breach, on the basis that Councillor Hipkins’ offending conduct in this matter does not appear to have been directed against a particular individual or individuals.

Appropriate sanction for the present breach

12. It is the Panel’s view that:

- (1) The present breach is the first time that the Panel has found that Councillor Hipkins has committed a minor breach.

¹² *Mazza and Local Government Standards Panel* [2009] WASAT 165 per Judge J Pritchard (Deputy President) at [107].

- (2) It is appropriate and proportionate to the gravity of the present breach that Councillor Hipkins should be publicly censured in the terms specified in the attached Minute of Order, as that sanction is an appropriate reflection of the seriousness of the present breach.

Panel decision

13. Having regard to the Reasons for Findings, the matters mentioned in paragraphs 3 to 12 above (both inclusive), and the general interests of local government in Western Australia, the Panel's decision on how the present breach is dealt with under section 5.110(6) is that, pursuant to subsection (b)(i) of that section, it orders that Councillor Hipkins be publicly censured as specified in the attached Minute of Order (being Attachment A).

.....
Brad Jolly (Presiding Member)

.....
Carol Adams (Member)

.....
John Lyon (Member)

NOTICE TO THE PARTIES TO THE COMPLAINT/S

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 "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 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).

Attachment A

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 14 of 2010 (DLG 20100124)
Heard: Determined on the documents
Considered: 26 August 2010 & 21 October 2010
Coram: Mr B. Jolly (Presiding Member)
Councillor C. Adams (Member)
Mr J. Lyon (Member)

Complaint No. SP 14 of 2010
Complainant: (Cr) Irene TAN
Council member complained about: Cr Richard Maxwell (Max) HIPKINS
Local Government: City of Nedlands

MINUTE OF ORDER

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Richard Maxwell (Max) Hipkins, the Deputy Mayor and a member of the Council of the City of Nedlands, 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 City of Nedlands 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 "Claremont-Nedlands POST" newspaper.

NOTICE OF PUBLIC CENSURE

The Local Government Standards Panel (the Panel) has made a finding that on
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25 March 2010 **COUNCILLOR RICHARD MAXWELL (MAX) HIPKINS, the Deputy Mayor and a member of the Council of the City of Nedlands,** breached regulation 7(1)(a) of the *Local Government (Rules of Conduct) Regulations 2007* in that he made improper use of his office of Council member to gain directly or indirectly an advantage for the applicant by voluntarily giving evidence for the applicant in an application to the State Administrative Tribunal for a review of a decision by the City of Nedlands to refuse development approval for the use of premises in the Nedlands Village shopping centre.

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

**LOCAL GOVERNMENT
STANDARDS PANEL**