

Welcome to our final edition of LG Matters for the 2010 calendar year. In this edition we cover a snapshot of current legal issues affecting Local Government in South Australia, presented to you by the Local Government Team at Wallmans Lawyers.

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## The Duty to Vote

As many readers will be aware, we have recently been undertaking intensive post election induction training for elected members and staff for the majority of the State's 68 Councils.

One issue which has come to the fore at a number of these sessions is that of the voting obligations upon elected members.

Section 86(5) of the *Local Government Act* 1999 requires that each elected member present at a Council meeting must (subject to any provision of the *Act* to the contrary) vote on a question arising for decision at that meeting. The obvious exceptions to this statutory obligation are where an elected member is absent for an agenda item as a consequence of a conflict of interest declaration or where the member has otherwise been suspended from part, or the balance of the meeting pursuant to Regulation 29 of the 'Meeting Regulations'. This means, of course, that there is a no discretionary element as to whether or not an elected member votes when present at a Council meeting because, quite simply, the law mandates that the member must vote either for or against the proposed decision.

The position set out at Section 86(5) of the *Act* is further reinforced by Regulation 17 of the 'Meeting Regulations' which provides that the presiding member will, in taking a vote, ask for the votes of those members in favour and then for the votes of those members against. This mechanism of meeting procedure



serves to ensure that the presiding member can be satisfied that the duty at Section 86(5) of the Act is being complied with by counting 1 vote from every elected member present.

Further, Regulation 27 of the Meeting Regulations provides that each elected member of a Council who is a member of a Council committee and who is present at a meeting of the committee must, subject to a provision of the Act to the contrary, vote on a question arising for a decision at that committee meeting. This duty is, therefore consistent with the obligation upon elected members at Council meetings. Where a Council is contemplating appointing non-elected members to a Council (Section 41) committee, consideration should therefore, be given to imposing a condition in the terms of reference for the committee which equally requires non-elected members of the committee to vote on all matters arising for decision.

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## **What can Happen if the Principal Member is an *ex officio* Member of Council's Audit Committee**

As we know, each Council must establish an Audit Committee in accordance with Section 126(1) of the *Local Government Act 1999*. The membership of the Audit Committee is determined in accordance with Regulation 13A of the *Local Government (Financial Management) Regulations 1999*. Regulation 13A(1)(a) prescribes that the Audit Committee must have between three and five members (inclusive). This raises an issue if the Audit Committee is comprised of the maximum five members and the Principal Member is an *ex officio* member of the Committee.

Under the 1934 Act, the Principal Member was automatically an *ex officio* member of all Council Committees. The position is different under the 1999 Act whereby, the Principal Member is only an *ex officio* member of a Council Committee when appointed by the Council in that capacity. This means the Principal Member may be appointed as an actual Committee Member or as an *ex officio* member. Where the Principal Member is appointed *ex officio* either specifically to a particular Committee or, generally to all Council Committees he/she has full voting rights and other entitlements when present. Separately, he/she will only be included in the quorum calculation when present at a meeting of the Committee. This means that if the Audit Committee has five members in addition to the Principal Member who is an *ex officio* member, when the Principal Member is present the membership of the Committee will exceed the statutory maximum number of members allowed under Regulation 13A. Such circumstances would place the Council in breach of the legislative requirements.

Accordingly, this situation can be rectified by not appointing the Principal Member as *ex officio* for any Audit Committee that comprises the maximum number of members. Alternatively, the number of Audit Committee members should be reduced to enable the Principal Member to fulfil *the ex officio* role without exceeding the maximum membership number for the Committee.

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## **Investigations of Complaints and Misconduct: 'It's not so elementary, Watson'**

The investigation of workplace complaints and instances of misconduct (including serious misconduct) calls for adherence to Council Code of Conduct and relevant policies. Sometimes applying the Code and policies



to the letter can still lead to an outcome that is open to criticism for being unfair, inadequate/inappropriate or unlawful. This is because not all types of workplace complaints or instances of misconduct can be incorporated into the Code and policies. Therefore, the exercise of personal judgment in applying the Code and policies when investigating complaints and misconduct is of ultimate importance. The primary focus in exercising this judgement is procedural fairness.

Applying procedural fairness means making certain that the investigation process is conducted in a timely, unbiased and reasonable manner. In this regard it is advisable to keep in mind the presumption of innocence, particularly whilst gathering relevant facts and evidence. In most, if not all circumstances, using an independent person to carry out the investigation is preferred. This person could be the Human Resource Manger, a Manager from another section or an external consultant or legal advisor, depending on the seriousness of the complaint or misconduct.

When taking statements from witnesses and relevant parties let them tell you what happened in their own words and try not to ask questions that have the answer built into them (these are called *leading questions* e.g. "You were at the photocopier at 2.15pm on Monday 29 November 2010 weren't you?"). Diligently and faithfully record everything that is said in interviews. This will greatly assist in the event legal advisors are engaged at some later stage to advise or defend Council. When in doubt and before taking any action, have the investigation process, as well as the evidence gathered, checked by your legal advisor. This should ensure that the ultimate decision made following investigations is reasonable, sustainable and lawful in the circumstances.

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## **Dense and Denser? *Sweeny v City of Onkaparinga* [2010] SAERDC 65**

This recent decision from the ERD Court contains some important guidance concerning the determination of residential density.

This appeal was brought against the decision of the Council to refuse a proposal for the construction of two two-storey group dwellings to the rear of an existing dwelling, a car-port in front of the existing dwelling, the removal of four significant trees and related landscaping and driveway works.

The proposed development was located in a Policy Area which strongly encouraged the retention of very low-density residential development.

The appellant's expert witness examined 4 areas surrounding the proposed development, and found that area 1 had a rate of 3.5 dwellings per hectare, area 2 had a rate of 6.1 dwellings per hectare, area 3 (which included the subject land) had a rate of 9 dwellings per hectare and area 4 had a rate of 10.2 dwellings per hectare.

The appellant argued that density is a relative concept and, as such, the existing density of area 3, having regard to its dwelling per hectare rate compared to areas 1, 2 and 4 was already medium-density. Therefore, the proposed development was in accordance with the existing pattern of development in the locality.

This argument was advanced despite the fact that the average allotment size in the locality was 986 square metres and the site area for each proposed group dwelling was approximately 350 square metres.



In rejecting the appellant's density argument, the Court held that density is indeed a relative concept, but that it is determined by reference to not only dwellings per hectare, but also site area, site coverage, bedrooms per dwelling and so on.

Accordingly, the Court found that, having regard to all of these factors, particularly site area and site coverage, the existing density was not medium-density but, rather, low-density and as such, the proposed development would be at odds with existing development in the locality.

This judgement is a useful reminder that although density is a relative measure and can vary from locality to locality, factors such as site area and site coverage cannot be ignored in making a determination in this regard.

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## **Authorisation Requirements for Section 81 Permits**

Pursuant to section 81 of the *Fire and Emergency Services Act 2005* an 'authorised officer' may issue a permit authorising a member of the public to light or maintain a fire during the fire danger season or contrary to terms of a total fire ban.

In practice, it is the responsibility of Fire Prevention Officers appointed by Councils under section 105B of the *Act* to issue Section 81 permits. However, a Fire Prevention Officer may only lawfully exercise this function where he/she has been properly authorised for this purpose.

Either the Chief Officer (of the CFS or MFS depending upon Council's location) or the Council may authorise a Fire Prevention Officer to issue Section 81 permits. However, pursuant to section 81(14)(b) of the *Act*, the authorisation may **only be made by Council with approval from the Chief Officer**.

Therefore, if a Council choose to authorise its Fire Prevention Officers under Section 81 of the *Act*, the Council is required to write to the relevant Chief Officer to inform him/her of the intention to authorise the Fire Prevention Officer and to seek approval for the authorisation. An authorisation made by the Council will be effective upon the receipt of approval from the Chief Officer.

It is recommended that where a Fire Prevention Officer has been authorised under Section 81(14) of the *Act* for the purposes of issuing Section 81 permits, that reference to this authorisation be included on the Officer's Instrument of Appointment.

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## **Probity Principles**

In order to ensure that the appropriate probity objectives of Local Government are satisfied, Councils should consider adopting the following protocols:



### Hospitality

Participating personnel must not accept hospitality from bidders or potential bidders. In addition, participating personnel should note that anyone offering hospitality may be a potential bidder or part of a bid consortium in the procurement process and should check whether parties issuing invitations are bidders or potential bidders in current market testing processes.

### Confidentiality

Procedures should be adopted to ensure that confidential information is identified and, once identified, that access to that information is restricted to personnel who have given appropriate confidentiality undertakings. It is important that procedures are adopted to oversee the protection of this information and to ensure that restricted access is maintained.

### Conflicts of interest

It is important to ensure that appropriate mechanisms exist for dealing with any conflicts of interest which may arise during the procurement process. Where competing interests and priorities exist, appropriate procedures must be adopted to minimise or avoid situations where conflicts could arise. Conflicts of interest should be a standing item at the beginning of all applicable meetings whereby those present confirm that no conflicts have arisen since the last meeting.

### Communication with bidders

One of the key probity related principles is that all bidders must be treated fairly and equitably and consistently with the rules of procedural fairness and natural justice. To achieve this, arrangements should be established and documented for communicating with bidders during the procurement process to ensure that information will not be provided to any bidder which gives, or has the potential to give, an unfair advantage to that bidder.

Contact with bidders should only occur through a nominated contact point. Having established this point of contact it will then be necessary to consider what restrictions need to be placed on information given in response to bidders' enquiries. Any communication with bidders should be documented with appropriate document management systems implemented.

### Request for bids

It is fundamental to the procurement process that all market invitations provided to bidders are consistent and sufficiently comprehensive to permit bidders to be able to make informed decisions about whether to submit bids and, if so, to submit bids capable of complying with the stated bid requirements.

If it becomes necessary to change the procurement process, as a general rule, these changes should be communicated to all bidders so as to minimise any potential detrimental outcomes for them. The ultimate strategy adopted depends on the degree of variation contemplated and should be assessed on a case by case basis.

### Evaluation

An evaluation plan containing the procedures to be adopted in respect of the receipt of bids and providing a clearly defined methodology for the evaluation of bids should be established prior to the opening of bids for future tenders.

Appropriate reporting processes should be established to confirm that compliance with the agreed evaluation methodology has been achieved and that the appropriate sign-offs have been obtained in relation to



compliance with these agreed processes.

### Debriefs

Procedures should be adopted in respect of the debriefing of unsuccessful bidders. It is important that a standard approach be taken in respect of debriefing. Bidders should generally be debriefed against the criteria against which they were assessed and, in accordance with Council policy, bidders should not be provided with information concerning other bidders, except for publicly available information and except in so far as comparative statements can be made without breaching confidentiality.

### Overall Compliance

Council should consider engaging (at an early stage in the process) a probity adviser to ensure compliance with probity principles. At the end of the procurement process as well as at key procurement process milestones, the probity adviser will report and 'sign off' to the Chair of the Evaluation Committee on the level of compliance of the procurement process with relevant probity requirements.

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## **Changes to Producer's (Liquor) Licence – From Cellar Door to Quasi Hotel?**

Councils should be careful when providing comment on Licensing applications looking to expand their cellar doors following the recent Liquor Licensing Act amendments. These changes have the potential to transform small wineries into quasi-hotels as it is now possible for Producer's Licences to:-

- sell the Licensee's product for consumption on the licensed premises (by glass or bottle eg. bar like trade);
- to sell liquor of any kind (including third party liquor) with or ancillary to a meal at the licensed premises. This includes beer, sparkling wines, spirits etc. Prior to the amendments, the licensee could only sell its product with meals; and
- conduct comparative sampling of third party liquor (in addition to sampling of the Licensee's product).

Several holders of Producer's Licences may also form collectives to sell their products from single premises (known as "Collective Outlets"). We understand that sometimes there may not be any reference on a Licence that it is part of a collective. Councils might, therefore, seek clarification from the applicant if in doubt.

It is worth noting that existing Producer's Licences might not specify the business' trading times. Councils might, therefore, seize on the opportunity to rectify this when considering the Licensing and/or Planning application. Limits on Entertainment can similarly be sought.

There may also be other associated issues Councils should consider such as increased traffic/car parking needs, appropriateness of trading hours, style of entertainment permitted, presence of security/crowd controllers, responsible service issues, a change in the nature/style of the premises etc.

There might also be *Development Act* issues such as will the changes sought amount to a change to the current approved use of the premises? Will it breach conditions of the current Development Approval? What impacts on amenity will there be (if any)?

Producers might also apply for a Licence endorsement permitting sale of liquor for consumption on or off a



specified site (eg at a local fair or farmer's market). Councils may be the landlords of such sites and should consider if permanent liquor sales are desirable during such events and whether it might cause any potential responsible service issues. Is there a potential conflict with a nearby Dry Zone? Would a Limited (Liquor) Licence be more suitable?

Perhaps the best way to avoid these changes becoming an issue is for Councils to be proactive in seeking appropriate Licensing and Planning conditions.

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## **Can Decisions not to Renew Licences over Community Land be Judicially Reviewed? *Khuu & Lee Pty Ltd v Corporation of the City of Adelaide* [2010] SASC 316**

Of the several remedies which are available in judicial review proceedings, orders in the nature of *certiorari* (requiring the decision maker to be more fully informed) are those most commonly sought against Council decisions.

According to the Supreme Court Rules, an order of *certiorari* to quash a decision can be sought where a decision-maker has a duty to act judicially, because of an error, absence of jurisdiction or a failure to observe the requirements of natural justice.

This recent decision from the Supreme Court examined a decision of the Council not to offer a new licence to a market stall holder after an existing licence expired.

The stall holder alleged that the decision to not offer a new licence was an exercise of public power and as such, the Council had breached the requirements of natural justice by not allowing the stall holder to be heard before making this decision.

However, the Court held that the Council was not exercising a public function (and thus had no duty to act judicially) in deciding to not renew the stall holder's licence. In making this finding, the Court had regard to the fact that:

- there was no "public" element of the stall holder's business in that it was a privately-owned, for profit enterprise which was not being treated differently to other businesses in the market; and
- the stall holder was not being excluded from trading in the market, rather the stall holder's licensed area was being reduced; and
- the Council had not tried to implement public policy through its decision.

Accordingly, the Court held that the Council was merely exercising private powers as a land-owner in these circumstances. Therefore, the Council was not under any common law duty to allow the stall holder to be heard before making this decision.

Further, the Court found that the provisions of section 202 of the *Local Government Act* which require public consultation before the grant of a lease or licence and which bound the Council to ensure that leases and



licences accorded with its community land management plan could not be reversed such that they applied to decisions to **not** grant such a lease or licence.

Accordingly, the Court dismissed the stall holder's application for judicial review, and instead dealt with the Council's decision under the provisions of the *Retail and Commercial Leases Act*.

This decision is useful for Councils as it reaffirms the fact that a Council is not necessarily bound to follow rules of procedural fairness (other than those prescribed in the *Local Government Act*) when dealing with decisions over community land which directly affect private business, or, when not exercising a public power.

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## Merry Christmas...

We extend our warmest wishes for the festive season.

We look forward to working with you in 2011.

# “All I want for Christmas is...



## A Legal Thought for the Season...

### CHRISTMAS CLOSURE

Dear Mr Claus,

#### FINAL LETTER of DEMAND

I refer to our brief meeting at The Magic Cave in the city on Friday 17 December 2010. Despite waiting in line to speak with you for several hours, I was eventually advised to send you a "list" of my concerns which you will "try" to address if I had been a "good boy". I have taken legal advice and list my urgent concerns herein for your prompt consideration.

#### Significant Tree

- 1 The roots of the "significant" fir tree in your front yard are lifting my driveway pavers and I have applied to the Council pursuant to the *Development Act* for an order for its urgent removal.
- 2 I have also filed a claim in the Magistrates Court seeking compensation for cracking to my driveway and I enclose, by way of service, Minor Civil Claim, for your immediate attention.
- 3 The bright light emanating from the twinkling lights on the said tree are severely impacting on the enjoyment of my land. Please find enclosed, by way of service, Application for an Injunction to restrain use of the lights listed for hearing in the Supreme Court on a date and time to be advised by the Court.

#### Domestic Animals

- 4 I am aware that you are keeping at least 8 deer on your property. The noise generated by the deer stampeding up and down your driveway (and occasionally landing on my roof!) creates an ongoing nuisance and I have asked that the Council make an order that you urgently arrange alternate accommodation for these animals. Despite efforts by your very industrious team of cleaning staff, the reindeer waste creates insanitary conditions in contravention of the *Public and Environmental Health Act* and I have notified the Minister accordingly.

#### Abandoned Vehicle

- 5 I have photographic evidence that your sleigh (Registration No 25/12 HOHO) has been abandoned on the road adjacent your property since 26 December 2009. This is an offence pursuant to s236 of the *Local Government Act* 1999 attracting a maximum penalty of \$5,000.00 and I have notified the Council accordingly.

#### Community Land

- 6 Despite some assertions that it "wasn't the real Santa", I witnessed you attend at the public Reserve adjacent our property several times this Saturday and Sunday where you proceeded to distribute what



appeared to be material goods to other users of the Reserve. Given such use was, I expect, for a "business purpose", please confirm that you held a current approval from the Council pursuant to s200 of the *Local Government Act 1999*.

Please note that your express suggestion at The Magic Cave, in front of at least several dozen members of the public, that I had been anything less than a "good boy" this year amounted to blatant defamation of my character and I reserve all rights under the *Defamation Act 2005* accordingly.

This letter gives you final notice of my concerns as outlined above. I trust that you will respond with necessary urgency in the circumstances.

Yours faithfully,  
Mr F Neighbour

## LG (*Xmas*) Kitchen

Sharon's Silly Season Struffoli

*An Italian sweet treat eaten at Christmas.*

### Ingredients:



- 600gm flour
- 4 eggs + 1 yolk
- 2 tbs sugar
- 80 g butter
- 1 small glass of limoncello or rum
- skin of ½ lemon grated
- pinch of salt
- oil for frying

### Seasoning and decoration:

- 400 gm of honey
- coloured hundreds & thousands
- cinnamon flavoured confetti chopped finely (sugared almonds)
- 100 gm of candied orange peel and 100 gm of candied citrus chopped finely

### Preparation:

- Place the flour on a working surface and mix together the eggs, butter, sugar, grated lemon rind, small glass of rum and some salt.
- Mix together well and make the pastry into a ball shape and allow to rest for ½ an hour. Work it again briefly and divide it into smaller balls the size of a fist. Roll these smaller balls out on a floured area and make into smaller sticks as thick as your finger. Cut these pastry sticks into small pieces and place to rest on a floured area.



- When ready to cook, brush off any excess flour and place them, a few at a time, in a deep frying pan with very hot oil. Remove them when they have puffed up and are golden in colour, but not burned and place them to dry on absorbent kitchen paper. Soften the honey in a large pan over a low heat, remove from the heat and add the fried struffoli mixing gently. Add ½ of the flavoured confetti (sugared almonds) and the candied fruit, then mix again gently. Prepare the struffoli on a serving plate. Then, whilst the struffoli are still warm sprinkle the rest of the confetti on the struffoli.

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