



Welcome to our June edition of LG Matters, covering a snapshot of current legal issues affecting Local Government in South Australia presented to you by the Team at Wallmans Lawyers.

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LGA Elections

The recent LGA election process resulting in the election of Mayor Lewis as the LGA President has identified a number of different practices and procedures being utilised by Councils. One of those has been the attempt by a number of Councils to move into confidence under Section 90 of the *Local Government Act* for the purpose of determining which presidential candidate the Council would vote for.

Section 90 provides a limited privilege to close a meeting to the public contrary to the fundamental statutory premise that Council meetings be open to the public. The grounds that a Council may rely upon to close a meeting for these purposes are those set out at Section 90(3) of the Act and reinforce the nature of the privilege being limited. None of these grounds set out at paragraphs (a)–(n) can be invoked for the purpose of determining this election issue.

Secondly, given the importance of the integrity of the election process it is critical that all Councils when voting do so on the original ballot papers provided to them by the LGA for this purpose. The reproduction of a ballot paper from the Council's records management system and/or a photocopy of it risks being rejected, thereby denying the Council a vote in this important election process.

[For further information please contact Michael Kelledy, Partner, Local Government Team on 8235 3091 or \[michael.kelledy@wallmans.com.au\]\(mailto:michael.kelledy@wallmans.com.au\)](#)

Having a Night out – Then Consider This!

The time of year is now fast approaching where both elected members and prescribed officers are required to complete and lodge their annual ordinary returns (i.e. within 60 days of 30 June). While the returns are required to be lodged by 29 August 2009, the ordinary return looks to the period of 1 July 2008 to 30 June 2009. Disclosures include providing details of any gift of or above the amount or value of \$750 received either by the elected member or officer, or a person related to the member or officer. This is particularly relevant for those invited to attend corporate functions. If you and/or your partner are invited to an event you should consider whether the monetary value of the invitation exceeds \$750 and whether it needs to be recorded in the ordinary return. The \$750 'trigger' applies to the collective value for you and the person related and to the total value of such gifts from the same source over the course of the year.

In addition, consideration should also be given to the Council's Gifts and Benefits Policy to ascertain whether the monetary value of the gift exceeds the amount specified in the Policy. If so, then receipt of the gift may also need to be confirmed by recording it in the Council's Gifts and Benefits Register. This recording should occur immediately after conferral of the gift/benefit, not annually as for ordinary returns.

So – when you next receive an invitation that you would like to accept, consider its monetary value and your disclosure obligations and you will then truly be able to enjoy that gift!

For further information please contact Natasha Jones, Senior Associate, Local Government Team on 8235 3039 or natasha.jones@wallmans.com.au

New Form 1 Requirements for Searches Under Section 7 of the Land and Business (Sale and Conveyancing) Act 1994

On 30 April 2009, the *Land and Business (Sale and Conveyancing) Variation Regulations 2009* were Gazetted.

The following changes, which are of relevance to Councils, will also be made:

1. Disclosure of Development Plan Amendments ("DPAs").
 - (a) From 1 September 2009, vendors will be required to state whether there is a current DPA released for public consultation by a Council or the Minister on which consultation is continuing or on which consultation has ended but whose proposed amendments have not yet come into operation.
 - (b) This differs from the current Form 1 which only requires disclosure of a DPA where the DPA has been sent to the Minister, or where the Minister has released a DPA for public consultation.
2. Notices, orders, declarations, charges, claims or demands given or made under the *Local Government Act 1999*.
 - (a) Currently, Form 1 does not require disclosure of such notices, etc under the *Local Government Act 1999*, but rather only disclosure of such notices, etc made under the *Local Government Act 1934* is required.
 - (b) Whilst our advice has been to disclose all such notices etc under both the 1934 and 1999 Acts, the new Form 1 remedies the discrepancy, and makes it clear that notices, etc under the *Local Government Act 1999* must be disclosed.

With the new Form 1 about to come into operation, it is appropriate for Councils to review their Section 7 Certificates and prepare for the new requirements from 1 September 2009.

For further information please contact Victoria Shute, Associate in the Local Government Team on 8235 3078 or victoria.shute@wallmans.com.au

Clarity Regarding SAPOL – Issued Expiation Notices

It has recently been brought to our attention that it is common practice for police officers to issue expiation notices 'on behalf' of a Council using Council forms, as if they were an Authorised Officer of that Council. In our view, this practice raises a number of concerns.

Under the *Expiation of Offences Act 1996*, where a member of the police force issues an expiation notice, the Commissioner of Police is the 'issuing authority' and is responsible for the enforcement of that notice (including any prosecution that arises) and/or, for determining any applications for a review of the notice received from the recipient.

Consequently, whenever a police officer exercises his/her power to issue an expiation notice *by virtue of the officer's position as a member of the police force*, the officer cannot do so (or purport to do so) on behalf of a council simply by using a Council form. This is because if the person to whom the notice is issued elects to be prosecuted (or to have the notice reviewed), the notice would direct that person to contact the Council. However, in accordance with the *Expiation of Offences Act*, SAPOL is the issuing authority responsible for the notice and for its enforcement.

Therefore, where a police officer expiates an offence (e.g. under a Council by-law) in his/her capacity as a member of the police force, the officer must use SAPOL forms so that the identity of the issuing authority remains clear to the recipient of the notice.

That being said, a Council could, pursuant to section 260 of the *Local Government Act 1999*, appoint a person who is a member of the police force as an Authorised Officer. Doing so would then authorise a police officer to issue an expiation notice on behalf of a Council.

For further information please Cimon Burke, Solicitor in the Local Government Team on 8235 3084 or cimon.burke@wallmans.com.au

Due Diligence and Local Government Contracts

In any industry today due diligence must play a vital role as part of the housekeeping policy. It should be employed at the initial stages of any joint venture and agent selection, and Councils are no exception to this application process.

Due diligence must, in every case, be a measured, reasonable investigation into, in the case of Councils, the Procurement Process. In some ways common sense is the first indicator.

Due diligence is best described as: *"The process of systematically evaluating information, to identify risks and issues relating to a proposed transaction, i.e. to verify that information is what it is proposed to be"*. From a Council perspective, this will mean a close analysis of the Tender Documents and the various representations made by the Tenderer its business and how it is conducted generally.

The definition of due diligence then is simple. What is not simple is how to carry it out. The process can often be a very long drawn out process. Besides the tendering conditions which must be adhered to, there are certain 'Due Diligence' tests that can be applied:

Company information - director's names, formation and ownership details, have they all been provided and are up to date? Experience in the field of work tendered for and suitable referees, can the Tenderer complete the job within budget? What do the recommendations say? How many employees does it have?

Financial information - current turnover and past returns. Is the Tenderer operationally sound? Has it taken too many

projects on at once? Will it be able to commit enough resources to complete the proposed works?

Legal history - judgements past, present or pending- is the company reliable and sound? How long has it been in business?

Political risk indication – is there a possible conflict of interest? Has influence of any nature been exercised?

Plans and specifications- have they been followed or is there a variation to the Specifications sought to be followed by Council? Is the variation superior to the Specification required by Council in the first instance?

Policies- does the Tenderer conform to Council standard at the very minimum?

The above represents the fundamental basics of what needs to be investigated to help with decision-making and the evaluation process. Every Council can undertake a level of due diligence at no cost whatsoever just by having a set standard in place and a checklist for every supplier, agent or end-user. This information must, of course, be verified, but just asking for it will in itself add to peace of mind. If it is not provided then the Tenderer will lose ground against those competing Tenderers or even invalidate their tender by not providing the proper information.

But remember – any due diligence report or evaluation decision is only a snapshot in time, so fresh investigations must be carried out at regular intervals.

For further information please contact Mark Sallis, Special Counsel, on 8235 3006 or mark.sallis@wallmans.com.au or Trevor Gormley, Local Government Team, on 8235 3010 or trevor.gormley@wallmans.com.au

Ensuring Council conditions are imposed onto Liquor Licences

When requested to comment on a Liquor Licence application, Councils will often ask to have certain conditions imposed on the Licence. Not all conditions will be imposed by the Licensing Authority as a matter of course.

The Licensing Authority will generally impose relevant planning conditions on the Licence (eg. trading hours, noise and disturbance conditions). Nevertheless, any relevant planning conditions which Council seeks to have imposed on a Licence must be outlined in the Council's response to the application.

There may be times when, aside from planning conditions, Council would like additional conditions imposed on the Licence (eg. a condition limiting noise to certain levels, the style of entertainment, or security patrol routes). Such conditions may, for instance, stem from a Council Licensing Precinct Statement, an Accord or a Council policy. The Licensing Authority is not obliged to impose such conditions.

In order to better protect their interests, Councils are able to lodge an objection/intervention and make submissions supporting such conditions at conciliation where the imposition of those conditions is resisted by an applicant. Importantly, the application will not be granted until the parties have come to an agreement or the Licensing Authority has determined the matter after a formal hearing.

Councils should also be aware that they are able to ask for conditions to be imposed on an existing Licence by other means (such as instigating disciplinary proceedings or by lodging a formal complaint).

For further advice or assistance please contact Peter Hoban, Partner, Hospitality and Licensing on (08) 8235 3001, email: peter.hoban@wallmans.com.au or Ben Allen, Senior Associate, Hospitality and Licensing on (08) 8235 3018, email: ben.allen@wallmans.com.au

Avoiding Judicial Review - Principles of Good Decision-Making under the Development Act

Most Planning Officers have either experienced, or understand the process by which an applicant or a representor may appeal to the ERD Court against the Council's decision to refuse, or approve, a development application. The appeal is a review of the merits of the decision. However, many officers are not aware that applicants or representors may challenge the Council's decision-making process, as well as, or as an alternative to the actual decision on the merits. One process by which the Council's decision-making process may be challenged is judicial review in the Supreme Court. Another is by way of complaint to the Ombudsman.

One case law example of judicial review proceedings is *Upham v The Grand Hotel (SA) Pty Ltd and the Development Assessment Commission [1999] SASC 414*. Upham applied to the Development Assessment Commission for approval to develop an Irish-themed hotel. The DAC categorised the application as a Category 2 application. The Grand Hotel was notified of the development and lodged a written representation objecting to the proposal. One of the issues raised by the Grand was the inadequacy of the carparking proposed as part of the application. Subsequent to receiving the Grand's representation, the DAC requested and received further information from Upham regarding carparking. The DAC also received information from the City of Holdfast Bay in respect of carparking. The Grand requested to inspect the DAC's file after the time within which it could make a representation. Initially, the DAC refused to grant access. Then, shortly before the DAC's hearing of the application, the DAC provided the Grand with a copy of some, but not all, of the information it held. The DAC ultimately resolved to grant development plan consent.

The Grand applied to the Supreme Court for judicial review (as opposed to a merits review) of the DAC's decision-making process on the ground that the DAC did not provide full and timely access to its file. The Full Court of the Supreme Court held that the rules of procedural fairness required that the Grand should have been given access to the information provided by Upham to the DAC (but not the information provided by the Council to the DAC). As a general principle, the Court held that procedural fairness requires that a person, entitled to be heard by the relevant authority, be given access to the information provided by the applicant to the relevant authority, up to the time of the hearing (but not including the applicant's response to the representations).

It is important for Councils to understand the principles of procedural fairness, as well as other administrative law principles, in decision-making processes under the Development Act. An understanding of good decision-making principles will minimise the risk of decisions being challenged in judicial review proceedings (or through the Ombudsman's office, in a process not dissimilar to a judicial review).

For further information please contact Nicole Harris, Senior Associate in the Local Government Team on 8235 3017 or nicole.harris@wallmans.com.au

If you would like to hear more about the principles of good decision-making, don't miss ***Precision in Decision Good Decision Making Under the Development Act and Regulations'***, the program being delivered by Wallmans in conjunction with PIA, Friday 24 July 2009, Ballroom 1, Sebel Playford, North Terrace, Adelaide, 2-5pm.

To book, or for further information please visit:

http://www.planning.org.au/index.php?option=com_events&task=view_detail&agid=1233&year=2009&month=07&day=24&Itemid=81

Easements and Community Land

Section 193 of the *Local Government Act 1999* states that all local government land that is owned by a Council or under a Council's care, **control** and management is classified as community land. "Land" is defined in the Act to include a legal estate or interest in, or right in respect of land.

An easement is a legal interest or right in respect of land. Therefore, all easements held by the Council (with the exception of any easement which the Council resolved before 1 January 2000, or at the time of their creation to specifically exclude from community land classification) are within the definition of community land.

Obviously, Councils need to think carefully before the creation of an easement and whether they should resolve to exclude such from community land classification, to avoid the various community land controls automatically applying to an easement.

For further information please contact Victoria Shute, Associate in the Local Government Team on 8235 3078 or victoria.shute@wallmans.com.au

Public Consultation Policy – Beware a Common Oversight & Get It Right!

Having undertaken legislative compliance audits for a number of Councils over the past year, we have identified a common area of non-compliance in relation to Councils' public consultation policies.

Section 50 of the *Local Government Act 1999* sets out the information that must be included within the policy and, in particular, that it include reference to the matters in respect of which the Act requires Councils to undertake public consultation.

Specifically, the Act prescribes a specific public consultation process in regards to the following matters:

- representation reviews – composition and wards (section 12);
- status of a council or change of various names (section 13);
- prudential reporting (section 48);
- public consultation policy (section 50);
- strategic management plan (section 122);
- annual business plan (section 123);
- by-laws (section 249); and
- order-making policy (section 259).

Furthermore, pursuant to the Act, Councils must also consult the community using the process set out in their policy in respect of the following matters:

- opening hours of principal office (section 45(3));
- code of practice (section 92(5)(b));
- basis of rating (section 151(5));
- community land classification (section 193(2));
- revocation of classification of land as community land (section 194(2));
- community land management plans (sections 197(1) and 198(2));
- alienation of community land by lease or licence (section 202(2));
- granting of a prescribed authorisation or permit (section 223); and
- planting of trees/vegetation (section 232).

For a public consultation policy to be compliant and accord with best practice, it must contain reference to each of the matters listed above. Therefore, when next undertaking a review of your public consultation policy, we recommend you ensure each of the above matters are addressed.

For further information please Cimon Burke, Solicitor in the Local Government Team on 8235 3084 or cimon.burke@wallmans.com.au

Delegates: What About The Application of Council Policy?

We all know that a Council may delegate a function or power conferred under legislation to an officer, committee or subsidiary. However, how often do we turn our mind to the application of any relevant Council policy in exercising the delegated or sub-delegated power?

The source of the power will usually be derived from legislation, and sometimes, the law will provide guidance as to how the delegated power should be exercised. However, some Councils will have in place an adopted policy that is to also guide administrative decision-making. This means that if delegated authority to make particular decisions is given, those decisions should also be made with regard to any relevant Council policy.

For example, if an officer is delegated the authority to grant an outdoor dining permit in accordance with Section 222 of the *Local Government Act*, the grant of this permit may also need to comply with the Council's Outdoor Dining Policy. This means that each officer exercising this delegated power should have intimate knowledge of the Council Policy which is relevant to the exercise of the delegated function. In these circumstances it may be more appropriate for the Council's delegations to make specific reference to any relevant policy in the instrument of delegation and identify compliance with the policy as a condition of exercising the statutory function, unless good reason can be shown to deviate from the Council policy.

For further information please contact Natasha Jones, Senior Associate, Local Government Team on 8235 3039 or natasha.jones@wallmans.com.au

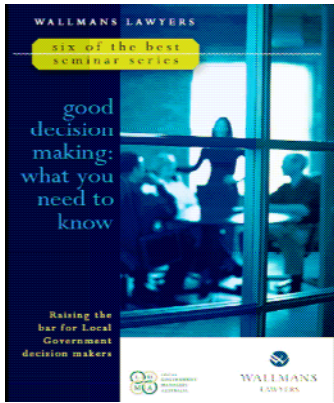
Elected Members Appointed to Boards

Across the State elected members are variously appointed to boards of organisations whether they are completely independent of the Council, or are otherwise within the *Local Government Act* framework, such as a Regional Subsidiary. The fundamental legal position in respect of all of these appointments is that an elected member, once appointed, has an overriding fiduciary duty to act in the best interests of that organisation when sitting as a member of the board of that organisation. That is, it is an oxymoron to suggest that the elected member/board member can represent the interests of their appointing Council. This principle has equal application whether the separate organisation is, for instance, an incorporated association established under the *Associations Incorporation Act* or a Subsidiary established under the *Local Government Act*.

It is to be particularly noted that an elected member who is a board member of a Council or Regional Subsidiary "*must exercise an active discretion in respect of all matters to be decided...*". This provision from Schedule 2 of the *Local Government Act* is a statutory codification of the longstanding common law position. The exception available to an elected member who is a board member of a Subsidiary is that where the Council(s) issues a direction to a Subsidiary which the board of management is bound to observe, the board member does not commit a breach of this fundamental duty by acting in accordance with that direction and not, therefore, exercising an active discretion. Clearly this exception has no application to any appointment to an external board which is not a Subsidiary.

The power of a Council (for a Council Subsidiary) or of the Constituent Councils acting collectively (for a Regional Subsidiary) is a formal statutory power to direct the Subsidiary and is to be exercised in accordance with the provisions of Schedule 2. This is not to be mistaken with a purported direction from a Constituent Council to its board member that he/she must vote on a matter for decision before the board of management of the Subsidiary in a manner dictated by the Council. A Council decision to direct a board member to vote in a certain manner is different from a Council decision to direct the Subsidiary. As such, a direction to a Subsidiary board member (as opposed to a direction to the Subsidiary) does not override the statutory obligation upon the board member to exercise an active discretion.

For further information please contact Michael Kelledy, Partner, Local Government Team on 8235 3091 or michael.kelledy@wallmans.com.au



Six of the Best Seminar Series: Good Decision Making for Regional Councils

Tailored Solutions for Regional Councils

Wallmans is dedicated to offering regional councils access to the *Six of the Best Seminar Series*. Special arrangements have already been made for a certain regions, so if the monthly format in Adelaide is not convenient for your council, why not contact us to tailor the program to your needs? Some regional councils have signed on for a 2-day intensive format delivered at their desired location (see below).

If you would like to discuss your Council's needs further, please contact Natasha Jones, Senior Associate, Local Government Team on 08 8235 3039 or natasha.jones@wallmans.com.au

Don't miss these upcoming Regional *Six of the Best* Conferences:

■ Port Lincoln Civic Centre- June 22 and 23, 2009

For the full program please visit:

http://www.lga.sa.gov.au/webdata/resources/files/Wallmans_Six_of_Best_Conference_EP.pdf

■ City of Mt Gambier- July 9 and 10, 2009

For the full program please visit:

<http://www.lga.sa.gov.au/webdata/resources/files/RegionCouncTrainingInitiatSE.pdf>

Disclaimer: The contents of this newsletter is for information only and should not be regarded as formal legal advice.



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