

# CITY OF JOONDALUP

**MINUTES OF SPECIAL COUNCIL MEETING HELD IN COUNCIL CHAMBER,  
JOONDALUP CIVIC CENTRE, BOAS AVENUE, JOONDALUP, ON MONDAY 16  
FEBRUARY 2004 AND FRIDAY 12 MARCH 2004**

## **OPEN AND WELCOME**

**The Chairman declared the meeting open at 1900 hrs.**

## **ATTENDANCES**

### **In Attendance:**

CMR J PATERSON – Chairman  
CMR A DRAKE-BROCKMAN – Deputy Chairman  
CMR M ANDERSON  
CMR A FOX  
CMR S SMITH

### **Officers:**

Director, Planning & Community	
Development:	C HIGHAM
Manager Human Resource Services:	M LOADER
Committee Clerk:	J HARRISON
Publicity Officer:	L BRENNAN

There were 48 members of the Public and 2 members of the Press in attendance.

## **PUBLIC QUESTION TIME**

(Section 7(4)(b) of the Local Government (Administration) Regulations 1996 states that a Council at a special meeting is not required to answer a question that does not relate to the purpose of the meeting. It was requested that only questions that relate to items on the agenda be asked).

### **Mr Chris Baker, Connolly:**

*Questions directed to the Chairman of Commissioners:*

*Q1 I refer to Item 4 of the published agenda of tonight's Special Council meeting. Can you please confirm that when any motion comes on for debate tonight concerning this important agenda item that you will have due regard to:*

- 1 *the advice of Mr Barry Matthews, Commissioner of Police, WA Police Service;*
- 2 *the advice of the WA Major Fraud Squad;*
- 3 *the advice of Mr Ken Petit QC, the State Government appointed Police Royal Commission QC;*
- 4 *the advice of Mr Neil Douglas, local government law specialist, Senior Partner of Minter Ellison Lawyers, the Chairman of the Local Government Act inquiry into the City of Cockburn Council, the Inquiry Chairman of the King Edward Memorial Hospital inquiry;*
- 5 *the previous resolutions of the elected members of the City of Joondalup;*
- 6 *the advice of Mr Tony Lucer QC, the West Australian Newspaper's legal advisory in respect of employment and industrial issues;*
- 7 *the various submissions made to the Council of the City of Joondalup by Blake Dawson Waldron, Lawyers;*
- 8 *the evidence of the elected members of the City of Joondalup given to the Upper House Inquiry into the appointment of our City's CEO, and;*
- 9 *the sworn affidavits tabled by several currently suspended and former elected members of the City of Joondalup, including the former Mayor and the former Deputy Mayor.*

A1 *Response by Chairman of Commissioners:* All matters are being dealt with by the Commissioners in their deliberations.

**Mr Michael O'Brien, Warwick:**

Questions directed to Cmr Drake-Brockman:

*Q1 Being well read in matters of law as (audi alteram partem) will you, before and/or during the proceedings for this evening's Special Meeting of the Commissioners be advising your colleague Commissioners of the right of the City's employee CEO Denis Smith to be heard in person and/or by his legal representative/s regarding the matter being discussed this evening?*

A1 This question will be taken on notice.

*Q2 Being well read in matters of law and no doubt (nemo debet esse iudex in propria sua causa) can you assure the community of the City of Joondalup that you, if you have, or have had any association with an organisation known as the Society of Labor Lawyers (WA Branch), Perth, Western Australia and as it is alleged that Ms Sarah Burke (daughter of former Labor Premier Brian Burke) is an associate lawyer with the Commissioners' advisors Fiocco's Lawyers, that there will be absolutely no bias that could be perceived to be Labor Political Party oriented, in the decisions that will be taken at this evening's meeting of the Commissioners?*

A2 *Response by Chairman of Commissioners:* This question is deemed very inappropriate.

The Chairman of Commissioners commented that Commissioners are appalled at the standard of some of the public questions which are being asked.

**Mrs C Mackintosh, Kallaroo:**

Q1 *How much money has the City spent to date on legal advice concerning the CEO issue?*

A1 This question will be taken on notice.

Q2 *Has the City received a request for financial assistance for suspended Mayor Carlos' legal fees?*

A2 *Response by Chairman of Commissioners:* I have received a request myself and I will be dealing with that.

**Mr S Magyar, Heathridge:**

Q1 *Re: Employment of the CEO and progressing matters regarding the CEO: Recommendation 11 from the Upper House Standing Committee referred to a case in New South Wales of Mr Glen Oakley who obtained his position by fraud and deception. Will the Commissioners be looking at the Oakley report and instigating a policy as recommended by the New South Wales Anti-corruption Commission to ensure that the Denis Smith fiasco cannot be repeated in Joondalup?*

A1 This question will be taken on notice.

**APOLOGIES AND LEAVE OF ABSENCE**

Nil

**DECLARATIONS OF FINANCIAL INTEREST/INTEREST THAT MAY AFFECT IMPARTIALITY**

Nil.

**ITEMS OF BUSINESS**

The purpose of the meeting is to enable the Commissioners to progress all matters in relation to the Motion passed at the Special Meeting on 11 December 2003.

Cmr Smith stated that the matters raised at the Special meeting of 11 December 2003 would not be concluded this evening, and foreshadowed that later in the meeting she would move a motion that the meeting be adjourned and reconvened at a later date.

**C1-02/04      LEGAL ADVICE FROM FIOCCO'S LAWYERS – [70544]**

**MOVED Cmr Smith SECONDED Cmr Fox that Council:**

- 1      formally RECEIVES the communication from Fiocco's Lawyers dated 16 February 2004 that is marked "Private and Confidential – Legal Professional Privilege" relating to the resolution of Council of 11 December 2003 that has been circulated to Commissioners prior to the meeting;**
- 2      NOTES that Fiocco's Lawyers has received advice from Senior Counsel, Mr Harry Dixon SC;**
- 3      AUTHORISES Fiocco's Lawyers to take the course of action recommended in Item 4 of its communication dated 16 February 2004 with Council to receive further advice in this connection that will allow it to consider the matter;**
- 4      NOTES the advice that funds previously allocated have been expended and authorises further expenditure necessary to complete the legal advice and action.**

Commissioners spoke to the motion.

**The Motion was Put and**

**CARRIED (5/0)**

**C2-02/04      FORENSIC AUDIT REPORT –[70544]**

**MOVED Cmr Anderson SECONDED Cmr Drake-Brockman that Council:**

- 1      RECEIVES the draft report of the forensic audit provided by Deloitte Touche Tohmatsu which is marked "Confidential – Not for Publication";**
- 2      INSTRUCTS Deloitte Touche Tohmatsu to provide a copy of the draft audit report to the CEO for comment with any comment from the CEO to be provided to the Chairman of Commissioners under confidential cover;**
- 3      NOTES the advice that funds previously allocated have been expended and authorises the necessary further expenditure.**

Cmr Anderson spoke to the motion.

**The Motion was Put and**

**CARRIED (5/0)**

**C3-02/04      ADJOURNMENT OF MEETING - [02154] [08122]**

**MOVED Cmr Smith SECONDED Cmr Drake-Brockman that the meeting BE ADJOURNED and that Standing Order 5.1 BE SUSPENDED to allow the Chairman of Commissioners to set the date, time and place for the meeting to be reconvened, and that this be publicly advertised.**

**The Procedural Motion was Put and**

**CARRIED (5/0)**

**The Meeting ADJOURNED at 1914 hrs on Monday 16 February 2004.**





*arises from establishing the materiality of the misrepresentations and the possible loss of the City's ability to rely upon the misrepresentations, because of past resolutions of the suspended Council declaring its support for, and confidence in, the CEO. These past resolutions arguably have had the effect of condoning the misrepresentations and waiving any right to rely upon the misrepresentations to rescind the Contract";*

- 5 NOTES the further advice from Fiocco's, which took into consideration the joint opinion, that *"...had the suspended Council, whether in accordance with advice or of its own accord, acted differently, the City's right to terminate the contract may have been different";*
- 6 NOTES that on or about 27 November 2003 the CEO commenced Supreme Court Action CIV No 2452 of 2003 ("*Supreme Court Action*") claiming damages against the City and suspended Mayor Carlos ("*Carlos*") and that the CEO has also threatened to commence defamation proceedings against the City and possibly, Carlos;
- 7 NOTES the results of the forensic audit that showed that the CEO had not in any material way breached any of the conditions of his employment contract but that there is cause for some concern to Commissioners in relation to procedures and processes at the City and the wording of the employment contract;
- 8 NOTES that advice has been provided to Commissioners in relation to four (4) possible courses of action in relation to this matter which are:
  - (a) that the CEO CONTINUE his employment until the completion of his fixed term contract of employment on 31 October 2006;
  - (b) that the CEO's fixed term contract of employment be terminated without payment of the balance of any salary he might be owed pursuant to his contract of employment; in other words, a summary dismissal of the CEO;
  - (c) that the CEO's fixed term contract of employment be terminated with some compensation being tendered by Council;
  - (d) that the Council instructs its Lawyers to negotiate with the CEO's lawyers to terminate the CEO's fixed term contract of employment upon payment of some compensation upon certain conditions;
- 9 NOTES the further advice of Fiocco's which took into consideration the joint opinion that, *"Despite the CEO's misrepresentations, a summary termination of the CEO's contract now will render the City liable to an action for wrongful dismissal and would expose the City to damages and legal costs...of a substantial nature ...Furthermore, unless the Supreme Court Action and threatened defamation proceedings are settled, additional...substantial...legal costs would be incurred by the City in defending these actions, assuming they were successfully defended";*

**10 DETERMINES that it is unacceptable for the CEO to remain in his position due to:**

- (a) the poor example that this matter sets for other staff at the City, especially in light of the City’s Code of Conduct;**
- (b) the lack of complete confidence that the Commissioners are able to feel in the CEO;**
- (c) the perceived poor view in the community of the CEO’s behaviour in relation to this matter that will affect the ongoing working relationship that the City wishes to maintain with the community;**
- (d) the inability of the City to move forward whilst this issue remains;**
- (e) the fact that, although it is acknowledged that the CEO has the right to commence the Supreme Court Action, the Supreme Court Action has and will continue to have an adverse impact on the operations of the City; and**
- (f) the need to restore good governance to the City and in the interests of the community;**

**11 DETERMINES that due to:**

- (a) past events, including decisions of the previous Council that have impacted on this matter;**
- (b) the fact that option 8(d) referred to above allows the Commissioners to, in addition to negotiating an appropriate termination of the CEO’s fixed term contract of employment, agree terms in relation to settling current and threatened legal action against the City;**
- (c) advice from John Fiocco of Fiocco’s Lawyers, which takes into consideration the joint opinion and other opinions received by the City from Ken Pettit SC and Minter Ellison that “*summary termination of the contract now will render the City liable to damages*”;**

**the Commissioners now seek a negotiated departure of the CEO from the City on the basis of conditions to be decided at this meeting by way of further resolution.**

Commissioners spoke to the motion.

**The Motion was Put and**

**CARRIED UNANIMOUSLY (5/0)**

**C15-03/04      NEGOTIATED TERMINATION OF CONTRACT OF  
EMPLOYMENT OF THE CHIEF EXECUTIVE OFFICER – [70544]**

**MOVED Cmr Drake-Brockman SECONDED Cmr Smith that Council:**

- 1      AGREES to a negotiated termination of the CEO's fixed term Contract of Employment;**
- 2      AGREES to:**
  - (a)      payment to the CEO of the sum of \$385,000.00 for the early termination of his fixed term contract of employment to any approved superannuation fund and/or to the CEO himself, such payments to be the subject to correct taxation treatment;**
  - (b)      payment to the CEO of the sum of \$90,000.00, as approved by Neil Douglas of Minter Ellison, in settlement of the present Supreme Court Action and any threatened Defamation Action;**
  - (c)      payment to the CEO of up to the sum of \$20,000.00 for relocation expenses on submission of invoices for relocation within Australia;**
  - (d)      payment to the CEO of an agreed annual leave entitlement of 12.67 days taking into consideration the report of the Forensic Auditor, Mr Martin Langridge;**
  - (e)      the payments in (a) to (d) above to be made subject to the City and the CEO entering into a confidential Deed of Release, that must include but is not limited to, the following terms and conditions:**
    - (i)      the CEO resigns his employment with the City at the date of execution of the Deed of Release;**
    - (ii)      the CEO releases the City, its employees, Councillors and Commissioners from all claims, past, present and future against the City in connection with his employment, his resignation, and all matters the subject of the settlement;**
    - (iii)      the CEO dismisses the Supreme Court Action against the City and covenants not to recommence proceedings against the City and in that regard each party agrees to bear their own costs in relation to the Supreme Court Action;**
    - (iv)      the CEO provides a complete indemnity to the City against any award of costs or damages that may be made against the City with respect to the Supreme Court Action. Such award may be made in the event that the CEO continues the Supreme Court Action against Carlos, and Carlos joins the City as a Third Party to the Supreme Court Action;**

- (v) in addition to condition (e) (iv), the CEO also agrees not to bring any further legal proceedings against Carlos arising out of or relating to or in connection with the CEO's employment, termination and the conduct of Carlos acting in his capacity as either a Mayor or Councillor of the City;
  - (vi) the CEO is to return any property of the City, including his motor vehicle;
  - (vii) the CEO preserve confidentiality with respect to the City's confidential information and in the event of a breach of this confidentiality, the CEO be liable to repay all monies paid to the CEO pursuant to these Resolutions;
- (f) the Chairman be authorised to sign the Deed of Release on behalf of the City and to affix the Common Seal of the City to the Deed of Release.

Commissioners spoke to the motion.

**The Motion was Put and CARRIED UNANIMOUSLY (5/0)**

**C16-03/04 ADJOURNMENT OF MEETING – [02154] [08122]**

**MOVED Cmr Anderson SECONDED Cmr Drake-Brockman that the meeting BE ADJOURNED for a period of between five (5) and fifteen (15) minutes, the time being 1507 hrs.**

Cmr Paterson requested that the meeting be adjourned at this point to enable him to sign the Deed of Release.

**The Procedural Motion was Put and CARRIED UNANIMOUSLY (5/0)**

The Meeting **RESUMED** at 1522 hrs, with all Commissioners being present.

**C17-03/04 RESUMPTION OF MEETING – [02154] [08122]**

**MOVED Cmr Anderson SECONDED Cmr Smith that the meeting be RECONVENED, the time being 1522 hrs.**

**The Procedural Motion was Put and CARRIED UNANIMOUSLY (5/0)**





**C24-03/04      PAYMENT FROM CITY'S RESERVES - [70544]**

**MOVED Cmr Anderson SECONDED Cmr Smith that Council AGREES that the payments to the CEO detailed in Motion 2 paragraphs (a) to (d), in settlement of this matter, be paid from municipal funds and ultimately to be drawn from the City's Reserves after due process has been followed.**

Commissioners spoke to the motion.

**The Motion was Put and**

**CARRIED UNANIMOUSLY (5/0)**

Cmr Paterson thanked members of the community present for their tolerance during the meeting and advised they were welcome to observe the Press Conference that was due to commence.

**CLOSE OF MEETING**

There being no further business, the Chairman declared the Meeting closed at 1548 hrs; the following Commissioners being present at that time:

CMR J PATERSON  
CMR A DRAKE-BROCKMAN  
CMR M ANDERSON  
CMR A FOX  
CMR S SMITH