

## **COMPLAINT BY CR MICHELE JOHN AGAINST CR BRIAN CORR IN RELATION TO A LETTER PUBLISHED IN THE COMMUNITY NEWSPAPER**

### **PRELIMINARY VIEW**

#### **The Complaint**

On 4 July 2008, Cr Michele John lodged a complaint pursuant to the Code of Conduct against Cr Brian Corr. At the request of the Chief Executive Officer, Cr John provided additional details to support her complaint on 24 September 2008. The complaint relates to Cr Corr's statements made in a letter which was published in the *Joondalup Times* on 3 June 2008.

The complaint was that Cr Corr's statements breached the provisions of sections 2(d); 2(f); 2(g); 3.3; 3.4(e); and 3.4(g) of the City's Code of Conduct. Specifically, Cr John alleged that Cr Corr's statements:

- (i) constitute public adverse reflection upon Council's decision in relation to item CJ081-05/08 'Sacred Heart College, Sorrento - Auditorium and classroom additions including canteen: Lot 16 (15) Hocking Parade, Sorrento';
- (i) cast aspersions on Cr John's character and good judgment; and
- (ii) inappropriately suggest that the public ought to have had an opportunity to comment on an amendment motion Cr John moved in relation to item CJ081-05/08.

#### **The relevant provisions within the Code**

Those clauses of the Code which are identified within the complaint are as follows:

<p><b>Clause 2 (d)</b> The local community and the public in general are entitled to expect that the following general principles should be used to guide council members ... in their behaviours: (d) avoid damage to the reputation of the City of Joondalup.</p>
<p><b>Clause 2 (f)</b> The local community and the public in general are entitled to expect that the following general principles should be used to guide council members ... in their behaviours: (f) base decisions on relevant and factually correct information.</p>
<p><b>Clause 2 (g)</b> The local community and the public in general are entitled to expect that the following general principles should be used to guide council members ... of the City of Joondalup in their behaviours: (g) treat others with respect and fairness.</p>
<p><b>Clause 3.3</b> Council members ... shall not take advantage of their positions to improperly disadvantage or cause detriment to the local government or any other person.</p>
<p><b>Clause 3.4 (e)</b> Council members ... shall: (e) make no allegations which are improper or derogatory (unless true and in the public interest) and refrain from any form of conduct in the performance of their official or professional duties, which may cause or is likely to cause any reasonable person unwarranted offence or embarrassment.</p>
<p><b>Clause 3.4 (g)</b> Council members ... shall: (g) act in accordance with their obligations of fidelity to the Council and not publicly reflect adversely upon any decision of the Council or the Executive Management Group.</p>

Clauses 2(d), 2(f) and 2(g) are general principles that govern standards of behaviour. It should be noted that the Code specifically provides that “it is not a rule of conduct that the principles be observed”.

### **Assessment of the complaint**

#### **1. Do the statements which are the substance of the complaint fall within the ambit of the Code of Conduct?**

This complaint relates to a letter prepared by an individual Councillor and published by the Community Newspaper.

Before assessing the complaint, it is necessary to determine whether the letter's publication is covered by the Code.

The first sentence of the Code under the heading 'Introduction' states “The Code of Conduct provides a framework for behaviour that must be observed in the wide range of interactions and scenarios experienced in the conduct of City of Joondalup activities”. This poses the question, is the preparation and submission of a letter to the Community Newspaper a City of Joondalup activity?

It is concluded that the answer to this question would most likely be 'no' if the letter's author just provided his or her name and did not mention the City. However, if the letter's author uses his title and makes reference to the City in the signature block, it is concluded that the answer is 'yes'. Furthermore, it can be concluded that the letter was written in Cr Corr's capacity as a Councillor due to references to the statements he made at the Council meeting on 13 May 2008. This is reinforced by the fact that many of the statements in Cr Corr's speech made in the chamber were reproduced in the letter to the editor.

It is clear that Cr Corr has engaged in public commentary on a matter that has been before Council. The public is likely to view any public comments made by an Elected Member on matters which are before Council as comments made by the Elected Member in their official capacity. This is because a Councillor's role under section 1.4 of the Local Government Act 1995 includes a role to: 'facilitate communication between the community and the council.' Given this role, it is reasonably arguable that any correspondence to the local newspaper on matters before Council is likely to fall within the role of a Councillor, and consequently be covered by the Code of Conduct.

Clause 2 of the Code, which identifies 'general principles and ethical standards of conduct', then states “the local community and the public in general are entitled to expect that the following general principles should be used to guide Council members...in their behaviours”. This statement does not specifically limit the application of the general principles and ethical standards to official Council business or City of Joondalup activities. Indeed, it could be argued strongly that because of their fundamental relevance, these principles and standards should apply at all times (i.e. one principle is to act lawfully).

Clause 3.3 of the Code contains a statement of limitation as to its applicability. That is, Council members “shall not take advantage of their position”. Here the question raised is 'does the letter to the Community Newspaper take advantage of an Elected Member's position?' The answer to this question would be 'no' if the letter made no reference to the author as an Elected Member. However, if the letter makes such a reference, it is concluded that the answer is 'yes'.

Clause 3.4(e) does contain a specific limitation on its application when it refers to “refrain from any form of conduct in the performance of their official or professional duties”. Writing a letter to the Community Newspaper is clearly not an official duty. However, the term 'professional duty' is viewed as being far broader. In this regard, it is concluded that a letter which references an Elected Member's position reflects the fact that they are carrying out a professional duty.

Clause 3.4(g) explicitly contains no limitations on its application. That is, the clause begins with the words “Always act”. In this regard, the sub-section would apply to the letter.

In light of the preceding discussion, it is concluded that the statements which are the substance of the complaint fall within the ambit of the Code. Having reached this conclusion, it is necessary to consider the individual elements of the complaint itself.

## **2. Clause 2(d)**

Clause 2(d) relates to avoiding damaging the reputation of the City of Joondalup. Cr John has alleged that specified comments in the published letter could damage the reputation of the City of Joondalup in the mind of a reasonable person. The comments are:

“The new recommendation to approve was only made known to the public when Cr John moved it during the council meeting.”

“Effectively, the decision to approve was made without the public’s knowledge”

Cr John has alleged the comments cast aspersions on Council’s decision-making process.

In accordance with the *Standing Orders Local Law 2005*, in respect to all Council decisions, Council has discretion to depart from officer’s recommendations provided that reasons are given. The Standing Orders do not provide for members of the public to have the opportunity to comment on alternative motions that are moved and seconded by Elected Members. By implying the public were deprived of the opportunity to comment when no such right is provided for in the Standing Orders, Cr Corr’s statements have called Council’s decision-making process into question.

The comments also imply the City has somehow deceived and been disloyal to the community by passing the resolution to support the development application. Allegations conveying deception and disloyalty clearly damage the reputation of the City.

It is concluded that the content of the letter is inconsistent with the guiding principle that Councillors, in their behaviours, should avoid damage to the reputation of the City.

As noted above, it is not a requirement that this general principle be observed.

## **3. Clause 2(f)**

Clause 2(f) states that decisions should be based on relevant and factually correct information. Two comments can be made about the applicability of this clause. Firstly, Cr John has not specifically identified the areas of the letter which in her opinion appear factually incorrect. Secondly, as the letter is not part of the decision-making process, it does not strictly fall within the parameters of subsection 2(f).

## **4. Clause 2(g)**

Cr John has alleged the letter casts aspersions on her character and good judgment in making the decision.

Clause 2(g) requires Elected Members to treat others with respect and fairness. The letter seeks to point out the apparent differences in the positions Cr John adopted prior to her election as councillor in her ‘CV’, which is a reference to her candidate profile, and at the Council meeting on 13 May with respect to the issue of height of coastal buildings.

The relevant statement in Cr John’s candidate profile is as follows:

*'I will support a coastal policy with a blanket 10 m height limit...'*

At the Council meeting, Cr John moved a motion to support the 14.6 metre high development which is located close to the beach in Sorrento.

The mere fact of pointing out this apparent difference in position is neither disrespectful of nor unfair to Cr John.

#### **5. Do the comments breach clause 3.3 of the Code?**

Clause 3.3 states that Elected Members are "not to take advantage of their position to...cause detriment to the local government or any other person". Here it is noted that causing detriment is a similar concept to damaging the City's reputation (the subject of clause 2(d) discussed above). As such, the comments identified as damaging the City's reputation are also considered to cause detriment to the City.

As previously dealt with in point 2, members of the public who read Cr Corr's letter may gain an impression that they have been deceived as there is the suggestion that Council's decision was made surreptitiously.

It is noted that the general tenor of the letter to the paper reflects adversely upon a decision of the Council in the public arena. This occurs, in particular, through the following statements:

- "the people feel betrayed because they have been betrayed". The word 'betray' connotes that there has been some form of disloyalty on the part of the Council and that the community feel 'let down' by the decision.
- "the massive breach of policy". This statement suggests that the decision to depart from Council Policy 3-4 was unauthorised and improper.
- "Effectively the decision to approve was made without the public's knowledge". As previously noted in the commentary under clause 2(d) above, this statement damages the reputation of the City.

By identifying himself as an Elected Member in the letter, Cr Corr has taken advantage of his office in order to achieve an improper outcome ie. to highlight his personal dissatisfaction with Council's decision and to publicly criticise it. In writing the letter, Cr Corr took advantage of his position as a councillor to cause detriment to the City.

Consequently, the complaint is upheld in relation to clause 3.3.

#### **6. Do the comments breach clause 3.4(e) of the Code?**

Clause 3.4(e) imposes two obligations on Council members:

- to make no allegations which are improper or derogatory (unless true and in the public interest); and
- to refrain from any form of conduct ...which may cause or is likely to cause any reasonable person any unwarranted offence or embarrassment.

This element of the Code relates to impacts on individuals rather than the City as a whole. It could be viewed that the references in the letter to Cr John are improper or derogatory or could cause her unwarranted offence or embarrassment. However, the letter is considered factual in that Cr John:

- Moved the motion approving the development application and argued for it;
- Understood that the decision in relation to the Sacred Heart College would not set a precedent unless substantially the same circumstances applied elsewhere; and
- Campaigned on a broad policy position against coastal high rise development during the 2006 Local Government Elections.

Consequently, it is concluded that the complaint is not upheld in relation to the letter's references to Cr John.

## 7. Do the comments breach clause 3.4(g) of the Code?

Cr John indicates in her complaint that the 'Code of Conduct states that once a decision is made in the Chamber no councillor is to go against this decision in the press.' This statement refers to sub-clause 3.4(g), which requires Elected Members to "not publicly reflect adversely on any decision of the Council".

### **'Precedent' issue**

Cr John has alleged that Cr Corr has 'condemned the Council decision by suggesting in the Joondalup Times press that a precedent could potentially have been set'. The relevant references in the letter to the editor are as follows:

- 'The original recommendation prepared by the officers said that this building, if approved, was "unlikely" to set a precedent.'
- 'Cr John's motion changed the wording to say that it "would not" set a precedent.'
- 'Is the policy breach at Sacred Heart a precedent? It might well be: the zoning may be different, but it is the same policy.'
- 'Council may refuse, but the State Administrative Tribunal could approve, based on this precedent.'

Clause 6.81(j) of the District Planning Scheme No.2 requires Council to have due regard to any previous decisions made by Council which are sufficiently similar for the proposed development to be relevant as a precedent. Arguably, if Council received an application for planning approval which involved sufficiently similar facts and circumstances to the Sacred Heart College situation, then the decision could be relied upon as a precedent.

Cr John contends that officers at the Council meeting 'unequivocally confirmed that a precedent would not be set by the alternative amendment' that she put forward. Part 4(b) of the alternative recommendation states:

*"given the unique combination of factors such as locality, topography, built form, size, shape and character of this parcel of land, this development application in Council's opinion would not set a planning precedent that would constrain any future decision making that may be considered under Council Policy 3-4 (Height of Buildings Within the Coastal Area – Non-Residential Zones)."*

A transcript of the discussion of this item shows that the Manager, Approvals, Planning and Environmental Services and the Chief Executive Officer both commented in response to Cr Hart's question about part 4(b) of the motion. Mr Terelinck's comments were:

*Mr Mayor, the report notably does not refer to precedent as an issue and I can explain the reasons for that either way.*

*In terms of precedent the way that their lawyers would explain it and have explained it to us is that generally precedent does not apply and that each application needs to be considered on its merits and the planning scheme expresses a number of factors in it that the Council needs to have regard to that we regularly put into reports for your consideration.*

*Precedent can however apply in exceptional circumstances and those circumstances might be where the Council makes a decision on a particular issue and another issue comes*

*forward where exactly the same planning considerations apply so if you could foreshadow an application in the future perhaps with a similar size parcel of land, similar topography issues, similar scale of buildings, similar separation between other buildings and land uses and all of those sorts of issues then you could carry whatever decision is made here with some precedent value to influence the next consideration but the reality is it is unlikely that there is in fact any other location along the coast that offers exactly the same kind of criteria and for that reason the precedent, or fear of precedent, has not been raised in the report even though the recommendation is in the negative and neither do I think it would apply in the case of a positive recommendation or positive resolution for this application.*

Mr Hunt's comments, which immediately followed Mr Terelinck's comments, were:

*Cr Hart the other comment I would make if you could read 4(b) and I am sure you can it says "given the unique combination of factors" you are actually identifying, you are not just saying that Council does not believe this will create a precedent, you have identified or in this resolution are proposing to identify the reasons why, so if someone claimed a precedent you could say hang on, if you look at the topography, if you look at the locality, the built form etc. etc. etc. the likelihood of someone having exactly the same circumstances, I have to say, would be pretty slim.*

It is not considered that the comments of Mr Terelinck and Mr Hunt constitutes 'unequivocal confirmation' that a precedent would not be set.

Having said this, Cr Corr's statements suggesting that the officer's recommendation was that the building was 'unlikely' to set a precedent is incorrect. There is no mention in the report or the officer's recommendation about 'precedent'. Furthermore, the statement 'Cr John's motion changed the wording to say that it "would not" set a precedent' implies that it contradicted the officer's wording when in fact there was no mention of 'precedent' in the recommendation. Although Cr Corr appears to have erroneously reported the text of the officer's recommendation, this does not amount to an adverse reflection upon a Council decision, as the comments relate to the report and not the resolution.

The other statements in the letter to the editor that refer to precedent are speculating that a precedent may have been set. In view of District Planning Scheme No.2 and the officers' comments given at the meeting which do not unilaterally rule out a precedent being established, it is possible, albeit remotely, that the decision in relation to item CJ081-05/08 may have some precedent value in the future. Consequently, the allegation that Cr Corr inappropriately and erroneously suggested that a precedent may have been set is not upheld.

### **Other criticisms**

The congratulatory remark in the letter in reference to the article by Adriana Tsoveas that was published in the *Wanneroo Times* on 27 May 2008 is also additional evidence that the letter is critical of a Council decision. The article reports that residents are launching legal action against the Council and quotes a resident's criticism of the Council decision. By congratulating the journalist and describing the article as 'informative and well-balanced' represents a tacit endorsement of the unfavourable comments quoted in the article. It is noted that the article is described as 'informative and well-balanced' despite the error in the second paragraph, which incorrectly reports the height of the building. Here, it is noted that the article mentions that the building is 16 metres high when the report to Council stated that it is 14.6 metres high.

Consequently, the complaint is upheld in relation to sub-section 3.4(g).

## **Conclusion and Recommendation**

The assessment of the complaint has concluded that the letter written by Cr Corr and published in the Community Newspaper does not meet the standard of behaviour set out in sub-section 2(d) and breaches section 3.3 and sub-section 3.4(g) of the Code of Conduct.

Having reached this conclusion, it is also noted that there are no penalties for breaches of the Code per se. Accordingly, it is recommended that this report be presented to Council and the matter closed.

## **CR CORR'S RESPONSE TO ALLEGATIONS**

The Chief Executive Officer wrote to Cr Corr on 14 January 2009 requesting comments on the Preliminary View of the complaint. Cr Corr responded to the allegations made against him on 20 February 2009. The following discussion is in response to matters raised by Cr Corr in his email of 20 February.

Cr Corr acknowledged the findings in respect of clauses 2(d), 2(f), 2(g) and 3.4(e) of the Code.

In reference to the comment in the Preliminary View that Cr Corr was expressing his 'personal dissatisfaction with Council's decision', it has been suggested that Cr Corr's letter was not expressing his personal opinion, but his opinion as an Elected Member. This aspect of the response confirms that the comments in the letter were by Cr Corr in his official capacity. The response also acknowledged that an error was made in repeating statements made in the Chamber during the decision-making process after the Council resolution. There was also some acknowledgement that there was damage to the council's reputation arising from the statement "the people feel betrayed because they have been betrayed."

It has been suggested by Cr Corr, however, that the element of 'improperly disadvantage' has not been satisfied in clause 3.3.

The meaning of clause 3.3 is not clear in that there is uncertainty as to the "reach" of the word improperly. The correct interpretation of clause 3.3 may be that the word "improperly" applies to both "disadvantage" and "cause detriment to" (i.e. *council members shall not take advantage of their positions to improperly disadvantage or improperly cause detriment to the local government or any other person*). Alternatively, it may be that the word improperly only applies to "disadvantage" (i.e. *council members shall not take advantage of their positions to improperly disadvantage or cause detriment to the local government or any other person*).

Cr Corr submits that the former is the proper interpretation of clause 3.3. Cr Corr further submits that to act improperly is analogous to acting in bad faith.

In this instance, as outlined in the Preliminary View, Cr Corr's comments were analysed in the context of causing detriment and it was concluded that the detriment was in the form of damage to the City's reputation, which is based on the latter interpretation. However, it is also considered that there has been a breach in the case that the former interpretation is the proper interpretation. The reason is that there is no requirement for bad faith or impropriety in order to find that a Councillor has acted improperly. The issue of whether a Councillor has acted "improperly" depends on whether he or she has breached standards of conduct expected of a person in his or her position, which may – or may not – involve acting in "bad faith".

As for the standards of conduct for Councillors, these are in effect set down in the Code of Conduct. As Cr Corr has been found to have breached the standard of behaviour set out in clauses 2(d) and 3.4(g) of the Code, Cr Corr has breached clause 3.3 by using his position to improperly cause a detriment in the form of damage to the City's reputation.

Comments were also received in relation to the allegation that the letter amounted to a public adverse reflection on a Council decision. It has been suggested that complimenting a journalist on writing an 'informative and well-balanced' article could not be taken to be reflecting adversely on a Council decision. In response to the statement in the Preliminary View that the congratulatory remark represented a 'tacit endorsement of the unfavourable comments quoted in the article', it was suggested that the article also included positive comments. The article written by Adriana Tsoveas appears only to convey one point of view, being that of the resident, and it does not include comments from the school or the City. As such, it is difficult to find support for the belief that the article was 'informative and well-balanced.' It is also difficult to ascertain any positive comments in the article, given that the context was potential legal action against the City.

The Preliminary View indicated that the journalist had incorrectly reported the height of the building as being 16 metres. Cr Corr's response suggested that the article is correct, because "the building is 14.6 metres above 'natural ground level' but is 16 metres when you add in the portion below natural ground level."

In response to this assertion, the original plans were remeasured. The height of the building including the area below the natural ground level is approximately 16.1 metres excluding the under stage storage area, and 18.8 metres including this under stage storage area. Depending on the context, Ms Tsoveas' reporting of the height of the building may be technically correct. However, the relevant definition<sup>[1]</sup> in the Coastal Height Policy requires the building height to be measured from natural ground level. As reported in the agenda paper, this is 14.6 metres. The portion of the building which is below natural ground level is not considered as there is minimal impact from the structure at this point.

Public comments made by a councillor on a matter that was before Council that are critical of the process and the decision of Council clearly go against the spirit and intent of clause 3.4(g). Having concluded that the letter amounted to an adverse reflection upon a Council decision based upon the endorsement of the negative connotations of the article, it is not considered a material point whether or not the height of the building was correctly reported by Ms Tsoveas.

## **FINAL VIEW**

Taking into account the evidence supporting the allegations, the audio of the Council meeting and Cr Corr's response to the Preliminary View and draft report, the Final View of the complaint is:

- The conduct complained of does not meet the standard of behaviour set out in sub-section 2(d) of the Code of Conduct;
- A breach of sections 3.3 and 3.4(g) of the Code of Conduct has been substantiated; and
- In accordance with section 8 of the Code, this report will be presented to Council.

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<sup>[1]</sup> Building Height

(ii) a building used other than exclusively for residential purposes, means the vertical distance measured at any point from the natural ground level to the uppermost part of the building above that point excluding any chimney or vent pipe.