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| SUBJECT: <i>QUASI-JUDICIAL POLICY</i>             | FILE NO:   | PLN/0105    |
| ADOPTED BY COUNCIL ON: 26 <sup>th</sup> July 2012 | MINUTE NO: | 229.07.2012 |
| AMENDED BY COUNCIL ON:                            | MINUTE NO: |             |

## PART 1 – GENERAL CONSIDERATIONS

### Policy Objectives

- 1) To assist Elected Members and employees of the Flinders Council to recognise when Council is exercising a 'quasi-judicial' function;
- 2) To explain why special principles apply to the exercise of quasi-judicial functions;
- 3) To provide guidance as to appropriate conduct regarding the exercise of quasi-judicial functions; and
- 4) To explain to Elected Members and Council employees some of the consequences of failing to act appropriately when exercising quasi-judicial functions.

### Explanation of the Principles of the Quasi-Judicial Role

Because the quasi-judicial role of Elected Members is not fully explained in the local government legislation (i.e. the *Local Government Act 1993*), the following explanation of the role is provided for the benefit of Elected Members and Council employees:

- 1) The community deserves and expects that persons sitting in judgment will:
  - (a) be free of bias and conflicts of interest;
  - (b) make their decision with reference to all relevant factual matters and having regard to all applicable laws; and
  - (c) act in accordance with the principles of natural justice, which are often equated with affording fairness to all persons involved.
- 2) The community deserves and expects that where a decision-making body is made up of more than one person, all of those persons will act in accordance with the standards set out in paragraphs (a), (b) and (c) in part 1) above.
- 3) The community deserves and expects that bodies required to make decisions affecting the property and interests of other persons will conduct themselves in a manner similar to that of a Judge or a Magistrate sitting in a Court, or a member of a Statutory Tribunal.
- 4) A local government Council when determining applications for planning

approval, and for other approvals, licences, consents and permits is acting in what can be described as a 'quasi-judicial' manner because the granting of approvals, licences, consents and permits is a quasi-judicial function granted by the Tasmanian Parliament through the passing of legislation.

- 5) Elected Members hold their positions by virtue of being elected by the residents of the municipality. Until properly educated in the requirements of due process, these residents will tend to expect Elected Members to protect the residents' particular interests, even when performing quasi-judicial functions.
- 6) Elected Members, while being sensitive to the expectations of residents of the municipality, are expected to perform their quasi-judicial functions properly – that is, in accordance with law. Some circumstances will arise where certain community expectations are not relevant to the decision an Elected Member is required to make, e.g. where a community objection is based on religious, moral or racial grounds, or in the case of planning matters a common complaint is the perceived impact a development may have on property values.
- 7) Persons who make application to Council for various approvals will frequently expect to be able to communicate with and persuade individual Elected Members or Council employees in favour of their proposals in a way that they would never contemplate doing with a Judge, a Magistrate or a member of a Statutory Tribunal. Elected members and Council employees must endeavour to deal with the overtures of such persons in a 'quasi-judicial' manner.

The above is a description of the general principles that underlie and explain the quasi-judicial role of Elected Members and Council employees. The balance of this Policy will apply those principles to the quasi-judicial functions of Elected Members and Council employees in general practice.

### Consequences of failure in the Quasi-Judicial Role

The following are some of the consequences of a Council failing to act in a quasi-judicial manner when exercising quasi judicial functions:

- 1) An allegation of actual or perceived bias which can have the following consequences:
  - (a) An allegation of improper conduct that could amount to an offence under the *Local Government Act 1993*;
  - (b) A Councillor being accused of breaching the Council's Code of Conduct Policy; and/or
  - (c) exposing the Council to the risk of proceedings being initiated against Council under the *Judicial Review Act 2000* which will cause Council to incur significant costs and could ultimately lead to Council's decision being invalidated.

- 2) In some cases, if failure of an Elected Member to act appropriately in the quasi-judicial role can be shown to have caused damage, this may result in a claim against the Elected Member personally for damages. Councillors should be acutely aware that they have personal legal and financial exposure in relation to these matters.
- 3) Acting with bias, or more generally failure to act with judicial fairness, will damage the reputation of the Elected Member concerned, the Council, and the institution of local government.

### **Recognition of Proper Role – Elected Members v Council Employees**

- 1) Elected Members and Council employees need to recognise their respective decision-making responsibilities.
- 2) If any issues arise they must be referred to the appropriate person (e.g. the General Manager).
- 3) Elected Members and employees should not attempt to intervene in, or allow themselves to be drawn into matters which are properly the function of others.

### **Council Employee Responsibilities**

- 1) Any Council employee who is required to gather information or evidence from an applicant or other interested party must ensure that detailed meeting notes are recorded.
- 2) The General Manager is to ensure that suitably qualified staff are responsible for the preparation of all reports provided to Councillors for use in decision making.

### **Elected Member Responsibilities**

- 1) Elected Members should not actively gather information when acting in a quasi-judicial role – this task is performed by Council’s duly appointed experts. The Elected Member’s role is not to investigate, but rather to consider and determine matters in accordance with law.
- 2) Elected Members may be approached by applicants or other interested parties who wish to discuss a matter which is currently before Council. The following rules provide Elected Members with guidelines for handling such enquiries:
  - A. Should an applicant or other interested party contact an Elected Member to discuss a matter that is before Council, (or will soon come before Council), then the Elected Member should;
    - politely listen to the reasons for the person making contact with the

Elected Member;

- ensure that the person is made aware of the Elected Member's role as a statutory decision-maker and the obligations that attach to that role;
  - if relevant, inform the person that the Elected Member is not in a position to comment or provide any opinion (interim or final) regarding the matter and that the final determination will be made by full Council in due course; and
  - direct the person to contact the relevant Council employee (e.g. Planning Officer, Environmental Health Officer, etc) and pursue the matter with them.
- B. Should the applicant or other interested party wish to continue discussing the matter and/or provide the Elected Member with additional information the Elected Member must:
- advise the person that the appropriate method for doing so is to write to the General Manager;
  - inform the person of the processes for making a written submission or representation to the General Manager; and
  - if the person requests that the Elected Member attend a site inspection, inform the person that they may request a site visit by contacting the General Manager in writing.
- C. If an Elected Member becomes aware of additional information relevant to a Council decision through contact with an applicant or other interested party then the following will occur:
- The relevant Elected Member must bring the additional information to the attention of the General Manager through a written notice and the General Manager will, after reviewing the information and taking advice if necessary, bring the additional information to the attention of the Council; and
  - Where an Elected Member provides such additional information, the General Manager may provide advice or commentary on the additional information or request a relevant Council officer to provide such advice or commentary.

### **Additional Information sought by Elected Members**

- 1) An Elected Member wishing to receive additional information whilst acting in the quasi-judicial role may, in writing, request the additional information through the General Manager.

- 2) Under no circumstances must an Elected Member take it upon themselves to independently obtain additional information regarding any matter in which Council is acting in a quasi-judicial capacity.
- 3) The General Manager will consider any requests for additional information in light of the relevance of the additional information requested and the Council's resources and capacity to obtain the requested information.

### Site Visits

- 1) Elected Members must not conduct site visits on their own or with other Elected Members whilst acting in a quasi-judicial role unless the visit has been organised by the General Manager. Elected Members wishing to arrange site visits must submit a request to the General Manager. The General Manager will then consider the request, take advice if necessary, and subject to that advice arrange a site visit.
- 2) Prior to the site visit, the General Manager will advise the Elected Members and all other relevant persons of the details and purpose of the site visit. The General Manager must ensure that a detailed record is made of the site visit.
- 3) Whilst it is Council's first preference that a site visit be attended by all Elected Members, an Elected Member need not attend a site visit if the Elected Member:
  - (a) is already familiar with the site and is able to demonstrate that they have adequate information with which to make a decision without conducting a site visit; or
  - (b) is unable to attend due to illness, leave or work commitments.
- 4) The General Manager will designate a Council employee to attend site visits and take detailed notes of the proceedings. A copy of all these notes will be distributed to all Elected Members as soon as practicable following the site visit.
- 5) In instances where an Elected Member is unable to attend a site meeting, the Elected Member must familiarise themselves with the recorded notes of the site meeting.

### Determining a matter acting in a quasi-judicial capacity

- 1) When determining a matter in which the Council is required to act in a quasi-judicial capacity, Elected Members must act with judicial fairness, in accordance with the principles of natural justice, without bias and are required to:
  - (a) consider only those facts and legal principles that are relevant and apply to the decision in question;

- (b) consider all relevant factors required by law as may be specified in the legislation pursuant to which the Council is making the decision; and
  - (c) not take into account any matters that are not relevant to the decision making process.
- 2) Where Elected Members act contrary to the recommendations of a Council Officer (e.g. a planning officer), the reasons for doing so must be based on relevant matter and must be recorded in the minutes of the relevant meeting.
  - 3) Any respondents or representors must be given a fair and courteous hearing of their issues.

## PART 2 – COUNCIL ACTING AS A PLANNING AUTHORITY

### Policy Objectives:

- 1) To assist Elected Members and employees of the Flinders Council to recognise that when Council is acting in its capacity as a planning authority it is acting in a quasi-judicial role;
- 2) To explain the special principles that apply to Elected Members when the Council is acting in its capacity as a planning authority;
- 3) To provide guidance regarding the exercise of Council's powers as a planning authority; and
- 4) To explain some of the consequences to the Council and to Elected Members and employees of the failure to act appropriately when Council is discharging its duties as a planning authority.

### Council as a Planning Authority

Whenever the Council is required to determine an application for a planning permit made pursuant to the *Land Use Planning and Approvals Act 1993* (the 'Act') the Council is acting as a planning authority and assumes a quasi-judicial role.

Councillors cannot simply take into account whatever considerations they wish when determining applications for planning permits – the Act specifies the matters that must be taken into account.

As a broad starting point, section 51(2) of the Act prescribes that in determining an application for a planning permit the planning authority must:

- 1) seek to further the objectives set out in Schedule 1 of that Act;
- 2) consider all relevant provisions of the Flinders Planning Scheme 1994;

- 3) take into consideration all matters raised in any representations that may be received from the public during the statutory notification period (if any); and
- 4) where relevant, have regard to all certified bushfire, environmental or natural hazard plans and any relevant certificates referred to in section 51(2)(d)(ii) of that Act.

Ordinarily, Elected Members are assisted in their assessment of an application for a planning permit by reports prepared by expert staff employed by Council. Such experts include Council's Planning Officers, Environmental Health Officers, and Natural Resource Management Officers.

The usually adopted course is that Council's officers will prepare a report which makes recommendations to the Council as to how the matter ought be determined. These recommendations are based on an assessment of all of the matters that the law prescribes must be taken into account.

Elected Members are entitled to asked questions of and scrutinize reports and recommendations received from Council officers. However, Elected Members must not introduce and base their decision on irrelevant considerations when determining an application for a planning permit.

As an example, members of the public often seek to oppose applications for planning permits with allegations that the proposed use or development will adversely affect property values. Unless the effect of a proposal on property values is a relevant '**planning consideration**' (i.e. as prescribed by the Flinders Planning Scheme 1994 or legislation such as the Act) this issue cannot and must not be taken into account.

### **Council determining matter contrary to Officer recommendations**

Elected Members are free to determine a matter contrary to the recommendations given by Council officers. However, in the context of applications for planning permits this may have the following consequences:

- 1) An applicant for a permit will almost certainly appeal a Council refusal to the Resource Management and Planning Appeal Tribunal if such refusal is contrary to the recommendations of Council's expert Officers;
- 2) In the event that Council's decision is appealed, the Council must incur the cost of locating and engaging a town and country planning expert. who is willing to support the Council's decision in the appeal; and
- 3) The Council Officer whose recommendations were rejected will most likely be called as a witness to give evidence against Council's position in any appeal – such a scenario is understandably unpleasant for the Council Officer and not in the Council's interests.

## **Consequences of failing to take into account only relevant considerations.**

In the event that Elected Members take into account irrelevant matters when determining an application for a planning permit, the Council's decision risks being the subject of an application for judicial review before the Supreme Court of Tasmania.

The potential consequences of judicial review have been detailed in Part 1 of this policy.

Please direct all enquiries regarding these policies to Council's General Manager.