



OMBUDSMAN
Western Australia

**Report on an investigation into a complaint by the Town of
Cambridge concerning the City Of Perth**

September - 2001

Parliamentary Commissioner for Administrative Investigations

Town of Cambridge and the City of Perth

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BACKGROUND TO COMPLAINT AND INVESTIGATION

1. In July 1998 the Town of Cambridge (“the Town”) asked me to investigate the role of the City of Perth (“the City”) in the events surrounding the changes to the constitution of a retirement village — Ocean Gardens Incorporated (“the Association”) in 1995. The Association had been set up initially by the City in 1985 and, following the restructure of the City (into a new City of Perth and three new towns — Cambridge, Vincent and Victoria Park), the retirement village was located within the Town’s boundaries.
2. Although the events in question occurred over twelve months before the complaint was received, I decided that there were special circumstances relevant to the case and commenced an investigation in September 1998. Nonetheless, my investigation was made more difficult because of the time that had elapsed since the City was restructured in 1995 and the decade that had passed since the City had set up the Association. Memories had dimmed and it was sometimes difficult to piece together the reasons for various actions or inactions from the available documentation. In addition, since 1985 some relevant legislation was repealed, enacted or amended.
3. In the course of the investigation my officers interviewed the Chief Executive Officer (CEO) of the Town and other relevant staff members. The City made available all the files it still held, together with copies of summaries of files that had been transferred to the Association in 1995. Legal advice obtained by the City was also provided. Staff of the City, including the CEO, were interviewed and during the investigation the CEO responded to my further written requests for information.
4. The files of the Department of Local Government (“the Department”) were examined and staff involved with the restructure of the City were interviewed. The Department also responded to my further written requests for information.
5. The Chairman of the Association made the files and minutes of the Association available for examination and the Secretary of the Association assisted in locating information. Other persons who may have had knowledge of, or who were involved in, relevant events were also interviewed.

RESPONSES INVITED FROM DEPARTMENT, ASSOCIATION AND CITY

6. Section 25(7) of the *Parliamentary Commissioner Act 1971* provides that I shall not in a report “*make any comment defamatory of or adverse to any person unless that person has been given an opportunity of being heard in the matter and his defence is fairly set forth in the report*”. I take a wide interpretation of this section because I wish to ensure that the principles of procedural fairness are, and are seen to be, observed. To that end I forwarded a copy of a draft report to the Association for its comments and the comments of any officer or member of the Association mentioned. A copy of the draft report was also forwarded to the Lord Mayor and Chief Executive Officer of the City and the Chief Executive Officer of the Department. I invited comments thereon from the Department and City or any of its staff and/or councillors.

7. The Association, the CEO of the City and the Department responded to my invitation. In response to those comments I have made changes to reflect some matters raised where I have considered that to be warranted. However, in circumstances where I have not agreed with the changes requested or the comments made then I have incorporated those comments and my observations about them in my report. I have also included comments made by the Association, the CEO of the City and the Department in my report where that commentary adds information rather than seeks changes to the report. The Association made two lengthy responses, one in November 2000 and a second in April 2001. The second response was a “Consolidated Position Statement” of the Association. In order to avoid any paraphrasing which may not represent entirely the arguments presented on the Association’s behalf, I have set out in Appendix A the full text of the Association’s consolidated response of April 2001.
8. In addition to considering the responses made by the Department, the City and the Association, I met with the Chairman of the Board of the Association and the Association’s legal adviser. The Association suggested to me that it may be possible to resolve the conflict by negotiating an agreement with the Town. I indicated that I was prepared to allow a reasonable time for the Association and the Town to attempt to reach an agreement and that – if an agreement were reached – then I would be happy to reflect that in my report. As part of that attempt I attended a meeting of the Board - which was also attended by the Town’s representatives on the Board. However, it became clear subsequently that the Town and the Association were unable to reach an agreement about the issues in contention and I therefore proceeded to finalise my report.
9. In the course of finalising my opinions about the issues raised by the investigation I consulted the then Minister for Local Government, the Hon M H Roberts MLA, and the subsequent Minister, the Hon T G Stephens MLC.

CHAIN OF EVENTS

10. A complex and in some ways extraordinary chain of events emerged from my investigation. Although this chain of events is lengthy I think it is important to detail the chronology before commenting on the issues.

Setting up the Association

11. In the 1984/85 financial year the City resolved to establish the Association — then known as the Bold Park Senior Citizens’ Centre and Homes Incorporated — in order to establish a retirement village on the land called Ocean Gardens in City Beach (more particularly described as Lot 3 on Plan 15410 in Swan Location 1911). The Association was to manage the affairs of the village. A separate association was established for residents of the village (“the Residents’ Association”) which would not be involved in village management.
12. On 21 March 1985 the Association was incorporated under the *Associations Incorporations Act 1895* (now repealed). The constitution of the Association was drawn up by the City’s solicitors and provided for the Association to be managed by a Board of

six persons, of whom three were to be councillors nominated by the City. The other three members of the Board were inaugurally appointed from the community and were to be replaced by the Board from time to time. One of the appointed City councillors was to take the position of Chairman, with a casting vote on all matters coming before the Board. The members of the inaugural Board were to be the only members of the Association although the constitution did provide for a person to nominate for approval by the Board to become an Association member. I will comment later in my report on the effect of this structure.

13. The original 1985 constitution also provided for moneys of the Association to be set aside in specific reserves. Any surplus over an amount calculated pursuant to a formula set out in the constitution was to be paid to the City to fund the development of similar facilities in other locations. The specific reserves were intended to provide for the purchase, replacement and periodic maintenance of capital items or equipment; repayment of contribution fees or deposits; or reserves arising out of a capital revaluation.
14. Any amendment to the 1985 constitution required both the approval of the City and a two-thirds majority at a special general meeting of members of the Association.

The Land and Guarantees for the Association

15. In conjunction with its resolution on 16 April 1984 to establish the retirement village, the City resolved to lease the land to the Association for a period of 21 years and to seek the Governor's approval for such a lease. However, the Association needed an asset to borrow against to raise the funds required to build the retirement village. The report accompanying the proposed resolution indicated that the City's financial consultants had advised that there was a marketing problem in selling leases to prospective residents of the village if there was insufficient security of tenure. Consequently, on 27 April 1985, the City resolved by absolute majority to rescind the resolution to lease the land and instead to transfer the land in fee simple to the Association for the sum of one dollar (\$1). The resolution also required that the land was to revert to the City should it no longer be required for the purposes of the Association; that an agreement to this effect was to be signed; and a caveat registered against the land to protect the City's rights of reversion.
16. The land in question formed part of the gift to the City covered by the *City of Perth Endowment Lands Act 1920* and was subject to conditions identified in that Act. It was provided for recreation purposes and was held in fee simple by the City. I refer to the implications of the legislation affecting the transfer of this land later in my report.
17. The City provided guarantees for the construction of the retirement units on the land by the Association and of the Association's performance as lessor in the subsequent leases of the units to persons who became residents of the village. The latter guarantee was required under the *Company and Securities (Retirement Villages) (Exemption) Regulations 1985*. I refer to these guarantees later in my report.

18. The City's solicitors drew up an agreement to gift the land to the Association for the purposes of establishing and operating a retirement village. The agreement provided (inter alia) that the City could require the return to it of ownership of the land, together with fixtures and fittings, for the sum of one dollar if the Association:
- failed to complete the development of Stage 1 of the retirement village;
 - no longer needed or used the land for a retirement village;
 - was dissolved or allowed the land to be attached or taken in execution or upon any legal process;
 - entered into liquidation or receivership; or
 - altered its objects without first obtaining the written permission of the City.
19. However, without the agreement having been signed or the caveat to protect the City's contingent interest lodged, the land was transferred to the Association on 1 April 1986. The City's file records that on 7 September 1987 its solicitors reminded the City that the agreement regarding the land had not as yet been signed. There is nothing in the files or that I was told by any of the persons concerned at the time to show that this was ever followed up.
20. The agreement has still not been signed nor has a caveat been lodged. The implications of this apparent inaction are considerable and are discussed later in my report.

City of Perth Restructuring Act

21. On 18 October 1993 the Parliament of Western Australia passed the *City of Perth Restructuring Act 1993* ("the Restructuring Act"), which commenced on 20 December 1993. Section 8 of the Restructuring Act provided a temporary limit of powers prior to the appointment of Commissioners to oversee the restructure of the City of Perth into the new City and three new Towns. The Restructuring Act placed the Ocean Gardens retirement village within the boundaries of the new Town of Cambridge.
22. Prior to the commencement of the Restructuring Act the Board of the Association considered the implications of that Act on its ability to function during the changeover period. The minutes of the Board meeting on 26 October 1993 give no indication that difficulties would be encountered with a changeover to the new Town, recording that:
- The Chairman indicated to the representatives of the Residents' Association that it was the belief of the Board that there was no problem with the financial viability, and it was most likely that the Board and the guarantee would continue with the new council when it became established.*
23. However, the Board decided at the meeting that, in order for it to be able to maintain quorums at Board meetings, it should recommend to the City that it approve an amendment to the constitution to enable the City to nominate *persons* rather than *councillors* to the Board. At the same meeting it was suggested that the Association's name be changed to "Ocean Gardens Incorporated".

24. The minutes of a later Board meeting, held on 3 November 1993, indicate a continuing intention that the positions held by the City on the Board of the Association would transfer to the Town. The minutes of the meeting record that one of the City councillors nominated to the Board of the Association:

... expressed the view that the amending legislation should provide that in the restructuring the responsibilities of the Perth City Council in relation to Ocean Gardens should be transferred to the Town of Cambridge and thus alleviate the concern which has been expressed by residents of Ocean Gardens.

25. Prior to the commencement of the Restructuring Act the Council of the City considered the implications of the restructure on the Association and a similar organisation at Lake Monger, the Harold Hawthorne Senior Citizens' Centre and Homes. On 15 November 1993 the City agreed with the recommendation of the Association referred to in paragraph 23 above and resolved (Resolution 1780/93) to approve the proposed amendment to the constitution to enable the City to fill its three positions on the Board with "persons" rather than "councillors". The staff report considered by the Council concerning the resolution made it clear that the councillors of the City expected that, ultimately, the Association would become a responsibility of the new Town. It is clear that it was on this basis that the resolution was passed. The full text of that resolution is as follows:

That the Council agrees to the Bold Park Senior Citizens' Centre and Homes Incorporated amending its constitution by replacing Clauses 9.1. and 9.2 with Clauses to read as follows: -

9. (1) The Board shall comprise six (6) members, three (3) of whom shall be persons appointed by the City from time to time. The City may by notice in writing remove any person so appointed or fill any vacancy which may arise in the City's appointment.

(2) For each member that the City appoints to the Board of Management the City may appoint one person to be deputy member to act on behalf of each person appointed as a Member of the Board of Management whenever that member is unable to be present at a meeting thereof.

26. On 14 December 1993 advice of this approval was forwarded to the Association so that it could amend its constitution accordingly. At that stage, however, no action was taken by the Board to amend the constitution as approved by the City. It is clear from both the City and Association records that at the time of the Restructuring Act the general expectation of both organisations was that the status quo would remain, with the new Town taking the role of the old City. The City intended that the constitution would ultimately be changed and the organisation managed by the new Town. However, at this stage, these amendments did not occur.

The Commissioners appointed under the Restructuring Act

27. The Restructuring Act provided for the appointment of five Commissioners to manage and implement the division of the City into four local government areas — a new City of Perth and the Towns of Vincent, Victoria Park and Cambridge. Five Commissioners — Lawrence, Karlson, Dolin, Park and Ednie-Brown — were appointed on 27 December 1993. All four new local governments were to be administered by the Commissioners until the election of councils in May 1995. In the interim the Commissioners were regarded for all purposes as the respective local governments.
28. On 4 July 1994 the Commissioners wrote to the City's solicitors seeking advice on the best way to proceed with changing the arrangement between the Association and the City. The Commissioners wanted to replace the City with the new Town in both the individual lease guarantees for the village residents and in the Association's constitution. The Commissioners informed the solicitors that, given the retirement village was located within what would be the Town, it would seem reasonable for the Town to take over the same rights and obligations of the City with respect to the Association. The solicitors wrote, on 14 July 1994, advising the Commissioners that the changeover arrangements could be simply effected, as far as the constitution was concerned, by amending the constitution to change references therein from the City to the Town. With regard to the residents' leases, however, the solicitors advised that in order to assign the guarantees to the Town the individual agreement of each resident would be required. The solicitors also pointed out that, although the 1985 constitution provided for a majority of two-thirds of the membership to amend the constitution, subsequent legislation (the *Associations Incorporations Act 1987*) overrode this provision. Instead, the majority needed to change the constitution was now 75% of the members of the Association.
29. Rather than seeking the agreement of each resident, the Commissioners pursued other avenues to transfer the lease guarantee obligation from the City to the Town. The Commissioners' solicitors advised that the transfer of the guarantees in the individual leases could be achieved either by a regulation made under section 32 of the Restructuring Act or by a Governor's Order under section 13 of the *Local Government Act 1960*.
30. In the meantime, on 10 March 1994, the Board of the Association had resolved to approach the Commissioners with proposals to amend the constitution, namely:
 - to reduce the numbers of nominated councillors as members;
 - to change the name of the Association; and
 - to remove the casting vote of the Chairman.
31. The Commissioners did not consider the Association's proposals until 13 September 1994, and on that day resolved to approve only one of them — an amendment to the constitution to change the name to Ocean Gardens Incorporated. In addition, the Commissioners resolved to pursue their own amendments to the constitution to substitute the Town for the City. Consistent with their role in relation to the City until the elections in May 1995, the Commissioners nominated three of their number to take

the place of the existing nominated councillors on the Board (Commissioners Dolin, Karlson and Park). The appointment of the three Commissioners was to facilitate the conduct of meetings to allow the approved amendments to the constitution to be processed. The Commissioners considered that the Town should continue to be involved with the Association in lieu of the City following the restructure and cited as some of the reasons:

- the initial role of the City;
- the existence of 217 lease guarantees to residents; and
- the continued advantage in marketing the units which the guarantees gave the Association.

32. Accordingly, also on 13 September 1994, the Commissioners approved that the Association make the following amendments to its constitution:

- substitute the “Town of Cambridge” and “the Town” for the “City of Perth” and “the City” respectively; and
- substitute “persons” for “councillors of the City (Town)”;

wherever those expressions appeared in the constitution.

33. The Commissioners made it clear that the intent of these approved amendments was to place the Town in the same position in relation to the Association that the City had previously held. It is significant to note that the Commissioners also saw fit at that time to resolve specifically to:

“advise the Board of Management that (other than the change of name already agreed) that it is not prepared to support any further amendments to the constitution”.

34. At the same meeting the Commissioners agreed that, in order to avoid the need to have each resident agree to an assignment of the guarantee, they would deal with the transfer of the existing lease guarantees from the City to the Town by way of a regulation made under the provisions of Section 32 of the Restructuring Act. The Department was advised of this by letter from the City dated 27 September 1994. The letter also advised that the City’s solicitors had suggested that a Governor’s Order under s13(2) of the *Local Government Act 1960* could achieve the same outcome.

35. On 18 October 1994 a special meeting of the members of the Association was held to consider the amendments to the constitution approved by the Commissioners. It was attended by the six members of the Board — the three Commissioners and three other non-councillor members (all of whom were, however, ex-councillors of the City). From the minutes of the meeting it is apparent that the three Commissioners must have realised fairly quickly that the other three members of the Association would not support the City’s approved changes to the constitution and that it would not be possible to achieve the required 75% majority to approve the amendments. The proposed change of substituting the Town for the City was not even put to the meeting. The minutes of the

meeting show that one member believed that there was never an intention that the City guarantee would be a continuing one. Another member suggested that, instead of a transfer of the guarantees, a trust fund could be set up in lieu of the City's lease guarantees. That member suggested that if there was no guarantee, as would be the case if a trust fund was established, there would be no need for City (or Town) representation on the Board. It was therefore proposed by the member that the constitution be changed so that, instead of there being three City-nominated members, the Mayor of the Town, a Government appointee and the Member of Parliament for the area, be appointed as Board members. However, the only amendment that was passed was the name change of the Association. When asked about this meeting, two of the Commissioners – Karlson and Park – confirmed that the constitutional amendments could not proceed because of opposition by the other members. However, the Commissioners remained hopeful that, eventually, the intentions of the Commissioners would be implemented by the Board.

36. There are no documents to indicate when the Commissioners first realised that there may be opposition to their proposed amendments to the constitution and their intentions for the Association. However, it seems clear that at least by the time of the meeting of the Association members on 18 October 1994 the Commissioners must have known there were problems. Nonetheless, at their meeting on 13 December 1994 the Commissioners made it clear that they still considered it appropriate to continue with the transfer of the City's interest in the Association to the Town. The Commissioners also resolved to advise the Association again of their wishes that the constitution be amended to:
- substitute the Town for the City in the relevant provisions of the constitution; and
 - enable the City/Town to appoint “persons” rather than “councillors”.
37. On 16 November 1994 the Department had written to the Commissioners seeking clarification as to which method the Commissioners wished to use to transfer the guarantees. On 13 December 1994 the Commissioners resolved to proceed by way of section 32 of the Restructuring Act and to advise the Association of their decision to proceed in this manner. On the same day the Commissioners considered the proposal by other members of the Board to establish a trust fund in lieu of the lease guarantees of the City. The Commissioners rejected this proposal. In so resolving, the Commissioners recorded that they considered its resolutions were in accordance with the intentions of the Restructuring Act to transfer the City's assets and liabilities to the Town.
38. By this stage the Commissioners had also been made aware of the earlier lack of action in 1986 and 1987 with respect to the transfer of the land to the Association. It was raised in a report to the Commissioners for consideration at the meeting of 13 December 1994. Consequently, in addition to advising the Association of their wishes for it to proceed with the approved amendments, the Commissioners also resolved on 13 December 1994 to inform the Board that it required the Association to execute the land transfer agreement referred to previously in paragraph 15.

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39. In a letter from the Commissioners dated 21 December 1994 the matter was drawn to the Board's attention. The matter was discussed at a Board meeting held on 12 January 1995, when the Board passed the following resolution:

It was RESOLVED that this matter should be held in abeyance until such time as the matters relating to the guarantee and the constitution amendment had been attended to.

The minutes do not reflect how individual members voted. Those Board members present were Mr R S Dawson, Mr PA Gallagher, Mr B E Prince and Commissioner H Park.

40. It has been suggested to me that during the six month period from November 1994 there was some uncertainty as to whether the Town had agreed to accept the liability of the guarantees. This would apparently explain why, on 28 April 1995, the Commissioners acting as the Town resolved to accept the transfer from the City of the contingent liability under the lease guarantees.
41. The council elections for the four newly created local government authorities were to be held on 6 May 1995. On 2 May 1995, at one of their last meetings before the elections, the Commissioners (as the City) again resolved:
- that the constitution of the Association should be amended to substitute the Town for the City;
 - that the Board should execute the agreement regarding the land transfer; and
 - to recommend to the Hon Minister for Local Government that the guarantee of performance of the lessor's covenants by the City in each of the residents' leases be transferred to the Town by means of a Governor's Order under section 13(2)(b)(ii) of the *Local Government Act 1960*.
42. It is not clear why the Commissioners decided to revert to a Governor's Order under section 13(2)(b)(ii) rather than continue with the previous intention of using section 32 of the Restructuring Act. A file note dated 28 July 1995 in the Department's files indicates that a copy of the resolution of 2 May 1995 had not been forwarded to the Department as at that date.

Events Following the Elections for the Four New Councils

43. By the time of the elections for the four new councils on 6 May 1995 the following resolutions of the Commissioners concerning the Association had not been carried out:
- the Governor's Order transferring responsibility for the lease guarantees to the Town had not been prepared or executed;
 - the Association had not executed the agreement concerning the transfer back of land; and

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- the constitution of the Association had not been amended to substitute the Town for the City as approved by the Commissioners.
44. The election of councillors to the new City resulted in the resignation of the three Commissioners for the City from their positions on the Board of the Association and, hence, as members of the Association. From 6 May 1995 to 30 May 1995, according to the register provided by the Association, the Board and the Association had only four members. At the inaugural Council meeting for the new City on 9 May 1995 the appointment of nominated members for the Association was on the agenda, but the item was deferred to a later meeting. At its meeting on 30 May 1995 the City nominated three councillors – Leahy, Sutherland and Sutton – as its members of the Board. Councillor Leahy had been an inaugural City councillor member of the Board in 1986. The Town was advised of this by letter on 31 May 1995.
 45. In the meantime, on 11 May 1995, just after the elections, the minutes of the Association record a “discussion” between two members of the Board, Mr Gallagher and Mr Prince. At that time the constitution provided that four members of the Board were required for a quorum and, in my opinion, the meeting did not have a quorum. The members present at the meeting discussed the constitution and decided to seek a meeting with some “City councillors” to discuss amendments to the constitution and the establishment of a trust fund to replace the lease guarantees. The meeting proposed that the Town should have only one nominated member on the Board.
 46. On 12 June 1995 discussions took place between some Board members and some members of the Residents’ Association. The establishment of a trust fund to replace the lease guarantee provided by the City was discussed and the minutes mention that some (unspecified) councillors of the City had agreed in principle to the proposal but wanted to be convinced that the residents would support such a change. I have been unable to locate any written record of the agreement in principle mentioned. The meeting decided the Residents’ Association would call a meeting of residents to provide a simple explanation of the intentions of the proposed trust fund.
 47. From this time, according to the City’s CEO, the City councillors who had been appointed to the Board by the City were anxious to resolve the outstanding matters of the Association. The CEO told my investigating officers that in June 1995 he was asked by a City councillor to determine whether it was within the power of the new City to rescind the resolutions passed by the Commissioners regarding the Association, particularly the constitutional amendments.
 48. The CEO advised that he recalls seeking information regarding the status of the Governor’s Order requested by the Commissioners as a means to transfer the liability for the lease guarantees to the Town. A handwritten notation dated 26 June 1995 is recorded on the letter dated 23 December 1994 which the Department received from the Commissioners seeking a Governor’s Order to transfer the lease guarantees from the City to the Town. The notation, written by an officer of the Department, refers to a telephone conversation with a City officer said to have occurred on 26 June 1995 and notes that:

"[... the City officer] confirmed previous advice that there has been concern that the elected councils of Cambridge and Vincent are reluctant to accept the liability of transferring the Retirement Villages to the respective Councils. He said that the matters — 2 proposals cannot be proceeded with until the matter is resolved. He expects the 2 Councils will agree in due course and possibly in 5-6 weeks — He will advise."

49. However, the City officer said to have conveyed the above information cannot recall making such a telephone call. Rather, he informed my investigating officers that, contrary to the note indicating that the elected members of the Town were concerned about taking on the guarantees, he understood the councillors of the Town were particularly anxious for the matter to be finalised.
50. In response to this part of my draft report the then CEO of the Department made the following comment:

"While I have no disagreement with the way in which the Department's actions are reported, I am advised by the officer responsible for processing the Order request that on 2 occasions he requested information from the City to enable their request to be actioned. On the first occasion in November 1994 he asked for more specific information in relation to the guarantee agreements. The City replied to this in late December.

On a second occasion in early 1995 he requested advice in relation to an undertaking given in Parliament that the new Towns would be created "debt free". This was answered in April 1995.

He also requested confirmation that the Town of Cambridge had agreed to accept the guarantee obligations. This request came after the Parliamentary Counsel's Office with whom the officer was liaising in the preparation of the Order, pointed out that section 13(2) of the 1960 Local Government Act required the agreement of both local governments to the transfer of liabilities and property. This was not replied to and in June 1995 the officer contacted the City only to be advised that the Town was reluctant to accept the liability. A record of this conversation is noted on the relevant Departmental file.

These events go some way to explaining the delay in processing the City's request of September 1994."

I do not take issue with these comments.

51. On 2 July 1995 a further meeting of the Board was held, attended by Messrs Dawson, Gallagher and Prince. Again, in my opinion, the meeting did not have a quorum. At this meeting a number of possible constitutional changes were discussed, including removing any reference to either the City or the Town — except that the Town would be invited to

nominate the Mayor and one other representative to be members of the Board. The discussion also covered the proposed trust fund and its performance objectives.

52. On 13 July 1995 a further meeting of the Board was held (once again, in my view, without a quorum). This meeting reviewed proposed constitutional changes provided by the Association's solicitors on the instructions of the Association's Secretary.
53. On 20 July 1995 a special meeting of the Board was held at the City's offices, which the City's CEO also attended. The meeting discussed the proposed changes to the constitution that had been prepared by the Association's solicitors. The proposed amendments:
- removed reference to the City and did not replace it with references to the Town;
 - reduced the number of members that could be appointed/nominated by the Town to two;
 - provided for a member of the Board to be from the Residents' Association;
 - provided that the Chairman was to be selected from any member of the Board;
 - removed the casting vote of the Chairman;
 - removed references to the formula for determining a surplus of funds to be paid to the City/Town;
 - removed the limitations on the prescribed reserves the Association could establish (the constitution at the time provided that reserves could only be those mentioned in paragraph 13 of this Report); and
 - reworded the provision for how surplus funds were to be distributed to provide instead that the distribution would be at the Board's discretion to any similar organisation.

At the meeting the City's CEO advised that he understood that the Town was in discussions with the then Minister for Local Government about the matter.

54. In response to the above paragraph in my draft report the CEO of the City made the following comment:

"In the information within this clause it seems to be implied that I was in attendance at the Board Meeting on 20 July 1995. My attendance at the Board Meeting was at the request of the City's Councillor representatives to provide background information and was, I believe, of a relatively short duration and I was not party to detailed discussions which have been outlined in the dot points."

I have no disagreement and do not take issue with these comments.

55. During July 1995 representatives from the Town were becoming concerned about the lack of progress in relation to the Commissioners' resolutions about the Association and

met with the then Minister for Local Government. On 31 July 1995 the Minister wrote to the City advising that he had urged the Town and the Board to meet as a matter of urgency to attempt to resolve outstanding concerns. He requested that until that meeting took place the City defer any formal consideration of constitutional changes.

56. Notwithstanding that request, on 2 August 1995 the City's CEO met with its solicitors in order to determine whether there was a legal impediment to rescinding the Commissioners' resolutions. I note that these issues had not yet come before the Council in any formal report or motion. On 8 August 1995 the CEO prepared a file note of his meeting with the City's solicitors, recording that advice had been received that:

"...it is competent for the City of Perth to approve the alteration by the Association of the constitution in a manner different to that originally proposed by the Commissioners — subject to appropriate resolutions being carried by council".

The file note also recorded that:

"As there is no longer a requirement for guarantees to be held by the City of Perth, it would be competent for the City to be relinquished from the existing guarantees by the residents."

A copy of the file note was sent to Crs Leahy, Sutherland and Sutton (the City's nominated members on the Association) on 8 August 1995. The Town was not provided with this information.

57. In the meantime the Association's Secretary had written to the City on 4 August 1995 providing draft copies of the proposed constitutional amendments and the proposed Trust Fund Deed. The letter requested the approval of the City for both the amendments and the proposed trust fund.
58. On 7 August 1995, at the request of the City's CEO, the Association's auditors faxed details of the 1992/93 and 1993/4 accumulated operating surplus for the Association. This surplus was referred to in the CEO's file note of 8 August 1995, where it was also noted that no payment had been received by the City under the formula provided for in the constitution to that date.
59. Still concerned by the inaction of the City in carrying out the resolutions of the Commissioners, the Town wrote to the City on 10 August 1995 advising that it wanted the matter finalised in the terms of the Commissioners' resolutions. The letter sought an acknowledgment within fourteen days or threatened that the Town would refer the matter for determination by the Minister for Local Government under s676 of the then *Local Government Act 1960* (which dealt with disputes between local governments) and/or apply to the Supreme Court without further notice for an injunction to restrain the City from exercising the power of approval under Clause 45 of the constitution of the Association. In response to the Town's letter the City advised that further legal advice was being sought. However, it seems the legal advice being sought related specifically

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to the threatened action in the Town's letter, rather than to the transfer of the guarantees or the constitutional amendments.

60. The City's CEO also advised its solicitors that it was intended to put the matter to a Council meeting on 22 August 1995. However, the matter was not dealt with at the meeting on that day. On 28 August 1995 the Town was advised by letter that the City was currently awaiting legal advice on several points and when that advice was received the City would make further contact with the Town. The City had written to its solicitors enclosing a copy of the Town's letter of 10 August 1995 and seeking general advice.
61. On 21 September 1995 the Secretary of the Association advised the City that there was an accumulated surplus of \$238,792 for the 1993/94 year as determined by the formula in the constitution. Since the establishment of the Association by the City in 1985 there had not previously been notification of a surplus and there is no indication that any surplus under the formula had ever been paid to the City before. However, on 19 October 1995 the City received a cheque for \$238,792 representing the operating surplus for the Association for the financial year 1993/94.
62. A staff report for the City's consideration had been prepared on 18 October 1995. That report proposed:
- rescinding the Commissioners' resolutions of 13 September 1994, 13 December 1994 and 2 May 1995; and
 - approving the constitutional changes proposed by the Board (see paragraph 53 above).
63. The report prepared on 18 October 1995 incorporated some of the Town's letter of 10 August 1995 (which advised that it would take legal action to ensure it had the opportunity to have input into any decision) and referred to the correspondence from the Minister for Local Government asking that the City not make a decision which would be detrimental to the Town. The report also referred to legal advice that it would be competent for the City to approve changes to the Association constitution with no reference to the Town. The report did not refer to the notification received from the Association of the surplus of \$238,792.
64. In relation to the surplus referred to in paragraphs 61 and 63, the CEO of the City commented as follows:
- "The surplus accumulated by the association was identified in an audit report and arrangements were therein made for the funds to be transferred to the City in accordance with the Constitution at that time. The funds were put into a special trust account and held there.*

Subsequently, a direction was given by the Minister for Local Government for release of the funds, with accrued interest, to the Town of Cambridge. That was effected on 14 June 1999. The amount of the transfer was \$262,000. This is a

direct result of a number of clauses which are outlined in the draft report, and one of the recommendations contained in the [draft] report ...

On several occasions there were both discussions and written advice given to the three Towns in an endeavour to establish an equitable way to distribute these surplus funds. A unanimous decision was not achieved and the Minister for Local Government resolved that a direction by him would be an appropriate way to expedite this matter."

65. I understand that it was the usual practice for the City's Council meeting agendas to be sent out to councillors and released to the public in the week prior to the meetings. The Town's CEO, concerned that there had been no action by the City to effect the Commissioners' resolutions, regularly scrutinised the agendas to see if any matters concerning the Association were to be raised. However, there was no mention of any item concerning the Association on the agenda for the City's meeting to be held on 24 October 1995 despite the preparation of the report of 18 October 1995.
66. The CEO of the City has commented that paragraph 65 gives the impression that each and every report for a Council Notice Paper is issued one week prior to the meeting and that this is not accurate; that the date of the report (18 October) would have been the date the report was first compiled and it was subject to a number of revisions and ongoing legal advice.
67. The City's CEO has advised that for each Council meeting, a draft agenda is prepared which is provided to councillors sometime prior to the release of the formal agenda as the focal point for briefing meetings and to give councillors the opportunity to discuss the issues and any other issues that may be coming before Council at a later date. At such briefing meetings, according to the CEO, officers brief the councillors on matters under consideration and councillors may make suggested changes to resolutions or ask that items be placed on the agenda or withdrawn for further research and review. The draft agenda is not retained by the City because it is considered that the formal agenda, subsequently released, supersedes it. The City's CEO has also advised that he did not recall whether Association matters were discussed at a briefing meeting or included on the draft agenda prior to the Council meeting on 24 October 1995.
68. In any event, and as noted, the agenda released publicly for the City Council meeting of 24 October 1995 did not contain any reference to the Association. The City's CEO informed my investigations officers that he was of the view that if the matter had been included in the agenda the Town would have taken immediate legal action to ensure the proposed course of action was deferred. At that meeting the matter of the Association was raised as urgent business, even though the report of 18 October 1995 had been prepared almost a week before. The report was tabled and the recommended resolutions to rescind all the relevant prior resolutions of the Commissioners and to approve the proposed constitutional changes were passed. The copy of the tabled report obtained by my Office is numbered as a report for Council consideration. Notwithstanding that the report was raised as urgent business, the page numbering of the report is consistent with the report having been prepared for inclusion in the papers for consideration as ordinary business in the City's agenda. According to the minutes of the City's meeting of 24

October the resolutions concerning the Association were moved, seconded and passed by absolute majority without discussion.

69. The City wrote to the Town advising of the City's resolutions on 27 October 1995. On 9 November 1995 at a meeting of the Association's members the constitution was amended in accordance with the City's approval. The Deed of Trust in lieu of the lease guarantees was also adopted. The funds to establish the Trust were drawn from profits of the Association. Whether or not those profits should have been paid to the City under the formula provided in the constitution will be referred to later in this report.

ISSUES

70. My investigation has raised a number of issues of concern. I have mentioned earlier in my report the difficulty I have had in determining both the objectives of and reasons why certain actions were taken during the period under investigation. Although some of this difficulty was the result of the passage of time, my task was made more difficult by the absence of records to support decisions involving substantial public assets and resources.
71. In addition, in my opinion the City's administrative processes did not ensure it achieved open and accountable management of the Association. The absence of effective processes incorporating checks and balances will not always result in unintended or poor outcomes. There were inherent problems with the provisions of the Association's constitution, but the events which occurred in relation to the Association at Ocean Gardens were not inevitable. I note that the retirement village association established by the City at Lake Monger in the 1980s (mentioned in paragraph 21 above) was, under the Restructuring Act, to be transferred from the City to the Town of Vincent. This was achieved without incident in the same manner as was proposed by the Commissioners for Ocean Gardens. In my view the events that occurred in relation to Ocean Gardens demonstrate that if proper processes are adopted by local governments then unintended outcomes are made more difficult and are less likely to occur.
72. The CEO of the City has expressed his view that the situation of the retirement village located near Lake Monger was different in a number of ways and not subject to any concern by either the Board of Management or people who occupied the facilities; and that the case of the Ocean Gardens village was very different in both the initial assessment and sequence of events subsequent to that.
73. The principal issues arising from the events described and the resulting situation that I have considered in this report are:

1. The Association's establishment and accountability

Since November 1995 the Association has been controlled by a Board independent of local government control or any other form of direct public accountability. This raises concerns about:

- whether the intentions of both the City in establishing the Association, and subsequently the Commissioners during the restructuring period, to preserve the involvement of local government, via the City and then the

Town, in the management of the Association and its assets, may not have been achieved; and

- substantial public assets which were invested in the Association are now no longer available for use by, or publicly accountable via, a local government.

2. Transfer of the land at Bold Park

Whether public land has been transferred without proper process and for inadequate consideration to what is now, essentially, a private association.

3. Surplus funds and Association reserves

One of the matters originally complained about to me by the Town was that the City had failed to pay over to the Town the surplus of \$238,792 (plus accumulated interest) that had been received by the City from the Association. During the course of my investigation the City paid to the Town those funds at the direction of the then Minister for Local Government. However, under the Association's present constitution neither the Town nor any other local government has an entitlement to further surplus funds of the Association. In addition, the Association established substantial financial reserves prior to the 1995 amendments to the constitution, raising the issue of whether those funds should have been, but are no longer, available for use by, or publicly accountable via, local government.

4. Decision-making by local governments

Whether the planning and decision-making processes employed were appropriate.

The Association's establishment and accountability

74. The building and management of a retirement village at Ocean Gardens in City Beach was a worthwhile but ambitious and expensive project for the City to undertake. The City committed considerable resources by way of the value of the land provided, the salary and other costs of its officers as well as legal and other expenses met by the City. There was also substantial risk associated with ensuring that the City's assets and those of the Association were adequately safeguarded – both initially and on an on-going basis – and accountable via the usual accountability processes for local government.
75. From the records of resolutions of the City from 1984 to 1986, files of the City and the Department and recollections of persons involved in the events at that time, I have ascertained details of the establishment of the Association — in particular:
- its constitution;
 - the transfer of land;
 - the formula for the return of surplus funds to the City; and
 - the guarantees given by the City.

As mentioned earlier in my report, the original 1985 constitution for the Association provided for a Board of six, three of whom were to be councillors nominated by the City. One of the councillors was to take the position of Chairman. The other three members of the Board were to be appointed from the community. The inaugural terms were staggered, with three members serving one year whilst the remaining members served two years. After the first term of the three inaugurally appointed non-councillor members of the Board expired, those three positions were to be filled by Board members who were to be elected or re-elected by the Association members (who were, of course, also the Board members). The seeds for self-perpetuation were clearly sown from the start.

76. The Chairman retained a casting vote for both meetings of the Board and of the members of the Association when the vote was equally divided. This casting vote was not a “governing director” vote — that is, it was not a vote which would enable the Chairman alone to determine ordinary or special resolutions. Amendments to the constitution originally required a two-thirds majority of Association members, later rising to a three quarters majority because of legislative change. Thus, with City councillors making up only half of the membership number, a constitutional change which the City did not deem appropriate could not be passed by the required majority. Conversely, however, if the City wished to propose changes of its own, then it would not have the numbers to achieve this, even with the Chairman's casting vote. The City would be able to block changes it opposed (both by its voting rights and by the provision in the constitution requiring all constitutional amendments to be approved by the City) but did not have the numbers to be able to pass changes it proposed. This latter situation was, of course, the position in which the Commissioners found themselves in 1994.
77. I have been unable to determine whether it was the intention of the City, when establishing the Association, for membership of the Association to be eventually substantially more than just the members of the Board or whether the members of the Board itself were intended always to be the sole members of the Association. Certainly it could be seen as desirable for residents to have some participation in village management or other persons invited to become Association members. Such a situation would not have reduced the ability of the City to maintain the “negative” control of the Association because of the requirement that any amendments to the constitution required the approval of the City.
78. The three non-councillor members of the Board were, after their inaugural terms, to be selected by the Association members. After the inaugural terms had expired the three community members tended to be replaced by ex-City councillors. This is understandable given the involvement of these persons in public administration and the community. Ex-councillors might be expected to retain an affinity with the Association and an interest in their local community. Nonetheless, with the advent of the Restructuring Act, the Board had difficulty in raising a quorum for its meetings because the attendees at the meetings usually were “community” members and there was no official representation from the City. In particular, during the critical period of May 1995 to November 1995, the majority of meetings of the Board failed to have a quorum, in my opinion. During this period the Association's Secretary was instructed to

undertake a number of steps relating to arranging meetings, preparing documentation and seeking legal advice about the preparation of constitutional amendments. None of these actions were endorsed by a quorum of the Board and there is no indication in any of the minutes of subsequent meetings that those decisions were ever ratified.

79. I mentioned earlier in my report that it is vital for local governments in planning stages to ensure processes are put in place to provide sufficient protection and flexibility for the management of risk. With the establishment of the Association, the City had provided guarantees for financing the building of the retirement village as well as the continuing residents' lease guarantees. By failing to ensure continuing City control of the Association's constitution (other than the "negative" control referred to earlier), I consider that the 1985 constitution failed to provide essential protection for the considerable public assets that were being entrusted to the Association. The 1985 constitution also failed to anticipate any further role that residents may have wished to have in the Association. During my investigation I was made aware of considerable discontent of some of the residents of the retirement village. It seems that this discontent is, to a large extent, a result of their lack of ability to participate in the management of the retirement village in which they live. However, I note that the constitutional changes effected in November 1995 now enable one representative selected from the Residents' Association to be a member of the Board.
80. The Association made substantial comment to me about the issue of "control" that I raised above. In the Association's view, the fact that the City could no longer control the Association's Board, did not result in a failure "to provide essential protection for the considerable public assets which were being entrusted to the Association". The Association put to me that it is accountable to the public through the application of various provisions of the *Associations Incorporation Act 1987*. For example, the Association argued that:
- *"to be eligible for incorporation under the Act, an association must be formed for one of the specified purposes set out in section 4 of the Act which are designed to benefit the local community (such as religious, educational, charitable, benevolent, artistic, recreational or community purposes).*
 - *an association is not eligible for incorporation under the Act if it is established for the purposes of trading or securing pecuniary profit to the members from the transactions of the association (section 4).*
 - *an association may be wound up by the Supreme Court if it was not at the time of incorporation eligible for incorporation under the Act, or it has engaged in activities outside the scope of its purposes as specified in its Rules, or if it has traded or secured pecuniary profit for the members of the association (section 3 1).*
 - *upon any winding up of an association, surplus property must be distributed to another incorporated association, or for charitable purposes, and cannot be shared amongst members or former members of the association."*

81. According to the Association, the above provisions ensure that “public assets” vested in incorporated associations are used for the benefit of the community, and not to profit individual members of the association. As such, the Association argued that it has never been necessary for any local government to “control” Ocean Gardens’ Constitution to ensure that this happens. However, for my part, I do not believe that an association is accountable to the public through the application of provisions of the *Associations Incorporation Act 1987* as has been suggested by the Association — at least not in the sense that I intended. My reference to accountability in my report is intended to mean accountability by a public sector agency to the public for the lawful, efficient and proper use of public funds and resources.
82. As well, the Association has pointed out that the constitutional changes effected in November 1995 enabled a residents’ representative to be a member of the Board — albeit that this did not result in the residents being able to control the Association.
83. Of course, any involvement by the residents in the management of the Association could be a two-edged sword. There was a need for the City to protect and remain accountable for the substantial assets which the village and land represented. It would never have been appropriate, in my opinion, for residents to be able to control what were, essentially, public assets. However, I have been unable to locate any evidence as to whether the issue of resident participation and consultation had ever been one which the City had considered either at inception or after the establishment of the retirement village.
84. In the course of my investigation my officers asked to see the register of members of the Association. A register is required to be maintained under the *Associations Incorporations Act 1987*. This was unavailable because it apparently had not been maintained. At my request the Association compiled a register, together with the names of deputies of members of the Board and dates on which deputies were appointed, and the relevant resolution for such appointment.
85. The register of members indicates that in November 1995 the Board members nominated by the City resigned immediately following the special meeting at which the constitution was changed. For a period of at least two months subsequent to this the Association had less than six members, according to that register. The *Associations Incorporations Act 1987* requires that an association shall have at least six members to be operable. In my opinion this is an indication of poor management of the Association and raises doubts as to the effectiveness of the decisions made by the Board during that time. In addition, although I understand the Board members had appointed deputies to act in their stead, the register did not include that information. The constitution does not require deputies to be members of the Association.
86. There are other issues about the City’s establishment of the Association that are worthy of comment. It is reasonably clear that when the Association was established the City sought, properly, to retain a considerable degree of control of the public assets invested in the Association by means of appointment of members who were City councillors and at least “negative” control of the Association's constitution. The assumption, therefore,

was that such appointed councillors would represent the interests of the City. Yet there is no indication that this role intended for its councillors was ever formalised to ensure, for example:

- regular reports from those councillors about the relevant operations of the Association;
- regular periodic reviews by the City of the Association's activities and financial position (remembering the right of the City to receive surplus funds);
- that the City representatives on the Association Board received regular directions or advice about the City's interests.

87. In practice, it seems the reporting role between the City and the Association was fulfilled by the Association Secretary. The role of Secretary was performed by an officer of the City as part of the officer's duties as a City employee— giving rise to possible conflicts of interest and confusion of responsibilities.
88. As a result of the constitutional changes made in November 1995 the Board currently consists of three community members, two Town nominees and a representative of the Residents' Association. The three community members, one of whom is the Chairman, are all former City councillors. According to the audited financial statement for the year ending 30 June 1996, the reserve funds of the Association totalled in excess of \$6.7 million - not including the value of the land at Bold Park .
89. In view of the Board's ability to select its own members (apart from the two nominees of the Town and the Residents Association member), the Association is essentially, therefore, one that is substantially controlled by private individuals but has control of substantial assets which are no longer available for use by or accountable via local government. In my opinion this result was not intended by the City when it built the retirement village and established the Association to manage the village. Clearly too, the Commissioners made resolutions during the period when they were responsible for restructuring the City to transfer the oversight of the retirement village and its public assets to the Town as the appropriate public sector agency. By so doing, in my opinion, the Commissioners intended the Association and the substantial public assets under its control to continue to be available for public benefit.
90. Instead, the City approved amendments to the constitution of the Association which were not in accordance with the intentions of the Commissioners. The Association is not accountable to the public and substantial public assets are now no longer available for use by the public sector. In my opinion, such a result is unfortunate. In forming that opinion I have not attempted to form any opinion about the motives of the individuals concerned in the events. In my view it does not matter what the (perhaps varied) motives were or how well-intentioned they were thought to be by the persons concerned. It is sufficient that the results of the decisions made and actions taken at the time were that very substantial public assets were removed from public accountability and use, contrary to the original intentions of the City and contrary to the need for on-going public scrutiny mechanisms. In my opinion, even if there was an argument that the Association could be legitimately "disconnected" to a substantial degree from local

government, decisions about that should have been made by the Town rather than the City, given the objectives of the *Restructuring Act*.

91. On the issues of the Association's constitution and accountability discussed above the Association submitted that it was always intended that the Association would operate independently from the City, albeit with input at Board level from City Councillors. The Association said that the controlling interest which the City initially had in relation to the Board was linked to the performance guarantees which it originally provided for the Village and that this is made clear in the report to the City Council in October 1995 just prior to the Constitution being changed, that is:

“From the City of Perth's point of view it has no interest in the land or the operation of the retirement village. The need for a continuing close relationship between the Association and the local authority particularly as regards financial matters is no longer considered to be necessary.

The Constitution changes are seen as reflecting the now mature status of the Association capable of running its own affairs and the increased involvement of the residents themselves. It would seem to be competent both morally and legally for the City of Perth to agree to a change of the Constitution which reduces the need for significant local authority involvement.

The changes should be supported in their own right. Whether the residents choose to release the City from any existing guarantees is a matter for the residents to decide but the Council could support the Association's proposal to encourage residents to release their guarantees in view of.

- (a) the proposed establishment of the Association's trust fund; and*
- (b) the statutory charge over the land owned by the Association in favour of the residents granted by the Retirement Villages Act.*

In view of the City's legal advice that the residents are secured by the statutory charge granted by the Retirement Villages Act, the City is no longer entering into any further guarantees in the case of new residents. The Board has been advised of this. It is understood that all leases now being offered to intending residents contain no guarantee or other reference to the City of Perth. Assuming the continued successful operation of the complex it seems unlikely that the existing guarantees would ever be called on. In any event the number of existing leases with guarantees (about 217) will diminish over time as those residents sell, pass away or move to other forms of accommodation.”

92. I agree that the Association was to operate independently of the City. However, I have some difficulty understanding what was meant by the comment in the report to Council of October 1995 viz, *“From the City of Perth's point of view it has no interest in the land ...”* It is not clear whether this comment is referring to the land being situated in the Town (after the restructuring of the City) or, possibly, that – because no mention was made of the failure of the Association to execute the Agreement – the Council was of the

mistaken view that the City had divested itself of the land at sometime in the past. In my view, the comment was incorrect. If the Council proceeded to make a decision so based, then in my view the decision may have been partly based on a mistaken premise.

93. The Association's assertion that the "controlling interest" which the City had on the Board was linked to the performance guarantees may well be the case. However, it is clear this was not the sole reason for the original structure of the Board. In any event, if amendments to the constitution were to be contemplated or even effected, such amendments ought to have been the responsibility of the Town. I am of the view that this was the intention of the Commissioners to effect the implementation of the Restructuring Act.

94. As to the intention of the Commissioners, the CEO of the City commented on my draft report as follows:

"On the appointment of three Councillors by the City post the May 1995 elections there were, to my understanding, attempts to finalise the transfer of the Ocean Garden village arrangements, but after a number of meetings with the Board, an alternative view to that of the Commissioners was arrived at. Legal advice was taken on the matter and progressed in that vein."

95. I have not taken issue on the legality or otherwise of the City Council's actions in passing different resolutions to those of the Commissioners. I agree it was certainly apparent that an alternative view to that of the Commissioners was arrived at by the City Council. However, the point I am making is that, in my view, the actions of the Council were not in the spirit of the Restructuring Act and were wrong to the extent that they deprived the Town of the ability to be involved in any alteration of the constitutional arrangements of the Association.

96. The Association suggested to me that my draft report made certain assumptions about the original intentions of the City in establishing the Association which have been based on incomplete information. The Association said that the original intention was for Ocean Gardens to be an autonomous incorporated body which would not be under the control of the City of Perth but that this position changed only when it was determined that in order for the incorporated body to obtain 100% debt funding for the construction of the village, it was necessary for the City of Perth to:

- transfer the land in fee simple to the Association;
- provide a financial guarantee to the lenders for the construction of the village; and
- provide a performance guarantee of the Association as lessor for the benefit of purchasers, as required under the relevant legislation.

It was for these requirements, according to the Association, that the City took control of the Association's Board by reducing its membership from nine to six but that once the initial debt had been discharged and a trust fund established to enable the Association to become self sufficient the provision of guarantees by the City subsequently became unnecessary.

97. Although I do not necessarily disagree with these comments I believe that they do not address the point I made — namely, that in my view substantial public assets are no longer available to the public sector and the Association – having received substantial public assets – is not accountable to the public for those assets.

The Land at Bold Park

98. According to the documentation contained within the draft Deed of Agreement, which has not been executed, the land was sold for one dollar (\$1). The *City of Perth Endowment Lands Act 1920* (now repealed) required that any conditions imposed by the *Local Government Act 1960* (now repealed) should apply to land dealings under the former Act. The *Local Government Act 1960*, current at the time of the events in question, required Ministerial approval for any sale. However, there is no indication from the files of the Department, nor from records of the City, that the land transfer by the City to the Association was approved by the Minister. If the transfer of land were to be considered a gift — and I am inclined to the view that it was intended to be a conditional gift — then section 266A of the *Local Government Act 1960* would have applied, requiring that the Minister approve the gift and that a Deed of Agreement providing for the return of the land to the City be executed. No such approval was obtained.
99. Such an agreement, although prepared, has never been executed. It is apparent that the City intended in 1985 that the land should be transferred with a significant condition attached, as was required by the *Local Government Act 1960*, namely return to the City if no longer needed for the purpose of a retirement village. The execution of the agreement was an essential condition of the land transfer. In my opinion the transfer of the land was not in accordance with legislative provisions applying at the time. My investigation has been unable to determine why this fundamental legislative requirement was overlooked by the City at the time of transfer or why the City failed to ensure the subsequent execution of the agreement prior to the restructure of the City.
100. Nonetheless, during 1994 the Commissioners were made aware that the land had been transferred to the Association without the necessary execution of the agreement by the Association. As a result, the Commissioners requested the Association to execute the agreement, but the Association did not do so.
101. As noted in paragraph 91, the report prepared for the City Council at its meeting on 24 October 1995 stated:

“From the City of Perth’s point of view it has no interest in the land or the operation of the Retirement Village. The need for a continuing close relationship between the Association and the local authority particularly as regards financial matters, is no longer considered to be necessary.”

102. In my opinion this statement is wrong on several grounds. The report failed to mention that the Agreement – a precondition of the transfer of land – had not been executed or

that, as a consequence, the City's original intention to have the right to a return of the land in certain circumstances (which was to be protected by the lodging of a caveat on the land title) had not been achieved. Equally, the report failed to mention the right of the City (or the Town) to receive surplus funds from the operation of the retirement village and that the absence of a "close relationship" with the Association could endanger that right.

103. In response to my draft report the CEO commented that:

"The land was originally zoned Parks and Recreation and subsequently zoned Residential R30, Retirement Village.

I understand that the new scheme for the Town of Cambridge retains that similar position. There is a memorial on the title of the land in relation to the use and tenure of the facilities which, we believe, kept the initial intention for the use of the land as determined by the Council pre-1993.

The initial pre-condition of the land was, as I understand it, largely related to attempts by the Council to ensure that the village was constructed as originally intended.

In 1995 the village and facilities had already been constructed."

104. Even if the CEO's understanding was correct, in my view, this is not an acceptable reason for the failure to mention in the report to Council that the Agreement had not been executed. Regardless of the motives of those concerned it is clear that public land was transferred, free of encumbrances and for nominal consideration, without legislated requirements being fulfilled and without adequate documentation to what has become, essentially, a private organisation.

105. The Association made the comment on my draft report that, because the land used by the Association was originally reserved for public open space, it was not available for subdivision or any residential or commercial development. The Association therefore suggested that the City did not in reality lose a commercially valuable asset but rather facilitated the use of land previously committed to public open space for the purposes of a retirement village which would benefit the local community in a variety of ways. It submitted that the Association has no legal power to deal with the land in any other way apart from using it for the purposes of a retirement village and that therefore the land does not represent a realisable asset of the Association nor was it transferred for "inadequate consideration".

106. I do not accept that the land has no assessable value. In any event, adequate consideration was to be provided by the safeguards of the Agreement and the caveat, neither of which eventuated — although the Association is, apparently, now prepared to enter into such an agreement if certain conditions are met.

Surplus Funds and the Association Reserves

107. The report prepared for consideration by the City Council at its meeting on 24 October 1995 did not mention that earlier in the month the City had received surplus funds for the 1993/94 financial year and it is not clear whether City councillors were informed orally of that at the meeting. Those funds were deposited and held in a trust account by the City for several years before being paid, with interest, to the Town - despite numerous requests by the Town for payment.
108. In January 1996 a report prepared for the Board of the Association recommended that additional reserves totalling \$6,756,688 be established from 30 June 1995 in order to ensure that no surplus had to be paid out under the formula for the financial year ended 30 June 1995. The report suggested that the resolution be made retrospective to also cover the previous financial year. These reserves were to be for purposes such as refurbishment, trust fund, operations contingency, proposed nursing home and general contingency.
109. It is possible that a detailed examination of the financial records of the Association may indicate that a surplus should have been declared for financial years other than 1993/94. No legal advice regarding this action was sought. In my opinion that detailed examination should occur to clarify the position.
110. The constitution has now been amended so that any surplus funds are not liable to be paid to the Town. As a consequence, the community of the Town no longer enjoys the potential of surplus funds becoming available for the extension and development of further aged persons accommodation within the Town.
111. The Association submitted to me that, of the reserve funds of the Association totalling in excess of \$6.7 million for the year ended 30 June 1996, only \$3,861,293.00 were liquid assets because \$1 million was allocated to the trust account to replace the City's guarantees and \$1,872,000.00 was for non-realizable assets. Further, the Association said that the Association had contractual obligations to repurchase leases in the amount of \$20,186,497.00 and that, therefore, liquid assets fell far short of the sum which would be required to buy back leases before any substantial rebuilding of Ocean Gardens could occur. As a consequence, the Association submitted that it is unlikely that any surplus funds would ever be available for the local government due to a likelihood in the foreseeable future for substantial maintenance or rebuilding of units at Ocean Gardens. The Association has submitted that it considers it to be necessary that funds are held in reserve for the purpose of the Association, rather than being made available to the local government for unrelated purposes.
112. Whether or not the Association's existing reserves are appropriate and whether or not there will ever be any further surplus funds generated by the Association are matters that should, in my opinion, be dealt with by the Board once an altered constitution is in place.

Decision-making by local governments

113. I have mentioned above that I am unable to determine the intentions or motivations of the City councillors in voting to approve amendments to the constitution of the Association in October 1995. The lack of any action to prepare the Governor's Order may have been a reason why the City concluded that it could rescind the earlier resolutions and support the proposed trust fund. It may be that with a trust fund established, the City considered that the Town would have no contingent liability and therefore no need to have the same level of representation as had the City on the Board. However, substantial public funds and property were involved and, in my opinion, in the making of decisions regarding the Association insufficient regard was had to safeguarding public assets, the interests of the Town, and the public interest in general.
114. The City was aware that the Town (and, indeed, the then Minister for Local Government) had requested that the City not act to approve amendments to the Association's constitution without notice. Nevertheless, the City did not provide the Town with an opportunity to be heard on the matter and, in my opinion, acted in a way that was designed to prevent or at least make more difficult the Town becoming aware of the Council's consideration of Association matters. To this extent the City's procedures, which should generally give persons who will be affected adversely by Council decisions notice of proposed resolutions and the right to be heard, were not extended to the Town. The decisions made by the City clearly affected adversely the interests and rights of the Town. In my opinion the City should have afforded the Town procedural fairness (or natural justice as it is also called) by giving the Town the opportunity to be heard in relation to the issues under consideration.
115. I have been informed that a number of local governments have adopted a practice of holding "briefing sessions" for Council members prior to the holding of formal meetings of the Council. Such briefings are said to be for the purpose of "streamlining" the formal meeting process by ensuring that elected members are fully conversant with the issues on which they will later vote.
116. Section 5.23 of the *Local Government Act 1995* requires the meetings of a local government's council and committees to be open to the public except in certain specified circumstances — and that a decision to close a meeting (or part thereof) and the reasons for that decision must be recorded in the minutes of the meeting. The section evinces a clear intention of the Parliament that decision-making by local governments will normally occur in public.
117. If it were to be the case that the private briefing sessions for councillors became the de facto meeting of a council – at which the issues were debated and a consensus reached about a decision – so that the formal council meeting involved little more than the formal passing of resolutions without discussion, then the intention of Parliament would be frustrated. At the very least, such a process would deny persons who would be affected by council decisions the opportunity to hear the arguments or objections put against their interests and the opportunity to counter them.
118. Decision-making by a local government in such circumstances carries the risk of undermining public confidence in the integrity of the decision-making process and of the

organisation concerned. I am advised that some local governments which use a briefing meeting system open the meetings to members of the public, who may also ask questions of councillors. No decisions are made at the briefing meetings. In my opinion briefing meetings of that type carry far fewer risks of frustrating Parliament's intentions as expressed in section 5.23 of the *Local Government Act 1995*

119. It is not possible now to conclude with any degree of certainty what happened at the briefing meeting for City councillors prior to the Council meeting of 24 October 1995. As I have noted at paragraph 67 above, the report dated 18 October 1995 had pages numbered in a way that suggested it was prepared for that meeting - but not eventually included on the Agenda for it. To that extent a perception may reasonably arise that an attempt was made to prevent the Town becoming aware that matters concerning the Association would be considered at the meeting. Given also that, at the meeting, the resolutions were passed without discussion, the impression may well be created that the issues may have been pre-determined. I will limit my observation to the point that councils of local governments must resist creating such impressions.

CONCLUSIONS AND RECOMMENDATIONS

120. My principal conclusions on the issues considered in this report can be summarised as follows. As a consequence of its decision in October 1995 the City permitted the constitution of the Association to be amended in a way that:
- defeated the intentions of the City when the Association was established and those of the Commissioners in relation to the transfer of assets and liabilities in accordance with the *Restructuring Act*;
 - defeated the legitimate expectations of the Town in relation to the Association and retirement village under the *Restructuring Act*; and
 - enabled the Association and its assets (including valuable real estate) to be changed from a situation where it was publicly accountable via the City to one in which there is, effectively, no public accountability for the administration of those assets or the disposition of any surplus funds.
121. I have considered whether I should make specific recommendations about a number of aspects of the matter that, in my opinion, require rectification. Examples of such matters include the need to restore to the Town the ability to regain ownership of the land if certain events were to occur and the need to review the financial position of the Association to ascertain whether surplus funds should have been identified. However, the Association is not an authority to which I can make recommendations pursuant to section 25 of the *Parliamentary Commissioner Act 1971* and, hence, any recommendation that I might make that the Association take specific action would not necessarily result in action.
122. I have, therefore, decided that the recommendations I should make will be directed to the City and to the Department (and, through the Department, to the Minister) with the intention that, if implemented, the Town would be restored to the position within the

Association that the City occupied prior to the October 1995 amendments to the Association's constitution. In that situation the Town can then exercise its influence within the Board of the Association to review the financial position of the Association, to cause the Association to execute an agreement relating to the land on which the retirement village is built and to, generally, achieve the original objectives of the City in relation to the establishment of the Association and the retirement village.

123. The Association has made the following comment about this approach:

“Ocean Gardens Inc is not an authority to which recommendations can be made pursuant to section 25 of the Parliamentary Commissioner Act 1971. Although no specific recommendations have been made to Ocean Gardens in the Ombudsman's draft report, in substance that is what is proposed. The draft recommendation is that the Department of Local Government should recommend to the Minister that the Minister request Ocean Gardens to make fundamental changes to its Constitution, failing which legislation should be introduced which would have this effect. The Minister for Local Government has no statutory powers to control an incorporated association.

In essence, the draft report amounts to a recommendation to Ocean Gardens Incorporated which falls outside the Ombudsman's powers. The only body affected by the draft recommendation is the Association. While the complaint relates to the City of Perth, the action which is proposed to be taken is directed solely at the Association (save for the request for an apology from the Lord Mayor). This is notwithstanding that the draft report has not at any point suggested that the Association has acted in an unlawful or improper way.”

124. I agree that the Association is not an agency to which I am able to make recommendations. However, in my view, the action of the City Council in approving the amendments to the constitution – contrary to the previous resolutions of the Commissioners acting in the shoes of the City and in a way that deprived the Town of the opportunity to influence the outcome – was wrong. Public property has been transferred to a private organisation in the manner which I have outlined. In my opinion, I have the power to make the recommendations I have made.
125. As I foreshadowed in paragraph 8, following receipt of my draft report various discussions accrued between representatives of the Town and the Association with a view to seeing if some acceptable compromise could be negotiated. That was not possible. The Association has commented that it has been concerned about the reinstatement of performance guarantees, the retention of the Association's status as a Public Benevolent Institution for taxation purposes, and corporate governance issues that would arise in relation to decision-making at the Board level as Town-nominees would have a conflict of interest in relation to matters such as handling surplus funds.
126. I have no doubt that these are important issues — but they are ones for the Board, the Association and the Town to address. I consider that further negotiations, with external assistance, would be useful and may assist in achieving an agreed outcome.

My recommendations are:

- 1. The City, through its Lord Mayor, should apologise to the Town for the City's failure to inform the Town of its intention to consider resolutions concerning the Association in October 1995 or to give the Town an opportunity to be heard in connection with those matters.**
- 2. The Chief Executive of the Department should invite the Board of the Association and the Town to enter into further discussions with a view to negotiating amendments to the constitution of the Association that are acceptable to the Town and the members of the Association.**
- 3. If those further discussions fail to achieve an agreed outcome, then the Chief Executive Officer of the Department should recommend to the Minister for Local Government and Regional Development that:**
 - (a) The Minister should request the Board and Members of the Association to make such amendments to the Association's constitution as would return the constitution to the form in which it would have been if the amendments approved by the Commissioners of the City on 13 December 1994 and 2 May 1995 had been implemented; and**
 - (b) If the Association refuses or fails to amend its constitution in accordance with such a request within a reasonable time then the Minister should recommend to the government that legislation be introduced to the Parliament that would, if passed into law, effect those changes to the constitution of the Association.**

Murray Allen
**PARLIAMENTARY COMMISSIONER FOR
ADMINISTRATIVE INVESTIGATIONS**

September 2001

APPENDIX A

Text of Submission of 3 April 2001 by Messrs Minter Ellison on Behalf of the Association

**COMPLAINT TO OMBUDSMAN
CONCERNING CITY OF PERTH BY TOWN OF CAMBRIDGE**

Consolidated Position Statement of Ocean Gardens Inc.

1. JURISDICTIONAL ISSUE

Ocean Gardens Inc. is not an authority to which recommendations can be made pursuant to section 25 of the *Parliamentary Commissioner Act 1971*. Although no specific recommendations have been made to Ocean Gardens in the Ombudsman's draft report, in substance that is what is proposed. The draft recommendation is that the Department of Local Government should recommend to the Minister that the Minister request Ocean Gardens to make fundamental changes to its Constitution, failing which legislation should be introduced which would have this effect. The Minister for Local Government has no statutory powers to control an incorporated association.

In essence, the draft report amounts to a recommendation to Ocean Gardens Incorporated which falls outside the Ombudsman's powers. The only body affected by the draft recommendation is the Association. While the complaint relates to the City of Perth, the action which is proposed to be taken is directed solely at the Association (save for the request for an apology from the Lord Mayor). This is notwithstanding that the draft report has not at any point suggested that the Association has acted in an unlawful or improper way.

2. ESTABLISHMENT OF THE ASSOCIATION

The draft report makes certain assumptions about the original intentions of the City in establishing the Association. It is respectfully suggested that these assumptions have been based on incomplete information.

Ocean Gardens Inc (formerly Bold Park Senior Citizens Centre and Homes Inc.) was originally to be established under similar conditions to the City of Perth's Harold Hawthorne Senior Citizens Centre and Homes Inc. In December 1982, the Perth City Council resolved that:

“subject to the Council first approving the proposed draft Constitution and the Council being satisfied as to all matters relating to the concept and the value and type of buildings to be erected, the land be leased to a body corporate to be established with the object of inter alia, developing the land in the manner outlined and that provision be made for the appointment of a board of management to comprise the Coast Ward Councillors, one of whom shall be a Chairman, and six other persons who shall be approved by the Council.”

Thus, the original intention was for Ocean Gardens to be an autonomous incorporated body which would not be under the control of the City of Perth.

This position changed only when it was determined that in order for the incorporated body to obtain 100% debt funding for the construction of the village, it was necessary for the City of Perth to:

1. transfer the land in fee simple to the Association;
2. provide a financial guarantee to the lenders for the construction of the village; and
3. provide a performance guarantee of the Association as lessor for the benefit of purchasers, as required under the relevant legislation.

It was as a result of these requirements that the City of Perth took control of the Association's Board by reducing its membership from 9 to 6, three of whom were Councillors, including its Chairman with a casting vote.

The provision of guarantees by the City subsequently became unnecessary once the initial debt had been discharged and a trust fund established to enable the Association to become self sufficient.

3. LAND VALUE / TRANSFER

The land used by the Association was originally reserved for public open space. It was not available for subdivision or any residential or commercial development. The land was therefore not a commercially valuable resource for the City, although it had obvious potential value to the community.

In order to establish the Association, it was necessary for the land to be rezoned to enable a retirement village to be located on the land. The transfer of the freehold title to the land from the City to the Association was also necessary to enable sufficient security of tenure for life long leases to be issued to those wishing to take up residence in the Village.

However, given the previous zoning of the land, it is submitted that the City did not in reality lose a commercially valuable asset. Rather, it facilitated the use of land previously committed to public open space for the purposes of a retirement village which would benefit the local community in a variety of ways.

The Association has always understood that if, in the future, the land is no longer needed or used for a retirement village, it would be returned to public use, or transferred to a similar body for community purposes. The Association has no legal power to deal with the land in any other way apart from using it for the purposes of a retirement village.

It is not clear why the agreement referred to in paragraph 14 of the draft report was not executed. If certain conditions (referred to in section 6 below) could be satisfied, the Association would be prepared to enter into an agreement in these terms.

However, the Association does not accept that the land was transferred for ‘inadequate consideration’. As previously mentioned, the land could not have been sold for commercial purposes, and does not represent a realisable asset of the Association. For this reason, the land has never been considered or listed as an asset of the Association. If the Village ever ceased to exist for any reason, the Association would likewise cease to exist.

4. CONSTITUTION / ACCOUNTABILITY

As mentioned in section 2, it was always intended that the Association would operate independently from the City, albeit with input at Board level from City Councillors. The controlling interest which the City initially had in relation to the Board was linked to the performance guarantees which it originally provided for the Village. This is made clear in the report to the City Council in October 1995 just prior to the Constitution being changed:

“From the City of Perth’s point of view it has no interest in the land or the operation of the retirement village. The need for a continuing close relationship between the Association and the local authority particularly as regards financial matters is no longer considered to be necessary.

The Constitution changes are seen as reflecting the now mature status of the Association capable of running its own affairs and the increased involvement of the residents themselves. It would seem to be competent both morally and legally for the City of Perth to agree to a change of the Constitution which reduces the need for significant local authority involvement.

The changes should be supported in their own right. Whether the residents choose to release the City from any existing guarantees is a matter for the residents to decide but the Council could support the Association's proposal to encourage residents to release their guarantees in view of.

- (a) the proposed establishment of the Association's trust fund; and*
- (b) the statutory charge over the land owned by the Association in favour of the residents granted by the Retirement Villages Act.*

In view of the City's legal advice that the residents are secured by the statutory charge granted by the Retirement Villages Act, the City is no longer entering into any further guarantees in the case of new residents. The Board has been advised of this. It is understood that all leases now being offered to intending residents contain no guarantee or other reference to the City of Perth. Assuming the continued successful operation of the complex it seems unlikely that the existing guarantees would ever be called on. In any event the number of existing leases with guarantees (about 217) will diminish over time as those residents sell, pass away or move to other forms of accommodation.”

It is against that background, that the changes to the Constitution were made.

The fact that the City could no longer “control” the Association’s Board, did not result in a failure “to provide essential protection for the considerable public assets which were being entrusted to the Association” as suggested in paragraph 71 of the draft report. As is the case with any other incorporated association, the Association is accountable to the public through the application of various provisions of the *Associations Incorporation Act 1987*. For example:

- to be eligible for incorporation under the Act, an association must be formed for one of the specified purposes set out in section 4 of the Act which are designed to benefit the local community (such as religious, educational, charitable, benevolent, artistic, recreational or community purposes).
- an association is not eligible for incorporation under the Act if it is established for the purposes of trading or securing pecuniary profit to the members from the transactions of the association (section 4).
- an association may be wound up by the Supreme Court if it was not at the time of incorporation eligible for incorporation under the Act, or it has engaged in activities outside the scope of its purposes as specified in its Rules, or if it has traded or secured pecuniary profit for the members of the association (section 3 1).
- upon any winding up of an association, surplus property must be distributed to another incorporated association, or for charitable purposes, and cannot be shared amongst members or former members of the association.

These provisions ensure that “public assets” vested in incorporated associations are used for the benefit of the community, and not to profit individual members of the association. It has never been necessary for any local government to “control” Ocean Gardens’ Constitution to ensure that this happens.

The Association now operates in a similar fashion to the Harold Hawthorne Senior Citizens Centre and Homes Incorporated, which was established by the City of Perth prior to the establishment of Ocean Gardens Inc. Like Ocean Gardens, the Harold Hawthorne Centre sells life long leases to its residents. The Centre is also an independent autonomous body managed by a Board comprised of 9 Directors, only two of whom are Councillors nominated by the Town of Victoria Park. It is understood that the Centre has operated very successfully under this arrangement.

The constitutional changes effected in November 1995 enabled a residents' representative to be a member of the Board. It is obviously logical for the residents to have a representative on the Board. However this did not result in the residents being able to control the Association in the manner suggested in the draft report. The Board of Management (whoever it comprises) has specific duties under the *Associations Incorporation Act* and the Association's Constitution which must be exercised for the benefit of the Association, and consistently with the requirements of the Act. There is no suggestion in the draft report that this has not happened in the case of Ocean Gardens Inc.

As noted in paragraph 77 of the draft report, the Board currently consists of three community members, two Town nominees and a representative of the Residents' Association. There is no reason why a Board comprised in this way cannot effectively manage the Association for the benefit of the residents and the community in general.

It should be noted however that reverting to the original constitutional arrangement would now potentially cause corporate governance difficulties. For example, in any decision to be made by the Board as to the payment of surplus funds to the Town, the members of the Board nominated by the Town would clearly have a conflict of interest, and therefore, be unable to participate or vote on that issue. For that reason alone, a reversion to the original Constitution would be unworkable and inappropriate.

In relation to paragraph 78, it is not unusual for incorporated associations to be controlled by private individuals. Indeed, the great majority of incorporated associations have voluntary boards of management drawn from relevant sections of the community which control substantial public funds or land holdings entrusted to the association for the public benefit. It is for this reason that the controls set out in the Associations Incorporation Act have been imposed. It is not accepted that the Association was established to 'manage the Village on [the City's] behalf. The Association was established as an independent body, and was never required to account or report to the City on its activities. It has been an extremely successful organisation, and has fulfilled and continues to fulfil the objectives for which it was first established.

5. SURPLUS FUNDS

In paragraph 77 of the draft report, it is noted that reserve funds of the Association totalled in excess of \$6.7 million for the year ended 30 June 1996. It should be noted that, of that sum, only \$3,861,293.00 were liquid assets. \$1 million was allocated to the trust account to replace the City's guarantees, and \$1,872,000.00 was for non-realizable assets as noted in the relevant balance sheet details. The balance sheet also notes that the Association had contractual obligations to repurchase leases in the amount of \$20,186,497.00. Liquid assets therefore fell far short of the sum which would be required to buy back leases before any substantial rebuilding of the Village could occur.

The surplus funds received by the City for the 1993/94 financial year have been transferred to the Town, and this is no longer an issue.

In relation to paragraph 89 of the draft report, the Association considers that it is unlikely that any surplus funds would ever be available for the local government. The Association currently has liquid reserves of approximately \$5 million. It is likely that in the foreseeable future, substantial maintenance or rebuilding of units will be required in order for the Village to continue to fulfil its objectives. Rebuilding cannot occur unless the leasehold interests are paid out by the Association. The present estimated total cost of this is \$58 million. The current reserves fall well short of this repurchase price although it is acknowledged that any rebuilding would occur on a staged basis.

The Association considers it to be necessary that funds are held in reserve for the purpose of the Association, rather than being made available to the local government for unrelated purposes. The Village has been a very successful venture and has greatly benefited the local community. It can only continue to do so if its funds are responsibly maintained and managed, particularly having regard to the likely need to rebuild units in the future.

6. COMPROMISE PROPOSALS AND RESPONSE FROM TOWN OF CAMBRIDGE

Notwithstanding the views expressed above, the Association has been prepared to explore ways of addressing the concerns of the Town, without compromising the Association's future viability.

While the Association would not support any change to the composition of the Board, it has given consideration to amending its Constitution to accommodate the future transfer of the land to the Town together with any genuine surplus funds which may in the future be obtained.

The Association's proposals in this regard have been formulated subject to the following important qualifications:

- the reinstatement of performance guarantees by the Town of a similar kind to those originally provided by the City; and
- the retention of the Association's "public benevolent institution" status to continue to allow tax concessions for its activities.

At this stage, there has been no offer made by the Town to reinstate the performance guarantees originally provided by the City. In addition, the Association's expert advice indicates that any change along these lines would jeopardise the Association's current tax status. For those reasons, the Association's proposals have been unable to be progressed.

The Town has now accepted that these aspects of the Constitution should not be changed, given the potential tax implications. In light of that concession, the Association contends that any other change to the Constitution (such as the restructure of the Board) would be meaningless and unwarranted, as the Town would have an insufficient interest in the Association's affairs to justify a controlling interest on the Board.

7. SUMMARY

The Association does not accept that the Constitution has been amended in a way that defeated the intentions of the City when the Association was established. As previously mentioned, the establishment of an incorporated association reflected an intention that the Village be run by an independent organisation, albeit with input from the relevant community sectors, including local government. Ultimately, it is only the processes established under the Associations Incorporation Act which ensure that an association is accountable and properly run. There is no evidence, either in the draft report or otherwise, that the Association has not behaved

responsibly, or otherwise consistently with the intentions of the City when it was first established.

Similarly, the assets and land held by the Association (whether it could be described as “valuable real estate” or not) have been and will continue to be managed in a responsible way. The Association's eligibility for continued incorporation depends upon it being managed for the benefit of the local community. The reasons for its initial establishment remain the reasons for its continuing existence. Regardless of the identities of the Board of Management, the public assets held by the Association cannot be used for private profit. In addition, regardless of who nominates members to the Board, those members are required to exercise their fiduciary duties solely for the benefit of the Association, and not for purposes unrelated to the Association's objects.

The suggestion in the draft report that legislation should be introduced to effect a change to the Association's Constitution is entirely unwarranted and inappropriate. Incorporated associations are highly regulated under the Associations Incorporation Act. Processes are established under the Act whereby associations may be wound up by the Supreme Court if they have acted outside the scope of their purposes or are no longer eligible to be incorporated under the terms of the Act.

There is therefore no justification for recommending the introduction of specific legislation to force an association to amend its Constitution in circumstances where it is otherwise complying with the law.

3 April 2001

**DEPARTMENT OF LOCAL GOVERNMENT
AND REGIONAL DEVELOPMENT**



GOVERNMENT OF WESTERN AUSTRALIA

Your Ref : 00007:MA:LVD
Our Ref : P4-1v4



Mr M Allen
Ombudsman
PO Box Z5386
St George's Terrace
PERTH WA 6831

Dear Mr Allen

Thank you for your letter of 25 September 2001 enclosing a copy of the final report of your investigation of a complaint from the Town of Cambridge about the role of the City of Perth in the events surrounding changes to the constitution of Ocean Gardens Inc. (the Association).

In accordance with Recommendation 2 of the report, I have today written to the Board of the Association and the Town of Cambridge to invite them to enter into discussions with a view to negotiating mutually acceptable changes to the constitution. I have requested them to provide me with a progress report by 30 November 2001.

If after a reasonable period of time, it is clear that an agreed outcome cannot be achieved through my intervention, I intend to give effect to Recommendation 3 of the report.

I will keep you informed of further developments.

Yours sincerely


Allan Skinner
ACTING DIRECTOR GENERAL

4 October 2001

Local Government
32 St Georges Terrace, PERTH WA 6000
GPO Box R1250, PERTH WA 6001
Tel: (08) 9222 0511 Fax: (08) 9221 2715
E-mail: info@dlg.wa.gov.au
www.dlg.wa.gov.au

Regional Development
168 - 170 St Georges Terrace, PERTH WA 6000
GPO Box 7234 Cloisters Square, PERTH WA 6850
Tel: (08) 9327 5666 Fax: (08) 9327 5481
E-mail: regional@commerce.wa.gov.au
www.regional.wa.gov.au

Westlink
2 Havelock Street, WEST PERTH WA 6005
Tel: (08) 9222 5192 Fax: (08) 9222 5205
E-mail: westlink@cams.wa.gov.au
www.cams.wa.gov.au/westlink



CITY OF PERTH

THE LORD MAYOR

15 March 2002



Mr Murray Allen
Ombudsman
PO Box Z5386
St Georges Terrace
PERTH WA 6831

Dear Mr Allen

I refer to your several enquiries and correspondence in relation to the Ocean Gardens report.

It is a very simple matter to apologise to someone on a personal basis and this would be made even moreso when it would be to someone like Mayor Ross Willcock who I admire greatly. Yet when it is a public apology on behalf of the City of Perth, the implications are far more significant.

I have therefore given this matter considerable thought and have decided on balance that it would not be appropriate for me to apologise to the Town of Cambridge.

Whilst it is acknowledged that the Commissioners of the City of Perth made decisions in relation to the restructuring process, once the Council was elected in May 1995 it became the duly constituted legal decision-making body for matters concerning its jurisdiction.

In those early days of 1995 there were many enquiries from people associated with the Ocean Gardens complex requesting that the City use its endeavours to overturn the actions of the Commissioners.

The Council took legal advice on this matter and made the decision of which you are aware. To apologise at this stage would suggest that the Council erred in its decision-making process. I can imagine and understand that the Town of Cambridge would have preferred advice of our intended action. No doubt they would then have seen fit to endeavour to thwart the Council from taking such action by legal process.

The Council of the day acted in what it saw as an appropriate manner to protect the interests of those at the centre, without impacting on the interests of the Town of Cambridge.

Yours sincerely

THE RT HON. THE LORD MAYOR DR PETER NATRASS
COUNCIL HOUSE, 27 ST GEORGE'S TERRACE, GPO BOX C120, PERTH, WESTERN AUSTRALIA 6001
TELEPHONE: (08) 9461 3339 FACSIMILE: (08) 9461 3053
E-MAIL: lord_mayor@cityofperth.wa.gov.au