CANADA)
PROVINCE OF SASKATCHEWAN)

IN THE MATTER OF AN INSPECTION AND INQUIRY BY THE HONOURABLE R.L. BARCLAY, Q.C. PURSUANT TO SS. 396 AND 397 OF THE MUNICIPALITIES ACT SS 2005, CHAPTER M-36.1 RESPECTING THE R.M. OF SHERWOOD NO. 159 AND THE SUBJECT MATTERS OF THE ORDERS MADE BY THE HONOURABLE JIM REITER MINISTER OF GOVERNMENT RELATIONS DATED JUNE 16, 2014 AND JULY 24, 2014 AND THE TERMS OF REFERENCE ATTACHED THERETO.

DECEMBER 30, 2014

FINAL REPORT OF THE INSPECTION AND INQUIRY INTO THE R.M. OF SHERWOOD NO. 159

Volume 1 of 2 (Final Report)

The Honourable R.L. Barclay Q.C., Inspector/Inquiry Officer

CANADA)
PROVINCE OF SASKATCHEWAN)

IN THE MATTER OF AN INSPECTION AND INQUIRY BY THE HONOURABLE R.L. BARCLAY, Q.C. PURSUANT TO SS. 396 AND 397 OF THE MUNICIPALITIES ACT SS 2005, CHAPTER M-36.1 RESPECTING THE R. M. OF SHERWOOD NO. 159 AND THE SUBJECT MATTERS OF THE ORDERS MADE BY THE HONOURABLE JIM REITER MINISTER OF GOVERNMENT RELATIONS DATED JUNE 16, 2014 AND JULY 24, 2014 AND THE TERMS OF REFERENCE ATTACHED THERETO.

December 30, 2014

To The Honourable Jim Reiter,
Minister of Government Relations

Pursuant to your Inspection Order dated June 16, 2014 and your Inquiry Order dated July 24, 2014, I have completed my Inspection and Inquiry as mandated by the Terms of Reference attached thereto.

With this letter I respectfully submit my Final Report on both the Inspection and Inquiry.

The Honourable R.L. Barclay, Q.C.

Acknowledgements

One of the most important decisions I undertook at the outset of the Inspection and Inquiry was to appoint capable and qualified legal counsel to work closely with me throughout the various stages of the proceedings.

I am privileged to have been able to appoint Maurice O. Laprairie, Q.C. senior partner in the law firm of MacPherson Leslie & Tyerman as Counsel to the Inspection/Inquiry to represent the public's interest at this Inquiry. Mr. Laprairie's considerable experience as a senior trial counsel made him a superior choice as my Counsel. I am grateful for his advice and candour, as well as his insights, professionalism, and sensitivity. He was ably assisted by Chris Hahn (student-at-law) and Matthew Klinger (law student), two talented young men. As it turned out the public was fortunate in my choices and so was I. My Counsel and his assistants were diligent, fair, thorough and extremely hard working.

I also wish to acknowledge the contribution made by Joel Hesje, Q.C., counsel for the RM, and Rodger Linka, counsel for Reeve Eberle, who participated in the hearings and filed detailed written briefs on behalf of their clients. Given the complex array of issues intertwining through the Inspection/Inquiry the written submissions proved very helpful to me.

I also wish to acknowledge the contribution of other counsel who appeared before me namely Merrilee Rasmussen, Q.C., Kevin Mellor and Joanne Moser. Their professionalism and integrity greatly assisted me during my deliberations.

ABBREVIATIONS AND ACRONYMS

Act	*The Municipalities Act*, SS 2005, c M-36.1
CAO	Chief Administrative Officer
City	City of Regina
Counsel	Maurice O. Laprairie, Q.C.
Developer	Great Prairie Development Corporation
Development	Wascana Village
DPC	The Sherwood-Regina District Planning Commission
GPDC	Great Prairie Development Corporation
Inquiries Act	*The Public Inquiries Act, 2013*, SS 2013, c P-38.01
Inspector or Inquiry Officer	The Honourable R.L. Barclay, Q.C.
Marathon	Marathon Properties Corp.
Minister	The Minister of Government Relations, The Honourable Jim Reiter
Ministry	The Ministry of Government Relations
MOU	Memorandum of Understanding signed by the RM and the City of Regina
OCP	Official Community Plan
PDA	*The Planning and Development Act, 2007*, SS 2007, c P-13.2
Report	The Final Report of the Inspection/Inquiry into the RM of Sherwood No. 159
RM	The Rural Municipality of Sherwood No. 159
Rules	*Rules of Procedure and Practice*
SPI	*The Statements of Provincial Interest Regulations*, RRS c P-13.2 Reg 3
ZB	Zoning Bylaw

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PART I – INTRODUCTION

I. PROCEDURAL HISTORY

A. Inspection Order

On June 16, 2014, I was appointed by The Honourable Jim Reiter, Minister of Government Relations (the "**Minister**"), to conduct an Inspection into the R.M. of Sherwood No. 159 (the "**RM of Sherwood**" or the "**RM**").[1] The Inspection Order was made pursuant to s. 396 of *The Municipalities Act*, SS 2005, c M-36.1 (the "**Act**") and reads as follows:

Minister's Order

Subsection 396(1) of *The Municipalities Act* provides as follows:

396(1) The Minister may require any matter connected with the management, administration or operation of any municipality, any committee or other body established by a council pursuant to clause 81(a) or any controlled corporation to be inspected:

(a) *If the minister considers the inspection to be necessary; or*

(b) *On the request of council.*

(2) The minister may appoint one or more persons as inspectors or the Saskatchewan Municipal Board as an inspector for the purposes of carrying out inspections pursuant to this section.

(3) An inspector:

(a) may require the attendance of any officer of the municipality or of any other person whose presence the inspector considers necessary during the course of the inspection; and

(b) has the same powers, privileges and immunities conferred on a commission by sections 11, 15, 25 and 26 of The Public Inquiries Act, 2013.

(4) When required to do so by an inspector, the administrator, committee or other body established by a council pursuant to clause 81(a) or a controlled corporation being inspected shall produce for examination and inspection all books and records of the municipality, committee, other body or controlled corporation.

(5) After the completion of the inspection, the inspector shall make a report to the minister and to the council.

[1] Exhibit 1; Appendix 1.

I consider it necessary to appoint the Honourable Ronald L. Barclay, Q.C. as an inspector pursuant to subsection 396(2) of *The Municipalities Act* to inspect and report on the matters connected with the management, administration or operation of the RM of Sherwood No. 159 identified in the terms of reference set out in Schedule "A" attached hereto.

The inspector shall carry out the inspection in accordance with the attached terms of reference.

The inspector may engage the services of legal counsel and any other professionals or experts which the inspector may consider necessary to assist the inspector in exercising his duties. The remuneration of the inspector shall be set at $350.00 per hour and any expenses of the inspector, which shall include reasonable travelling and sustenance expenses incurred by the inspector in the performance of his duties as well as the costs of legal counsel and any other professionals or experts engaged.

This order shall take effect on the date of signing and shall terminate two weeks following receipt of the written report unless otherwise extended, or previously amended or revoked, by the Minister.

Dated at the City of Regina, in the Province of Saskatchewan, this 16 day of June, 2014.

The Honourable Jim Reiter
Minister of Government Relations

Terms of Reference

1. The Inspector will inspect the following matters connected with the management, administration or operation of the Rural Municipality of Sherwood No. 159 (the "municipality"):

(a) the full history, background, process, facts and circumstances which led to the approval by the Council of the municipality (the "Council") of the amendments to the official community plan and zoning bylaws and subsequent concept plan(s) for the proposed Wascana Village development;

(b) the appropriateness of the directions, actions or inactions of any employee or agent of the municipality or member of Council relating to the proposed Wascana Village development;

(c) whether the mechanisms in place in the municipality for the identification, disclosure and addressing of pecuniary interests in matters brought before Council are appropriate and effective.

2. The inspector shall prepare a written report in relation to the matters under his inspection outlining his findings of fact, conclusions and any recommendations and provide the report to the Minister and to the Council as soon as reasonably possible.

3. To conduct the inspection the Inspector shall have the power, privileges and immunities provided for in section 396 of *The Municipalities Act* which includes the power to:

(a) require the attendance of any officer of the municipality or of any other person whose presence the inspector considers necessary during the course of the inspection;

(b) require a person to give evidence under oath or after making an affirmation or declaration, orally or in writing, for the purpose of the inspection, and for that purpose may require a person to attend at any location; and

(c) require a person to produce to the inspector, or to a person designated by the inspector, all records and other property in his or her custody or control that may relate in any way to the matters that are the subject of the inspection.

4. The Inspector may determine the rules of, as well as the process and procedure for, the inspection as he sees fit.

5. The Inspector may consider any document, including electronic record, or any other evidence, verbal or written, that he considers relevant and reliable.

6. The Inspector will provide interim reports on the progress of the inspection to the Minister and the Council.

The original Inspection Order and Terms of Reference are attached as Appendix 1 to this report.

On the day of my appointment and in accordance with my powers under the Act and *The Public Inquiries Act, 2013*, SS 2013, c P-38.01, (the "**Inquiries Act**"), I engaged Maurice O. Laprairie, Q.C. as counsel to the Inspection ("**Counsel**"). Also on that date and pursuant to the Inquiries Act, I further authorized my Counsel to inquire into matters within the jurisdiction of the Inspection and authorized him to receive all records and property compelled to be produced under the Act for the purposes of the Inspection.[2]

Following my appointment, I issued twenty five Subpoenas to Produce Documents to individuals and corporations that my Counsel and I believed may have relevant records and property. These persons included current and former members of council of the RM ("**Council**" or "**Councillors**"), current and former administrators and planners of the RM, Great Prairie Development Corporation ("**GPDC**" or the "**Developer**") as well as all the parties who sold land to the Developer. My Counsel caused the Subpoenas along with a letter of explanation to be served on the individuals and corporations named therein who were located primarily in Saskatchewan, but also in Alberta, Manitoba and Ontario.

[2] Exhibit 5; Appendix 2.

Commencing June 17, 2014, persons served with Subpoenas began to make reports to my Counsel as to the documents in their possession or control that related to the subject matter of the Inspection. Throughout late June and early July, a number of potential witnesses were interviewed in conjunction with their appearances to produce documents. The documents produced in relation to the Inspection numbered in the tens of thousands.

Initially, it had been my plan for the Inspection to compel production of documents, have my Counsel conduct initial interviews and then to commence with the examination of witnesses under oath. However, as a result of certain allegations that came to light at the initial stage of the Inspection, I concluded that I needed to pause the Inspection and issue an interim report as contemplated by the Terms of Reference for the Inspection (the "**Inspection Mandate**").

The reason for this pause was that throughout the course of the Interviews, allegations were made that Reeve Eberle had engaged in inappropriate conduct in relation to the proposed Wascana Village Development ("**Wascana Village**" or the "**Proposed Development**"). The Proposed Development would see an urban style subdivision with mixed use and high density housing for approximately 14,000 people on land in the RM in close proximity to the City of Regina's southern border. It has never been in dispute that Reeve Eberle has or had economic interests in all five quarter-sections proposed for the Wascana Village Development.

While it was apparent that Reeve Eberle had made a declaration of a pecuniary interest to Council regarding Wascana Village and that he recused himself from voting on any Council decisions relating thereto, there was evidence and allegations that Reeve Eberle may have had other involvement with matters connected to Wascana Village that was inappropriate.

In my Interim Report dated July 10, 2014, I recommended that the Minister issue a new order for an Inquiry under s. 397 of the Act.[3] The impetus for my recommendation was twofold. First, I was of the view that the documents that had been produced, and the allegations that had been received by my Counsel, warranted further investigation. Second, my Inspection Mandate did not permit me to investigate or report on the conduct of council members – a necessary precondition to exploring the allegations that had surfaced. The combination of these two factors led me to reach the conclusion that an expanded mandate was required in order to fully investigate and report on the underlying issues in relation to the Wascana Village Development and the RM. I had not reached any conclusions in my Interim Report. I simply identified that a Final Report based on an Inspection alone might not produce the full review that was expected unless the mandate was expanded to include an Inquiry.

B. Inquiry Order

Subsequent to my Interim Report the Minister issued an Order for an Inquiry on July 24, 2014.[4] The Inquiry Order was made pursuant to s. 397 of the Act and reads as follows:

[3] Appendix 3.
[4] Exhibit 2; Appendix 4.

MINISTER'S ORDER

1. On June 16, 2014, I appointed the Honourable R.L. Barclay, Q.C. as an Inspector to inspect and report on the matters connected with the management, administration or operation of the RM of Sherwood No. 159 ("the municipality"). An interim report was provided by the Inspector on July 10, 2014 recommending an inquiry under section 397 of The Municipalities Act to inquire into issues of conduct. In his interim report, the Honourable R.L. Barclay, Q.C. recommended that the Inquiry be conducted in addition and concurrently with the Inspection.
2. Section 397 of The Municipalities Act provides as follows:

> 397(1) The minister may order an inquiry described in subsection (2):
>
> (a) if the minister considers the inquiry to be necessary;
>
> (b) on the request of the council; or
>
> (c) on receipt of a sufficient petition of voters of the municipality requesting the inquiry.
>
> (2) An inquiry may be conducted into all or any of the following:
>
> (a) the affairs of the municipality, a committee or other body established by the council pursuant to clause 81(a) or a controlled corporation;
>
> (b) the conduct of a member of council or of an employee or agent of the municipality, a committee or other body established by the council pursuant to clause 81(a) or a controlled corporation.
>
> (3) The minister may appoint an individual to conduct the inquiry, or may request the Saskatchewan Municipal Board to conduct the inquiry.
>
> (4) Any persons appointed to conduct an inquiry have the same powers conferred on a commission by sections 11, 15 and 25 of The Public Inquiries Act, 2013.
>
> (5) The results of the inquiry shall be reported to:
>
> (a) the minister;
>
> (b) the council; and
>
> (c) any committee or other body established by the council pursuant to clause 81(a), controlled corporation, councillor or employee that may be the subject of the inquiry.

3. I consider it necessary to appoint the Honourable R.L. Barclay, Q.C. as an Inquiry Officer pursuant to subsection 397(3) of The Municipalities Act to inquire into the conduct of members of council and agents of the municipality and the affairs of the municipality in relation to the matters identified in the terms of reference set out in Schedule "A" attached hereto, concurrently with his duties as an Inspector.
4. The Inquiry Officer shall carry out the Inquiry in accordance with the attached terms of reference.
5. The Inquiry Officer may engage the services of legal counsel and any other professionals or experts which the Inquiry Officer may consider necessary to assist the Inquiry Officer in

exercising his duties. The remuneration of the Inquiry Officer shall be set at $350.00 per hour and any expenses of the Inquiry Officer, which shall include reasonable travelling and sustenance expenses incurred by the Inquiry Officer in the performance of his duties as well as the costs of legal counsel and any other professionals or experts engaged, as approved by the Inquiry Officer.

6. This order shall take effect on the date of signing and shall terminate two weeks following receipt of the written report unless otherwise extended, or previously amended or revoked, by the Minister.

Dated at the City of Regina, in the Province of Saskatchewan, this 24 day of July, 2014.

_____

The Honourable Jim Reiter,
Minister of Government Relations

SCHEDULE "A" TERMS OF REFERENCE

1. The Inquiry will inquire into the appropriateness of the conduct of members of council and agents of the Rural Municipality of Sherwood No. 159 (the "municipality") and the affairs of the municipality in relation to the developments proposed for section 33, township 16, range 19 and the northern half of section 28, township 16, range 19 (the "proposed development"), including, without limiting the generality of the foregoing:

    (a) whether members of council or agents of the municipality had or have pecuniary interests in the proposed development, and if so whether such interests were appropriately identified and disclosed; and
    (b) whether members of council or agents of the municipality, directly or indirectly, inappropriately attempted to influence, promote or advance the proposed development to benefit any such pecuniary interests.

2. In conducting the Inquiry into the appropriateness of conduct and affairs, the Inquiry Officer shall consider the relevant standards applicable to members of municipal council by virtue of The Municipalities Act, (the "Act"), the Official Oath prescribed in Form A of The Municipalities Regulations, the municipality's Code of Conduct and the common law in relation to conflicts of interest as it relates to the duties of members of council to the municipality and the public.

3. In the event the Inquiry Officer is considering making an adverse finding in relation to conduct, the Inquiry Officer will provide reasonable notice of the substance of the allegation and the individual(s) would have a reasonable opportunity during the Inquiry to be heard in person or by counsel. Any notice of such alleged conduct will be delivered on a confidential basis to the person(s) to whom the allegations relate.

4. The Inquiry Officer shall prepare a written report with the results of the Inquiry outlining his findings, conclusions and any recommendations and provide the report to the Minister, the Council, and any person who receives a notice pursuant to section 3 of the Terms of Reference. The written report will be provided on or before December 31, 2014, unless otherwise extended by the Minister.

5. To conduct the Inquiry, the Inquiry Officer shall have the powers provided for in section 397 of the Act which includes the power to:

    (a) require the attendance of any officer of the municipality or of any other person whose presence the Inquiry Officer considers necessary during the course of the Inquiry;
    (b) require a person to give evidence under oath or after making an affirmation or declaration, orally or in writing, for the purpose of the Inquiry, and for that purpose may require a person to attend at any location; and
    (c) require a person to produce to the Inquiry Officer, or to a person designated by the Inquiry Officer, all records and other property in his or her custody or control that may relate in any way to the matters that are the subject of the Inquiry.

6. The Inquiry Officer may determine the rules of, as well as the process and procedure for, the Inquiry as he sees fit, subject to the requirement that the Inquiry proceedings will not be open to the public.

7. The Inquiry Officer may consider any document, including electronic record, or any other evidence, verbal or written, that he considers relevant and reliable.

8. The Inquiry Officer will provide interim progress reports on the Inquiry to the Minister and the Council.

9. The Inquiry Officer shall carry out this Inquiry concurrently with his mandate to perform an Inspection of the municipality pursuant to the Minister's Order of June 16, 2014, including, to the extent possible, utilising the same proceedings, records and evidence to fulfill both mandates.

As I alluded to in my Interim Report, the Inspection and Inquiry were conducted concurrently as the matters at issue under both mandates were highly integrated.

On July 24, 2014 I appointed my Counsel under the Inspection to serve a concurrent role as counsel to the Inquiry.[5]

Following my appointment as both Inspector and Inquiry Officer, and in consultation with my Counsel, I issued *Rules of Procedure and Practice*[6] (the "**Rules**") to those parties involved in the Inspection and Inquiry. A full copy of the Rules are attached to my Report as Appendix 6 and will be referenced in the body of this Report where necessary.

[5] Exhibit 5; Appendix 5.
[6] Exhibit 3; Appendix 6.

After the Inquiry Order was made, my Counsel continued the review and cataloguing of the documents produced pursuant to the Inspection Subpoenas. As a result of this review my Counsel issued a sixty page index of documents titled Statement of Documents Produced to the Inspection of the RM of Sherwood No. 159 (the "**Statement of Documents**").[7] The Statement of Documents contains an index of all documents received pursuant to the Inspection Subpoenas. All parties with standing under the Inspection or Inquiry were provided with the Statement of Documents and were granted access to the documents listed therein in accordance with the Rules.

On August 20, 2014, I issued subsequent Subpoenas to Produce Documents to twenty-one individuals or corporate entities that my Counsel and I believed may have documents relevant to either the Inspection or Inquiry.

The Subpoenas were returnable on August 26, 2014 and resulted in the production of numerous additional documents that my Counsel reviewed and catalogued. As a result, a Supplementary Statement of Documents was produced to all parties with standing in accordance with the Rules.[8]

C. September 10, 2014 - The Initial Hearing

Following my issuance of the Inspection Subpoenas in June, outstanding issues remained in relation to the production of certain documents. The Developer and the landowners involved in the Proposed Development – Reeve Eberle, Kevin Chekay and Marathon Properties Corp – had each expressed concern to my Counsel that the financial information set out in their agreements not be made public, and sought assurances from my Counsel that this information be held by me in confidence. All parties involved had concerns that the publication of the financial consideration in their agreements could potentially harm their business affairs.

In order to address these concerns, my Counsel proposed that he give an undertaking that any document disclosure would be held in confidence until such time as counsel for these parties were afforded an opportunity to make an application before me to have the financial disclosure withheld from the Final Report. Counsel for Marathon produced their agreements to my Counsel on this basis and in a complete form. Legal counsel for Reeve Eberle and Mr. Chekay, as well as legal counsel for the Developer, did not accept this proposal and resisted production.

As a result of this resistance, significant time and effort was expended in relation to obtaining non-redacted copies of the land sale agreements between the Developer and both Reeve Eberle and Mr. Chekay. In a letter dated August 26, 2014, my Counsel pointed out that my Final Report would be made to the Minister and the RM, and would not be made public by me. In response to that letter, legal counsel for the Developer and legal counsel for Reeve Eberle and Mr. Chekay wrote my Counsel on September 4, 2014 to communicate their willingness to provide the agreements.[9] On September 3, 2014 Counsel for Marathon accepted my Counsel's letter of August 26, 2014 and

[7] Exhibit 4, Appendix 7.
[8] Exhibit 27; Appendix 8.
[9] Exhibits 20 and 21.

released the undertaking.[10] The agreements at issue were provided in a non-redacted form on September 9 and September 10, 2014.

I would be remiss if I did not express my frustration at the delay that occurred as a result of the position taken by the Developer, Reeve Eberle and Mr. Chekay in refusing to produce non-redacted documents. They steadfastly refused to produce non-redacted documents until, on September 4, on the eve of an application to compel production from Reeve Eberle and Mr. Chekay (September 10), and in response to my Counsel's letter of August 26, 2014, they agreed to produce non-redacted documents.

My Counsel's letter of August 26, 2014, did little more than to state the obvious, that according to the Terms of Reference I would be making the report to the Minister and the RM and that that the Minister would have to consider the provisions of T*he Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 before he released my Final Report. Their agreement to produce these documents after receiving that letter left me to wonder why there was such a delay.

The end result was a delay of several weeks to this process. Additionally, unnecessary expenses were incurred through the issuance of additional subpoenas, conducting interviews and preparing for an application to compel production. All of this time and effort would have been much better utilized in pursing the mandate of the Inspection/Inquiry.

Having the document disclosure issue addressed, it was my intention to proceed with the commencement of hearings on the originally scheduled date of September 10, 2014. At the September 10, 2014 hearing (the "**Initial Hearing**"), certain foundational and jurisdictional documents were filed before me. Additionally, several submissions were made to me on a variety of other issues that had arisen throughout the document production stage of the Inspection/Inquiry.

At the Initial Hearing, Mr. Linka, counsel for Reeve Eberle, made a formal request for adjournment of the hearings until such time as harvest, which was then underway, was completed. This request was supported by various other members of Council and went unopposed by my Counsel. I granted Mr. Linka's request for an adjournment and set the date for the recommencement of the hearings for October 15, 2014 (the "**Hearings**").

At that time, Reeve Eberle also made an application for further disclosure, which included the notes taken by my Counsel during interviews of certain proposed witnesses. Mr. Linka's oral submission, on behalf of Reeve Eberle, was supplemented by a written submission dated August 27, 2014 on this same matter that was sent to my Counsel.[11] Reeve Eberle's application was supported by legal counsel for Councillor Barry Jijian, Councillor Joe Repetski, Deputy Reeve Probe and the RM.

[10] Exhibit 22.
[11] Exhibit 23.

My Counsel opposed Reeve Eberle's application and made both written and oral submissions to that effect. My disposition of this matter is fully set out in my Decision dated September 24, 2014.[12] The portion of my Decision relevant to the matter of disclosure provides as follows:

> [42] I am satisfied that the procedures prescribed by the Rules which include the providing to each affected party, summaries of evidence and the Notice of Potential Adverse Findings will ensure that they will have full notice of the allegations made against them. In addition, the Rules will ensure that any affected party will have the right to be heard, to cross-examine witnesses and to call additional witnesses who possess relevant information. At the conclusion of the testimony, counsel for the affected party will have the right to present argument.
>
> [43] It is also critical to underscore that the notes from these informal interviews have never been provided to me, although I was informed by my counsel of the allegations that were made and provided with the disclosed documents that supported certain of these allegations. Once I reviewed the relevant documents and considered the unsworn allegations, I made a decision that an expanded mandate was warranted in order to investigate and report on the allegations relating to conduct.
>
> [44] I am unable to agree with Mr. Hesje, Mr. Linka and Ms. Moser that the process envisioned through document disclosure, witness summaries and the issuance of Notices of Potential Adverse Findings will fall short of the disclosure requirements mandated by the principles of natural justice. To these comments I should also add that I make them under the assurance from my counsel that the combination of the summaries pursuant to Rule 18 and the Notices pursuant to Rules 29 and 32 shall be fulsome in nature.
>
> [45] In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 682, Justice L'Heureux-Dubé highlighted the context-specific nature of procedural fairness in any given circumstance: "Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case." The procedures adopted in relation to the Inspection and Inquiry have been done with the aim to ensure that the process is flexible, efficient and most of all, fair to those affected by its operation.
>
> [46] In view of the above, I hereby make the following orders:
>
> 1. All currently contemplated Notices of Potential Adverse Findings (Rules 29-32) ("Notices") be provided to those affected 14 days before the first witness is called to testify. These Notices, as the Rules contemplate, may be the subject of supplementary Notices. In addition, there may be parties that receive such

[12] Exhibit 26; Appendix 9.

> Notice for the first time during the course of the hearings, as the information and evidence unfolds.
>
> 2. All witness summaries, where applicable, as contemplated by Rule 18, be provided at least three (3) business days before the witness is scheduled to be heard.
>
> 3. The schedule of witnesses to be called in any given week shall be provided a minimum of four (4) days in advance of that week of testimony or proceedings.
>
> 4. Rule 18(a) is to be amended to delete the word "brief".
>
> 5. However, I refuse the request for production of the notes taken by my counsel of any witness or potential witnesses.

I note here that in accordance with the Rules and my Decision, fulsome witness summaries and Notices were provided by my Counsel to the affected parties. On several occasions during and after the Hearings, counsel for the parties made favorable comments to me about the level of detail and timing of this disclosure.

In addition to the submissions on disclosure and adjournment, various parties also made submissions – both oral and written – requesting an order in relation to the reimbursement of legal fees associated with their participation in the Inspection/Inquiry. As I was provided no jurisdiction to make any orders as to funding, these applications were all dismissed.

D. The Role of Commission Counsel

Although made in the context of an inquest, the comments of Steel J.A. in *Hudson Bay Mining and Smelting Co., Limited v Cummings*, 2006 MBCA 98, 272 DLR (4th) 419 reflect the role of counsel for the Inquiry:

> [57] In the advancement of the administration of justice and the public interest, Crown counsel at an inquest should be impartial and neutral. He performs a public duty which requires him to ensure that all available relevant evidence is presented in a fair, impartial and objective manner. The court, in the case of *Cronkwright Transport Ltd. v. Porter*, [1983] O.J. No. 558 (H.C.J.) (QL), commented that "[i]t is not the duty of the Crown at an inquest to have an adversary position" (at para. 8). This concept is reinforced in The Honourable Mr. Justice T. David Marshall, *Canadian Law of Inquests*, 2d ed. (Toronto: Carswell, 1991), when the author states (at p. 99):
>
> > … [T]he mandate of the Attorney-General, when the Crown is not a party and there is no *lis inter partes* at an inquest, is only to preserve the general integrity of the law and the administration of justice.

> [58] Viewed in this light, Crown counsel does not have a "client"; there are no adversarial parties against whom he must maintain a zone of privacy. As stated earlier, the whole assumption which grounds the doctrine of litigation privilege is that it is related to litigation and the zone of privacy is required to facilitate adversarial preparation. There is no adversary here against whom Crown counsel's work product needs to be protected.

The role of counsel for the Inquiry is that he should be impartial and neutral and that he performs a public duty which requires him to ensure that all available evidence is presented in a fair, impartial and objective manner.

The role of commission counsel was also articulated by Steel J.A. in the case of *Southern First Nations Networks v Hughes*, 2012 MBCA 99, [2013] 1 WWR 456 [*Southern*] where she cites with approval the comments of Commissioner Bellamy, a Superior Court Justice in Ontario. She delineated the impartiality of commission counsel in this way in her ruling of October 15, 2003 (as quoted in Professor Ed Ratushny's text, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law Inc., 2009) at p. 221-22 [*Conduct of Public Inquiries*]:

> ... Impartiality on the part of commission counsel is not to be confused with a lack of rigour and vigilance in seeking the truth. Commission counsel must still act forcefully whenever necessary to overcome resistance that could obscure truth. This persistence is particularly important wherever the transparency of public inquiries motivates resistance on the part of those with something to hide. What makes commission counsel's role unique is that they must take into consideration the public interest, the interests of all parties, and furthermore, must explore conscientiously all plausible explanations and outcomes regardless of whose interests are advanced. We have now reached a point in the evolution of commission counsel's role where it can be confidently asserted that every task they undertake must be infused with impartiality inseparable in degree from that of the commissioner.

Steel J.A., also states in *Southern* as follows:

> [79] I agree with this view of the role of commission counsel. It is commission counsel who has the primary responsibility to vigorously and completely represent the public interest, including the interests, issues and theories of ***all*** parties. In order to do so, commission counsel needs to foster effective communication with all of the parties to the Inquiry. By way of illustration, the parties may be able to shed light on information not initially thought to be relevant or suggest additional fields of inquiry. Conversely, commission counsel should ensure that relevant information is getting to the parties on a timely basis, and should be available to discuss issues with other counsel.
>
> 80 Parties granted standing in a commission of inquiry need to be aware of the wide scope of commission counsel's mandate, and should be able to trust and rely upon commission counsel to fulfill that role. As stated by Ratushny (at p. 257):

> …. The parties granted standing have a "substantial and direct interest" in some aspect(s) of the inquiry's terms of reference. But commission counsel responsible for marshalling the evidence and managing the hearings represents the public interest with respect to all aspects. No other person has the same comprehensive and intimate knowledge of all of the evidence and witnesses and their interrelationships....
>
> [81] Counsel for parties and intervenors with standing should endeavour to assist commission counsel by communicating any issues that are of concern to them and their clients. This will greatly assist commission counsel in effectively bringing forward the interests, issues and theories of all parties in the public interest. While the courts are available to remedy a breach of procedural fairness, it is important that counsel work together toward the common goal of facilitating the important work of a commission of inquiry.

Commissioner Dennis O'Connor, former Associate Chief Justice of the Ontario Court of Appeal, who presided over the Walkerton and Arar Inquiries authored an article entitled "The Role of Commission Counsel in a Public Inquiry" (2003) 22 Advocates' Soc J at 9-11. In this article, summarized in *Conduct of Public Inquiries* at p. 219, he stated the role of counsel to the Inquiry as follows:

> 1) To provide advice and guidance to the commissioner throughout the process. This includes acting as a "sounding board."
>
> 2) To supervise and conduct the investigation into all of the information relevant to the terms of reference including gathering documentation and interviewing witnesses.
>
> 3) To develop and maintain open communication with all parties and to encourage cooperation in facilitating the disclosure and presentation of evidence.
>
> 4) To call evidence at the hearings, including witnesses the parties seek to call. Cross-examination by the parties is likely to be limited if the prior examination by commission counsel has been thorough and fair.
>
> 5) To assist the commissioner in writing the report. This role varies with different commissioners but is easier to accept when commission counsel has acted in an "impartial and even-handed way" throughout the inquiry.
>
> 6) To serve as media spokesperson for the commission to the media.

Commissioner O'Connor also explained the relationship of counsel to the commissioner. He concluded that it is with the commission counsel that the commissioner carries out his or her mandate investigating the subject matter of the inquiry, leading evidence and throughout,

commission counsel acts on behalf of the commissioner. As the learned author Ratushny states, commission counsel in effect becomes an extension of the commissioner (*Conduct of Public Inquiries* at p. 217).

Commissioner O'Connor further went on to say in paras. 10 and 12 (as quoted in *Conduct of Public Inquiries* at p. 217):

> And this is where commission counsel play such an important role. Commission counsel are on the very front line of doing much of what is necessary to gain the public confidence about the process and about the integrity and impartiality of the inquiry itself.... As a result, commission counsel's role is not to advance any particular point of view, but rather to investigate and lead evidence in a thorough, but also completely impartial and balanced, manner. In this way, the commissioner will have the benefit of hearing all of the relevant facts or evidence unvarnished by the perspective of someone with an interest in a particular outcome.

I am more than satisfied that throughout all aspects of this Inspection/Inquiry my Counsel performed the duties and played the role outlined by these authorities in the highest traditions of the legal profession.

E. Natural Justice and Procedural Fairness

I am conscious of the fact that a significant degree of procedural fairness is owed to those who were called on to testify before me in these proceedings because of the potential impact on their reputations. I will make some general observations of the law in this regard and then outline specifically how procedural fairness was dealt with in the Inspection/Inquiry.

1. Applicable Legal Principles

I refer to the comments of Cory J. in the Supreme Court of Canada decision in *Canada (Attorney General) v Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 3 SCR 440 at para 55:

> The findings of fact and the conclusions of the commissioner may well have an adverse effect upon a witness or a party to the inquiry…. It is true that the findings of a commissioner cannot result in either penal or civil consequences for a witness…. Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.

I intend to bring some clarity to the often overlapping administrative law concepts of natural justice and procedural fairness. In this regard I would endorse the commentary of Madam Justice Dawson in *Blass v University of Regina Faculty Association*, 2007 SKQB 470:

> [51] "Natural justice" connotes the requirement that administrative tribunals, like courts, when reaching a decision, must do so with procedural fairness. Procedural fairness relates to fairness between the parties and before the Board. Natural justice is "the basic requirement of procedure that one who judges is neither interested nor biased" and "that the parties have enough notice and the chance to be heard". S.A. DeSmith, *Judicial Review of Administrative Action*, 4th ed. by J.M. Evans (London: Stevens 1980) at 77 and 156.
>
> [52] Natural justice is comprised of two fundamental principles: *audi alteram partem* - that a person must know the case being made against him/her and be given an opportunity to answer it ...; and *nemo judez in sua causa debet esse* - the rule against bias... (p. 204 *Principles of Administrative Law*, Jones De Villars).
>
> [53] The principle *audi alteram partem* is an imperative, which translated means "hear to other side". More generally, it refers to the requirement in administrative law that a person must know the case being made against him/her and be able to answer it before the tribunal or agency will make a decision. "Fair hearing" is defined as "the opportunity to fully answer and defend, adequately to state one's case" in the *Dictionary of Canadian Law*. The concept of "fair hearing" connotes fairness between the parties or litigants.
>
> [54] Generally, fair hearing refers to a process of fairness, openness and impartiality. Fair hearing requires notice of the hearing, knowing the case to be met, disclosure, the opportunity to present the other side, the right of reply and the right to cross-examine.

The concept of procedural fairness depends upon the nature of the particular hearing. In the decision of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817 [*Baker*], the Court considered whether a decision not to allow a woman to stay in Canada on humanitarian grounds violated procedural fairness. L'Heureux-Dubé J. for the majority, agreed that a duty of procedural fairness applied and that the concept of procedural fairness is eminently variable.

At paras 23-27 of the *Baker* decision, L'Heureux-Dubé J. made reference to five factors which could be used to determine the content of the duty of procedural fairness in a particular context. The first factor identified was the nature of the decision being made and the process followed in making it. The more the process resembled judicial decision-making, the more likely that procedural protections closer to the trial model will be required by the duty of fairness. The second factor was the nature of the statutory scheme and the role of the decision within the statutory scheme. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute or when the decision is determinative of the issue. The third factor to consider is the importance of the decision to the individual affected. The more important the decision is to the lives of those affected and the greater its impact on those persons, the more stringent the procedural protections should be. The fourth factor considers the legitimate expectations of the person challenging the decision. Thus, if the promises or regular practices of a decision-maker lead

someone to believe the same practice will be followed, it will generally be considered unfair for the decision-maker to act in contravention of those representations. Finally, the analysis of which procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself.

2. Manifestation of Natural Justice and Procedural Fairness

In this case the issues of procedural fairness and natural justice were addressed in a number ways: (a) through my Terms of Reference; (b) the Rules I promulgated; (c) the amendments I made to the Rules as a result of my Decision of September 24, 2014; (d) the legal memorandum on standards that my Counsel prepared on my instructions and circulated in advance of the Hearings; (e) the fulsome witness summaries that were provided for all witnesses who agreed to participate in an interview; and (f) the detailed notice of potential adverse findings that were provided where applicable ("**Notices**"). I will now briefly comment each of these steps:

a) Terms of Reference

My Terms of Reference addressed issues of procedural fairness and natural justice by providing notice to all parties involved as to the specific matters I was investigating. Additionally, my Terms of Reference made express reference to the standards by which their conduct was to be assessed. Lastly, my Terms of Reference also included an express requirement that reasonable notice would be provided to any individual that was subject to a potential adverse finding in my Report. These Notices, as contemplated by my Terms of Reference, also required that the substance of the allegation be disclosed and an opportunity to be heard provided. The relevant clauses in my Terms of Reference are reproduced here for convenience:

1. The Inquiry will inquire into the appropriateness of the conduct of members of council and agents of the Rural Municipality of Sherwood No. 159 (the "municipality") and the affairs of the municipality in relation to the developments proposed for section 33, township 16, range 19 and the northern half of section 28, township 16, range 19 (the "proposed development"), including, without limiting the generality of the foregoing:

    a. whether members of council or agents of the municipality had or have pecuniary interests in the proposed development, and if so whether such interests were appropriately identified and disclosed; and
    b. whether members of council or agents of the municipality, directly or indirectly, inappropriately attempted to influence, promote or advance the proposed development to benefit any such pecuniary interests.

2. In conducting the Inquiry into the appropriateness of conduct and affairs, the Inquiry Officer shall consider the relevant standards applicable to members of municipal council by virtue of The Municipalities Act, (the "Act"), the Official Oath prescribed in Form A of The Municipalities Regulations, the municipality's Code of Conduct and the common law in relation to conflicts of interest as it relates to the duties of members of council to the municipality and the public.

3. In the event the Inquiry Officer is considering making an adverse finding in relation to conduct, the Inquiry Officer will provide reasonable notice of the substance of the allegation and the individual(s) would have a reasonable opportunity during the Inquiry to be heard in person or by counsel. Any notice of such alleged conduct will be delivered on a confidential basis to the person(s) to whom the allegations relate.

b) The Rules

My Terms of Reference were supplemented by the Rules which I caused to be promulgated for the Inquiry. The specific Rules that can be seen to engage matters relating to natural justice and procedural fairness are reproduced here below.

II. STANDING

8. Those parties who receive Notice(s) of Potential Adverse Findings pursuant to Part V of these Rules will have standing at the Inspection and Inquiry to the extent proceedings relate to the matters referenced in the notice(s).

…

11. Those granted standing are deemed to undertake to follow these Rules of Procedure and Practice and will have the privileges and responsibilities outlined herein.

…

B. Documentary Evidence

16. All materials and documents received by the Inquiry Officer pursuant to subpoenas or otherwise will be treated as confidential. However, Counsel to the Inquiry Officer is permitted to produce relevant documents to parties with standing prior to the hearing or the examination of any witness provided they execute an undertaking to treat such disclosure as confidential and use it only for the purposes of the Inspection/Inquiry.

17. The Inquiry Officer is permitted to make reference to, and disclosure of, any and all evidence and documents that he deems necessary and appropriate in his final report.

18. Where practical and in the best interests of facilitating an efficient, thorough and fair process, Counsel to the Inquiry Officer will make best efforts to provide to witnesses, and affected individuals or parties with standing, the following materials prior to the testimony of a witness:

    a. a brief summary of anticipated evidence;

    b. identification and/or copies of documents that will be referred to during the course of a witness' testimony.

19. Where applicable, witnesses and parties with standing are required to notify Counsel to the Inquiry Officer as soon as reasonably possible if they believe they are entitled to receive a summary of anticipated evidence and any related documents pursuant to these Rules.

20. Witnesses and affected individuals with standing that receive information and documents pursuant to these Rules shall be deemed to undertake that they will use the documents solely for the purposes of this Inspection and/or Inquiry and that they will not disclose or disseminate any such information or evidence to any other person or party, other than to their legal counsel.

…

IV. RIGHT TO COUNSEL

27. Witnesses and parties with standing are entitled, but not required, to have counsel present while being interviewed by Counsel to the Inquiry Officer or testifying in front of the Inquiry Officer.

...

V. NOTICE OF POTENTIAL ADVERSE FINDINGS

29. In the event the Inquiry Officer is considering making an adverse finding in relation to the conduct of an individual or party subject to the Inquiry, the Counsel to the Inquiry Officer shall provide reasonable notice of the substance of such and grant the individual a reasonable opportunity during the Inquiry to be heard in person or by counsel.

30. If an individual or party in receipt of a notice referred to in these Rules feels that it is necessary to adduce additional evidence to respond to potential adverse findings in relation to his or her conduct, he or she may apply to the Inquiry Officer for leave to call that evidence. Leave may be granted on such terms as imposed by the Inquiry Officer.

31. Notice of the potentially adverse findings will be delivered on a confidential basis to the individual or party to whom it relates.

32. Supplementary or additional Notices may be delivered from time to time by the Counsel to the Inquiry Officer as warranted by information disclosed through the course of the Inspection and/or Inquiry. [13]

c) Decision of September 24, 2014

As a result of my Decision of September 24, 2014, I made the following orders which amended the Rules to provide earlier notice and expanded notices:

[13] Exhibit 3; Appendix 6.

1. All currently contemplated Notices of Potential Adverse Findings (Rules 29-32) ("Notices") be provided to those affected 14 days before the first witness is called to testify. These Notices, as the Rules contemplate, may be the subject of supplementary Notices. In addition, there may be parties that receive such Notice for the first time during the course of the hearings, as the information and evidence unfolds.

2. All witness summaries, where applicable, as contemplated by Rule 18, be provided at least three (3) business days before the witness is scheduled to be heard.

3. The schedule of witnesses to be called in any given week shall be provided a minimum of four (4) days in advance of that week of testimony or proceedings.

4. Rule 18(a) is to be amended to delete the word "brief."

d) Standards Memo

To ensure that anyone whose conduct was to be brought into question before me understood the standards by which that conduct was to be assessed, I directed my Counsel to prepare and circulate a memorandum of law outlining those standards.[14] That memorandum was circulated to all parties on October 8, 2014, one week before the commencement of the Hearings. At the commencement of the Hearings on October 15, 2014, parties were invited to comment on the standards and in that regard I received one written submission from Mr. Linka, on behalf of Reeve Eberle.[15]

e) Witness Summaries

I am advised by my Counsel that the parties were provided with 'fulsome' witness summaries that included a summary of what each witness was expected to testify to along with copies of all documents that the witness was expected to be referred to.

f) Notices of Potential Adverse Finding

Only one Notice was served in the Inquiry and that was in relation to Reeve Eberle. I am informed by my Counsel that the Notice was served as required and was 'fulsome' in that it was composed of 16 pages and over 61 attached documents.

As a result of the efforts of my Counsel and the cooperation of other counsel, I never heard a single complaint or issue being raised regarding the scheduling of witnesses, the details of witness summaries or the timing or completeness of the Notice. Quite the opposite, counsel for the parties commented favorably to me both during and after the proceedings that the disclosure provided was both fulsome and timely.

[14] Exhibit 28; Appendix 10.
[15] Exhibit 29; Appendix 11.

F. Preparations for the Hearings

a) Progress Report

On September 24, 2014, as per clause 8 of my Terms of Reference, I issued a progress report on the Inquiry.[16] In the progress report I noted the promulgation of the Rules; the gathering, disclosure and cataloguing of documents; the resolution of the redacted documents issue; the Initial Hearing on September 10; the release of my Decision on the issue of disclosure; and the adjournment of the Hearings to October 15, 2014.

b) Call for Submissions

Subsequent to my Decision I issued a call for submissions on September 25, 2014 to the parties involved in the Inspection/Inquiry.[17] In my letter I encouraged the submission of all views, comments, observations and recommendations that related to my Terms of Reference, whether positive or negative, so as to ensure that my Final Report would be as complete as possible. My letter also encouraged legal counsel to endeavor to assist my Counsel by bringing to light any issues that were of concern to them or their clients.

It should be noted that no formal submissions were made in response to my letter of September 25. However, throughout the course of the Hearings, issues or concerns of those individuals involved in the proceedings were addressed, and, appropriately accommodated.

c) Voluntary Interviews

Prior to the Hearings, my Counsel interviewed numerous witnesses and prepared witness summaries as contemplated by the Rules. This was an entirely voluntary process but an important one in order to further the efficient operation of the Hearings. A few witnesses declined the interview and witness summaries could not be prepared. These witnesses were Councillor Jijian, Councillor Repetski and Deputy Reeve Probe.

G. The Hearings

a) Appearances

With the foregoing items completed, the Hearings reconvened on October 15, 2014. In total, 14 witnesses appeared before me over the course of 18 days. A total of 377 documents were entered as exhibits (see Appendix 14 for a complete listing and description). A complete list of witnesses and the dates they testified is provided as follows:

1. **Ralph Leibel –** Executive Director of Community Planning

[16] Appendix 12.
[17] Exhibit 24; Appendix 13.

Appearances: October 15-17 and October 20.

2. **Rachel Kunz** – former Chief Administrative Officer for the RM (2012-2014)

   Appearances: October 21, October 23 and November 10.

3. **Blaine Yatabe –** former Director of Planning for the RM (2011-2012)

   Appearances: October 24.

4. **Ron Hilton** – former Administrator and Manager of Public Works for the RM (2007-2012)

   Appearances: October 28.

5. **David Wellings –** former Council member of the RM (2010-2013)

   Appearances: October 28.

6. **Corey Wilton** – former Council member of the RM (2007-2014)

   Appearances: October 29.

7. **Dale Heenan –** Council member of the RM (2007 to present)

   Appearances: October 29.

8. **Barry Jijian** – former Council member of the RM (2007 – October 23, 2014)

   Appearances: October 30 and November 4.

9. **Tim Probe –** Council member of the RM (2007 to present)

   Appearances: November 4.

10. **Daniel Schmid –** President and Director of GPDC

    Appearances: November 5.

11. **Joseph Repetski –** Council member of the RM (2008 to present)

    Appearances: November 6.

12. **Kevin Eberle** – former Council member and Reeve of the RM (2008 to present)

    Appearances: November 12.

13. **Jacqueline East –** former Director of Planning and planning consultant contracted by the RM (2012 to present)

    Appearances: November 18.

14. **Ron McCullough –** Chief Administrative Officer of the RM (July 2014 to present)

    Appearances: November 18 and November 19.

b) Hearings Location

The Initial Hearing on September 10, 2014 was conducted in a boardroom at my Counsel's law office in Regina. The remainder of the Hearings were all conducted at the hearing room of the Automobile Injury Appeal Commission, 504 – 2400 College Avenue, Regina. I would like to express my appreciation to the Commission for the use of those hearing facilities which proved to be ideal for our purposes.

The Hearings for the Inspection and Inquiry were not open to the public. The only persons permitted to attend were those who had received a subpoena to produce documents and their respective counsel. All persons who attended and their counsel were required to, and did, execute a document entitled – "Undertaking to Treat Documents, Information and Transcripts as Confidential". A sample of such document is attached as Appendix 15.

The testimony of all witnesses was transcribed by Royal Reporting Services.

c) Rulings

During the course of the Hearings I was required to, and did make, several rulings as follows:

1. Reeve Eberle's legal counsel, Mr. Linka, noted that the disclosure of information and documents by my Counsel related to Reeve Eberle's alleged conduct was of such a volume that he required assistance from other counsel in conducting the cross examination of witnesses. According to the Rules such other counsel would not have had standing to conduct these cross examination absent my agreement. I ruled that

other counsel would be permitted to assist Mr. Linka in the cross examinations with Mr. Linka having the right to cross examine after them.

2. During the cross examination of Rachel Kunz, Mr. Kevin Mellor, counsel for Deputy Reeve Probe, who was cross examining pursuant to my above noted ruling, requested an adjournment of that cross examination for personal reasons. Ms. Kunz lived and worked in, Alberta and had taken time off work to attend the Hearings. Given the existing schedule the requested adjournment meant Ms. Kunz had to have her cross examination interrupted for over 2 weeks. Despite objections from my Counsel and the RM's legal counsel, Mr. Hesje, I granted the requested adjournment.

3. Mr. Linka requested that Reeve Eberle testify as the last witness and I agreed to that request. When it became necessary for the RM to call Ms. East and Mr. McCullough as the last witnesses I permitted this, but allowed Reeve Eberle to be recalled by Mr. Linka to address any new matters that he thought necessary to address. This did not prove to be necessary.

4. At one point during the Hearings, Mr. Hesje objected to any witnesses being allowed to give recommendations during their testimony. I ruled that given my mandate providing recommendations was not only appropriate, but highly desirable.

d) Witness Immunity

An anomalous situation existed in the context of this Inspection/Inquiry with respect to the protection of the testimony of witnesses who testified before me. The precise situation was outlined in detail in an email sent by my Counsel to all parties, a copy of which is attached as Appendix 16. Briefly, those sections of the Inquires Act that are made applicable to my mandate by the Act do not include s. 10 thereof that provides for witness immunity. To ensure that all witnesses that appeared before me were provided with all other available immunity a series of questions was asked of all witnesses at the commencement of their testimony so that they could then claim the immunity available to them under other legislation.

e) Written Submissions

At the conclusion of the Hearings all counsel agreed to make their final submissions in a written form. I have received submissions from my Counsel, Mr. Linka (on behalf of Reeve Eberle) and Mr. Hesje (on behalf of the RM). I found the submissions to be extremely helpful in focusing the issues and highlighting the crucial aspects of the testimony.

I thank Mr. Laprairie, Mr. Linka and Mr. Hesje for their excellent written submissions and arguments which were of great value in assisting me with the issues I had to consider and decide.

II. HISTORY AND BACKGROUND

A. Municipalities

In Saskatchewan, municipalities fall within three general classifications: urban municipalities, rural municipalities and northern municipalities.[18] The RM of Sherwood is one of Saskatchewan's 296 rural municipalities which make up the 782 total municipalities in the Province. Rural municipalities, like all municipalities, are creatures of provincial statutes, and as such, receive their authority through provincially enacted legislation. In Saskatchewan, rural municipalities gain their authority from the Act. The Act came into force on January 1, 2006 and provides a modern and comprehensive legislative framework to govern the operation of municipalities within the Province. The purpose of the Act is as follows:

- to provide the legal structure and framework within which municipalities must govern themselves and make the decisions that they consider appropriate and in the best interests of their residents;

- to provide municipalities with the powers, duties and functions necessary to fulfil their purposes;

- to provide municipalities with the flexibility to respond to the existing and future needs of their residents in creative and innovative ways;

- to ensure that, in achieving these objectives, municipalities are accountable to the people who elect them and are responsible for encouraging and enabling public participation in the governance process.[19]

The Act also provides that municipalities are natural persons, and as such, their purposes are as follows:

- to provide good government;

- to provide services, facilities and other things that, in the opinion of council, are necessary and desirable for all or a part of the municipality;

- to develop and maintain a safe and viable community;

- to foster economic, social and environmental well-being;

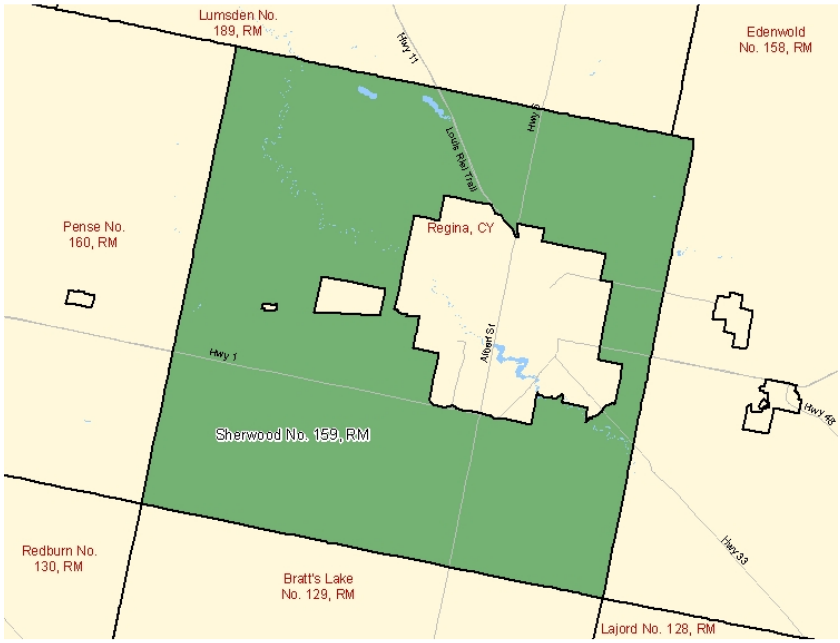
- to provide wise stewardship of public assets.[20]

[18] Note: urban municipalities are further subdivided into Cities, Towns, Villages and Resort Villages.
[19] s. 3(2).
[20] s. 4(2).

In order to give effect to the natural person powers granted to municipalities under the Act, municipalities are required to act through their elected council members. Municipalities, through either the passage of bylaws or resolutions, exercise the powers, duties and functions of the municipality.[21]

B. The RM of Sherwood No. 159

The RM of Sherwood is located in the southern part of the Province and completely surrounds the City of Regina. The RM's boundaries and proximity to the City of Regina are demonstrated in the map below. The RM is denoted in green (darker shading).



The RM of Sherwood was established in 1911 shortly after Saskatchewan became a province. According to the most recent census numbers, the RM has 929 residents.[22] Although sparsely populated, the RM is host to a thriving agricultural industry. Additionally, the RM's "Sherwood Industrial Park" is home to a number of major industrial businesses such as Evraz North America, Brandt Industries, Kramer Ltd., Sakundiak Equipment, Degelman Industries, Shaw Pipe and the Co-op Refinery Complex.

In order to facilitate the movement of crude oil from Northern Alberta to various points in the United Stated, the RM is traversed by a number of pipelines owned by TransCanada, Enbridge and Alliance.

Adding to its strategic location, the RM of Sherwood is also the proposed site for the future South Regina Bypass that will facilitate the Trans-Canada Highway's circumvention of the City of Regina. The RM of Sherwood is also home to a number of golf courses, including the Wascana Golf & Country Club, Sherwood Forest Golf & Country Club, Tor Hill Golf Course and the Murray Golf Course.[23]

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[21] s. 5.

[22] Statistics Canada, *Census Profile*, online: <http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/prof/details/page.cfm?Lang=E&Geo1=CSD&Code1=4706026&Geo2=PR&Code2=11&Data=Count&SearchText=&SearchType=Begins&SearchPR=01&B1=All&Custom=&TABID=2> (10 December 2014).

[23] RM of Sherwood No. 159, *History*, online: < http://RMofsherwood.ca/about-us/> (11 December 2014).

C. Planning and Development in the RM

Subject to the applicable provincial oversight, municipal councils have authority to determine how planning and development are implemented within their municipality. While the Act touches on planning and development tangentially, *The Planning and Development Act, 2007*, SS 2007, c P-13.2 (the "**PDA**") is the governing legislation on land use and development matters in Saskatchewan. The PDA's primary purpose is to establish planning and development standards in accordance with the Province's interests that support development in a manner that is environmentally, economically, socially and culturally sustainable.[24]

The Statements of Provincial Interest Regulations, RRS c P-13.2 Reg 3, enacted as a regulation to the PDA, sets out the Province's policy objectives on municipal planning and development. The primary purpose of the *Statements of Provincial Interest* are to ensure that the Province's interests in planning and development are implemented through the decisions of municipal councils. The *Statements of Provincial Interest* expressly provides that municipalities are to set policies governing the development of their communities through three mechanisms:

(1) official community plans and district plans containing policies to guide land use and community development;

(2) zoning bylaws establishing permitted, prohibited or discretionary land uses, development standards and permit requirements; and

(3) subdivision bylaws.

Outside of the major urban centers in the Province which have been granted jurisdiction to act as their own approving authority by the Minister, municipalities remain subject to provincial oversight in relation to planning and development matters.

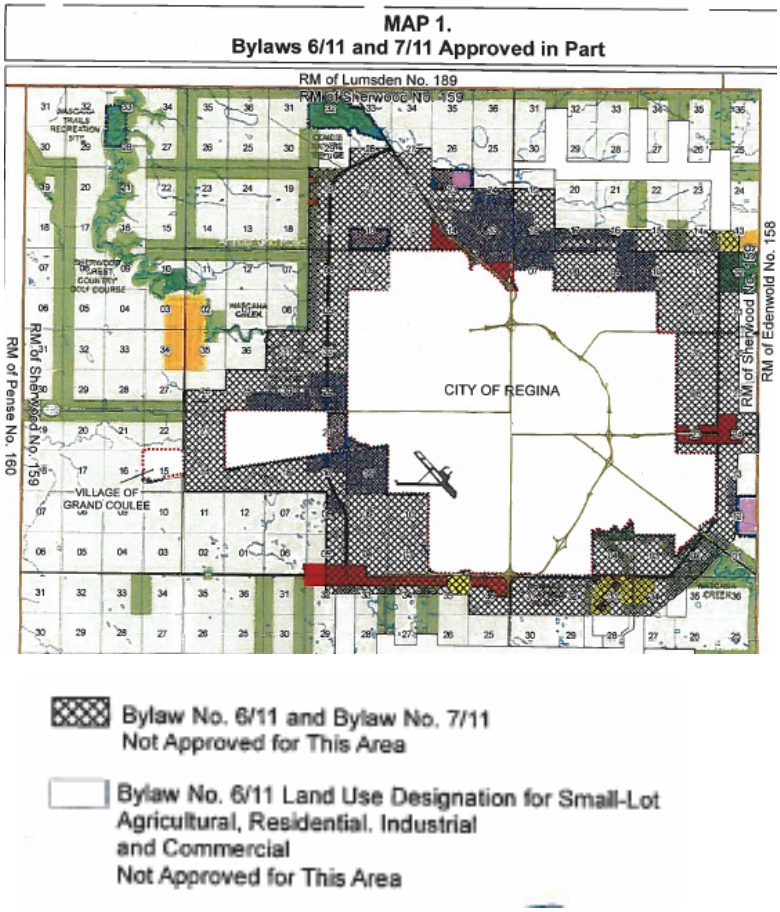
After adopting an official community plan ("**OCP**") or zoning bylaw ("**ZB**"), the municipality must then submit these documents to the Community Planning Branch of the Provincial Government for approval. An OCP and/or ZB will not apply in the municipality until they have been approved by both the municipality's council and the Community Planning Branch of Government Relations.

At the time of the issuance of this Report, the RM of Sherwood regulates its planning and development through the concurrent application of two OCPs. In 1991 the RM of Sherwood adopted a Development Plan,[25] which was the term used under the legislation that pre-dated the PDA. All previously termed 'development plans' are now deemed to be OCPs under the PDA. At the same time the 1991 Development Plan was adopted, the RM also adopted a Zoning Bylaw. The 1991 OCP and ZB were passed pursuant to Bylaws 9/91 and 10/91 respectively (the "**1991 OCP**").

[24] s. 3.
[25] Exhibit 38.

Over the last several years the RM has made several attempts to update and modernize its 1991 OCP. On August 7, 2012, through Bylaws 6/11[26] and 7/11,[27] the RM submitted a new OCP and ZB to Community Planning for ministerial approval (the "**2011 OCP**"). On August 27, 2012, Community Planning returned Bylaws 6/11 and 7/11 and provided a list of actions required by the RM before Community Planning would be able to undertake a review of the newly submitted 2011 OCP.[28] After taking into consideration the items outlined in in the August 27, 2012 letter, the RM re-submitted the 2011 OCP for approval on September 13, 2012.[29]

On February 22, 2013 the Ministry of Government Relations issued a Notice of Decision to the RM which resulted in partial approval of the 2011 OCP.[30] The partial approval was not in relation to the 2011 OCP itself, but instead, was in relation to the areas within the RM that it would apply. The map provided below provides a depiction of the areas where the 2011 OCP applied after the February 22, 2013 Notice of Decision.



The areas immediately adjacent to the City of Regina where the 2011 OCP was not approved (indicated above by the diagonal line overlay), remained subject to the 1991 OCP.

On July 24, 2013 the RM passed Bylaws 20/13, 21/13, 22/13 and 23/13[31] (the "**2013 OCP Amendments**") that were intended to amend the OCPs and ZBs that were in force as a result of the February 2013 Notice of Decision. There were four different Bylaws in 2013 because the RM needed to amend both the 1991 OCP and the 2011 OCP that was partially approved in the February, 2013 Notice of Decision.

The 2013 OCP Amendments that were adopted by Council in July 2013 were a direct result of the recently announced Wascana Village Development. On May 30, 2013, the RM and the

[26] Exhibit 68.
[27] Exhibit 69.
[28] Exhibit 76.
[29] Exhibit 77.
[30] Exhibit 93.
[31] Bylaws 20/13-23/13; see Exhibits 89-92.

Developer held a press conference officially announcing Wascana Village. This announcement was followed by a technical briefing put on by the RM in relation to their OCP. The 2013 OCP Amendments were required to accommodate residential development of the lands devoted to Wascana Village.

The 2013 OCP Amendments were eventually submitted to Community Planning for approval on August 28, 2013. Through a series of negotiations between the RM and Community Planning, the 2013 OCP Amendments were given conditional approval on December 31, 2013.[32] Unlike the partial approval granted on February 22, 2013 in relation to the 2011 OCP, the conditional approval of the 2013 OCP Amendments precluded their application until the conditions were satisfied.

As of the issuance of this report, the conditions outlined in the December 31, 2013 Notice of Decision have yet to be satisfied, and as such, the 2013 OCP Amendments have yet to come into force.

On September 10, 2014, the RM of Sherwood, through Bylaws 1/14 and 2/14, adopted another new OCP and ZB (the "**2014 OCP**"). Bylaws 1/14 and 2/14 were submitted to Community Planning on September 19, 2014 and as of the date of this Report, are still undergoing review.

D. The RM and the City of Regina

Due to their proximity, both the RM of Sherwood and City of Regina have significant interests in one another's planning and development initiatives. The need for collaborative planning between the RM and the City was recognized as far back as 1958, when the initial Sherwood-Regina Planning District agreement was signed.[33] This initial agreement was renewed in 1965 and again in 1990. All iterations of this agreement resulted in the entire RM of Sherwood being subject to the requirements outlined in the Sherwood-Regina Planning District agreement, but no portion of the City. From the RM's perspective, the key aspect of the various agreements is that they required the City to approve all major planning decision within the RM.

The 1990 agreement remained in effect until the RM of Sherwood commenced legal action on April 5, 2012 in order to have the Sherwood-Regina District Planning Commission (the "**DPC**") dissolved.[34] The impetus for the lawsuit was twofold. First, the RM was interested in gaining autonomy over its planning and development. In order to facilitate this desire, the RM was seeking a reduction of the area that was covered by the agreement. The negotiations with the City over the proposed boundary had been ongoing for some time without any agreement being reached and the RM generally felt as though the DPC was not working.[35]

Second, under the applicable legislation the RM was essentially permitted to unilaterally withdraw from the DPC. The legislation also required the Minister to dissolve any district planning

[32] Exhibit 106.
[33] Exhibit 37.
[34] Exhibit 65.
[35] T. Probe Transcript [November 4, 2014 – p. 164-67].

commission with only one member – a situation that arose upon the RM of Sherwood's withdrawal. Then Minister of Municipal Affairs, Daryl Hickie, issued an order dissolving the DPC on May 4, 2012,[36] following which the RM discontinued its legal action.

What followed the dissolution of the DPC can be fairly described as a period of dysfunction between the RM and City. With no formal lines of communication open, this dispute was often played out in the media. During this period, the major points of contention between the RM and the City involved annexation of portions of the RM by the City as well as the issuance of inconsistent future growth plans through their respective OCPs.

Acknowledging the need for some type of process to facilitate collaborative planning and development between themselves, the RM and the City entered into negotiations in the summer of 2013 in order to reach an agreement on the appropriate mechanisms to facilitate that collaboration. On November 6, 2013 the RM and the City signed a Memorandum of Understanding (the "**MOU**") to document their shared recognition of the need to work collaboratively.[37] The MOU mandated the formation of three different committees: (1) the Sherwood-Regina Governance Committee; (2) the Sherwood-Regina Regional Development Committee; and (3) the Sherwood-Regina Administrative and Technical Committee.

These three different committees work in conjunction to ensure issues of mutual interest are properly identified and resolved. The committees are structured in a hierarchal fashion where the Administrative and Technical Committee meets most frequently and passes unresolved issues to the Regional Development Committee. The final referral point and the highest level committee is the Governance Committee, which is comprised of the respective councils, including the Mayor of Regina, and the Reeve of the RM.

The MOU appears to be a positive step in the relationship between the RM and the City which, as noted above, has at times been adversarial. During the period between the dissolution of the DPC and the commencement of the negotiations that preceded the MOU, there was considerable dysfunction between the RM and the City in relation to their planning and development initiatives. The disagreements between the RM and the City, that were often played out publically in the media, appear to have dissipated since the MOU was signed.

These comments are not made to attribute blame to either the RM or the City, but merely to highlight the progressive steps that both sides have taken to acknowledge and manage the conflict that was in existence. The RM and the City both have vested interests in one another's decisions in relation to land use, and as such, collaborative decisions are integral to the orderly development of the land and infrastructure in areas of mutual interest.

[36] Exhibit 66.
[37] Exhibit 96.

E. Wascana Village Background

1. The Development

Wascana Village is a proposed high-density residential development to be located southeast of the City of Regina in the RM of Sherwood. As indicated by the red bordering in the map below, the Development is to span five quarter-sections of land, covering a total of 736 acres. At full build-out, the Wascana Village Development is estimated to provide homes to 14,000 residents.

Wascana Village really began in early 2012 when Daniel Schmid arrived on the scene. Mr. Schmid, a resident of Waterloo, Ontario was initially interested in the quarter-section owned by Marathon Properties Corp. ("**Marathon**"), which is the most NW quarter-section of the lands depicted in the above map. Mr. Schmid was originally interested in the property because of its proximity to the SIAST campus. He was exploring the possibility of constructing a student residence(s) there. Mr. Schmid had prior involvement with building high rise student housing in Waterloo, Ontario.

Mr. Schmid's initial interest in building student housing morphed into the idea of developing a mixed use development for 14,000 people. Despite the fact that this was the first time he had personally been involved in such a development,[38] Mr. Schmid caused the incorporation of Great Prairie Development Corporation ("**GPDC**") of which he was the sole officer and director.

The Wascana Village Development was first presented to the RM at their Regular Meeting of Council on May 9, 2012. At that time the Council voted unanimously to incorporate the Wascana Village block plan into the RM's 2011 OCP which was eventually granted partial approval in the February 2013 Notice of Decision (approval was withheld for the area designated for Wascana Village).

On May 30, 2013, the Developer held a press conference to formally announce the Wascana Village Development. Shortly thereafter the RM Council adopted the 2013 OCP Amendments which

[38] D. Schmid Transcript [November 5, 2014 – p. 48-49].

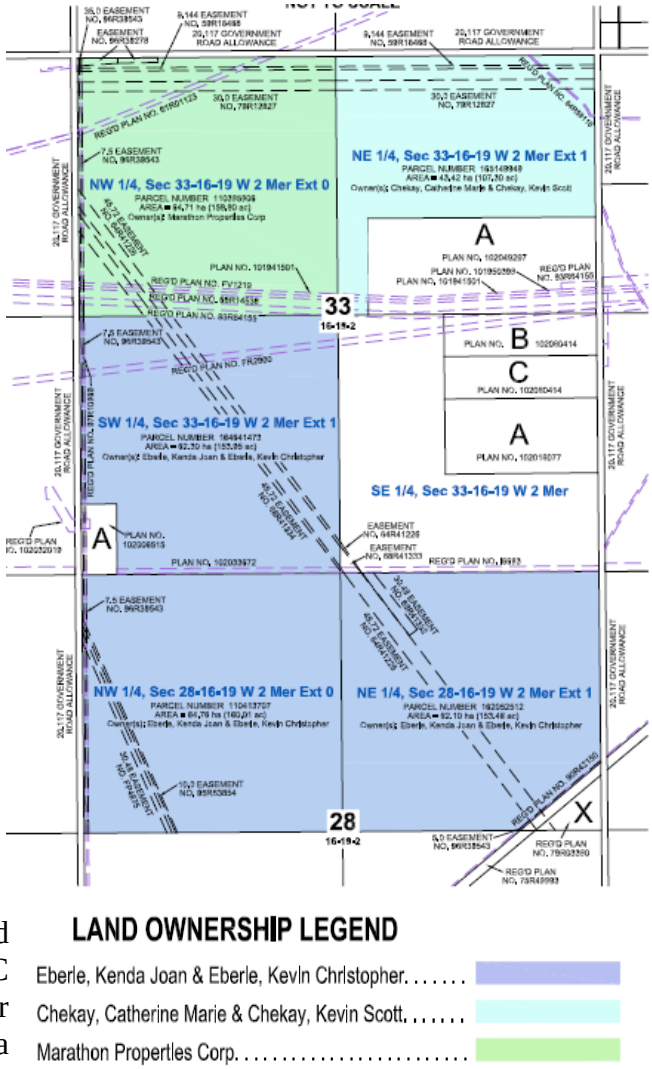
amended the existing OCP to provide for the rezoning of the lands proposed for Wascana Village. The Developer submitted a subdivision application for Wascana Village on November 6, 2013, which has yet to receive approval at the issuance of this Report. As noted previously, the 2013 OCP Amendments were given conditional approval in the Notice of Decision issued December 31, 2013.

The December 2013 Notice of Decision was conditional on a Concept Plan being submitted that was in compliance with a number of items set out in an appendix attached to that Decision. The Concept Plan that was prepared by the Developer was approved by Council on February 12, 2014 and submitted to Community Planning shortly thereafter.

Community Planning rejected the Concept Plan submitted by the RM on April 14, 2014. To date, the Developer has yet to submit a new Concept Plan to the RM for approval as required by the December 2013 Notice of Decision. As a result, the 2013 OCP Amendments have yet to take effect and remain subject to conditional approval until December 31, 2015.

2. Land Ownership

The land proposed for the Wascana Village Development is currently owned by the same individuals that owned that land on May 9, 2012 when Wascana Village was first presented to Council. Reeve Eberle and his wife, Kenda, own three quarter-sections (comprising 467.2 acres); Reeve Eberle's cousin, Kevin Chekay and his wife, Catherine, own one quarter-section (comprising 107 acres); and Marathon Properties Corp. ("**Marathon**") owns one quarter-section (comprising 160 acres). The land ownership throughout the relevant time period is as depicted in the adjacent map.



Mr. Schmid, on behalf of GPDC, entered into purchase and sale agreements with the Eberles, Chekays and Marathon in early May 2012. All three agreements failed to close. Beyond these initial agreements, GPDC has entered into a number of agreements with the Eberles, Chekays and Marathon. These agreements will be examined more closely under the section of this Report dealing with Reeve Eberle's pecuniary interest. None of the agreements ever constituted an outright purchase of the properties by GPDC and were always conditional in one way or another on the land being rezoned so that the Wascana Village development could proceed.

As of the issuance of my Report, the five quarter-sections that are to comprise Wascana Village are still owned by the Eberles, Chekays and Marathon, although some or all of those lands may still be under contract to GPDC.

PART II – THE INSPECTION

A. Introduction

The essential Terms of Reference for the Inspection are as follows:

1. The Inspector will inspect the following matters connected with the management, administration or operation of the Rural Municipality of Sherwood No. 159 (the "municipality"):

   (a) the full history, background, process, facts and circumstances which led to the approval by the Council of the municipality (the "Council") of the amendments to the official community plan and zoning bylaws and subsequent concept plan(s) for the proposed Wascana Village development;

   (b) the appropriateness of the directions, actions or inactions of any employee or agent of the municipality or member of Council relating to the proposed Wascana Village development;

   (c) whether the mechanisms in place in the municipality for the identification, disclosure and addressing of pecuniary interests in matters brought before Council are appropriate and effective.

2. The inspector shall prepare a written report in relation to the matters under his inspection outlining his findings of fact, conclusions and any recommendations and provide the report to the Minister and to the Council as soon as reasonably possible.

It should be noted here that the conduct of any specific member of Council does not fall within my jurisdiction under the Inspection, and as such, in this respect my Report must address the broader function of the RM, its procedures and processes, and its actions through its Council, employees and agents, as these matters were engaged in relation to Wascana Village.

The Inspection component of my Report will address the items outlined in my Terms of Reference in the order they appear. First, a chronology of events regarding the Wascana Village Development and the RM is provided in full. Second, I provide a more fulsome picture of the relevant facts and circumstances that existed throughout the relevant time period that led to the various approvals of the Development. At this point I also provide my comments on the decisions made by the RM through their Council, agents and staff. Third, I comment on the relationship between the RM and the Community Planning Branch of Government Relations. Fourth, the items that I identified in my Interim Report as being of preliminary concern to me will be addressed with the benefit of the evidence provided to me throughout the Hearings. Lastly, I comment on the systemic issues that the RM faced in regard to managing conflicts of interest and refer to the recommendations I suggest for addressing these issues.

B. Chronology of Wascana Village and the RM

The first witness that I heard from was Ralph Leibel who holds the position of Executive Director at the Community Planning Branch of the Ministry of Municipal Relations. Mr. Leibel has been employed with the Province for over 30 years and is a highly educated, knowledgeable and well-spoken individual.[39]

Mr. Leibel was examined and cross examined over the course of four days. He provided me with much of the "full history, background facts and circumstances which led to the approval by the Council of the municipality of the amendments to the official community plan and zoning bylaws and subsequent concept plan(s) for the proposed Wascana Village development." Certainly his evidence was supplemented by many other witnesses that followed him to the stand, but he provided me with the essential framework to understand the evidence that was to follow.

From his evidence the following chronology emerges:

2001 – the RM hired John Wolfenberg to prepare a new Sherwood-Regina District Development Plan and Zoning Bylaw. There was no development planned for the Wascana Village area.

2005 - 2006 – Armin Preiksaitis and Associates prepared a new Development Plan (OCP equivalent) and ZB for the RM. Neither the OCP nor the ZB show any development planned for the Wascana Village area.[40]

February 5, 2010 – the RM submitted a new OCP and ZB to Community Planning. The OCP indicated no development in the Wascana Village area. The ZB rezones one quarter-section (owned by Marathon) as Country Residential 2 Hold.[41]

May 26, 2011 – the RM submitted a letter requesting Community Planning to comment on a draft OCP and ZB proposing to designate the Marathon and Chekay quarter-sections as country residential. The southern Wascana Village sites owned by Reeve Eberle are still zoned agricultural.[42]

October 2011 – the RM published a revised OCP and ZB on its website in preparation for a November 8, 2011 public meeting. This version of the OCP designates the Marathon and Chekay quarter-sections as residential area. The ZB shows the entire Wascana Village area as agricultural (having removed the old zoning from the previous draft).[43]

[39] Exhibit 34.
[40] Exhibits 39-40.
[41] Exhibits 43-44.
[42] Exhibits 52-54.
[43] Exhibits 56-57.

May 9, 2012 – the RM Council heard a presentation from GPDC and its representatives. The Council voted unanimously to have the RM's planner work with GPDC to incorporate the Wascana Village Block Plan into the RM's 2011 OCP.[44]

July 31, 2012 – the RM adopted amendments to the 2011 OCP. The amendment to the 2011 OCP designates the entire Wascana Village area as residential and adds a small commercial area designation at the south-east corner of Wascana Village. The ZB still lists the area as agricultural.[45]

August 27, 2012 – Community Planning returned the 2011 OCP unapproved to the RM by letter from Barry Braitman to Ms. Kunz. Attached to the letter was a checklist of concerns including:

- Deficiencies in the information on the bylaws and amendments submitted to the Ministry;
- Inadequate public advertising due to incorrect versions and maps on website;
- Concerns over whether landowners received written notice;
- Statements of Provincial Interest inadequately addressed;
- Not meeting expectations on collaboration and consultation with the City, provincial ministries and provincial agencies;
- Lack of proper discretionary use criteria;
- Various other concerns based on a preliminary assessment of the bylaws.[46]

September 13, 2012 – the RM re-submitted the 2011 OCP for approval.[47]

October 2012 – the RM's website is updated to include the current version of the OCP and ZB showing the entire Wascana Village area as residential.

February 22, 2013 – the Ministry issued a Notice of Decision that results in partial approval of the RM's 2011 OCP. The Minister also directs numerous changes to the 2011 OCP. The 1991 OCP continues to apply to the non-approved area.[48]

May 30, 2013 –Wascana Village is officially announced at a press conference.

July 24, 2013 – the 2013 OCP Amendments that amend the 1991 and 2011 OCPs are passed by Council following a public hearing, notwithstanding objections from the City and other stakeholders.[49]

[44] Exhibit 67.
[45] Exhibit 68-69.
[46] Exhibit 76.
[47] Exhibit 77.
[48] Exhibit 93.
[49] Exhibit 89-92.

August 28, 2013 – The RM submitted the 2013 OCP Amendments to Community Planning for approval.

November 6, 2013 – The Ministry received a subdivision application from Mr. Schmid on behalf of GPDC to subdivide phase 1 of the Wascana Village Development.[50]

December 16, 2013 – ADM Keith Comstock sends a letter to Deputy Reeve Probe returning the 2013 OCP Amendments for Wascana Village to allow for consultation through the MOU process between the RM and the City.[51]

December 27, 2013 – various representative from the RM and Community Planning meet to negotiate an approval of the 2013 OCP Amendments. The Developer needed some form of approval by years end to address business arrangements needed to continue the project. The RM and the Developer indicated that conditional approval was acceptable.[52]

December 31, 2013 – the Ministry issued a Notice of Decision that conditionally approved the 2013 OCP Amendments to accommodate Wascana Village. The conditions included the completion of a concept plan and subsequent amendments to the OCP and ZB within two years. During the interim period, the existing land use designations in the 1991 and 2011 OCP would remain in effect.[53]

January 29, 2014 – the Developer presented the RM with a draft copy of its Concept Plan as required by the December Notice of Decision.[54]

February 12, 2014 – the RM Council adopted the final Concept Plan presented by the Developer at the February 10, 2014 Committee of the Whole Meeting.[55]

February 20, 2014 – the RM submitted the Concept Plan to Community Planning for approval.[56]

March 17, 2014 – the RM's solicitor sent a letter to the Ministry requesting the conditional approval imposed by the December Notice of Decision be removed.[57]

April 14, 2014 – The Ministry returned the Concept Plan for Wascana Village to the RM to allow the RM to adopt it as per the PDA and to comply with the conditions imposed by the December Notice of Decision. Community Planning's reasons for rejection included:

[50] Exhibit 97.
[51] Exhibit 100.
[52] Exhibits 101-102.
[53] Exhibit 106.
[54] Exhibit 175.
[55] Exhibit 109.
[56] Exhibit 108.
[57] Exhibit 110.

- the Concept Plan was not adopted in accordance with the PDA;
- failure to comply with the condition imposed by the Notice of Decision;
- failure to consult with stakeholders; and
- Numerous infrastructure shortcomings including confirmation of a water source; the location and sustainability of the sewage treatment plan; traffic impacts; environmental impacts; pipelines and utilities running through the proposed area; and the need for community services.[58]

April 30, 2014 – the Ministry sent the Developer's consultants, Weston Consulting, a letter providing an update on the status of the subdivision application (submitted November 6, 2013) and detailing the outstanding issues which included:

- the plan of proposed subdivision did not meet the requirements of the Subdivision Regulations;
- copies of current land titles were needed;
- the interchange requirements with the South Regina Bypass needed to be addressed;
- school sites meeting the requirements of the school boards;
- transmission line easements were designated for public recreation;
- the requirements for appropriate setbacks and crossing of pipelines needed to be addressed;
- insufficient municipal reserve requirements;
- environmental impact considerations
- requirement for proper traffic impact study;
- confirmation of a potable water source;
- proper assessment of a wastewater treatment plan that also met the regulations;
- information regarding the provision of fire, police, EMS, solid waste disposal and recreational services;
- the negotiation of municipal servicing agreements be negotiated; and
- a drainage plan which meets the requirements of the Saskatchewan Water Security Agency.[59]

August 15, 2014 – the RM sent a letter to the Developer outlining the conditions that remained outstanding.[60]

August 21, 2014 – the RM wrote to the Ministry in support of rezoning and modification of some of the conditions imposed by the Minister.[61]

August/September, 2014 – the RM received correspondence from various stakeholders commenting on the 2014 OCP, which included, among others: SaskEnergy, the City of Regina,

[58] Exhibit 112.
[59] Exhibit 117.
[60] Exhibit 121.
[61] Exhibit 123.

the Ministry of Highways and Infrastructure, the Ministry of the Economy, SaskPower and the Saskatchewan Water Security Agency.[62]

September 10, 2014 – the RM adopted the 2014 OCP.

September 19, 2014 – the RM submitted the 2014 OCP to the Ministry for approval.[63]

September 25, 2014 – the Ministry responded to the RM's letter of August 21 and reaffirmed the requirements for approval of a Concept Plan.[64]

November 5, 2014 – the Ministry sent a letter to the Developer's consultant, Weston Consulting, providing an update and comments regarding their subdivision application.[65]

C. Facts and Circumstances Leading to Approval(s) of Wascana Village

The proposal for the Wascana Village Development came quickly on the heels of the RM being unsuccessful in landing what would have been a major development for the entire region. The proposed development that was lost was a tire re-treading facility to be owned and operated by Kal-Tire. The loss of the Kal-Tire development was significant both in terms of its magnitude and its timing in relation to the Wascana Village proposal. This point was made by a number of witnesses and reflected in the written submission filed on behalf of the RM:

> The Wascana development proposal was presented to Council shortly after Kal Tire abandoned their proposed major development in the RM and relocated the development to Alberta. This represented a significant loss to the RM and the province.[66]

The majority of Council members had been elected on a pro-development platform. There is little doubt that the loss of the Kal Tire development was a major disappointment to them.

This disappointment was later reflected in an email from Deputy Reeve Probe to Ms. Kunz dated May 8, 2013. Deputy Reeve Probe was responding to an email from Ms. Kunz wherein she advised that GPDC's investors had concerns about the availability of potable water for the Development. The email reads as follows:

> I thought they had all the answers before with regards to water and sewer. We as a council have always been up front with our capabilities to service a large scale development. This is another one for the province to sit back and watch us lose another investor !!!![67]

[62] Exhibits 350, 352, 353, 355, 357, 359 and 361.
[63] Exhibit 124.
[64] Exhibit 131.
[65] Exhibit 371.
[66] Written Submission of the RM dated November 27, 2014 at para. 29.
[67] Exhibit 158.

The Developer's first official contact with the RM was on Monday May 7, 2012, when he asked to be added to the agenda for the Regular Meeting of Council on May 9, 2012.[68] The concept for Wascana Village was not mentioned in the Committee of the Whole Meeting that took place on Monday May 7, 2012. Reeve Eberle entered his first agreement with the Developer on the next day, May 8, 2012. The Developer and its representatives were afforded almost an hour and half to make their presentation that occurred at the May 9 Regular Council Meeting. It should be noted that the RM's Director of Planning was not informed of the Proposed Development until a few hours before the presentation – something he testified was not normal practice.[69]

Toward the conclusion of the May 9, 2012 Regular Meeting of Council, the following resolution was passed unanimously:

Reeve Eberle declared pecuniary interest and left the Chair at 9:45 p.m.

Deputy Reeve Tim Probe assumed the Chair at 9:45 p.m.

270/12 <u>GREAT PRAIRIE DEVELOPMENT CORPORATION</u>

COUNCILLOR JIJIAN: THAT Director of Planning Blaine Yatabe, work directly with representatives of Great Prairie Development Corporation regarding their proposal for a Block Plan of their lands to be developed in the RM of Sherwood No. 159, to ensure inclusion into the Official Community Plan, prior to introduction of second reading. CARRIED UNANIMOUSLY

Reeve Kevin Eberle re-assumed the Chair at 9:46 p.m.

The RM had never in its history considered a proposal for a high density residential development of this magnitude but, in a matter of hours, without any study or professional reports from their staff, they were behind the proposal. As is evidenced by the resolution above, the elapsed time between the motion being tabled and then voted on was roughly one minute. The vast majority of Council was anxious to see development and this was a development on a grand scale. However, there were serious challenges to such a development, the greatest of which being approval of a new OCP and securing a proven water source.

From May 9, 2012 until August, 2014 the RM, in concert with the Developer, attempted to secure the approval of the Ministry without first satisfying most of these serious challenges facing the Development and never satisfying the single biggest impediment, the location of a water source. Enormous frustration with Community Planning and the Ministry in general was experienced by these hardworking Council members. However, I find that frustration was, for the most part, a result of Council's failure to (1) recognize that Community Planning and the Ministry had an obligation to protect the public by ensuring all proper conditions were met before approval was given; and (2) to recognize that the ultimate responsibility for these conditions lay with the Developer.

[68] Exhibit 321.
[69] B. Yatabe Transcript [October 24, 2014 – p. 73-74].

As highlighted previously, the Ministry issued a Notice of Decision on December 2013 that conditionally approved the 2013 OCP Amendments to accommodate Wascana Village. The conditions imposed on the approval of the 2013 OCP amendments included the completion of a concept plan (the "**Concept Plan**") and subsequent amendments to the OCP and ZB within two years. Attached as Appendix A to the Notice of Decision was a list of matters that had to be addressed in the Concept Plan. The said Appendix A reads as follows:

> Appendix A: Matters to be addressed in Concept Plan
>
> The decision on Bylaws 20/13 to 23/13 [the 2013 OCP Amendments] was approval, conditional on the further amendment to adopt a concept plan under PDA for the Wascana Village lands. In order to meet the PDA and regulations the concept plan must address the following issues:
>
> - The availability of an adequate source of water with volume and quality sufficient for the intended development including firefighting must be confirmed and a plan be established for the infrastructure required to the satisfaction of Saskatchewan Water Security Agency (SWSA) and any other agency party to the provision of water.
>
> - Sewage treatment is proposed as a "state of the art" Membrane Bio-Reaction system. While this has promise, confirmation is needed of its suitability in our climate, sustainability of operating costs, provision of backup for maintenance, odor impacts upon full build-out of the community, disposal of sludge etc. This will need to be addressed to the satisfaction of SWSA.
>
> - If an alternative system is to be considered this should be documented in the concept plan, with confirmation from SWSA and any other agency party to the provision of sewage service that the treatment proposed is acceptable before it can be determined the site is suitable for large scale urban development based on this system.
>
> - The proximity of the sewage treatment plant to residential development will need to be addressed to the satisfaction of SWSA who will consider its policy of 600 metre setback from residential areas.
>
> - Road impacts for the intended 14,000 population will be significant and need to be addressed. A Traffic Impact Study will be required, and solutions to manage traffic to an acceptable level of service established, along with acceptance of all affected parties including the RM, City, developer and Ministry of Highways and Infrastructure (MHI) regarding these impacts, traffic solutions and the associated costs.
>
> - MHI has stated no direct access will be allowed to the bypass from adjacent residential or commercial lands. The concept cannot be based on an at grade intersection with the bypass, with either lights or a stop sign. The concept plan will

need to eliminate this connection and confirm how traffic will alternatively be handled, or confirm a solution for a suitable connection and costs has been worked out with MHI.

- Burrowing owl nesting has been identified on the site. The concept will need to demonstrate how this will be protected, to the satisfaction of the Ministry of Environment.

- Drainage of the site and downstream impacts will need to be confirmed and the concept include how these impacts will be managed to the satisfaction of SWSA, Sherwood Conservation Area Authority, the City and other stakeholders affected by drainage.

- There are numerous electrical, pipeline and other utility transmission corridors traversing the lands. Protection or relocation of these corridors, and suitability of adjacent land uses including setbacks to minimize risk should be identified and confirmed acceptable to the affected utility agencies and the Ministry of Environment.

- Fire service needs to be addressed and the concept plan needs to identify how fire protection will be met. If a new fire hall is required this should be identified.

- The concept plan will need to address community services including the location and possible timing of school, as well as confirmation arrangements for school service in the interim, to the satisfaction of the school division. The need and provision of other services such as solid waste, a community centre, and library, also need to be addressed.

- The concept plan will be coordinated with the subdivision application for Wascana Village which applies the MOU process to address inter-municipal cooperation. The list of issues to be addressed in the concept plan is based on the understanding of the development considerations identified through the subdivision review to date, and as the subdivision review continues, other issues may be identified which need to be addressed in a concept plan.

[emphasis added]

Despite having two years to meet the above noted conditions, in February 2014, roughly six weeks later, Council approved a Concept Plan that essentially satisfied none of the conditions. They did this knowing it would probably not be accepted and that they would have to 'make it political'. Mr. McCullough, the new CAO of the RM, observed that this was not done with full due diligence and this is conceded in the RM 's final written submission. When asked about the circumstances around Council's adoption of the Concept Plan by my Counsel, from what he understood to have occurred, Mr. McCullough offered the following:

> **A** First desire would always be that there's opportunity to perform due diligence on a -- on a proposal such as a concept plan for Wascana Village. Ideally, and I used to drive the bus on planning matters in Brandon and area, 30 to 60 days would be ideal for a document of that size to review prior to and -- and have an opportunity to work with the proponent to tweak it or improve it if necessary before presenting for approval.

I find as a fact that the Concept Plan was approved in complete haste without much, if any, due diligence. I further find that the idea of making the matter 'political' if the Concept Plan was not accepted was a failure on the part of the Council to recognize the Ministry's duty to protect the public good by ensuring that these conditions were met.

Finally, on August 15, 2014, the RM identified, for the first time, who was ultimately responsible to satisfy the conditions imposed by the Ministry – the Developer, and not the RM. I consider the August 15 letter to be a pivotal communication authored by the new CAO Mr. McCullough that satisfies me that the RM is now on the 'right track' of identifying and directing itself in relation to the Wascana Village Development.[70]

I was very surprised to learn at the Hearing from Mr. McCullough that the RM had never performed a cost/benefit analysis for the Wascana Village Development.[71] Mr. McCullough appeared to be somewhat surprised himself that this had not been done when he assumed his duties earlier this year. In other words, the RM has never taken the most basic step of determining whether the Proposed Development will ultimately be economically beneficial to the citizens of the RM. As Mr. McCullough indicated, revenue from the increased tax base must at least equal a cost of servicing the Development.[72] This lack of a cost/benefit analysis fortifies my observation that the Council threw their support behind Wascana Village at the first opportunity and with little, or no, study or consideration.

While I am satisfied that the Councillors who testified before me were, for the most part, elected on a pro-development platform, I am not satisfied that the Council has broad support for a large scale residential development in the RM. In that regard, I was provided with two pieces of evidence. First, in August 2013 the Council was presented with a 'petition' of sorts signed by approximately 80 residents and ratepayers asking a number of questions and making suggestions. Amongst the questions and concerns raised were:

> The lands designated for Wascana Village are currently or were previously owned by Reeve Eberle of the RM and other family members. In the absence of a proper analysis of the desirability/feasibility of such a development in this location, there are serious concerns regarding the extent to which the wider public interest has been considered in RM council's actions in this regard.

[70] Exhibit 121; Appendix 17.
[71] R. McCullough Transcript [November 19, 2014 – p. 111-114].
[72] R. McCullough Transcript [November 19, 2014 – p. 169-170].

…

> 1(b) Why are OCP/Zoning Bylaw amendments to accommodate Wascana Village being initiated that are contrary to Provincial directives, and in advance of the completion of detailed studies regarding water, sewer, transportation, and integration generally with City expansion? What are the financial implications of this proposal for the RM of Sherwood, and will an independent study be done in this regard?
>
> …
>
> 2(b) Suspend all current activity regarding the Wascana Village proposal, pending resolution of governance issues for the Fringe and approval by the Province of OCP/Zoning Bylaw policies for this area.[73]
>
> [emphasis added]

Having become very familiar with the full history of the Development, I find that these questions were eminently reasonable at the time and remain so to this day. The petition was received by Council but no formal response was ever provided, nor was a cost/benefit analysis ever performed. Efforts were however expended to make sure the Developer was provided with a copy of the petition.[74]

Second, earlier in 2013, the RM hired Redworks Communications who in turn engaged Fast Consulting to conduct a series of interviews to gauge the reaction of 'Key Informants' to the RM's OCP. Fast Consulting prepared their report based on those interviews. At page seven of the report it was noted:

> Participants perceive a strong interest in and demand for rural residential properties. While there was no indication of support for creating suburban style housing tracts in the RM, the development of acreage properties was strongly supported. [75]
>
> [emphasis added]

Once again, I heard no evidence of support for this type of development in the RM other than from the Councillors who, in my judgment, supported it primarily because it was a substantial development.

I was also surprised to learn from Mr. McCullough's testimony that the RM had done no due diligence with respect to the Developer prior to their decision to throw their full support behind his Development for the last several years. Under Mr. McCullough's leadership, such due diligence is

[73] Exhibit 171
[74] Exhibit 171.
[75] Exhibit 319.

now being performed. When asked about his concerns regarding the Developer, Mr. McCullough offered the following:

> **A** …This one did not sit right with me.
>
> **Q** Why?
>
> **A** You don't walk into a municipality and the very first conversation I had with Mr. Schmid went from a proposed 800-acre development, 15,000 person build out, to in the next breath he was telling me about, no, Ron, it's 2,300 acres and 60,000 people. Now, at the crux of it I see nothing wrong with that, even at its location, but you don't go from zero to hero in two breaths. You better have your stuff together if you're going to talk to me like that.
>
> So I said stop, I knew nothing about your 2,300 acres and 60,000 people, we're still dealing with 800 acres and 15,000 people, which the RM wants and I support. We have to make sure it's done correctly. So what twigged me immediately, and it was within the first week on the job was -- and I call it my instincts suggested, and it's an Alberta and Manitoba term, big cattle hat, no cattle.[76]

I am left to wonder what would cause good, honest, hardworking Councillors to pursue the Wascana Village Development through the torturous years I have outlined in my chronology above. I am left to wonder what part Reeve Eberle played with the other Councillors during this period of time. I am also left to wonder what part the Developer and the RM retaining the same lawyer throughout much of this time period played. While answers to these questions are outside the scope of my Inspection Mandate, I am left to conclude that the Council blindly (no costs benefit analysis, no mandate, no due diligence) pursued the Wascana Village Development for the simple sake of development.

Mr. McCullough was hired as the new CAO for the RM in July 2014.[77] Mr. McCullough has a wealth of administrative experience as demonstrated by his resume.[78] Since being hired, he has brought a good deal of order and direction to the RM. He caused an Administration Bylaw to be passed by Council,[79] has gotten Council to approve an Organizational Chart[80] and established a written position description for his role as CAO.[81] None of these documents existed prior to his hiring.

I was particularly impressed by his candid assessment of Wascana Village and his noting that there had not been full due diligence on documents submitted to the Ministry, a cost-benefit analysis had not been performed and no due diligence had been performed regarding the Developer. He further

[76] R. McCullough Transcript [November 19, 2014 – p. 156-57].
[77] Exhibit 368.
[78] Exhibit 365.
[79] Exhibit 366.
[80] Exhibit 367.
[81] Exhibit 368.

impressed me with how he would have dealt with conflicts of interest that might arise under his watch. I assess him as a tough, intelligent, no nonsense leader. While this is not intended as a criticism of the RM's previous CAO, this is precisely what is needed by this RM.

When Mr. McCullough discovered that the RM was represented by the same lawyer who also represented the Developer, he confirmed that the RM's solicitor had ceased acting for the Developer.[82] Mr. McCullough offered how he would have addressed the situation had he been with the RM at the time:

> **A** …My advice as CAO, had I been on the job at the time, would be no, there must be clear lines of -- of representation and -- and you are either legal counsel for the municipality or you are legal counsel for the developer, but not both. That's a standard I've always practiced. I appreciate in small communities crossover happens, but there needs to be, in my opinion, very clear delineation between the two.[83]

When asked about his letter to the Developer of August 15, 2014 regarding the conditions imposed by the Ministry he replied:

> **Q** Now I'm reading the letter, I get the impression that you put the ball back in Great Prairie's court, that they should satisfy these conditions?
>
> **A** Absolutely correct. And to explain a little bit of timeline in between July 31, we had the teleconference, Mr. Schmid had very high expectations, and I'm going to use the words abdicating responsibility, believing the municipality should do all this stuff.[84]

I am satisfied that the RM is, and will be, well served by its current administration under the leadership of Mr. McCullough.

D. Relationship between the RM and Community Planning

As mentioned previously, the first witness to be called before me was Ralph Leibel, the Director of Community Planning. Mr. Leibel testified before me for four days and many exhibits were entered through him. He provided me with a comprehensive chronological review of the facts, documents and circumstances involving Wascana Village. I found him to be an honest and knowledgeable witness.

Considerable evidence was presented before me about the dysfunctional relationship between the RM and Community Planning. The majority of Councillors blamed Mr. Leibel personally for this relationship. I understand that the Council was frustrated with the reviews and responses they were getting from the Ministry, and specifically Community Planning, to their numerous failed attempts

[82] R. McCullough Transcript [November 19, 2014 – p. 143-45].
[83] R. McCullough Transcript [November 19, 2014 – p. 145-46].
[84] R. McCullough Transcript [November 19, 2014 – p. 153-54].

at securing unqualified approval of their OCP and by necessary implication Wascana Village. But, I find those responses and reviews were entirely reasonable and lawful.

Community Planning prepared and presented these reviews with the best interests of the public in mind. I conclude that the Councillors wrongly chose to personify and target their frustration on Mr. Leibel. In their minds, he was the bearer of all bad news related to their OCP and Wascana Village. He was readily accessible to them, so in this regard they chose to 'demonize' him.

Mr. Leibel's relationship with the key Council members at the RM has deteriorated to the point where he has removed himself from direct involvement with the RM wherever possible. I was informed that Community Planning has devoted another employee to deal with the day-to-day planning and development matters within the RM.

The dysfunction between the RM and Community Planning has resulted in a notable distrust on the part of Community Planning. In the RM's 2014 OCP, the usage of certain terminology has led those at Community Planning, specifically Mr. Leibel, to believe that the RM may be trying to circumvent the conditions imposed in the December 2013 Notice of Decision in order to advance Wascana Village. The RM's consultant planner, Ms. East, testified to this matter and provided a full explanation for the decision to use the different terminology in relation to the term 'concept plan'. I am confident that the RM still intends to honor the conditions imposed by the Ministry. I therefore find there is no basis in fact for Mr. Leibel's suspicion.

E. Findings regarding other Preliminary observations noted in my Interim Report

In my Interim Report dated July 10, 2014 I had identified a number of preliminary observations that had yet to be fully investigated at that time. In his submission, my Counsel suggested that my jurisdictional limitations may preclude me from commenting on certain matters. This suggestion was made in light of the evidence that was adduced on those matters. In result, I am satisfied that certain items identified in my Interim Report are unrelated to Wascana Village, as demonstrated by the evidenced adduced throughout the Hearings. In such instances I have largely adopted the reasoning of my Counsel.

My findings in regard to the matters identified in my Interim Report are as follows:

1. Legal Counsel

In my Interim Report I noted the following:

> 33. Resulting from my review of the Documents, it has become apparent that the RM and the Developer have retained the same legal counsel throughout a significant portion of the relevant time period. While there may be no specific prohibition of this practice, it may not be desirable for the RM, or any municipality for that matter, to retain legal counsel that is also advancing the interests of a land developer actively engaged in development within the RM I intend to investigate this and provide a report after hearing all the evidence and submissions

On this issue I conclude as follows:

Commencing July 9, 2012, at the latest, the RM's solicitor began acting for both the Developer and the RM.[85] This concurrent representation persisted until some point in the spring of 2014, when the RM's solicitor is purported to have terminated his retainer with the Developer. If the RM and the Developer had entirely congruent interests, retaining the same counsel could in theory be permissible. However, at some point around the commencement of Mr. McCullough's employment with the RM there was a recognition that the Developer's interests were not completely compatible with those of the RM. This point is aptly reflected in the letter from the RM to the Developer dated August 15, 2014, a piece of correspondence that would have been difficult for the RM to produce had their legal counsel still been representing the Developer at the time of its composition.[86]

I would also note that the RM's solicitor prepared two legal opinions during the relevant time period, initially one for Council generally, and later, one for Reeve Eberle specifically. It cannot be ignored that the crucial April 2013 Opinion was provided while the RM's solicitor was in this concurrent role.

In summary, while I would not necessarily conclude that such a practice must be avoided in every case, having regard to the contentious nature of the Wascana Village Development and the active role the RM's solicitor had in relation to negotiations with the Ministry, the concurrent legal representation that existed during the time period described above should not have been permitted to continue.

2. <u>Road Closure</u>

In my Interim Report I noted the following:

> 34. As evidenced in the March 12, 2014 Minutes of the Regular Meeting of Council, it appears the RM has developed a 'precedent' of transferring municipal streets and roads which are neither needed or in use by the RM to landowners in the RM without consideration. It should be noted that the roadway subject to the March 12, 2014 Council Resolution was situated on a quarter section of land directly adjacent to the City of Regina and was transferred to a member of Council. At this stage, the 'precedent' is cited only as a potential concern and a full report or recommendation on such will be reserved for my final report.

On this issue I conclude as follows:

While the road closure for the benefit of the Councillor was clearly relevant to the management, administration and operation of the RM, in the end result there was no evidence to establish that the road closure was related to the Wascana Village Development. Following from this, further

[85] Exhibits 203-205.
[86] Exhibit 373.

commentary on this matter is precluded by my jurisdiction as promulgated by the Terms of Reference.

3. Council Procedure Bylaw

In my Interim Report I made this preliminary observation:

> 35. Certain allegations have also highlighted potential deficiencies in the manner in which delegations are granted standing to give presentations to the RM Council particularly in relation to Wascana Village. At this early stage and without the advantage of a full investigation, the purported deficiencies include the potential absence of safeguards to ensure delegations are only added to the Council's agenda after first having complied with the procedures put in place by the RM of Sherwood Council Procedure Bylaw. In addition, there are concerns in relation to the timing of delegations being added to the Council agenda, and whether this practice satisfies the requirements set out in the RM of Sherwood Council Procedure Bylaw.

The relevant matters at issue in relation to the *RM of Sherwood Council Procedure Bylaw*[87] (the "**Procedure Bylaw**") were outlined in full by my Counsel in his submission, which reads as follows:

The evidence demonstrated a number of instances that the Procedure Bylaw was relaxed for the benefit of the Developer. It should be noted that *RM of Sherwood Council Procedure Bylaw* treats delegations and submissions to Council differently. The latter are subject to compliance with certain conditions that must be met one week in advance of the next Council meeting that the submission is to be considered. In contrast, the Procedure Bylaw imposes no time limit on delegations to submit the required information.

In relation to the May 9, 2012 presentation by the Developer at the RM Regular Meeting of Council, there was evidence that the Developer was not added to the agenda until two days prior to their appearance.[88] Even assuming the Developer can only be interpreted as a delegation, and not engaging the standards applicable to submissions, it may not have been advisable for the RM to permit a delegation to be added to the agenda just two days prior to a Regular Meeting of Council. This concern may be heightened having regard to the fact that this delegation was afforded an hour and twenty-four minutes for their presentation on what has been purported to be a project valued at roughly $2 billion dollars.

Further concerns over compliance with the Procedure Bylaw arise in relation to the June 24, 2013 Special Meeting of Council. There was evidence adduced that the Developer had to submit certain materials to the RM one week in advance of their appearance before Council so that the materials could be properly circulated for consideration by Council.[89] That these materials had not been

[87] Exhibit 314.
[88] Exhibit 321.
[89] Exhibit 164.

submitted to the RM by Tuesday June 18, 2013 (6 days prior to the next Council meeting) was not in dispute. Despite this, a delegation consisting of GPDC, Weston Consulting and Morrison Hershfield was permitted to make a presentation to council on June 24, 2013.

Lastly, evidence was adduced that GPDC did not submit the final version of its Concept Plan to the RM until the mid-afternoon of February 10, 2014. This same Concept Plan was approved by Council at the February 10, 2014 Committee of the Whole Meeting[90] – a decision that was affirmed by resolution 089/14 at the February 12, 2014 Regular Meeting of Council.[91]

I find that in all the foregoing instances, Council did not adhere to the Procedure Bylaw. I find this lack of strict adherence was motivated by an almost unanimous desire to see the Wascana Village Development succeed. In his written submission, Reeve Eberle noted that the Procedure Bylaw must provide for some flexibility and pragmatism. While I largely agree, I find that the allowances granted to the Developer exceeded mere flexibility and extended beyond pragmatism.

4. Conflict with the Province and City of Regina

In my Interim report I made this preliminary observation:

> 36. The Documents and Interviews have indicated that an adversarial relationship has developed between the RM and both the City of Regina and Province of Saskatchewan in relation to Wascana Village. While some discord between bordering municipalities and cities is common-place, the evidence adduced thus far appears to indicate the level of conflict is beyond that which could reasonably be expected. The purpose of this interim report and Inspection as a whole is not to attribute blame for this conflict. I only highlight the issue at the present time, while noting that the issue will be addressed in my final report.

My finding is as follows:

As previously discussed, (see 'The RM and the City of Regina') having regard to my mandate under both the Inspection and Inquiry, my jurisdiction to comment on matters internal to the Province and City of Regina is limited. Having said that, there was a wealth of evidence that demonstrated the dysfunctional and often adversarial relationship between the RM and both the Province and City of Regina. The preliminary observation made in the Interim Report that the level of conflict was beyond that which could reasonably be expected appears to have been confirmed throughout the course of the Hearings. However, due to the constraints of my mandate I may not comment further on this.

[90] Exhibit 264.
[91] Exhibit 109.

5. Decision to withdraw from the Sherwood-Regina DPC

Earlier herein, I reviewed Council's decision to withdraw from the DPC. While I initially suspected that this might be linked to clearing the way for Wascana Village, the evidence did not bear out this suspicion. I conclude that the decision to withdraw from the DPC was as a result of Council's desire to modernize and equalize their relationship with the City of Regina and was not directly related to Wascana Village. As there has been no demonstrated connection to Wascana Village, I must withhold further comment as it is not within my mandate to comment further.

6. High Employee Turnover

These were my preliminary observations:

> 38. My preliminary observations have also resulted in a concern over the high turnover of RM administrators and employees during the relevant time period. Adding to this concern are certain allegations by former employees of poor treatment that they received while in the employ of the RM which related in one way or another to Wascana Village. Again, I stress that these allegations are only that at this point and I intend to more fully investigate these matters throughout the later stages of the Inspection.

I conclude that:

The relatively high turnover of Council members and staff at the RM was well documented in the evidence. Some of this turnover was inevitable and some due to the demanding work that resulted from understaffing, however, I find that matters related to Wascana Village were also a contributing factor. The resignation of Ms. Kunz on March 27, 2014 and Councillor Wilton on May 1, 2014 were in part related to the Development. I will reserve further comment on these matters for the Inquiry section of my Report.

7. Council Decisions Made Outside of Council Meetings

I noted the following in my Interim Report:

> 38. A number of individuals associated with the RM including staff members and former Council members have called into question whether certain RM business that relates to Wascana Village is discussed and largely decided outside of Council Chambers. Section 119 of the Act, subject to certain exceptions outlined in section 120, requires that RM decisions must be adopted by resolution or bylaw at a duly constituted public meeting. Compliance with section 120 requires more than the mere rubber-stamping of decisions made informally outside of public meetings. Resulting from the allegations made and as required by my mandate I intend to more fully investigate if this alleged practice was in any way employed by Council members and if so, to what extent.

I conclude as follows:

There was no direct evidence adduced that Council, or certain members of Council, held meetings outside of Council Chambers to pre-determine matters coming before Council. Despite this absence of evidence, certain resolutions were passed at Council meetings with shockingly little debate. These matters were often of significant importance to the RM. While this caused me some concern, other than noting the occurrence, the absence of evidence on this matter precludes from reaching any conclusion as to its cause.

8. Division 5 Seat Vacancy

I made the following preliminary observations in my Interim report:

> 39. On May 8, 2013 the resignation of former RM Council member David Wellings was accepted pursuant to Resolution 268/13. On this same date, it was further resolved that a by-election for Mr. Wellings Division 5 seat would be held in October 2014 concurrently with the election for the even numbered Divisions. The Council Minutes also indicate that the RM intended to seek further legal advice in relation to this matter. Resulting from this series of events the Division 5 seat will have remained vacant for a full eighteen months. I consider it necessary to fully investigate the rationale behind the RM's decision to leave a council seat vacant for what would appear to be an inordinate amount of time and whether this has any connection to Wascana Village.

I can report as follows:

Mr. Welling's resignation was accepted on May 8, 2013, leaving his seat vacant until this past October when Rod Culbert took office by acclamation. As evidenced by the minutes of the May 8, 2013 Regular Meeting of Council, legal advice was to be sought in relation to the decision to have the seat remain vacant until the October 2014 election. Whether or not legal advice was actually obtained, it is sufficient to note that the decision to leave the seat vacant was unaffected.

The dominant theme from the Council members that testified to this matter was that the decision was made having regard to the costs of an election. Without further information as to the costs to run a one-division election, it is impossible for me to determine the validity of this position. There is insufficient evidence to determine one way or another whether this decision was motivated in whole or in part to preclude any opposition to Wascana Village.

F. Mechanisms to Identify Conflicts of Interest

The mechanisms in place at the RM for the identification, disclosure and addressing of pecuniary interest were, and are, materially insufficient. This comment should not be construed as a criticism of the RM, but of the mechanisms, or lack thereof, that are in place in municipalities throughout the Province. The noted insufficiency in mechanisms is likely exacerbated by the RM's proximity to the City and the significant land values and economic opportunities within the RM.

Currently, the 'mechanisms' in place at the RM in include the guidance contained within the Act, some very basic materials available through Municipal Relations that are no more than a user-friendly re-statement of the Act and the independent legal advice that the RM retains as needed.

The various shortcomings in the current conflict of interest regime governing municipal councillors are outlined in full in the Recommendations section in Part IV of my Report. Due to the overlapping nature of my Inspection Mandate and my mandate under the Inquiry, my list of recommendations is appropriately placed at the conclusion of my Report as it addresses both systemic inadequacies and recommendations to redress the specific conduct that was at issue before me.

III. INSPECTION – CONCLUSION

In summary, the RM's unabashed endorsement of Wascana Village has come about as a result of a number of factors. Losing the Kal-Tire development was a major blow to the RM and a significant lost opportunity. The importance of Wascana Village arriving on the scene shortly thereafter cannot be understated. The majority of the Council was and are proponents of a pro-development agenda and with the arrival of Wascana Village, so too came an opportunity for redemption.

Much evidence was given that a new OCP is one of, if not the most, important goals of this Council. Shortly after first hearing the initial Wascana Village proposal, and without the benefit of any discussion, Council unanimously decided to amend their OCP to include the Development. The inclusion of Wascana Village in the OCP has served to make the RM's OCP controversial in the eyes of a number of key stakeholders because of the mass implications of the Development. The foregoing is not to say that Council should have chosen not to pursue the Development, but only that its inclusion in the OCP has likely contributed to difficulties the RM has experienced in relation to OCP approvals.

A number of Council members testifying before me stressed that Wascana Village was not merely development for developments sake. However, without the completion of even an initial cost-benefit analysis, I fail to understand how those Council members, or anyone for that matter, could be confident in the net benefit of the Development. That such a study was not initially performed may be excusable, however, once prompted by a concerned group of ratepayers to perform such a study, I cannot see how Council could have failed to see the utility in the exercise.

Council's decision in February 2014 to submit what was conceded to be a clearly deficient Concept Plan to Community Planning demonstrates a failure to consider the wider public interest. Council's assimilation with the Developer's intention to make the matter political was a luxury not afforded to the RM by virtue of its broader mandate. Unlike the Developer, the Council owes a duty to keep the best interests of the RM in mind.

A number of witnesses, in their testimony before me, suggested that the paternal approach to planning and development in Saskatchewan should be decentralized by granting further independence to the municipalities. The RM's decision to fully endorse a Developer without

performing any due diligence, and an estimated $2 billion dollar Development,[92] without performing a cost-benefit analysis or securing a water source does not weigh in favor of such a recommendation.

Throughout the course of my Inspection, the RM has shifted its position in relation to the Developer to the point that clear lines of demarcation have now been drawn as to the differing responsibilities of the RM and the Developer. This has no doubt been aided by the decision that was made to have the RM and the Developer cease sharing legal representation. As noted, I find that Mr. McCullough's contributions in this respect have also been significant. From his testimony, Council too may have refocused its understanding of the differing roles of the RM and the Developer as they relate to advancing the Development.

Other than noting that I have found the mechanisms in place for the identification, disclosure and addressing of pecuniary interests insufficient, I will reserve further comment for my recommendations outlined in Part IV of my Report.

[92] D. Schmid Transcript [November 5, 2014 – p. 136-37].

PART III - THE INQUIRY

I. BACKGROUND

A. Interim Report – Jurisdictional Limitation

As highlighted earlier, I had initially anticipated proceeding with the Inspection in accordance with the limitations imposed by my Terms of Reference associated therewith. However, with the allegations that began to surface throughout the early stages of the Inspection, I paused the proceeding and submitted an Interim Report to the Minister in which I requested an expanded mandate to investigate and report on conduct.

As I have stressed, the allegations and documents that had raised issues around conduct were at that time untested, unsworn and in relation to documents that had not yet been subject to the benefit of explanation. This point was stressed throughout the body of my Interim Report, examples of which include:

> 14. In view of these allegations I am recommending to the Minister that he issue a new Order for an Inquiry under section 397 of the Act. It is important to reiterate that at this stage, these are merely allegations which have not been proven. Reeve Eberle will have the right to challenge these allegations should the Inquiry Order be issued. Details of the allegations have been withheld from this report in order to avoid unfairly prejudicing Reeve Eberle. If the Inquiry proceeds, details would be made available to him through the Terms of Reference and as the Inquiry proceeds. This will enable him to make a full response to any allegations of misconduct, including breaches of the Act, his oath of office, fiduciary duties, common law duties or the Council Code of Ethics (the "Code of Ethics").
>
> …
>
> 19. I now recommend issuing such an order to ensure the public interest is served by a comprehensive investigation, as well as to provide a fair opportunity for Reeve Eberle to respond to these allegations.[93]

The necessity to pause the Inspection and obtain an expanded mandate was based on my limited jurisdiction under s. 396 of the Act – the section authorizing the Inspection. At this point it is important to understand the differing scope of my jurisdiction under the Inspection which has been reviewed in the preceding section, and my expanded jurisdiction under the Inquiry.

The Inspection Order enabled me to investigate the general decision-making process of the RM's Council as it related to the Wascana Village Development. This is because s. 396 expressly authorizes an inspection to include "any matter connected with the management…of any

[93] Appendix 3.

municipality" and there is a viable argument that the role and purpose of the members of Council is to engage in the management of the municipality.

However, s. 396 cannot be relied upon to substantiate an investigation into the specific conduct of one or more members of the RM's Council. This is because s. 397 of the Act expressly authorizes the Minister to commence an inquiry to investigate the conduct of a member of council.

Given this distinction, once I became aware of the allegations that were being made as to the specific conduct of certain council members, it was incumbent on me to either forgo further investigation of those allegations or seek an expanded mandate. Consequently, the Minister issued an Inquiry Order which authorized me to investigate and report on the conduct of the members of the RM's Council.

Before addressing the conduct that was at issue before me, it is necessary that I first outline Reeve Eberle's pecuniary interest, as his conduct is necessarily at issue because of the pecuniary interest(s) he had during the relevant time period. Next, I will set out the standards that inform my assessment of conduct. Following which I will assess Reeve Eberle's conduct and provide my conclusions.

II. REEVE EBERLE'S PECUNIARY INTEREST

The issues and/or concerns around Reeve Eberle's conduct are entirely dependent on whether he had a pecuniary interest in relation to the matters that he was involved in. As such, his conduct cannot be analyzed without understanding the nature, content and duration of his pecuniary interest. What follows is a summary of the matters that Reeve Eberle had, or has, a pecuniary interest in throughout the time period at issue.

A. District Planning Commission Boundary

The DPC boundary is important because of the effect it had on the property of landowners in the RM. The DPC mandated that all planning decisions made in relation to lands within its boundary were subject to the approval of the City. From 1958 until it was dissolved in April of 2012, the DPC boundary included the entire RM of Sherwood. Consequently, the City had an effective veto power over the entire RM's development plans. Therefore, it is understandable that a landowner would want their lands excluded from this restrictive area once negotiations began as to its reduction.

Starting at some point around 2007, the RM began negotiating with the City to reduce the DPC boundary. In November 2007 Councillor Jijian proposed a motion to send forward a boundary proposal that excluded the area that eventually became designated as Wascana Village.[94] While a Council member, Mr. Chekay eventually became active in advancing a similar boundary that would exclude his lands. As a result, the RM had Merrilee Rasmussen, Q.C. prepare an opinion that concluded that he had violated the Act and should be disqualified as a councillor.[95] Mr. Chekay then had his lawyer prepare an opinion which reached the opposite conclusion (on the premise that there

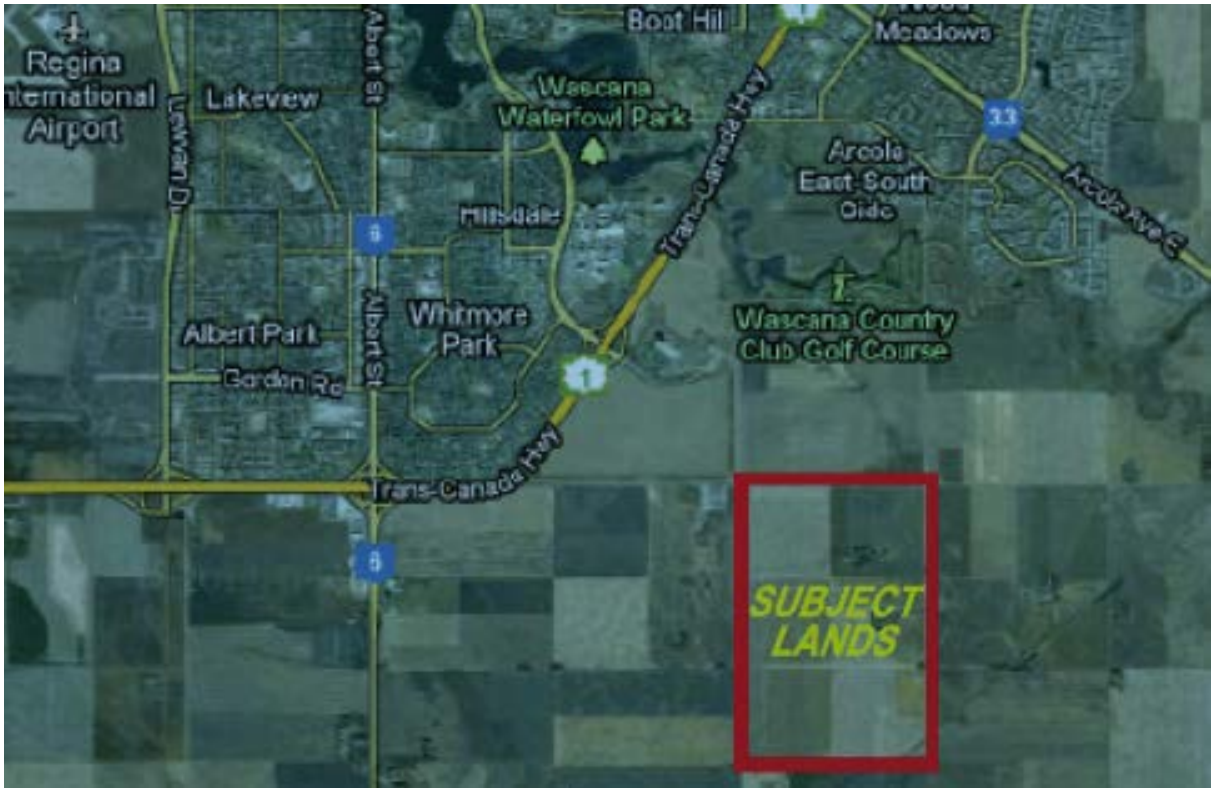
[94] Exhibit 324.
[95] Exhibit 229.

was no evidence that exclusion from the DPC boundary would increase the value of Mr. Chekay's lands).[96]

On September 8, 2010, Reeve Eberle replicated Mr. Chekay's earlier action by tabling a DPC boundary that excluded his lands.[97] The issue surrounding the boundary subsequently became irrelevant as the DPC was dissolved. I also accept that Reeve Eberle may not have been aware of the conclusions outlined in Mrs. Rasmussen's opinion and that he acted in good faith when he tabled the motion. Additionally, I have not drawn any correlation between this event and the subsequent arrival of Wascana Village, and as such, any commentary on Reeve Eberle's conduct is precluded by my Terms of Reference.

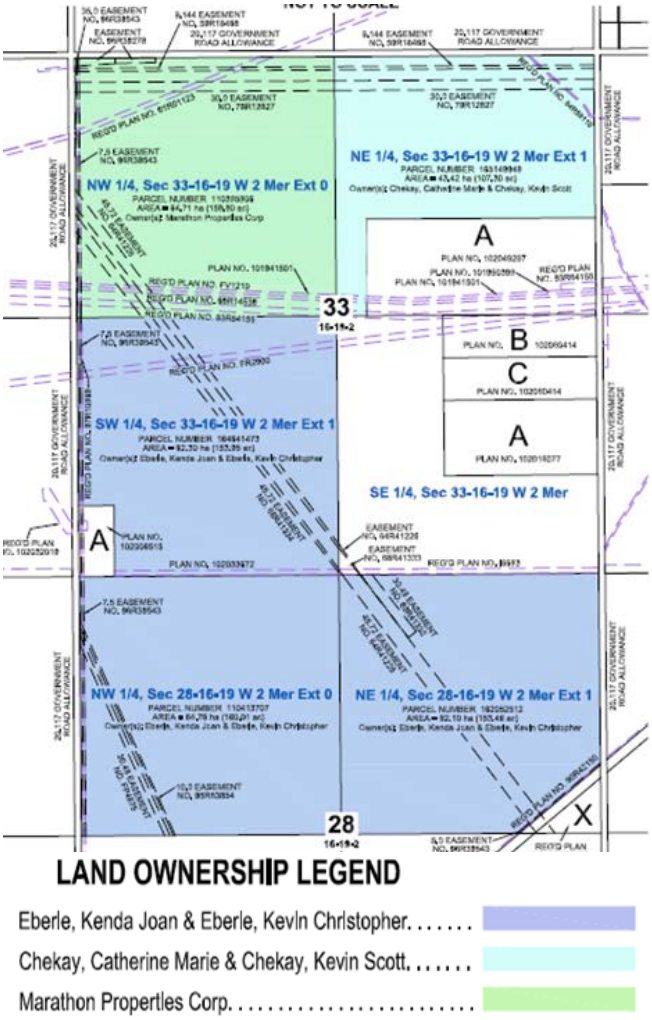
B. Purchase and Sale Agreements

In 1995 Reeve Eberle and his wife Kenda (the "**Eberles**") purchased five quarter-sections of land from Ralph Lyons. The 'Subject Lands' indicated in the map below provide an indication of where the Eberles' lands are located in relation to the City. Five out of the six quarter-sections bordered in red belonged to the Eberles, with the most northeasterly quarter-section belonging to Reeve Eberle's cousin, Mr. Chekay.



[96] Exhibit 234 and 235.
[97] Exhibit 232.

Reeve Eberle retained these five quarter-sections until May 2, 2007 when he sold the NW quarter-section to Marathon Properties Corp. which is a development company based in Calgary. The Eberles sold the NW quarter of Section 33 for $400,000 ($2,500/acre). The adjacent map (provided earlier) reflects the status of the land ownership in the area later proposed for the Wascana Village Development, subsequent to the Eberles' 2007 sale to Marathon. The quarter-section sold by the Eberle's to Marathon is the NW quarter of Section 33 and is denoted in green in the above map. At this time the Eberle's retained ownership over the four southern-most quarter-sections depicted in the adjacent map.



Agreement #1 – May 2012

In early 2012, the Eberles were approached by Daniel Schmid in relation to the potential sale of their property. Mr. Schmid and his affiliates were located out of Waterloo, Ontario and became aware of the Eberle's lands through Wynn Sturm who was a principle of Marathon – the same company that the Eberles had previously sold land to.

Mr. Schmid, in association with a corporation named Activa Development Corporation, presented the Eberles with a purchase offer in March of 2012. This initial offer was never executed and Reeve Eberle testified that it was never even considered by him and his wife.[98]

In the spring of 2012, the Eberles were again approached by Mr. Schmid, this time on behalf of his company GPDC. On May 8, 2012 the Eberles entered into a purchase and sale agreement with GPDC. The purchase and sale agreement included three of the Eberles' four quarter-sections of land – excluding only their home quarter. The Eberles were to be compensated $7,973,000 ($17,000/acre) in exchange for their 469 acres of farmland. The May 2012 agreement also provided a number of conditions for the benefit of the Eberles:

- Roads constructed on the lands being sold for the Wascana Village Development shall be connected to the Eberles' home quarter at the expense of GPDC;

[98] Transcript of K. Eberle [November 12, 2014 – p. 44].

- The Eberles' home shall be connected to the water and sewer system constructed by GPDC and the water and sewer system shall be delivered to the Eberle's home quarter in a manner consistent with the Eberle's intended development;

- A ¾ acre lot in Wascana Village shall be transferred to the Eberles;

- Parks and lakes in Wascana Village to be constructed by GPDC shall bear the name "Eberle";

- GPDC shall pave the access road to the Eberles' residence.

The three quarter-sections that the Eberles agreed to sell GPDC in May of 2012 are denoted in purple in the above map. Neither at that time, nor at any time in the future did the Eberles ever enter into a land sale agreement that included their home quarter, which is denoted in white in the above map.

The May 2012 agreement also provided certain conditions for the benefit of GPDC. Of note, the following clause was part of the agreement:

> *This Agreement is conditional for a maximum of 45 Days following mutual acceptance of this Agreement upon the Purchaser;*
>
> *ii) satisfying itself that the development of the property as the Purchaser may contemplate and deem appropriate, is, in its sole and unfettered opinion, economically viable and will be permitted by all governmental, quasi-governmental and other regulatory bodies which may have jurisdiction.*

On June 20, 2012, Mr. Schmid provided notice to the Eberles that he was waiving the conditions in place for the benefit of GPDC, which included clause ii) above.[99] Despite their agreement and Mr. Schmid's waiver of conditions, the May 2012 agreement never closed as Mr. Schmid was unable to secure financing for the transaction. On July 20, 2012, one month after Mr. Schmid's waiver of condition, the May 2012 agreement lapsed and Mr. Schmid's $50,000 deposit was forfeited.

Agreement #2 – September 2012

On September 25, 2012 the Eberles entered into what was termed an 'extension agreement' with GPDC. The September 2012 agreement essentially revived and extended the May 2012 agreement. In terms of the subject lands and purchase price, the extension agreement remained unchanged. There was however several notable inclusions in the September 2012 agreement in relation to payment terms. In addition to the $17,000/acre purchase price, the agreement provided for the following:

[99] Exhibit 32 under 'Eberle' Tab 2.

2) The Vendor agrees to extend the Agreement for Purchase and Sale on the following terms:

d) As additional compensation to the Vendor, the Purchaser shall pay to the Vendor the sum of $3000.00 per acre within ten days from the date when the Real Property described in the Agreement for Purchase and Sale and this Agreement has been rezoned to permit development of the land in accordance with the block plan submitted by the Purchaser to the RM of Sherwood for rezoning approval.

This 'additional compensation' amounted to a total of $1,407,000. It is to be noted that this 'additional compensation' was payable upon rezoning to permit development.

The September 2012 agreement provided for a closing date of October 5, 2012, which was only ten days after the agreement was executed. The operative clause reads as follows:

b) The Closing Date shall change to October 5, 2012 or such later date as the vendor may permit;

During the course of Reeve Eberle's testimony there was some discussion of the proper interpretation of clause b).[100] Despite the open ended language of the provision, Reeve Eberle was adamant that the September 2012 agreement was at an end on October 5, 2012, and further, he was of the view that he was not required to affirmatively serve notice on GPDC to end the agreement. This matter and its importance in relation to my mandate under the Terms of Reference for the Inquiry will be addressed in full below.

Agreement #3 – April 2013

On April 19, 2013, the Eberles entered into their third agreement with GPDC. The April 2013 agreement included the same three quarter-sections that were subject to sale under the previous two agreements, however, the purchase price had now increased to $11,300,000 ($24,187/acre). The April 2013 agreement also became significantly more complicated in terms of its payment provisions and the additional consideration that would flow to the Eberles in addition to the purchase price. $4,700,000 of the total purchase price was to be deposited with an escrow agent (designated as Reeve Eberle's legal counsel) and payable to the Eberles upon three occurrences, one of which being:

This Agreement and the obligations of all of the parties hereto shall terminate upon the earliest to occur of:

(a) Rezoning of the Real Property, the Marathon Lands and the Chekay Lands, as referenced in the Sale Agreement, from Agricultural to Residential or a

[100] K. Eberle Transcript [November 12, 2014 – p. 80-84].

similar designation which permits residential development as contemplated in the Sale Agreement;

The April 2013 agreement, under the heading "Payment Terms" also included the following clause:

> *D.* *It is the intention of the parties that the Real Property, the Marathon Lands and the Chekay Lands will be rezoned by the appropriate municipal authority to permit development substantially in accordance with the Preliminary Block Plan dated May 4, 2012 annexed as Schedule "E" hereto (the "**Rezoning**") and the Purchaser agrees to use its best efforts to obtain such Rezoning.*
>
> [emphasis added]

In addition to the purchase price, there were a number of conditions to be performed by the Developer for the benefit of the Eberles, many of which were holdovers from the two previous agreements. One notable addition to the April 2013 agreement included:

> *The Purchaser agrees to the following conditions for the sole benefit of the Vendors:*
>
> (i) *Six percent (6%) of the "Total Net Profits" to a maximum of Six Million ($6,000,000.00) dollars realized by the entire Development planned for the Real Property and adjacent lands legally described as NW 33-16-19 W2 and a portion of NE 33-16-19 W2 (the "Adjacent Lands") which lands are being contemporaneously purchased (the Real Property and the Adjacent Lands hereinafter referred to together as the "Development") which will be payable as a deferred payment for additional compensation on the purchase price, beginning, in the discretion of the Purchaser, upon the completion of Phase II of the Development but no later than December 31, 2026. "Total Net Profits" for the purpose of this agreement means the excess, if any, of gross profits after paying all normal expenses, expenses shall not include income tax, which amounts shall be determined by an independent auditor in accordance with generally-accepted accounting principles.*

For the first time in the agreements they had entered into, the Eberles now had an interest in the entire Development as they would share in the profits from the Development of not only the lands they owned, but also those lands owned by Marathon and the Chekays.

The April 2013 agreement was structured to provide for individual default payments should the Developer fail to meet the conditions for the Eberles benefit. Incorporating the values of the default payments, the total consideration of the April 2013 agreement, assuming the $6,000,000 share of the profits was realized, was $21,826,500 ($46,718/acre).

The April 2013 agreement was set to close on May 10, 2013, but again failed to close as Mr. Schmid and GPDC were unable to obtain financing for the purchase.[101]

It should be noted here that while the April 2013 agreement is the first time Reeve Eberle had an agreement to share profits with GPDC, the possibility of sharing profits was discussed months earlier in January 2013. At that time, Mr. Schmid proposed that Reeve Eberle become a director of GPDC. In a draft agreement dated in January 2013, Reeve Eberle was to serve as a director of GPDC to "provide oversight and direction" in relation to the Development for which he was to be compensated by payment of three percent of the total net profits. The agreement was never executed and Reeve Eberle did not become a director.[102]

Agreement #4 – November 2013

From May 10, 2013 until November 16, 2013 there was no agreement in place between the Eberles and GPDC. On November 16, 2013 a purchase and sale agreement was executed that covered the same three quarter-sections as the previous three agreements for a purchase price of $11,980,000 ($25,642/acre). The November 2013 agreement again contained a clause whereby the 'parties' expressed their intention that the property would be rezoned by the appropriate municipal authority.

Similar to the April 2013 agreement and those preceding it, the November 2013 agreement provides a number of conditions for the Eberles benefit, which include:

- The roadways within Wascana Village shall be connected to the Eberle home quarter at the expense of GPDC;

- The Eberle residence shall be connected to the water and sewer system to be constructed by GPDC by December 31, 2018, or in lieu of such, payment of $97,5000;

- Water and sewer shall be constructed and delivered to the Eberles' home quarter in a manner consistent with their intended development (the Estates at Wascana Village) by December 31, 2028, or in lieu of such, payment of $2,050,000

- A fully-serviced 32 Unit lot in Wascana Village shall be transferred to the Eberles by December 31, 2018, on in lieu of such, payment of $600,000;

- A park and street shall bear the name "Eberle Court" and all lakes within Wascana Village shall bear the name "Eberle" or a name chosen by the Eberles;

- GPDC shall pave the access road to the Eberles' residence by December 31, 2018, or in lieu of such, payment of $154,000;

[101] K. Eberle Transcript [November 12, 2014 – p. 67].
[102] Exhibit 291.

- Five fully-serviced residential lots within Wascana Village shall be transferred to the Eberle's by December 31, 2018, or in lieu of such, payment of $2,045,000;

- A commercial condominium of not less than 3,000 square feet in a commercial building of not less than 50,000 square feet. GPDC is also responsible for finishing the interior of the commercial condo to a maximum of $25.00/square foot ($75,000). Failing which GPDC shall provide payment of $750,000 to the Eberles;

- GPDC shall be responsible project development and construction management services for the Eberle's in accordance with the development proposed for the Estates at Wascana Village.

The closing date of the November 2013 agreement was set for 40 days following the date on which rezoning is obtained. Under the November 2013 agreement, if rezoning did not occur before December 31, 2013, the Eberles had the right, in their sole discretion, to terminate the agreement by providing 30 days written notice to GDPC.

The evidence tendered during the Hearing indicates the November 2013 agreement remains alive at the time of the issuance of this Report. There was certainly no evidence presented that Reeve Eberle served GPDC with the notice required under the November 2013 agreement.[103]

Agreement #5 – Profit Sharing Agreement

On the same date that the November 2013 purchase and sale agreement was entered into, the Eberle's also entered into a separate Profit Sharing Agreement with GPDC. The Profit Sharing Agreement provided that in addition to the consideration payable under the November 2013 agreement, the Eberle's were entitled to the following:

> *5. Profit Sharing*
>
> *(a) Great Prairie shall pay Eberle Ten per cent (10%) of the "Total Net Profits" realized by the Development.* ***Total Net Profits****" for the purpose of this Profit Sharing Agreement means the excess, if any, of gross profits after paying all normal expenses excluding income taxes, which amounts shall be determined by an independent auditor in accordance with generally-accepted accounting principles. Eberle shall receive his share of the Total Net Profits at the same time or times as other investors.*

Appendix A to the Profit Sharing Agreement is a proforma estimate of the profits to result from the Wascana Village Development. Over the thirteen year span forecasted by the proforma, the estimated net profit of the Wascana Village Development is $400,789,916, ten percent of which is $40,078,991.

[103] K. Eberle Transcript [November 12, 2014 – p. 69].

Combining the purchase price with the monetary values attributed to the conditions for the Eberle's benefit and the full satisfaction of the profit sharing forecast, the Eberle's total compensation for their lands in the November 2013 Agreement and Profit Sharing Agreement was roughly $57,751,500 ($123,612/acre).

C. The Estates at Wascana Village

Throughout the preceding section, numerous references were made to The Estates at Wascana Village in the agreements with the Eberles. The Estates at Wascana Village was a long-range country residential development that was contemplated for the lands being retained by the Eberles and Chekays. The agreements that both the Eberles and Chekays entered into with the Developer contemplated the connection of roadways and various services to The Estates at Wascana Village. Additionally, the Developer also undertook to provide project development and construction management services as consideration for the sale of their lands. The schematic for The Estates at Wascana Village is provided in the adjacent map.

The concept of The Estates at Wascana Village was not known to anyone at the RM outside of Reeve Eberle. It should be noted that Reeve Eberle stressed that The Estates at Wascana Village was a very long-range plan and by no means a certainty to occur. I make no comments as to the likelihood that the development would have come to realization. While the Estates at Wascana Village was never part of the Wascana Village Development, it is mentioned here so the reader is able to make the link between the consideration given under the agreements between the Eberles and Chekays and the Developer.

D. The RM of Sherwood Official Community Plan

At the May 9, 2012 Regular Meeting of Council, the following resolution was unanimously passed by Council:

> *Reeve Eberle declared pecuniary interest and left the Chair at 9:45 p.m.*
> *Deputy Reeve Tim Probe assumed the Chair at 9:45 p.m.*

> **270/12 <u>GREAT PRAIRIE DEVELOPMENT CORPORATION</u>**
> COUNCILLOR JIJIAN: THAT Director of Planning Blaine Yatabe, work directly with representatives of Great Prairie Development Corporation regarding their proposal for a Block Plan of their lands to be developed in the RM of Sherwood No. 159, to ensure inclusion into the Official Community Plan, prior to introduction of second reading.
> CARRIED UNANIMOUSLY

Reeve Kevin Eberle re-assumed the Chair at 9:46 p.m.

As a result of the above resolution, the RM's 2011 OCP was subsequently amended to re-designate the five quarter-sections where Wascana Village was to be built from agricultural to residential (three of which being owned by the Eberles). The amended OCP and ZB were passed pursuant to Bylaws 6/11 and 7/11 at the RM's Regular Council Meeting on July 31, 2012[104] and then submitted to Community Planning for approval on August 7, 2012.[105]

Without reproducing the history of the OCP and ZB's that the RM has submitted to Community Planning since 2012, it is sufficient to note that all iterations of these planning documents rezoned the lands comprising Wascana Village from agricultural to residential, and therefore rezoned Reeve Eberle's lands. To clarify, the various OCP and ZB's were not repeatedly amended to accord with the status of Reeve Eberle's agreement(s) with GPDC, but remained consistent in that they rezoned the Eberle's lands from agricultural to residential.

The rezoning of the Eberle's lands from agricultural to residential in the OCP and ZB was an event that would undoubtedly result in an increase to the value of Reeve Eberle's lands. This conclusion is supported by common-sense and the appraisal report tendered into evidence by Reeve Eberle.[106] While the appraisal report does not address the differing values between lands zoned agricultural versus residential in the OCP and ZB, it does demonstrate the significant increase in value that is associated with the reduction of obstacles to residential development. Reeve Eberle's testimony also supports this conclusion as indicated by the following exchange where the two valuations within the appraisal support are reviewed:

[104] Exhibit 266.
[105] Exhibit 70.
[106] Exhibit 327.

MR. LINKA: … So, Mr. Eberle, tell me if you agree with me. Extraordinary assumption A is an OCP that covers the land, and then the value of the land would be 32 million. Extraordinary assumption set B, as I see it, is that the land is ready for development. All the legal regulatory hoops have been covered, and I would guess that that means zoning, concept plan, and subdivision approval?

A That's how I would read it as well.

Q Okay.

…

INQUIRY OFFICER: And if those conditions, A and B, are not possible, then the market value obviously is subject, it could be, to a major change of it.

MR. LINKA: Exactly. Exactly. I was just going to mention that.

INQUIRY OFFICER: Yeah.

Q If it doesn't, then all bets are off on the value of this land.

A We're back -- we're back to growing wheat.

Q Back to growing wheat. So based on – on these appraisals, your land would have a value at OCP stage of what?

A 32 million I think it said there.

Q No. Per acre.

A Well, that would be the whole development. I'm not sure, Mr. Linka. $40-some thousand I think it works out to, 43 or 44,000.

[emphasis added]

Relevant to this exchange is the evidence that Marathon recently entered into an agreement for the purchase and sale of their quarter-section of land within Wascana Village for $4,000,000 or $25,000 per acre. Reeve Eberle's evidence, including the appraisal report he tendered into evidence, confirms that the rezoning of his lands by the OCP resulted in a valuation in the range of more than $40,000 per acre. This valuation is also supported by the agreements that Reeve Eberle entered into with GPDC that were conditional on rezoning. In light of this evidence, it is clear that Reeve Eberle had a pecuniary interest in the approval of the OCP that would cause his lands to be rezoned.

The first three agreements entered into by the Eberle's had all lapsed at some point. Notwithstanding their lapse, in light of his underlying and persisting pecuniary interest in the OCP, it is my view that

Reeve Eberle has had an ongoing pecuniary interest that flows from all of the RM's OCP or ZBs that provided for the rezoning of his lands.[107]

Furthermore, the totality of the evidence, including Reeve Eberle's agreements and correspondence with GPDC, demonstrate that there was no significant period of time when the Wascana Village Development was not being advanced in some capacity. While the first three agreements lapsed, I find that there was no time-frame after the May 2012 agreement when Reeve Eberle would not have either had his lands under contract, or have reasonably contemplated a contract to be forthcoming. The evidence adduced during the Hearings establishes that Mr. Schmid has made a considerable investment and remains confident in the ultimate realization of the Wascana Village Development to this day.

III. LEGAL ISSUES

A. "Standards" Informing the Assessment of Conduct

In advance of the Hearings, and as per my instruction, my Counsel undertook the task of preparing a legal memorandum that outlined the standards to which I was to consider when conducting the Inquiry into the appropriateness of the conduct of the RM Council members.[108] My Counsel also invited submissions from other counsel in order to ensure that all parties had equal input into the standards that would inform my assessment of conduct.

A significant portion of my Counsel's submission went unopposed and I would endorse those portions wholeheartedly as both accurate and fair. There were however certain submissions made by my Counsel that were opposed by legal counsel for Reeve Eberle and the RM's solicitor.[109] These matters have been largely resolved by the agreement of counsel.

I intend to briefly set out the standards that inform the conduct of municipal council members. Much of what follows will be derived from my Counsel's memo, except where there were submissions to the contrary by other counsel or where I do not agree. Any matters to which there were competing submissions will be indicated and commented on as necessary.

As outlined in my Terms of Reference for the Inquiry, there are four main sources that together constitute the relevant standards applicable to members of municipal council:

1. Provisions from *The Municipalities Act* dealing with both pecuniary interests of council members and the consequences for breaching such statutory provisions;

2. The Official Oath required to be sworn by all members of council pursuant to the *Act*;

[107] The reader should note that from February 22, 2013 (Notice of Decision granting partial approval to the 2011 OCP) until August 28, 2013 (submission of the 2013 OCP Amendments), there was no OCP being reviewed or conditionally approved.
[108] Exhibit 28.
[109] Exhibit 29.

3. The RM's Code of Ethics; and

4. The common law as it relates to conflicts of interest.

These four 'standards' will be outlined in full below.

1. Applicable Provisions from the *Act*

Part VII of *The Municipalities Act* deals with pecuniary interests of members of council, which pursuant to s. 2(1)(u) includes a mayor, reeve or councillor. Section 143 and 144 of the *Act* establish both the definition of a pecuniary interest, the exceptions to when such an interest will be found to exist, and the conduct expected of any member of council with a pecuniary interest that conflicts with their duties as a council member.

a) What constitutes a pecuniary interest?

Section 143(1) sets out when a member of council will have a pecuniary interest in a matter:

> **Pecuniary interest**
> 143(1) Subject to subsection (2), a member of council has a pecuniary interest in a matter if:
> (a) the member or someone in the member's family has a controlling interest in, or is a director or senior officer of, a corporation that could make a financial profit from or be adversely affected financially by a decision of council, a council committee, a controlled corporation, or other body established by the council pursuant to clause 81(a); or
> (b) the member of council or a closely connected person could make a financial profit from or be adversely affected financially by a decision of council, a council committee, a controlled corporation, or other body established by the council pursuant to clause 81(a).

Section 143(1) clearly establishes a pecuniary interest will be found if any member of council (or their spouse, parent or child or their agent, business partner or employer) has the potential to either financially profit or be financially disadvantaged as a result of a decision made by either their council, or by a committee or a body established by their council.

It should be noted that the statutory language of s. 143(1) refers to a member of council who could make a financial profit, not that they have done so or that they will.

Section 143(2) goes on to provide a number of enumerated exceptions when such a pecuniary interest will not be found to exist, even if the member of council financially benefits from a decision of their council. In the circumstances, the most important exception is at s. 143(2)(i):

> (2) A member of council does not have a pecuniary interest by reason only of any interest:
> …
> (i) that the member or a closely connected person may hold in common with the majority of voters of the municipality or, if the matter affects only part of the municipality, with the majority of voters in that part;
> …

[emphasis added]

The exception enumerated in subs. 143(2)(i) contains what has been referred to by other courts as the "community of interest" exception. This exception will apply if the member of council's pecuniary interest is shared by a majority of voters or, if the interest is shared with a majority of voters in the part of the RM to which the decision applies.

Perhaps one of the most contentious matters that has arisen relates to the scope and application of the community of interest exception. After all submissions were made, there remained a difference of interpretation between my Counsel and Reeve Eberle's counsel on this point of law. I do not intend to address the differing positions in a vacuum and will do so in relation to the facts to be set out in the following section.

b) What conduct is prohibited by section 144 of the Act?

Section 144(1) of the *Act* requires that a member of council with a pecuniary interest declare that interest before any discussion of the matter that is relevant to that interest, and additionally, prohibits that council member from discussing or voting on the matter. By contrast, s. 144(2) contains an express prohibition against that council member attempting to influence the voting on any question to do with their pecuniary interest, at any time, either before during or after the meeting when the vote takes place:

> **Disclosure of pecuniary interest**
> 144(1) If a member of council has a pecuniary interest in a matter before the council, a council committee or a controlled corporation of which the member is a director, the member shall, if present:
> (a) declare the pecuniary interest before any discussion of the matter;
> (b) abstain from voting on any question relating to the matter;
> (c) subject to subsection (4), abstain from any discussion of the matter; and
> (d) subject to subsections (3) and (4), leave the room in which the meeting is being held until discussion and voting on the matter are concluded.
> (2) No member of a council shall attempt in any way, whether before, during or after the meeting, to influence the voting on any question involving a matter in which the member of council has a pecuniary interest.

Before looking at the type of conduct that is prohibited by s. 144, it is perhaps first helpful to review the purpose and scope of this legislative provision. Courts in both Ontario and Saskatchewan have already concluded that it is to be interpreted broadly and expansively. In *Briseboit v Chabot* (1987), 62 Sask R 246 (QB), Maurice J. stated the following with respect to the purpose of a parallel provision that existed in *The Urban Municipality Act*, SS 1983-84, c U-11:

> [7] The purpose of the conflict-of-interest provisions was succinctly stated by Robins J. in *Re Moll and Fisher* (1979), 23 O.R. (2d) 609, (sub nom. *Fisher v. Moll*) 8 M.P.L.R. 266, 96 D.L.R. (3d) 506 at 509 (Ont. Div. Ct.):

> This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad prescription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.

> [8] The importance of conflict-of-interest provisions was the subject of comment by Estey J. of the Supreme Court of Canada in *Gillespie v. Wheeler* (1979), 97 D.L.R. (3d) 605 at 618-19, 25 N.B.R. (2d) 209, 51 A.P.R. 209, 26 N.R. 323:

> > As I have indicated, qualifications for the election to and the holding of high office in all levels of government are a matter of considerable importance in the functioning of the democratic community. The sanctity of these offices and the strict adherence to the conditions of occupying those offices must be safeguarded if democratic government is to perform up to design. Therefore, these enactments as they are brought before the courts in applications in *quo warranto* and otherwise, must be given their full application according to law.
>
> [emphasis added]

In *Jaffary v Greaves* (2008), 47 MPLR (4th) 1 (Ont Sup Ct), Wood J. cited to another paragraph from *Moll and Fisher* when he concluded:

> [34] In performing this exercise [of assessing the real intention of the legislature in interpreting the comparable Ontario statute,] I adopt the words of Robins J. in *Moll v. Fisher* as did Farley J. in *Mangano*:
>
> > the obvious purpose of the act is to prohibit numbers [sic] of council and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic interest. (My emphasis)
>
> [emphasis in original]

It is apparent from both of these cases that the courts have interpreted these conflict of interest provisions broadly, given their conclusion that the legislature's intention in enacting these provisions is to prohibit individual members of council from using (or abusing) their elected positions for their own financial benefit.

While several of the legislative provisions in s. 144 are clear on their face, there are a couple of matters that require further comment with respect to their interpretation. Specifically, these are what does "declare the pecuniary interest" entail and what does "influence the voting" mean.

c) What does "declare the pecuniary interest" in s. 144(1)(a) entail?

On this point my Counsel initially took the position that, having regard to the broad interpretation the jurisprudence has given to conflict of interest provisions, that there may be some ambiguity as to whether a bare declaration of a pecuniary interest is sufficient.

In his legal memorandum my Counsel reached the following conclusion after presenting arguments both for and against an interpretation requiring only bare disclosure:

> The interpretation of the requirement imposed by s. 144(1)(a) of the *Act* must be kept separate and distinct from the factual context to which it is applied. While various scenarios may arise where a more fulsome disclosure than that expressly required by the *Act* is necessary, it cannot be said conclusively one way or the other, that the *Act* does in fact require a more fulsome declaration or disclosure than a mere bare declaration of the pecuniary interest.

In his written reply Reeve Eberle's counsel opposed an interpretation requiring anything beyond a bare declaration of the pecuniary interest. Reeve Eberle's position is indicated in the following passage from his counsel's memorandum:

> The plain meaning of the words, “declare the pecuniary interest” is that the council member must “declare”, that is, must *state*, the fact that he or she has a pecuniary interest.
>
> There is nothing here that requires the council member to go further and disclose *the nature or extent* of the pecuniary interest. There is no basis on which one could to [*sic*] reach beyond the plain meaning of the words to import a requirement that simply is not there.
>
> […]
>
> The applicability of this interpretive reasoning [implied exclusion] to the provision at issue here is underscored and reinforced by the contrasting provision in *The Cities Act* of Saskatchewan.
>
> The contrasting provision is clause 117(1)(a) of that Act. It provides that:
>
> > 117(1) If a member of council has a pecuniary interest in a matter before the council, a council committee or a controlled corporation of which the member is a director, the member shall, if present:
> > (a) declare **the general nature** of the pecuniary interest before any discussion of the matter

[emphasis added]

> Obviously, inclusion of the words “the general nature” compared to their non-inclusion in the provision at issue here gives added and emphatic “reason to believe” that, if the Saskatchewan Legislature had meant to require that there be a declaration as to the general nature or, indeed, as to the extent of a municipal council member’s pecuniary interest, it would have expressly stated such a requirement.

Reeve Eberle's position on this point was agreed to by my Counsel after the conclusion of the Hearings where he stated: "In light of the submissions of my colleagues, I am inclined to agree with their position and concede that there is insufficient authority to conclude that anything other than a bare declaration is required by the *Act*." My Counsel's decision to concede to Reeve Eberle's position on this point was quite correct in my view and I am also inclined to agree with Reeve Eberle in so far as I would conclude that the Act only requires a bare declaration of a pecuniary interest. I will comment further on this matter when I address the circumstances surrounding Reeve Eberle's disclosure of his pecuniary interest.

d) What conduct constitutes "influencing the vote"?

Given the broad and purposive interpretation that is to be given to these legislative provisions, the scope of the prohibition against "influencing the vote" as stipulated in subs. 144(2) of the *Act*, should be interpreted equally expansively.

While there is essentially no case law from Saskatchewan on this topic, in *Amaral v Kennedy*, 2010 ONSC 5776, Roberts J. had reason to define what conduct would constitute "influencing the vote". That case involved School Board Trustees and the issue of whether a Trustee who had declared a conflict and abstained from voting (in compliance with their legislation) had then breached their comparable legislation when she allegedly made a thumbs down motion when the vote was being conducted. Justice Roberts, in addressing this question, defined the test for determining whether a council members' actions would constitute influencing the vote:

> [54] Section 5(1)(c) of the *Act* requires an attempt to influence. This involves a deliberate act made with the intention of influencing another or which a reasonable person would objectively see as meant to influence another. I agree that a person may have breached this section if that person does something that he or she should have reasonably known could influence or would reasonably look like an attempt to influence. As agreed by the parties, a thumbs-down gesture cannot be construed in any other way but as an attempt to influence.

[emphasis added]

This test is not dependent on the subjective intentions of the parties, but uses an objective standard against which the conduct of members of council should be assessed. It is equally clear from the plain language of s. 144(2) that the conduct of members of council is not limited to that which takes

place during council meetings, but also includes actions that could have occurred before or after a meeting in which a vote took place, if those actions would reasonably be seen as meant to influence the voting on an issue by other council members.

What is apparent from these statutory provisions is that for any impugned conduct to run afoul of s. 144(2), it must be connected to a vote that was to be taken by either council or a committee or body created by council. However, as explained in more detail below, the common law fills in any void created by statute and so acts to prohibit a member of council from otherwise preferring their own interests over those of his or her electors or the municipality.

2. <u>The Official Oath</u>

Before looking at the common law however, there are two other places where the standard of conduct expected of members of council is set out. The first of these is in the Oath of Office that all members of council are required to swear.

This requirement is set out in s. 94 of the *Act*, though the form and content of the official oath is prescribed in s. 3 of *The Municipalities Regulations*, RSS c M-36.1 Reg 1. The form and content of the Oath is prescribed in Form A that requires all members of council to swear the following oath:

1. I will truly, faithfully and impartially, to the best of my knowledge and ability, perform the duties of this office;

2. I have not received and will not receive any payment or reward, or promise of payment or reward, for the exercise of any corrupt practice or other undue execution of this office

3. I will disclose any pecuniary interest as required by and in accordance with *The Municipalities Act*.

The applicability of a member of council's oath of office was discussed by Justice Cunningham, in his capacity as Commissioner of Inquiry over the Mississauga Inquiry. This Inquiry looked into the conduct of Mayor McCallion in Mississauga, Ontario after her son's involvement in a proposed land development in the City came to light. As a preliminary matter, counsel for some of the parties raised the question of what standard the Commissioner was to apply in determining whether the Mayor had breached her conflict of interest requirements. Counsel for the Mayor had argued that determining whether a conflict of interest had arisen should be gauged in accordance with the "only standard in place at the time, namely the *Municipal Conflict of Interest Act*".

While Cunningham J. ultimately concluded that the common law would apply in addition to the statute, which is discussed in more detail below, he also provided the following comment on the applicability of the Mayor's oath that she had sworn when assessing her conduct:

> One final note, When Mayor McCallion swore her oath or declaration of office yet again on December 4, 2006, she agreed *inter alia* to "…truly, faithfully and

> impartially exercise this office…" She did not simply say she would abide by the *Municipal Conflict of Interest Act*.[110]

Similarly in this case, the oath of office sworn by members of council requires that they will "truly, faithfully and impartially…perform the duties of this office" and that that they will not obtain a pecuniary benefit for the exercise of any corrupt practice or undue execution of their office.

3. The Code of Ethics

The RM has enacted Bylaw 29/12, *A Bylaw to Regulate the Proceedings of the Council of the Rural Municipality of Sherwood No. 159*. This bylaw, at paragraph 4(a), confirms that the RM has adopted a Code of Ethics "for the guidance of conduct of members of Council".

This Code of Ethics states:

> Given that they hold positions of leadership and authority within the municipality, members of Council should:
>
> a) be motivated by an earnest desire to serve the municipality and its people;
>
> b) endeavour to attend all Council meetings;
>
> c) ensure that all funds of the municipality are expended efficiently, economically and in the best interests of the municipality;
>
> d) maintain the integrity, confidence and dignity of the office of a rural municipal Councillor, treat other Council members, the municipal staff and the public with respect and consideration;
>
> e) refrain from discussing or sharing confidential business or documents of Council outside of Council and committee meetings;
>
> f) abide by majority decisions of Council once they are made;
>
> g) endeavour to keep up to date on all local, provincial and national municipal developments of significance.

4. The Common Law

a) The common law still applies after the enactment of the Act

The Supreme Court of Canada in a number of decisions has confirmed the principles relating to the removal of the common law upon the enactment of legislation. In *Gendron v Supply and Services*

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[110] Hon. J. Douglas Cunningham, *Commissioner's Ruling on "Conflict of Interest"*, July 8, 2010, online: <http://mississaugainquiry.ca/li/pdf/Ruling_Conflict_of_Interest.pdf>.

Union of the Public Service Alliance of Canada, Local 50057, [1990] 1 SCR 1298, L'Heureux-Dubé J. confirmed (at 1315-16) the general rule that legislatures do not intend to oust the common law and to conclude otherwise requires either clear and express statutory language or a conclusion that the common law is ousted by necessary implication:

> Although in a different context, this Court has had recent occasion to consider the effect of statutory codification upon a pre-existing common law duty or remedy in the case of *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70. Many of the considerations that occupied the Court in that case are relevant here. Our analysis in this area must be guided by the rule that unless the statute contains words that expressly or by necessary implication oust the common law duty or remedy, one has a choice of remedies. As Cory J., albeit in different terms, stated for the majority in *Rawluk*, *supra*, at p. 90:
>
> > It is trite but true to state that as a general rule a legislature is presumed not to depart from prevailing law "without expressing its intentions to do so with irresistible clearness" (*Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614).
>
> [emphasis added]

That the Act has not ousted the common law as it relates to conflicts of interest was a matter agreed to by counsel for all parties involved in this Inquiry. I do not intend to elaborate beyond what has been provided above and would conclude by expressing my support for the conclusion that the Act has not displaced the common law. In Saskatchewan, conflicts of interest for municipal members of council continue to be governed by the concurrent application of both the Act and the common law.

b) What is the Common Law Prohibition Against Acting in a Conflict of Interest

Having established that the common law is still applicable, it is necessary to establish the scope of the common law with respect to acting in a conflict of interest. Justice Boyd addressed this issue in *L'Abbé v Blind River (Village)* (1904), 3 OWR 162 (WL) (Div Ct) [*L'Abbé*] when he wrote:

> [11] The High Court of Parliament was not only a legislative but a judicial body. It combined legislative capacity and judicial power; and it would seem that the analogy of cases as to judges and magistrates strongly applies to the fiduciary conduct of municipal councillors. The member of a council stands as trustee for the local community, and he is not so to vote or deal as to gain or appear to gain private advantage out of matters over which he, as one of the council, has supervision for the benefit of the public. The councillor should not be able to invoke the political or legislative character of his act to secure immunity from control, if the taint of personal interest sufficiently appears therein.
>
> …

> [17] Now, the interest or bias which disqualifies is one which exists separate and distinct as to the individual in the particular case - not merely some interest possessed in common with his fellows or the public generally... This may be a direct monetary interest, or an interest capable of being measured pecuniarily, and in such case that a bias exists in presumed. But there may be also substantial interest other than pecuniary, and then the question arises, on all the circumstances, as to whether there is a real likelihood of bias - a reasonable probability that the interested person is likely to be biased with regard to the matter in hand.
>
> [emphasis added]

Justice Sopinka in *Old St Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 SCR 1170 (WL) [*St. Boniface*] added to the development of the common law in this area when he wrote (at 1196):

> … It is apparent from the facts of this case, for example, that some degree of prejudgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest: see *Re Blustein*, [1967] 1 O.R. 604, 61 D.L.R. (2d) 659 (H.C.); *Moll v. Fisher* (1979), 23 O.R. (2d) 609, 8 M.P.L.R. 266, 96 D.L.R. (3d) 506 (Div. Ct.); *Ctee. for Justice*, *supra*; and *Valente v. R.*, [1985] 2 S.C.R. 673, 49 C.R. (3d) 97, 37 M.V.R. 9, 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, 19 C.R.R. 354, 14 O.A.C. 79, 64 N.R. 1.
>
> [emphasis added]

Both *L'Abbé* and *St. Boniface* establish that the scope of the common law duty is not as narrow as that set out in the Act and other comparable provincial statutes, but instead, seeks to prohibit a member of council from acting in a manner that would, in the words of Sopinka J., "influence the exercise of [their duty as publicly elected officials]". Justice Boyd in *L'Abbé* went so far as to confirm that the duty extended beyond voting and encompassed dealing with any issue if it would result in that member of council gaining or appearing to gain a private advantage, which itself is not limited to a pecuniary advantage.

The common law prohibition against acting in a conflict of interest clearly extends beyond simply not voting on a matter in which a member of council has an interest. This point was affirmed by the Alberta Court of Appeal in *R v Hawrelak* (1965), 53 DLR (2d) 353 (WL) (Alta CA) [*Hawrelak*]

when they reviewed the disqualification of the Mayor of Edmonton due to his having an interest in a land development company that purchased land for a municipal reserve.

The Court of Appeal in *Hawrelak* went on to apply the common law conflict of interest rules with respect to non-voting activities in a land development context. Although the disqualification was based on a statute, the Alberta Court of Appeal characterized the statute as merely providing the "machinery and procedure" to remove a councillor that filled a procedural void in the common law. Chief Justice Smith, writing for the Court (at paras. 37-44), relied on common law cases to discuss the impropriety of Mayor Hawrelak's conduct which justified invoking that machinery, before he concluded:

> [45] …there is no doubt that William Hawrelak placed himself in a position in which his duty and his interest were in conflict as a result of which he was prevented from giving the Council the benefit of his unbiased opinion in the interests of the city to which the electors of Edmonton were entitled. That he disclosed his interest and did not vote upon the motion which I have found amounted to adoption and ratification of the agreement, in my view, is beside the point. …
>
> [46] The owner of land adjoining a city is naturally anxious to have the city develop in the direction of his land so that he will reap a profit and often a rich profit; it is in the owner's interest to have the city extend in the direction of his land as soon as possible. <u>But the duty and responsibility of the Council of the city is to cause the extension of the development of the city at the most advantageous time and in that direction which is most advantageous to the electorate and rate payers of the city and the corporation itself. It seems obvious that inevitably conflict between interest and duty arises when a person who is a Councillor has an interest in land which he hopes lies in the path of urban development</u>…
>
> [emphasis added]

The Court in *Hawrelak* recognised that participation in activities outside of the council legislative process, including involvement in what information is presented to council and other executive actions is inappropriate where a member of council has a conflicting private interest. The common law prohibition against acting in a conflict of interest clearly applies to those activities of members of council that are outside of their normal legislative role.

More recently, this expanded scope of the common law on conflict of interest was affirmed by Justice Cunningham in the Mississauga Inquiry. After reviewing both his own terms of reference, as well as the passages cited above from *L'Abbé* and *St. Boniface*, Cunningham J. concluded that the common law existed in conjunction with the statutory provisions, was more expansive than that codified in the Ontario *Municipal Conflict of Interest Act* and should be the standard against which the conduct of the Mayor was measured. In so doing, Cunningham J. wrote, after specifically referencing the paragraph from *L'Abbé* above:

> The important words I take from that paragraph are “deal”, “gain” and “or “appear to gain”. Members of City Council are entrusted by those who elect them to act in the public interest. Optics are important. In other words, members of a municipal council must conduct themselves in such a way as to avoid any reasonable apprehension that their personal interest could in any way influence their elected responsibility. Suffice it to say that members of Council (and staff) are not to use their office to promote private interests, whether their own or those of relatives or friends. They must be unbiased in the exercise of their duties. That is not only the common law, but the common sense standard by which the conduct of municipal representatives ought to be judged.[111]
>
> [emphasis added]

Following the completion of the Mississauga Inquiry, Cunningham J.'s report on the conflict of interest issues also confirmed that the scope of the common law on conflict of interest encompassed significantly more than simply not voting on a matter to which a member of council may have an interest:

> As I explained in my July 8, 2010, Ruling on Conflict of Interest, the most important words in the above paragraph [referring to *L'Abbé*] are "deal", "gain", and "or appear to gain," and I stressed the importance of optics.
>
> This broader approach to conflict of interest has also been recognized as the prevailing standard by previous commissions of inquiry, including those conducted by Commissioners Denise Bellamy and W.D. Parker. As identified in the Parker Commission, there are various manifestations of conflict of interest. A conflict of interest may be real or apparent.
>
> > A real conflict of interest has three prerequisites: (1) the existence of a private interest (2) that is known to the public office holder; and (3) that has a nexus with his or her public duties and responsibilities that is sufficient to influence the exercise of those duties and responsibilities.
>
> An apparent conflict of interest arises when a reasonably well-informed person could reasonably conclude, as a result of the surrounding circumstances, that the public official must have known about the connection of his or her involvement with a matter of private interest.[112]
>
> [emphasis added]

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[111] *Ibid*.

[112] Hon. J. Douglas Cunningham, *Report of the Mississauga Judicial Inquiry: Updating the Ethical Infrastructure*, October 3, 2011, online: < http://mississaugainquiry.ca/report/pdf/MJI_Report_Phase_II.pdf> at 148-49 (footnotes omitted, emphasis added).

Justice Cunningham's report expressly rejected Mayor McCallion's very narrow and technical reading of the requirements contained in their applicable statutory provisions:

> …I find Mayor McCallion's narrow view of her duties in the face of a conflict of interest troubling.
>
> The mayor's position throughout the Inquiry was that her conduct in the face of the conflict of interest posed by her son's pecuniary interest in [the development] should be assessed only with regard to the provisions of the *Municipal Conflict of Interest Act*. I find that the mayor was mistaken in this belief. Specifically, I find that whether the mayor's conduct was appropriate in the face of the real conflict of interest must be assessed with regard not only to the MCIA, but also to the common law of conflict of interest.[113]
>
> [emphasis added]

Justice Cunningham's ultimate conclusion was that the mayor's only actions in relation to this proposed commercial development would have been to:

1. identify and disclose the nature and extent of her son's interest in the development;

2. declare a conflict of interest before any consideration of the development was undertaken by the council, a committee of the council or a local board; and

3. take no further role in promoting the development.[114]

Based upon all of the foregoing, it is apparent that the common law as it relates to conflict of interest applies and runs concurrently with the applicable provisions of the *Act*. The type of conduct prohibited under the common law regarding conflicts of interest is more expansive than that prohibited by the *Act*. Furthermore, the common law is concerned not only with steps taken by a member of council with respect to their legislative role on council, but also prohibits a member of council from participating in any activity that could reasonably be seen as preferring their own private interests ahead of the interests of their voters or the municipality as a whole.

B. Burden of Proof

Prior to delving into my assessment of the conduct that is here at issue, I wish to briefly comment on the burden of proof that is required for me to make any finding or reach any conclusion that amounts to a finding of misconduct. It is well established that a judge seized with jurisdiction in a civil court of law must premise his decisions on proof sufficient to establish the occurrence of an event on a balance of probabilities.

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[113] *Ibid.* (footnotes omitted).
[114] *Ibid*.

The proceedings that I have been seized with jurisdiction over are entirely different in nature. In *Conduct of Public Inquiries*, the learned author Ed Ratushny, who notably served as senior commission counsel to former Chief Justice of the Supreme Court of Canada, Antonio Lamer, provides a useful assessment of the differing nature of an inquiry and civil court at p. 382-83:

> In *Erebus,* the Privy Council contrasted the role of a commissioner with that of a trial judge:
>
> > Where facts are in dispute in civil litigation...the Judge has to decide where, on a balance of probabilities, he thinks the truth lies as between the evidence which the parties...adduce before him. He has no right to travel outside that evidence...and if the parties' evidence is so inconclusive as to leave him uncertain...he must decide the case by applying the rules as to onus of proof.
>
> In contrast, a commissioner may take the initiative to go where the evidence leads and pursue new lines of investigation. There is no legal onus of proof on the parties to a commission of inquiry and no standard of proof by which evidence must be evaluated.

While the foregoing is accurate in relation to the general findings of fact outlined in this report, the same cannot be said for findings or conclusions that reflect adversely on those individuals subject to my Report. In such instances procedural fairness mandates that any such adverse findings must be made on the standard of proof commensurate with the impact those findings may have on those individuals to which they relate, that being a balance of probabilities.

The Supreme Court of Canada in *F.H. v McDougall*, 2008 SCC 53 at para 46, 3 SCR 41 had occasion to comment on the balance of probabilities standard and provided that: "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test." This is the standard to which I have subjected all evidence that engages issues of conduct, and thus, potential findings of misconduct.

IV. MATTERS ENGAGING ISSUES OF CONDUCT

A. The Bare Declaration of Pecuniary Interest

There was no dispute in the evidence that Reeve Eberle declared a pecuniary interest whenever matters related to Wascana Village came before Council. On such occasions, Reeve Eberle declared the fact that he had a pecuniary, gave no further details, and left Council Chambers. As outlined above, the Act does not require a municipal councillor to disclose any details of their pecuniary interest. All the Act requires, from a purely legalistic view, is a bare declaration of a pecuniary interest. However, in a legal opinion dated April 18, 2013 (the "**April 2013 Opinion**")[115] that was prepared specifically for Reeve Eberle's use, the RM's solicitor offered the following:

[115] Exhibit 155.

> As you have now entered into an agreement which provides for compensation based upon, or contingent upon, rezoning, it is clear that your pecuniary interest is no longer a general interest and is a disqualifying personal interest **and that needs to be disclosed** to the rest of Council and the Administrator so that steps can be taken to avoid future conflicts.
>
> [emphasis added]

In interpreting the above opinion, I am making the assumption that the RM's solicitor would have been aware of Reeve Eberle's practice of giving a bare declaration of his pecuniary interest and recusing himself when matters related to Wascana Village arose at Council meetings. In my view, the above statement contemplates a suggestion that more was required in light of the unique nature of his agreement(s) with the Developer. At this point in time the RM's solicitor was also acting for the Developer and as such, must have been acutely aware of the content of Reeve Eberle's agreement. In his testimony, Councillor Repetski indicated that he interpreted the April 2013 Opinion similarly.[116]

Throughout the course of the Hearings, Reeve Eberle relied heavily on a passage taken from a conflict of interest guideline that is posted on the Municipal Relations website. The guideline states that a council member who believes he/she has a pecuniary interest should declare it before discussion of the matter, but it is not necessary to state the exact nature of the interest.[117] Despite clear instruction from a legal opinion from one of the leading law firms within the Province, written specifically for Reeve Eberle and his circumstances, Reeve Eberle has continued to maintain the position that his conduct in this regard was only governed by the technical requirement within the Act, as outlined on the Municipal Relations website.

While there was some debate over whether some Council members had constructive notice that Reeve Eberle's agreement(s) were conditional on rezoning by virtue of the April 2013 Opinion which references that fact, other than Ms. Kunz,[118] no Council member was specifically informed by Reeve Eberle that his compensation under the agreement(s) was conditional on rezoning. Councillor Heenan testified that Reeve Eberle, on two separate occasions, stated that he was unconcerned with whether Wascana Village went ahead because he already had his money.[119]

In regard to the profit sharing component of Reeve Eberle's two latest agreements, there was no Council member that testified at the Hearings that they were aware that Reeve Eberle had such an agreement(s).

When asked what their position would have been had they have known more details, the responses of Council members were telling and highly divergent:

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[116] J. Repetski Transcript [November 6, 2014 – p. 62].
[117] Exhibit 250.
[118] R. Kunz Transcript [October 21, 2014 – p. 203].
[119] D. Heenan Transcript [October 29, 2014 – p. 65-66].

Dave Wellings

Q Okay. If you had been aware of it at the time, what would your position have been?

A I believe that he should have resigned from being Reeve Eberle.

Q Okay. And why?

A Well, it's a gross pecuniary interest. Being Reeve Eberle, it's even more -- I think it's more pecuniary interest than a councillor because I just think you can't -- you can't carry that card. You can't be trying to sell land subject to rezoning when you're trying to promote the rezoning of the land to get the profit on the sale and the profit on the sale of the other lands. I mean, it doesn't -- I mean, it's just not ethical.[120]

Corey Wilton

Q Okay. Had you been aware of such an agreement, what would your position about -- be about his continued involvement in the Wascana Village development?

A He should have, a long time before that, resigned from his position and let the council at hand deal with the matters and let it run its political process.[121]

Dale Heenan

Q And if you had been told about that at that time what would you have done?

A Well, the same as I had mentioned early, that I'd have probably gone and sought legal counsel on what to do. What' -- you know, something's wrong. This isn't correct. I'd have gone to ask a lawyer, what do you do next or what are my options?[122]

Joe Repetski

Q Okay. And had you known about it at the time what would your position be with respect to his continued involvement in Wascana Village?

A Well, my understanding -- my understanding has been that as long as he removed himself from proceedings, you know, of council.[123]

Tim Probe

Q Okay. Was that something you think you should have been made aware of at that time?

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[120] D. Wellings Transcript [October 28, 2014 – p. 61].
[121] C. Wilton Transcript [October 29, 2014 – p. 29].
[122] D. Heenan Transcript [October 29, 2014 – p. 55].
[123] J. Repetski Transcript [November 6, 2014 – p. 61].

A Again, I think in my earlier statement, and I'll reiterate it again, the profit or what he negotiated in terms of that was not important to me. What was important is that he did not involve himself with regards to the Wascana Village or getting it approved by persuasion or other means. So my answer still remains the same at this point in time. What his agreements were in totality were not a concern to me. What was -- would be a concern to me was if it would be him directing or persuading council members to act on his behalf.[124]

Barry Jijian

Q Now, if you had been aware that Reeve Eberle was sharing -- proposing to share profits with this developer over his lands and lands that he didn't own, the Marathon and Chekay properties, if you'd have known that at the time, would you -- what would your opinion be about Reeve Eberle proceeding to be involved in Wascana Village?

A I would have said man, what an agreement. How could -- how could Daniel Schmid agree to that, and that would be it. I mean, that's -- in a contract, that's two companies dealing with each other. Good on you if you got a developer to -- I wish I could have been in that situation and make that kind of money.

Q So you didn't have any qualms --

A No. And you're asking me, now, if I have any qualms about it?

Q Right.

A I'm saying no.[125]

In fairness, the differing views outlined above are largely derived from the Councillors differing views on what Reeve Eberle's continued involvement in matters related to Wascana Village was.

Had I been able to conclude that Reeve Eberle had removed himself entirely from any and all matters related to Wascana Village, I would have had more difficulty concluding that he should have provided additional details on the nature of his agreement(s). Ignoring Reeve Eberle's alleged direct involvement in Wascana Village, his decision to continue to be involved in matters indirectly related to the Development such as securing approval of the OCP and the procurement of water, required him to be open and honest with Council. I am not suggesting that he should have disclosed specific figures, but the fact that his agreement(s) were subject to rezoning and contained profit sharing on the entire Development is not something that Council would have reasonably contemplated. Additionally, these contractual arrangements were material in so far as Reeve Eberle sought to remain involved in matters within the RM that also affected Wascana Village.

[124] T. Probe Transcript [November 4, 2014 – p. 103-104].
[125] B. Jijian Transcript [October 30, 2014 – p. 80-81].

During the Hearings my Counsel asked Councillor Repetski whether he thought Reeve Eberle should have disclosed his profit sharing agreement with the Developer. Councillor Repetski commented that in hindsight something more than a bare declaration may have been required. The exchange is as follows:

> **Q** Okay. Now, looking at this now, looking at this opinion and knowing that he had an interest in the entire development, don't you believe that that's something you should have been told about at the time?
>
> **A** I could -- I would say moving forward from now, yes.[126]

Considering all of the circumstances, Reeve Eberle should have provided additional details of his agreement with the Developer which included, at minimum, the fact that it was subject to rezoning and provided him with a share in the profits of the entire Development. By not providing a more fulsome disclosure Reeve Eberle was acting contrary to the April 2013 Opinion and good conscience. Reeve Eberle remained resolute during the Hearings before me that nothing more than a bare declaration should be required:

> **A** ...And as I sit here today, Mr. Laprairie, it concerns me that if there would ever be a recommendation out of this hearing that the private business of any member with respect to that would be publicly disclosed. And let me explain myself. I've been involved in the politics of the RM since 2000. Mr. Heenan would absolutely vote against it if he felt that I was going to receive financial benefit. He would set the interests of the RM aside and the desires of the community to try and impose hurt on someone that is a political adversary.[127]

Again, I am not suggesting that Reeve Eberle should have made his agreements public, but good conscience required something more than was given. I find Reeve Eberle's rationale unconvincing, Councillor Heenan (referenced to by Reeve Eberle) voted against the OCP and all Wascana Village related matters throughout the relevant time period without the luxury of knowing any details of Reeve Eberle's agreement(s).

B. Matters Engaging the Community of Interest Exception

Throughout the course of this Inquiry the allegations in relation to Reeve Eberle's conduct can be categorized as either directly or indirectly related to Wascana Village. As evidenced from the documents produced pursuant to this Inquiry, Reeve Eberle was engaged in matters related to the RM's various OCPs. This involvement can be further categorized as follows: (1) advocating for the approval of the various OCPs submitted to Community Planning; and (2) participating in efforts related to the RM's public relations campaign regarding the RM's OCP and public profile.

That Reeve Eberle was engaged in the foregoing to some extent cannot be disputed. There was ample documentary evidence to establish at least some level of involvement in relation to the OCP

[126] J. Repetski Transcript [November 6, 2014 – p. 63].
[127] K. Eberle Transcript [November 12, 2014 – p. 96].

and the media campaign. As was urged by Reeve Eberle, these matters can all be considered as general to the RM and not specific to the Wascana Village Development. However, it cannot be ignored that the approval of the OCP was both a necessary and monumental first step in the advancement of the Wascana Village Development. Additionally, Reeve Eberle's agreement(s) with the Developer were also conditional on rezoning, a matter clearly related to the approval of the OCP.

I intend to fully set out Reeve Eberle's involvement in relation to the OCP, following which I will address the appropriateness of his conduct with respect to these matters.

1. Involvement in the Official Community Plan

At the May 9, 2012 Regular Meeting of Council, Councillor Jijian tabled a resolution to have the RM's director of planning work with GPDC to ensure that their proposed block plan was incorporated into the OCP. The actual amendments to the OCP were undertaken in June or July of 2012 and the amended OCP was adopted by Council at its Regular Meeting on July 31, 2012.[128] The marrying of the OCP and the Wascana Village Development was by no means a drawn out process.

As outlined previously, from this point forward the OCP contained land-use policies that were to see the Eberle lands rezoned from agricultural to residential. This was of course necessary in order to facilitate the Wascana Village Development, but it should be noted that the rezoning was not itself dependant on the Wascana Village Development. Despite the lapse of GPDC's various land sale agreements with the Eberles and others, all iterations of the RM's OCP that were submitted to Community Planning for approval during the time periods relevant to this Inquiry included the rezoning of the lands proposed for Wascana Village.[129]

In fairness to Reeve Eberle, the OCP was supported by a majority of council. There was substantial evidence presented that the 1991 OCP that was in place in 2012 was severely outdated and served as an impediment to development and prosperity within the RM.

As early as May 2012 Reeve Eberle sought legal advice from the RM's solicitor in relation to his ongoing involvement in the affairs of the RM, and particularly the OCP. The result of this initial consultation was a draft pecuniary interest letter dated May 29, 2012. [130] The reason I term it a 'draft' letter is that the letter was addressed to the ratepayers of the RM and its Council, but there is no evidence that it was ever signed or provided to its intended recipients. Despite the uncertainty regarding its dissemination, the draft letter was provided to Councillors Jijian, Repetski and Deputy Reeve Probe via email.[131]

[128] Exhibit 266.
[129] Exhibits 68, 69, and 89-92.
[130] Exhibit 143.
[131] *Ibid.*

In this draft letter, Reeve Eberle addresses his potential involvement in relation to Wascana Village and indicates that he intends to remove himself entirely from "discussions that involve or relate to the sale, whether directly or indirectly, and will abstain from voting on any question relating to the matter, inclusive of any subsequent applications that may be made by the developer."[132]

In relation to the OCP, Reeve Eberle goes on to acknowledge that there may also be issues with his involvement in advocating generally for the approval of the OCP. The draft letter reads as follows:

> I have also consulted with counsel for the RM to determine whether I might be in a conflict of interest in respect of the RM's more general initiatives such as its efforts to have its OCP finalized approved [*sic*] by the responsible Minister. In a very general way, it might be said that the proposed OCP and zoning bylaw may indirectly benefit me by making my lands more valuable.[133]

The draft letter also touches on the community of interest exception where Reeve Eberle notes that he has been assured by the RM's solicitor that holding an interest in common with the majority of voters in the RM in relation to the OCP "is not a pecuniary interest within the meaning of s. 143(1) of *The Municipalities Act* or the common law." Notwithstanding this, Reeve Eberle indicated that he was recusing himself from Council discussion of the OCP and voting on the matter. The draft letter concludes by stating "I wish council members all of the best in dealing with the OCP initiative going forward." Despite noting concerns around his continued general advocacy for the OCP, Reeve Eberle provides no stated intention in relation to his involvement in securing approval of the OCP.

Based on the evidence put forward at the Hearings, it is unlikely that the OCP would have actually been amended to include Wascana Village by late May, although it was surely contemplated in light of the May 9, 2012 Resolution.[134] The conclusion in the draft letter that the OCP may indirectly benefit Reeve Eberle by making his lands more valuable also indicates that the draft letter may have been written prior to the OCP being amended. The reason I say this, is that it cannot be said that the actual rezoning of the Eberles' lands – which was included in the 2011 OCP once it was amended – 'may indirectly benefit' Reeve Eberle. Rezoning of his lands would in fact directly benefit him.

On June 18, 2012, the RM received a legal opinion (the "**June 2012 Opinion**") from its solicitor that addressed whether the RM Council members, as a group, had a pecuniary interest in the passage of the OCP which was eventually adopted by Council on July 31, 2012.[135] More specifically, the June 2012 Opinion was intended to provide guidance on the community of interest exception that has been highlighted above. After a lengthy review of the relevant authorities, the June 2012 Opinion concludes as follows:

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[132] *Ibid.*
[133] *Ibid*.
[134] Exhibit 67.
[135] Exhibit 144.

> In our opinion, the adoption of the proposed OCP is clearly a community interest rather than a personal interest and this exception has been recognized in section 143(2)(a) of the Act, being a general interest one has as a taxpayer or voter and section 143(2)(i) being an interest held in common with the majority of voters of the municipality or with the majority of affected voters. No member of council that owns land in the RM of Sherwood therefore has a pecuniary interest by reason only of owning such land notwithstanding it is likely to increase in value as a result of the adoption of the OCP.
>
> Members of council, of course, will have a pecuniary interest in any decisions relating to the subdivision or rezoning of their own land as these matters would be personal to him or her as opposed to electors in the whole of the RM or a smaller but still significant community of interest.[136]

It is important to note that this opinion was provided to, and for, the entire RM Council as it was applicable to all Council members owning land in the RM. The June 2012 Opinion was sent via email from the RM's solicitor on June 18, 2012 and then forward by Ms. Kunz on June 19, 2012 to councillors Jijian, Wilton, Heenan, Wellings and Repetski.[137] The June 2012 Opinion was discussed in-camera at the June 20, 2012 Regular Meeting of Council that was attended by all Councillors with the exception of Councillor Heenan.[138]

The June 2012 Opinion was highly influential in determining the Council's understanding of pecuniary interests as they related to the OCP and, more specifically, the scope and application of the community of interest exception. Reeve Eberle's understanding of the permitted scope of his involvement in relation to the OCP would have been informed by the May draft letter, the June 2012 Opinion and the verbal advice he was receiving from the RM's solicitor during that time period.

When testifying in relation to the June 2012 Opinion, Reeve Eberle stated the following as to the impetus for the June 2012 Opinion being prepared:

> **A** I think what the reason, Mr. Laprairie, was -- is I -- I needed to understand whether I could participate in certain aspects. The continuation of the OCP which had been in the works for a very large period of time and was central to my campaign -- and then the other issue is whether or not I could continue in these ongoing negotiations with the City of Regina that affected, you know, how we work with them and the lands around the city. And Mr. Kwochka's view was that I could participate in both of them, and I actually ended up removing myself from both of those processes.

In light of the foregoing, at some point in late June or July of 2012 there was a conference call involving Ms. Kunz, Deputy Reeve Probe, Reeve Eberle and the RM's planning consultant at that

[136] *Ibid*.
[137] Exhibit 244.
[138] Exhibit 265 and 266.

time, Planning Alliance. Planning Alliance was based out of Edmonton and had been brought on to prepare and submit a new OCP for the RM. Deputy Reeve Probe's testimony of the call sheds light on what was discussed:

> **A** …I'm going to give a little, if I can, a little bit of the history of the OCP from that perspective with Planning Alliance. We brought Planning Alliance on previous to that, about a year to two years, and their contract with us, as I understood it, was to get our OCP approved with the Province, to do what was necessary, get the necessary documentation and whatever was required. So that was their -- their position on that, and they were supposed to do that for approximately around 20 or 25 thousand dollars.
>
> We proceeded to be -- come into the same problems that we've had over the history of the RM with the Department of Ministry Affairs, Community Planning. It didn't seem to matter what they did, we were still short on what was required, supposedly, by minister -- Community Planning. So we proceeded with approximately a year to two years with Planning Alliance, and I'm not positive of the dates, but our contract went from somewhere around 25,000 to I think we were in excess of $100,000 by the time Planning Alliance called us.
>
> When we -- we had a meeting in Rachel's office, and I'm not sure of the exact date on that, but there was Kevin Eberle, myself, Rachel Kunz, and I'm not sure if there was somebody else there, but we were on a conference call with Planning Alliance out of Edmonton to get them to finally do their due diligence and get our OCP into effect. They understood, very pointedly, through our discussion that we were tired of waiting, they needed to get it done now…[139]

Whether or not the 2011 OCP had been amended at the time of this conversation is not material. Based on Resolution 270/12 passed in the May 9, 2012 Regular Meeting of Council, Reeve Eberle was fully aware that the OCP had, or would prior to its submission to Community Planning, be amended to include Wascana Village.

On August 23, 2012 Reeve Eberle and Deputy Reeve Probe had a meeting with Minister Reiter. The agenda of their meeting is outlined in an undated letter from Ms. Kunz to Minister Reiter wherein she states:

> Thank you for agreeing to meet with Reeve Kevin Eberle and Deputy Reeve Tim Probe on August 23rd, 2012.
>
> The Rural Municipality of Sherwood No. 159 has many issues it would like the opportunity to discuss with you. However, as time is limited, Reeve Eberle and Deputy Reeve Probe would like to specifically discuss:

[139] T. Probe Transcript [November 4, 2014 – p. 170-71].

> 1. The new **Official Community Plan and Zoning Bylaws** for the Rural Municipality of Sherwood recently submitted to Community Planning for approval. These bylaws have been more than 10 years in the making and Council is committed in seeing these Bylaws approved.[140]

The other two agenda items were the urban/rural fringe affecting the RM and the City of Regina, as well as, the adversarial relationship between the RM and the City of Regina.

On December 21, 2012, Reeve Eberle wrote Minister Reiter in response to an earlier letter of the Minister which resulted from a meeting between the Minister and Reeve Eberle (which may have been the August meeting referred to above).[141] The subject matter of the correspondence is again the OCP and the RM's relationship with the City of Regina. At this time, the RM's OCP is awaiting ministerial approval and Reeve Eberle appears to be taking an active position in securing that approval where he states:

> Numerous developers have approached Sherwood with proposals for suitable developments within our municipality but Sherwood is unable to accommodate such requests until the Official Community Plan (the "OCP") receives your approval. A further difficulty is that developers are frustrated as we are unable to provide much guidance as to the time frame for such approval, whether conditional or otherwise. We are of the opinion that the proposed OCP doesn't just meet all statutory requirements and Statements of Provincial Interest but is the most modern and comprehensive plan that has ever been put forward by a rural municipality in this Province.[142]

On February 22, 2013 the Minister released his Notice of Decision on Bylaws 6/11 and 7/11, which as indicated previously resulted in partial approval of the RM's 2011 OCP.[143] Following the issuance of the Notice of Decision, a meeting was arranged with the Minister for early March 2013. Reeve Eberle's continued involvement in OCP related matters is indicated by an email of Ms. Kunz to Mr. Probe, the RM's solicitor and Lance Donison on March 5, 2013.[144] Mr. Donison was a lobbyist that had been contracted by the RM in order to aid in the OCP approval process among other initiatives.

In her email Ms. Kunz states: "Kevin has asked that I set up a meeting for 10:30am tomorrow to discuss the strategy for Thursday's meeting with the Minister." Ms. Kunz testified that Reeve Eberle always attended these 'strategy sessions' which occurred prior to any meeting with the Minister, and further, that the OCP was central to this particular meeting.[145]

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[140] Exhibit 146(a).
[141] Exhibit 148.
[142] *Ibid*.
[143] Exhibit 93.
[144] Exhibit 150.
[145] R. Kunz Transcript [October 21, 2014 – p. 83-84 and 336-337].

The eventual meeting with the Minister took place on March 7, 2013. In a series of emails between Reeve Eberle and Mr. Donison that followed this meeting, it is clear that the OCP and the Minister's recent Notice of Decision were discussed at the March 7 meeting. These subsequent emails reflect Reeve Eberle's frustration with the Minister's position and the resulting delay on development in the RM.[146]

April 18, 2013 is an important milestone in relation to Reeve Eberle's involvement in relation to the OCP. On this date the April 2013 Opinion was provided to Reeve Eberle that specifically addressed his ongoing involvement in relation to the OCP having regard to his April 2013 agreement with the Developer. As mentioned previously, and unlike the June 2012 Opinion, the April 2013 Opinion was written exclusively for Reeve Eberle. The April 2013 Opinion opens as follows:

> You have asked that we provide an opinion in relation to disqualifying pecuniary interest of members of a municipal council. Specifically, we understand that you have entered or will be entering into an agreement to sell certain lands within the Rural Municipality of Sherwood No. 159 (the "**Sherwood**") to a developer and that payment of a significant portion of the total purchase price is contingent upon the adoption of certain land use concepts within an Official Community Plan (the "**OCP**") and rezoning of those lands. You have asked that we clarify to what extent you can involve yourself in the proposed OCP and zoning bylaws given the agreement you have entered into.[147]

The April 2013 Opinion goes on to state, much the same as the June 2012 Opinion, that the mere ownership of land within the RM by a Council member is not a personal interest, but rather a general interest that is shared with the majority of ratepayers in the RM. The April 2013 Opinion goes on to conclude:

> Notwithstanding this general interest, a member of council will have a pecuniary interest in any decisions relating to the subdivision or rezoning of their own land as these matters would be personal to him or her as opposed to electors in the whole of the RM or a smaller but still significant community of interest. As you have now entered into an agreement which provides for compensation based upon, or contingent upon, rezoning, it is clear that your pecuniary interest is no longer a general interest and is a disqualifying personal interest and that needs to be disclosed to the rest of Council and the Administrator so that steps can be taken to avoid future conflicts.
>
> The result is that you ought not to vote or otherwise participate as a member of Council in discussions involving your lands nor direct planners or other administrative personnel in relation to your lands. <u>You can continue to advocate for the OCP generally, the contents of which have been fixed well in advance of your</u>

[146] Exhibits 151 and 152.
[147] Exhibit 155.

> pecuniary interest arising. Notwithstanding that you have a personal interest in relation to your lands, you continue to share a general interest with the community in relation to the OCP generally.[148]
>
> [emphasis added]

I take issue with the presumption on which the April 2013 Opinion is based in relation to Reeve Eberle's continued advocacy. I intend to comment further on this matter in my findings on conduct.

Moving ahead to early 2014, the RM was again contemplating the submission of another new OCP. On January 28, 2014, Ms. Kunz sent an email to the RM Council and certain staff informing them that a draft OCP was ready for discussion.[149] Ms. Kunz suggested that the document be reviewed and discussed in a 'strategic meeting' to occur on January 30 at noon. As advertised by Ms. Kunz, this meeting was Council's opportunity to comment on the document and have amendments made before it was presented for first reading.

The January 30 'strategic meeting' took place as scheduled and was led by the RM's Director of Planning, Ms. East. Ms. Kunz took notes of the meeting[150] and when testifying she had a vivid recollection of the meeting. Ms. Kunz testified that Reeve Eberle attended this meeting, asked pointed questions and gave directions on how the OCP could be tweaked.[151]

In March of 2014 a meeting was scheduled with Minister Reiter to take place at the annual SARM convention.[152] It should be noted that this meeting was scheduled to take place one month after the RM had submitted its Concept Plan to Community Planning that was required pursuant to the December 31, 2013 Notice of Decision.

In accordance with normal practice, the RM held a strategy meeting a day or two in advance of the actual meeting with the Minister. Ms. Kunz testified that Reeve Eberle attended the strategy meeting on this occasion, but did not attend the actual meeting with the Minister as Wascana Village, and specifically the Concept Plan that was submitted for approval the previous month, were on the agenda for the latter meeting.[153]

Reeve Eberle was again involved in OCP related discussions outside of council on March 21, 2014. On this date a lunch meeting at Golf's Restaurant was attended by Reeve Eberle, Councillor Jijian, Ms. Kunz and Ms. East. While Councillor Jijian refuted certain claims by Ms. Kunz as to what was discussed at the March 21 lunch meeting, he was clear that the meeting did include a discussion related to the OCP and the delay to its approval.[154]

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[148] *Ibid*.
[149] Exhibit 322.
[150] Exhibit 176.
[151] R. Kunz Transcript [October 21, 2014 – p. 230].
[152] Exhibit 196.
[153] R. Kunz Transcript [October 21, 2014 – p. 336-38].
[154] B. Jijian Transcript [October 30, 2014 – p. 160-61].

Months later, on June 4, 2014, Reeve Eberle emailed Ms. East and requested an electronic copy of the current draft of the OCP.[155] Upon receipt of that document, Reeve Eberle forwarded a copy of the OCP to Mr. Schmid of GPDC. The next day, June 5, Mr. Schmid forwarded the OCP and other related documents to his consultants at Weston Consulting and copied Reeve Eberle on that email. The instructions of Mr. Schmid to his consultant read as follows:

> Further to our previous telephone conversation, please find attached the RM of Sherwood OCP which has been forwarded to the province for approval for your confidential review/comments.
>
> Kevin Eberle has asked that you review and in strictest confidence let him know your thoughts. Please note that he has requested that you check to see if there is any mention of a) Burrowing Owls habitat, and b) EPA designation with respect to the NE corner of the Wascana Village lands. He would like this stricken from the OCP if mentioned in the OCP.
>
> Mark, thank you in advance for your attention to this confidential matter and I wish you a most blessed day!

When giving testimony on Reeve Eberle's instructions, as outlined in his email, Mr. Schmid explained as follows:

> **Q** …So you had had a conversation with Mr. Eberle and he asked you to do these things?
>
> **A** No, he did not.
>
> **Q** Okay.
>
> **A** It's -- actually, that was a typo error of mine and I should have reformulated it. I was in a hurry that morning. It should have said we, meaning Great Prairie, would like this stricken from the OPC, not Kevin Eberle.
>
> **Q** Okay. But where it says "Kevin Eberle has asked that you review and in the strictest confidence let him know your thoughts" --
>
> **A** Correct.
>
> **Q** Why was it in the strictest confidence?
>
> **A** Well, first of all, Kevin Eberle wanted the OCP before it was submitted checked by another party, a planner, and not do a formal review, and give their input as to what they thought about the OCP submission.

[155] Exhibit 284.

On June 6, 2014 Reeve Eberle received a copy of the draft zoning bylaw that accompanied the OCP and again forwarded this document onto Mr. Schmid.[156] On this same date, one of Mr. Schmid's planners at Weston Consulting sent him an email with commentary on Reeve Eberle's concerns over the land designation applicable to the NE corner of Wascana Village and the Burrowing Owls. In his email, the planner indicates that "Pending your review, I will send as a separate email to Kevin."[157]

On June 9, 2014 Mr. Schmid forwarded an email that he received from his planner at Weston Consulting to Reeve Eberle and noted that the planner has "given you a choice as to what Jackie [Ms. East] may write into the amended OCP."[158] The attached email that was prepared by Weston Consulting deals with the land designation applicable to Wascana Village and the Burrowing Owl issue – the matter previously identified by Mr. Schmid as being of concern to Reeve Eberle.

Reeve Eberle has consistently offered that any involvement he had in relation to the RM's various OCPs was as a result of the legal advice he obtained through the RM's solicitor. This advice is demonstrated through the May 2012 draft letter, June 2012 Opinion and the April 2013 Opinion. In addition to these two written opinions, Reeve Eberle testified that he also received verbal advice from the RM's solicitor on numerous occasions – this point was also affirmed by Deputy Reeve Probe in his testimony.[159]

While not evident from the foregoing, the RM's solicitor was often in attendance during meetings with Minister Reiter involving the OCP and is alleged to have assisted in the drafting of correspondence on behalf of Reeve Eberle to the Minister that also involved the OCP.

2. Involvement in the RM's Public Relations

In the spring of 2013 the RM contracted with Marielle Gauthier of Redworks Communications to begin a public relations campaign for the RM. While the general scope of the of the work was to improve the profile of the RM, Mrs. Gauthier was also involved in matters related to the OCP. Although Ms. Gauthier did not testify before me, the documents that she produced indicate that she worked directly with Reeve Eberle. In light of these documents, Reeve Eberle has maintained the position that any and all involvement he had was of a general nature and in the best interests of the RM.

One of the first major public relations events to come on line after Ms. Gauthier's arrival was the unveiling of Wascana Village. On May 30, 2013, Mr. Schmid held a press conference to formally announce the Wascana Village Development. Immediately following Mr. Schmid's press conference the RM also held a technical media briefing on their OCP after it had just passed first reading.

[156] Exhibit 283.
[157] Exhibit 285.
[158] Exhibit 289.
[159] T. Probe Transcript [November 4, 2014 – Pages 235-236].

In an email to Ms. Kunz on May 17, 2013, Ms. Gauthier indicates that she was going to suggest that the RM hold their technical briefing after the OCP has passed third reading. However, Ms. Gauthier changed her mind after speaking with the Developer's public relations firm, who informed her that they spoke with Reeve Eberle who informed them that the Wascana Village press conference should be held sooner than later. In light of Reeve Eberle's influence on the timeline, Ms. Gauthier concluded that the technical briefing needed to follow the GPDC press conference at the end of the month.

The RM had determined that Deputy Reeve Probe would be their representative at the technical media briefing. On May 30, the day of the Wascana Village press conference and technical media briefing, Reeve Eberle forwarded Deputy Reeve Probe a news clip suggesting that he should address another developer's comments that the RM needs services from the City.

A short time later on June 21, 2014, an article appeared in the Leader Post titled "Sherwood plans 'box' city in".[160] The article resulted from an interview with Regina Mayor Michael Fougere in which he was critical of the RM's recent OCP and its inconsistency with the City's OCP. Mayor Fougere also made comments critical of the recently announced Wascana Village Development.

Following the release of this article, there was much internal discussion generated amongst the RM Council members. On this same day the RM's solicitor issued an email to everyone which opened with the following: "All: I had a lengthy discussion with Kevin and he asked me to communicate the following strategy…".[161] It should be noted that Reeve Eberle's suggested strategy is reasoned and provides no positive endorsement of either the OCP or Wascana Village.

On June 23, 2013, and part of the same email chain, Ms. Kunz sent the RM's solicitor an email that attached an earlier email chain between her and Reeve Eberle where she references his request that she notify the media as to the RM's upcoming Council meeting where the Wascana Village bylaws will be tabled. In her email to the RM's solicitor she writes:

> FYI
> This will displease the Ministry. It is one thing to have the developer call the media, another for us to do it.
> I am reluctant to do this but kevin is insisting. I don't know what this will accomplish that is positive. If Daniel Schmid wants to answer his critics, he should call a news conference away from the RM.
> I though you should be kept in the know.[162]

In her testimony, Ms. Kunz was asked to expand on the content of the above email and stated as follows:

[160] Exhibit 320.
[161] Exhibit 165.
[162] Exhibit 165.

Q And again you're referring to Kevin Eberle there?

A Yes, I am.

Q And what was he insisting be done?

A He wanted me to call the media and invite the media to the special meeting so that there would be a some publicity around the first reading of those Wascana Village bylaws.

When asked about this exchange Reeve Eberle took the position that Ms. Kunz was referencing an item further back in the email chain that was unrelated to Wascana Village.[163]

3. Conclusion

a) Involvement in the Official Community Plan – Conclusion

While I am not bound by any unduly technical or legalistic assessment of Reeve Eberle's conduct, a determination of its appropriateness turns in part on whether his interest(s) in the above matters can be characterized as an interest that was shared with the community. The 'community of interest' exception reads as follows:

> (2) A member of council does not have a pecuniary interest by reason only of any interest:
>
> (i) that the member or a closely connected person may hold in common with the majority of voters of the municipality or, if the matter affects only part of the municipality, with the majority of voters in that part;
>
> [emphasis added]

Both of the legal opinions prepared by the RM's solicitor address the community of interest exception, with the April 2013 Opinion being written specifically for Reeve Eberle. I had earlier noted that I had one point of contention with the April 2013 Opinion. My concern relates to the following passage that I will reproduce for convenience:

> You can continue to advocate for the OCP generally, the contents of which have been fixed well in advance of your pecuniary interest arising. Notwithstanding that you have a personal interest in relation to your lands, you continue to share a general interest with the community in relation to the OCP generally.[164]
>
> [emphasis added]

[163] It should be noted that the time stamps on the June 23, 2013 emails did not provide a consistent time line. Upon review of the documents' properties it was discovered that the differing time-zones of the senders/recipients resulted in the inconsistency.
[164] Exhibit 155.

It is crucial to note that the April 2013 Opinion condones Reeve Eberle's continued advocacy for the OCP. This position is however premised on the statement that the contents of the OCP have been fixed well in advance of Reeve Eberle's pecuniary interest arising. However, as indicated previously, the contents of the OCP were amended subsequent to, and as a direct result of, Reeve Eberle's pecuniary interest arising in the Wascana Village Development.

Contrary to the suggestion in the April 2013 Opinion, the contents of the OCP were not fixed in advance of Reeve Eberle's pecuniary interest. Nonetheless, the April 2013 Opinion concludes that Reeve Eberle has both a personal and general interest, the presence of which apparently supported his continued advocacy for the OCP. It should also be noted that the April 2013 Opinion provides no legal authority for the position that Reeve Eberle can have a personal interest that runs concurrent with his community interest, and further, that such a concurrent interests permits general advocacy for the matter that those interests pertain to.

Reeve Eberle's legal counsel also advanced the position that the community of interest exception contained at s. 143(2)(i) of the Act can be interpreted as contemplating a set of concurrent interests which permitted his general advocacy for the OCP. Reeve Eberle's position, as outlined by his legal counsel, can be summarized as follows:

> To clarify: it is our position that the community of interest exception extends beyond the disqualifying pecuniary interest. Mr. Eberle would be entitled to participate in the continued effort toward approval of the OCP as this was an interest that he held in common with rate payers as a whole. The legal opinions of Mr. Kwochka say this and Mr. Eberle rightly relied on those opinions. It was only when an OCP matter directly related to Wascana Village, such as bylaws or zoning specific to Wascana Village, that Mr. Eberle was required to step back. He was also entitled to work on water issues for the benefit of the RM or on strategic sessions with the Minister. His pecuniary interest prohibited him from voting, influencing or directing relative to rezoning of his lands and approval of the concept plan for Wascana Village.
>
> This issue may be moot in that Mr. Eberle sought to not be involved with the OCP. This, however, will require findings of fact that are supportive of Mr. Eberle's testimony. In the event he was involved in the OCP, he was advised that he could participate in the OCP broadly, except for when his lands were specifically and solely at issue, such as rezoning Wascana Village bylaws.

What Reeve Eberle is arguing is that a community interest 'cures' his disqualifying personal interest. If accepted, this line of argument renders the common law prohibition on advancing matters in which one has a personal interest void, assuming of course, the matter also benefits the ratepayers generally.

Reeve Eberle's position, as outlined by his counsel, fails to recognize the specific requirement of the community of interest exception set out in s. 143(2)(i), that it must be the only reason for Reeve Eberle's pecuniary interest.

My Counsel highlighted this alternative interpretation of the 'community of interest' exception which can be outlined as follows:

> [I]t is important to note that for [the community of interest exception] to apply, it must be the only reason the member of council has a pecuniary interest…
>
> …this exception cannot be relied upon if the member of council has another pecuniary interest that is not shared by a majority of voters. In other words, a majority of voters, including a member of council, may benefit from a property development being built in their municipality as they may all get the benefit of better infrastructure and possibly increased land values. If a member of council however, in addition to these general benefits that are shared by other voters, will also separately financially benefit in a way that is not shared by a majority of other voters, then this exception will not apply…

It is not within my mandate to determine whether Reeve Eberle's conduct falls squarely within the legal definition of 'community of interest' – instead it is to determine whether his conduct was appropriate having regard to these standards that informed his conduct. Out of fairness, part of that assessment must also include consideration of the legal advice he received and whether his actions were done in good faith and in reliance on that advice.

Despite the misplaced assumption upon which the April 2013 Opinion is premised, I somewhat reluctantly conclude that Reeve Eberle's reliance on the legal advice provided to him was made in good faith. I say reluctantly because Reeve Eberle has demonstrated himself to be a very intelligent individual throughout the Hearings before me, which makes me question whether or not he would have noticed the assumptive error in the April 2013 Opinion. My perception is further reinforced by the testimony of Councillor Wilton during which he comments about Reeve Eberle as follows:

> **Q** Why should he have known better?
>
> **A** Because of the issues with pecuniary interest. And he knows the laws inside and out better than any of us on council, I would say, so --
>
> **Q** And why do you say that?
>
> **A** Just because he's very astute and very -- he's very knowledgeable, very -- he's -- he's very detail oriented. He definitely knows information regarding that. He's been a long-time council member as well and has had to deal with similar -- not similar situations, but has been involved with --[165]

It is, however, in my opinion, only fair to also keep in mind that the OCP, and by necessary implication, its ultimate approval, was clearly supported by the majority of Council. Much evidence was given by the majority of the Council that they often looked to Reeve Eberle for leadership and

[165] C. Wilton Transcript [October 29, 2014 – p. 34-35].

spoke highly of his abilities in that regard. The passage and approval of the OCP was of central importance to the RM and it would have been natural for Council to look to Reeve Eberle for leadership on that matter.

Based on all of the foregoing I am not convinced that Reeve Eberle acted inappropriately when he advocated for the approval of the OCP. I make this conclusion primarily having regard to the legal advice Reeve Eberle received and his interpretation thereof, despite my earlier noted reservations.

I must however conclude to the contrary in relation to Reeve Eberle's involvement with Mr. Schmid and the OCP. Reeve Eberle maintained the validity of his continued involvement on the basis of his community interest. Based on this understanding he was granted significant allowances in that he was routinely copied on emails unless they were very specific to Wascana Village. Reeve Eberle used this position to routinely forward correspondence onto the Developer.[166]

Additionally, Reeve Eberle not only forwarded the information but also made the specific request that amendments be made to the OCP. Such instruction is material considering there was evidence given that the Developer's consultants had significant influence in drafting some of the RM's bylaws.[167] The only reason this instruction ever came to light was through Mr. Schmid's recounting of it. I find this was consistent throughout the Hearings in that Reeve Eberle's involvement was almost exclusively documented through the emails of third parties. Suffice it to say, I do not think the absence of a significant documented record of involvement supports the conclusion that Reeve Eberle was not intimately involved.

In conclusion, no interpretation of the April 2013 Opinion would have enabled Reeve Eberle to believe it was permissible for him to forward copies of the RM's OCP onto the Developer and give him instructions to have his planners attempt to have amendments to the OCP undertaken. I do not accept Mr. Schmid's assertion that the operative portion of the correspondence resulted from a typo. Reeve Eberle's conduct in this respect was inappropriate and took advantage of the trust reposed in him by the RM staff that regularly corresponded with him on matters indirectly related to Wascana Village.

b) Involvement in the RM's Public Relations – Conclusion

Ms. Gauthier of Redworks Communications was hired by the RM to aid in their public profile which necessarily involved media relating to their OCP. The extent to which Reeve Eberle was involved in these media relations does not appear to be significant. Any involvement Reeve Eberle may have had would be subject to my commentary above in relation to the OCP. The legal advice that Reeve Eberle was given was the he was permitted to continue to advocate for the OCP generally, one aspect of which would have involved the public relations associated therewith.

To the extent that Reeve Eberle was involved in relation to Wascana Village, I cannot reach the same conclusion. Ms. Kunz's testimony and the email chain of June 23, 2013 evidence that Reeve

[166] Exhibits 281-84.
[167] R. Kunz Transcript [October 21, 2014 – p. 170-71].

Eberle instructed Ms. Kunz in relation to the first reading of the Wascana Village bylaws on June 23, 2013.

Additionally, given the testimony of Deputy Reeve Probe, I find that it is more than likely that Reeve Eberle was involved in media relations of the RM as they related to Wascana Village. When asked about a meeting that will be discussed at length later in my Report, Mr. Probe offered the following:

> **A** Well, in regards to this whole -- I actually invited Reeve Eberle into this – this situation because I felt it had no bearing on -- on decisions being made around Wascana Village by council. It was simply a news media release to introduce the project to the public, to get the -- to get the public on side with what we were doing as an RM. Kevin has had extensive background with SaskTel, and therefore I felt it was prudent and he had -- he obviously had things to offer in regards to the news media release, so for that reason I felt there was a value in that.[168]
>
> [emphasis added]

While I will deal with credibility at length in due course, I accept Ms. Kunz's evidence that Reeve Eberle instructed her as was indicated in her June 23 email. It is not plausible that she would have fabricated her email to Reeve Eberle and then another to the RM's solicitor, all to establish that Reeve Eberle wanted a media presence for the first reading of the Wascana Village Bylaws.

The ameliorating factors which I have considered in relation to Reeve Eberle's involvement in the OCP do not apply to the specific involvement he had in this instance. Reeve Eberle had a pecuniary interest in the Wascana Village Development and it was entirely inappropriate for him to provide instruction to the CAO of the RM to contact the media for the benefit of the Developer.

C. Reeve Eberle's Alleged Involvement in Matters Specific to Wascana Village

At the very early stages of my Inspection, allegations began to surface that Reeve Eberle was involved in advancing the Wascana Village Development from behind the scenes. The primary source of these allegations was the RM's former CAO Ms. Kunz. While having no first-hand knowledge, the general themes of Ms. Kunz's testimony were supported by a certain faction of the Council which included Councillors Heenan, Wilton and Wellings.

From the outset Reeve Eberle has been unwavering in his denial of any allegation that he sought to exert influence in relation to the Wascana Village Development. Reeve Eberle has received notable support from Councillors Repetski, Jijian and Deputy Reeve Probe. Like those who generally support Ms. Kunz's testimony, those in support of Reeve Eberle also have little first-hand knowledge (in most instances), which is of course because they deny that he had any involvement with Wascana Village.

[168] T. Probe Transcript [November 4, 2014 – p. 112].

I do not wish to speak at length in generalities, but some background is necessary so as to inform the reader as to why the chronology of alleged involvement which follows is largely told from Ms. Kunz's perspective. As a result of the highly divergent testimony, credibility has become a major issue and something I will deal with at length later in my Report.

1. <u>Involvement in the Procurement of a Water Source</u>

It is not disputed that the RM has a persisting need for a water source for development within the RM generally. The reason that Reeve Eberle's involvement in the procurement of water becomes a potential concern is the fact that a water source was the single largest hurdle preventing Wascana Village from proceeding (potentially outside of only OCP approval).

There are three ways in which a prospective developer can secure water for their development in the RM. First, water can be obtained by drilling a well. This option has obvious limitations having regard to the size of development which could be properly serviced by a well(s). The second option is to obtain a servicing agreement with the City of Regina. The City currently services a number of developments within the RM, although it is at their own discretion. The third option is by obtaining a water allocation from the Provincial Government. In order to obtain a water allocation, a study must be conducted that establishes that the proposed water source, normally an aquifer, has sufficient capacity to allow the Province to delegate an allocation in addition to current usage. The monitoring period for such a study is lengthy and the cost of such a study is significant.

As it concerns Wascana Village, the City and the Province are the only two viable options for a water source. The evidence presented before me indicates that the City has remained steadfast in its position that it will not supply Wascana Village with water. In regard to the Province, the RM and/or the Developer has yet to complete the required study to determine if there is sufficient allocation remaining within the viable aquifers in proximity to the RM, although I understand that process may be underway.

As with the OCP, Reeve Eberle has retained an active role securing water for development within the RM. As with much of Reeve Eberle's activities, he and Ms. Kunz differ in respect to whether this involvement was of a general nature as Reeve Eberle suggests, or whether it was specific to Wascana Village. Prior to outlining the extent of Reeve Eberle's involvement, it is necessary to again emphasize that, like the OCP, there was near unanimous support amongst Councillors for securing a proven water source. The majority of the Council was pro-development and it was not in dispute that the absence of a water source was the single largest impediment to development within the RM.

On November 21, 2012 at the Regular Meeting of Council, the following motion was passed unanimously by council, including Reeve Eberle:

> **648/12 <u>REQUEST FOR PROPOSAL-FUTURE POTABLE WATER SOURCE</u>**
> COUNCILLOR PROBE: THAT Administrator, Rachel Kunz send a Request for Proposal to a minimum of three consultants for a feasibility study for a future potable water source in the RM of Sherwood No. 159,

AND FURTHERMORE THAT Administrator, Rachel Kunz and Manager of Engineering Operations, Rod Benroth award the contract to the best qualified proposal.

CARRIED UNANIMOUSLY[169]

According to Ms. Kunz's testimony the above water study was necessary to determine a water source for larger developments, which included, but was not limited to Wascana Village.[170]

On February 25, 2013 the Deputy City Manager sent Ms. Kunz a letter that indicated that the City was open to discussing the provision of services to three industrial/commercial development areas within the RM.[171] This correspondence is material in that it represents a theme that was consistent throughout the Hearings – that the City was open to providing services to areas/developments that they viewed as complimentary to the City and not competitive.

In a June 4, 2013 letter from Reeve Eberle to Mayor Fougere, the RM's discontent with the City's proposal to supply specific developers/developments is noted where Reeve Eberle states: "We are aware that the City has made offers to specific developers to provide services and Council is adamant that services must be offered to regions or areas and be supplied via Sherwood as opposed to individual developers."[172]

That Ms. Kunz was taking direction from Reeve Eberle to secure water was not an issue in dispute. Their correspondence throughout the months of February and March demonstrates that there was an open dialogue on this matter.[173] Ms. Kunz's personal notes dated February 14 and March 27 also indicate that Reeve Eberle was heavily involved in the pursuit of water, albeit in a manner directly for the benefit of Wascana Village.[174]

On March 27, 2014, the RM and the City were to have their first meetings pursuant to the recently signed MOU. A few days prior to that initial set of meetings, Ms. Kunz sent out the agenda to Council members for the RM. Reeve Eberle responded in turn by stating: "There is nothing on the agenda other than bypass! What am I missing? Should we not be discussing servicing?"[175]

After Ms. Kunz's resignation on March 27,[176] Reeve Eberle sent Ms. East an email on April 2, 2014 where he indicates the conditions on which water services from the City of Regina would be acceptable:

> Another issue that needs to be addressed is the term of context of Regina water service to the RM (ie the 4 drop points are just that drop points). The RM needs to identify our long and short term requirements. Regina needs to be aware that the RM

[169] Exhibit 147.
[170] R. Kunz Transcript [October 21, 2014 – p. 69-71].
[171] Exhibit 149.
[172] Exhibit 275.
[173] Exhibit 191.
[174] Exhibits 190 and 201.
[175] Exhibit 200.
[176] Exhibit 202.

> is purchasing a quantity and it is not tied to a development or area. Further it will be exclusively the RM that determines the use. This is a high priority to get accurately documented. If we cannot come to terms with the city then we need to place all our emphasis on our own source.[177]

While it is certainly an understandable policy decision that the RM would want greater control over the provision of services within the RM, one cannot ignore the fact that the City was clear that it would not supply Wascana Village, and further, the RM Council was clear that they were behind the Development.[178] It is not unreasonable to assume that had the City provided a supply of water that was not conditional on its end use, the RM would have been likely to deploy it to Wascana Village.

In her testimony, Ms. East was asked whether she had any knowledge of Reeve Eberle exerting influence on Ms. Kunz in relation to Wascana Village and she responded as follows:

> **Q** Right. And did she tell you that -- that she was instructed that she shouldn't pursue that and she should pursue water for Wascana Village instead?
>
> **A** No. I remember that -- that there was -- no, not really. I mean, we knew we had to -- we knew that Wascana Village needed water, and we did talk about the opportunities with the east/west pipe to the -- on the south. We did talk about that, but I never knew of the other four coming off the agenda. I think she may have shared a -- like, she would get into -- Reeve Eberle and Rachel would get into arguments, and I think that that -- they might have ended up in an argument about this -- who -- where -- what is our priority for servicing, where should we service or something like that. So I think that became -- like, again, the commitment she thought she had from the City was these four points of service, and I somehow recall that there were arguments with Rachel and Reeve Eberle about are those -- why are those our priorities and sort of that was going back on this -- on how far she got with the city.
>
> **Q** So she conveyed that to you?
>
> **A** Yes.[179]

Reeve Eberle's legal counsel addressed the above comments on cross-examination where Ms. East provided the following:

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[177] Exhibit 316.
[178] T. Probe Transcript [November 4, 2014 – p. 244-46]; J. Repetski Transcript [November 6, 2014 – p. 247-48]; B. Jijian Transcript [November 4, 2014 – p. 57-60]; and C. Wilton Transcript [October 29, 2014 – p. 58-69].
[179] J. East Transcript [November 18, 2014 – p. 192-93]

> **A** And the City's view was no, they were only prepared to provide water to developments that they supported, not an allocation of water for the RM to determine within some context.
>
> **Q** Right.
>
> A So it does bring to mind that the argument was -- was Rachel was concerned that there was -- that all -- that we want -- that there was going to be a pull to have all of the water that might be allocated to Wascana Village so there was -- the argument was what is -- what is the real -- what is the real desire for this water.
>
> **Q** Mmhmm.
>
> **A** Like, what is the -- it was an argument about the -- what the RM would do about this -- this allocation of water.[180]

Ms. Kunz's testimony was unequivocal in relation to the instruction she received from Reeve Eberle and whether it was specific to Wascana Village. When asked by my Counsel whether Reeve Eberle abided by the April 2013 Opinion that instructed him not to direct staff in relation to his lands, Ms. Kunz offered the following:

> **Q** Okay. And then it says continuing, "nor direct planners or other administrative personnel in relation to your lands." Did he do that?
>
> **A** Yes.
>
> **Q** And what do you know that he did?
>
> **A** Well, he was -- the -- I knew that, for example, Wascana Village, his deal with Wascana Village would only be good if the -- it was rezoned, so I constantly had direction from him to facilitate that rezoning, so, you know, find him water, find him sewer, talk about access from highways, that kind of direction.[181]

When asked by Counsel whether she had ever seen the April 2013 Opinion prepared by the RM's solicitor, she said she had not seen it and went on to elaborate as follows:

> **A** I wish I had seen this because it would have made my life a lot easier. It would have because the -- the RM of Sherwood gives great latitude to Reeve Eberle, so Reeve Eberle is very involved in the day-to-day operation of the municipality. At times I had expressed my frustrations with some members of council about Reeve Eberle interfering with the duties of the administrator and the day-to-day things that I do, and, you know, it's always been, well, he's the boss, he's the – you know, he's Reeve Eberle, right, so he's just involved, he cares

[180] J. East Transcript [November 18, 2014 – p. 219]
[181] R. Kunz Transcript [October 21, 2014 – p. 103-04]

> about the municipality, so just -- you know, if he -- you take his directions. If I had this, then I could have presented this to council, and council would have had the discussion, they would have -- they would have understood that it's not just a reeve saying, you know, did you send a letter to somebody, it's a reeve saying find me water for Wascana Village, do this and do that, right. So that would have made my life a lot easier and maybe I could have -- the -- the involvement of Reeve Eberle in the day-to-day operations of the municipality would have been less.[182]

Reeve Eberle categorically denies giving any instruction to Ms. Kunz as it would relate to Wascana Village. His position as to his admitted involvement with the procurement of water for the RM is accurately summed up in the submission of his legal counsel:

> [171] As set out in these submissions, Mr. Eberle possessed a good faith understanding that he could continue to act as Reeve in the interests of the RM as a whole. His efforts towards acquisition of water fall within his authority. If he had not done so and refrained from those efforts it would have been to the detriment of all other parts of the RM. To characterize the requirements as to pecuniary interest as setting such a high standard would be tantamount to requiring Mr. Eberle to resign, which is far from the standard that is set out in the legislation and the legal opinions provided to Mr. Eberle. It should be noted, nevertheless, that when RM council addressed the matter of a water study, Mr. Eberle recused himself.

2. <u>Wascana Village – Concept Plan</u>

a) Evidence of Rachel Kunz

Ms. Kunz was employed as the CAO for the RM from May 28, 2012 until March 27, 2014. Ms. Kunz graduated from the Ecole Polytechnique de Montreal in 1984 with a B. Engineering in mining. For a decade she practised her profession as a Mining Engineer in British Columbia. She then moved to Naicam, Saskatchewan to farm with her husband which was a new challenge. She later returned to the University of Regina where she received a Certificate in Local Government Administration. In her new discipline she became Administrator for the Town of Star City and then Administrator for the Northern Village of Air Ronge, Saskatchewan.

When an opening arose for an Administrator for the RM of Sherwood, she was successful in obtaining the position and commenced her duties on May 28, 2012. Shortly after Ms. Kunz commenced her employment, she became aware that Reeve Eberle had a pecuniary interest in relation to property in the proposed Wascana Village Development.[183]

When Ms. Kunz was hired, other than Reeve Eberle, the Councillors were Joe Repetski, Dale Heenan, Corey Wilton, Dave Wellings, Barry Jijian and Deputy Reeve Tim Probe. At that time the employees were Sharon Pope (Municipal Clerk), Lorna Hillier (Clerk), Elan Krieser (Receptionist),

[182] R. Kunz Transcript [October 21, 2014 – p. 105-06]
[183] R. Kunz Transcript [October 21, 2014 – p. 24-25].

Rod Benroth (Manager of Public Works), Blaine Yatabe (Director of Planning) and Adam Toth (Planner).[184] Ms. Kunz stated that when she arrived, the affairs of the RM were very disorganized.[185]

As to her duties, Ms. Kunz was responsible for complying with the responsibilities as they were prescribed by the Act. Ms. Kunz also answers to the RM Council and must also comply with their directions.

When Ms. Kunz commenced her duties as CAO, Wascana Village was one of many projects presented to Council. She said six months had lapsed before she even saw a plan.[186] Shortly after Ms. Kunz's arrival, the planning consultant that was employed by the RM, Planning Alliance, abruptly ended their relationship with the RM as they had found themselves in a conflict of interest in relation to the RM's OCP and a contract which they had entered with the City of Regina.

Ms. Kunz testified that she was subsequently informed by Reeve Eberle that the RM needed a consulting firm that would defend the 2011 OCP and secure its approval. In July of 2012, the RM hired Dillon Consulting and began working with their planner, Jacqueline East. Initially hired as a consultant, Ms. East later became an RM employee and its Development Officer. At the time of this Report, Ms. East is no longer an RM employee but has reverted back to her earlier status as a consultant.

Things remained relatively quiet on the OCP front until February 22, 2013 when the Ministry released its Notice of Decision partially approving the 2011 OCP.

In the late summer of 2013, the RM submitted the 2013 OCP Amendments which amended the OCP in place after the February Notice of Decision. As the end of the calendar year was approaching, the Developer began to express his frustration with the delays to the approval of the 2013 OCP Amendments. A number of witnesses testified that Mr. Schmid indicated that he was going to lose his investors unless the 2013 OCP Amendments were approved by the Ministry by the end of the year.[187]

At some point in the life-cycle of Wascana Village it was decided that Councillor Jijian would assist Ms. Kunz in dealing with the Developer. The impetus for Councillor Jijian's involvement is outlined in his testimony on the subject:

> **Q** And so you hadn't met Daniel Schmid before the May 9th, 2012, meeting, correct?
>
> **A** No.
>
> **Q** You got to know him after that?

[184] See Appendix 18 for a full chronology of the Council members and administrators for the RM.
[185] R. Kunz Transcript [October 21, 2014 – p. 35].
[186] R. Kunz Transcript [October 21, 2014 – p. 40].
[187] R. Kunz Transcript [October 21, 2104 – p. 215]; B. Jijian Transcript [October 30, 2014 – p. 96].

A I did.

Q And did you get to know him as a result of this development?

A That's correct.

Q What role did you play in this development -- Wascana Village development after May 9th? Can you just outline that to us?

A I can't give you the specific timeline that I started to get involved.

Q Yes.

A It was agreed to -- well, first off Rachel had approached council and said that I am very, very busy, I've got so much on our plate. The Wascana Village development's going to take a tremendous amount of time; I need more staff. It was decided at that point, then, we would have councillors assist her with meetings et cetera, et cetera. And Tim Probe and I were asked if -- well, I wouldn't say asked, said that we would sit on -- say, a lack of a better word, that committee to support her, and we did.

Q And did Reeve Eberle ask you to do that?

A Reeve Eberle was part of that. Tim Probe was part of that. I was part of that. We were all part of that because we need -- she needed assistance…And so Tim and I said we would assist Rachel. We all agreed to it. It wasn't somebody just directed us to do it.

Q Okay. But Reeve Eberle was involved in that decision?

A Yes.[188]

The urgency for approval of the 2013 OCP Amendments becomes apparent in the following email Ms. East sent to Mrs. Halliday (Municipal Clerk) on December 2, 2013 and copied to Mr. Benroth and Ms. Kunz:

> Hi Erin,
>
> Just a heads up that Cllr Jijian called me Friday to ask about the status of the Wascana Village applications. I spent some time explaining to him that the applications were still at the Province awaiting their approval. However, I also explained that additional information is required of the applicant before any additional approvals can be processed. I mentioned that Daniel Schmidt is aware of the engineering that remains to be sorted out, specific to confirming water, sewer, and downstream traffic solutions, and that he met with the RM and the City with his engineers last month to discuss the project

[188] B. Jijian Transcript [October 30, 2014 – p. 67-69].

and outstanding issues. Cllr Jijian seemed surprised that approvals were subject to any additional due diligence and surprised that approvals would be delayed for any reason.

Cllr Jijian made a subsequent comment to me that he and Reeve Eberle would be on this matter, and be in touch. I don't know to what he was referring but I want to:

1) Ensure we are all on the same page with respect to the status of this development proposal;

2) Ensure that, if discussions are required over the next two weeks, that you do not hesitate to involve me in the discussions about planning approvals. If you want to take a message and text me – I can return a call asap. I would hate if anything got 'crazy' after all the positive steps over the past months.[189]

When asked about the content of Ms. East's email, Councillor Jijian did not know why Ms. East would have made the statement contained in her email. He could not recall ever discussing the above matters with Reeve Eberle.[190]

When asked about the email, despite indicating that Mr. Jijian's telephone call was about Wascana Village, Ms. East relied on her comment that "I don't know to what he was referring" to support the position that Councillor Jijian's comments may have been in relation to Wascana Village or the planning practices at the RM regarding rezoning and subdivision generally.[191]

Mr. Benroth, who was also copied on the December 2 email replied shortly thereafter by stating: "I believe Kevin is trying to get Barry to force the issue here." When presented with this email, Mr. Jijian stated: "I'm very surprised that that statement is there. And I don't know why Rod [Benroth] would say that."[192]

By late December, the negotiations for the approval of the 2013 OCP Amendments were heating up. On December 27, 2013 a meeting was held with Community Planning and the RM to get the 2013 OCP Amendments passed by years end. Ms. East, Ms. Kunz and the RM's solicitor were in attendance, along with various employees of Community Planning and the Deputy Minister of Government Relations. The negotiations that took place on this date ultimately resulted in the Notice of Decision dated December 31, 2013 that conditionally approved the 2013 OCP Amendments.

The conditional approval of the 2013 OCP Amendments was dependant on the RM adopting a Concept Plan that would address a number of items. A Concept Plan was needed to provide the framework for assessing the suitability of the land for an intensive urban residential and commercial

[189] Exhibit 174.
[190] B. Jijian Transcript [October 30, 2014 – p. 91-92].
[191] J. East Transcript [November 18, 2014 – p. 177].
[192] B. Jijian Transcript [October 30, 2014 – p. 93].

neighbourhood, to identify the public works necessary to provide services for the development and to confirm that Provincial interests are met.

The decision of the Ministry reflected that it was critical that the Concept Plan fully address the statements of Provincial interest:

> When complete, the concept plan will be of great value to the RM, provincial agencies and other jurisdictions in determining the appropriate framework for a myriad of land use and development decisions which follow, such as land use designation, zoning, subdivision, and impacts on other infrastructure and services such as highways, roads, fire service, recreation, schools, water and drainage. These matters reflect the interests of the various jurisdictions which have responsibility in this area including agencies accountable for managing provincial interests.[193]

Therefore, the decision of the Ministry was to approve the 2013 OCP Amendments conditional upon the RM completing a Concept Plan and preparing subsequent amendments to the OCP and ZB within two years.

b) February 4 Meeting

Of central importance to my findings in relation to Reeve Eberle's conduct is a meeting that was purported by Ms. Kunz to have occurred on February 4, 2014. According to Ms. Kunz, the meeting was attended by her, Reeve Eberle and Councillor Jijian, and the subject matter was Wascana Village, specifically the Concept Plan that was required by the Province. When asked whether he attended this meeting with Ms. Kunz as she alleged, Reeve Eberle responded as follows:

> **Q** And is there anything you disagree with what she's recorded about a discussion she had with yourself and Councillor Jijian as indicated in these notes?
>
> **A** I think we have to start out, Mr. Laprairie, at a different level.
>
> **Q** Okay.
>
> **A** The conversation, the meeting did not occur.
>
> **Q** Oh.
>
> **A** It did not occur.
>
> **Q** You did not have a meeting with Councillor Jijian, Reeve Eberle, that's yourself, and Rachel Kunz on February 4th at approximately 2:00 p.m.?
>
> **A** Absolutely not.

[193] Exhibit 106.

Q Okay. So you can't comment on these notes then?

A The only thing I can comment on, Mr. Laprairie, is that –

INQUIRY OFFICER: You just say the meeting didn't occur.

A -- these -- these are not accurate. They must be untruthful because the meeting simply didn't occur. I wasn't there. There may have been a meeting. I wasn't there.[194]

In contrast, Ms. Kunz is adamant that this meeting occurred and produced a set of handwritten notes recounting the matters discussed at the meeting.[195] For his part, Councillor Jijian's testimony was marred with imprecision. He denied the occurrence of the meeting alleged by Ms. Kunz, and offered that he recalled having a meeting with her but did not offer when it took place or what was discussed.[196] When referred to the emails that corroborate this meeting and asked again by my Counsel as to the occurrence of this meeting, Councillor Jijian answered "No, I said -- no, I said I could have had meetings and I can't recall that meeting."[197]

The February 4 meeting was in relation to the Concept Plan that was required pursuant to the December 2013 Notice of Decision, which was eventually passed by the RM Council on February 12, 2014. Before discussing the February 4 meeting, it is important that some background is provided as to what preceded it.

On January 29, 2014, the Developer's representative from Weston Consulting, Tim Jessop, forwarded Ms. Kunz a copy of the draft Concept Plan and requested commentary.[198] On February 3, 2014, Mr. Jessop emailed Ms. East and indicated that he had spoken with Ms. Kunz about the draft Concept Plan and wanted to follow up with Ms. East for further discussion. In her reply of the same date, Ms. East informed Mr. Jessop that the key items, as listed in Appendix A of the Notice of Decision, were still missing and she concludes by suggesting they reconvene their discussion the week of February 18.[199]

On this same date, February 3, Mr. Jessop also prepared an email to Mr. Schmid where he outlined in detail his conversation with Ms. Kunz and the concerns she had with the current draft Concept Plan. Mr. Schmid then forwarded Mr. Jessop's email onto Reeve Eberle, "as promised", at 10:15 pm on the same date.[200] On this same night at 11:01 pm Councillor Jijian, who was not included on Mr. Schmid's 10:15 pm correspondence, then emailed Ms. Kunz as follows: "Can I set up a meeting today (Tuesday) with you and get Daniel Schmid and Jackie on a conference call. Daniel is getting

[194] K. Eberle Transcript [November 12, 2014 – p. 143-44].
[195] Exhibit 182.
[196] B. Jijian Transcript [October 31, 2014 – p. 126].
[197] B. Jijian Transcript [October 31, 2014 – p. 133-34].
[198] Exhibit 175.
[199] Exhibit 343.
[200] Exhibit 295.

very concerned that the RM is asking for more detailed studies which he believes is covered off in the reports sent to the Province."[201]

Upon receipt of Councillor Jijian's email, Ms. Kunz then forwarded it to Deputy Reeve Probe at 5:42 am on the morning of February 4 and requested that he call her and indicated that "Jackie [East] and I are just trying to do our job. I need some direction."[202]

Later, on the morning of February 4, Ms. Kunz emailed the entire RM Council with the exception of Reeve Eberle and expressed her position on the Concept Plan:

> Barry:
>
> Could you call me to discuss? I do not believe that a meeting is necessary.
>
> The RM is simply asking them [Weston/GPDC] to draft a complete Concept plan that provides the answers the Ministry is requiring. Normally, we would call this a Secondary Plan but the Notice of Decision is calling it a Concept Plan because it has to be an amendment to the OCP, so we will call it that.
>
> The Concept Plan Wascana Village has presented so far is lacking. For example, and there are many more, Appendix A in the decision states:
>
> - "availability of an adequate source of water…must be confirmed". The draft does not confirm the source.
> - "no direct access will be allowed to the bypass from adjacent residential or commercial lands. The concept cannot be based on an at-grade intersection with the bypass with either lights or a stop sign". Page 14 & 17 of the draft concept plan propose a stop sign at the at-grade intersection of Fleet and the bypass.
> - "The need and provision of…solid waste…need to be addressed." Page 28 of the draft concept plan states "The RM of Sherwood currently manages the collection and disposal of waste with in its municipal boundary. It is anticipated that the RM will continue to deal with waste disposal in accordance with the policies of its Official Plan". Yesterday, Tim Jessop did not know that we do not collect garbage and that we do not have a garbage dump.
> - "Fire services need to be addressed…identify how fire protection will be met". The draft concept plan is silent on this. However, I was told yesterday that the developer's solution may be to consider allocating land for a fire hall which the RM would need to build, equip and staff. If that is the case, the RM needs to have a discussion with the developer. How will we pay for this an man it/ [*sic*]
>
> Note that the conclusions on page 9 in the Dillon Report dated December 2013. The draft concept plan does not address the issues identified by our consultant. The report

[201] Exhibit 177.
[202] Exhibit 177.

only looked at water, wastewater and storm water. A second report on the subdivision application is being compiled. I am sure that there will be more issues identified.

Council will need to look closely at the Concept Plan. Did you notice that there are no plans for a location for an RM shop of any kind. Where will we store equipment? This development will be the size of Swift Current at full build out. Or are we planning to haul equipment back and forth from Pinkie? (One day, Council should discuss the immediate costs to the RM of the development and plan accordingly.)

The RM is not standing in Daniel Schmidt's way. We are doing our due diligence and asking for a complete Concept Plan that will satisfy the Province. I attended the meetings with the Province and I assure you that the draft Concept Plan presented to us is far less than what the Province expects.

Of course, Council may decide to accept much less than the minimum required by the Province but that will be Council's decision. I have attached the Secondary Plan worksheet discussed during the meeting last week.

If you have questions, please call.[203]

[emphasis added]

On the afternoon of February 4 at 2:03pm, Ms. Kunz sent an email to Ms. East with the following parting statement: "I have to go. I see Reeve Eberle and Barry are here to discuss Wascana Village."[204] The testimony given by Ms. Kunz and her personal notes taken subsequent to her meeting with Reeve Eberle and Councillor Jijian reflect Reeve Eberle's influence in regards to the Concept Plan:

When told that staff may write a report that recommends not approving the Concept Plan Bylaw but that it would be Council's decision to make a political decision and go against the recommendations and accept the Concept Plan Reeve Eberle completely lost it. I was told that all reports from staff are to be positive and are to recommend approving the Concept Plan. He said that he will not give Ralph Leibel and Community Planning a reason to not accept the Concept Plan by being able to say that RM Council chose to go against the recommendations of its professional staff.

I was told that the RM has to assist Daniel Schmidt [sic] in finding the solutions and that we have to actively set things up for him.[205]

[emphasis added]

[203] Exhibit 179.
[204] Exhibit 181.
[205] Exhibit 182.

A short time after the meeting Ms. Kunz wrote another email to Ms. East who had by this point developed a friendly working relationship with Ms. Kunz. Sent at 3:24pm, Ms. Kunz writes: "Just had an interesting meeting with Kevin and Barry."[206] Ms. Kunz goes on to mention certain items that were discussed at the meeting and concludes "Anyway, another unprofessional meeting with everyone raising their voice and someone losing it again."[207]

Several days later on February 9, 2014, Ms. Kunz sent the RM's solicitor an email which concludes by referencing the meeting held with Councillor Jijian and Reeve Eberle on February 4:

> I made the "mistake" earlier this week of telling Tim Jessop that I would have difficulty supporting the draft Concept Plan he submitted to the RM for Wascana Village as it did not address any of the conditions in Appendix A of the December 31st Notice of Decision. Jacquie made the "mistake" of telling him that it lacked some of the elements required in any concept plan. Well, this triggered a chain of events that resulted in an unpleasant meeting with Reeve Eberle and Barry Jijian. In short, I have received specific instructions from Reeve Eberle and Barry. They have arranged for a meeting between Barry, Daniel Schmidt and I for this afternoon. Daniel is flying in. I don't know what the meeting is about. I'll let you know when you return.
>
> I would like the opportunity to discuss these matters with you. I certainly hope that you are not reading this on the golf course…[208]

The notes that were made by Ms. Kunz were completed one hour after the meeting.[209] Despite Ms. Kunz's personal notes and the foregoing emails, Reeve Eberle and Councillor Jijian remained steadfast that they did not attend a meeting together on February 4 with Ms. Kunz.

On February 6, Mr. Schmid sent an email to Mr. Jessop wherein he noted:

> I was on the phone most of yesterday afternoon and into the evening with Kevin Eberle and Barry Jijian. Let me explain to you where they are coming from first. I do not know what you want to accomplish further by speaking with MH on these issues. From my review, it is clear Jacquie is asking for items WAY beyond what is required for re-zoning approval. This is also the opinion of Kevin and Barry and they are not in the development game![210]

Mr. Schmid explained the reference to Reeve Eberle as follows: "I called Kevin and I said who -- he says, Dan, I told you before, I have to keep out of this. He referred me to Barry Jijian or Tim Probe,

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[206] Exhibit 183.
[207] *Ibid*.
[208] Exhibit 186.
[209] R. Kunz Transcript [October 21, 2014 – p. 261]
[210] Exhibit 263.

and Barry Jijian and I, we spent quite a -- quite an amount of time trying to figure out how to best proceed with this."[211] For his part, Councillor Jijian offered the following:

> **A** I think Daniel Schmid is overexaggerating on this call because there's no way I would have been on a call all day long.
>
> **Q** But do you recall there was a lengthy call?
>
> **A** No, I really don't. I don't know what this is about.
>
> **Q** But -- so you don't recall being on a --
>
> **A** Well, I'm not denying it. I just don't recall it.[212]

On February 7 Ms. Kunz met with Councillor Jijian and Mr. Schmid regarding the Concept Plan that Weston Consulting had prepared for Wascana Village.[213] This meeting took place on a Friday and Ms. Kunz was instructed that Mr. Schmid's consultants would be available over the weekend, and that she should submit any comments she has on the weekend so that they could be incorporated before the RM Council meeting on Monday February 10.

Despite her earlier concerns that were outlined in detail in her email to Council on February 4, Ms. Kunz sent Mr. Schmid an email on February 8 which stated as follows: "You asked that, should I have comments on the draft document, I provide these to you this morning. I have no comments at this time."[214]

Ms. Kunz testified as follows in relation to the February 7 meeting and subsequent email on February 8:

> **A** …when they were in my office they gave me a copy, and I was told that if I had comments I -- I should make comments I think – I can't remember if it was by Saturday afternoon or by Sunday morning because they needed to put that and get it printed and get those binders ready, and just to send the comments. The truth be told, I never read the concept plan, the new version.
>
> **Q** Why didn't you?
>
> **A** Because it made no difference. I couldn't comment on it, say anything negative about it.
>
> **Q** Why couldn't you?

[211] D. Schmid Transcript [November 5, 2014 – p. 111].
[212] B. Jijian Transcript [October 30, 2014 – p. 139].
[213] Exhibit 187; R. Kunz Transcript [October 21, 2014 – p. 280]; B. Jijian Transcript [October 30, 2014 – p. 134].
[214] Exhibit 296.

A Because Reeve Eberle told me I couldn't.[215]

At this point it time, it was clear that the Developer was not interested in making any further expenditures on the project and all that was done was repackaging the original Concept Plan. He was also of the view that the Ministry should not have the right to demand that the conditions imposed be complied with and that these requirements should not have to be fulfilled until after the Concept Plan had been approved and the property had been rezoned.[216]

The Concept Plan that was required by the Notice of Decision of December 31, 2013, was presented to the Council on February 10, 2014, and was adopted by Council in a decision that was affirmed at their Regular Meeting of Council on February 12.[217] On February 13, 2014, Ms. East wrote Ms. Kunz the following email regarding Council's decision to send the Concept Plan ahead:

> I'm glad they sent if [*sic*] forward. It is nothing that any of us could have professionally endorsed. They did us a huge favour. We knew they didn't want to do anything right. This way, at least none of us are a part of it.[218]

In fairness to the RM Council, Ms. East testified that she was referring to the Developer when she said that that they didn't want to do anything right. Despite Ms. East's caveat, I have no doubt in finding that Council had made the decision to submit the Concept Plan knowing full well that it was a deficient response to the December 31, 2013 Notice of Decision.

Beginning with the February 4, 2014 meeting with Reeve Eberle and Councillor Jijian, Ms. Kunz began making notes for all such meetings that she felt were inappropriate until her ultimate resignation on March 27, 2014. A full record of these notes are attached as Appendix 19 to my Report. Ms. Kunz testified about a number of meetings between her and Reeve Eberle throughout February and March. Throughout her testimony, reference was often had to Ms. Kunz's notes, excerpts of which are reproduced below:

Meeting of February 11, 2014:

2 pm
Meeting with Reeve Eberle & Councillor Jijian

1. *Reeve said that he has always been fully informed of anything to do with Wascana Village. That he has had meeting with council to discuss and has read every report and email from this office on Wascana Village. He added that he has regular meetings to discuss with Daniel Schmidt.*

[215] R. Kunz Transcript [October 21, 2014 – p. 278].
[216] R. Kunz Transcript [October 21, 2014 – p. 227-28]; see also T. Probe Transcript [November 4, 2014 – p. 121-126].
[217] Exhibits 264 and 109.
[218] Exhibit 189.

2. *Told that he is personally involved because he is the Reeve, it is his RM and only when there is a vote does he step aside.*

3. *Furious that we (administration) are questioning Wascana Village's Concept Plan.*

4. *Under no circumstances are we to suggest to Wascana Village that they collaborate with the City or contribute to their infrastructure.*

5. *The RM is not to judge to concept plan. Daniel Schmidt will submit it to us as complete as he wishes it to be.*

6. *If Concept Plan will be accepted by council and sent to the province. If Community Planning and Ralph Leibel do not accept it, it will become political.*
   Wascana Village and Daniel Schmidt will cancel the deal if we do not approve the Concept Plan fast.

7. *When told that staff may write a report that recommends not approving the Concept Plan Bylaw but that it would be Council's decision to make a political decision and go against the recommendations and accept the Concept Plan The Reeve completely lost it. I was told that all reports from staff are to be positive and are to recommend approving the Concept Plan. He said that he will not give Ralph Leibel and Community Planning a reason to not accept the Concept Plan by being able to say that RM Council chose to go against the recommendations of its professional staff.*

8. *I was told that the RM has to assist Daniel Schmidt in finding the solutions and that we have to actively set thing up for him.*

Meeting of February 14, 2014:

11am- noon
Reeve Eberle

1. *Was told the Reeve Eberle is my boss not council and that is what it is. That Tim & Reeve run the municipality, council does what Tim and Reeve instruct them to do.*

2. *Says I am not being micromanaged. The reeve wants to know all that is going on. Does not want anything strategic to go to council before he knows about it. Says he will not change, he is here for a long time.*

   …

5. *Reeve told me he is not going anywhere and he has no intention of changing his management style. I am too defensive.*
   I told him that to me, it's him that I answer to instead of council. He said that's right, he is the head of council. He is my boss, too bad if I don't like it.

…

Meeting of March 6, 2014:

12:30-1:30 pm
Reeve Eberle & Rachel Kunz

…

Reeve want to "unofficially" run the show on Wascana Village but nothing official. Does not want anything written.

I told him that I am confused. If I tell him something, he gets mad. If I don't, he gets mad. Said he gets it.

Said that he has been so mad about how the RM has put conditions on Daniel Schmidt that he recently told Daniel Schmidt that Daniel should just pay for the land now so he can get back to "officially" running the RM.

I told him that staff is doing their job. We are not politicians, only RM employees. If he want us to be political, we can't be. That is his job. He said that I need to control my "underlings" and that I need to get them to do what is politically needed. I said that he needs to make the political decisions & give staff instructions.

…

Meeting of March 27, 2014:

415 pm

…

At 10:30 am while I getting ready to walk over to the City Hall, Reeve Eberle called and he was very displeased. He said that he had not agreed to the SRATC work plan & project briefs and did not agree with them. He wante [sic] the planning brief to not be in existence, did not know why it existed when I explained that the 23 priorities identified in the SRATC work plan came from the MOU, annexation agreement, mediation or from our OCPS. He said that he did not give a shit what we agreed to. He was not to be forced to discuss any of the 23 priorities. That the City is sneaky & that they can never be trusted. As for the SIP project brief, he did not want to see it in any shape or form. I was to ask for x water x sewer and the RM would decide where we would take it from and where it would go. I tried to explain that sewer/water would come from one of 4 spots and that SIP was identified as the easiest one to discuss. He said he did not care. I was to only ask for water and sewer and we would decide where & how. He mentioned Wascana Village and said that the City had to provide services and that if we wanted to take the water from SIP and pipe it around to Wascana Village, we should do it and I should get it.

…

Reeve told me that he does not want any of the brief. I am to ask for services for the entire RM and Wascana Village Development…

Ms. Kunz resigned on March 27, 2014, which was also the day that the RM and the City held their first set of meetings under the recently signed MOU. On the morning of March 27, the Governance Committee was to meet at 11:00 am at City Hall. Prior to this meeting, Ms. Kunz testified that Reeve Eberle called her and advised her that he was displeased that the Technical Committee was not going to discuss servicing to Wascana Village. He again reiterated that he wanted the servicing to Wascana Village on the agenda.[219]

Ms. Kunz advised Reeve Eberle that there were 23 priorities that had been identified on the agenda. Reeve Eberle responded by emphasising that he did not care about the other items on the agenda and his primary concern was to have the City supply water that could be deployed to Wascana Village.[220]

After the meeting, Ms. Kunz walked back to the RM office with Councillor Joe Repetski. When she returned to the office she had a second conversation with Reeve Eberle, this time by telephone. Reeve Eberle was angry that she had not corrected the Mayor for the City of Regina at the Governance Committee meeting and that generally he was furious the way the two meetings had gone. Reeve Eberle again expressed his concern with the water supply for Wascana Village.[221]

At this time Reeve Eberle was insisting that Ms. Kunz schedule a further meeting the following day, notwithstanding that she intended to use the following day to prepare for her upcoming vacation.[222]

It was at this time that Ms. Kunz made a decision to resign from her position as CAO for the RM. Her explanation was as follows:

> **A** The interference from Reeve Eberle, the directions to push Wascana Village, you know, all these spots were really fast in your head, and I thought that's the last straw, I quit. So I informed Joe Repetski that I was resigning as the CAO for the municipality effective immediately. The reasons I did is professionally is — well, there's — I'm supposed – instructions from Reeve Eberle were I'm supposed to forget about the 23 things we've agreed as a municipality to deal with for the City of Regina, the issues we're supposed to resolve. I'm supposed to throw this all out and only talk about water for Wascana Village. I'm supposed to go back on our word. I'm supposed to go back to them and say what we approved today, council members approved, we've changed our minds. I'm supposed to go to Glen Davies and —

[219] R. Kunz Transcript [October 23, 2014 – p. 57-58].
[220] R. Kunz Transcript [October 23, 2014 – p. 58-59].
[221] R. Kunz Transcript [October 23, 2014 – p. 69-76].
[222] R. Kunz Transcript [October 23, 2014 – p. 75-78].

INQUIRY OFFICER: Who is Glen Davies?

THE WITNESS: He's the manager for the City of Regina, and I'm supposed to go to Diana Hawrylak and say, you know what, my word and the discussions we've had and all the good will, I'm throwing all out, it's no good, all I want to do is talk about Wascana Village. I'm supposed to say I know you've been telling me for over a year that there is no services, there's never any services delivered to Wascana Village, but I'm supposed to insist this is what we're going to talk about. So all of that, I thought I've had enough. So I — I — I'm done, so I quit.

(Recessed momentarily)

MR. LAPRAIRIE: Sorry.

THE WITNESS: So it's — that was the last straw for me. I — it's — I just quit. It was not something I had planned, to quit. I had planned to quit one day, but just to, say, make a transition, you know, shake their hands and say it's been good, and go on to another job. It's not easy quitting a job that pays $150,000 a year and just walk away and say I'm done, there's nothing, I'm done. But when I quit, it was with the — the intention is, like, I quit, and to me the RM — the minute I quit it was the RM is in my rearview mirror, I'm done, I'm starting a new phase in my life, I'm going on vacation, I will come back and I will never hear from the RM again.[223]

Ms. Kunz never spoke to Reeve Eberle again. Subsequent to her resignation, Ms. Kunz received a letter of commendation from Councillor Repetski on behalf of the RM.[224] The RM also posted a similar notice on their website which remains there at the time of my Report.[225]

While she was aware that Reeve Eberle's September 2012 agreement provided payment that was conditional on rezoning, Ms. Kunz was never aware of the profit sharing agreement Reeve Eberle entered into. When advised by my Counsel that Reeve Eberle would receive a profit from the entire Development, she said that was a game changer. Her answer with respect to this issue was as follows:

Q Were you aware that he was potentially entitled to 6 percent or up to $6 million on the entire development?

A No, I was not, and that's a — that's a game changer actually.

Q Why do you say that?

[223] R. Kunz Transcript [October 23, 2014 – p. 82-84].
[224] Exhibit 375.
[225] Exhibit 374.

A Because it's almost like he's a developer because any decision that we make that's going to cost the developer Wascana — the developer for Wascana Village money is actually costing him money, so he's — it's almost like he's a developer, right? So if I make a decision and say it's going to cost you a million dollars to do something, and he gets — so it's a million dollars out of their profit, so it's costing him 6 percent, so it's a — it's a game changer.

Q A game changer for whom?

A For how the municipality deals with Reeve Eberle. Like, we — if we had been aware of this and council would have been aware of this, like, I am sure that council would have actually said then, you know, you can't have anything to do with no decision. If we're talking about access — for example, one of the discussions we had this — when I was there was with highways, is the access that's going to go from the bypass to the development, is who is going to pay for it? Now, the instruction from Reeve Eberle was I was going to stand firm and say the developer doesn't have to pay for it, even though that's what the municipality wants. Well, now he's not really talking for the municipality, he's talking for himself because if it's going to cost a million bucks, it's some of his money out of his pocket, right? So he's more like a developer in that case. Instructions that I had in the summer to go to a meeting —

Q Summer of what year?

A Of 2013.

Q Right.

...

Q So you never knew that he had an interest in seeing the other two quarter sections owned by Marathon and Chekay developed?

A That's correct.

Q Okay.

A That's correct because if they — if they get developed now and they make money, he's going to make money. I certainly didn't know there were some plans to develop his home quarter.

That's — and that's all — the implication of that is that if you — you get the water and the sewer, we do that, and then he develops his own home quarter, he's going to be 100 percent developer then, but he's — he's making sure that that can proceed so he can — start — sell all these acreages. This is — that should have been made clear to the — council at some time. How — even just to declare pecuniary interest when there's a decision and Reeve Eberle says I have pecuniary interest, the way it's set up now he doesn't say why, he just

says — or how, he just says I have pecuniary interest. I have never heard him say to council I have pecuniary interest because I'm going to — I get 6 percent of the profits, so never. I'm a little choked, sorry.[226]

After the Inspection and Inquiry commenced, Ms. Kunz became aware of the November 2013 agreement which provided for profits up to $40 million and became emotional and said "my stomach turned." On this issue, her testimony was very telling and I quote from the transcript as follows:

Q Having seen it now, what's your reaction?

A The first time you mentioned this my stomach turned and my stomach is still turning. It's — it's — well, they — he misled staff, he misled council — or I think he misled council because I've never seen him tell council that he was taking part in the profit and that he was, in effect, a developer. The – my stomach is turning because it's a — it's — I look at this coincidence, ten days after we resolve the issues with the City of Regina and we have a process to discuss issues, he has a new contract. So my stomach is really turning.

Q Okay. If you had been aware of it at that time what would you have done?

A If – I would have forced council to have a council meeting. I would have called a council meeting and said, Council, you — I want some direction, you know, lay it on the line, you need to give me some direction, what do we do? And council should have had that discussion. I'm not in the position of saying whether or not the council — I don't know if council knew about this, I don't. All I know is that I didn't, and it was never presented to a council at a formal council meeting, so — but I would have — so I would have made sure that it is presented to council so there's a record and then let them decide what they want to do.[227]

3. <u>Attempts to Conceal Involvement in Wascana Village</u>

Reeve Eberle attempted to conceal his involvement in Wascana Village as demonstrated by at least two incidents that I will set out. Before I do so, the reader is reminded that Reeve Eberle was specifically instructed in the April 2013 Opinion by the RM's solicitor that he was not to have any involvement in directing planners or other administrative personnel in relation to his lands.

In the first instance, Ms. Kunz advised the Inquiry that Reeve Eberle instructed her sometime in the Spring of 2013 to make sure that if she had any emails related to Wascana Village that Reeve Eberle had been copied on, or received directly, that she was to delete all such documents and to instruct the RM's planner, Mr. Toth, to do the same. Ms. Kunz also testified that this instruction extended to any hard-copy documents that would have similarly demonstrated Reeve Eberle's

[226] R. Kunz Transcript [October 21, 2013 – p. 123-26].
[227] R. Kunz Transcript [October 21, 2013 – p. 211-12].

involvement.[228] In his testimony, Reeve Eberle categorically denied that any such instruction was given.[229]

Ms. Kunz explained that she moved all of the Wascana Village emails involving Reeve Eberle into a separate folder in her email application, but did not delete them. According to Ms. Kunz, after this first request, Reeve Eberle asked her more than once to make sure the documents had been deleted. Ms. Kunz further testified that in the summer of 2013 she had issues with her email application and twice lost her email folders. In relation to the instruction to instruct Mr. Toth, Ms. Kunz could not recall whether she ever relayed the instruction.[230] In his testimony, Reeve Eberle was adamant that Ms. Kunz's story was not possible as the RM Council was never informed that there was lost data.[231]

The second incident occurred around this same time in the spring of 2013. At this time the Developer was preparing for the formal announcement of Wascana Village. The press conference took place on May 30, 2013. In preparation, the Developer held a teleconference on May 10, 2013 to discuss the upcoming media release for Wascana Village. The attendees were: Reeve Eberle, Deputy Reeve Probe, Ms. Kunz, Mr. Schmid and Richard and Barbara Allen (Arfin Allen – GPDC's media relations firm).

The Minutes of the May 10 meeting were recorded by Mr. Schmid and distributed via email on May 15, 2013 to all attendees with the instruction to report any errors/discrepancies to Mr. Schmid.[232]

There were several references to Reeve Eberle in the original set of minutes. Those references were:

> 1.8 Kevin Eberle noted, that that we should place a "positive spin" on our development. No negative aspects should be emphasised in the media coverage.
>
> 1.9 Kevin Eberle also noted the following to be emphasised in the media release:
>
> - The current land/housing crisis in the City of Regina and immediate area.
> - Deficit of infrastructure in the region. We are working with other stakeholders to resolve this issue.
> - We will emphasise our "mega" development and the quality as being above standard and 22nd century.
> - Value of economy to the region and relate this to the Premiers Plan for Economic Growth.

[228] R. Kunz Transcript [October 21, 2014 – p. 128-29].
[229] K. Eberle Transcript [November 12, 2014 – p. 105].
[230] R. Kunz Transcript [October 21, 2014 – p. 128-32].
[231] K. Eberle Transcript [November 12, 2014 – p. 105].
[232] Exhibit 157.

- The life-style value we are bringing to the people through our development.

- Emphasis on the positive aspect of bringing employment to the region through/by our development.

...

1.11 Kevin Eberle noted that the infrastructure need shall be independent of the City of Regina.

1.12 Kevin Eberle recommends we meet with Minister Ryder [sic] (Minister of Government Relations) and Minister Boyd (Minister of Economy) prior to the press release so that it will not surprise them. RM of Sherwood will coordinate these meetings.
Action by: RM of Sherwood

1.13 It was suggested that the RM of Sherwood give thought and recommend where the press conference is to take place. [233] **Action by: RM of Sherwood**

On that same day Ms. Kunz emailed Reeve Eberle and Deputy Reeve Probe and informed them that she did not recall, nor make a note, that the RM was agreeing to organize the meeting with the Ministers or find a location for the press conference. Other than these two corrections, Ms. Kunz took no other issues with the minutes.

Two days later, on May 17, 2014, Mr. Schmid emailed Ms. Kunz and copied Reeve Eberle. The email has an attached new set of minutes and advises as follows: "Further to my telephone conversation yesterday evening with Kevin Eberle, would you please be so kind and replace your existing Minutes of Meeting with the attached copy."[234] The edited minutes removed Reeve Eberle from the list of attendees and the comments that he had made became unattributed to any individual attendee.

I had alluded to this teleconference previously in my Report when I made reference to Deputy Reeve Probe's testimony where he stated that he invited Reeve Eberle to take part in the meeting owing to his considerable media experience.[235] Both Reeve Eberle and Deputy Reeve Probe testified that it was at the latter's request that Reeve Eberle took part and that they did not view it as inappropriate as it was the teleconference of the Developer and not the RM. Reeve Eberle addressed his involvement as follows:

> **A** I think it's important -- and I'm glad you brought this up because had you not brought it up, I wanted to talk about it because I want to clear the air on -- number 1, Ms. Kunz made a statement in her testimony, and it went something like this: Now he's got me changing minutes. These were not the minutes of the RM of Sherwood. These minutes were Mr.

[233] Exhibit 157.
[234] Exhibit 157.
[235] *Supra* note 168 - T. Probe Transcript [November 4, 2014 – p. 112].

> Schmid's minutes. There was a political purpose, and that is the only reason that I requested to have those minutes changed by removing my name. So I think it's important that we understand the context of what occurred here. I was invited into this meeting, and I was invited in as -- they wanted me to reflect or give my knowledge with respect to media, local market, et cetera. I did that. So why did I think I could go to that meeting? Let's go back to that Tab 19. The legal advice that I received is that I'm not to vote. There was no voting. I'm not to participate as a member in council discussions. There was no council meeting. There was no council discussion. I am not to direct planners. There was no planners in that meeting. And I was not to direct any administrative personnel. I did not direct any administrative personnel…[236]

While Reeve Eberle may be correct that he was technically in compliance with the April 2013 Opinion, I am more concerned with his conduct after the minutes were released. Reeve Eberle testified that he and Deputy Reeve Probe were concerned that the minutes could be used for political purposes and were amended to prevent that from occurring. While the motivation may be genuine, the decision to alter the minutes was a deceptive act and is consistent with Ms. Kunz's assertion that Reeve Eberle wanted no documented record of his involvement in Wascana Village.

4. Lands Sales Agreements

Attached as Appendix 20 is a comparison of the various land sales agreements for the land that made up the proposed Wascana Village. What emerges from this comparison is that Reeve Eberle's lands attracted more per acre for bare land value but when the potential profit sharing arrangements are added to the per acre value of the land there is no real comparison as Reeve Eberle's land attracted a price well beyond that proposed to be paid to Marathon or Chekay.

I did hear evidence that Reeve Eberle's land was more valuable than the quarter-section sold by Marathon and Chekay due to his lands being less encumbered by easements. Additionally, evidence was given that Reeve Eberle's lands were better positioned as they were not directly over the Richardson Aquifer.[237] However these differences cannot account for the substantial difference in per acre value when profit sharing is added into the equation.

Reeve Eberle also entered a very detailed exhibit that outlined a number of other land sales within various areas of the RM that attracted per/acre values that met or exceeded that which he received.[238] While I found the map to be of some assistance, I have difficulty in concluding that there is any better indication of market value than those sales negotiated with the same Developer that Reeve Eberle was negotiating with, in the same area, for the same Development.

[236] K. Eberle Transcript [November 12, 2014 – p. 253-254].
[237] D. Schmid Transcript [November 5, 2014 – p. 175-184].
[238] Exhibit 329.

I heard no evidence that either Marathon or Chekay, who also agreed to sell land to the Developer, were ever offered a share of the profits of the entire Development as was offered to and accepted by Reeve Eberle.[239]

Ordinarily one could only admire Reeve Eberle for obtaining the best deal he could for his lands, but when he agreed to accept profit sharing in the entire Development as part of his compensation while continuing as Reeve and, as I have found, remained involved in the advancment of Wascana Village, this was "a game changer". He then had an interest in seeing the Development succeed even if the Development only ever involved the first phase of Wascana Village (this involved only the Marathon and Chekay lands and not his).

The conflict the Reeve found himself in when he agreed to share profits with the Developer was horrendous and keeping that conflict secret from his fellow Councillors and the Administrator was inexcusable.

5. Credibility

a) The Legal Principles

As evident from the foregoing, credibility has become a central issue to this Inquiry. The law with respect to credibility is accurately stated in the case of *Faryna v Chomy*, [1952] 2 DLR 354 (BCCA) at 356-57, where O'Halloran J.A. states:

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

[239] Reeve Eberle put forward evidence that another landowner in the area was granted a profit sharing agreement by GPDC. The agreement that was put into evidence granted that landowner a 10% stake in the corporate entity that would own the lands after they were sold. There was no indication that development was imminent on these lands, nor what the nature of that development was. It should also be noted that the lands were sold for a considerably lower per/acre purchase price when compared to the Eberle lands. In summary, I do not view Reeve Eberle's evidence as indicative that his compensation was on par with what GPDC was providing to other landowners.

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick minded, experienced and confident witnesses, and of those shrewd persons adept in the half lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say 'I believe him because I judge him to be telling the truth', is to come to a conclusion on consideration of only half the problem. In truth it may easily be self direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

As to credibility there is no universally applicable formula, but there are some general principles that judges impart to juries. The 2005 report of The Honourable Madame Justice Denise E. Bellamy, *Toronto Computer Leasing Inquiry / Toronto External Contracts Inquiry*, September 12, 2005 (Vol. 1) sets out those principles. They are:

- How well was the witness able to observe the events?
- How good is the witness's memory?
- How well can the witness describe what he or she saw?
- Is the witness's evidence internally consistent?
- Is the witness's account consistent with other reliable information?
- Does the witness's story change at all under cross examination?
- Is the witness evasive or hostile?
- Has the witness earlier said something different from his or her testimony?

- Is the witness's evidence consistent with common sense?

- Does the witness have a reason to lie?

In Saskatchewan, the Queen's Bench Judges who are presiding over a jury trial, usually use the following principles in instructing a jury on credibility. They are:

> (a) When you go to your jury room to consider the case, use the same common sense that you use every day in deciding whether people know what they are talking about and whether they are telling the truth. There is no magic formula for deciding how much or how little to believe of a witness' testimony or how much to rely on it in deciding this case. But here are a few questions you might keep in mind during your discussions;
>
> (b) Did the witness seem honest? Is there any reason why the witness would not be telling the truth?
>
> (c) Did the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other;
>
> (d) Did the witness seem able to make accurate and complete observations about the event? Did she/he have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine?
>
> (e) Did the witness seem to have a good memory? Does the witness have any reason to remember the things about which she/he testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up as an excuse to avoid answering questions?
>
> (f) Did the witness seem to be reporting to you what she/he saw or heard, or simply putting together an account based on information obtained from other sources, rather than personal observation?
>
> (g) Did the witness' testimony seem reasonable and consistent as she/he gave it?
>
> (h) Do any inconsistencies in the witness' evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because she/he failed to mention something? Is there any explanation for it? Does the explanation make sense?
>
> (i) What was the witness' manner when she/he testified? How did she/he appear to you? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common

> experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.
>
> (j) These are only some of the factors that you might keep in mind when you go to your jury room to make your decision. These factors might help you decide how much or little you will believe of and rely upon a witness' evidence. You may consider other factors as well.

I have employed all the foregoing in my assessment of credibility that has become a vital aspect of my Report. Without going into detail on each point, I would like to address some of the specific issues that were raised by Reeve Eberle in his final submission – those being plausibility and corroboration.

b) Plausibility

Ms. Kunz testified that Reeve Eberle was continually trying to advance Wascana Village and that he had instructed her to progress the Development in various respects. Ms. Kunz testified that she met with Reeve Eberle on five occasions, namely, February 4, 11, 14, March 6 and 27, 2014, and Wascana Village was discussed at each of the meetings.[240] While Reeve Eberle was not repeatedly asked about the occurrence of each and every one of these meetings, his evidence was that he never met with Ms. Kunz as she indicated in her evidence, and he specifically denied the February 4 meeting. Ms. Kunz made personal notes to record what was said at the meetings and testified that those notes were true and accord with her memory of events.

The February 4 meeting, which was exhaustively chronicled above, is the most glaring example of this. The subject matter of Ms. Kunz's allegations are entirely consistent with the focal point of the RM's attention at that time. The conversation she had with Mr. Jessop that precipitated the February 4 meeting was documented by Mr. Jessop himself in an email that was forwarded to Reeve Eberle the night before the meeting. Councillor Jijian, only 45 minutes after Reeve Eberle received the email, then emailed Ms. Kunz at 11:01 pm requesting a meeting. Councillor Jijian was a proponent of Wascana Village and conceded himself that Reeve Eberle was involved in the decision to have him 'assist' Ms. Kunz.

That the February 4 meeting occurred is amply supported by the emails before and after the meeting. No email being more important than that of February 9 to the RM's solicitor. Ms. Kunz also made personal notes of this meeting due to its inappropriate nature. There is no other rational explanation other than that the meeting did occur, and Reeve Eberle's testimony that the meeting never occurred is not only misleading, but it is clearly false.

[240] Exhibits 182, 188, 190, 195, 199 and 201.

If there was no meeting on February 4, why would Ms. Kunz describe in detail what transpired at the meeting and what was said in several emails she sent to various individuals, and why would she record what happened? There is no other reasonable explanation other than Reeve Eberle was misleading the Inquiry.

In addition to the February 4, 2014 meeting, Ms. Kunz testified that she met with Reeve Eberle on four other occasions. These meetings were on February 11 and 14, March 6 and 27, 2014. In the February 11 meeting, Ms. Kunz' notes reflect that any report she made to Council had to be approved by Reeve Eberle and only if he did so, would she be entitled to make a presentation. She also said that Reeve Eberle went on a rant about Wascana Village being the perfect development.[241]

When they met again on February 14, Reeve Eberle again stated that he did not want anything strategic to be presented to Council before he was aware of it and that it was his duty to ensure that all reports from any of the professionals were consistent with the vision of Council.[242]

Ms. Kunz again met with Reeve Eberle on March 6, 2014. Her notes and testimony again reflect that Reeve Eberle advised that unofficially he wanted to run the show on Wascana Village, but nothing official. In particular, he said that he did not want anything in writing.[243]

The last interaction with Reeve Eberle was on March 27, 2014, and this was the date Ms. Kunz resigned. She again made notes with respect to the conversation they had when Reeve Eberle instructed her that she should not pursue the 23 priorities identified by the Technical Committee, but instead pursue services or Wascana Village. The detailed notes which she verified as accurate were filed as an exhibit and consisted of six pages.[244]

At the close of the Hearings, Reeve Eberle's legal counsel submitted a 65 page written submission to me. A considerable portion of that submission was devoted to credibility, and rightly so. In my review of the submission, I could not help but note that there was no mention of what reason Ms. Kunz would have to lie. Simply put, Ms. Kunz had no motive to lie.

In his written argument, Reeve Eberle's legal counsel submits that there were several aspects of Ms. Kunz' testimony that are implausible. These aspects of the testimony are:

1. <u>The April 2013 Opinion</u>

There is an issue as to when or whether Ms. Kunz saw the April 2013 Opinion. Ms. Kunz testified that she never saw it. When she was confronted with the fact that it was located in the filing cabinet in her office (seven months after her resignation) she conceded that it may have been there, although she said she usually stored legal opinions on top of her cabinet in the wire basket. Certain employees of the RM had examined her office previously and were unable to locate the April 2013

[241] Exhibit 188.
[242] Exhibit 190.
[243] Exhibit 195.
[244] Exhibit 201.

Opinion. Unlike the earlier June 2012 Opinion from the RM's solicitor, there was no email trail to indicate that she was provided with the April 2013 Opinion or that she distributed it. The appearance of the April 2013 Opinion in October of 2014 is troubling. At the time the April 2013 Opinion was produced there was no outstanding request to locate it, as the April 2013 Opinion had been produced by Reeve Eberle in July when the Inspection began.

The evidence on this issue can be summarized as follows:

> (a) Councillors Jijian, Repetski and Deputy Reeve Probe, who all support Reeve Eberle, all indicate that it was distributed and reviewed, as did Reeve Eberle;
>
> (b) There is no actual record of its distribution other than it was provided to Reeve Eberle;
>
> (c) Councillors Heenan, Wilton and Ms. Kunz all take the position that to the best of their knowledge, they had never seen it before.
>
> (d) My Counsel made a specific request to the RM on August 15 to determine if they also had a copy of the April 2013 Opinion;
>
> (e) After giving specific instruction to the RM staff to locate the April 2013 Opinion, the RM's solicitor wrote my Counsel on August 25 to confirm that they located the June 2012 Opinion but could not locate the April 2013 Opinion;
>
> (f) The April 2013 Opinion was located on or about October 22, well into the Hearings;
>
> (g) To my knowledge there was no outstanding request to locate the April 2013 Opinion;
>
> (g) The April 2013 Opinion was found in a file with the June 2012 Opinion inside the cabinet in Ms. Kunz's old office;

I do not view the discovery of the April 2013 Opinion as undermining Ms. Kunz' evidence in anyway. She was adamant that she did not see it and testified what she would have done had she seen it. This late production of the April 2013 Opinion from her office, does not mean it was there when she resigned.

2. Destruction of Documents

Ms. Kunz testified that in the Spring of 2013, Reeve Eberle gave her instructions to destroy any documents, including emails, that made reference to his involvement with Wascana Village. She said she simply moved the emails to another folder which subsequently and inadvertently were erased due to a crash of the server.

Mr. Linka argues that the RM has a backup server and it would have maintained the emails. There was no evidence brought forward that, in response to the subpoenas I issued, the RM undertook a review of their backup server for any relevant documents to the Inspection or Inquiry. I do not view

it as likely nor reasonable that the RM would have conducted such an exhaustive search for documents. I also understand that due to the environment at the RM, Ms. Kunz did not inform anyone of this request, even if Mr. Linka asserts that it was her legal obligation to do so. I believe Ms. Kunz when she states that Reeve Eberle instructed her to destroy certain documents, including emails. This is also consistent with the alteration of the GPDC meeting minutes that occurred in or around this time. As I will elaborate later in my Report, Reeve Eberle had a reason to mislead the Inquiry whereas Ms. Kunz did not have any motive to not tell the truth.

3. February 4th Meeting

Rachel Kunz testified that Councillor Jijian and Reeve Eberle met with her regarding the Concept Plan for Wascana Village. Mr. Linka contends that Councillor Jijian denies such a meeting. Councillor Jijian is a friend of, and supportive of Reeve Eberle. An examination of his evidence reflects that it is unclear what Councillor Jijian remembered as he advised my Counsel that he may have had a meeting but could not recall.[245] In any event, I accept Ms. Kunz's testimony that she met with both Reeve Eberle and Councillor Jijian that day.

4. Water for Wascana Village

The evidence clearly establishes that the City would not provide water for Wascana Village. Additionally, Reeve Eberle also took the position that Wascana Village would need a water source independent from the City. It was also established that Reeve Eberle remained involved in the RM's procurement of water for development. Reeve Eberle testified that his involvement in this was always of a general nature and for the good of the RM. Ms. Kunz testified that he was angling for water for Wascana Village.

The City had agreed to supply water to the RM in several locations (industrial developments) in 2013. Reeve Eberle did not accept that the City should be able to pick and choose which developments got water and he was adamant that it should be an unconditional supply of a certain volume of water. Ms. Kunz testified that Reeve Eberle said that if the City agreed to an unconditional supply, then the RM could simply pipe the water to Wascana Village.

Mr. Linka submitted that this notion was entirely implausible. His submission on this point is as follows:

> 5. Water for Wascana Village
>
> Rachel Kunz testified that on her final day Mr. Eberle instructed her to focus her efforts entirely on obtaining drop points for water from the City of Regina so that water could be piped over to Wascana Village. That Mr. Eberle would have made such a suggestion knowing all the pertinent circumstances is perhaps the most implausible testimony from Ms. Kunz for the following reasons:

[245] B. Jijian Transcript [October 31, 2014 – p. 133-34].

a) The City of Regina had made it abundantly clear that it did not support Wascana Village and would not provide water (or other services) to it.

b) It is not plausible or even possible to secretly transport large volumes of water to Wascana Village area from the four proposed drop points: Sherwood Industrial Park, Brandt Industries, South Lewvan or Sherwood Forest.

c) Such a venture would have left those four areas with insufficient or no water.

I do not accept Mr. Linka's submission. In an April 2, 2014 email that Reeve Eberle sent to Ms. East shortly after Ms. Kunz's resignation, he takes the following position:

> Another issue that needs to be addressed is the term of context of Regina water service to the RM (ie the 4 drop points are just that drop points). The RM need to identify our long and short term requirements. Regina needs to be aware that the RM is purchasing a quantity and it is not tied to a development or area. Further it will be exclusively the RM that determines the use. This is a high priority to get accurately documented. If we cannot come to terms with the city then we need to place all our emphasis on our own source.

This demonstrates that Reeve Eberle was only interested in services from the City that were provided without any conditions. If the City provided a water supply and it was up to the RM to "exclusively determine its use", is it not reasonable the RM would deploy that water to Wascana Village? All of the evidence established that the majority of the Council was supportive of Wascana Village and was aware that water was its single biggest impediment.

In my view this does not affect the credibility of Ms. Kunz.

c) Corroboration

Outside of her personal notes and the emails that reference certain matters that she testified to, there was virtually no testimony that provided a first-person account corroborating Ms. Kunz's testimony. With that said, outside of the February 4 meeting attended by Councillor Jijian, none of Ms. Kunz's allegations required third-party corroboration. I have dealt with the February 4 meeting at length above, and as indicated, I find it implausible that the meeting alleged to have occurred by Ms. Kunz did not occur.

In Reeve Eberle's final submission much was made of the absence of corroboration. I do not find this as a major obstacle having regard to the fact that, outside of the February 4 meeting, Ms. Kunz's testimony does not engage the issue of corroboration. Additionally, what emerged before me throughout the course of the Hearings was that there was a culture at the RM that fully explains the nature of the evidence provided by Ms. Kunz.

When confronted with documents that read plainly and detrimentally to Reeve Eberle, witnesses routinely proffered implausible explanations for the contents of their correspondence. Outside of Councillor Repetski's testimony that Reeve Eberle should have disclosed his profit sharing

agreement, there was not one single instance where Reeve Eberle or those in support of his evidence conceded that anything done during the time period under review was in any way untoward. When faced with an impeccably documented meeting, it did not happen. When confronted with the fact that the Concept Plan was entirely deficient, it was done because they had no choice but to make it political because Ralph Leibel would not approve it anyway. When presented with clear documented evidence of Reeve Eberle's involvement with the OCP, it was for the good of the RM and the legal opinion permitted such involvement. To describe it in one word, the testimony from this perspective was unapologetic.

Ms. Kunz's internalization of the matters she was faced with is entirely reasonable having regard to the circumstances. While I was thoroughly impressed with Mr. McCullough, I should note that he may have had considerably more difficulty asserting his leadership had he taken his position at a time when the RM was not subject to an Inspection and Inquiry.

Although there was no first-hand corroboration of Reeve Eberle's involvement in Wascana Village, Councillor Wilton testified as to the conversation he had with Ms. Kunz about a month prior to her resignation:

> Q So it's within a month or so of her resignation?
>
> A Yes.
>
> Q Okay. So tell us what happened.
>
> A She confided in me that she was very unhappy in her position because of the stress that Kevin was putting on her to drive issues ahead with the OCP regarding Wascana Village and very unhappy with the process because she felt she was compromising her morals, and it was something that she didn't want to be part of anymore and didn't know where to go. She was in duress with her position because she -- you know, she's a well-paid person that -- or she's a well-paid professional in her field, and it was going to -- she wasn't sure if she wanted to continue on. It was too much for her to want to work with the RM anymore and advised me at that point that she was probably going to be looking for another job.
>
> Q And did this relate to Reeve Eberle directing her to do things?
>
> A Yes, I think she was put under duress by Kevin, Reeve Eberle, to do things that weren't -- that -- to -- to stand -- or to move information forward that she wasn't happy with. He was putting pressure on her to move agendas forward that she wasn't prepared to represent as her -- as her doing it, so --
>
> Q And what did these agendas relate to?
>
> A To Wascana Village, as she told me –
>
> Q Did --

A And regarding -- and regarding our OCP, but I guess as much as it -- as it affected Wascana Village, as well as, you know, the generalized -- to make -- to move the OCP ahead, which was all part of the package, so --

Q What was your feeling when you learned of this?

A I was very disappointed. I knew Kevin was, at the time -- or Reeve Eberle, at the time, was -- I understood he was doing his best to be removed from all of that, but I wasn't aware of all the backroom, I guess, discussions or whatever that were going on regarding that, and I felt that -- I guess I was -- I felt duped.

Q You felt duped?

A Yes….[246]

Councillor Wilton resigned a short time later on May 1, 2014. As indicated above, he had no first-hand knowledge of Reeve Eberle's conduct, but relied on what he could gather and the discussion he had with Ms. Kunz. Reeve Eberle's legal counsel questioned Councillor Wilton on why he did not attempt to verify Ms. Kunz's allegations:

Q Did you talk to any of the other councillors?

A I think I made most of the assumptions on -- from what I could gather and taking Rachel as a -- for the words that she -- she confided in me that -- that it was her -- that was how she felt.

Q You took --

A And I thought she was a professional, so she had really no reason to tell me anything that wasn't the truth.

Q You took her at her word?

A Yes.

Q And you did not try to verify what she was saying at all?

A I could see -- I guess personally I didn't see it -- I didn't see any -- any council or any -- or, sorry, administration or whatever act with Kevin's direct direction, but I guess I just -- I guess I assumed, yes --

Q Right.

[246] C. Wilton Transcript [October 29, 2014 – p. 32-34].

A -- that that's what was going on.

Q You did not see anything directly that was untoward. You relied on Rachel Kunz?

A Yes, I did.

Q And you even resigned over it?

A I did. That's how strongly I felt that -- that -- yeah.[247]

Councillor Wilton resigned on May 1, 2014 and in doing so provided the following letter of resignation to the RM Council and Administration:

> **Council and Administration,**
> Please accept this letter as my formal resignation as councilor for Div 4 for the RM of Sherwood.
>
> I have come to the realization in the past few months that the direction of council has swayed away from something that I would like to be part of any more. I used to think that council was looking to better of the whole RM and until recently I felt we were part of some beneficial growth initiative. Things have become too personal and the vision we had collaboratively in the early days of our current council has now become clouded. I cannot look in the mirror and feel that I am making decisions for the people who voted for me with confidence any more. I am not making decisions with all the information being taken into consideration good or bad, I feel I am just presented with the version that some want me to hear. I will accept responsibility for part of this as I am not allowed to put in the effort to be involved on all aspects of process due to the constraints of my career and work ethic. I hope council can re-align itself in the future and keep the best interest of the whole RM in their decisions.
>
> I feel let down that it has worked out his way and partially responsible as I could have had stronger voice, questioned more and not have been party to some of our "advised decisions" we were allowed to make. I think council needs to look in the mirror and remember why were elected.
>
> "Councilors have a duty to act honestly and with reasonable care and diligence in undertaking their role and council business. A councilor must not make improper use

[247] C. Wilton Transcript [October 29, 2014 – p. 93-94].

of the office of councilor or of information obtained through council to gain an advantage for themselves or anyone else."[248]

In his testimony, Councillor Wilton was asked by my Counsel to elaborate on some the points in his resignation letter. The exchange is as follows:

Q You go on in your letter to say, I used to think that council was looking to better the whole RM. Until recently, I felt we were part of some beneficial growth initiative. What were you thinking of there?

A I guess -- actually, I guess how you read that is, until recently, I felt we were part of a regional -- or a beneficial growth initiative over the whole RM, not just a particular area.

Q And what particular area were you thinking?

A Well, any -- any -- not directly related to any one, but it falls under -- you know, obviously Wascana Village was being pushed forward. I looked at it as, we were trying to -- you know, the water, sewer was going to affect the whole -- you know, affect the whole RM, and it would have, but there was more to it than that. It was first and foremost for -- for somebody else, I think.

Q For who?

A For Wascana Village.[249]

…

Q And then you go on to say, Things have become too personal, and the vision we had collaboratively in the early days of our current council has now become clouded. I cannot look in the mirror and feel I am making decisions for the people who voted for me with confidence anymore. I'm not making decisions with all the information being taken into consideration, good or bad. I feel I am just presented with the version that some want me to hear.

A That's correct.

Q What were you thinking about?

A That's as I alluded -- that the -- you know the committee recommendations, and basically I think the information that was presented to council from a lot of the committee meetings was what some people -- a certain group of people wanted to hear.

[248] Exhibit 254.
[249] C. Wilton Transcript [October 29, 2014 – p. 37-38].

Q And what group are we talking about?

A Well –

Q What are -- what –

A I guess no particular group, but the -- you know, to -- the -- the growth initiative was to move Wascana Village forward, first and foremost, I feel, so –

Q Okay. Is that what you were –

A And secondary that the RM would benefit from it.[250]

…

Q And why did you end your resignation letter with that quote?

A I guess just to make council as a whole aware that we were here to make the right decisions for the whole community and not to benefit ourselves.[251]

…

Q Did you ever raise that with Reeve Eberle or any of the other councillors?

A No, I didn't.

Q Okay. Why not?

A I asked myself that question a few times after the fact, and I don't know why I didn't. I guess I just didn't want to open a -- I don't deal well with stress on that level, and I just didn't want to get into something that was too big for me to deal with, so I just -- my answer was to resign and let them sort it out themselves.[252]

Councillor Wilton's decision to resign rather than confirm Ms. Kunz's allegations speaks to me of his belief in their truthfulness and the futility in the exercise of going to the other members of Council considering the culture at the RM at that time.

[250] C. Wilton Transcript [October 29, 2014 – p. 38-39].
[251] C. Wilton Transcript [October 29, 2014 – p. 42].
[252] C. Wilton Transcript [October 29, 2014 – p. 43].

d) Summary of Findings of Credibility

I have no hesitation in accepting the testimony of Ms. Kunz. I find that she told the truth during her evidence. She is honest, ethical and a woman of integrity and courage. She gave her evidence in a very forthright manner and, even after a day and one-half of cross-examination by experienced counsel who had the benefit of a transcript, there was no material changes to her testimony.

Further, as previously reviewed, her testimony is entirely consistent with other evidence, such as emails to other parties. By contrast, the testimony provided by Reeve Eberle denying that the key meetings took place is not truthful.

First, this testimony is implausible. If one were to accept the testimony of Reeve Eberle that these meetings did not occur, Ms. Kunz would have had to embark upon an improbable exercise of fabrication at several levels. She would have had to fabricate what was said at each meeting. She would then have had to falsify lengthy notes to record what was said at the meetings. In addition, she then would have had to compose false emails to be sent to various parties about the meeting that did not occur. Last, she would also have had to falsely confide in Councillor Wilton. Viewing the evidence as a whole, the only conclusion is that Reeve Eberle's testimony in this regard is untruthful.

Second, I am convinced that Reeve Eberle had reasons to mislead the Inquiry.

The accusations made against Reeve Eberle by Ms. Kunz are unflattering and would have obvious implications for his reputation if found to be substantiated. Importantly, as well, Reeve Eberle stood to make a significant sum of money through his agreements with the Developer. Further, a positive Report as to the management, administration and operations of the RM, in addition to a review of his conduct, would have at minimum had a neutral effect on the advancement of the Wascana Village Development.

6. Reeve Eberle's Involvement in Matters Relating to Wascana Village

a) Restatement of Applicable Principles

At this time it should be stressed that Reeve Eberle's above noted involvement is not necessarily inappropriate because of any standard outlined in the Act. The Act merely provides a procedural code for how pecuniary interests must be addressed when they arise in council chambers. In contrast, the common law encompasses a range of conduct that would appear inappropriate to a reasonable observer, who would at the same time be unable to point to a specific section in the Act prohibiting that same conduct. As alluded to throughout my Report, the 'common law' is little more than common sense in that it requires the avoidance of self-interested dealings.

In assessing the allegations of misconduct against Reeve Eberle, the evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. This is the standard to which I have subjected all evidence that engages issues of conduct and thus potential findings of misconduct (see *F.H. v McDougall, supra.*)

b) Conclusions

Procurement of a Water Source

The fact that securing a water source was also in the best interest of the RM does not, in my mind, excuse Reeve Eberle's conduct. While I have little doubt that Reeve Eberle was likely the most capable member of Council to head this initiative, the nature of his agreements and the situation faced by the Developer, especially in light of the December 31, 2013 Notice of Decision, put him in a conflict of interest. Once it became apparent that a water source was crucial to the viability of the Development, Reeve Eberle's continued involvement was not appropriate.

While Reeve Eberle's involvement in the procurement of water generally would arguably be excusable as it was an interest shared with the community, Ms. Kunz gave direct evidence that Reeve Eberle's interest in securing water was not entirely altruistic and that he gave her repeated instructions to locate a water source specifically for Wascana Village.

Reeve Eberle's specific directions to Ms. Kunz to secure water for Wascana Village were objectionable for obvious reasons. The decision to have Ms. Kunz devote her time and effort to securing water for Wascana Village was to be made by Council and not Reeve Eberle. That the majority of Council supported Reeve Eberle and the Development does not remedy his conduct.

Wascana Village – Concept Plan

Reeve Eberle's influence over Ms. Kunz in relation to the Concept Plan submitted by the Developer is outlined in detail above. Having established Mr. Kunz's credibility as a witness, her allegations against Reeve Eberle quite naturally result in the conclusion that his conduct in this respect was highly inappropriate. Unlike a majority of Reeve Eberle's conduct that has been at issue in my Report, there is clearly no 'community interest' exception applicable to this conduct.

Reeve Eberle quite clearly should have had no involvement in the Wascana Village Concept Plan, let alone actively instructing the RM's CAO not to provide any report that would not support Council's decision to pass the Concept Plan. I find that Reeve Eberle's conduct in this regard was inappropriate in the circumstances and would have remained so even if he did not have a pecuniary interest in the Development. The RM was paying Ms. Kunz a substantial salary and her correspondence throughout the early part of February 2014 demonstrates that she ably rebuked the Developer's attempts to push ahead with a clearly deficient Concept Plan. Ms. Kunz assessment of the situation was supported by Ms. East who, by all accounts, is a person of considerable expertise in her field.

Council should have had the opportunity to be fully informed of the merits and deficiencies of the Wascana Village Concept Plan that was approved on February 10 and 12, 2014. This opportunity was denied to them as a result Reeve Eberle's involvement.

Judging by the testimony of Councillors Jijian, Repetski and Deputy Reeve Probe, the Concept Plan may have been passed in any event. Nonetheless, I have no hesitation is concluding that Reeve

Eberle should have let the matter run its course and his involvement in the circumstances is indefensible.

Concealing Involvement

The decision to have the May 10, 2013 teleconference meeting minutes altered to remove any indication of Reeve Eberle's involvement was clearly objectionable. Having made the decision to participate in the teleconference, Reeve Eberle should not have subsequently covered up his involvement. Even accepting Reeve Eberle's justification that he did not want his involvement to be political fodder, his involvement in having the minutes altered to portray a false record was a deceptive act.

Reeve Eberle was very cautious to ensure there was minimal documentation of his involvement in matters related to Wascana Village. As I mentioned before, virtually all of the evidence that demonstrated Reeve Eberle's direct involvement in Wascana Village came from emails between third parties who made reference to that involvement. This conduct is consistent with Ms. Kunz's allegation that Reeve Eberle instructed her to destroy documents that implicated him as involved in the Development. Reeve Eberle's instruction to Ms. Kunz to destroy documentation, and his repeated attempts to confirm that it was completed, was highly inappropriate.

Land Sales Agreements

My comments here are more of an observation than a conclusion. Mr. Schmid gave considerable evidence as to why the Eberle lands garnered considerably more consideration than either the Chekay or Marathon Lands. Much of Mr. Schmid's justification for the higher purchase price was self-serving. I remain unconvinced that the Eberle lands attracted a significantly greater sum by virtue of their physical attributes or Reeve Eberle's negotiating abilities alone.

Ignoring the substantial profit sharing agreement, Reeve Eberle's most recent agreement still provides him with per/acre consideration significantly in excess of the agreement signed by Mr. Chekay at the same time and the Marathon agreement that was entered into in 2014.

V. INQUIRY – CONCLUSION

In his written submission after the conclusion of the Hearings, Reeve Eberle, through his legal counsel, submitted the following:

> [57] The legal opinions involved in this matter did not contain any outline of the common law that relates to conflicts of interest. In terms of governance of his conduct, Mr. Eberle had no source of information or knowledge to guide his conduct other than *The Municipalities Act* and the legal opinions provided.
>
> …
>
> [62] In the context of Mr. Eberle's knowledge based on the legal opinions he received, Mr. Eberle understood that his obligations – beyond declaring his

> pecuniary interest – encompassed a prohibition against voting, influencing other council members and, lastly, against any direction of administrative or planning staff or contractors. This last aspect of direction of administrative or planning staff or contractors is not a requirement of *The Municipalities Act* and must be drawn from the common law as to conflict of interest.
>
> [63] It is reasonable and indeed to be expected that Mr. Eberle would rely on the legal opinions. It would not be reasonable or indeed fair to further impose an expectation that his conduct would constitute perfect compliance with common law principles of which he was not informed

The underlying error in the above submission is that it advocates for the application of a set of proscriptive, as opposed to prescriptive, standards in the assessment of Reeve Eberle's conduct. The error in this view has been recognized in two notable past inquiries. In the Mississauga Inquiry, Cunningham J. noted that Mayor McCallion swore an oath to truly, faithfully and impartially exercise her office, and not just abide by the applicable legislation. In the Inquiry into the financial dealings of Karlheinz Schreiber and former Prime Minister Mulroney, Commissioner Oliphant endorsed the opinion of a witness that appeared before him who offered the following in relation to the standard applicable to former Prime Minister Mulroney:

> … they can't rely on the legal technicalities that are open to ordinary litigants who appear before our courts. I think, sir, that they should come forward and tell the Canadian people everything and let the Canadian people … decide whether their behaviour is appropriate or not.[253]

The comments of Cunningham J. and those endorsed by Commissioner Oliphant are equally applicable to the proceedings that are before me. The essence of the standard by which I have assessed Reeve Eberle's conduct is captured by the following comments of Cunningham J.:

> Suffice it to say that members of Council (and staff) are not to use their office to promote private interests, whether their own or those of relatives or friends. They must be unbiased in the exercise of their duties. **That is not only the common law, but the common sense standard by which the conduct of municipal representatives ought to be judged**.[254]
>
> [emphasis added]

Despite being advised to disclose his pecuniary interest to Council and the Administrator in the April 2013 Opinion, I find that Reeve Eberle did not do this. While he may have disclosed to some Councillors that his land was sold subject to rezoning, he did not disclose this fact to all

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[253] Commissioner Jeffrey J. Oliphant, *Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney,* (Ottawa: May 31, 2010) at 2 [*Oliphant Commission*].
[254] *Supra* note 110.

Councillors. At no time did he tell anyone that he was sharing profits with the Developer over the entire Development which profit sharing started in April 2013 and continues to the present time. Faced with this scenario, identifying and disclosing the nature and extent of this interest was something the April 2013 Opinion, and indeed, common sense, required. It is inconceivable to me that someone in such a gross conflict could keep this secret and continue in an elected capacity to advance the Development both directly and indirectly.

The evidence clearly established that Reeve Eberle sought to exert influence in relation to the Wascana Village Concept Plan that was needed to meet the conditional approval to the RM's 2013 OCP Amendments to include Wascana Village. Of all the conduct at issue, I find Reeve Eberle's involvement in this matter the most egregious. It is not excusable under any standard of conduct and demonstrates a clear preference of his own interest over those he was elected to represent. I have little hesitation in concluding that Reeve Eberle should have had absolutely no involvement in the Concept Plan and his decision to the contrary was highly inappropriate.

Throughout the course of the proceedings before me it became very apparent to me that Reeve Eberle was highly concerned with leaving any documented record of his involvement in Wascana Village. Reeve Eberle's decision to have Mr. Schmid amend the minutes of the GPDC teleconference is consistent with and supports Ms. Kunz's assertion that Reeve Eberle instructed her to delete or destroy any documentation implicating him as involved in Wascana Village. These actions were both quite clearly unacceptable.

I find that Reeve Eberle had a serious conflict of interest and failed to act in accordance with his Oath[255] and in the best interests of the RM. Instead he sought to advance Wascana Village in numerous respects, most notably, directing the RM's CAO Ms. Kunz to withhold unfavorable commentary, procure a water source and destroy documents. Reeve Eberle was to receive millions in compensation for his lands. Additionally, he was also entitled to share in the profits of the entire Development, his share of which being estimated in the tens of millions. His conduct in advancing Wascana Village was highly unethical.

In its written submission to me, the RM stated "The RM expects high ethical conduct on the part of its elected officials and administration…". In light of my findings, Reeve Eberle fell far short of meeting that expectation. Reeve Eberle's actions were highly inappropriate for an elected representative of a municipality. His actions do not withstand public scrutiny and violate the public trust reposed in him.

Reeve Eberle's actions fall far below any standard by which I was asked to assess his conduct. Unfortunately, the opportunity to earn significant profits has interfered with his moral compass.

Beyond the actual conflict that Reeve Eberle faced, it is equally important to consider his actions through the lens of a reasonable observer. This point was aptly made by Commissioner Oliphant in his final report:

[255] Exhibit 311; Appendix 21.

> Public officers ultimately owe their positions to the public whose business they are conducting. Ensuring they do not prefer their private interest at the expense of their public duties is a fundamental objective of ethical standards.[256]

In sum, the conduct of Reeve Eberle, as outlined above, coupled with his lack of recognition of the effect of this conduct, and lack of remorse, has left me to conclude that serious damage has been done to the office of Reeve as well as to the integrity and credibility of the RM as a whole.

[256] *Supra* note 253, vol. 3: p. 515.

PART IV – RECOMMENDATIONS

Throughout the course of the Hearings, numerous witnesses provided me with recommendations in relation to the matters subject to the Inspection and Inquiry. I have now considered these recommendations along with my own observations and findings. I therefore propose the following recommendations:

A. The Municipalities Act

The colourful former speaker of the United States House of Representatives, Tip O'Neill, stated that "all politics is local." In a growing economy where rural municipalities are close to large city centres, major developments are likely to occur. It is therefore an opportune time to examine the accountability regime for RM council members.

As Conflict of Interest Commissioner for the Province of Saskatchewan, I have always been of the opinion that ethics and integrity are at the core of public confidence in government and in the political process, and elected officials are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence, avoids the improper use of influence of their office and conflicts of interest, both apparent and real, and the need to uphold both the letter and the spirit of the law. This last statement is now contained in the City of Mississauga Code of Conduct.

The present legislation, *The Municipalities Act*, does not sufficiently protect the public with respect to a pecuniary or conflict of interest.

1. Bare Declaration

A major criticism I have with the legislation is the provision dealing with the disclosure of a pecuniary interest. Although a councillor must 'declare' that he/she has a pecuniary interest and abstain from voting on any question relating to matters, there is no obligation to give particulars of the interest.

Section 144(2) of the Act currently provides:

> **Disclosure of pecuniary interest**
> 144(1) If a member of council has a pecuniary interest in a matter before the council, a council committee or a controlled corporation of which the member is a director, the member shall, if present:
>
> (a) declare the pecuniary interest before any discussion of the matter;
>
> [emphasis added]

I would recommend the following amendment to subclause (a):

> …the member shall, if present:

(a) *prior to discussion of the matter, disclose the general nature of the pecuniary interest and any details thereof that could reasonably be seen to materially affect that member of council's impartiality in the exercise of his or her office*.

The adoption of this, or a like amendment, would bring the Act more in line with *The Cities Act*, SS 2002, c C-11.1 and the parallel legislation in other jurisdictions.[257] It is difficult to determine what, if any, rationale there is for the less onerous requirement in the Act.

In most instances, where a council member completely retires from any involvement whatsoever in the matter to which he or she has a pecuniary interest, the additional disclosure that this provision would require would not be material. However, in circumstances where the council member has done a self-assessment of his or her interest and he or she has concluded that one of the exceptions outlined in s. 143(2) apply, there would be a system of checks and balances to ensure that the self-assessment was correct. Having council and staff more fully informed would prevent a council member from either intentionally or unintentionally becoming involved in matters contrary to their obligations under the Act, *Code of Ethics*, Oath of Office or common law.

2. <u>Disclosure Statement</u>

Section 142(1) of the Act provides that a municipal council has the discretionary authority to enact a bylaw that requires every member of council to submit an annual public disclosure statement. The public disclosure statement requires the following information:

(a) the name of:
  (i) the employer of the member of council, if any;
  (ii) each corporation in which the member or someone in the member's family has a controlling interest, or of which the member or family member is a director or a senior officer; and
  (iii) each partnership or firm of which the member of council is a member; and

(b) the municipal address or legal description of any property located in the municipality or an adjoining municipality that:
  (i) the member of council or his or her spouse owns; or
  (ii) is owned by a corporation, incorporated or continued pursuant to *The Business Corporations Act* or the *Canada Business Corporations Act*, of which the member or his or her spouse is a director or senior officer or in which the member or his or her spouse has a controlling interest.

The advisability of a such a bylaw was subject to considerable comment in the Hearings before me. A number of concerns were expressed, including that such fulsome and detailed disclosure being open for public inspection may dissuade certain highly qualified individuals from engaging in local politics. Additionally, the information required for disclosure by the public disclosure statement lacks flexibility in that it is overbroad, while at the same time, unduly narrow.

[257] See *Municipal Government Act*, RSA 2000, c M-26; *Municipal Conflict of Interest Act*, RSO 1990, c M.50; and *Community Charter*, SBC 2003, c 26.

It is my recommendation that this section be replaced or accompanied with a disclosure requirement that would only be triggered by a declaration of a pecuniary interest in council chambers. Once a council member declares a pecuniary interest, there would be an onus on that council member to file with the Administrator, a written declaration of the pecuniary interest setting out the material details thereof.

The council member who submitted that written disclosure statement would be subject to an ongoing duty of disclosure that would be triggered whenever there is a material change to his or her interest. This ongoing duty would remain in effect as long as the matter remained subject to council consideration.

Importantly, this disclosure statement would not be open for public inspection and would therefore not act as an overly invasive deterrent to council members.

3. Legislative Recognition of Common Law

Part VII of the *Act* – Pecuniary Interests of Members of Council – could be amended to include a section at the outset to clarify the status of the common law of conflicts of interest. A draft of the proposed section is as follows:

> **Common law preserved subject to Act**
> (1) The common law as it relates to conflicts of interest continues to apply and run concurrent to this Act except in so far as it is inconsistent with the express provisions herein.

The express confirmation of the common law would be beneficial for two reasons. Most obviously, it would remove any uncertainty on the matter. Second, and more importantly, it would provide indirect notice to council members, administrators and even RM solicitors, of a set of legal standards upon which conflicts of interest are governed. Inclusion of the above section in the Act would serve the dual purpose of confirming the continued operation of the common law, while at the same time providing much needed notice to members of council of the obligations imposed by the common law.

Alternatively, or additionally, an express codification of the common law prohibition against influencing matters to further a private interest could be inserted into the Act. A draft of the proposed section, inspired by a like section in the *Members' Conflict of Interest Act*, SS 1998, c M-11.11, would read as follows:

> **Influence**
> (1) A member of council shall not use his or her office to seek to influence a decision made by another person or to cause the occurrence of an action to further the council member's private interest, or the private interests of a closely connected person or family member.

B. Code of Ethics

As a result of the submissions I received subsequent to the Hearings, it is my belief that the RM's current *Code of Ethics* is entirely inadequate in providing any meaningful guidance to members of

Council. While I have not reviewed similar codes for other municipalities in Saskatchewan, I have little hesitation in concluding that this issue is not unique to the RM of Sherwood.

In their submission, the RM suggested that it may be advisable for a model code to be developed that could be adopted, and amended as needed, by municipalities throughout the Province. I would endorse this suggestion wholeheartedly. The preparation of an exhaustive code would be a major undertaking for a single municipality, and when considering that the absence of such guidance is an issue not specific to only the RM of Sherwood, the creation of a model code makes an abundance of sense.

One result flowing from the Mississauga Inquiry was an updated code of conduct. I would recommend that the following Rules, which form part of the Mississauga Code of Conduct,[258] be included in the proposed code which would help to regulate the conflicts of interest of members of municipal council in a more targeted and flexible manner than can provincial statutes.

Definition of 'conflict of interest':

> A member has an apparent conflict of interest if a well informed reasonable person could properly have a reasonable perception, that the Member's impartiality in deciding to exercise an official power or perform an official duty or function must have been affected by his or her private interest.

The inclusion of the following 'Key Principles' that would underlie the proposed code:

a. Members of Council shall serve and be seen to serve their constituents in a conscientious and diligent manner.

b. Members of Council should be committed to performing their functions with integrity and to avoiding the improper use of the influence of their office, and private conflicts of interest, both apparent and real. Members of Council shall also not extend in the discharge of their official duties, preferential treatment to Family Members, organizations or groups in which they or their Family Members have a direct or indirect pecuniary interest.

c. Members of Council are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence and will bear close public scrutiny.

And lastly:

> <u>Improper Use of Influence:</u>

[258] Mississauga Council Code of Conduct, online: <http://www.mississauga.ca/file/COM/CouncilCode_Conduct.pdf> (15 December 2014) [*Mississauga Code*].

1. No member shall use the influence of his or her office for any purpose other than for the exercise of his/her official duties.

In his submission, my Counsel provided a host of actions to be taken in relation to the RM's current *Code of Ethics.* I would endorse his comments and add that they would apply with equal force to the model code which I have recommended be prepared:

- The *Code of Ethics* should be an organic document that is given annual review and amended when necessary. The RM will inevitably gain useful experience through its operation that will warrant amendment to the *Code of Ethics* to take into consideration new and unforeseen issues. Additionally, relevant legislative amendments may warrant consequent amendment to the *Code of Ethics*. In short, the *Code of Ethics* should evolve to be an accurate representation of the ethical values of the municipality and the legislative landscape.

- The *Code of Ethics* should include an interpretative section that provides that the *Code of Ethics* and any other applicable legislation should be interpreted broadly having regard to not only the letter of the law, but its spirit and intent. Such a provision would guide council members to avoid situations that may be legally defensible, but are otherwise detrimental to the integrity of their office.

- A 'commentary' should be added to each of the provisions or rules within the *Code of Ethics*. The addition of commentary would transition the document from aspirational to practical. As with many of 'Codes of Conduct/Ethics' the commentary section often provides the most useful advice and removes the interpretive subjectivity that can arise with a bare rule or aspirational statement.

- The *Code of Ethics* should be amended to provide more fulsome guidance on conflicts of interest. As evidenced from the Hearings (and the legal opinions reviewed therein), there appears to be an almost exclusive reliance on the Act. The common law, as outlined in my memorandum, fills a crucial void in the gaps in the *Act*. Currently, there does not appear to be any instruction to municipal council members as to their obligations under the common law in relation to conflicts of interest. These obligations could be included in the RM's *Code of Ethics* for future guidance.

- Assuming the conflict of interest ombudsman, or a like position, were to be created, the *Code of Ethics* should define council member's obligations in relation to that position. By way of example, the *Code of Ethics* should mandate a requirement that any reliance on legal advice from the ombudsman is subject to full and ongoing disclosure of any information material to the council members conflict of interest.

- The *Code of Ethics*, in relation to conflicts of interests, should provide a list of interests or arrangements that should be avoided due to the potential for actual or apparent conflicts of interests to arise therefrom.[259]

As was noted by my Counsel, the above list is non-exhaustive and only intended to identify some of the more notable omissions from the RM's current *Code of Ethics.* The *Code of Ethics* could also be expanded to address items such as conduct in relation to municipal elections, demarcation of the role of council in relation to its professional staff, and provide further guidance on conduct in relation to other elected officials, employees of the Province, employees of neighboring municipalities and RM staff members.

In my view, the proposed code should recognize conflicts of interest which extend beyond pecuniary interests and the formal legislative arena. I am comforted by the preamble of the Mississauga Code of Conduct which provides:

> And whereas ethics and integrity are at the core of public confidence in government and in the political process, and elected officials are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence, avoids the improper use of influence of their office and conflicts of interests, **both apparent and real** and the need to uphold both the letter **and the spirit of the law** including policies adopted by Council.
>
> [emphasis added]

I would envision the creation of a model code to be an initiative undertaken by Government Relations in association with the Saskatchewan Association of Rural Municipalities (SARM) and the Saskatchewan Urban Municipalities Association (SUMA).

C. Conflict of Interest Ombudsman

The creation of a conflict of interest ombudsman for municipalities was much discussed and received significant support from those appearing before me and their counsel. In his submission, my Counsel provided a recommendation on this matter that garnered support from both the RM and Reeve Eberle. I would largely support my Counsel's recommendations, interspersed within my own commentary, which follows:

Based on the very nature of municipalities, council members are often important members of the local community and often have significant land holdings and other business interests within their municipality. Because of this common scenario, conflicts of interest frequently arise within municipal council chambers. Municipalities and their council members are currently left with a narrow range of options to address this oft occurring issue. The council member, with the aid of his colleagues and/or staff, can choose to internally assess the matter and determine whether the interest

[259] Inspiration for these recommendations was drawn from the Mississauga Code, *ibid*.

is a disqualifying interest. Alternatively, the municipality can obtain a legal opinion and incur the cost associated with its preparation.

Neither of these two options currently available to address conflicts of interests are ideal. Municipal council members and staff should not be expected to reach determinations on what are often nuanced legal issues. Outside of scenarios where there is a clear conflict of interest, the municipality should have access to expertise on the matter which does not come at a significant expense to the municipality and its ratepayers.

With these concerns in mind, a provincially appointed conflict of interest ombudsman would be an invaluable resource for municipalities across the Province. The creation of such a position would grant quick and easy access to a specialized set of information that by all accounts is in great demand. A provincially appointed conflict of interest ombudsman would also provide the added benefit of independent advice.

A conflict of interest ombudsman could also serve as a screening device to determine whether a fulsome legal opinion is in fact necessary. There would undoubtedly be a host of instances where the individual or municipality seeking legal advice would be cleared of any conflict. In these situations, the affected member(s) of council would be able to proceed with piece of mind having efficiently gained competent legal advice.

The ombudsman should have the power to conduct an investigation in respect to a breach of the Act or the *Code of Ethics*. The enabling legislation should also permit the ombudsman to convert his or her investigation into an inquiry, which is an important middle ground between a regular investigation by the Ombudsman and a full judicial inquiry. By converting an investigation into an inquiry, the Ombudsman can exercise powers under the Inquiries Act to obtain information.

If an inquiry is conducted and the Ombudsman finds that a member of council has contravened the *Code of Ethics* or the Act, then council may issue and reprimand or suspend the salary of the member for up to 90 days. The appropriate amendment to the Act would have to be made to authorize council to impose those sanctions.

Regardless of the nomenclature applied to the position, a conflict of interest ombudsman would fill a meaningful gap in the resources currently available to municipalities and their council members. The legal advice that would become available by virtue of this position would be an effective and efficient medium for municipalities to resolve the often complex issues they are faced with in regards to conflicts of interest among their council members.

A conflict of interest ombudsman would also provide the Provincial Government with a more specialized resource to receive and investigate complaints. The creation of such a position would redress the current all or nothing approach the Provincial Government faces when in receipt of allegations of inappropriate conduct by municipal councillors.

Of course the Province already has an Ombudsman position and the creation of an entirely new office may be inefficient and impractical. With that in mind I would be fully supportive of an

expansion of the current Ombudsman's mandate, subject to the addition of the staff and resources that may be required.

D. Other Recommendations

Attached as Appendix 22 to my Report is a collection of all the recommendations made by the various witnesses who appeared before me. I thank them all for their contribution.

In many cases I was not able to give their recommendations serious consideration because the recommendation falls outside the scope of my limited mandate in performing this Inspection/Inquiry. Nonetheless they add valuable insight into some of the significant challenges to governing a municipality in this robust and growing economy.