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## Local Government Standards Panel

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Complaint Number	SP 60 of 2018
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Steven Cain</b>
<b>Respondent</b>	<b>Councillor Lee-Anne Smith</b>
Local Government	<b>City of Cockburn</b>
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mrs Sheryl Siekierka (Presiding Member) Mrs Emma Power (Member) Councillor Paul Kelly (Member)
Heard	7 December 2018 Determined on the documents
Finding	One (1) Breach of Regulation 7(1)(a)

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### FINDING AND REASONS FOR FINDING

Delivered 10 January 2018

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#### DEFAMATION CAUTION

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#### Summary of the Panel's decision

1. The Panel found on 7 December 2018 that Councillor Lee-Anne Smith, the Deputy Mayor of the City of Cockburn ("**the City**") did commit a minor breach under the



Local Government Act 1995 (WA) (“**the Act**”) and regulation 7 of the Local Government (Rules of Conduct) Regulations 2007 (“**the Regulations**”) when she:

- a. had discussions and made agreements with an applicant regarding a development application for the installation of electronic signage on land situated in the City; and
- b. drafted an alternative recommendation for the approval of the Development application and inclusion of certain development approval conditions proposed to be raised at the Ordinary Council Meeting of 10 May 2018 (“**the OCM**”),  
as further described in paragraphs 21, 22, and 29 below.

### **The Panel’s Role**

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.<sup>2</sup>
5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
6. In considering whether a minor breach is established the Panel must consider:
  - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate<sup>3</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>4</sup>.
7. The Panel does not possess investigative or supervisory powers.<sup>5</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority’s website.
8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
9. The Panel also must have regard to the general interests of local government in Western Australia<sup>6</sup>.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

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<sup>1</sup> Section 5.105 of the Act

<sup>2</sup> Section 5.106 of the Act

<sup>3</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

<sup>4</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>5</sup> *Re and Local Government Standards Panel* [2015] WASC 51 (at paragraph 24)

<sup>6</sup> Section 8(6) of Schedule 5.1 of the Act



## Regulation 7

11. Regulation 7 prohibits councillors engaging in conduct to either gain an advantage for either themselves or another party or cause detriment to another party and specifically provides as follows:

### ***“7. Securing personal advantage or disadvantaging others***

- (1) *A person who is a council member must not make improper use of the person’s office as a council member —*
- (a) *to gain directly or indirectly an advantage for the person or any other person; or*
- (b) *to cause detriment to the local government or any other person.*
- (2) *Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.*

## Jurisdiction and Procedural Fairness

12. On 17 July 2018 and 18 July 2018 the Panel received two emails from Mr Stephen Cain, the complaints officer of the City (**“the Complaints Officer”**). The same enclosed a letter dated 4 July 2018 and a Complaint of Minor Breach Form (with various attachments) dated 3 July 2018 provided by Mr Stephen Cain as complainant (together **“the Complaint Form”**).
13. The Complaints Officer confirmed that a copy of the Complaint had been sent to Cr Smith setting out the specifics of the alleged conduct and minor breaches.
14. The Panel convened on 7 December 2018 to consider the Complaint.
15. The Panel:
- accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission’s website, that Cr Smith was:
    - last elected to the Council of the City in 2017 for a term expiring in October 2021;
    - a City Councillor at the time of the alleged breach; and
    - a Councillor when the Panel met on 7 December 2018;
  - was satisfied the Complaint were made within two years after the alleged breach occurred<sup>7</sup>;
  - was satisfied that the City’s Complaint Officer had dealt with the Complaint in accordance with the administrative requirements of the Act for dealing with complaints of a minor breach<sup>8</sup>;
  - was satisfied the Department had provided procedural fairness to Cr Smith; and
  - found it had jurisdiction to consider the Complaint.

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<sup>7</sup> Section 5.107(4) and 5.109(2) of the Act

<sup>8</sup> Section 5.107 and 5.109 of the Act



## Background of Complaint

16. On 6 September 2017 Cr SP (now deceased) proposed to attend a meeting with a landowner in the City (**“the Landowner”**) in relation to landscaping, beautification and the erection of certain signage on his land (**“Lot 38”**). The meeting subsequently occurred on 15 September 2018.
17. In 2017, a third party applicant (**“PP”**) made formal application for the installation of a Large Format Digital Signboard (**“the Signboard”**) on Lot 38 (**“the Development Application”**).
18. The Development Application was refused by the City under delegated authority but subsequently referred to Council for consideration due to requests by Cr SP and then Cr Smith.
19. The City’s officers recommended that Council refuse the Development Approval for the Signboard due to the following reasons:
  - “1. *The proposed use is not permitted within the Special Use 23 zone of Town Planning Scheme No. 3. 2.*
  2. *Approval of the proposed development would not demonstrate orderly and proper planning and would therefore contradict the aims of Town Planning Scheme No. 3. 3.*
  3. *The proposal will detract from the visual amenity of the area.*
  4. *The proposal is contrary to the City’s Local Planning Policy 3.7 – Signs and Advertising, in that it would allow the advertising of services and products that do not relate to the subject property.”*
20. The matter was included in the Agenda as item 14.5 for consideration and vote at the Ordinary Council Meeting to be held on 10 May 2018 (**“the OCM”**).
21. Prior to the OCM Cr Smith worked with the Director of Planning and Development Services to draft an alternative recommendation to be included in item 14.5 of the Agenda to approve the Development Application subject to certain conditions (**“the Alternative Recommendation”**). This included a condition drafted by Cr Smith in respect to certain content being provided on the Signboard free of charge to both the City and the Melville Cockburn Chamber of Commerce (**“MCCC”**).
22. Cr Smith proposed the following draft condition as part of the Alternative recommendation:
  - “13. *At no cost to the City a minimum of 15 percent of the content shall display images and text directly benefiting and relating to the City of Cockburn.*
  - 13a. *10 percent allocated to Council for community purposes to the satisfaction of the City of Cockburn.*
  - 13b. *5 percent allocated to MCCC for a trial period of 3 years to promote local chamber events and local Cockburn businesses.*
  - 13c. *These advertisements will be provided at no cost to the City and the MCCC. Advertisements can be changed as often as they so choose. Specification sheets will be provided to both the City and the MCCC to facilitate design criteria. Once the advertisement is agreed upon by both parties it will be loaded into the system as displayed live on the screen.”*(**“the Advertising Condition”**).



23. The Advertising Condition was discussed and it was later proposed it be modified to exclude clauses 13a, 13b and 13c.
24. All other elected members and the CEO were provided with a copy of the proposed Alternative Motion including the Advertising Condition at various stages for comment.
25. Immediately prior to the OCM, legal advice was sought by the City in respect to whether:
  - a. the Council had the ability to formally consider the Development Application;
  - b. the Council legally had the ability to require the applicant (PP) to allocate 10% of sign content to the City and 5% to a third party (the MCCC); and
  - c. by directly negotiating a proposed outcome with the applicant, Elected Members have breached the Regulations.
26. Due to the pending legal advice, Cr Smith agreed that the Alternative Recommendation should be delayed and removed from the agenda for the OCM.
27. The legal advice was subsequently provided and was also the subject of a presentation to the Elected Members on the 13 June 2018. The same confirmed the following:
  - a. the proposed signage use was a use not permitted within Special Use Zone 23 and that Council did not legally have the ability to approve the Development application;
  - b. the Council did not have the ability to impose a condition requiring the applicant to allocate signage content to the City or the MCCC; and
  - c. if an Elected Member directly negotiated an outcome for the approval of the Signboard then they would be in breach of the Regulations.
28. The City of Kwinana had recently approved similar large format signboards subject to similar conditions regarding content, although it is understood that the zoning provisions differ.

### **The Specifics of the Complaint**

29. Mr Cain makes the following allegations in the Complaint:
  - a. Cr Smith held discussions with the applicant prior to the OCM which included the negotiation of the inclusion of the Advertising Condition for the benefit of the City and the MCCC;
  - b. the direct negotiation by Cr Smith is confirmed by a text message from Cr Smith to another councillor including the following:

*“I’ve squeezed 10% free advertising for Cockburn and 5% for Local business out of these guys. That’s signage everyday encouraging people to visit Cockburn.”*

(“the **Text Message**”).
  - c. Cr Smith proposed the Alternative Recommendation and, had this been successful, this would have provided a financial benefit for the applicant/developer (PP), MCCC and the City;
  - d. the proposed Alternative Recommendation would have contravened the City’s Planning Scheme and Local Planning Policy on Signage;



- e. Cr Smith sought to influence fellow Elected Members to approve the Development Application;
  - f. in making representations in support of the Development Application, Cr Smith acted improperly as she did not:
    - i. provide any record of the meeting/discussion with the applicant (PP) as required under the State Record Keeping Act; or
    - ii. declare an impartiality interest at the OCM prior to the consideration of the relevant agenda item; and
  - g. entering a “trade off” to approve a non permitted use to secure an entitlement for the City, PP or MCCC would have been improper under the Planning and Development Act.
30. With the Complaint Form Mr Cain also provided:
- a. a copy of the Summary of Agenda to be Presented to the Ordinary Council Meeting to be Held on Thursday, 10 May 2018 at 7.00pm; and
  - b. a screen shot of the Text Message.

### **Respondent’s Response**

- 31. By an email dated 3 August 2018 Cr Smith provided a response to the Complaint.
- 32. Cr Smith denies any breach occurred in relation to the Complaint.
- 33. Cr Smith makes the following comments and arguments:
  - a. the information provided is ad hoc and does not highlight the communication and advice received from the Director of Planning to herself;
  - b. Cr Smith acted under the advice and guidance of the City’s Director of Planning. There were 6 days of communication including emails, phone calls and messages) between herself and the Director of Planning, Acting Director of Governance, the Minutes Clerk and Elected Members (including the Mayor) (together “**the Correspondence**”);
  - c. Cr Smith acted within the City’s alternative recommendation guidelines;
  - d. Cr Smith received certain advice from the CEO 20 minutes prior to the OCM which gave her no opportunity to review the late advice. This advice, however, was taken seriously and she deferred the motion for formal legal advice;
  - e. during the OCM Cr Smith apologised to the gallery stating that she was now uncertain about the alternative recommendation and asked for such statement to be noted. Such statement also noted that she would be very upset if she had done anything wrong;
  - f. Cr Smith deemed it only proper to seek legal advice before a decision of the Council was made and Elected Members agreed with this stance;
  - g. the City of Kwinana had recently entered an agreement with the same applicant (PP) for the same digital advertising (although for 10% content);
  - h. the wording for the Alternative Recommendation was taken from the City of Kwinana’s minutes under the direction and advice of the City’s Directors;
  - i. Cr Smith trusted the guidance and advice she received from the City’s Directors and followed the City’s Alternative Recommendation Guidelines;



- j. at no time during the discussions with the Director for Planning and Development Services was a possible breach of the Regulations brought up by any party;
  - k. all Elected Members were given the same information and opportunity to ask questions and vote accordingly; and
  - l. Cr Smith did not attend the initial meeting with the landowner and did not attend any subsequent meetings with the applicant (PP).
34. Cr Smith also provided the following additional material for the Panel's consideration with her response:
- a. a summary and time line of Cr Smith's actions and involvement in the matter;
  - b. email dated 6 September 2017 from Cr SP to all Elected Members and the Director for Planning and Development Services regarding the meeting with the landowner in 2017 and a response from the Director for Planning and Development Services regarding the same;
  - c. Minutes of the Ordinary Council Meeting of the 17<sup>th</sup> January 2018 of the City of Kwinana;
  - d. copies of the Correspondence (referred to in clause 33.b above);
  - e. email trail including the following:
    - i. email dated 14 June 2018 from Director for Planning and Development Services to Elected Members regarding the presentation of legal advice regarding the matter and confirming the legal advice;
    - ii. email dated 14 June 2018 from Cr Smith to the Director for Planning and Development Services regarding the legal information session; and
    - iii. email dated 14 June 2018 from Director for Planning and Development Services to Cr Smith stating Council Policy SC9 – representation of Council related forums and Site Visits.

### **Panel's Consideration**

35. The Complainant does not allege that Cr Smith caused any person to suffer a detriment and as such, the relevant regulation to be considered is 7(1)(a).
36. To make a finding of a minor breach of regulation 7(1)(a) of the Regulations the Panel must be satisfied that:
- a. Cr Smith was a councillor at the time of the alleged breach and the time of the determination; and
  - b. Cr Smith made use of her office as Council member of the City;
  - c. when viewed objectively, such use was an improper use of Cr Smith's office in that:
    - i. it involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons<sup>9</sup>; and
    - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty<sup>10</sup>; and
  - d. Cr Smith engaged in the conduct in the belief that an advantage would be gained directly or indirectly for herself or any other person;

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<sup>9</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81 at [26] – [34]

<sup>10</sup> *Hipkins and Local Government Standards Panel* [2014] WASAT 48 at [9]

### Was Cr Smith a Councillor at the relevant times

37. Cr Smith was a councillor at the time of the alleged breaches and at the date the Panel considered the Complaint.

### Cr Smith made use of her office as Council member of the City;

38. It is not alleged that Cr Smith was acting in any other capacity than that of an elected member.
39. The Panel finds, to the required standard, that Cr Smith was acting in her role as councillor and therefore making use of her office as a council member.

### Cr Smith's use was improper

40. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or a lack of wisdom<sup>11</sup>.
41. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of a councillor by reasonable persons with knowledge of the duties, powers and authority of that person's position as a councillor and the circumstances of the case<sup>12</sup>.
42. It requires unsuitable or inappropriate behaviour that a councillor knew (or ought to have known) was not authorised.
43. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent<sup>13</sup>.
44. In addition, any decision as to what is "improper" cannot be made in isolation but must be considered in the relevant context. Such context will include the specifics of the relevant event as well as councillor's formal role and responsibilities.
45. In this case it is unclear to what extent Cr Smith had contact with PP. However, the Text Message and, in particular, the use of the words "squeezed" and "out of these guys" indicates that at least some contact was made and that certain negotiations took place.
46. The role of a councillor includes "representing the interests of electors, ratepayers and residents of the district, providing leadership and guidance to the community in the district"<sup>14</sup>. However, in undertaking this role a councillor must act in accordance with their fiduciary duties and any relevant code of conduct.
47. It is not improper or incorrect for an Elected Member to make an alternative recommendation or to represent the electors in his or her district. Further, the Panel, considers that it is more likely than not that the proposal and drafting of the Alternative Recommendation, in and of itself, was more likely than not to have been undertaken in accordance with the City's relevant Guidelines.
48. The improper conduct in question relates to the content of such Alternative Recommendation and Cr Smith's actions in so far as they were intended to gain a benefit of a party and specifically:
- a. negotiating on behalf of the City to gain 10% free advertising (which should properly be an administrative function of the City); and

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<sup>11</sup> Complaint of Minor Breach No. SP 3 of 2013

<sup>12</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59

<sup>13</sup> *Chew v R* [1992] HCA 18

<sup>14</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81 at [27] and *Hipkins and Local Government Standards Panel* [2014] WASAT 48 at [8] to [11]



- b. contact with, and negotiation on behalf of, MCCC for a 5% share of free advertising.
49. It is also alleged that Cr Smith's contact with PP was improper as was her failure to disclose such contact.
50. Meetings and communication between elected members and parties within a community who wish to lobby for a certain outcome will always be considered problematic where any outcome may result in a financial (or other) benefit of some kind for one or more party and this gives rise to a perception of bias.
51. Local councils therefore create policies and guidelines to assist Elected Members and the Regulations further define Elected Members' obligations.
52. However, councillors must balance their obligations under the Regulations with their responsibilities to the community.
53. As set out in *Bradley and Local Government Standards Panel* [2012] WASAT 44; (2012) 80 SR (WA) 69 at [45]:
- “Local councillors do a critical, necessary and difficult job; they attempt to represent local opinion which is not always an easy task..... They do not always get things right..... But they are not to be criticised for attempting to represent their constituency and community interests to the best of their abilities. Their job should not be made even more difficult by the imposition of unworkable rules that, in effect, limit what they may say when they are undertaking these critical functions.”*
54. The Panel finds that the mere fact Cr Smith may have met with or communicated with PP would not be considered improper.
55. However, negotiating the outcome of a 15% share of advertising for the benefit of the City and the MCCC and indicating to PP that such outcome would likely be agreed by the City is improper.
56. Despite the fact that Cr Smith only considered the same to be for the benefit of the City and the community, this type of conduct is not within the scope of Cr Smith's functions as a councillor.
57. The Panel finds that Cr Smith's actions in negotiating an outcome for the benefit of the Council and the MCCC were improper and were of such a nature that a reasonable individual would consider the same to:
- a. be inappropriate;
  - b. constitute an improper use of Cr Smith's position; and
  - c. be deserving of a penalty.

Cr Smith intended an advantage to be gained directly or indirectly

58. The definitions of the noun 'advantage' in the Shorter Oxford English Dictionary (6<sup>th</sup> ed) include a favouring circumstance, something which gives one a better position, benefit, increased well-being or convenience or a pecuniary profit.
59. The Panel considers the term 'advantage' in regulation 7(1)(a) is to be construed widely, and includes a financial or a non-financial benefit, gain or profit, or any state, circumstance, opportunity or means specially favourable.<sup>15</sup>

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<sup>15</sup> Complaint SP 12 and 13 of 2011



60. In this case the approval of the Development Application would have provided a financial advantage to each of the applicant (PP), the City and the MCCC.
61. It is not necessary to find whether any advantage was actually secured<sup>16</sup> and only an intent to secure such advantage must be established.
62. In this case, Cr Smith's response to the Complaint and the Correspondence demonstrate the clear intent of Cr Smith to attract a benefit to both the City and the MCCC.
63. The Panel finds it more likely than not that Cr Smith's undertook the course of action of negotiating with PP and proposing the Alternative Motion in the belief that an advantage would be gained for the City and MCCC.
64. For the purposes of regulation 7(1)(a), it is immaterial whether the benefit was not for Cr Smith personally, or that she was acting ultimately to benefit the City. This type of conduct is expressly prohibited by the Regulations.
65. This element is met.

#### Conclusion

66. The Panel finds that the elements required to find a breach of regulation 7(1)(a) of the Regulations have been met and Cr Smith did commit a minor breach.

#### **Panel's Finding**

67. Cr Smith did commit one breach of regulation 7(1)(a) of the Regulations.

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Sheryl Siekierka (Presiding Member)

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Emma Power (Member)

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Paul Kelly (Member)

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<sup>16</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]