

## LOCAL GOVERNMENT STANDARDS PANEL

Established under section 5.122 of the *Local Government Act 1995* (WA)

Complaint Number	SP 1 of 2016 [DLGC 20160003]
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Michael Foley</b>
<b>Subject of complaint</b>	<b>Councillor Rod Henderson</b>
Local Government	<b>City of Swan</b>
Regulation	Regulations 7(1), 8(b), 9(1) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr B Jolly (Presiding Member) Councillor P Kelly (Member) Ms M Strauss (Member)
Heard	24 February 2017 Determined on the documents
Outcome	Breaches of regulations 7(1)(a) and 8(b)

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### DECISION AND REASONS FOR DECISION

Published 16 March 2017

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#### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.

### **Finding of two minor breaches – regulations 7(1)(a) and 8(b)**

1. On 17 August 2016 the Panel found that Councillor Rod Henderson (Cr Henderson), a councillor for the City of Swan (the City), committed two minor breaches under the *Local Government Act 1995* (WA) (the Act) and regulations 7(1)(a) and 8(b) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) on 22 November 2015 when he sent a letter to the then Minister for Planning about a development application.
2. On 11 November 2016 the Panel published its Reasons for finding that Cr Henderson breached regulations 7(1)(a) and 8(b).

### **Possible sanctions**

3. Under section 5.110(6) of the Act a breach is to be dealt with by —
  - (a) dismissing the complaint; or
  - (b) ordering that —
    - (i) the person against whom the complaint was made be publicly censured as specified in the order; or
    - (ii) the person against whom the complaint was made apologise publicly as specified in the order; or
    - (iii) the person against whom the complaint was made undertake training as specified in the order;or
  - (c) ordering 2 or more of the sanctions described in paragraph (b).

### **Councillor's submission**

4. If the Panel finds that if a councillor has committed a minor breach, the Panel must give the councillor an opportunity to make submissions to the Panel about how the breach should be dealt with.<sup>1</sup>
5. The Panel accepted the advice of the Department of Local Government and Communities (the Department) that it sent a letter to Cr Henderson on 11 November 2016 notifying him of the Panel's findings and provided him with a copy of the Panel's Findings and Reasons dated 11 November 2016.
6. The Panel also accepted the Department's advice that it contacted Cr Henderson on three additional occasions to determine if he intended to make a submission. A Department file note reads:

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<sup>1</sup> Section 5.110(5) of the Act.

*“Telephone call to Cr Rod Henderson. Asked if he had received the Department’s correspondence and if he would be making a submission on the LGSP’s findings. He was vague in his ability to recall receiving the letter and (the Department’s) emails. He then recalled the letter and stated that the LGSP “ignored” his submission, didn’t allow him to put his case in person, and believed that making a sanction submission would be a waste of time. He located (the Department’s) email of 2 December and said he would consider responding to it. However from the tone of the conversation it is expected that he will not make a sanction submission.”*

7. On 11 January 2017, after that telephone call, Cr Henderson sent an email to the Department saying “I have nothing further to comment as this time”.

### **Panel’s consideration**

8. In its Findings and Reasons the Panel said:

- “15. Mr Foley alleged that on 22 November 2015 Cr Henderson committed minor breaches under regulations 7, 8 and 9 when he sent a letter on his Councillor letterhead dated 21 November 2015 to the Hon John Day MLA, the then Minister for Planning (the Complaint).

16. The letter relates to an application for approval to operate a stockfeed business in Campersic Road in the Swan Valley Rural Zone, lodged with the City on 20 July 2015 (the Application) by two of Cr Henderson’s constituents (the Applicants).

17. The Applicants wanted to buy an existing stockfeed business that had to close and move it to their property in Campersic Road.

18. The City refused the Application.

...

24. The Applicants sent an email to Cr Henderson asking for his “help and support with this” because the supply of stockfeed was essential for businesses and residents in the area.

...

27. On 21 November 2015 Cr Henderson wrote his letter to the Minister on a coloured letterhead (the Letter). The letterhead included the City’s title and logo and a photograph of Cr Henderson. Words beside the photograph read “Cr Rod Henderson, Swan Valley/Gidgegannup Ward Councillor”. Cr Henderson signed the Letter as “Cr Rod Henderson”.

28. After giving the Minister some background to the Applicants’ objectives and the Determination, Cr Henderson said:

“The applicant has considered making an appeal to SAT however given the X use they are concerned that this could be a waste of time and money.

...

I request if you are unable to make a determination to allow the closing of the business in one location and the establishment of the same business activity in a nearby location that you advise the City of Swan this be dealt with as a Use Not Listed or some other dispensation to allow the application or that you request (SAT) do so.

...

It is not our intention of opening the floodgates to other applications more broadly. I see this as a specific case where the use exists and is needed however LPS17 has been applied to the detriment of local needs.”

### **Breach of regulation 7(1)(a)**

#### 9. The Panel said:

“Did Cr Henderson use his office improperly?”

38. In his response Cr Henderson said his motivation was to ensure the equestrian community had readily accessible feed, by allowing the 30-year stockfeed business to continue, although at a different site. He said he was open and accountable in his actions, having sent Mr Foley, as CEO, a copy of the Letter.

...

47. The Act requires the Panel members to have regard to the general interests of local government in Western Australia.<sup>2</sup> Regulation 3 of the Regulations sets out general principles to guide the behaviour of council members, although contravention of any of any of these does not amount to a minor breach.<sup>3</sup> Regulation 3 provides that councillors should act with honesty and integrity, avoid damage to the reputation of the local government, and be open and accountable to the public.

48. It is in the interests of local government that decisions are authorised, fair and consistent so that all-comers are treated equally. Ratepayers, residents and other individuals or organisations operating in the local government’s area are entitled to know the rules and have confidence that the rules will be applied consistently. Proper decision-making processes will earn the community’s trust and respect. A local government’s reputation would be damaged if community members thought decision-making processes were not being applied consistently or that individuals in the local government were not abiding by, or were actively seeking to overturn, decisions lawfully made by officers or the Council.

49. The City’s Code of Conduct provides, in relation to the role of councillors and their relationships with officers (pages 7,14):

Councillors sitting formally as the Council, either make, or are accountable for all decisions that are to be taken at the Council level. Decisions are made through a formal Council meeting process or through the formal delegation of powers to Committees, the CEO or City staff through the CEO.

The focus of the Council and Councillors should be on strategy, policy and outcomes. That is, they should focus on how the community is to benefit from the City’s activities and in what way. The role of City staff is to focus on advice, implementation and operations.

A number of factors contribute to a good relationship between Councillors and City staff. These include goodwill, a clear understanding of each other’s roles, good communication, agreed structures and protocols, an appreciation of legislative requirements and clear delegations.

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<sup>2</sup> Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

<sup>3</sup> Regulation 3.

50. There is no doubt that Cr Henderson knew that City officers had refused the Application...
51. There is no reason to doubt Mr Foley was correct in saying in the Complaint Form that Cr Henderson had the appropriate induction and was a member of the Governance Committee that reviewed the Code before Cr Henderson wrote the Letter, and that the revised Code was the one Council unanimously adopted on 21 November 2015.
52. It doesn't matter that Cr Henderson thought he was doing his best to help the Applicants and other members of the community, or that he thought he was using a proper process. The question is whether, in all the circumstances, a reasonable person would consider he acted improperly.<sup>4</sup>
53. The Panel is satisfied to the required standard that a reasonable person, looking at all the circumstances, including the standards of conduct expected of councillors and their duty to Council, would conclude that Cr Henderson knew or should have known that:
- the relevant officer made the decision to refuse the Application as a delegate of the Council;
  - the delegate made the decision on behalf of Council;
  - he owed a duty of fidelity to Council to accept and support that decision, not to undermine the officer's decision, which was in effect the Council's decision;
  - Cr Henderson's actions in asking the Minister to effectively overturn the City's decision did not meet the standards of conduct expected of councillors;
  - it was not appropriate for Cr Henderson to write to the Minister, effectively asking him to approve the Application – “ if you are unable to make a determination to allow the closing of the business in one location and the establishment of the same business activity in a nearby location ...” after the City had made its Determination;
  - it was not appropriate for Cr Henderson to ask the Minister to “advise” the City to give the proposed land use a different classification so it would be permitted under the local planning scheme; and
  - it was not appropriate for Cr Henderson to ask the Minister to ask SAT to decide the matter in favour of the Applicants so the Applicants didn't have to spend money on applying to SAT themselves.
54. The Panel is satisfied to the required standard that a reasonable person would judge Cr Henderson's actions in asking the Minister to intervene in the ways listed in the paragraph above to be improper. Accordingly the Panel finds that Cr Henderson used his office improperly.

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<sup>4</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81, paragraph 30.

Did Cr Henderson use his office improperly to gain directly or indirectly an advantage for the person or any other person?

55. Cr Henderson denied he sought to gain an advantage for the Applicants.
56. The Shorter Oxford English Dictionary<sup>5</sup> defines “advantage” as “a favouring circumstance; something which gives one a better position ... benefit; increased well-being or convenience ... pecuniary profit ...” The Macquarie Dictionary<sup>6</sup> defines “advantage” as “any state, circumstance, opportunity or means specifically favourable to success, interest or any desired end ... benefit, gain, profit.”
57. “To” in “to gain directly or indirectly an advantage” indicates that for this element to be satisfied the councillor must have an intention to gain an advantage. He must be found to have taken action for the purpose of, or with a view to, gaining an advantage for the Applicants.
58. For this element to be satisfied, it is not necessary to establish that Cr Henderson’s actions did, or could reasonably have, delivered the result he sought for the Applicants.<sup>7</sup>
59. Cr Henderson asked the Minister to:
- make a determination himself in favour of the applicants;
  - advise the City to deal with the Application under a different use criteria;
  - advise the City to make some other “dispensation to allow the application”; or
  - ask SAT to “do so”.
60. The meaning of “do so” is unclear. It could mean Cr Henderson wanted the Minister to ask SAT to tell the City it should assess the Application in a way that would result in an approval; or that he wanted the Minister to ask SAT to itself approve the Application.
61. The only possible inference is that Cr Henderson wrote to the Minister with the intention of getting an approval for the Applicants, which would in turn allow them to conduct their business in their property.
- ...
63. Cr Henderson fully understood what the Applicants were seeking to achieve, and why, and decided to ask the Minister to help achieve it after they hadn’t been able to get the City’s approval.
64. The Panel is satisfied to the required standard that by writing to the Minister Cr Henderson intended to gain a benefit for the Applicants, that is, to get approval to run the stockfeed business from their property, which was in an area in which such use was not permitted. Cr Henderson sought to gain the advantage directly or indirectly – he requested the Minister to take specified action which, in Cr Henderson’s mind, would result in approval of the Application (a benefit), which in turn would allow them to operate the business from their property (a subsequent benefit).”

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<sup>5</sup> Sixth Edition.

<sup>6</sup> Revised Third Edition

<sup>7</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraphs 71,72.

### **Sanction for breach of regulation 7(1)(a)**

10. In his Complaint Form Cr Henderson denied he had breached regulation 7(1)(a). In his response letter he said he wanted to ensure the equestrian community had readily accessible feed. He may have had good intentions, to assist his constituents, but he knew City officers had acted under delegated authority.
11. The Panel found that Cr Henderson knew or should have known it was improper to write to the Minister asking him to intervene. Not only was it improper to challenge the officer's decision, he did so to get a special benefit for his constituents, one that other people would not get if they followed the rules. His conduct is likely to have embarrassed the councillors and City officers.
12. The Panel outlined the standards expected of a councillor (paragraphs 47 to 49 of its Reasons, quoted above) and why his actions were improper yet Cr Henderson's comments in the telephone call with Department showed he didn't respect the Panel's decision. He made no apology for doing the wrong thing.
13. It is not appropriate to dismiss the breach. Cr Henderson's conduct was serious. He knew or should have known it was wrong but has not acknowledged this or apologised.
14. Neither is it appropriate to order that Cr Henderson undergo training because he has not shown any willingness to learn.
15. The Panel considers a public apology would not be appropriate because Cr Henderson has not admitted he was at fault and is not convinced an apology would be sincere.
16. The Panel finds that the appropriate sanction is that Cr Henderson be publicly censured.

### **Sanction for breach of regulation 8(b)**

17. The Panel said:... ..

- “67. Cr Henderson's response to the alleged breach of regulation 8 was that he wrote the Letter in his personal capacity, not representing the Council. He cited the words “personal correspondence” and the addition of his personal website in the footer as evidence of this. He said the Letter was not “in the name of the City” – it was “personal correspondence from me, a councillor seeking direction on (a) matter.”
68. Cr Henderson also said the CEO should not issue these letterheads if they are not for “personal correspondence”.
69. The Panel has already found that Cr Henderson was a councillor at the time of the alleged breach and sent the Letter in his capacity as a councillor.

#### Did Cr Henderson use the City's resources?

70. It appears to the Panel that Cr Henderson considers correspondence in his capacity as a councillor to be “personal correspondence”, and that he denies the paper with the City letterhead is a “local government resource”.

...

Did Cr Henderson use the letterhead for a purpose that was not authorised by the Act, the Council or the CEO?

75. The Panel has already found that Cr Henderson acted improperly by writing the Letter, in contravention of the Regulations and the standards of conduct expected of councillors. The Act requires councillors to abide by the Regulations. Nothing in the Act authorises a councillor to use a local government resource for an improper purpose.”
18. Cr Henderson has not accepted the Panel’s decision or apologised for his breach. He criticised the Chief Executive Officer for issuing the letterheads.
19. The Panel considers that in light of the Act, Regulations, the City’s Code of Conduct and the induction for councillors, Cr Henderson knew or should have known how to differentiate his role as a councillor from that as a private citizen.
20. It is not appropriate to dismiss the breach because Cr Henderson has not shown any respect for the Panel’s decision and has not acknowledged his breach or apologised for it.
21. Neither is it appropriate to order that Cr Henderson undergo training because he has not shown any willingness to learn from his behaviour.
22. The Panel considers a public apology would not be appropriate because Cr Henderson has not admitted he was at fault and is not convinced an apology would be sincere.
23. The Panel finds that the appropriate sanction is that Cr Henderson be publicly censured.

**Panel’s decision**

24. The Panel’s decision on how the minor breaches are to be dealt with under section 5.110(6) if the Act is that Cr Henderson be publicly censured for the two breaches, as set out in Attachment A hereto.

  
Brad Jolly (Presiding Member)

  
Paul Kelly (Member)

  
Merranie Strauss (Member)



Date of Reasons – 15 March 2017

Attachment A

**LOCAL GOVERNMENT STANDARDS PANEL**

Established under section 5.122 of the *Local Government Act 1995* (WA)

Complaint Number	SP 1 of 2016 [DLGC 20160003]
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Michael Foley</b>
<b>Subject of complaint</b>	<b>Councillor Rod Henderson</b>
Local Government	<b>City of Swan</b>
Regulation	Regulations 7(1), 8(b), 9(1) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr B Jolly (Presiding Member) Councillor P Kelly (Member) Ms M Strauss (Member)
Heard	24 February 2017 Determined on the documents
Outcome	Public censure

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**SANCTION ORDER**

Published 16 March 2017

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**DEFAMATION CAUTION**

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**THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:**

1. Mr Rod Henderson, Councillor of the City of Swan, be censured as specified in paragraph 2 below.
2. Within the period of 29 days to 43 days from the day following the date of service of this Order on Cr Rod Henderson, the Chief Executive Officer of the City of Swan arrange for the following Notice of Public Censure to be published, in no less than 10 point print:
  - (a) as a one-column or a two-column display advertisement in the first 15 pages of "The West Australian" newspaper; and
  - (b) as a one-column or a two-column display advertisement in the first 15 pages of the Echo Newspaper.

