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## Local Government Standards Panel

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Complaint Number	SP 64 of 2018
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Robert Jeans</b>
<b>Respondent</b>	<b>Councillor Matthew Whitfield</b>
Local Government	<b>City of Rockingham</b>
Regulation	Regulation 9 of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Ms Sheryl Siekierka (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Rebecca Aubrey (Deputy Member)
Heard	21 November 2018 Determined on the documents
Outcome	One breach of Regulation 9

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### FINDING AND REASONS FOR FINDING

Published 30 January 2019

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. The Local Government Standards Panel ("the Panel") found that Councillor Matthew Whitfield ("Cr Whitfield"), a councillor for the City of Rockingham ("the City"), committed one breach under the *Local Government Act 1995 (WA)* ("the Act") and regulation 9 of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations") with reference to dealings he had with property developers in relation to a new property development project.

## Jurisdiction

2. The Act provides for the circumstances in which a council member commits a minor breach.<sup>1</sup>
3. On 24 July 2018 the Department of Local Government, Sport and Cultural Industries ("the Department") received a Complaint of Minor Breach Form dated 24 July 2018 ("Complaint") in respect of Cr Whitfield submitted by Mr Robert Jeans ("the Complainant") containing two allegations of a breach of regulation 9 by Cr Whitfield ("Allegations"). The Allegations relate to two separate incidents, the first regarding a post Cr Whitfield added to the Baldivis Now website regarding a proposed structure plan and the second when he referred to dealings he had with property developers in relation to a new property development project in the City in a Facebook post published on 25 June 2018.
4. On 31 July 2018 the Department advised Cr Whitfield of the Complaint and invited him to respond. The Department sent Cr Whitfield a copy of all the supporting documents provided by the Complainant.
5. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.<sup>2</sup> On 21 November 2018 the Panel convened to consider the Complaint.
6. The Panel:
  - (i) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Whitfield was a councillor at the time of the alleged breaches, having been elected on 21 October 2017, and was still a Councillor when the Panel met on 21 November 2018;
  - (ii) was satisfied the Complaint had been made within two years after the alleged breaches are said to have occurred<sup>3</sup>;
  - (iii) was satisfied the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches<sup>4</sup>; and
  - (iv) was satisfied that the Department had provided procedural fairness to Cr Whitfield.

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

<sup>2</sup> Section 5.110(2)(a) of the Act.

<sup>3</sup> Section 5.107(4) of the Act

<sup>4</sup> Sections 5.107, 5.108, 5.109 of the Act.



7. If a councillor has previously committed two or more minor breaches, the Panel may send the complaint to the Chief Executive Officer of the department assisting the relevant Minister at the time instead of considering the Complaint itself.<sup>5</sup> As Cr Whitfield had not previously committed a minor breach the Panel did not consider sending the Complaint to the Chief Executive Officer of the Department.
8. Based on the information referred to in paragraphs 2 to 7 above the Panel found it had jurisdiction to determine whether Cr Whitfield had breached regulation 9 in connection with the Complaint and the two Allegations made against him.

### **Panel's role**

9. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
10. Any finding that a councillor has committed a minor breach must be based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur (the required standard of proof).<sup>6</sup>
11. Where direct proof of an alleged fact, proposition or conduct is not available, in order to find the allegation, proposition or conduct has been established, the Panel must be satisfied on the evidence that it is more probable than not that the alleged fact, proposition or conduct occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.<sup>7</sup>
12. For a finding that a councillor has breached a particular regulation the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

### **Regulation 9**

13. Regulation 9 provides:

#### ***"9. Prohibition against involvement in administration***

- (1) A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the council or by the CEO to undertake that task.*
- (2) Subregulation (1) does not apply to anything that a council member does as part of the deliberations at a council or committee meeting.*

### **Substance of the two Allegations**

14. The functions of the City's CEO are those as prescribed by s5.41 of the Act which includes the responsibility of managing the day to day operations of the City.

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<sup>5</sup> Sections 5.110(2)(b), 5.111(1) of the Act.

<sup>6</sup> Section 5.106 of the Act.

<sup>7</sup> *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.

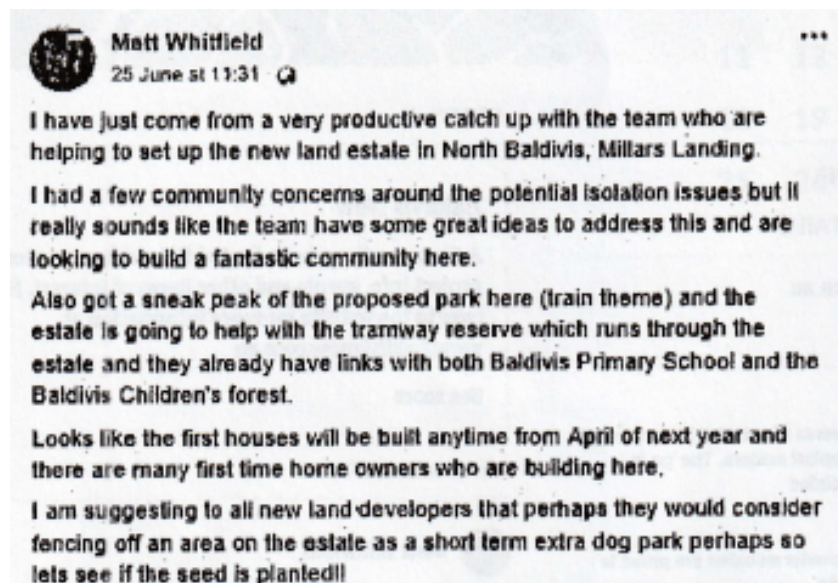


### First Allegation

15. During February 2017 the City received the Proposed Structure Plan for Lot 1512 Lake Street and Lot 5000 Fisher Street, Rockingham (“Proposed Structure Plan”) from the planners in relation to the land that previously operated as Palm Beach Caravan Park.
16. On or about 7 March 2017, the City’s Manager of Strategic Planning and Environment determined, under delegated authority, that the Proposed Structure Plan was suitable for advertising. Once the City accepted the Proposed Structure Plan, the City was required to advertise the same in accordance with the requirements of clause 18(2) of Schedule 2, Part 4 of the *Planning and Development (Local Planning Scheme) Regulations 2015* (“Clause 18(2)”).
17. It was the CEO’s responsibility to ensure that the City complied with its obligations under Clause 18(2) and the Proposed Structure Plan was thereafter advertised for a period of 28 days, commencing on 17 March 2017 and concluding on 14 April 2017 (“Public Advertising”). In response to the Public Advertising, the City received fourteen public submissions and eight submissions from Government agencies.
18. The CEO was also required to ensure that advice and information was available to the Council so that an informed decision could be made in relation to the Proposed Structure Plan.
19. The Complainant states that on 20 March 2017 (during the period of Public Advertising), Cr Whitfield published a post on the Baldvis Now website (“Baldvis Now Post”) in which he referred to the Proposed Structure Plan, which included highlighted extracts and comments by Cr Whitfield as well as two diagrams from the Proposed Structure Plan. Cr Whitfield is responsible for and runs the Baldvis Now website which is described on the site itself as a “community resource”.
20. It is the Complainant’s understanding that neither the CEO at the time, nor Council, authorised the publication of the Baldvis Now Post.
21. The Complainant contends that by publishing the Baldvis Now Post, Cr Whitfield:
  - a. involved himself in the CEO’s performance of his statutory obligation to provide the Public Advertising; and
  - b. may have influenced the outcome of the public consultation process by commenting on and selectively highlighting aspects of the Proposed Structure Plan,and thereby breached regulation 9 by undertaking a task that contributed to the administration of the local government without the approval of the CEO or Council.

## Second Allegation

22. “Millars Landing” is the name given to a property development being undertaken in North Baldivis and is being developed in stages in accordance with a structure plan.
23. The Complainant sets out a brief chronology of the progress of the Millars Landing development and describes how City officers had to work with the developers to resolve a large number of issues in order to obtain the City’s approval and clearance for Stage 1A. Such matters included drainage works, earthworks, retaining walls, roads and landscaping. The City subsequently undertook similar work in relation to Stage 1B.
24. On 25 June 2018, Cr Whitfield published a post on his Facebook account (“Millars Landing Post”) in which he noted that:
  - a. he had just come from a *“very productive catch up with the team who are helping set up the new land estate in North Baldivis, Millars Landing”*; and
  - b. he had suggested that new land developers consider *“fencing off an area on the estate as a short-term extra dog park perhaps”*.
25. A copy of the Millars Landing Post is below:



26. The Complainant was the City’s Acting CEO at the time the Millars Landing Post was published and had been since 12 March 2018. The Complainant was also the City’s Director Planning and Development Services, which position he had held since 1992.
27. It was the Complainant’s function at the time as the Acting CEO to manage the daily operations of the City and this included dealing with property developers to ensure that subdivision applications were properly considered and that all necessary matters were addressed prior to clearing a subdivision application.



28. As at 24 June 2018, the City had not cleared Stage 1B of Millars Landing and other stages had yet to be submitted to, or considered by, the City.
29. At the time when the Millars Landing Post was published, neither the Complainant (as Acting CEO) nor Council had authorised Cr Whitfield to meet with anyone representing the Millars Landing development. The Complainant contends that Cr Whitfield breached regulation 9 when he attended the meeting referred to in the Millars Landing Post and when he spoke with developers by:
  - a. involving himself with the Complainant's statutory obligation to assess and make recommendations on applications for subdivision approval, including subsequent detailed design, and to assess requests for subdivision clearances; and
  - b. potentially compromising the City's dealings with the developers.

### **Councillor Whitfield' Response**

30. Cr Whitfield denies the allegations and asks that the Complaint be dismissed. Cr Whitfield believes that the Complaint has arisen as a result of him being personally targeted by the Complainant and a personality clash existing between the two parties. Cr Whitfield has on seven different occasions offered to meet with the Complainant and he believes mediation would have helped resolve the matter but his requests have been denied.
31. Cr Whitfield is a hardworking councillor and enjoys the role. He has used social media for the entirety of his near five-year term and believes it is an important tool in relaying information both to and from residents.

### First Allegation

32. The alleged conduct that is the subject of the Allegation (the Baldvis Now Post) occurred over sixteen months ago (as at the date of Cr Whitfield's Response). This illustrates that the previous CEO had no issue with Cr Whitfield's conduct in relation to the Baldvis Now Post.
33. Cr Whitfield regularly advertises items that might be of interest to the community and has not received any negative feedback from doing so. The community appreciates knowing that there are submission periods and Cr Whitfield believes in a democracy where residents' views matter.
34. If this was a one-off incident then it could perhaps look concerning however it was not as Cr Whitfield promotes every public submission. One of the roles of a Councillor is to be a conduit between Council and residents and to relay information both ways. Cr Whitfield was simply doing what he has always done which is to pass on information to residents that was already in the public domain. Unfortunately, many residents do not receive the local papers where these matters are advertised and in 2018 (or in 2017 in this case) people use social media instead.





35. The comment is made that Cr Whitfield highlighted various points from the Proposed Structure Plan in the Baldvis Now Post and therefore omitted others. However, people's attention span is small and social media space is limited. There cannot be a fair and reasonable expectation that Cr Whitfield would copy and paste all eighty pages of the submission in the post itself for people to read.
36. Cr Whitfield attaches screenshots of social media posts by councillors from different local government councils and he has no doubt that these councillors are not involving themselves in the administration of the City, and nor was he. Cr Whitfield admires what these councillors do and does not view their actions as operational at all. Cr Whitfield doubts whether the CEOs of other councils are required to give consent prior to similar posts being promoted / shared.
37. Cr Whitfield has not benefited in any shape or form through the submission period, the development is not near his home and is of no consequence at all to him. Cr Whitfield has no material, financial or proximal interest in the actual planning application in question.
38. Cr Whitfield believes he did not become involved in the operational side of the City or Council and he has no intention of doing so. He strongly disputes the allegation to the point he would be prepared to challenge it further if necessary.

#### Second Allegation

39. The Allegation is that Cr Whitfield met with developers and involved himself in the operational side of running the City.
40. Unfortunately, there is a lot of mistrust between Cr Whitfield and the Complainant and if the Complainant had asked Cr Whitfield about this, Cr Whitfield could have explained the situation but unfortunately, the Complainant did not.
41. The meeting Cr Whitfield referred to in the Millars Landing Post was with a group called Creating Communities ("Creating Communities"). Creating Communities are the community capacity building team for a new estate and are not developers. Cr Whitfield attaches the first contact that he made with Creating Communities by email.
42. Cr Whitfield works alongside several community groups and networks regularly in order to assist them; he often meets with groups to discuss issues such as this. Cr Whitfield is the Chair of the Baldvis Children's Forest and he was excited that the Children's Forest had secured funding from Millars Landing through Creating Communities to assist with important projects; some would see this as a positive community outcome.
43. At the meeting, which Cr Whitfield describes as a coffee in a café, Cr Whitfield and Creating Communities discussed Baldvis generally, including issues such as crime, future sponsorship opportunities and events. Cr Whitfield did also mention that Baldvis residents love their dogs and '*would it not be wonderful if there were to be another dog park somewhere*'. Again, one of the roles of a Councillor is to be a conduit between Council and residents and to relay information both ways, and this was all Cr Whitfield did. The parties did not discuss planning approvals or anything similar, as those are operational matters.



44. The Allegation is unfounded, malicious, a waste of everyone's time, petty and completely without merit and could have been avoided if the Complainant had simply asked the question of Cr Whitfield regarding who the meeting was with.

### **Panel's consideration**

#### Regulation 9

45. The essential elements which need to be satisfied for a contravention of regulation 9 to have occurred are that it is more likely than it is not that:

- a. a Councillor took on or was involved or participated in the performance, attempted performance, or part-performance, of a function or responsibility which under the Act or by delegation it is for the local government CEO to perform or direct; and
- b. such taking on, involvement or participation:
  - (i) contributed (ie played a part in achieving) something in or by such performance, attempted performance, or part-performance; and
  - (ii) did not occur as anything the member did as part of the deliberations at a council or committee meeting; and
- c. the local government's council and the CEO did not authorise such taking on, involvement or participation.

46. Section 5.41 of the Act sets out the Chief Executive Officer's functions which includes managing the day to day operations of the local government<sup>8</sup>.

#### First Allegation

47. Based on the evidence before it, the Panel is not satisfied to the required standard that the elements of regulation 9 have been established in relation to the First Allegation. The Panel finds that it is more likely than not that:

- a. The City advertised the Proposed Structure Plan during the Public Advertising period from 17 March 2017 to 14 April 2017 and invited submissions from the community and other parties.
- b. Cr Whitfield published the Baldivis Now Post on 20 March 2017, during the Public Advertising period, to *share* the information with the wider community that the Proposed Structure Plan was open for public consultation so that they could participate if they wished to. This is stated in the post itself:

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<sup>8</sup> S5.41(d)



## Palm Beach Former Caravan Park Site

© MARCH 20, 2017   👤 MATT WHITFIELD   💬 1 COMMENT

### PROPOSED STRUCTURE PLAN – LOT 1512 LAKE STREET AND LOT 5000 FISHER STREET, ROCKINGHAM (THE FORMER PALM BEACH CARAVAN PARK SITE)



The City of Rockingham is responsible for the approvals process for this development and the Defence Housing Australia are the owners of this land now and seek to put a mixture of defence housing and private housing onto this site.

This is being shared here as this is open for public consultation.

- c. By including some background and general information on the Proposed Structure Plan, Cr Whitfield fulfils his duty as a Councillor to keep the community up to date with current projects in the City. The Baldvis Now Post included a link where readers could view full details of the proposal and find the relevant reports in their entirety.
- d. Furthermore, by keeping the community informed, Cr Whitfield made it less likely that parties would subsequently be critical of any final decision on the Proposed Structure Plan, as they had been given the opportunity of having their say.
- e. The Baldvis Now Post is informative and well-balanced and Cr Whitfield does not make any comment on the particular strengths or weaknesses of the proposals.
- f. Cr Whitfield chose to share the information on the Proposed Structure Plan via the Baldvis Now website which was a legitimate and reasonable way of doing so, in the same way if he had been asked in person about it and had provided the same information. Based on the evidence, Baldvis Now is a community site which might potentially reach members of the community who were not otherwise aware of the public consultation period.
- g. By publishing the Baldvis Now Post, Cr Whitfield does not undertake any specific administrative tasks himself; he did not initiate the process of advertising the Proposed Structure Plan or make any decisions on how it should work, such as telling members of the public to contact him directly if they had queries – he simply shared the fact that the Proposed Structure Plan was open for public consultation.
- h. Cr Whitfield acknowledges in the post at the outset that the City is “*responsible for the approvals process for this development*” and also provides the City’s contact details for any communication thereby facilitating contact between the community and the City:



Details of the proposed Structure Plan may be inspected below and at the Council Offices, Civic Boulevard, Rockingham during the hours of 8.30am and 4.30pm, Monday to Friday.

Submissions on the Structure Plan can be lodged in writing and are to include the Structure Plan name, the property affected and details of the submission and lodged with the Chief Executive Officer, and be received on or before **14 April 2017**.

Please note that any written submission received in response to this invitation may be placed on the public record and be available for inspection.

Furthermore, the Structure Plan is being advertised to seek public comment on the proposal and does not indicate any formal support of the proposal by the City of Rockingham or the Western Australian Planning Commission.

#### SHARE YOUR THOUGHTS NOW

- Online via Rock Port
- Via email
- mail to: Chief Executive Officer, City of Rockingham, PO Box 2142, Rockingham DC WA 6967.

To view the full details and to read the attached reports please head to this link  
- <http://www.rockingham.wa.gov.au/Services/Town-planning-services/Town-planning-advertising#LakeSt>

48. On the evidence before the Panel, it is not satisfied that it is more likely than not that Cr Whitfield undertook a task that contributed to the administration of local government by publishing the Baldvis Now Post.

#### Findings

49. Therefore, for the above reasons, the Panel finds that Cr Whitfield did not breach regulation 9 in relation to the First Allegation.

#### Second Allegation

50. The basis of the Complainant's Second Allegation stems from the following comments in the Millars Landing Post:

*"I have just come from a very productive catch up with the team who are helping to setup the new land estate in North Baldvis, Millars Landing.*

.....

*I am suggesting to all new land developers that perhaps they would consider fencing off an area on the estate as a short term extra dog park perhaps so lets see if the seed is planted".*

51. Based on the evidence before it, the Panel is satisfied to the required standard that the elements of regulation 9 have been established in relation to the Second Allegation.

*Reference to "catch up" in the Millars Landing Post*

52. There is conflicting evidence as to the role the party Cr Whitfield met with played in relation to the Millars Landing project. In the Complaint, the Complainant does not specify who it was that Cr Whitfield met with but suggests that they were property developers. However, Cr Whitfield states that he met with Creating Communities who are not developers but instead are "a community capacity building team for a new estate". In his post he refers to meeting with "the team who are helping to set up the new land estate in North Baldvis, Millars Landing" ("the Team").



53. While determining whom it was that Cr Whitfield actually met with is an important aspect of the allegation that Cr Whitfield involved himself with the administration of the City by attending the meeting, there is agreement that the Team have an influential role in the development of the new subdivision.

*Cr Whitfield's suggestion to all new developers regarding a short-term dog park*

54. Cr Whitfield also states in the post that he is "*suggesting to all new land developers that perhaps they would consider fencing off an area on the estate as a short term extra dog park*".

55. The Panel finds that it is more likely than it is not that by speaking to developers and the Team on this basis, Cr Whitfield did involve himself in the administration of the local government.

56. Part of a councillor's role is to consider the need for and desirability of projects and / or works and to highlight possible courses of action, however councillors generally do not have authority to act as individuals. While Cr Whitfield may have had the initial idea regarding a short-term dog park on the new estate, it would have been appropriate for him as a councillor to raise his suggestion through the formal meeting process before council where it could be properly considered, and not directly with developers.

57. The process for giving effect and implementing council decisions once made is an administrative function that the CEO is responsible for, which would have included the task of dealing with developers on such a detail as a short-term dog park and amongst other things temporary fencing. Cr Whitfield potentially influenced the developers and the management of the project in this respect.

58. Based on the evidence before it, the Panel is satisfied to the required standard that Cr Whitfield undertook a task that contributed to the administration of local government, that he did not have authority to do so and such action was not part of the deliberations at a council or committee meeting.

### Findings

59. Accordingly for the above reasons, the Panel finds that Cr Whitfield breached regulation 9 in relation to the Second Allegation.

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Sheryl Siekierka (Presiding Member)

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Elanor Rowe (Deputy Member)

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Rebecca Aubrey (Deputy Member)