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## Local Government Standards Panel

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Complaint Number	SP 2021-055
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Mr Brian Hearne</b>
<b>Respondent</b>	<b>Councillor Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 18 of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members	Mr Tim Fraser (Presiding Member) Mrs Emma Power (Member) Cr Peter Rogers (Member)
Heard	5 August 2021 Determined on the documents
Finding	Breach x 3 - Regulation 18(1)(b) of the Regulations

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### FINDING AND REASONS FOR FINDING

Delivered 6 September 2021

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#### DEFAMATION CAUTION

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## Summary of the Panel's decision

1. On 5 August 2021, the Panel found that Councillor Michael Southwell a councillor of the Shire of Capel ("**the Capel**") did commit a minor breach pursuant to the *Local Government Act 1995 (WA)* ("**the Act**") and Division 4 and Regulation 18 of the *Local Government (Model Code of Conduct) Regulations 2021* ("**the Regulations**") when he made comments that were allegedly incorrect and detrimental at each of:
  - a. the Ordinary Council Meeting of the Shire of 24 February 2021;
  - b. the Annual General Meeting of Electors of the Shire of 28 April 2021; and
  - c. the Ordinary Council Meeting of the Shire of 28 April 2021,as further set out in paragraph 17 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 and the *Local Government (Administration) Regulations 1996* provide for the circumstances in which a council member commits a minor breach.
4. Section 5.105(1) of the Act provides that a council or committee member commits a minor breach if the council or committee member contravenes a rule of conduct. Division 4 of the Regulations sets out the rules of conduct for council members and candidates.
5. Regulation 34D of the *Local Government (Administration) Regulations 1996* also provides that the contravention of a "*local law as to conduct*" is a minor breach pursuant to the Act.
6. 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>1</sup>
7. 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.
8. 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>2</sup>; and
  - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding<sup>3</sup>.

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<sup>1</sup> Section 5.106 of the Act

<sup>2</sup> *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1

<sup>3</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336



9. The Panel does not possess investigative or supervisory powers.<sup>4</sup> The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials in the public domain or published by the relevant local authority's website.
10. 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.
11. The Panel also must have regard to the general interests of local government in Western Australia<sup>5</sup>.
12. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

### **Jurisdiction and Procedural Fairness**

13. On 12 May 2021 the Panel received a complaint from Mr Tom Kettle acting as complaints officer of the Shire ("**the Complaints Officer**"). The same enclosed a Complaint of Minor Breach Form dated 10 May 2021.
14. In the complaint form, the Complainant alleges that Cr Southwell has breached regulation 18 of the Regulations when he made comments that were allegedly incorrect and detrimental at each of:
  - a. the Ordinary Council Meeting of the Shire of 24 February 2021;
  - b. the Annual General Meeting of Electors of the Shire of 28 April 2021; and
  - c. the Ordinary Council Meeting of the Shire of 28 April 2021, as referred to in paragraph 16 below ("**the Complaint**").
15. The Panel convened on 5 August 2021 to consider the Complaint.
16. The Panel:
  - a. accepted the advice of the Department of Local Government, Sport and Cultural Industries ("**the Department**") that, based on information published on the Western Australian Electoral Commission's website, Cr Southwell was:
    - i. elected to the Council of the Shire in October 2017 for a term expiring in October 2021;
    - ii. a Councillor at the time of the alleged breach; and
    - iii. a Councillor when the Panel met on 5 August 2021;
  - b. was satisfied the Complaint was made within six months after the alleged breach occurred<sup>6</sup>;

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<sup>4</sup> Re and Local Government Standards Panel [2015] WASC 51 (at paragraph 24)

<sup>5</sup> Section 8(6) of Schedule 5.1 of the Act

<sup>6</sup> Section 5.107(4) and 5.109(2) of the Act



- c. was satisfied that the Shire's Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach<sup>7</sup>;
- d. was satisfied the Department had provided procedural fairness to Cr Southwell; and
- e. found it had jurisdiction to consider the Complaint.

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

17. The Complainant provided the following comments and arguments in respect to the Complaint:
- a. Cr. Michael Southwell continues to cause the Complainant detriment using demeaning public comments on many occasions.
  - b. The Complainant attended the 3 March 2021 Annual Electors meeting (**"the Electors Meeting"**).
  - c. Cr Southwell issued a President's Statement at the Electors meeting.
  - d. While it is not uncommon for the presiding member to say a few words at an Annual Electors Meeting in support of statements in the annual report it is unusual to raise critical comment about previous election results going back some 6 years and past Councillors.
  - e. The Complainant, as an ex Councillor with some 20 years' experience on city and country shires, was not prepared when Cr. Southwell deviated from his published report to state the following.

*" I urge you not to be distracted and take much notice of the tiny, noisy and notorious minority which seems to thrive on certain disreputable Facebook sites. Unfortunately we have in our midst of a group of people associated with former councillors, apparently disaffected by recent local government election results, who spend a lot of time recycling untruths, defamations and distortions, attempting to paint me as some kind of maniac, and the new Council as dysfunctional"*
  - f. To the best of the Complainant's recollections there were 2 past Councillors' present at the Elector's Meeting, including one who has not been a member of Council for over 20 years.
  - g. The Complainant was the only other ex-Councillor present in the midst of ratepayers.
  - h. The statement by Cr Southwell was unfounded and the Complainant has never posted a comment on Facebook.
  - i. Under Cr. Southwell's leadership the Shire/Council has faced a lot difficult issues that are hard to attribute to, or blame, Facebook for the wrong doings, mistakes or faults of others.

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<sup>7</sup> Section 5.107 and 5.109 of the Act



- j. There were 31 ratepayers present at the meeting and his unwarranted comments at the Annual Electors meeting have since been viewed via YouTube by further patrons and remain on the public record casting doubt on the Complainant's integrity and that of past councillors and the many ratepayers who might have had past dealings with them.
- k. Cr. Southwell has made personally critical remarks when the Complainant attempts to get answers from Cr. Southwell to questions raised at council meetings.
- l. The Complainant confirms that he is not associated with any group, other than the Capel Golf Club, or belong to any disaffected group in the Shire.
- m. An unreserved apology would be appreciated.
- n. Cr. Southwell also made further comments at the 28 April 2021 Ordinary Council Meeting ("**the April OCM**").
- o. The Complainant was not present at the April OCM.
- p. At the April OCM Cr Southwell responded to a question from Mr. Hastie, a ratepayer, concerning Cr Southwell's claim that he was previously a firefighter with comment blaming others for his predicament. He stated:
  - " Well, what I will say to that if there are any current or former Councillors from previous Council or their associates who are encouraging you in this kind of antic, they should be ashamed of themselves"*
- q. Mr. Hastie was quick to make clear that Cr. Southwell was wrong in his insinuation that any past or present Councillor had a part in provoking his question, but Cr. Southwell did not withdraw his remark.
- r. When the Complainant asked a similar question at the 24 February 2021 Ordinary Council Meeting ("**the February OCM**") Cr Southwell did not address or answer the question asked but diverted attention with another personal attack.
- s. Cr. Southwell responded by saying:
  - i. the question was "*a vexatious question*";
  - ii. "You have a problem" (meaning the Complainant); and
  - iii. "*What you are basically saying is that you think I am a liar*"; and
  - iv. "*You should come and talk to me about it perhaps rather than coming here every month asking these offensive types of questions*".
- t. The Complainant fails to understand why Cr. Southwell routinely sees the need to act in such an offensive and intimidating manner towards him.
- u. Like any other ratepayer the Complainant is entitled to ask questions and receive a civil response.
- v. By continuing his constant and personal attacks against the Complainant's good name Cr Southwell continues to breach Regulation 18.
- w. The Complainant refuses to be used as a public scapegoat for problems Cr. Southwell is facing as a consequence of the way he is carrying out his role as



an elected member and President and his inability to secure Council support to pursue his own agendas.

18. The Panel was also provided with the following material:
  - a. copy of Motion by Electors from the Elector's Meeting Minutes;
  - b. copy of the President's Statement from the Elector's Meeting Minutes;
  - c. copy of announcements by the Person Presiding without discussion from minutes from 20 January 2021 Ordinary Council Meeting;
  - d. copy of public question asked by Mr Hastie asked at the April OCM from the April OCM Minutes;
  - e. copy of public question asked by the Complainant asked at the February OCM from the February OCM Minutes;

### **The Respondent's Response**

19. By an email dated 18 June 2021, Cr Southwell provided a response to the Complaint.
20. Cr Southwell denies that he has committed any minor breach.
21. Cr Southwell provided the following comments and arguments regarding the Complaint as summarised by the Panel:
  - a. The Complaint is defective. It relates to a statement Cr Southwell made at a Recent Electors Meeting. He did not name Mr Hearne, or identify him.
  - b. When Cr Southwell used the term "in our midst" he was obviously referring to the local community, not to the meeting itself. In any case, Cr Southwell's criticism was of "people associated with former councillors". There are many former councillors who have many associates.
  - c. The Complaint fails to establish the detriment, or how it was caused.
  - d. The Complaint is malicious and vexatious.
  - e. This has got to the ridiculous point where Mr Hearne apparently hangs on every word Cr Southwell say in any forum (even personal emails to him) looking for anything which could possibly sustain another pointless Minor Breach complaint.

### **Regulation 18**

22. Regulation 18 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:

**" 18. Securing personal advantage or disadvantaging others**

*(1) A council member must not make improper use of their office —*



- (a) *to gain, directly or indirectly, an advantage for the council member or any other person; or*
- (b) *to cause detriment to the local government or any other person.*
- (2) *Subclause (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.”*
23. To make a finding of a minor breach of regulation 18(1)(b) of the Regulations the Panel must be satisfied to the required standard that:
- a. Cr Southwell was an elected member at the time of the alleged breach and the time of the determination;
  - b. Cr Southwell made use of his office as Council member of the City;
  - c. when viewed objectively, such use was an improper use of Cr McCullough’s office in that it:
    - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
    - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
  - d. Cr Southwell engaged in the conduct in the belief that detriment would be suffered by another person.
24. As there is no allegation that Cr Southwell intended to gain an advantage for himself or any other party the Panel has only considered regulation 18(1)(b) of the Regulations in this instance.
25. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom . It requires an abuse of power or the use of the councillor’s position in a manner that such councillor knew (or ought to have known) was not authorised.
26. 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 .
27. Any decision as to what is “improper” cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor’s formal role and responsibilities.
28. In the case of impropriety arising from an abuse of power, a councillor’s alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power will be important factors in determining whether the power has been abused<sup>8</sup>.
29. “Detriment” means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.

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<sup>8</sup> Treby and Local Government Standards Panel [2010] WASAT 81 (at 31); Chew v The Queen (1992) 173 CLR 626 (at 640 - 641 [Dawson J]); R v Byrnes (1995) 183 CLR 501 – (at 514 - 515 [Brennan, Deane, Toohey and Gaudron JJ] and at 521 [McHugh J]).



30. It is not necessary to find whether any detriment was actually suffered<sup>9</sup>, but an intent to cause such detriment must be established.

### **Code of Conduct**

31. The Shire adopted their code of conduct during the Ordinary Council Meeting 24 February 2021 (**“the Code of Conduct”**).
32. This adoption occurred following the alleged conduct the subject of Allegation 1.
33. As such, pursuant section 5.104(5) of the Act, the model code prescribed by section 5.103(1) of the Act – being the code contained in the Schedule 1 of the Regulations (**“the Model Code”**) applied at the time of the conduct the subject of Allegation 1.
34. The relevant provisions of the Model Code are as follows:

#### **“ 5. Relationship with others**

*(1) A council member, committee member or candidate should —*

*(a) treat others with respect, courtesy and fairness; and*

*(b) respect and value diversity in the community.*

*(2) A council member or committee member should maintain and contribute to a harmonious, safe and productive work environment.”*

#### **“ 9. Relationship with others**

*A council member, committee member or candidate —*

*(a) must not bully or harass another person in any way; and*

*....*

*(c) must not use offensive or derogatory language when referring to another person; and*

*...”*

#### **“10. Council or committee meetings**

*When attending a council or committee meeting, a council member, committee member or candidate —*

*(a) must not act in an abusive or threatening manner towards another person; and ....”*

35. For the purposes of Allegation 2 and Allegation 3 the Code applies, the relevant provisions of the same being the same as set out above for the Model Code above.

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<sup>9</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]





## **PANEL'S CONSIDERATION**

### **Allegation 1 – February OCM**

#### **Cr Southwell was an Elected Member at the relevant times**

36. Cr Southwell was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
37. This element is met.

#### **Cr Southwell made use of his office as Council Member of the Shire**

38. Cr Southwell was attending and presiding over the February OCM in his capacity as Shire President and he was answering a question of the Complainant during public question time.
39. As such, the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member.
40. This element is met.

#### **Cr Southwell's use was improper**

41. Allegation 1 is concerned with the following comments by Cr Southwell when answering a question by the Complainant.
42. The Minutes indicate the relevant exchange occurred as follows:

“ **Question 1**

*On January 21 2021, Tim Wong Si on his ABC Southwest and Great Southern breakfast program replayed an interview conducted by reporter Georgia Loney with the Capel Shire President Michael Southwell in regard to the motion that he had placed on the agenda for the January 21 council meeting.*

*During part of the informative interview Cr Southwell stated 'I'm a volunteer firefighter by the way. Have been for a long time, for many years so I'm attacking myself. I'm a volunteer firefighter'.*

*We all know that we have two Councillors that are volunteer firefighters, Cr Kitchen and Cr Scott and that Cr Noonan has also stated he is a former volunteer.*

*So that ratepayers are fully informed:*

- *What brigade does Cr Southwell belong too;*
- *How long has he been a member of that fire brigade; and*
- *What training has he undertaken for the role of firefighter?*

#### **Shire President Response**

*Mr Hearne, it is clear that you have some sort of personal issue with me. This is clearly a vexatious question. You have a problem. You should come and talk to me about it perhaps rather than coming here every month and asking these offensive types of questions. What you are basically saying is that you think I*



*am a liar. Why haven't you asked the same questions of the other people. You say 'we all'. I don't know who you are talking about 'we all know these people are volunteer fire fighters'. Who's 'we all'?*

*Everybody in Western Australia? Who are you referring to?*

**Mr B Hearne**

*Well there was about 600 people outside at the last meeting.*

**Shire President**

*They all know do they? You've asked them all personally about what they know, about who?*

*Now, for example, you say that Cr Noonan has stated that he is a former volunteer. Why haven't you stepped up tonight to ask him which brigade, how long was he a member and what training has he undertaken. Why didn't you ask that about Cr Noonan?*

**Mr B Hearne**

*I know because he has told me.*

**Shire President**

*You could have asked me.*

**Mr B Hearne**

*Well I did, I am asking you.*

**Shire President:**

*No, you could have asked me before you come in here and try to make a vexatious allegation against me that I'm a liar. Well my answer to your question is I'm not a liar."*

43. The Complainant argues that Cr Southwell acted improperly as he diverted attention with a personal attack and acted in an offensive and intimidating manner.
44. The Panel considers that the relevant statement was in breach of the Model Code in that it:
  - a. did not treat the Complainant as a member of the Public asking a question during public question time with respect courtesy and fairness in breach of item 5(1)(a) of the Model Code.  
  
Instead Cr Southwell indulged in an aggressive response which implied that the Complainant had done something wrong in asking the question and was acting in a vexatious manner.
  - b. acted in an offensive and intimidating manner in breach of item 9(a) of the Model Code by arguing with a member of the public during a council meeting; and
  - c. amounted to an attempt to bully or harass the Complainant into not requesting an answer the relevant question in breach of item 9(a) of the Model Code.



45. Despite these breaches, the Panel does not consider that the conduct amounted to being abusive for threatening in breach of item 10(a) of the Code.
46. Further, as presiding member Cr Southwell has a obligation to answer public queries in a courteous, factual and straight forward manner. To instead attack the motives of a member of the public, comprises an abuse of power in his capacity as Presiding Member.
47. Cr Southwell may have been frustrated at the questions, however, his response was not the appropriate manner to deal with the same. In the event that Cr Southwell, in his capacity as Presiding Member, considered the questions was not appropriate due to their subject matter then he should have declined to take the questions.
48. However the Panel comments that the circumstances in which Cr Southwell made the relevant claim that was being queried was when he was speaking in his capacity as Shire President. In those circumstances it is reasonable that members of the public would and could confirm whether such public statements were accurate.
49. Given the above, the Panel finds that it is more likely than not that the comments were improper as:
  - a. the conduct was in breach of the Model Code;
  - b. the conduct was a breach of power of Cr Southwell in his capacity as Shire President;
  - c. the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - d. the conduct is deserving of a penalty.
50. This element is met.

Cr Southwell intended to cause a disadvantage

51. Cr Southwell asserts in his response that the Complaint is malicious and vexatious and that the Complainant is overly concerned with Cr Southwell's comments.
52. Cr Southwell further claims the Complaint is defective as the Complaint fails to establish the detriment, or how it was caused.
53. To clarify, it is not necessary that any detriment is suffered, it is the intent of the respondent that must be established.
54. The Panel has not reproduced the highly derogatory comments made by Cr Southwell regarding the Complainant in his Response, however, the same clearly indicate a lack of respect for any party who may disagree with Cr Southwell.
55. In this case, Cr Southwell took the opportunity to call the Complainant vexatious and imply that the Complainant had acted inappropriately by asking the relevant questions. Cr Southwell did not, in fact answer the relevant questions, but simply took the opportunity to argue with the Complainant.
56. Given this, although Cr Southwell may have wished to defend himself, the Panel finds that the primary motive of Cr Southwell was to attempt to embarrass the Complainant and to make the other parties listening to think less of the Complainant.



57. The Panel finds to the required standard that in answering the relevant question in the manner he did, Cr Southwell had an intention to cause a detriment to the Complainant.
58. This element is met.

#### Conclusion

59. Given the above, the elements required to find a breach of regulation 18(1)(b) of the Regulations have been met.

### **Allegation 2 – Electors Meeting**

#### Cr Southwell was an Elected Member at the relevant times

60. Cr Southwell was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.
61. This element is met.

#### Cr Southwell made use of his office as Council Member of the Shire

62. Cr Southwell was attending and presiding over the Electors Meeting in his capacity as Shire President and his comment formed a part of the President's Statement.
63. As such, the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member.
64. This element is met.

#### Cr Southwell's use was improper

65. Allegation 2 is concerned with the following comment by Cr Southwell as reproduced in the Minutes of the Elector's Meeting:

*"I urge you not to be distracted and take much notice of the tiny, noisy and notorious minority which seems to thrive on certain disreputable Facebook sites. Unfortunately we have in our midst of a group of people associated with former councillors, apparently disaffected by recent local government election results, who spend a lot of time recycling untruths, defamations and distortions, attempting to paint me as some kind of maniac, and the new Council as dysfunctional.*

*Please don't be gulled. I know the vast majority of residents and ratepayers are reasonable and intelligent, fair-minded people, so I'll just continue to put forward facts and ignore those who seem to hate change, even when it's for the better."*

66. The Complainant argues that the comments made are improper as they are inaccurate and derogatory.
67. The Panel considers that the relevant statement was in breach of the Code as the same did not treat others with respect, courtesy and fairness. The comment widely accuses members of the public of stating untruths, defamations and distortions and implies such parties are trying to mislead the public.



68. The relevant comment was not appropriate in the context of the Elector's Meeting as:
- a. the same was not related to the presentation of the Annual Report to Electors; and
  - b. the comment was made very publicly without any relevant evidence being presented or the ability of any party to refute or comment on the accusation.
69. Even where Cr Southwell feels aggrieved or does not agree with the position of other parties, that does not permit him to say and publish whatever he likes in respect to other parties.
70. The comment goes further than being robust commentary on a matter of importance in the Shire. It was simply a critical and derogatory statement singling out certain members of the public that was entirely unnecessary in the context of the Elector's Meeting.
71. The Panel finds that it is more likely than not that the Email was improper as:
- a. the conduct was in breach of the Code;
  - b. the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
  - c. the conduct is deserving of a penalty.
72. This element is met.

Cr Southwell intended to cause a disadvantage

73. In this case the Complainant has argued that the comment related to himself.
74. Cr Southwell asserts that:
- a. the statement did not name the Complainant or identify him and in fact referred to the local community; and
  - b. the Complainant fails to establish the detriment, or how it was caused.
75. In this case, it is entirely likely that that particular comment was not specifically about the Complainant.
76. However, this does not detract from the fact the comment was improper or that Cr Southwell was clearly referring to identifiable members of the public in a derogatory manner.
77. Further, as noted above, it is not necessary to show that a detriment occurred, only that a detriment was intended.
78. Due to the fact that Cr Southwell used his capacity as Shire President to use a public platform (where he was aware members of the public were present) as well as the specific language used, indicates that he publicly intended to cause a detriment to those parties by making others to think less of them.
79. The Panel finds to the required standard that in answering the relevant question in the manner he did, Cr Southwell had an intention to cause a detriment to the parties referred to as "*a group of people associated with former councillors*".



80. This element is met.

Conclusion

81. Given the above, the elements required to find a breach of regulation 18(1)(b) of the Regulations have been met.

**Allegation 3 – March OCM**

Cr Southwell was an Elected Member at the relevant times

82. Cr Southwell was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

83. This element is met.

Cr Southwell made use of his office as Council Member of the Shire

84. Cr Southwell was attending and presiding over the March OCM in his capacity as Shire President and he was answering a question of Mr Hastie during public question time.

85. As such, the Panel finds that it is more likely than not that Cr Southwell was acting in his capacity as an elected member made use of his office as a council member.

86. This element is met.

Cr Southwell's use was improper

87. Allegation 3 is concerned with the following comment by Cr Southwell when answering a question by the Complainant.

88. The Minutes indicate the relevant exchange occurred as follows:

***“ Question 1***

*You have never been a Volunteer fire fighter have you?*

***Shire President response:***

*That is not a Council matter. That is not a matter for the public.*

***Question 2***

*You have publicly stated on all sorts of venues such as the ABC radio station etc. The Freedom of Information data that I have here, which you have had advanced notice of, shows there is a degree of dishonesty, which then shows that your suitability to continue in the office of President is no longer tenable and ask that you resign from the Capel Shire Council immediately?*

***Shire President response:***

*Well, what I will say to that is that if there are any current or former Councillors from previous Council or their associates who are encouraging you in this kind of antic, they should be ashamed of themselves.*



**Mr Hastie:**

*There is no former Councillor or anyone else. It is just that I do listen to the radio, I do listen to everything and I do take notice of what you say and what you said is that you are a volunteer fire fighter and you stated that as a President. When you say that as a President of this locality that it is a Council business. I've made exhaustive enquiries at Manjimup, Bridgetown, Boyup Brook and no one has ever heard of you being a volunteer fire fighter. What have you got to say to that?*

**Shire President response:**

*Have you finished?*

**Mr Hastie:**

*Yes.*

**Shire President response:**

*Thankyou."*

89. The Panel considers that the relevant statement was in breach of the Model Code in that Cr Southwell:
- a. did not treat certain parties with respect courtesy and fairness in breach of item 5(1)(a) of the Code as Cr Southwell:
    - i. did not answer the question in a courteous and factual manner as he should have in his capacity as Shire President;
    - ii. instead referred to Mr Hastie, a member of the public asking a question during public question time, as engaging in an "*antic*";
    - iii. expressly stated that "*current or former Councillors from previous Council or their associate*" should be ashamed of themselves, thereby indicating that:
      - A. those parties were acting inappropriately; and
      - B. Mr Hastie was likely acting with an improper motive by asking the question.
  - b. amounted to an attempt to bully or harass the Complainant into not requesting an answer the relevant question in breach of item 9(a) of the Model Code.
90. In addition, when Cr Southwell answered the query in this manner, with belligerence and a criticism rather than an answer, this comprised an abuse of power in his capacity as Presiding Member.
91. Cr Southwell may have been frustrated at the question, however, similarly to Allegation 1, his response was not the appropriate manner to deal with the same.
92. The Panel finds that it is more likely than not that the comments were improper as:
- a. the conduct was in breach of the Code;



- b. the conduct was a breach of power of Cr Southwell in his capacity as Shire President;
- c. the conduct was of such a nature that a reasonable individual would consider the same to be inappropriate or not in keeping with the conduct that would be expected of a councillor; and
- d. the conduct is deserving of a penalty.

93. This element is met.

Cr Southwell intended to cause a disadvantage

- 94. Cr Southwell asserts in his response that the Complaint is malicious and vexatious and that the Complainant is overly concerned with Cr Southwell's comments.
- 95. Cr Southwell further claims the Complaint is defective as the Complaint fails to establish the detriment, or how it was caused.
- 96. As specified above, it is not necessary that any detriment is suffered, it is the intent of the respondent that must be established.
- 97. In this case, Cr Southwell did not undertake his function as Presiding Member by answering questions from the public. Instead Cr Southwell attempted to bring into question the validity of the question and then engaged in discourteous commentary as to why Mr Hastie had raised the question.
- 98. The Panel considers that the reference "*to current or former Councillors from previous Council or their associates*" was likely a reference to:
  - a. the Complainant due to his prior question relating to the same matter; and
  - b. other members of the public who had ongoing disagreements with Cr Southwell (as mentioned in his comments at the Electors Meeting).
- 99. The Panel finds that the primary motive of Cr Southwell was to attempt to embarrass Mr Hastie and to indicate he was not asking the question in good faith.
- 100. The Panel finds to the required standard that in answering the relevant question in the manner he did, Cr Southwell had an intention to cause a detriment to Mr Hastie and the parties referred to as "*current or former Councillors from previous Council or their associates*".
- 101. This element is met.

Conclusion

- 102. Given the above, the elements required to find a breach of regulation 18(1)(b) of the Regulations have been met.





### **Panel's Findings**

103. With respect to Allegation 1, Cr Southwell did commit a breach of Regulation 18(1)(b) of the Regulations and therefore did commit a minor breach.
104. With respect to Allegation 2, Cr Southwell did commit a breach of Regulation 18(1)(b) of the Regulations and therefore did commit a minor breach.
105. With respect to Allegation 3, Cr Southwell did commit a breach of Regulation 18(1)(b) of the Regulations and therefore did commit a minor breach

### **Signing**

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Tim Fraser (Presiding Member)

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Emma Power (Member)

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Peter Rogers (Member)



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## Local Government Standards Panel

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Complaint Number	SP 2021-055
Legislation	<i>Local Government Act 1995 (WA)</i>
<b>Complainant</b>	<b>Mr Brian Hearne</b>
<b>Respondent</b>	<b>Former Councillor Michael Southwell</b>
Local Government	<b>Shire of Capel</b>
Regulation	Regulation 18(1)(b) of the <i>Local Government (Model Code of Conduct) Regulations 2021</i>
Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Councillor Peter Rogers (Member) Ms Elanor Rowe (Deputy Member)
Heard	5 August 2021 Determined on the documents
Penalty Considered	11 November 2021
Outcome	No Sanction

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### DECISION AND REASONS FOR DECISION

Delivered 15 December 2021

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#### DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005 (WA)*, 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



## Introduction

1. At its meeting on 5 August 2021, the Panel found that Councillor Michael Southwell (“Cr Southwell”), a councillor for the Shire of Capel (“the Shire”), committed three minor breaches under the Local Government Act 1995 (“the Act”) and Regulation 18(1)(b) of the *Local Government (Model Code of Conduct) Regulations 2021* (“the Regulations”) when he made comments that were incorrect and detrimental at each of:
  - a. the Ordinary Council Meeting of the Shire of 24 February 2021;
  - b. the Annual General Meeting of Electors of the Shire of 28 April 2021; and
  - c. the Ordinary Council Meeting of the Shire of 28 April 2021.(together the “Minor Breaches”).
2. On 6 September 2021, the Panel published its Finding and Reasons for Finding (“Findings”) stating that Cr Southwell had breached Regulation 18(1)(b). The Panel reviewed all the evidence presented to it and made the following observations:

### **“Allegation 1 – February OCM**

44. *The Panel considers that the relevant statement was in breach of the Model Code in that it:*
  - a. *did not treat the Complainant as a member of the Public asking a question during public question time with respect courtesy and fairness...*

*Instead, Cr Southwell indulged in an aggressive response which implied that the Complainant had done something wrong in asking the question and was acting in a vexatious manner.*
  - b. *acted in an offensive and intimidating manner...by arguing with a member of the public during a council meeting; and*
  - c. *amounted to an attempt to bully or harass the Complainant into not requesting an answer to the relevant question...*

.....

46. *Further, as presiding member Cr Southwell has an obligation to answer public queries in a courteous, factual, and straightforward manner. To instead attack the motives of a member of the public, comprises an abuse of power in his capacity as Presiding Member.*

.....

56. *....although Cr Southwell may have wished to defend himself, the Panel finds that the primary motive of Cr Southwell was to attempt to embarrass the Complainant and to make the other parties listening think less of the Complainant.*

### **Allegation 2 – Electors Meeting**

.....

69. *Even where Cr Southwell feels aggrieved or does not agree with the position of other parties, that does not permit him to say and publish whatever he likes with respect to other parties.*



### **Allegation 3 – March OCM**

.....

90. *In addition, when Cr Southwell answered the query in this manner, with belligerence and criticism rather than an answer, this comprised an abuse of power in his capacity as Presiding Member.”*

### **Jurisdiction and Law**

3. Cr Southwell was a councillor at the time of the alleged breaches and was still a councillor when the Panel met on 5 August 2021 to consider whether the alleged breaches in the Complaint occurred.
4. However, at the time the Panel convened, on 11 November 2021, to consider how it should deal with the Minor Breaches, Cr Southwell was no longer an elected member of the Shire.
5. Under the Act, if a Panel finds that a council member has committed a breach, it is required to determine how the breach should be dealt with<sup>1</sup>. Therefore, the Panel proceeded to consider how it should deal with the Minor Breaches at the meeting on 11 November 2021.

### **Possible Sanctions**

6. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach by:
    - (a) *ordering that no sanction be imposed; 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*
      - (iv) *the person against whom the complaint was made, pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;*

*or*

  - (c) *ordering 2 or more of the sanctions described in paragraph (b).*
7. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. Under section 5.110(6)(a), the Panel may order that no sanction

<sup>1</sup> *Local Government Act 1995 (WA)*, s 5.110(6).



be imposed; not to reverse the finding of a breach, but to however indicate that in all the circumstances the relevant councillor should not be penalised further.

8. Sub-section 5.110(6)(b)(iv) (in respect of a monetary sanction) was introduced in 2019 to allow the Panel to require a councillor to personally bear the cost of dealing with a complaint, which in other circumstances, would be paid by the local government concerned. This ensures the cost of a breach is borne by the councillor individually, and not simply passed onto the local government and therefore, ultimately, rate payers.

### **Cr Southwell's Submissions**

9. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).<sup>2</sup>
10. In a letter dated 10 September 2021, Cr Southwell was:
  - i. notified of the Panel's Finding of the Minor Breaches;
  - ii. provided with a copy of the Panel's Findings; and
  - iii. offered an opportunity to make submissions as to how the Minor Breaches should be dealt with under section 5.110(6) of the Act.
11. The Department did not receive a response from Cr Southwell in relation to the Panel's Findings.

### **Panel's Consideration**

12. The purpose of the imposition of a sanction under the Act is generally for the protection of the public and the maintenance of standards of council members. Furthermore, it reflects the disapproval of a contravention of the Regulations, dissuades councillors from other local governments from engaging in similar conduct, and facilitates the maintenance of appropriate standards of behaviour by councillors. Guidance on the factors which the Panel may consider in determining the appropriate penalty to impose, include, but are not limited to:
  - a. the nature and seriousness of the breaches;
  - b. the councillor's motivation for the contravention;
  - c. whether or not the councillor has shown any insight and remorse into his / her conduct;
  - d. whether the councillor has breached the Act knowingly or carelessly;
  - e. the councillor's disciplinary history;
  - f. the likelihood or not of the councillor committing further breaches of the Act;

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<sup>2</sup> *Local Government Act 1995 (WA)*, s 5.110(5).



- g. the councillor's personal circumstances at the time of the conduct, and at the time of imposing the sanction;
  - h. the need to protect the public through general deterrence and maintain public confidence in local government; and
  - i. any other matters which may be regarded as aggravating conduct or mitigating its seriousness.
13. In this case, the Panel found that Cr Southwell breached Regulation 18(1)(b) on three occasions when he made comments that were incorrect and detrimental at each of:
- a. the Ordinary Council Meeting of the Shire of 24 February 2021;
  - b. the Annual General Meeting of Electors of the Shire of 28 April 2021; and
  - c. the Ordinary Council Meeting of the Shire of 28 April 2021.
14. The subject of the Minor Breach Findings, was viewed by the Panel as, and considered, a serious matter. Despite that, throughout the proceedings, Cr Southwell did not show any insight or remorse as to the effect his conduct may have had on the Complainant. The Panel also notes that Cr Southwell had previously been found to have committed several other minor breaches.
15. On that basis, the Panel considered it reasonable that a penalty may have been warranted.
16. However, as stated above, at the time when the Panel convened to decide how the breaches were to be dealt with, Cr Southwell had ceased to be an elected member. Therefore, in the circumstances, the Panel finds that the imposition of a penalty would be futile.



## Panel's Decision

17. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6)(a) of the Act, is that no sanction is to be imposed against Cr Southwell.

A handwritten signature in black ink, appearing to read 'Tim Fraser'.

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Tim Fraser (Presiding Member)

A handwritten signature in black ink, appearing to read 'Peter Rogers'.

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Peter Rogers (Member)

A handwritten signature in black ink, appearing to read 'Elanor Rowe'.

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Elanor Rowe (Deputy Member)



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## NOTICE TO THE PARTIES TO THE COMPLAINT

### RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a complaint **and** the person complained about each have the right to apply to the State Administrative Tribunal (the SAT) for a review of the Panel's decision in this matter. In this context, the term "decision" means a decision to dismiss the complaint or to make an order.
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules an application to the SAT under its review jurisdiction **must be made within 28 days of the day on which the Panel (as the decision-maker) gives a notice** [see the Note below] under the *State Administrative Tribunal Act 2004 (SAT Act)*, section 20(1).
- (3) The Panel's ***Breach Findings and these Findings and Reasons for Finding – Sanctions***, constitute the Panel's notice (i.e. the decision-maker's notice) given under the *SAT Act*, section 20(1).

**Note:**

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
  - (1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
  - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

  - (a) by delivering the document to him personally; or
  - (b) by post in accordance with section 75(1); or
  - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
  - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."