

## LOCAL GOVERNMENT STANDARDS PANEL

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

Complaint Number	SP 50 of 2015 [DLG 20150258]
Legislation	<i>Local Government Act 1995</i>
<b>Complainant</b>	<b>Councillor Roger Le-Maître</b>
<b>Subject of complaint</b>	<b>Councillor Fred Spindler</b>
Local Government	<b>Shire of Cue</b>
Regulation	Regulation 7(1)(b) 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	2 August 2016 (Determined on the documents)
Outcome	Cr Spindler breached Regulation 7(1)(b)

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### FINDING AND REASONS FOR FINDING

Published 30 August 2016

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#### DEFAMATION CAUTION

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## Introduction

1. On 14 October 2015 Mr John McCleary, then the Chief Executive Officer (CEO) and Complaints Officer at the Shire of Cue (the Shire), sent a Complaint of Minor Breach Form dated 14 October 2015 signed by the Shire President, Councillor Roger Le-Maitre, (the Complaint), to the Presiding Member of the Local Government Standards Panel (the Panel).
2. The Complaint alleged that Shire Councillors Peter Tegg, Fred Spindler and Petronella Pigdon<sup>1</sup> had each contravened regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (the Regulations) by making statements that were later reported in an article on the front page of the Midwest Times.
3. When the Panel considered the Complaint at its meeting on 21 December 2015 Crs Spindler and Tegg were no longer Shire Councillors. The Panel determined that it did not have jurisdiction to consider the Complaint in respect of Crs Spindler and Tegg unless and until they were re-elected as councillors of a local government.
4. At its meeting on 21 December 2015 the Panel found that Cr Pigdon had committed the minor breach alleged in the Complaint.
5. At its meeting on 30 March 2016, the Panel decided under section 5.110(6)(b)(ii) of the *Local Government Act 1995* (the Act) that Cr Pigdon's breach was to be dealt with by ordering that Cr Pigdon apologise publicly.
6. The Department advised the Panel that Cr Spindler was re-elected as a Shire councillor on 8 April 2016. At its meeting on 2 August 2016 the Panel determined that it had jurisdiction to consider the Complaint as it relates to Cr Spindler.

## The Complaint

7. Cr Le-Maitre's Complaint was about the three councillors but in these Reasons the Panel will refer to the Complaint and other information as it applies to Cr Spindler.
8. Cr Le-Maitre attached a copy of the article published on the front page of the Midwest Times (the Article). The Article referred to a budget decision made by the Council in February 2015. From further information provided by Cr Le-Maitre<sup>2</sup>, it appears the Article was published just after ABC Radio aired an interview with Cr Le-Maitre on or about 5 October 2015.
9. The Article, headed "Council split on chief's spa", relates to a council vote in February 2015 to approve spending \$15,000 on a spa for the house the Shire provided for the CEO.
10. The Article recited that:
  - at the Shire's ordinary council meeting on 17 February 2015, (the OCM) Council voted unanimously<sup>3</sup> "to consider and adopt a review of the budget, which included an allowance for a 'water feature'";
  - Appendix eight in the OCM agenda contained details of the Shire's financial activity for the period 1 July to 31 December 2014;
  - Appendix eight stated that \$15,000 was allocated for a "water feature" to be installed at the CEO's house;
  - the Midwest Times contacted all seven councillors; and

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<sup>1</sup> Who is also known as Pixie Pigdon.

<sup>2</sup> Referred to later in these Reasons.

<sup>3</sup> Only five of the seven Shire councillors attended the meeting.

- “(of) those contacted, three councillors, Fred Spindler, Peter Tegg and Pixie Pigdon – who voted in favour of the water feature ... said they were irate about the decision, and suggested they were deceived by the wording in the appendix.”

11. In the Complaint Cr Le-Maitre alleged:

- the Midwest Times reported that Cr Spindler said he was irate about the decision (to adopt a budget review, including an allowance for a “water feature”);
- Cr Spindler answered the Midwest Times’ questions in his capacity as a councillor; and
- Cr Spindler’s reported comments had the effect of causing detriment to the Council and the CEO.

12. By email dated 23 October 2015, the Department asked Cr Le-Maitre to provide the following information:

- details of the actual comments he was alleging that Cr Spindler made;
- how Cr Spindler, in or by committing the alleged conduct, made improper use of his office in a way that is inconsistent with the discharge of his duties arising from his office; and
- what detriment Cr Spindler caused to Council and the CEO when he committed the alleged conduct.

13. Cr Le-Maitre gave the Department further information in emails dated 26 and 27 October 2015 (his further information). The further information establishes the following timeline:

- the decision to amend the budget to allow \$15,000 for a “water feature” was made at the OCM on 17 February 2015;
- a council forum was to be held on 25 August 2015;
- on 21 August 2015 Crs Ross and “Pix” Pigdon sent an email to all councillors and the CEO saying “ Roger ... Questions for 25/8/15 Forum” then listed items 1 to 6, referred to below;
- on 22 August 2015 Cr Le-Maitre sent an email to all councillors (including Cr Spindler) and the CEO containing the agenda for the forum;
- the 22 August email included the agenda item “Spa for CEO’s house”;
- on or about 5 October 2015 ABC Radio interviewed Cr Le-Maitre about the water feature/spa issue;
- on 5 October 2015 the ABC published an article online titled “Shire of Cue defends CEO spa spend as residents question backyard renovation”;
- just after the ABC’s interview and online article, the Midwest Times published the Article.

14. The 21 August 2015 email from Mr and Mrs Pigdon reads:

“Roger

Questions for 25/8/2015 Forum

Fred Spindler

1. TV Tower
2. Weeds around town and caravan park
3. Butt bin for Janes Shop
4. Beds and Mattresses from Huts C/Park
5. CEO’s Spar Quote; Luxury (Free Indulgence a costly pleasure something extravagant but not necessary for personal use.
6. Was there a scope of works done for all the Shire house?”

15. The “Spa for CEO’s house” item in Cr Le-Maitre’s 22 August 2015 email reads:

“Spa for C.E.O’s house. This was voted on 12 months ago at last (year’s) budget, and reviewed at a recent forum. Councillors need to pay attention to their agendas and what they are voting for. It is not appropriate to raise an issue that is ‘done and dusted’. Indeed, it is contrary to the code of conduct, where even had you voted against the motion, you are obligated to support the majority decision.”

16. Cr Le-Maitre’s further information (referring to the three councillors, Spindler, Tegg and Pigdon) also included:

**Notwithstanding the foregoing the three councillors in question knew full well that:-**

- 1. Only the Shire President is authorised to speak on matters concerning the shire.**
- 2. Regardless of their inability to comprehend an agenda item they had none the less voted for it and making adverse comment breached our standing orders 7.4 (1) (appendix 5).**
- 3. Although not listed or recorded, the C.E.O had pointed out at a forum, prior to placing the order for the spa that the water feature was to be a spa, this sparked some good humoured banter in which Crs, Tegg, Pigdon and Spindler joined. To subsequently claim ignorance as the councillors did in the newspaper article is at best disingenuous but more accurately a lie.**
- 4. The newspaper report gave weight to their comments *because of their position as councillors* (Mr Campbell did not rate a mention) and thus made improper use of their positions as councillors. Had four residents complained there would have been no story, the media only considered it newsworthy because it involved three members of council.**
- 5. The newspaper head line “Council Split on Chief’s Spa” caused detriment to the council by implying dysfunction; and caused detriment to the CEO by the imputation it was for his benefit rather than an enhancement of shire property.**

17. On 5 May 2016 the Department asked Cr Spindler to comment on the alleged breach. Cr Spindler responded to the Complaint in an email to the Department dated 31 May 2016 (his Response), in which he said:

“I still believe that Councillors were deceived by (Le-Maitre) and McCleary in turning the wording around from water feature i.e. bird bath to Spa Bath for personal EGO’s.

Approximately \$30,000 for renovations. For house décor, gardens, and retic also a water fountain – bird bath (“NOT A SPA”).

The ratepayers and residents of Cue voted me in as a councillor again for a second time as they believe in me and I work for them as I have and did in the past. And they are still up in arms over the waste over \$17000 + more than half of the spend allotted for the house.

(Le-Maitre) did also say that the Spa could be returned. The Spa is still sitting in the Shire yard and still in its box still as new as ever. I did mention to McCleary that should pay for the Spa and take up to Upper Gascoyne with him. He said I don't need it now.

I am a 76 year old great grandfather and will continue to work hard for the ratepayers and residents of Cue. I have lived in Cue for many many years and will continue to do so and help look after out town.

A councillor did resign over the matter. He would not give (Le-Maitre) the satisfaction of an apology nor McCleary”.

### **Agenda for OCM 17 February 2015**

18. Agenda item 8.11 is titled “2014/15 Financial Review”<sup>4</sup> and includes:

#### “Matters for Consideration

To consider and adopt the Budget Review as presented in the Statement of Financial Activity for the period 1 July 2014 to 31 December 2014 as detailed in Appendix 8.

#### Background:

A Statement of Financial Activity incorporating year to date budget variations and forecasts to 30 June 2015 for the period ending 31 December 2014 is presented for council to consider.

...

#### Officer’s Recommendation

That Council adopt the budget review, with the variations as detailed in Appendix 8 for the period 1 July 2014 to 31 December 2014 and amend the budget accordingly.”

The CEO is stated as the author for item 8.11.

19. Page 13 in Appendix 8 contains a table headed “Budget Amendments” which includes the item “15 Allen St – Water Feature” in the category of Capital Expenses, noting an increase of \$15,000 in the budget.

### **Minutes of the OCM**

20. The Minutes for item 8.11 record that Cr Spindler moved the motion:

“That Council adopt the budget review, with the variations as detailed in Appendix 8 for the period 1 July 2014 to 31 December 2014 and amend the budget accordingly.”

The Minutes record that the motion was carried five votes to nil.

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<sup>4</sup> Agenda page 29.

## Revoking or changing a council decision

21. Section 5.25 of the Act provides that regulations may provide for the circumstances and manner in which a council decision may be revoked or changed. Regulation 10 of the *Local Government (Administration) Regulations 1996* (Administration Regulations), titled “Revoking or changing a decision” provides how a motion to revoke or change a decision can be passed.

22. The OCM Agenda (page 4) under “Revoking or Changing Decisions Made at Council Meetings” refers to regulation 10 of the Administration Regulations.

### Regulation 7

23. A councillor commits a minor breach if he or she breaches Regulation 7 provides:

“7. Securing personal advantage or disadvantaging others

*(1) A person who is a council member must not make improper use of the person’s office as a council member —*

*(a) to gain directly or indirectly an advantage for the person or any other person; or*

*(b) to cause detriment to the local government or any other person.*

*Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.”*

24. The alleged conduct is not conduct that contravenes s5.93 of the Act or s83 *The Criminal Code*.

### Panel’s role

25. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.

26. Panel members are required to have regard to the general interests of local government in Western Australia.<sup>5</sup> The Regulations include 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>6</sup>

27. 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”<sup>7</sup>.

28. The Panel considered the documents referred to in Attachment A to these Reasons and the parts of the OCM Agenda and Minutes referred to above.

### Essential elements for contravention of regulation 7(1)(b)

29. In order to find that Cr Spindler committed a minor breach under regulation 7(1)(b), the Panel must be satisfied that it is more likely than not that:

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<sup>5</sup> Schedule 5.1 of the Act, clause 8(6).

<sup>6</sup> Regulation 3.

<sup>7</sup> Act s5.106.

- Cr Spindler made the alleged comments to the Midwest Times (that he was irate about the Council's decision to approve the revised budget and that he had been deceived by the wording in Appendix 8);
- and if so, that Cr Spindler made use of his or her office as a councillor when making the comments;
- and if he made use of his office, this use was improper;
- and if Cr Spindler made improper use of his office, he did so to cause detriment to the local government or any other person.

**Did Cr Spindler engage in the alleged conduct?**

30. In his Response to the Complaint Cr Spindler didn't deny that he told the Midwest Times he was irate about the Council's decision to approve the revised budget, or that he told the Midwest Times that had been deceived by the wording in Appendix 8. In his Response Cr Spindler said he still felt councillors were deceived by Cr Le-Maitre and the CEO.

31. The Panel is satisfied that Cr Spindler made these comments to the Midwest Times.

**Did Cr Spindler make use of his office when making the comments?**

32. The Article reported that the Midwest Times contacted the three councillors for comment about the Council's decision to approve the revised budget.

33. In his Response Cr Spindler did not deny that he spoke to the Midwest Times in his capacity as a councillor. He said he worked for the ratepayers and residents who were "up in arms over the waste (of) over \$17,000".

34. The Panel is satisfied that Cr Spindler made the comments to the Midwest Times in his capacity as a councillor, thereby making use of his office to make the comments to the Midwest Times.

**Did Cr Spindler use his office improperly?**

35. The general principles in the Regulations (regulation 3) require councillors to act with reasonable care and diligence; and avoid damage to the reputation of the local government. The Shire of Cue's Code of Conduct as from September 2013, provides:

"4.1 Personal Behaviour

(a) Council Members, Committee Members and staff will:

- (i) act, and be seen to act, properly and in accordance with the requirements of the law and the terms of this Code;
- (ii) perform their duties impartially and in the best interests of the Local Government uninfluenced by fear or favour;
- (iii) act in good faith (i.e. honestly, for the proper purpose, and without exceeding their powers) in the interests of the Local Government and the community;
- (iv) make no allegations which are improper or derogatory (unless true and in the public interest) and refrain from any form of conduct, in the performance of their official or professional duties, which may cause any reasonable person unwarranted offence or embarrassment; and
- (v) always act in accordance with their obligation of fidelity to the Local Government."

36. The meaning of “improper” must be considered in the context of relevant legislation (such as the Act and the Regulations) and other rules and standards that apply to a councillor’s role, such as the local government’s Code of Conduct.

37. Impropriety is to be judged objectively: in all the circumstances how would a reasonable person with knowledge of the powers and duties of a councillor expect a councillor to behave? Conduct can be improper even though the councillor’s judgment is that it isn’t improper. A councillor’s use of his or her office can be improper even though the councillor is intending to benefit the council.<sup>8</sup>

38. In *Hipkins and Local Government Standards Panel* [2014] WASAT 48, Senior Member McNab said:

“ ... it seems clear that the expression 'improper use' found in reg 7(1) of the Regulations and its application to any relevant event, transaction or circumstances must have regard to the local government context in which it is sought to be applied. That context will include not only the statutory and formal context of a local government councillor's duties and responsibilities, but also the particular events surrounding the relevant event, transaction or circumstances, which form the backdrop to, and is the subject of, the charge of improper use of a person's office as a Council member.”

39. Section 2.29(1) of the Act provides:

*“(1) A person elected as an elector mayor or president or as a councillor has to make a declaration in the prescribed form before acting in the office.”*

40. The prescribed form contains the declaration:

*“(I) declare that I take the office upon myself and will duly, faithfully, honestly, and with integrity, fulfil the duties of the office for the people in the district according to the best of my judgment and ability, and will observe the *Local Government (Rules of Conduct) Regulations 2007*.”<sup>9</sup>*

41. The form of the prescribed declaration indicates that a councillor must be faithful to the office of councillor, which indicates he or she has a fiduciary obligation towards the council and the local government to serve the best interests of the local government.

42. Judge Sharp in *Yates and Local Government Standards Panel* [2012] WASAT 59<sup>10</sup> recognised a fiduciary relationship in saying that the standards of conduct that would be expected of a councillor can also be discerned from the fiduciary obligations which councillors owe to their councils.<sup>11</sup>

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<sup>8</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby and Local Government Standards Panel* [2010] WASAT 81.

<sup>9</sup> *Local Government (Constitution) Regulations 1998*, Schedule 1, Form 7.

<sup>10</sup> Summarising principles relevant to improper use given in *Treby and Local Government Standards Panel* [2010] WASAT 81.

<sup>11</sup> Paragraph 64, page 17.

43. Cr Spindler clearly voted to approve the revised budget. He had a duty to read and consider the Agenda, including Appendix 8, before voting on the motion.<sup>12</sup> In his Response Cr Spindler said he was working for ratepayers and residents who were concerned about wasting over \$17,000. If unnecessary spending was a concern for Cr Spindler and the people he represented it would have been prudent to query the \$15,000 allocation for a water feature before he moved the motion to approve the spending.

44. Cr Le-Maitre held the senior position of Shire President. After receiving notice in the email dated 21 August that Cr Spindler thought the spa was extravagant, a luxury and a “costly pleasure”, Cr Le-Maitre told Cr Spindler (in his email dated 22 August) that he, Cr Spindler, was obliged to support the Council’s decision to approve the spending.

45. Cr Spindler did not apparently take any notice of Cr Le-Maitre’s advice that it was inappropriate to complain about the \$15,000 allowance. Cr Spindler knew or should have known that he could only seek to change the decision by taking it back to the Council for a revocation or amendment. However, Cr Spindler did not do this and challenged the decision and the decision-making process over one month later in the media.

46. When telling the Midwest Times that he was irate and had been deceived, Cr Spindler used his position of councillor contrary to his duty (under the Act and the Shire’s Code of Conduct) to be faithful to Council decisions. A reasonable person reading the Article would be likely to think poorly of the CEO, Shire officers and the local government as a whole. The Panel finds that Cr Spindler used his office to cast doubt on the integrity of the CEO and the other Shire officers, and did not act in the interests of the local government, thereby using his office improperly.

### **Did Cr Spindler make improper use of his office to cause detriment to the local government of any other person?**

47. “Detriment” means loss, damage or injury.<sup>13</sup>

48. “Detriment” can include financial and non-financial loss, humiliation, denigration, intimidation, harassment, discrimination, disadvantage, adverse treatment, and dismissal from, or prejudice in, employment. A person can suffer detriment if others think less favourably of them.<sup>14</sup>

49. For regulation 7(1)(b) to be satisfied, it is not necessary to show that the local government or the person concerned actually suffered detriment.<sup>15</sup> But it also not enough to show that the local government or the person concerned suffered detriment.

50. The Council decision to approve the revised budget and the \$15,000 allowance was made in February 2015. The Panel finds that it is more likely than not Cr Spindler complained about the decision at the forum on 25 August 2015. Despite Cr Le-Maitre’s advice in August 2015 that Cr Spindler was obliged to support the decision, Cr Spindler took the opportunity to criticise the decision in the media.

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<sup>12</sup> *Corr and Local Government Standards Panel* [2014] WASAT 86, paragraphs 21 and 27.

<sup>13</sup> Macquarie Dictionary Revised Third Edition, 2001.

<sup>14</sup> *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 32.

<sup>15</sup> *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraphs 71,72.

51. A councillor can express disappointment in the media about a decision, but Cr Spindler went well beyond that – he breached his fiduciary duty to the Council and the local government by reflecting adversely on the character and actions of Shire officers.<sup>16</sup>

52. Cr Spindler spoke to the Midwest Times more than seven months after the OCM. There can be no doubt that he had time to carefully consider whether he should seek to revoke or change the decision through the proper channels.

53. The Panel finds that Cr Spindler made a deliberate choice to speak to the media and to use the words attributed to him.

54. It was clear from the information available to the Panel that Cr Le-Maitre was in favour of improving the CEO's accommodation to attract applicants for the position and to encourage any CEO that might be appointed to stay in the job. It was more likely than not that any reasonable person reading the article could doubt the integrity and professionalism of Cr Le-Maitre, the CEO, Shire staff and perhaps other councillors who voted for the \$15,000 allowance.

55. The Panel is satisfied that by telling the Midwest Times that he was irate and that he had been deceived, Cr Spindler intended to cause detriment to the CEO and other Shire officers by implying they lacked integrity. The Panel is also satisfied that Cr Spindler intended to cause detriment to the local government by casting a shadow over its ability to run proper decision-making processes and to make decisions that are good for the community.

#### **Panel's decision**

56. The Panel finds that Cr Spindler committed the minor breach, by breaching regulation 7(1)(b), as set out in the Complaint.

  
Brad Jolly (Presiding Member)

  
Paul Kelly (Member)

  
Merranie Strauss (Member)

Date of Reasons 30 August 2016

<sup>16</sup> *Treby and Local Government Standards Panel* [2010] WASAT 81, paragraph 56.

**Attachment A  
THE AVAILABLE INFORMATION**

Description
Statement of Facts (1-page)
<b>Complaints Officer originating correspondence:</b>
Copy of (1-page) correspondence from Mr John McCleary, former Chief Executive Officer and Complaints Officer at the Shire of Cue, dated 14 October 2015.
Copy of (3-page) completed Council Member Details form dated 14 October 2015.
<b>Complaint and accompanying information:</b>
Copy of (4-page) <b>Complaint of Minor Breach No. SP 50 of 2015</b> dated 14 October 2015, and its attachments, made by Mr Le-maître.
Copy of (1-page) extract of Mid-West Times article relevant to complaint.
<b>Correspondence with the Complainant</b>
Copy of (2-page) letter to Mr Le-maître dated 22 October 2015, requesting clarification on allegation and notifying that matter against Cr Fred Spindler was suspended.
Copy of (9-page) response letter with attachments from Mr Le-maître to the Department dated 26 October 2015.
Copy of (5-page) email from Mr Le-maître to the Department dated 27 October 2015, with further information on Complaint.
<b>Correspondence with the Councillors complained about:</b>
Copy of (1-page) letter to Cr Fred Spindler dated 23 October 2015 advising of the suspension of the Complaint.
Copy of (11-page) Request for Comments letter to Cr Spindler dated 5 May 2016 with attached complaint summary and Form A.
Copy of (3-page) response letter from Cr Spindler to the Department dated 31 May 2016 with attachments.
SP 50 of 2015 – LGSP Reasons For Findings – Cr Pigdon
SP 50 of 2015 – LGSP Reasons For Decision – Cr Pigdon