

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held in West Dunbartonshire Council Headquarters, Garshake Road, Dumbarton on 22 November 2016

Panel Members: Mrs Julie Ward, Chair of the Hearing Panel
Mr Kevin Dunion, OBE
Mr Ian Gordon, OBE, QPM, LL.B (Hons)

The Hearing arose in respect of a Report by Mr Bill Thomson, the Commissioner for Ethical Standards in Public Life in Scotland (“the CESPLS”) further to complaint reference LA/WD/1879 (“the Complaint”) concerning an alleged contravention of the Councillors’ Code of Conduct (“the Code”) by Councillor Thomas Rainey (“the Respondent”).

The CESPLS represented himself. The Respondent was represented by Mrs Frances Randle of Steel & Shamash solicitors.

COMPLAINT

A complaint was received by the CESPLS about the alleged conduct of the Respondent. The substance of the allegation was that the Respondent had contravened the Councillors’ Code of Conduct and, in particular, provisions relating to the declarations of interests and taking decisions on quasi-judicial or regulatory matters.

The CESPLS investigated the complaint and concluded that the Respondent had breached paragraphs 5.3, 5.7, 5.9 and 7.12 of the Councillors’ Code of Conduct.

The relevant provisions were:

Declarations of Interest

5.3 You may feel able to state truthfully that an interest would not influence your role as a councillor in discussion or decision-making. You must, however, always comply with the objective test (“the objective test”) which is whether a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as so significant that it is likely to prejudice your discussion or decision making in your role as a councillor.

Your Non-Financial Interests

5.7 You must declare, if it is known to you, any NON-FINANCIAL INTEREST if:-

(i) that interest has been registered under category eight (Non-Financial Interests) of Section 4 of the Code; or

(ii) that interest would fall within the terms of the objective test.

There is no need to declare:-

(i) an interest where a general exclusion applies, but an interest where a specific exclusion applies must be declared; or (ii) an interest which is so remote or insignificant that it could not reasonably be taken to fall within the objective test.

You must withdraw from the meeting room until discussion of and voting on the relevant item where you have a declarable interest is concluded other than in the following circumstances.

There is no need to withdraw in the case of:-

(i) an interest covered by a general exclusion or a specific exclusion; or

(ii) an interest which is so remote or insignificant that it could not reasonably be taken to fall within the objective test.

5.9 You will also have other private and personal interests and may serve, or be associated with, bodies, societies and organisations as a result of your private and personal interests and not because of your role as a councillor. In the context of any particular matter you will have to decide whether to declare a non-financial interest. You should declare an interest unless you believe that, in the particular circumstances, the interest is too remote or without significance. In reaching a view on whether the objective test applies to the interest, you should consider whether your interest (whether taking the form of association or the holding of office) would be seen by a member of the public acting reasonably in a different light because it is the interest of a person who is a councillor as opposed to the interest of an ordinary member of the public.

7.12 If you have an interest, whether financial or non-financial, in the outcome of a decision on a planning application, or a planning agreement, or on taking enforcement action, or in a Local Review Body, you must declare that interest and refrain from taking part in making the decision.

The CESPLS submitted a report to the Standards Commission on 11 August 2016 in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 as amended.

Joint Statement of Facts

The CESPLS and Respondent's representative signed a Joint Statement of Facts on 15 November 2016, which outlined the parts of the CESPLS's Report that were agreed. The Hearing Panel noted that it was not in dispute that the Respondent attended a Planning Committee of West Dunbartonshire Council on 27 January 2016 and participated in the consideration of a planning application submitted by the Council's Roads Department in respect of a car park at Strathleven Place, Dumbarton.

Evidence Presented at the Hearing

The CESPLS outlined the facts as set out in his Report. He explained that, on 27 January 2016, the Planning Committee considered a Report by the Council's Head of Regeneration and Economic Development, which was entitled 'Extension to existing car park at Strathleven Place, Dumbarton by West Dunbartonshire Council.' The Report outlined the development details contained in the planning application and summarised representations that had been received in respect of it.

The CESPLS advised that, under the proposal, planning permission was sought to extend the existing car park of St Patrick's Church in to an open space, to create a further 37 parking spaces to be used by the public as a park and ride facility. Some of the land which was to be developed was owned by St Patrick's Church. It was further proposed that work would be undertaken to upgrade the existing Church car park, which included resurfacing and also measures that would allow the Church to control access to its spaces. This work would be carried out in lieu of a financial payment in respect of the use of the Church's land.

The CESPLS indicated that representations on the planning application, as summarised in the report, included objections from two community councils. This included questioning why public funds were to be used to upgrade the Church's private car park.

The CESPLS advised that the Respondent attended St Patrick's Church on a regular basis and was a member of its choir. The CESPLS argued this created a significant nexus between Councillor Rainey and the Church. As such, the Respondent had a non-financial interest in terms of paragraph 5.7 of the Councillors' Code of Conduct, which a member of the public, with knowledge of the relevant facts, would reasonably regard as being sufficiently significant as to be likely to prejudice his discussion or decision-making in terms of paragraph 5.3 of the Code. The CESPLS argued, therefore, that the Respondent should have declared the interest in terms of paragraphs 5.9 and 7.12 and should have refrained from taking part in the discussion and decision-making on the planning application.

The CESPLS noted that the Respondent's position was that if any member of the public had knowledge of the relevant facts, they would not consider he had an interest. The CESPLS indicated, however, that the objections outlined by the community councils demonstrate that there was a perception, by at least some members of the public, that the Church would benefit from the proposal. The CESPLS noted that the Respondent received the Report on the planning application in advance of the committee meeting. He was, therefore, aware of this perception and, as such, should have erred on the side of caution when considering the objective test under paragraph 5.3 of the Councillors' Code of Conduct.

The CESPLS accepted that the Respondent may have been able to state truthfully that the interest would not influence his decision-making and confirmed that he was not arguing that it had indeed done so. The CESPLS's position was, however, that the Respondent's association with the Church was widely known. This was evidenced by the fact that the complainant had questioned, at the meeting, whether any members of the Planning Committee were also member of the Church. The Respondent accepted the enquiry had been a reference to him. The CESPLS contended that this demonstrated the Respondent was aware of the perception at the meeting. He had, however, continued to take part in the discussion, had seconded a motion to approve the planning application and had proceeded to vote to approve it.

The CESPLS further noted that the Respondent's position was that no benefit would be derived by the Church as it was not seeking payment for the use of its land. The CESPLS advised, however, that the potential benefits to the Church had been outlined by the Parish Priest in a letter of representation he submitted to the Council on 14 January 2016. The Church's Parish Finance and Fabric Committee had also expressed support for the planning application. In any event, the CESPLS argued even if the agreement between the Council and Church amounted to a fair exchange, there was still benefit to both parties.

The CESPLS accepted that the Respondent had acted in accordance with advice he had sought and received from a Council Officer at the Planning Committee after the complainant raised his query. The CESPLS contended, however, that the officer had not fully considered the extent of the Respondent's connection with St Patrick's Church and, therefore, his advice had not been complete and accurate. The CESPLS argued that the Respondent should have declared the non-financial interest and taken no part in the discussion and decision-making on the planning application.

The Respondent's representative accepted it was the Respondent's personal responsibility to comply with the Code, regardless of any advice he received. The Respondent was a conscientious member of the Planning Committee, who had always sought to be open and transparent when dealing with quasi-judicial matters. He had previously been a Senior Environmental Officer at the Council and, as such, was well aware of the rules governing best value and dealing with potential conflicts of interest. The Respondent's representative indicated the Respondent would have declared an interest, had he considered one existed.

The Respondent's representative advised that any member of the public, with knowledge of the relevant facts, would not have regarded any interest to be so significant as to be likely to prejudice the Respondent's decision-making. This is because the relevant facts were that, as part of his faith, the Respondent was not only obliged to attend Church, but to attend in the parish where he lived. His attachment was not, therefore, to St Patrick's Church in particular. The Respondent only attended St Patrick's Church because it was his local parish church. His faith in itself did not amount to a close association with St Patrick's Church.

The Respondent's representative contended that the Respondent's discussion and decision-making on the planning application had, in no way, been influenced by his attendance at St Patrick's Church. She advised that the Respondent had undertaken a visit to all car parks in the area on the day of the Planning Committee to ascertain whether a further car park was required. It was the findings of this visit that had led him to second the motion to approve. The Respondent's representative confirmed that the Respondent had not been involved in any negotiations between the Council and the Church, had not spoken to the Parish Priest about the matter and had not seen any of the representations made on the planning application in advance of receiving the Report to be considered at the Planning Committee.

The Respondent's representative argued that the focus of the planning application was the proposed park and ride facility. Therefore, the benefit from the planning application was to the town centre itself, as opposed to the Church. The Respondent's representative argued that while it was accepted that the planning application included a proposal to improve the existing Church car park, it was impossible to say this was a benefit without knowing the amount the Church could have charged for the use of its land in exchange.

The Respondent's representative indicated that the Respondent did not have any interest whatsoever in the outcome of the decision on the planning application, as required by paragraph 7.12 of the Code. He lived very close to the Church and, as such, did not use its car park.

The Respondent's representative noted that it was not in dispute that the Respondent had openly sought advice from an officer at the Planning Committee meeting as to whether being a member of the Church's congregation and its choir amounted to a non-financial interest that required to be declared. The officer had advised it did not. The Respondent's representative argued in seeking this advice and acting in accordance with it, the Respondent had fulfilled his obligations not just to act fairly but also to be seen to be acting fairly.

The Respondent's representative led evidence from the Respondent himself. The Respondent advised that, contrary to the representations made by the community councils as outlined in the

Report on the planning application, he was aware of concerns about a lack of parking space in the town centre. The Respondent indicated he had, therefore, undertaken a tour of the local car parks on the morning of the Planning Committee meeting and had found the majority of these to be full. The Respondent advised that he was satisfied, therefore, that a further car park was required.

The Respondent confirmed he did not consider he had a non-financial interest as he attended St Patrick's Church simply to fulfil his obligations to his faith. He was obliged to attend St Patrick's because it was his local parish church. The Respondent indicated he was aware the Church supported the planning application as he had read the Report on it before the Planning Committee meeting. The Respondent accepted he was also aware of the objections, which included the perception that public funds were to be used to improve the Church's car park. The Respondent advised, however, that he was aware that the community councils had very few members and, as such, had considered these representations to be the biased views of one or two individuals.

The Respondent confirmed that he had not considered he had an interest as his attendance at St Patrick's Church and membership of its choir would, in no way, influence his decision-making as a councillor. The Respondent accepted he was aware that the planning application included proposals to improve the Church's car park but contended that this was on a *quid pro quo* basis and that the main focus of the proposal had been the benefit to the town as a result of the new park and ride facility.

When questioned by the Hearing Panel, the Respondent advised he did not consider that a member of the public with knowledge of the relevant facts would consider he had an interest as attending Church was simply a way of undertaking obligations to his faith. It was, therefore, different to voluntarily being a member of a club or association. The Respondent accepted, however, that the obligation was a willing one and that he had taken part in other aspect of St Patrick's Church in the past, such as being a member its Hall Committee. The Respondent confirmed that there was no reference to his religious affiliation or attendance at Church on his Register of Interests.

DECISION

The Hearing Panel considered in detail all of the submissions, including the presentations made during the Hearing on behalf of the CESPLS and Respondent.

The Hearing Panel found as follows: -

1. The Councillors' Code of Conduct applied to the Respondent.
2. The Hearing Panel found the Respondent had breached paragraphs 5.3, 5.7(ii), 5.9 and 7.12 of the Councillors' Code of Conduct.

The Hearing Panel determined:

- The Respondent was a parishioner in the parish served by St Patrick's Church and regularly attended as a member of the congregation for most of his life. The Hearing Panel noted

that the Respondent was obliged to attend Church as part of his faith and that he attended St Patrick's Church because he lived in the parish catchment area. The Hearing Panel noted, however, that the Respondent was also active in Church life by being a member of the Church's Choir and had, in the past, been a member of its Hall Committee. The Hearing Panel considered that this amounted to a close association with St Patrick's Church.

- The planning application before the Planning Committee on 27 January 2016 included a proposal to improve St Patrick's Church car park and to enable the Church to control access to it. While this work was to be undertaken in exchange for the Council using some land owned by the Church, the Hearing Panel was of the view that this agreement was to the advantage of both parties. The Hearing Panel considered, therefore, that St Patrick's Church would derive a clear benefit from the proposal.
- As a member of the Planning Committee and a recipient of the Council Officer's Report submitted to the Committee, the Respondent was aware, prior to the meeting, of the benefit to St Patrick's Church from the proposal.
- The Respondent did not have any personal involvement in the car park proposal. There was no suggestion that the interest had actually influenced the Respondent's decision-making or that he would derive any personal benefit from the planning application being agreed. The Hearing Panel nevertheless concluded that as the Respondent had a close association with a body that would benefit from the planning application, he had a non-financial interest in the matter. It would be reasonable for a member of the public to conclude that the Respondent's close association with St Patrick's Church, as noted above, meant that he may have had an interest in the outcome of the specific planning application, which may prejudice his decision-making.
- The Hearing Panel considered that the Respondent was aware of the public perception that this may be the case and, as such, should have had regard to the objective test and declared the interest at the Planning Committee.
- The Respondent, having a non-financial interest, should have then refrained from taking part in the decision-making on the planning application in compliance with paragraph 7.12 of the Councillors' Code of Conduct.
- Following an enquiry during the course of the meeting, the Respondent sought and received advice from an officer to the effect that no declaration was required. The Hearing Panel considered the officer did not take proper account of the significance of the Respondent's association with the Church. In any event, the Hearing Panel considered it was the Respondent's personal responsibility to be aware of and comply with the provisions in the Councillors' Code of Conduct. He had failed to do so.
- For the avoidance of doubt, the Hearing Panel noted that there was no need for the Respondent to register his religious affiliation or attendance at the Church.

The Hearing Panel therefore concluded that the Respondent had breached paragraphs 5.3, 5.7(ii), 5.9 and 7.12 of the Code.

Evidence in Mitigation

The Hearing Panel heard that the Respondent took his role on the Planning Committee very seriously and was a conscientious member of it. The Respondent had tried to be fair and transparent, which is why he had openly sought advice from the officer when the query about membership of St Patrick's Church had been raised. The Respondent had acted in good faith and in accordance with the advice he had received. He genuinely believed he did not have any interest that required to be declared. The Hearing Panel further heard that the Respondent would never knowingly act in a biased way in favour of the Church and had not gained any personal benefit from the decision that was made.

The Council's Strategic Head of Legal, Democratic and Regulatory Services (who was also the Monitoring Officer), gave evidence to the effect that the Respondent was a dedicated, diligent and fair member the Council's Licensing and Planning Committees. He was also the Chair of the Appeals Committee and Depute Convener of Corporate Services. He had always displayed integrity and honesty in undertaking these roles.

SANCTION

The decision of the Hearing Panel was to censure the Respondent.

The sanction was made under the terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 section 19(1)(a).

Reason for Sanction

In reaching their decision, the Hearing Panel:

1. Took account of the statement in mitigation made on behalf of the Respondent and, in particular, that he had sought advice, had acted in accordance with the officer's recommendation and had gained no personal benefit whatsoever.
2. Heard evidence from the Council's Monitoring Officer that the Respondent was a dedicated, diligent and honest elected member who had always displayed integrity and fairness.

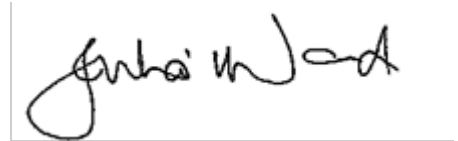
However the Hearing Panel:

1. Found there had been a breach by the Respondent of the Councillors' Code of Conduct in respect of the declaration of interests.
2. Emphasised that the declaration of interests is a fundamental requirement of the Code. A failure to declare interests removes the opportunity for openness and transparency in a councillor's role and denies members of the public the opportunity to consider whether a councillor's interests may or may not influence the decision-making process.

RIGHT OF APPEAL

The attention of the Respondent was drawn to Section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 as amended which details the right of appeal in respect of this decision.

Date: 28 November 2016



**Julie Ward
Chair of the Hearing Panel**