

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held in the Council Chamber of Aberdeen City Council, Town House, Broad Street, Aberdeen on 24 January 2017

Panel Members: Mr Kevin Dunion, OBE, Chair of the Hearing Panel
Mrs Lindsey Gallanders
Mrs Julie Ward

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/AC/1876 (“the Complaint”) concerning an alleged contravention of the Councillors’ Code of Conduct (“the Code”) by Councillor William Cormie (“the Respondent”).

The CESPLS was represented by Mr Ian Mackay, Investigating Officer. The Respondent was represented by Mr Scott Martin, solicitor.

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 taking decisions on quasi-judicial or regulatory matters.

The CESPLS investigated the complaint and concluded that the Respondent had breached paragraphs 7.1, 7.3 and 7.4 of the Councillors’ Code of Conduct.

The relevant provisions were:

Introduction

7.1 The Code’s provisions relate to the need to ensure a proper and fair hearing and to avoid any impression of bias in relation to statutory decision making processes. These provisions apply not only to those made under planning legislation but to a number of others of a quasi-judicial or regulatory nature which the local authority may also have to consider. These will include applications for taxi, betting and gaming, liquor, theatres, cinemas and street trader licences and a range of other similar applications where the issuing of a statutory approval or consent is involved. This also includes where the local authority is acting in an enforcement, disciplinary or adjudicatory role.

Fairness and Impartiality

7.3 In such cases, it is your duty to ensure that decisions are properly taken and that parties involved in the process are dealt with fairly. Where you have a responsibility for making a formal decision, you must not only act fairly but also be seen as acting fairly. Furthermore, you must not prejudice, or demonstrate bias in respect of, or be seen to be prejudging or demonstrating bias in respect of, any such decision before the appropriate Council meeting. In making any decision, you should only take into account relevant and material considerations and you should discount any irrelevant or immaterial considerations.

7.4 To reduce the risk of your, or your Council's, decisions being legally challenged, you must not only avoid impropriety, but must at all times avoid any occasion for suspicion and any appearance of improper conduct.

The CESPLS submitted a report to the Standards Commission on 2 November 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 16 January 2017, which outlined the parts of the CESPLS's Report that were agreed. The Hearing Panel noted that these included the following facts:

- That the Respondent, as a member of the Council's Licensing Committee, made comments to the press on 23 October 2015 regarding an application to operate a house of multiple occupancy (HMO) at 32 Roseberry Street, Aberdeen, which was due to be considered by the Licensing Committee on 3 November 2015. The comments included ones to the effect that HMO's were not appropriate for the area, were not required and that a HMO licence being granted in respect of the specific application would cause difficulties in terms of parking and waste disposal. A press article containing the comments and a photograph of the Respondent was published on 23 October 2015, which was before the Licensing Committee papers had been issued.
- Before the meeting on 3 November 2015, both officers and the Convener of the Licensing Committee advised the Respondent that the comments, as reported, suggested a pre-determination of the matter and, as such, he should not take part in the discussion and decision-making on the item. However, the Respondent told the Convener that he had no intention of leaving the meeting and would be 'moving against the application'.
- The Respondent proceeded to take part in the consideration of the application at the Council's Licensing Committee meeting on 3 November 2015. The Respondent advised the meeting of his support for an amendment to refuse the application, stating he had previously voted against the planning application for change of use in respect of the property. The Respondent proceeded to vote for the amendment to refuse the application, which was then carried.
- The Council's decision was appealed under Section 159 of the Housing (Scotland) Act 2016. The initial writ challenged the decision not to grant the application on a number of grounds, but specifically cited that the Respondent had formed a view on the application in advance of the Licensing Committee meeting on 3 November 2015 as evidenced by his comments as quoted in the press article of 23 October 2015.
- The Respondent participated in the discussion and voting, as a member of the Council's Licensing Committee, when it considered whether or not the appeal should be defended at a meeting on 19 January 2016. The Respondent seconded an unsuccessful amendment to the effect that the appeal be defended.

The Hearing Panel noted that the Respondent accepted that he had contravened paragraph 7.3, as read in conjunction with the introductory paragraph 7.1, of the Councillors' Code of Conduct in having been perceived to have pre-determined the HMO licence application.

Evidence Presented at the Hearing

The CESPLS's representative outlined the facts as set out in his Report. He explained that an application for change of use from a residential property to a HMO had been considered at a meeting of the Council's Planning Development Management Committee on 16 July 2015. The Respondent had moved an amendment to refuse the application on the grounds that it did not accord with Council policy and that there was insufficient parking. The application had, however, been approved.

The CESPLS's representative indicated that the subsequent HMO licence application was placed on the agenda for the Licensing Committee meeting on 3 November 2015 after a number of objections were received. The objectors included the Rosemount and Mile-end Community Council, who determined at a meeting on 20 October 2015, attended by the Respondent, that their planning officer would attend the Licensing Committee meeting in order to make representations. A journalist from the Press and Journal newspaper, who had also been at the Community Council meeting, approached the Respondent the next day and sought comments from him in respect of the HMO licence application. The comments provided by the Respondent, as described above, were published in the newspaper on 23 October 2015 and demonstrated that the Respondent was clearly opposed to the HMO licence application being granted. The CESPLS's representative advised the comments in question demonstrated bias against the application, which were suggestive of the Respondent pre-judging the matter before he had received the Licensing Committee papers and heard any of the submissions on it, including those of the applicant.

The CESPLS's representative indicated that when Council officers became aware of the contents of the newspaper article, they brought it to the attention of the Licensing Committee's Convener. Both the Convener and officers approached the Respondent before the Licensing Committee meeting and suggested he should consider not participating in the discussion and voting on the HMO licence application on the grounds that his comments suggested pre-determination of the matter. The Respondent advised the Convener, however, that he had no intention of leaving the meeting and would be 'moving against the application'. The CESPLS's representative advised that the Respondent told officers that he had not spoken directly to the press. He further advised officers that the comments quoted in the newspaper article had been made at an earlier Community Council meeting and related to the planning application for a change of use, not the HMO licence application.

The CESPLS's representative advised that the Respondent proceeded to participate in consideration of the application at the Licensing Committee meeting. While the Respondent had asked questions of both the applicant and objectors, he stated at the meeting that he had voted against the prior planning application and saw no need for a HMO in the area. The Respondent proceeded to vote for an amendment to refuse the application.

The CESPLS's representative noted that councillors were not only obliged by the Code to refrain from pre-judging or demonstrating bias in respect of quasi-judicial or regulatory applications

before they were determined at the appropriate Committee meeting, but were also under a duty not to be seen to be pre-judging or demonstrating bias in respect of any such decisions. The CESPLS's representative contended that any member of the public reading the newspaper article would conclude, on the balance of probabilities, that the Respondent was opposed to the granting of the HMO licence and, as such, had pre-judged it. The CESPLS's representative argued, therefore that the Respondent had contravened paragraphs 7.1 and 7.3 of the Councillors' Code of Conduct.

The CESPLS's representative advised that, following the Licensing Committee meeting, the applicant lodged an appeal against the decision to refuse the HMO licence application. In the initial writ, the applicant argued that the Council had acted contrary to natural justice in basing its decision on incorrect material facts. The initial writ also identified the Respondent individually and argued that his failure to disqualify himself from considering the HMO licence application, having formed a view on it before the Licensing Committee meeting, was also contrary to natural justice.

The CESPLS's representative stated that the Council's Head of Legal and Democratic Services discussed the initial writ at a meeting with the Respondent on 12 January 2016. The Head of Legal and Democratic Services advised the Respondent that a decision on whether or not to defend the appeal was to be made at a meeting of the Licensing Committee on 19 January 2016. The Respondent told the Head of Legal and Democratic Services that the comments he had made, as quoted in the press article, concerned the planning application, not the HMO licence application. The Head of Legal and Democratic Services advised the Respondent that, nevertheless, where there was a perception that a councillor had pre-determined a matter and then participated in a quasi-judicial decision, the decision was potentially open to legal challenge. As such, he should not participate in any further discussion and decision-making in respect of the matter.

The CESPLS's representative advised that the Respondent had disregarded this advice and had proceeded to take part in the discussion and voting on whether or not to defend the appeal at the Licensing Committee on 19 January 2016, which included seconding an amendment to the effect that the appeal should be defended. The Respondent stated at the meeting that he had not pre-judged the application and that the comments he had made, as quoted in the press article, related to the prior planning application. Following a vote, the motion not to defend the appeal was approved and, on 4 February 2016, the Sheriff remitted the matter back to the Council to consider the HMO application afresh. The Respondent was not in attendance when the Licensing Committee considered the application afresh on 8 March 2016.

The CESPLS's representative argued that knowing his own personal behaviour had been cited in the appeal and given the advice received from the Head of Legal and Democratic Services, the Respondent should have refrained from taking part in the discussion and decision-making on whether or not to defend the appeal at the meeting on 19 January 2016. The CESPLS's representative contended that, in failing to do so, the Respondent contravened paragraph 7.1 of the Code, which emphasises the need to ensure a proper and fair hearing and to avoid any impression of bias in relation to statutory decision making processes and also paragraph 7.3 of the Code, which obliges councillors to ensure that decisions are both taken and seen to be taken properly and fairly.

The CESPLS's representative further argued that the submission of the appeal meant that the HMO licence application was effectively still live. This continued to be the case until the application was finally determined at the meeting on 8 March 2016. The CESPLS's representative

contended that the consideration by the Licensing Committee about whether or not to defend the appeal was, in effect, a continuation of the decision-making in respect of the HMO licence. In taking part in the consideration of and voting on the item at the Licensing Committee on 19 January 2016, the CESPLS's representative argued that Respondent continued to fall foul of the requirement to avoid being seen as pre-judging or demonstrating bias and, as such, breached paragraphs 7.1 and 7.3 of the Code.

The CESPLS's representative argued that the Respondent's actions amounted to improper conduct, which had placed the Council at risk of legal challenge. The identification of the Respondent in the initial writ and the contention that his actions had been contrary to natural justice demonstrated that he had failed to avoid any occasion for suspicion and any appearance of improper conduct. The CESPLS's representative argued that given there had been a breach of paragraphs 7.1 and 7.3, it followed that the Respondent had also contravened paragraph 7.4 of the Code.

The Respondent's representative accepted that the comments the Respondent had made, as quoted in the press article, would lead a reasonable and unbiased observer to conclude that he has pre-determined the HMO licence application before it was considered by the Licensing Committee on 3 November 2015. The Respondent's representative argued, however, that a breach of paragraph 7.4 of the Code did not automatically follow a finding of breach in respect of paragraph 7.3. If it did, it was arguable that any councillor who had been party to a prevailing vote in respect of a matter which was subsequently successfully appealed could find themselves falling foul of the provision in respect of paragraph 7.4 simply as a consequence of the matter being legally challenged. The Respondent's representative indicated that for a contravention of paragraph 7.4 to be found, there would have to be evidence of proper bias in the decision-making, such as if a councillor voted in favour of a matter for personal financial gain. There was no such proper bias in this case and no suggestion of material gain.

The Respondent's representative further argued that while the Respondent's actions had been detailed in the initial writ, the majority of the arguments in favour of the appeal concerned a failure by the Council to have proper regard for relevant and material considerations in respect of the HMO licence application, such as the steps that could be taken to reduce any possible public nuisance, and for its failure to discount irrelevant considerations in respect of the amenities within the property. As such, it could not be said that the Respondent's conduct alone had caused the Council's decision to be the subject of the legal challenge.

The Respondent's representative noted that it was accepted practice that judges can determine motions to recuse themselves. It followed, therefore, that councillors were also entitled to decide whether or not they could take part decisions on matters even where their individual conduct had been challenged, as it could not be the case that they would be obliged to follow a higher standard than that applied to the judiciary. In this case, the Respondent was entitled to decide whether or not he could take part in the decision about whether to defend the appeal at the meeting on 19 January 2016. In any event, even if the Respondent had not taken part in the decision and voting on the matter at the meeting on 19 January 2016, the decision would have remained the same; namely that the appeal should not be defended. The Respondent's representative concluded, therefore, that there had not been any breach of paragraph 7.4 of the Code.

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 7.1, 7.3 and 7.4 of the Councillors' Code of Conduct.

The Hearing Panel determined that:

- Through his comments reported in the press and the position he outlined to the Licensing Committee Convener, the Respondent demonstrated that he had pre-judged the HMO licence application before hearing the evidence and submissions at the meeting on 3 November 2015. The Respondent should, therefore, have withdrawn from the meeting and taken no part in the discussion or decision-making on the item. He had failed to do so.
- The meeting on 19 January 2016 was a continuation of the same matter as it formed part of the overall process of further considering matters relating to the HMO application. Knowing that officers and the Convener had expressed concerns about his participation in the item at the meeting on 3 November 2015 and that he had been individually identified in the subsequent appeal, the Respondent was aware that he was perceived as having pre-judged the matter. As such, he should not have taken part in the item at the meeting on 19 January 2016.
- It therefore concluded that the Respondent had breached paragraphs 7.1 and 7.3 of the Code in respect of his participation at both the meetings on 3 November 2015 and 19 January 2016.
- The Respondent had repeatedly misrepresented the context of the comments he had made, as quoted in the press article. The Hearing Panel noted that it was not disputed in the Joint Statement of Facts, signed on behalf of the Respondent on 16 January 2017, that he had made the comments attributable in the press directly to the reporter and that they concerned the HMO licence application. However, the Hearing Panel was concerned to note that, prior to the meeting on 3 November 2015, the Respondent not only denied speaking directly to the press but also maintained that the press article related to a Community Council meeting concerning the planning application, as opposed to the HMO licence application. The Respondent further contended at a meeting with the Council's Monitoring Officer on 12 January 2016 that he had not pre-determined the matter as his comments concerned the planning application, not the HMO licence application. He continued to maintain that position at the meeting on 19 January 2016.
- Noted that while the Respondent was not obliged to follow any advice received on how to comply with the Code, it was apparent that he had failed to properly consider the advice tendered by the Convener and officers before the meeting on 3 November 2015. The

Hearing Panel considered this failing was compounded by his subsequent disregard of the advice proffered by the Head of Legal and Democratic Services before the meeting on 19 January 2016. In addition, there was no evidence that the Respondent had reflected on the fact that his conduct had been criticised in the initial writ, despite his attention having been drawn specifically to it.

- It was not persuaded that a breach of paragraph 7.4 automatically followed a breach of paragraphs 7.1 and 7.3. However, in all of the circumstances of this case and in particular:
 - by repeatedly misrepresenting the context of his press comments;
 - failing to reflect on the fact that he had been individually named in the writ; and
 - failing to properly consider the advice proffered by officers

the Respondent failed to avoid any appearance of improper conduct, which would have reduced the risk of the Council's decision on the HMO licence being legally challenged. The Hearing Panel determined, therefore, that the Respondent had also breached paragraph 7.4 of the Code.

- 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.

The Hearing Panel therefore concluded that the Respondent had breached paragraphs 7.1, 7.3 and 7.4 of the Code.

Evidence in Mitigation

The Hearing Panel was provided with copies of letters of support from a number of the Respondent's constituents. The Hearing Panel noted that these indicated the Respondent had been engaged with, and supported, a number of community groups and had actively contributed to a number of local community improvement projects and initiatives. The Hearing Panel noted the constituents stated that the Respondent was an active, well-respected and diligent constituency representative.

The Respondent's representative advised that he had been a councillor since 2007 and had not previously been the subject of a complaint. Before being elected, the Respondent had served on a community council for 20 years, including 15 years as its Chair.

The Respondent's representative indicated that the issue of whether the property should become a HMO was clearly a matter that his constituents were concerned about, even before the HMO licence application was submitted and that the Respondent had been keen to ensure their views and interests were represented. This had been his sole motivation. The Respondent accepted, however, that he should not have pre-judged the application and apologised for doing so.

SANCTION

The decision of the Hearing Panel is to suspend for a period of four months, the Respondent, from all committees and sub-committees of the Council that make decisions on quasi-judicial or regulatory matters with effect from 27 January 2017.

This sanction is made under terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 section 19(1)(b)(ii).

Reason for Sanction

In reaching their decision, the Hearing Panel:

1. Took account of the written statements in mitigation submitted on behalf of the Respondent. The Hearing Panel noted that these had been provided by constituents who stated that he was an active, well-respected and diligent constituency representative.
2. Heard evidence from his representative that the Respondent was motivated by trying to act in the interests of his constituents.
3. Acknowledged the contribution to public life made by the Respondent both as a community councillor and a local authority councillor.

However the Hearing Panel:

1. Found that there had been a serious breach by the Respondent of the Councillors' Code of Conduct in respect of taking decisions on quasi-judicial or regulatory matters, which had the potential to result in such decisions being legally challenged and to erode public confidence and trust in local government and the democratic process itself.
2. Found that the Respondent had deliberately misrepresented the basis on which his comments to the press had been made prior to, and during the decision-making meetings, and also during the course of the subsequent investigation by the CESPLS.
3. Found that the Respondent consistently disregarded advice from senior officers and colleagues, which exacerbated the situation.
4. Found that the Respondent disregarded the scope within the Code for councillors to make representations on behalf of their constituents and to then declare an interest and retire from the room after making such representations, instead of taking part in decision-making on the particular issue.
5. Emphasised that the duty on a councillor to act fairly and to be seen to be acting fairly when taking quasi-judicial and regulatory decisions is a fundamental requirement of the Code.

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: 27 January 2017



**Professor Kevin Dunion OBE,
Chair of the Hearing Panel**