

## **Decision of the Standards Commission for Scotland**

On receipt of a report from the Ethical Standards Commissioner (ESC), the Standards Commission has three options available, in terms of Section 16 of The Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act). These are: (a) to direct the ESC to carry out further investigations; (b) to hold a hearing; or (c) to do neither.

In this case, the Standards Commission determined to **do neither**.

### **Background**

The Standards Commission is a statutory body established under the 2000 Act. The 2000 Act created an ethical standards framework, under which councillors and members of devolved public bodies in Scotland are required to comply with Codes of Conduct. Under the framework, complaints about breaches of these Codes are investigated by the ESC and adjudicated upon by the Standards Commission.

### **Report to the Standards Commission**

Following his investigation into a complaint (reference LA/Mo/3620) concerning an alleged contravention of the Councillors' Code of Conduct dated July 2018 (the Code) by an elected member and a former elected member of Moray Council (the Respondents), the Acting ESC referred a report to the Standards Commission on 30 November 2022.

The complaint concerned a meeting of Moray Council's Local Review Body on 25 March 2021, at which the Respondents voted for the granting of planning permission that had previously been refused. The Complainer alleged that certain aspects of the Respondents' conduct at the meeting indicated that they had failed to take into account relevant and material considerations and/or had considered irrelevant matters and, further, that they did not have sufficient information to reach a decision, meaning that their decision was not made fairly and properly.

In his report, the Acting ESC investigated whether the Respondents' conduct would amount to a contravention of the provisions in the Code regarding the making of decisions on quasi-judicial or regulatory applications. The Acting ESC advised that:

1. There was no dispute that the Respondents were acting as councillors at the time of the conduct in question. The Acting ESC further advised that he did not find the majority of the Complainer's allegations to be factually proven.
2. In assessing the allegations that he found to be factually proven, the Acting ESC considered whether the Respondents had failed to take into account relevant and material considerations and/or had considered irrelevant matters. The Acting ESC noted that he had established the reasons given by the Respondents for supporting the planning application were material and relevant, as they all related to comments made by the public set out in the document bundle provided to councillors in advance of the meeting. The Acting ESC further noted that Scottish Government guidance confirms that comments from the public can amount to material considerations at the planning review stage. Given the materiality and relevancy of their reasons, the Acting ESC considered that the Respondents had not demonstrated bias or given the appearance of doing so, and further that they had avoided occasion for suspicion and the appearance of improper conduct. As such, the Acting ESC recommended that the Respondents' conduct did not amount to a breach of the Code.
3. The Acting ESC noted that he had also considered whether, as alleged by the Complainer, the second Respondent's request for a site visit was evidence that he did not have sufficient information to reach a

decision at the meeting. The Acting ESC found, however, that the second Respondent's suggestion of a site visit was not related to the decision he reached, but rather to his disagreement with the designation of the site within the Local Development Plan. As such, the Acting ESC considered it was not evidence that the second Respondent did not have sufficient information to reach a decision.

### **Reasons for Decision**

Having considered the terms of his report, the Standards Commission did not consider that it was necessary or appropriate to direct the Acting ESC to undertake any further investigation into the matter.

In making a decision about whether to hold a Hearing, the Standards Commission took into account both public interest and proportionality considerations, in accordance with its policy on Section 16 of the 2000 Act. A copy of the policy can be found at: <https://www.standardscommissionscotland.org.uk/cases>.

In assessing the public interest, the Standards Commission noted that a breach of the fairness and impartiality provisions in the Code could have the potential bring the role of a councillor, the Council's committee system and the Council itself into disrepute. It could also leave the Council open to the risk of a successful legal challenge. In this case, however, the Standards Commission was of the view that, on the face of it, there was no evidence of any such breach of the Code.

The Standards Commission noted that holding a Hearing (with the associated publicity) could promote the provisions of the Code, if it was found that the Respondent's conduct amounted to a breach of the Code. There could, therefore, be some limited public interest in holding a Hearing. Regardless of this, the Standards Commission was, however, also required to consider whether it would be proportionate to do so.

In considering proportionality, the Standards Commission noted that the Acting ESC, in his report, had reached the conclusion that the Respondents' conduct did not amount, on the face of it, to a breach of the Code. Having reviewed the evidence before it, the Standards Commission found no reason to depart from that conclusion, and further noted that it had no reason to question the Acting ESC's conclusions regarding those aspects of the complaint that were not found to be factually proven.

The Standards Commission noted that although, in making quasi-judicial and regulatory decisions, councillors are required to comply with legislation, guidelines and the Code, they nevertheless must also exercise their own judgement. The Standards Commission was of the view that the fact that a member of the public may disagree with a decision, and may consider that the exercise of such a judgement was flawed, would not in itself be evidence that the Code had been breached. The Standards Commission noted that it was important to draw a distinction between, on the one hand, the performance of a councillor in exercising their discretion when discharging their decision-making responsibilities and, on the other, a situation where a councillor acted improperly or demonstrated bias (for example if they were biased in favour of one of the parties to the application or participated even though they had a personal interest in the matter).

The Standards Commission noted that councillors were simply required, under the Code, to exercise their judgement fairly and impartially and to base their decision on material and relevant reasons. In this case the Standards Commission noted that the Acting ESC had found the reasons given by the Respondents for supporting the planning application were material and relevant. The Standards Commission was satisfied, therefore, that there was no evidence, on the face of it, of a breach of the Code.

The Standards Commission noted that the Complainer had also alleged that the first Respondent failed to take account of legal advice given by the Council's legal representative and failed to rescind arguments he had made before the advice was given. The Standards Commission noted, however, that a failure to accept legal advice in full, or to take back previous arguments, following receipt of legal advice, would not in itself constitute a breach of the Code.

Having taken into account the above factors, and in particular the fact that it is not satisfied, on the face of it, that the conduct as established could amount to a breach of the Code, the Standards Commission concluded that it was neither proportionate, nor in the public interest, for it to hold a Hearing. The Standards Commission determined, therefore, to take no action on the referral.

**Date: 6 December 2022**



**Lorna Johnston  
Executive Director**