

## **Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Falkirk Town Hall, West Bridge Street, Falkirk on 24 October 2016.**

**Panel Members:** Mr Matt Smith, OBE, Chair of the Hearing Panel  
Mr Kevin Dunion, OBE  
Mrs Lindsey Gallanders

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/Fa/1799, (“the complaint”) concerning an alleged contravention of the Councillors’ Code of Conduct (“the Code”) by Councillor Alan Nimmo (“the Respondent”).

The CESPLS was represented by Mrs Claire Gilmore, Investigating Officer. The Respondent was not represented at the Hearing and was not in attendance. However, Sandemans solicitors submitted written representations on his behalf before the Hearing.

### **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, the provision that prohibited a councillor from seeking preferential treatment because of their position as a councillor.

The CESPLS investigated the complaint and concluded that the Respondent had breached paragraph 3.19 of the Councillors’ Code of Conduct.

The relevant provision was:

#### *Dealings with the Council*

*3.19 You will inevitably have dealings on a personal level with the Council of which you are a member - for example as a Council taxpayer, ratepayer, tenant, recipient of a Council service or applicant for a licence or consent granted by the Council. You must not seek preferential treatment for yourself, your family, friends, colleagues or employees because of your position as a councillor or as a member of a body to which you are appointed by the Council and you must avoid any action which could lead members of the public to believe that preferential treatment is being sought.*

The CESPLS submitted a report to the Standards Commission on 16 August 2016 in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 as amended.

### **Evidence Presented at the Hearing**

No witnesses were called by the CESPLS's representative.

The CESPLS's representative outlined the facts as set out in the CESPLS's Report. In particular, she explained that the complainant was a neighbour of the Respondent. According to the complainant, his relationship with the Respondent had soured since the referendum on Scottish independence in 2014. The CESPLS's representative advised that the Respondent had taken issue with a garden structure the complainant had erected on the grounds that it overshadowed his own garden.

The CESPL's representative advised that the Respondent sent an email to the Council's Head of Planning and Transportation on 28 May 2015, entitled 'urgent', in which he asked whether planning permission would be required for the structure and, if so, whether this had been sought and granted. The Respondent asked that the Council's Head of Planning and Transportation respond 'as a matter of urgency'. He signed off the email as 'Cllr. Alan Nimmo'.

The CESPLS's representative indicated that the Respondent then sent an email on 29 May 2015 to the Council's Development Management Co-ordinator advising he understood an officer had contacted the complainant about the structure. The Respondent requested an update. While the Respondent signed this email off as 'Alan', the Council's Development Management Co-ordinator addressed his email response of the same day, in which he provided an update, to 'Councillor Nimmo'.

The CESPLS's representative advised that when it had become apparent that planning permission was required and had not been sought or granted, the Respondent sent the Council's Head of Planning and Transportation an email on 2 June 2016 asking how long the complainant had to comply with the requirement to apply for planning permission. He sent a further email on 9 June 2015 to a Planning Enforcement Officer of the Council asking whether a read receipt had been received in respect of an email sent to the complainant advising him of the 28 day period of submit a retrospective planning application. The Planning Enforcement Officer addressed his response of 10 June 2015 to 'Councillor Nimmo'.

The CESPLS's representative argued that it was self-evident from the email exchanges described above that the officers concerned were corresponding with the Respondent in his capacity as a councillor. The CESPLS's representative further argued that in asking an officer about whether they had received a read receipt, the Respondent was seeking information that would not normally be available to a member of the public. The CESPLS's representative further argued that, when sending his emails, the Respondent used the Council's IT system and failed to draw any distinction between his personal interest in the matter, as a neighbour and potential objector, and his role as a councillor.

The complainant submitted the required planning application on 6 June 2015. The CESPLS's representative explained that, under the Council's Scheme of Delegation, a decision on the application fell within the powers delegated to officers. However, it was open under

paragraph 51.3(d) of the Scheme of Delegation for councillors to request that any application be referred, or 'called up' to a Planning Committee.

The CESPLS's representative explained that the Respondent sent an email on 17 June 2015 to the Council's Planning Officer responsible for dealing with the matter stating that he wished to call in the application to the Planning Committee. The Respondent asked for confirmation as to what the office recommendation would be in respect of the application. He signed off the email as 'Cllr. Alan Nimmo'. The CESPLS's representative advised that the Council's Planning Officer replied by email on 23 June 2015 indicating that the application could not be called in until a recommendation was made and it was placed on the weekly recommendation list.

The CESPLS's representative advised that the Respondent sent the Council's Planning Officer an email on 24 June 2015 enclosing a letter of objection to the application on behalf of himself and his wife. The letter outlined his objections, which were based on the Respondent and his wife's concerns that the structure would affect their enjoyment of their own property. The CESPLS's representative asked the Hearing Panel to note that the Respondent copied his email of 24 June 2015 to several other Council officers and also to Councillor McLuckie, who was the Vice Convener of the Council's Planning Committee.

The CESPLS's representative indicated that Councillor McLuckie provided evidence to the CESPLS's Investigating Officer that, on receipt of the email, he advised the Respondent that he considered it would be inappropriate for the Respondent to call in the application. Councillor McLuckie offered to call in the application instead as he had concerns about the potential overshadowing and also because he was of the view that, for the sake of transparency, an application involving the interests of a councillor should be dealt with in a public forum.

The CESPLS's representative asked the Hearing Panel to note that, when interviewed, the Respondent indicated that he could not recall speaking to Councillor McLuckie about the matter and had been unable to provide any reasons as to why he had wished to call in the application.

The Council's Planning Officer advised the Respondent by email of 31 July 2015 that the application would appear on the weekly recommendation list that day. Again, the CESPLS's representative noted the officer addressed the email to 'Councillor Nimmo'. In an email of response on 3 August 2015, the Respondent asked whether Councillor McLuckie had called in the application. The CESPLS's representative noted that the Respondent sent the Council's Planning Officer a further email on 6 August 2015 attaching photographs which he indicated evidenced the overshadowing caused by the structure. The CESPLS's representative argued that these emails demonstrated the Respondent had continued to seek information from officers until he was certain the application was going to be called in to the Planning Committee.

The Planning Committee initially considered the application at a meeting on 15 September 2015 and agreed to a continuation in order to allow a site inspection. The CESPLS's representative advised that the Respondent had properly declared a financial interest in the matter and took no part in the consideration of it at the Committee, other than as an

objector. The application was approved unanimously at a Planning Committee meeting on 28 October 2015. The Respondent was not present at the meeting, having tendered apologies.

The CESPLS's representative argued that the Respondent had a personal interest in the application, which was not connected to his role as a councillor. However, he had nevertheless sent a number of emails to officers about the matter in which he had signed himself off as a councillor. The CESPLS's representative accepted, in response to a question from the Hearing Panel, that it would not be unusual for officers to address any response to elected members as councillors, regardless of whether or not the councillor had designated themselves as such in the original correspondence. However, the CESPLS's representative contended that the Respondent had made no attempt to distinguish his interest as a private citizen with his role as a councillor. While members of the public were entitled to seek information on planning matters and applications, as a councillor he had existing working relationships with officers and, as such, enjoyed an advantageous position. The CESPLS's representative argued that by requesting information that would not normally be available to members of the public, by asking officers to deal with the matter urgently and by failing to distinguish between his roles, the Respondent was clearly seeking preferential treatment in breach of paragraph 3.19 of the Councillors' Code of Conduct.

The CESPLS's representative noted that in his written submissions of 19 September 2016, the Respondent's representative argued that in asking officers to deal with the matter urgently, the Respondent was acting in the complainant's best interests. The CESPLS's representative rejected this argument as not credible in light of the context of the dispute between the Respondent and complainant.

Turning to the Respondent's actions in respect of the calling in of the application, the CESPLS's representative asked the Hearing Panel to note that the Respondent's representative initially argued in his response received on 8 July 2016 to the CESPLS's report that, in his email of 17 June 2015, the Respondent was not directing the Council's Planning Officer to call in the application. Instead, he was asking about the correct process. The CESPLS's representative argued this was not the case as the Respondent had not asked any questions nor sought any clarification in his email of 17 June 2015. In any event, the CESPLS's representative argued that this position was incompatible with the position taken in the written submissions of 19 September 2016, in which the Respondent's representative argued that the Respondent had attempted to call in the application because he had an interest in it and wished the process to be as transparent as possible.

The CESPLS's representative contended the only conclusion that could be drawn was that the Respondent had attempted to call in the application himself and had done so because he had a personal interest in it and wished the decision to be made by the Planning Committee rather than by an officer. The CESPLS's representative further contended that in seeking to call in the application, the Respondent was seeking preferential treatment in breach of paragraph 3.19 of the Councillors' Code of Conduct.

### **Written Submissions made on behalf of the Respondent**

The Hearing Panel considered the written submissions of 19 September 2016 lodged on behalf of the Respondent. The Hearing Panel noted the Respondent did not dispute any of the facts outlined in the CESPLS's report. The Respondent's representative contended, however, that it was obvious that the contact the Respondent had with officers about the matter was on a personal basis. He had made it clear that he was taking issue with a structure erected by his neighbour. As such, the Respondent's representative argued it was clear to officers that he was acting on a personal basis and not as a councillor.

Turning to the question of calling in the application, the Respondent's representative argued that it was entirely appropriate for the Respondent to have attempted to do so. The reasons why councillors were entitled to call in applications related to openness and fairness. The Respondent's representative stated that the Respondent had attempted to call in the application because he had a personal interest in it and, as such, simply wished for the decision to be made in as transparent as way as possible.

The Respondent's representative argued that in seeking to have the matter dealt with urgently, the Respondent was acting in the complainant's best interests. He further argued it was correct for the Respondent to have contacted a senior officer as such an officer was best placed to identify who should deal with the matter. The Respondent's representative asked the Hearing Panel to note the senior officer had not been asked to intervene. He contended the Respondent had not been seeking preferential treatment and, as such, there had been no contravention of paragraph 3.19 of the Councillors' Code of Conduct.

### **DECISION**

The Hearing Panel considered all of the submissions, including the presentations made during the Hearing by the CESPLS's representative and the written representations submitted on behalf of the Respondent, and found as follows:-

1. The Councillor's Code of Conduct applied to the Respondent.
2. The Hearing Panel found the Respondent had breached paragraphs 3.19 of the Code, which prohibits councillors from seeking preferential treatment for themselves, family, friends, colleagues or employees because of their position as a councillor.

The Hearing Panel determined that:

1. The Respondent had used his position as a councillor to seek information from senior officers of the Council, which would not normally be available to members of the public and to exert influence in asking that the matter be dealt with urgently. The Hearing Panel noted that officers may have felt under pressure to comply with such a request. There was, however, no evidence that the Respondent attempted to put pressure on officers to reach a particular outcome in respect of the planning application, nor that his actions had any bearing on the decision that was ultimately made.

2. The Respondent attempted to call-in his neighbour's planning application for personal reasons. However, in doing so, he failed to distinguish between his role as a potential objector and his role as a councillor.
3. The Respondent's actions in requesting information that would not normally be available to members of the public, in asking officers to deal with the matter urgently, and in failing to distinguish between his as a potential objector and his role as a councillor amounted to attempts to seek preferential treatment from the Council, as prohibited by the Code.
4. 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 Councillor Nimmo had breached paragraphs 3.19 of the Code.

### **Evidence in Mitigation**

The Hearing Panel considered written representations made on behalf of the Respondent in mitigation as contained in a letter from his representatives dated 19 September 2016. In the letter it was pointed out that there was animosity between the parties, which was stated not to have been of the Respondent's making and which was a matter of regret to him. It was further stated that the Respondent had served as a councillor in exemplary fashion and without previous criticism. In particular, the Hearing Panel noted the Respondent had not attempted to exert any influence over the decision in respect of the application.

### **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 Respondent's statement in mitigation and, in particular, that he demonstrated awareness that he should not take part in the decision-making on the application.
2. Noted the Respondent had made it clear to officers that he was enquiring about, and would be objecting to, a structure (for which planning consent had not been sought), as a neighbour.

3. Considered there was no evidence that the Respondent attempted to put pressure on officers to reach a particular outcome in respect of the planning application, nor that his actions had any bearing on the decision that was ultimately made. The Hearing Panel noted that the officers concerned behaved appropriately at all times.

However the Hearing Panel:

1. Found there had been a clear breach by the Respondent of the Councillors' Code of Conduct in respect of paragraph 3.19. The Respondent had sought preferential treatment in breach of this provision.
2. Emphasised that councillors must comply with the Code and must not attempt to seek preferential treatment. The Hearing Panel further emphasised that councillors should exercise care when communicating with their Council in respect of personal matters, particularly because officers may assume they will be doing so in their official capacity as elected members and are likely to respond to them in that capacity.

#### **RIGHT OF APPEAL**

The attention of the Respondent is 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 October 2016



**Mr Matt Smith OBE  
Chair of the Hearing Panel**