

## **Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at The Helensburgh and Lomond Civic Centre, Helensburgh on 18 January 2019.**

**Panel Members:** Mr Michael McCormick, Chair of the Hearing Panel  
Mrs Tricia Stewart  
Mr Paul Walker

The Hearing arose in respect of a Report by Mr Bill Thomson, the Commissioner for Ethical Standards in Public Life in Scotland (the ESC), further to complaint reference LA/AB/2125 (the complaint) concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Gary Mulvaney (the Respondent).

### **COMPLAINT**

A complaint was received by the ESC about the alleged conduct of the Respondent. Following an investigation, the ESC referred the complaint to the Standards Commission for Scotland on 22 October 2018, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act), as amended.

The substance of the referral was that the Respondent had failed to comply with the provisions of the Code and, in particular, that he had contravened paragraphs 5.3 and 5.7.

The relevant provisions are:

#### ***Declaration of Interests***

*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.*

## **Evidence Presented at the Hearing**

### **Submissions made by the ESC**

The ESC advised that the Respondent had been a councillor for some 15 years and, following the May 2017 local government elections, had been appointed as Argyll & Bute Council's representative on the Board of the Dunbritton Housing Association (the Housing Association). The ESC confirmed that the position was not remunerated and that the Respondent had included it as a non-financial interest in his Register of Interests.

The ESC advised that a development of sheltered housing managed by the Housing Association was located at Scott Gardens, Cardross. The development was accessed via a cul-de-sac off the main road in Cardross. The ESC indicated that when the development was built, a layby on Main Road, Cardross, at the junction with Scott Gardens, had been retained without any parking restrictions. The ESC stated that, in 2016, a manager and tenant of the Housing Association had made representations to Argyll & Bute Council (the Council) about parking in the layby causing difficulties in terms of the sightlines and egress from the development, albeit there was no record of a formal complaint having been made.

The ESC indicated that the Council had investigated the matter and a report proposing to extend existing no waiting restrictions on the main road to include the layby was prepared for consideration at a meeting of the Helensburgh and Lomond Area Committee (the Area Committee) of the Council on 21 December 2017. The ESC advised that it was not in dispute that the Respondent had received the Committee papers, including the report, before the meeting.

The ESC advised that the report before the Committee referred to the difficulties being incurred by vehicles exiting the Scott Gardens development and further stated that an increase in the number of drivers using the layby had resulted in the Housing Association "regularly receiving complaints from the residents", who were finding it increasingly difficult to egress onto the main road. The ESC advised, however, that the report also contained three objections to the proposal from members of the public, on the grounds of loss of the amenity and road safety.

The ESC advised that it was not in dispute that the Respondent had not declared any interest in the item, and, further, had spoken in support of the recommendation to permit a no waiting restriction in the layby. The ESC noted that the Area Committee agreed unanimously, at the meeting on 21 December 2017, to permit the no waiting restriction and to have the layby marked with double yellow lines.

The ESC argued that it was clear from the report that, while there were overall issues of road safety, the principal beneficiaries of the proposal to extend the no waiting restrictions to include the layby were the residents of, and any visitors to, the Housing Association managed Scott Gardens development. As such, the ESC contended that, having registered his appointment as a non-financial interest, in terms of paragraph 5.7 of the Code, the Respondent should have considered

the objective test when making a decision about whether or not to declare it at the meeting of the Area Committee on 21 December 2017.

The ESC noted that there would have been no need to declare the interest if it had been so remote or insignificant that it could not reasonably be taken to fall within the objective test. The ESC argued, however, that in this case the Respondent should have considered that a member of the public, with knowledge of the relevant facts, may have reasonably concluded that the Respondent would act in the best interests of the Housing Association and its tenants. As such, the interest could be objectively regarded as so significant that it was likely to prejudice his discussion or decision-making. The ESC argued, therefore, that the Respondent should have declared the interest, withdrawn from the room and taken no part in the discussion and decision-making on the item.

### **Submissions made by the Respondent**

The Respondent advised that he did not dispute any of the facts as found and presented by the ESC. The Respondent advised, however, that he disputed the ESC's conclusions. The Respondent noted that there was no mention of the Housing Association or its manager having made any complaints in the report before the Area Committee. The Respondent advised that he had had no discussions with the Housing Association or any individuals, either within or external to the Council, about the matter before the meeting and, further, that he did not know any of the tenants of the Scott Gardens development. The Respondent advised that he had considered the proposal with an open mind and that his decision was solely based on merit and what he perceived to be the overall public interest in terms of road safety.

The Respondent drew the Hearing Panel's attention to the fact that he had declared an interest in the Housing Association on 11 other separate occasions, which he contended demonstrated that he was aware of the provisions and requirements of the Code. The Respondent argued that, in this case, he had read the report some two to three days before the meeting of the Area Committee, and had noted that the recommendation to extend the existing no waiting restrictions was based on overall road safety concern and, in particular, on a perception that a recent opening of a new shop in the area was causing more difficulties as there had been an associated increase in usage of the layby as a parking area.

The Respondent noted that there had been no mention of the Housing Association in the report's Executive Summary and that there was no evidence of it being involved in either supporting or opposing the proposal. The Respondent noted that the only reference to the Housing Association had been contained in the body of the report, in relation to it having received complaints. The Respondent reiterated that the matter had not come to his attention, either formally or informally before the Area Committee meeting. The Respondent further noted that there was no explicit reference to such complaints having been made by the residents of the Scott Gardens development or to them being the primary beneficiaries of the proposal to extend the no waiting restrictions.

The Respondent advised that, in determining whether or not he should declare an interest, he had concluded that the matter concerned overall road and public safety and, as such, his interest in the Housing Association was too remote / of too little significance to fall within the objective test. The Respondent confirmed, therefore, that he had not declared an interest and had instead taken part in the discussion and decision-making. The Respondent asked the Hearing Panel to note that the decision to approve the proposal had been passed unanimously.

## **DECISION**

The Hearing Panel considered the submissions made both in writing and orally at the Hearing. It concluded that:

1. The Councillors' Code of Conduct applied to the Respondent, Councillor Mulvaney.
2. The decision was finely balanced. Having taken all relevant matters into consideration, however, the Panel determined that the Respondent had breached paragraphs 5.3 and 5.7 of the Code.

## **Reasons for Decision**

The Hearing Panel noted that the Respondent accepted the facts as outlined in the ESC's Report, albeit he did not accept the ESC's interpretation of these and his conclusions.

The Panel noted the Respondent's position was that the report before the Area Committee did not explicitly state that the Housing Association had made any representations on the matter or that it had submitted a complaint to the Council; and indeed that he had no knowledge of it having done so. The Respondent's position was that the report only referred to the Housing Association as having received complaints from residents about drivers using the layby as a parking area, making it more difficult for them to egress on to the main road.

The Panel found that while the Housing Association was mentioned twice in the main body of the report, it had not been identified as having made a complaint or having objected to the proposal. The Panel further found that the report concerned road safety in general, and that the opening of a shop had led to a material change in circumstances from when the development was built. The Panel considered that it was nonetheless apparent from the report that the proposal could benefit the residents of the Housing Association to a greater extent than other members of the public.

The Panel accepted that the Respondent, in deciding whether to declare an interest, had a finely balanced judgement to make. The Panel further accepted that the Respondent had: included his appointment to the Housing Association's Board in the Council's Register of Interests; considered the terms of the Code when deciding whether to declare an interest in relation to the proposed change to parking restrictions in Cardross; and focused on road safety in his consideration of the report. The Panel concluded, however, that having considered the full terms of the report before the Committee, the objections received should have put the Respondent on notice that the residents of the Housing Association owned development may have gained a particular benefit in terms of their egress on to the main road and, therefore, had a greater interest in the outcome of the proposal than that of general members of the public. As such, and having considered the terms of the objective test, the Panel determined that the Respondent should have concluded that a member of the public, with knowledge of the relevant facts (including the fact that he had a registered interest as a Member of the Board of the Housing Association), would reasonably conclude that his interest could be sufficiently significant as to affect his discussion or decision-making.

The Panel accepted there was evidence that the Respondent had applied the objective test and declared an interest in the Housing Association on 11 separate other occasions. The Panel was

satisfied that this demonstrated that the Respondent was aware of the requirements of the Code and was diligent in applying them. In this case, however, the Panel was of the view that, on balance, the Respondent should have erred on the side of caution, as advised by paragraph 5.2 of the Code, and reached the view in terms of paragraph 5.7 his interest in the Housing Association would not be perceived as being so remote and insignificant, given the particular benefit its residents might gain from the proposal in question, that it could not fall within the objective test under paragraph 5.3.

As such, the Panel determined that, in terms of paragraph 5.3 of the Code, the Respondent should have declared a non-financial interest in the matter as required by paragraph 5.7, when taken together with the Respondent's need to also give consideration to the Code's advice to err on the side of caution.

The Panel therefore concluded that the Respondent had contravened paragraphs 5.3 and 5.7 of the Councillors' Code of Conduct.

### **Evidence in Mitigation**

The Respondent advised that while he was disappointed, he nevertheless accepted the Hearing Panel's interpretation of the Code and decision.

The Respondent confirmed that his intention was always to act honestly and openly in the best interest of his constituents. The Respondent noted that he had made a judgement call at the Area Committee meeting in determining whether or not to declare an interest and, while he now accepted he should have perhaps erred on the side of caution in applying the objective test, he had nevertheless considered the matter objectively when reaching a decision as to whether the proposal was in the overall public interest. The Respondent confirmed that there had been no personal gain and reiterated that the decision made by the Area Committee had been unanimous.

The Respondent asked the Hearing Panel to note that he had an unblemished record in his 15 years in public service.

### **SANCTION**

The decision of the Hearing Panel was to censure the Respondent, Councillor Mulvaney.

The sanction was made under the terms of the section 19(1)(a) of the 2000 Act.

### **Reasons for Sanction**

In reaching their decision, the Hearing Panel noted it was obliged under the 2000 Act to impose a sanction where a breach had been found.

The Panel considered the Standards Commission's Policy on the Application of Sanction. The Panel:

- Noted that the Respondent accepted its determination and welcomed his full participation in the Hearing procedures.

- Further noted the contribution made by the Respondent to public life in his 15 years as a councillor.
- Was satisfied that that there had been no personal gain to the Respondent and, given that the proposal had passed unanimously, it was unlikely that his failure to declare an interest and withdraw would have had any impact on the overall decision of the Committee.
- Was further satisfied that the Respondent had demonstrated insight and understanding of the provisions of the Code and the importance of complying with it. The Panel had no reason to doubt that the Respondent had been trying to act in the overall public interest in terms of road safety.

However, the Panel:

- Wished to make it clear that the requirement to declare interests is an integral part of the Code as it provides the opportunity for openness and transparency and affords members of the public the opportunity to consider whether a councillor's interests may influence his or her discussion and decision-making.
- Reiterated that public confidence in a Council's decision-making processes can be eroded by a failure to declare interests as required by the Code. The Panel noted that it was essential for the public to have the highest confidence that those elected to local government are making decisions in the public interest only.
- Considered that, on this occasion, when faced with a finely balanced decision, the Respondent should have taken cognisance of the advice in the Code to err on the side of caution in order to ensure full transparency and maintain public confidence.

### **RIGHT OF APPEAL**

The Respondent has a right of appeal in respect of this decision, as outlined in Section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended.

**Date:** 23 January 2019



**Mr Michael McCormick  
Chair of the Hearing Panel**