

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Midlothian House, 40-46 Buccleuch Street, Dalkeith, EH22 1DN on 9 May 2019.

Panel Members: Professor Kevin Dunion, Chair of the Hearing Panel
Mrs Tricia Stewart
Mr Paul Walker

The Hearing arose in respect of a Report by Mr Bill Thomson, the former Commissioner for Ethical Standards in Public Life in Scotland (the ESC), further to complaint reference LA/Mi/2166 & 2169 (the complaint) concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Margot Russell (the Respondent).

The ESC was represented by Mr Paul Donnachie, Solicitor. Councillor Russell was represented by Mrs Frances Randle, Solicitor.

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 31 January 2019, 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 she had contravened paragraphs 7.3 and 7.4.

The relevant provisions are:

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.

Evidence Presented at the Hearing

Background

The complaints about Councillor Russell concerned her attendance at a meeting of Midlothian Council's Planning Committee on 3 April 2018, at which a planning application by Dalkeith Lawn

Tennis Club for the erection of screen netting was considered. The Panel noted that while objections to the proposal had been submitted by the proprietors of a property adjacent to the tennis club, who were concerned about potential light depletion, the planners' recommendation was that planning consent should nevertheless be granted.

Joint Statement of Facts

The Hearing Panel noted that a Joint Statement of Facts had been agreed between the parties. In this, the parties confirmed that it was not in dispute that, before the meeting on 3 April 2018, Councillor Russell undertook an unaccompanied site visit to the objectors' property, that lasted around 30 to 40 minutes, and discussed the potential impact of the netting with one of them. It was not in dispute that Councillor Russell called-in the application, on 12 March 2018, on the grounds that the views of the objectors should be considered by the Planning Committee.

The Panel noted that it was also not in dispute that Councillor Russell made comments on the proposal and the potentially adverse impact on the objectors' property during the discussion on the application at the Planning Committee meeting on 3 April 2018. Councillor Russell seconded a motion to approve the proposal subject to a change to the type of netting that was to be used. The Panel heard that the motion was approved without dissent and planning consent was granted on that basis.

Submissions made by the ESC's Representative

The ESC's representative advised that Councillor Russell had admitted that she had not sought advice from officers before undertaking an unaccompanied visit to the objectors' property. The ESC's representative advised that it was not in dispute that, during the visit, Councillor Russell spoke to one of the objectors about their concerns regarding the impact of the proposed netting.

The ESC's representative noted that it was accepted as good practice for elected members to ask officers to accompany them on site visits to reduce the risk of the public having concerns that councillors were acting improperly or unfairly. The ESC's representative further noted that the Councillors' Code of Conduct did not differentiate between the size and importance of any planning applications in terms of the obligations it imposed on elected members to act fairly and ensure they were seen to be acting fairly when making any quasi-judicial or regulatory decisions.

The ESC's representative indicated that Councillor Russell had not engaged in any discussions with the applicants about the proposal, nor had she made any corresponding visit to their premises. The ESC's representative contended that Councillor Russell's failure to balance her visit with one to the applicants or to seek their views on any proposal to amend the application, in terms of the type of netting to be installed, meant that she failed to ensure that all the parties involved in the process were dealt with fairly.

The ESC's representative further argued that, by drawing the Committee's attention to a different type of netting than that being sought in terms the planning application, Councillor Russell not only took into account an irrelevant consideration but influenced other members to do so. While the ESC's representative accepted that Councillor Russell may have been trying to act fairly, her failure to ensure that only relevant matters were being considered and that the views of both parties were

fully explored, gave rise to a reasonable perception that she was behaving improperly. As such, the ESC's representative contended that she had breached paragraphs 7.3 and 7.4 of the Code.

Witness Evidence

The Respondent's representative led the Respondent as a witness.

Councillor Russell advised that she had now been a councillor for over 20 years and had been the Deputy Provost since 2017. Councillor Russell explained that she sat on numerous Council Committees and outside bodies and was committed to serving her ward and community.

Councillor Russell indicated that, having received a request sent by the objectors to all members of the Planning Committee, she had contacted them directly and arranged a site visit. Councillor Russell advised that she had considered doing so would be helpful to enable her to gain a better understanding of the potential impact of the netting. Councillor Russell stated that she had not considered it appropriate or necessary to take an officer on the site visit and away from their duties, due to the relatively minor nature of the application and her knowledge of how busy planning officers were.

Councillor Russell confirmed that she had engaged in a conversation with one of the objectors during the visit about their concerns regarding the potential impact of the netting to their property in terms of light depletion, but had not given any indication of how she intended to vote on the proposal. Councillor Russell indicated that while she had walked along the objectors' side of the perimeter fence between their property and the tennis club's premises to ascertain the disparity in height, she had not been able to see this from the other side.

Councillor Russell stated that she had not considered it necessary to undertake a corresponding visit to the tennis club as, having read the application, she was aware of their position. Councillor Russell advised that she had called-in the application to ensure all Committee members were aware of the potential impact of the netting and to allow a full debate on the proposal to take place.

Councillor Russell indicated that, at the Planning Committee meeting, she had only contributed to the debate on the proposal towards the end of the discussion on the item, when she had advised the Committee about her site visit and findings. Councillor Russell advised that she had then proceeded to consider the application objectively and with an open mind, having taken into account all the relevant evidence and submissions, including the comments made by other members. Councillor Russell confirmed that she had seconded a motion to approve the planning application subject to a lighter green netting, which had a different weave, being used.

In response to cross-examination from the ESC's representative, Councillor Russell admitted that she had only assumed officers were busy and had not asked anyone to accompany her on the site visit to the objectors' property. Councillor Russell further admitted that she did not recall noting that the proposal was not just for further dark green netting to be installed, but for the existing lighter green netting at the site to be replaced with the darker material. Councillor Russell confirmed that she nevertheless considered that the comments on the application she had made at the meeting, to the effect that there was a disparity in terms of the impact of the two different types of netting in terms of the light getting through to the objectors' property, had been relevant.

Councillor Russell confirmed that she did not, however, discuss the application or the difference in the netting with anyone from the tennis club or any officers before the meeting.

Submissions made by the Respondent's Representative

Councillor Russell's representative noted it was up to the local ward member to call-in a planning application. In this case, Councillor Russell had done so in order to ensure there was a proper debate on both the application and the objections to it. Councillor Russell's representative argued that Councillor Russell had been trying to act fairly by undertaking the site visit to ensure that she could reach a fully informed view. While Councillor Russell's representative accepted it would have been good practice for Councillor Russell to have asked an officer to accompany her, in practice this was not always possible or practical. Councillor Russell's representative reiterated that Councillor Russell had not, in any way, indicated her support for, or opposition to, the application before the meeting.

Councillor Russell's representative noted that Councillor Russell had advised the Committee about her site visit during the discussion on the proposal and contended that it was clear from her contribution that she had been attempting to seek a compromise that would be acceptable to both parties. Councillor Russell's representative argued that, as such, it was clearly not the case that she had acted improperly or given any reason for anyone to suspect she had done so, in contravention of paragraph 7.4 of the Code. Councillor Russell's representative further argued that the risk of legal challenge to the Committee's decision, in the circumstances, was negligible.

DECISION

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

1. The Councillors' Code of Conduct applied to the Respondent, Councillor Russell.
2. The Hearing Panel found the Respondent had breached paragraph 7.3 of the Councillors' Code of Conduct.
3. The Panel determined that the Respondent did not breach paragraph 7.4 of the Code.

Reasons for Decision

The Hearing Panel noted that it was not in dispute that Councillor Russell called-in the application, on 12 March 2018, on the grounds that the views of the objectors should be considered by the Planning Committee. The Panel further noted that it was not in dispute that, before the meeting on 3 April 2018, Councillor Russell undertook an unaccompanied site visit to the objectors' property, that lasted around 30 to 40 minutes, and discussed the potential impact of the netting with one of them.

The Panel noted that Councillor Russell admitted that she had not made any corresponding visit to the applicants' premises, nor had she discussed the planning proposal with them. While the Panel accepted that Councillor Russell considered she was aware of the applicants' position, it noted that this was only in respect of the dark green netting that was being sought. The Panel noted that the

applicants may well have had views on the suitability of the lighter green netting as a windbreak that Councillor Russell proposed be used, following her site visit to the objectors' property.

The Panel noted that at the Planning Committee on 3 April, Councillor Russell had made comments on the proposal and the potentially adverse impact on the objectors' property (in the course of which she informed the Committee that she had visited the site) and seconded a motion proposing that permission should be granted, but only on the basis of the lighter green netting being installed.

The Panel recognised that paragraph 7.3 of the Code provides that councillors have a duty to ensure that any formal decisions are properly taken and that any parties involved in the process are dealt with fairly. Councillors are not just required to act fairly, but are also obliged to be seen as acting fairly.

In this case, the Panel determined that it would be reasonable for a member of the public to consider that by:

- failing to seek advice from officers before contacting the objectors directly and undertaking an unaccompanied site visit, despite it being best practice for elected members to ask officers to accompany them on such visits;
- making a relatively lengthy visit to the objectors' property and discussing the proposal with one of them;
- failing to make any corresponding visit to the applicants' property or any effort to discuss the proposal, or any potential changes to it, with them;
- calling-in the application so that the objectors' concerns could be considered by the Committee; and
- seconding a motion to change the proposal without having explored the applicants' views on it;

Councillor Russell gave an appearance of unfairness and bias towards one of the parties.

The Panel therefore concluded that Councillor Russell had breached paragraph 7.3 of the Code.

The Panel further noted that paragraph 7.4 of the Code not only obliges councillors to avoid impropriety, but requires them to avoid any occasion for suspicion and any appearance of improper conduct, at all times, in order to reduce the risk of the Council's decision being legally challenged.

The Panel was satisfied that there was no question of Councillor Russell having tried to conceal the visit, or her discussion with one of the objectors, and noted that she had openly declared the fact that she had made a site visit at the Committee meeting. The Panel was satisfied that Councillor Russell's actions did not give rise to any appearance of improper conduct. As such, the Panel determined that she had not breached paragraph 7.4.

Evidence in Mitigation

Councillor Russell's representative advised that Councillor Russell had made a clear and admirable contribution to public life in her 20 years as a councillor. Councillor Russell's representative indicated that Councillor Russell was dedicated to her community and took her responsibilities to her constituents very seriously.

Councillor Russell's representative asked the Panel to note that the breach was a one-off incident and that there had been no deliberate intent on the part of Councillor Russell to breach the Code. Councillor Russell's representative advised that Councillor Russell had reflected on the matter and gained a better understanding of the requirements of the Code. She had co-operated fully with the investigative and adjudication processes and was willing to apologise to the applicants.

Councillor Russell's representative confirmed that there had been no benefit or personal gain to Councillor Russell as a result of the contravention.

SANCTION

The decision of the Hearing Panel is to suspend for a period of one month, the Respondent, Councillor Russell, from Midlothian Council's Planning Committee. This decision is effective from 1 June 2019.

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

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. In reaching its decision, the Hearing Panel noted, in mitigation, that Councillor Russell had co-operated fully with the investigative and Hearing processes. The Panel further noted the evidence of the substantial contribution Councillor Russell had made to public life and her community in her 20 years as a councillor.

The Panel was satisfied that there was no personal gain to the Respondent and that she had now demonstrated insight and understanding of the importance of compliance with the Code.

The Panel emphasised, however, that the duty on councillors to act fairly and to be seen to be acting fairly when taking quasi-judicial and regulatory decisions is a fundamental requirement of the Councillors' Code of Conduct. The Panel noted that a breach of these provisions had the potential to erode public confidence and trust in how such decisions was being made and in local government itself. The Panel was concerned that Councillor Russell had failed to ensure that she complied with the Code in this regard, and agreed that the sanction should reflect this.

The Panel was nevertheless of the view that Councillor Russell's conduct did not warrant a longer suspension. This was because the incident had been a one-off and there was no suggestion or evidence that there had been any deliberate intent to breach the Code. The Panel also accepted that Councillor Russell had not acted dishonestly or made any attempt to conceal her visit to the objectors' property.

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: 13 May 2019



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