

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on 23 November 2020.

Panel Members: Mr Michael McCormick, Chair of the Hearing Panel
Mrs Tricia Stewart
Professor Kevin Dunion

The Hearing arose in respect of a Report referred by Ms Caroline Anderson, the Commissioner for Ethical Standards in Public Life in Scotland (the ESC), further to complaint reference LA/Fi/3039 & 3075, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Tony Miklinski (the Respondent).

The case against the Respondent was presented by Mr Martin Campbell, Director of Investigations and solicitor to the Ethical Standards Commissioner. The Respondent was represented by Mr Gary McIlravey, solicitor.

Referral

Following an investigation into complaints received about the conduct of the Respondent, the ESC referred a report to the Standards Commission for Scotland on 22 July 2020, 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 3.1, 3.2 and 3.6. The relevant provisions were:

3.1 *The rules of good conduct in this section must be observed in all situations where you act as a councillor or are perceived as acting as a councillor, including representing the Council on official business and when using social media.*

Relationship with other councillors and members of the public

3.2 *You must respect your colleagues and members of the public and treat them with courtesy at all times when acting as a councillor. Insert relevant paragraphs from Code.*

Bullying and Harassment

3.6 *Bullying or harassment is completely unacceptable and will be considered to be a breach of this Code.*

Evidence Presented at the Hearing

Joint Statement of Facts

The Panel noted the terms of a joint statement of facts agreed between the ESC's and Respondent's representatives. The Hearing Panel noted, in particular, that it was not in dispute that there were three matters before it, arising from complaints made one of the owners of Carphin House (which is located in the village of Luthrie, in the Howe of Fife and Tay Coast Ward) and his father who was involved in the business activities connected to the property (the complainers).

The Panel noted that that:

- A Mr A and his daughter, Ms A, occupy a farm in the vicinity of Carphin House. The only vehicle access into and out of Carphin House is via a tarmac track, known as the Wynd, which runs adjacent to the farm and is also used by Mr A and Ms A.
- A dispute exists between residents of Luthrie and the complainers, concerning the use of Carphin House as a wedding venue.
- On 18 April 2018, the Council's North East Planning Committee refused planning applications submitted by the complainers for the erection of a wedding venue at Carphin House. A subsequent appeal against the Committee's refusal to grant the planning applications was dismissed by Scottish Ministers in August 2018.

- The Council issued an enforcement notice, in September 2018, requiring the cessation of the use of Carphin House and its curtilage for use as a commercial wedding venue.
- On 2 April 2019, Fife Council's Licensing Board granted four occasional alcohol licenses for weddings booked to take place at Carphin House on 17, 24, 31 August and 14 September 2019, despite several Luthrie residents having raised objections. The licenses related to an area of woodland in the grounds, outwith the area specified in the enforcement notice.
- In May 2019, the Respondent joined the Luthrie Residents Group as an advisor. This was recorded as an interest on his Register of Interests and he subsequently declared it as an interest at any Council meetings where matters concerning Carphin House were being discussed.
- Following several objections by Luthrie residents, the Council sent officers to the wedding on 17 August 2019 to monitor events. A dispute then arose as to whether the complainers had complied with the terms of the enforcement notice. The complainers' contention is that a provision permitting a 28-day annual allowance to host weddings outside the curtilage of Carphin House was in place.

The Panel noted there were three matters before it, the first of which concerned a message the Respondent posted on the Luthrie Residents' Facebook page on 3 July 2019. The Panel noted that it was accepted that, in this, the Respondent stated that "it's a pretty sick individual who would deliberately unlock a gate that secures livestock. And 5 further padlocks smashed means someone wants access when it's not theirs to have. Is this about access to Carphin House, or is there a serial padlock smasher out there? Not difficult to work out and this needs to stop before something worse happens."

The Panel noted the second matter before it concerned an email the Respondent sent, on 19 August 2019, to the mother of the groom of the wedding held on 17 August 2019, responding to one she had sent to various people complaining about the conduct of local residents (in trying to disrupt the wedding and in behaving in an aggressive and intimidating manner towards guests). In his reply, the Respondent stated, "the first 3-4 hours of your wedding on Saturday broke the terms of the current enforcement order because it took place in the house and gardens....Fife Council Planning Officers are considering how to react to Saturday's events as I write". The email, which was sent from the Respondent's Council email account and was copied to the first complainer, Mr B.

The Panel noted that, having received the Respondent's email, Mr B sent the council an email the same day, expressing dissatisfaction and asking whether Respondent had obtained the information outlined in his reply from the Council. A council officer responded, also that day, and confirmed that no decision to take any action in respect of the matter had been made, and that if any action was to be take, Mr B as the landowner, would be the first to know. The Panel heard that it was not in dispute that while the Council subsequently determined that there had been a breach of the enforcement notice, no decision had been made at the time of the Respondent's email.

The Panel noted that the third matter concerned an incident that occurred on 30 August 2019, after the complainers and employees of Carphin House removed signs erected by the Luthrie Residents Group on land adjacent to the Wynd. It was accepted that while the Respondent was aware the group were going to erect signs, he had not been involved in deciding the specific wording to be used on them. The Panel noted it was not in dispute that the Respondent was visiting Mr A and Ms A at the time. Mr A saw the signs being removed via a CCTV system and immediately left the house and cycled to the Wynd. On arrival, Mr A dismounted from his bicycle and stood on the Wynd, pointing a mobile phone at the complainers' vehicle. In standing on the Wynd in the manner he did, Mr A blocked the complainers, and their employees, from continuing their drive up the Wynd towards Carphin House for approximately 10 minutes.

The Panel noted that it was also not in dispute that the Respondent had followed Mr A on foot and, on arrival at the scene approximately 90 seconds later, had stood to the side of the road. When Mr B exited the vehicle to speak to Mr A, the Respondent stood on the Wynd and pointed his mobile phone at Mr B while they were

engaged in a discussion. The Panel noted that it was accepted that Mr B had asked the Respondent and Mr A to move out of the way and to stop blocking the road and had indicated he was happy to have a discussion, but not when they were standing in the middle of the road. Approximately one minute after arriving at the Wynd, the Respondent put his mobile phone into his pocket, moved back onto the verge and waved his hand towards Mr A, motioning him to move off the road. Mr A remained on the Wynd pointing his phone at Mr B. The Respondent had then walked up the Wynd towards another vehicle.

The Panel noted that it was accepted that, approximately two minutes after arriving at the Wynd, the Respondent returned to Mr A, placed his hand on his shoulder and motioned that he should move off the Wynd. In response, Mr B stated, "thank you, councillor. I appreciate that". Other residents had then appeared, stood in the road and pointed their mobile phones at Mr B or the complainers' vehicle. The Panel noted that the incident ended shortly afterwards, when the police arrived (having been called by the complainers), spoke to the parties and cleared the Wynd.

The Panel noted that the parties agreed that the complainers' vehicle was fitted with a dashcam that recorded the incident and all exchanges in range and that the footage from this, as provided to the Panel, was what it purported to be.

Witness Evidence

The ESC's representative led evidence from the two complainers, being one of the owners of Carphin House (Mr B), and his father (Mr C).

Mr C advised that he had first become aware of the Respondent when he was quoted in articles and letters published in the local press making what Mr C considered to be untrue comments about what had happened at the wedding on 17 August 2019. Mr C stated that he was aware the Respondent was assisting the Luthrie Residents Group in respect of its opposition to Carphin House being used as a wedding venue, having previously spoken and voted against the planning applications at meetings of the Council's North East Planning Committee.

Mr C advised that the access track to Carphin House had frequently been blocked deliberately with wood, tractor tyres and other obstacles. In addition, signs had been placed along it, protesting about the use of property as a wedding venue. Mr C advised that he found the signs to be 'obnoxious'. Mr C referred to a photograph, contained in the productions, of a sign erected in the village, that depicted a caricature of his son holding a knife, with the word 'greed' written on it, aimed in the direction of a wedding cake.

Mr C advised that he and his son had become aware, on 30 August 2019, that signs had been put up along the sides of the Wynd when they approached it while driving to Carphin House. Mr C noted that as he was aware of the Respondent's involvement with the Luthrie Residents Group, he had assumed he was involved in their appearance. Mr C advised that the signs had made him 'feel sick' as he felt they were completely unfair to his son, who was simply trying to run a business. Mr C stated that, after confirmation had been sought and obtained from both the Council and police that it was legal to do so provided they did not damage them, his son and employees of Carphin House had proceeded to remove the signs.

Mr C advised that he believed by joining the residents in blocking the Wynd and in pointing his mobile phone at Mr C's son when doing so during the incident on 30 August 2019, the Respondent was not only continuing with a course of conduct aimed at preventing weddings being held at Carphin House but was also actively engaging in a 'vendetta' against Mr C's son. Mr C accepted, however, that the video footage of the incident demonstrated that the Respondent had made at least two attempts to urge Mr A to move from his position in the middle of the Wynd, that he himself had mainly stood on the verge (and, as such, had not been blocking access) and that Mr C's son had thanked him for trying to persuade Mr A to move. Mr C accepted that the verges, where the signs were placed, did not form part of the property owned by his son.

Mr B advised that he had faced a great deal of opposition and challenges to his attempts to operate Carphin house as a wedding venue. Mr B stated that the Luthrie Residents Group had targeted both his business and him as an individual. Mr B advised that he had first become aware of the Respondent's Facebook post when a journalist contacted him. Mr B stated that he considered that the Respondent was alluding, in the Facebook post, to him and his wife, as owners of Carphin House, being responsible for the acts of vandalism and death of the cow. This was not only because the property was mentioned by name but also because it was well known that there had been a number of disputes in respect of access to it. Mr B stated that the post had made him feel sick, angry and upset, and confirmed, for the avoidance of doubt, that neither he, his wife nor any of their employees had been responsible for any of the acts of vandalism described. Mr B advised that, in posting the message, he considered the Respondent and was trying to incite a response and, as such, had escalated the situation, when he could have been expected, as a councillor, to have tried to defuse it. Mr B further advised that he found the reference in the post to a "sick individual" to be offensive as it was clearly directly at him. Mr B indicated he considered that the message had been posted in retaliation for a complaint he had made about the Respondent's earlier participation at the committee meeting when the planning applications were considered.

Mr B advised that his initial reaction, on receiving the Respondent's email of 19 August 2019 had been shock and disbelief. Mr B advised that he had been trying to keep the dispute over the use of Carphin House from any wedding guests so that it did not spoil their experience. Mr B advised he had been particularly distressed by the Respondent's contention that the enforcement order had been breached, and that Council officers were to act, as he had not been so advised. Mr B stated that, as such, he had immediately emailed council officers, who had confirmed, in response, that was not the case. Mr B advised he had then felt obliged to write to the wedding guest to explain the situation. Mr B stated that he felt that, in providing a wedding guest with inaccurate information, the Respondent was again behaving in a vindictive manner towards him.

Turning to the incident on 30 August 2019, Mr B advised that he had been "gutted" when he had seen the signs put up along the Wynd as he was expecting the arrival of guests that day, in advance of a wedding taking place the following day and did not want anything to detract from their experience. Mr B indicated he was particularly upset by the fact that the signs were targeted at the wedding guests. As such, he had asked Carphin House staff to remove the signs. Mr B confirmed that Mr A had then appeared and blocked the road. Mr B advised he had been "really disappointed" when the Respondent had then appeared. Mr B advised that as the Respondent pointed his mobile phones at him, he had felt that he was joining Mr A and presenting a united front with him, as opposed to trying to resolve the situation. Mr B accepted, however, that there were times during the incident where the Respondent had tried to usher Mr A and other residents off the access road and that he had thanked the Respondent for his attempts to do so.

Mr B advised that he no longer lived at Carphin House as a result of the incidents and the conduct of the Luthrie Residents Group.

In response to cross-examination, Mr B accepted that the sign depicting a caricature of him had not been placed at the side of the Wynd on the same day at the other signs had been erected and agreed that it may have been put up at the entrance to Luthrie on another date, before a different wedding.

In response to a question from the Panel, Mr B confirmed he had referred to the Respondent as 'Councillor Miklinski' during the incident on 30 August 2019 and indicated this was because it was how the Respondent was known to him.

Submissions made by the ESC's Representative

The ESC's representative argued that the mention of access to Carphin House in the Respondent's Facebook post gave rise to a clear innuendo, and was intended to infer, that the owners of the property were responsible for the acts of vandalism as described. The ESC's representative accepted that the Respondent had not named Mr B or his wife in the post but argued this did not matter given that Luthrie was a small

community, where the residents knew the identity of the owners. The ESC's representative contended that as the post contained unfounded accusations about, and was derogatory in its tone towards, Mr B the Respondent had failed to act with courtesy and respect towards him, as required by the Code.

In respect of the email of 19 August 2019, the ESC's representative noted that the Respondent had advised the wedding guest 'in absolute terms' that the enforcement order had been breached, despite this not being a decision he was empowered to make and despite it not being the concluded position of the Council at that time. The ESC's representative noted that council officers had subsequently advised Mr B that he would be the first to know if any action was to be taken by the Council in respect of the enforcement order. The ESC's representative argued, therefore, that the Respondent had condemned and impugned Mr B to a wedding guest before any due process had been followed. The ESC's representative argued that, in providing unverified information and making an unfounded and serious allegation as to the complainers' conduct, that that had the potential to damage their business, the Respondent had again failed to treat them with courtesy and respect.

The ESC's representative accepted that, during the incident on 30 August 2019, the Respondent could be seen in the video footage motioning for Mr A to leave the middle of the road. The ESC's representative noted, however, that the Respondent had, at times, formed part of the larger group of residents who were blocking access to the Wynd and that he had also joined the residents in pointing their mobile phones at Mr B. The ESC's representative argued that the Respondent's conduct in doing so was discourteous, disrespectful and intimidating.

The ESC's representative contended that all three incidents, both individually and taken together as a course of conduct, also amounted to bullying and harassment. The ESC's representative noted that bullying and harassment is defined in the Standards Commission's Advice Note on the subject as inappropriate and unwelcome behaviour or conduct that has no legitimate workplace purpose and which makes someone feel offended, humiliated, intimidated or uncomfortable. The ESC's representative argued that in making disparaging comments and insinuations about Mr B and his business interests, and in joining a larger group of residents who were engaged in intimidating behaviour towards him, the Respondent's conduct fell within this definition. The ESC's representative noted that the Standards Commission's Advice Note made it clear that even if behaviour is unintentional, it can still be classed as a form of harassment. The ESC's representative argued that, in respect of the incident on 30 August 2019, the Respondent's conduct in hovering between the verge of the Wynd and the road itself could reasonably be perceived by Mr B as joining in with, or at least condoning, the conduct of the residents in blocking his access. The ESC's representative noted that the protection to freedom of expression afforded by Article 10 of the European Convention on Human Rights did not extend to acts of bullying and harassment. As such, the ESC's representative contended that the Respondent had breached paragraphs 3.2 and 3.6 of the Code.

The Respondent's Evidence

The Respondent's representative led evidence from the Respondent.

The Respondent advised the Luthrie residents had sent numerous emails to all Fife councillors throughout 2018 voicing concerns about Carphin House being used as a wedding venue. The Respondent confirmed that Luthrie was not in his ward and advised that, as such, he had asked two of the three ward councillors to assist the residents. When they had not done so, he decided to become involved and joined the Luthrie Residents Group as an advisor. The Respondent indicated that this had involved providing the residents with advice about planning and licensing matters and how they could engage with Council officers.

The Respondent confirmed that he had published the Facebook comments in response to another post on the page relating to the death of one of Ms A's cows, following the severing of five padlocks on Ms A's land. The Respondent advised that the Luthrie residents, and Mr A and Ms A, in particular, were extremely upset

by the incident. The Respondent confirmed that he had deliberately chosen to post his message from his personal Facebook page, as opposed to the one he used for political matters.

The Respondent's position was that there had been a great deal of tension in the local community at the time and that, in publishing the post, his intention was to provide a level of public support and solidarity, and to deter any further such action. The Respondent advised that the post was not intended as an attack on Mr B or his wife. The Respondent contended, in any event, that as he had posted from his personal Facebook page (rather than the one he used as a councillor), he had not been acting and could not be perceived as acting, as an elected member at the time.

Turning to the email of 19 August 2019, the Respondent advised that it was apparent from the wedding guest's email that while she had been upset, she did not know of the background to the dispute. The Respondent advised, therefore, that his aim had been to ensure she was aware of the factual position. The Respondent advised that he had observed the wedding held on 17 August 2019 and that it had been clear to him, from doing so, that the first few hours of it had breached the enforcement order. The Respondent noted that this had been subsequently confirmed by the Council and that, as a result, it had now submitted a report to the Procurator Fiscal. The Respondent noted, nevertheless, that he should have made it clear in the email that he was only expressing his personal opinion at the time.

The Respondent confirmed that while he was aware of the Luthrie Residents Group's intention to erect signs along the side of the Wynd, on Mr A's land, protesting about the use of Carphin House for weddings, he had no knowledge of, or input into, their specific wording and content. The Respondent stated that he had advised the group to keep the contents of the signs factual, to avoid being inflammatory.

The Respondent advised that he had been visiting Mr A and Ms A on 30 August 2019 to discuss a related matter, when Mr A had realised, from watching CCTV footage, that the signs were being removed. The Respondent advised that after telling Ms A to call the police, he had followed Mr A to the scene. The Respondent stated that he had decided to do so in order to act as an independent witness and to try to deter any possible violence, or trouble, in the meantime. The Respondent confirmed that he had repeatedly tried to get Mr A to move from the road to allow access. The Respondent noted that he himself had only stood in the middle of the road for some 30 seconds or so, and that he had deliberately distanced himself from the group when the other residents had arrived at the scene. The Respondent confirmed that he had held his mobile phone and had pointed it in the direction of Mr B for a short period, but advised that his intention in doing so had been to ensure there was a recording of what had been said (albeit he did not actually make a recording) and that his actions in doing so were not, in any way, an attempt to escalate the situation. The Respondent confirmed that Mr B had thanked him for his assistance in trying to usher Mr A to the side of the road.

In response to cross-examination, the Respondent stated that he could understand why he *may* have been perceived as acting as a councillor in respect of all three matters, given he had confirmed, in his evidence, that he was providing the residents group with advice he had gained through his experience as a councillor. The Respondent rejected the contention that this perception could have arisen as a result of the fact that he had stepped in to assist the Luthrie Residents Group when others elected members refused to do so, on the basis that Luthrie was outwith his own ward. The Respondent also rejected the suggestion that his Facebook post could be perceived as harassment or an attempt to incite residents and contended that he had simply been seeking to address the perpetrator, in a bid to ensure there was no further vandalism. The Respondent accepted that the decision on whether the specific wedding had been held in breach of the enforcement order was not one for him to make, but disputed the contention that his email of 19 August 2020 would have caused Mr B any significant distress, given that a Council officer had replied, within an hour, to Mr B's request for clarification and had outlined the correct position.

In response to questions from the Panel, the Respondent confirmed that he could see, with hindsight, how his Facebook post could be perceived as an attempt to blame someone for the acts of vandalism, as opposed to just being his opinion that such acts were intolerable. The Respondent advised that while he had made no physical effort to usher the other residents from the road, during the incident on 30 August 2018, he had nevertheless suggested to them that they should let the complainers pass.

Submissions made by the Respondent's Representative

The Respondent's representative argued that the respondent's evidence should be preferred to that of the complainers, as it was evident that the complainers were trying to blame the Respondent for all events and were avoiding taking any responsibility for contravening the enforcement notice. The Respondent's representative contended that the complainers were conflating any distress and upset they felt as a result of the planning and licensing decisions with their feelings about the Respondent's conduct. The Respondent's representative argued that any contention that the complainers felt harassed bore no relation to the Respondent's behaviour and, instead, was the result of the ramifications and the outcome of their own conduct in breaching the enforcement order.

The Respondent's representative argued that it was evident that the video footage of the incident on 30 August 2019 was not consistent with the complaints made about it, in that it was clear that, instead of joining the residents in blocking the road, the Respondent made efforts to distance himself from them and to persuade Mr A to move away. The Respondent's representative asserted that the fact that Mr B had thanked the Respondent during the incident supported this position. The Respondent's representative noted, in any event, that the Respondent was under no ethical duty to move anyone on, nor was he required to do so in terms of the Code.

The Respondent's representative contended that the Respondent had not intended his Facebook post to cause offence and argued, in any event, that as it was posted from his personal page (rather than his political one), he could not reasonably be perceived as acting as a councillor at the time. The Respondent's representative noted that the test to determine whether a respondent could reasonably be perceived as acting as a councillor should not be simply whether they are known to be an elected member, with no regard been given to the context in which the conduct occurred.

The Respondent's representative argued that even if it was determined that the Respondent had 'misspoke' or 'jumped the gun' in his email to the wedding guest of 19 August 2019, the fact remained that the information he had provided to the effect that the enforcement notice had been breached ultimately proved to be true and accurate. The Respondent's representative noted that any harm caused was of very limited duration and nominal in nature, given that the council officer had clarified the position within an hour.

Turning to the question of whether the Respondent was entitled to any protection in terms of Article 10 of the European Convention on Human Rights, the Respondent's representative drew the Panel's attention to the case of *Lombardo v Malta (2009) 48 EHRR 23*, where the European Court of Human Rights found that comments made in a political context, which amount to value judgements, are tolerated even if untrue, as long as they have some or any factual basis. The Court found that even a statement of fact will be tolerated if what was expressed was said in good faith and there is some reasonable (even if incorrect) factual basis for saying it. The Respondent's representative argued that, with the exception of the email of 19 August 2019, the Respondent had not been acting in the capacity of a councillor in respect of the any of the matters before the Panel. The Respondent's representative contended that the Respondent's statement, in the email, to the effect the enforcement notice had been breached, was made in good faith, amounted to a value judgement and, further, was based on the Respondent's belief that it was factually correct (which subsequently proved to be the case). As such, the Respondent's representative argued that the Respondent should be entitled the enhanced protection afforded to politicians under Article 10.

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 Miklinski.
2. The Respondent had breached paragraphs 3.2 and 3.6 of the Code

Reasons for Decision

The Panel noted that paragraph 3.1 of the Councillors' Code of Conduct provides that the rules of good conduct in section 3 must be observed in all situations where a councillor is acting as an elected member, or where they are perceived as acting as such. In respect of the first matter before it, the Hearing Panel accepted that the Respondent had not identified himself as such on the Facebook page. The Panel nevertheless was of the view that it would have been reasonable for a member of the public to have perceived that the Respondent been acting as a councillor, in all matters concerning the Luthrie Residents Group and Carphin House, given that:

- his connection to the Luthrie Residents Group was recorded on his Register of Interests;
- the email responding to the wedding guest was sent from his council email account and he had signed himself off as 'Councillor Miklinski';
- he had drawn on his knowledge of planning and licensing matters gained from his experiences as a councillor when responding to the email and providing advice to the group; and
- the dispute between the residents and the complainers concerned planning and licensing decisions made by the Council.

The Panel further noted, in support of this, that Mr B could be heard referring to the Respondent as 'councillor' in the recordings of the incident on 30 August 2019. It was apparent, therefore that at least one individual present perceived him as such. The Panel considered that this was a reasonable conclusion to reach, in the context outlined above and was satisfied therefore, in terms of paragraph 3.1, that the Code applied to the Respondent in respect of all three incidents under consideration.

The Panel accepted that the Respondent had not mentioned Mr B or his wife by name in the post on the Luthrie Residents Facebook page. The Panel was of the view, however, that it was evident to anyone reading the post, who had any knowledge of the Luthrie Residents' position, would have inferred that the Respondent was blaming the owners of Carphin House or their staff of the acts of vandalism he had described. The Panel was further of the view that the Respondent's position of authority would have added a certain amount of gravitas to the post. The Panel noted that the complainers had given evidence, under oath, that they were not responsible and, further, that there was no suggestion that the Respondent had any evidence to support this accusation. The Panel considered, therefore, that the accusation was unfounded. The Panel considered that, in making unfounded and serious allegations as to Mr B's conduct, on a public forum, the Respondent had failed to treat him with courtesy and respect. The Panel was particularly concerned that the post had been published at a time of considerable tension between the Luthrie Residents Group and the complainers and considered that it could have only served to enflame the situation.

Turning to the second matter, being the Respondent's email to the wedding guest of 19 August 2019, the Panel was satisfied that while Fife Council subsequently considered there had been a breach of the enforcement order and reported the matter to the Procurator Fiscal, this had not happened at the time the email was sent. The Panel noted that the question of whether the enforcement order had been contravened was not one for the Respondent to make. The Panel noted that the wedding guest would have been entitled to accept what was being said as being accurate, given the Respondent's position of authority. The Panel considered that, in supplying incorrect and unverified information about whether the specific wedding had been held in contravention of the enforcement order, which had the potential to damage the complainers' business relationships, and in presenting it as a factual situation, the Respondent had again failed to treat them with respect.

In respect of the third matter, having watched the video footage carefully, the Panel was satisfied that it was clearly evident from it that the Respondent had made some attempts to diffuse the situation on 30 August 2019 and to usher Mr A off the road. While the Panel noted that the Respondent had stood in the middle of the track at a certain point during the incident and had briefly joined other individuals in pointing his mobile phone at Mr B, it was not of the view that his actions, during the incident, could reasonably and objectively be perceived as him having been blocking the Wynd and the complainers' access. The Panel noted that the complainer had been using a dashboard camera and wearing a body camera during the incident (albeit the latter device had not functioned), as advised by the police, and accepted that the Luthrie residents may well have received similar advice in respect of capturing digital evidence. The Panel was not satisfied, therefore, that the Respondent failed to treat the complainers with courtesy and respect or that he had harassed them in respect of the third incident.

The Panel was satisfied that, on the face of it, the Respondent had contravened paragraph 3.2 of the Code in respect of incidents one and two. The Panel further determined, in respect of the first incident and in making unfounded and serious allegations as to the complainers' conduct the Respondent's behaviour towards them amounted to harassment and was also a breach of paragraph 3.6 of the Code. Before coming to a finding on the matter, however, the Panel considered the provisions of Article 10 of the European Convention on Human Rights, which concerns the right to freedom of expression.

The Panel noted that the Courts have interpreted Article 10 widely and have found that the enhanced protection enjoyed by politicians can extend to comments which some may consider to be inappropriate, offensive and emotive. In addition, comments made in the political context, which amount to value judgments, are tolerated even if untrue, as long as they have some, or any, factual basis. The Panel accepted, therefore, that the Respondent had a right to make value judgements. It agreed, however, that it was not possible to conclude that the Respondent's inference in the post that Mr B, his wife or any of their employees were responsible for the severing of the padlocks and the death of the cow had any basis in fact. In relation to the email regarding planning enforcement action, the Panel recognised that the Respondent was of the view that a breach of the planning arrangements had taken place. The Panel determined, however, that the protection afforded by Article 10 did not extend to him representing his opinion as that of Fife Council, even if this was inadvertent, especially in the circumstances where it was likely that his statement could cause distress to the recipient and complainers. The Panel was further satisfied that the right to freedom of expression did not extend to harassment, particularly where such conduct could have had a serious impact on the complainers and their business. As such, the Panel found that the Respondent was not entitled to the enhanced protection for afforded to politicians under Article 10. The Panel was satisfied that as the Respondent's conduct, in respect of the Facebook posting and email was unacceptable, a finding of breach and subsequent application of a sanction, was justified in the circumstances and would not amount to a contravention of Article 10.

The Panel concluded, therefore, that the Respondent had contravened paragraphs 3.2 and 3.6 of the Councillors' Code of Conduct.

Evidence in Mitigation

The Respondent's representative advised that the Respondent had served as a Royal Navy Commodore for some 31 years and was a veteran of the Falklands conflict. The Respondent's representative advised that the Respondent had an unblemished record since being elected as a councillor in 2017 and that he had been made the Deputy Leader of the Conservative Group. The Respondent's representative noted that, at the time the Respondent first became involved with the residents' group, he was still a relatively inexperienced councillor and had felt compelled to step in to assist them when other elected members declined to do so. The Respondent's representative accepted that, with the benefit of hindsight, it was arguable that the Respondent had become too personally invested in the matter, but noted that it was a complex situation.

The Respondent's representative asked the Panel to consider that the breaches of the Code, as found, were at the lower end of the scale in terms of seriousness, were limited in duration and had caused minimal, if any, actual harm.

SANCTION

The decision of the Hearing Panel was to suspend the Respondent, Councillor Miklinski's entitlement to attend the next two full meetings of Fife Council.

The decision was made in terms section 19(1)(b) of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

Reasons for Sanction

In reaching its decision on sanction, the Panel noted, in mitigation, that the Respondent had co-operated fully with the investigative and adjudicatory processes. The Panel further noted the Respondent's service and contribution to public life. The Panel accepted that the Respondent was relatively inexperienced as a councillor at the time and that he now accepted that he may have become too personally vested in the dispute between the complainers and residents' group.

The Panel considered, however, that the requirement for councillors to refrain from conduct that is discourteous, disrespectful and that could amount to harassment, is an important feature of the Code, as a failure to do so can undermine relationships and public confidence in the role of a councillor and the Council itself. The Panel noted that councillors should be able to make points and engage with members of the public in a constructive, respectful, courteous and appropriate manner, without providing misleading information or resorting to personal attacks and being offensive. In this case, the Respondent had failed to conduct himself in a courteous and respectful manner and, instead, had behaved in a manner that amounted to harassment. The Panel was concerned that the Respondent had not considered the potential impact of his actions on the complainers and others.

The Panel was nevertheless of the view that the Respondent's conduct did not warrant a more severe sanction. This was because the contraventions found were restricted to one social media post and an email, and there had been no personal gain.

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: 27 November 2020



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