

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at the Council Chambers, Irvine, on Friday 26 January 2024.

Panel Members: Ms Helen Donaldson, Chair of the Hearing Panel
Ms Ashleigh Dunn
Ms Anne-Marie O'Hara

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint reference LA/NA/3707, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Tom Marshall (the Respondent).

The Respondent was represented by Mr Chris Weir, Solicitor, Anderson Strathern.

Referral

Following an investigation into a complaint received on 1 February 2022 about the conduct of the Respondent, the ESC referred a report to the Standards Commission on 26 October 2023, in accordance with the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The substance of the referral was that the Respondent had failed to comply with the provisions of the Code at a Local Review Body meeting on 15 December 2021 and, in particular, that he had contravened provisions concerning the declaration of interests and taking decisions on quasi-judicial and regulatory matters, being as follows:

Declaration of Interests

5.1 For each particular matter I am involved in as a councillor, I will first consider whether I have a connection to that matter.

5.2 I understand that a connection is any link between the matter being considered and me, or a person or body I am associated with. This could be a family relationship or a social or professional contact.

5.5 I understand my connection is an interest that requires to be declared where the objective test is met – that is where a member of the public with knowledge of the relevant facts would reasonably regard my connection to a particular matter as being so significant that it would be considered as being likely to influence the discussion or decision-making.

5.6 I will declare my interest as early as possible in meetings. I will not remain in the meeting nor participate in any way in those parts of meetings where I have declared an interest.

Quasi-Judicial and Regulatory Matters

7.1 I need to be especially vigilant when I am making a decision on a quasi-judicial or regulatory application. For these applications, I need to ensure there is a proper and fair hearing of the application and I must avoid any impression of bias in the whole decision-making process.

7.4 In dealing with these applications, I WILL:

- a) throughout my involvement with the entire application process act fairly and be seen to act fairly;*
- b) declare interests where required in terms of Section 5 of this Code and leave the meeting until the matter has been determined;*
- c) deal fairly and impartially with all parties involved in the application;*

7.5 In dealing with such applications, I WILL NOT:

- a) pre-judge or demonstrate bias or be seen to pre-judge or demonstrate bias;*
- b) indicate or imply support for or opposition to an application nor indicate my voting intention prior to the appropriate meeting where the application will be considered;*
- e) express any view on the application before the appropriate meeting where the application will be considered. If I do so I will not participate in any aspect of the decision-making nor vote on the application;*

f) formulate my conclusions on an application until all available information is to hand and has been duly considered by me at the meeting where the application will be considered;
g) express any indicative or provisional views in the course of my involvement in any aspect of the application;
or
h) otherwise act improperly or do anything which could reasonably create a perception that I have acted improperly.

The Standards Commission determined that it was both proportionate and in the public interest to hold a Hearing to decide whether a breach of the Code had occurred. The Hearing was initially scheduled to be held on 9 January 2024. Following a request from the Respondent's representative, the Hearing was postponed to 26 January 2024.

Preliminary Matters

The Panel members confirmed that they had watched a webcast recording of the Local Review Body meeting on 15 December 2021 in preparation for the Hearing.

Evidence Presented at the Hearing

Joint Statement of Facts: The Panel noted that a joint statement of facts had been agreed between the ESC and the Respondent's representative. This recorded that it was not in dispute that the Respondent had visited the Complainer's street on 13 December 2021, in his capacity as a councillor, and he had spoken to the Complainer's then neighbours about the Complainer's planning application to build an extension to his home.

The joint statement of facts recorded that it was not in dispute that the Local Review Body held a hearing on the application on 15 December 2021. The Respondent chaired the hearing and did not declare an interest when the Complainer's planning application was considered. A council officer advised that the planning application had been refused as, in particular, it had been considered to be "out of character with the original design and scale of the [Complainer's] existing dwellinghouse and neighbouring properties within the street and would be to the detriment of the character and amenity of the area".

The joint statement of facts recorded that after the Complainer presented his case, the Respondent stated that he had visited a street adjacent to the Complainer's one "a number of weeks ago". The Respondent noted that virtually every house there was the same, with "no two-storey extension houses at all". The Respondent noted that the application had been refused by officers "because of sighting, design and the proportion [being] out of character", and asked the Complainer whether he thought that his proposed "extension would be out of character" with other houses in its vicinity.

The joint statement of facts recorded that it was not in dispute that while other elected members had asked the Complainer questions, the Respondent did not then make any further comments on the merits of the application or on any points raised during the subsequent discussion. The Respondent, as chair, then called for a discussion on the matters raised. Another councillor on the Local Review Body advised that in her experience, there was a lot of individuality in respect of the houses on the adjacent street and that they were "not really all the same". Following another councillor moving to accept the recommendations in the council's report to refuse the application, which was then seconded, a further councillor proposed an amendment, which was also seconded. The Respondent, then called for a vote on the application which was refused by four votes to two. The Respondent voted against the application.

Webcast of Local Review Body Hearing on 15 December 2021: The Panel noted that, when making a statement in support of his planning application at the hearing on 15 December 2021, the Complainer advised that "someone from the Council" had visited his neighbours two days earlier to ask why they were objecting

to the extension. The Panel noted that the Respondent did not respond or identify himself as the individual in question.

Introductory Comments from the ESC

The ESC advised that the Complainer had applied unsuccessfully to the Council for planning permission to build a two-storey extension to his house. After his application had been rejected twice by council officers, the Local Review Body considered an appeal at its meeting on 15 December 2021. The Complainer was concerned that the hearing held by the Local Review Body into his appeal was not conducted fairly due to bias. This was because the Respondent had undertaken a site visit to his street on 13 December 2021 and when speaking to two of the Complainer's then neighbours, Neighbours 1 and 2, had expressed the view that the extension would look out of place. The Complainer contended that this demonstrated that the Respondent had pre-judged the application and, therefore, he should have declared an interest and taken no part in the discussion or decision-making at the Local Review Body hearing on 15 December 2021.

The ESC advised that he considered there were three key questions for the Panel to determine, those being whether the Respondent had:

- expressed a view on the appropriateness of the application in advance of the Local Review Body meeting on 15 December 2021;
- introduced himself as a councillor during the site visit; and
- pre-judged the application and given rise to a suspicion of bias by then failing to declare an interest and by taking part in the discussion and decision-making at the meeting on 15 December 2021.

Evidence from Witnesses for the ESC

The ESC led evidence from three witnesses, being the Complainer and two of his former neighbours; Neighbour 1 and Neighbour 2.

Neighbour 1: Neighbour 1 advised that she was at home on 13 December 2021 when the Respondent arrived unannounced at her home. Neighbour 1 advised that the Respondent had said he was from the planning department and had asked why she and her husband had objected to the Complainer's planning application. Neighbour 1 advised that they had not objected and that the Respondent must have the wrong house. Neighbour 1 indicated that the Respondent had advised that while he did not have the paperwork with him, he thought she and her husband had objected. Neighbour 1 advised she could not recall whether the Respondent had introduced himself, and only remembered him saying that he was from the Council's Planning Department. Neighbour 1 advised she did not recall the Respondent having offered any identification, such as a business card.

Neighbour 1 explained that after the Respondent had asked whether she had received correspondence about the application, she had confirmed that she had, and had pointed out the Complainer's house. Neighbour 1 advised that when she told the Respondent she considered the proposed extension would look "stunning", he had noted that the Council were trying to ensure houses in the area looked the same and had noted the extension would make the Complainer's house look different. Neighbour 1 advised she *thought* the Respondent had said that the extension would look out of place compared to the rest of the houses in the street, but that she could not be sure, given the amount of time that had elapsed since the visit.

Neighbour 1 advised that her recollection was that she and her husband were both outside the house facing the Respondent when the conversation took place. Neighbour 1 explained that while they were in the garden near the rear door, their position had been some distance from the street as they had a long driveway that could fit approximately four cars back-to-back.

Neighbour 1 advised that she visited the Complainer's house later that day, as she wanted him to know that she and her husband had not objected to the application. Neighbour 1 explained she spoke to the

Complainer's wife and told her someone from the council had visited and asked why she and her husband had objected to the application. Neighbour 1 noted that she had advised the Complainer's wife that she had told the visitor they had not done so.

Neighbour 1 indicated that when she encountered the Complainer several weeks later, he had asked whether she knew the name of the individual who had visited her on 13 December 2021. Neighbour 1 advised that when she indicated she did not, the Complainer had asked her to look at a photo of the Respondent on the Council's website and advise whether it had been him. Neighbour 1 stated that she had proceeded to do so, had confirmed the visitor was the Respondent and had advised the Complainer accordingly.

In response to questions from the Respondent's representative, Neighbour 1 accepted that it was possible the Respondent had introduced himself and that she had simply not heard him say his name. Neighbour 1 advised she was nevertheless sure that the Respondent had not offered a business card to either her or her husband.

Neighbour 1 stated that she was sure the Respondent had stated he was from the Council's Planning Department, albeit she accepted that when she had subsequently searched for him on the Council's website, he had been easy to find and was clearly identifiable as a councillor. When asked whether it would have been credible for the Respondent to have introduced himself as someone from the Council's Planning Department, when it was so easy to check and establish that he was not, Neighbour 1 was unable to offer any explanation.

When asked by the Panel about whether the Respondent had said it was his opinion that the extension would look out of place, or that of the Planning Department, Neighbour 1 stated that she did not think the Respondent was expressing his own view.

Neighbour 2: Neighbour 2 advised that he had been inside his house with his wife, Neighbour 1, when a tradesperson working on their property had advised them that they had a visitor. Neighbour 2 advised that he had then followed his wife to the rear door of the property to speak to the Respondent. Neighbour 2 stated he did not recall the Respondent as having introduced himself as Councillor Marshall or having offered any business card or other form of identification. Neighbour 2 advised he thought the Respondent had stated he was from the "planning office".

Neighbour 2 indicated that he had pointed out the Complainer's house after the Respondent asked which property was the subject of the planning application. Neighbour 2 advised that as he experienced hearing difficulties, he had relied on his wife relaying some of the conversation. Neighbour 2 stated that he recalled, nevertheless, that the Respondent said the proposed extension would look out of place on the street. Neighbour 2 advised that he and his wife were standing at the bottom of the steps to the rear door, facing the Respondent, during the conversation. Neighbour 2 noted that the rear door to the house was at the end of a driveway, which was long and could fit four cars.

In response to questions from the Respondent's representative, Neighbour 2 accepted it was possible that the Respondent had introduced himself and that he had simply not heard him say his name. Neighbour 2 advised that while he thought the Respondent had said he was from the planning department, he accepted it was possible that he was mistaken or that it could have been his wife who had relayed that information.

In response to a question from the Panel, Neighbour 2 advised that he did not know whether the Respondent had said it was his own view, or that of the Planning Department, that the extension would look out of place.

The Complainer: The Complainer advised that his wife had told him, before the Local Review Body hearing on 15 December 2021, about Neighbour 1 having advised that someone from the council had visited her property to discuss the application. The Complainer advised that, at the time of the hearing, he was unaware

of the identity of the individual in question, which was why he mentioned the visit when making his supporting statement at the hearing.

The Complainer advised that shortly after the hearing he had encountered Neighbour 1 and had asked her to describe the individual who had visited her home. The Complainer indicated he had suspected, from the description Neighbour 1 provided, that it had been the Respondent. The Complainer explained that as he had not wanted to taint Neighbour 1's recollection, he had not named the Respondent and, instead, had simply asked her to look at the photos of all elected members on the Council's website to see if she recognised any of them as being the individual in question. Neighbour 1 had then reported the next day that she was sure it had been the Respondent.

The Complainer stated that Neighbour 1 had advised him, during their conversation after the hearing, that the Respondent had asked her whether she thought the extension would be too big and not in keeping with other properties in the area; and that, in response, Neighbour 1 had pointed out other properties that had been extended.

The Complainer advised that he sent a letter of complaint to the Council Leader on 21 January 2022, in which he advised that the Respondent had suggested to Neighbours 1 and 2, during the site visit, that the extension would look out of place. The Complainer explained, in this letter, that he had raised concerns during the hearing about the visit but that these had been quickly dismissed by other elected members present on the grounds that a council officer would have shown identification.

The Complainer advised that he did not understand why the Respondent had not disclosed, at the hearing, that he was the individual who had undertaken the site visit and spoken to Neighbours 1 and 2. The Complainer advised he felt that this failure had influenced other elected members present and that this had meant he was not given a fair hearing.

In response to questions from the Respondent's representative, the Complainer advised that he was unsure whether, when he spoke to her after the hearing, Neighbour 1 had told him the visit had been from a council official or a person from the council but that it had been definitely one or the other. The Complainer accepted that it was council officers who had reached the view that the extension would look out of place, which was why they had rejected the application. The Complainer stated, nonetheless, that the Respondent had not identified himself as an elected member when speaking to Neighbours 1 and 2 and he had not disclosed the visit during the hearing. The Complainer advised that he was certain the Respondent had concealed the visit in an attempt to influence other elected members.

Submissions made by the ESC

The ESC noted that there was no dispute that the Respondent was acting as a councillor both during the site visit and at the Local Review Body meeting on 15 December 2021 and, therefore, that the Code applied.

The ESC contended that the Respondent had failed to disclose his site visit and had failed to avoid the perception that he had pre-judged the application or demonstrated bias. The ESC argued, therefore, that the Respondent should have declared an interest in the application and should not have participated in the discussion or decision-making. In support of this contention, the ESC noted that the Respondent failed to mention his visit to the Complainer's neighbours despite this having taken place only two days before, and despite him having referred, at the meeting, to having visited another street in the vicinity.

The ESC noted that the question of whether and how the Respondent introduced himself to neighbours 1 and 2, and exactly what he had said during the visit was in dispute. The ESC noted that the Respondent's partner had advised the Investigating Officer that she had overheard the conversation between the Respondent and neighbours 1 and 2. The ESC contended that it was apparent, from the evidence provided

by neighbours 1 and 2 about where everyone was positioned and the length of their driveway, that she would not have been able to do so from her location in a parked car on the road. The ESC argued, therefore, that the Respondent's partner's evidence should be discounted.

The ESC noted that the Respondent's position was that he had not realised, at the Local Review Body meeting on 15 December 2021, that the Complainer was referring to him when he mentioned someone from the council had visited his neighbour as, firstly, he was not a council officer and, secondly, he had met two neighbours. The ESC contended that this position was simply not credible and that the Respondent must have known the Complainer was referring to the visit he had undertaken.

The ESC accepted that the Respondent was entitled to undertake a site visit and to have formed a preliminary view. The ESC noted, however, that the Respondent was not allowed to share this view with others before the meeting at which the application was to be determined. The ESC argued that the only credible explanation for the Respondent's failure to disclose that he was the individual in question was because he had not wanted to disclose what he had said to the neighbour, as he would have been aware that his comments gave the impression of him having pre-judged, or been biased against, the application.

The ESC noted that the Respondent advised his office, during the investigation, that the first time he had reached the view that the proposed extension would look out of place was at the Local Review Body meeting on 15 December 2021. The ESC contended that this was not plausible as the only reason a councillor would undertake a site visit would be to enable them to form a preliminary view on the application to be considered. The ESC further contended that it was not plausible for the Respondent to suggest that he had not read the papers for the Local Review Body meeting on 15 December 2021 before the site visit, given he would not otherwise have known that the reason the application had been rejected previously by officers related to concerns that the proposed extension would look out of place.

The ESC noted that Section 7 of the Code requires councillors, when making decisions on quasi-judicial and regulatory matters (such as planning applications), to be "especially vigilant" and to ensure there is a proper and fair hearing. The ESC noted that councillors are obliged not only to act fairly and without bias, but also to be seen to be acting as such during the whole decision-making process. The ESC further noted that councillors must not indicate or imply opposition to an application before the meeting where the application is to be considered and that if they do so, they are required to declare an interest and refrain from participating in the decision-making. The ESC argued, in this case, that the Respondent expressed the view to Neighbours 1 and 2 that the proposed extension would look out of place. The ESC contended that, by doing so, the Respondent provided an indicative or provisional view the application, in contravention of Section 7 of the Code.

The ESC accepted that the Respondent had no prior links to the application. The ESC contended, however, that by expressing an opinion to the neighbours he showed that he had pre-judged the matter, the Respondent's action created a connection to, and an interest in, the application. The ESC argued that a member of the public, with knowledge of the facts, would consider that the Respondent's connection to the application was significant enough as to influence his decision-making. This was because he told members of the public that he did not think the proposed extension would fit in with the other houses, suggesting that he had already made his mind up on the application. The ESC concluded, therefore that as the objective test was met, the Respondent should have declared an interest at the Local Review Body meeting on 15 December 2021 and should not have participated in the decision. The ESC concluded that, by failing to do so, the Respondent had also contravened Section 7 of the Code.

The ESC noted case authorities cited by the Respondent's representative. The ESC accepted that while the authorities on whether real or apparent bias on the part of councillors gave rise to grounds for appeal were of interest, he noted that they concerned adherence to planning legislation, rather than the Code. The ESC

noted that the purpose of the Code was not simply to preclude successful challenges, but also to maintain high ethical standards. The ESC argued that the question of whether the Respondent's conduct was material to the outcome of the planning decision and / or any subsequent appeal against the Council's decision was irrelevant to the question of whether the Code had been contravened.

In response to questions from the Panel, the ESC accepted that neither Neighbour 1 nor Neighbour 2 had been able to testify, with any certainty, that the Respondent had expressed his own personal view on the proposed extension during the visit. The ESC accepted that the testimonies they had given at the Hearing on this was inconsistent with the evidence they provided during his investigation, to the effect that the Respondent had told them he thought the extension would look out of place. The ESC argued that as the accounts of the visit given by both neighbours during the investigation were more contemporaneous, they were more reliable and should be accepted by the Panel as such. The ESC noted that today's Hearing was the first time any reference had been made to the views of the Planning Department.

Evidence from Witnesses for the Respondent

The Respondent's representative led two witnesses, being the Respondent himself and the Respondent's partner.

The Respondent's partner: The Respondent's partner advised that she had been with the Respondent when they were in the neighbourhood, and he had suggested they drive down the road to see where it was proposed that an extension would be built. The Respondent's partner stated that the Respondent was unaware of the exact address, so had parked the car outside the property of Neighbours 1 and 2. The Respondent's partner advised that the Respondent had spoken to a tradesperson who was in the garden, who had proceeded to enter the house and fetch Neighbours 1 and 2. The Respondent's partner advised that she was able to witness the Respondent present his business card to Neighbours 1 and 2, although she could not see whether they took it or not. This was because while the Respondent's partner could see Neighbours 1 and 2 were standing in the doorway, they were not fully visible to her from her position in the car. The Respondent's partner stated that as her car window was down, she could "more or less" hear the Respondent's side of the conversation. The Respondent's partner stated that she heard the Respondent introduce himself as Councillor Marshall and that she was sure he had not said he was from the Planning Department.

In response to a question from the ESC, the Respondent's partner confirmed that she was in a car parked at the other end of the driveway to where the Respondent and Neighbours 1 and 2 were located.

In response to a question from the Panel, the Respondent's partner advised that she heard the Respondent ask Neighbours 1 and 2 whether they were happy with the proposed extension but did not hear him make any further comment on it.

The Respondent: The Respondent advised that he had been an elected member for approximately 20 years and, at the time of the events in question, had chaired the Council's Planning Committee for some five years. The Respondent indicated that while the Local Review Body held roughly 20 hearings per year, his impartiality had never previously been questioned.

The Respondent advised that, when driving past it on 13 December 2021, he had recognised the name of the Complainer's street, as being one where a property that was subject to an appeal was located. The Respondent stated that although he had not read the papers at that stage, he thought he would go and have a look. The Respondent advised that when he had seen a tradesperson in a garden in the vicinity, he had stopped to ask which property was the subject of the appeal. The Respondent stated that the tradesperson had gone inside the house to alert Neighbours 1 and 2. The Respondent said that when Neighbours 1 and 2 came to the door, he had introduced himself and offered his business card, as was his normal practice. The

Respondent advised he always carried business cards in his wallet and was sure he had offered one to Neighbours 1 and 2, albeit he could not recall whether they had accepted it. The Respondent contended that he always introduced himself as a councillor as he would always seek to build a rapport with members of the public, as potential voters.

The Respondent contended that he asked Neighbours 1 and 2 whether they were happy with the proposed extension, and they had confirmed that they were. The Respondent advised that he had engaged in a short conversation with them, before leaving. The Respondent stated that he had not said anything to the effect that he considered the proposed extension would look out of place or character.

The Respondent advised that, at the Local Review body meeting on 15 December 2021, he was aware that the application had been rejected by officers on two previous occasions. The Respondent accepted that the Complainer had referred, at the hearing on his application, to someone from the Council having visited his neighbours two days before. The Respondent contended, however, that he had not recognised that this was a reference to his visit as he was not an officer and there could have been any number of reasons why officers from, for example, the roads or planning teams could have been at the site.

The Respondent advised that he had read the papers between his visit on 13 December and the meeting on 15 December 2021, which is why he had asked the Complainer about the concerns raised by officers in respect of whether the proposed extension would look out of place. The Respondent stated that as this was why the application had been rejected previously, he considered it was important to give the Complainer, as the applicant, the opportunity to respond to these concerns. The Respondent advised that he had then given other elected members time to discuss the application before calling for a vote. The Respondent stated that he had not tried to influence other elected members at the meeting and noted that he had not responded or intervened when another councillor spoke in favour of the application.

The Respondent advised that he had no personal connection to the application and that he had no reason whatsoever to be biased or prejudiced against either it or the Complainer. The Respondent further advised that his decision on the application had been based solely on its merits. The Respondent contended that he did not form a view on the application before the Local Review Body meeting on 15 December 2021 and that he had only undertaken the site visit in order to see for himself what the street looked like.

In response to questions from the ESC, the Respondent accepted it was possible he may have asked Neighbours 1 and 2 whether they thought the extension might look out of place but contended that at no point had he suggested that this was his view or indicated they should object to the application. The Respondent noted that doing so would have been entirely futile, given the deadline for the submission of any objection would have long since expired. The Respondent advised he was not there to gather objections; he had simply visited the street as he was passing and wished to see what the properties looked like.

In response to questions from the Panel, the Respondent confirmed he could not recall exactly where Neighbours 1 and 2 had been located during their conversation, but thought they were on the footpath facing him, near the rear corner of the house. The Respondent confirmed that his car had been parked on the road at the end of the driveway.

When asked by the Panel why he had not mentioned the site visit, despite having referred to a visit he made to an adjacent street, the Respondent advised he had not considered it was necessary as it was not the normal practice for elected members to disclose any site visits.

Submissions made by the Respondent's Representative

The Respondent's representative noted that it was up to the Panel to determine, on the balance of probabilities, whether:

- firstly, the Respondent introduced himself to Neighbours 1 and 2 during the visit;
- secondly, if he had asked them whether they considered the extension would look out of place; and
- thirdly, if so, whether doing so in itself would give rise to any reasonable suspicion of prejudice or bias.

The Respondent's representative reminded the Panel that there was no dispute that elected members were allowed to undertake site visits and to discuss any ongoing applications with any members of the public present.

The Respondent's representative noted that while Neighbours 1 and 2 could not recall the specifics of the conversation, the Respondent had been consistent in his recollection as to what had been said. The Respondent's representative contended that, as such, the Panel should prefer the Respondent's evidence. The Respondent's representative noted that there was a clear difference between expressing a view and asking a question. The Respondent's representative contended that, in this case, it was evident that the Respondent had simply asked Neighbours 1 and 2 whether they thought the proposed extension would look out of place. As such, his site visit should not be viewed as anything other than a fact-finding exercise.

The Respondent's representative noted that the Respondent did not consider himself to be a council official or a representative of its planning department and argued that it was inconceivable, therefore, that he would have introduced himself to Neighbours 1 and 2 as such. The Respondent's representative noted that there was no suggestion whatsoever that the Respondent had a personal interest in the application, which might lead him to try to conceal his identity or role as an elected member during the visit.

The Respondent's representative drew the Panel's attention to the case of *Porter v Magill*¹, which outlined the test for bias as being *whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*. The Respondent's representative referred to the case of *Berky*², in which the Court noted that councillors who have a personal interest must not participate in the decision-making, but recognised that, when making planning decisions, elected members are not required to cast aside any views on planning policy they may have formed when seeking election or acting as councillors. The Respondent's representative argued that *Berky* was analogous to the one before the Panel given there was no suggestion in this case that the Respondent had any personal interest in the planning application.

The Respondent's representative further contended that, as the application had been refused on two previous occasions on the grounds that the extension would be out of character, it was entirely reasonable for the Respondent to have asked the Complainer about this at the hearing on 15 December 2021. The Respondent's representative contended that, by doing so, the Respondent was giving the Complainer a fair opportunity to respond to officers' concerns as outlined in their report on the application. The Respondent's representative contended that it was not, therefore, indicative of the Respondent having pre-judged the application and argued that, if anything, it demonstrated that he was willing to consider all views on the matter.

The Respondent's representative suggested that it was evident from the webcast and the manner in which the Respondent, as chair, had conducted the meeting that he had not attempted to influence any other elected members. The Respondent's representative argued that no fair-minded person, with knowledge of:

- the question the Respondent put to Neighbours 1 and 2 regarding whether they thought the extension could look out of place; and

¹ (2001) UKHL 67

² *Berky, R (on the application of) v Newport City Council & others* (2012) EWCA Civ 378

- his conduct at the Local Review Body meeting on 15 December 2021, including his willingness to hear the Complainer's views and to allow another elected member to explain why she did not consider the extension would be out of character,

would conclude that there was a real possibility that he was, or had been, biased or that he had closed his mind on the merits of the application before the meeting.

The Respondent's representative argued that the Respondent's explanation that he had not thought that the Complainer's mention of a council official having visited his neighbours was a reference to him, should be considered reasonable. This was because the Respondent was not a council official. The Respondent's representative submitted that it was entirely possible that the Respondent had just confused his two visits to the areas. The Respondent's representative argued, in any event, that a failure to mention the site visit in question would not be sufficient to give rise to any reasonable and objective perception of bias or apparent bias. The Respondent's representative reminded the Panel that the test for such a perception was the view of a fair-minded observer, rather than someone (such as the Complainer) who, as a result of having a vested interest in the outcome of the application, might be viewing the matter with an unduly suspicious mind. The Respondent's representative concluded that as the Respondent's conduct did not give rise to any suspicion of bias, or him having pre-judged the application and having closed his mind, there had not been any contravention of the Code.

DECISION

The Hearing Panel considered the evidence led, 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 Marshall; and
2. The Respondent had not breached the Code.

Reasons for Decision

The Panel noted that there was no dispute that the Respondent was acting as a councillor both during the site visit and at the Local Review Body meeting on 15 December 2021. As the Respondent was acting as a councillor at the time of the events in question, the Panel was satisfied that the Code applied.

The Panel further noted there was no dispute that the Respondent participated in the discussion and decision-making on a planning application at a meeting of the council's local review body on 15 December 2021. There was also no dispute that the Respondent did not mention, at the meeting, that he had visited the site on 13 December 2021 and had discussed the application with the Complainer's former neighbours (the Complainer being the applicant).

The Panel noted that the Complainer's former neighbours gave evidence during the ESC's investigation to the effect that the Respondent had stated to them, during his visit, that he thought the proposed extension would look out of place. The Panel noted that, given the passage of time, the neighbours were less sure, when recollecting the visit during the Hearing as to whether he had stated this, or had just asked for their views as to whether that could be the case. The Panel noted that the Respondent denied having expressed a view. The Respondent contended that, instead, he had merely asked whether the neighbours were happy with the application and whether they thought it could look out of place.

The Panel noted that neither Neighbour 1 nor 2 could rule out the possibility that the Respondent had referred to it being the Planning Department's view that the extension would look out of place. Given both neighbours were under the impression that the Respondent was from the Planning Department, the Panel

considered that it may have been the case that the Respondent referred to the reason officers had given for the previous rejections of the application, in any attempt to seek the neighbours' views, and the neighbours assumed he was expressing his own opinion.

Given the passage of time and the (entirely understandable) discrepancies in recollections, the Panel was unable to determine conclusively what exactly had been said during the visit. The Panel was nevertheless satisfied, on the balance of probabilities, that the Respondent raised the possibility of whether the proposed extension could look out of place.

The Panel noted that councillors are entitled to carry out site visits and discuss applications with any interested parties before meetings. The Panel noted that doing so would not in itself necessarily create a declarable interest. The Panel acknowledged that even if the Respondent had questioned whether the proposed extension might look out of place, he would only have been required to declare an interest at the local review body meeting, if the objective test was met. The objective test was where a member of the public with knowledge of the relevant facts (being the application to be discussed and the comments allegedly made by the Respondent during the site visit) would reasonably regard his connection to the particular matter before the local review board as being so significant that it would be considered as being likely to influence his discussion or decision-making at the meeting.

In this case the Panel was not satisfied that any suggestion made by the Respondent to the neighbours that the proposed extension might look out of place would be considered sufficiently significant as to be likely to have an impact on his discussion or decision-making. The Panel noted there would have been nothing to prevent the Respondent from making such a suggestion at the Local Review Body meeting itself.

The Panel concluded, therefore, that the Respondent's actions did not give rise to a declarable interest and, as such, there had not been any contravention of Section 5 of the Code.

The Panel noted that the Respondent did not mention his visit during the Local Review Body meeting, despite the Complainer noting that someone from the council had attended the site and asked whether the neighbours had concerns. The Panel accepted the Respondent's position that he had not claimed to be a council official during the visit, given there would have been no reason for him to have done so and given this would be relatively easy to disprove. In reaching this conclusion, the Panel noted that there was no evidence or suggestion that the Respondent had any personal interest in the application. It noted again that he was entitled to undertake the site visit and discuss the application with any interested parties before meetings. The Panel further accepted the Respondent's point that he wished to engage with potential voters in his capacity as a councillor. The Panel could not, therefore, identify any good reason why the Respondent would have sought to conceal his identity during the visit.

The Panel noted that the Respondent mentioned a visit to a neighbouring street during the Local Review Body meeting on 15 December 2021, but did not state that he had been to the Complainer's street and had spoken to the neighbours. The Panel noted the Commissioner's view was that the only plausible reason for the Respondent not having done so was because he knew he had expressed a view about the application to the neighbours and did not wish to disclose this as he would have been aware that his comments gave the impression of him having pre-judged, or been biased against, the application. The Panel considered it may have been more transparent for the Respondent to have mentioned the site visit, but was not satisfied that a failure to do so was an attempt to conceal it. This was because the Panel noted that it was entirely possible the Respondent did not think it was worth mentioning if, as he alleged, he had not expressed his own view on the proposed extension during the visit. It may also have been the case that the discussion had moved on before the Respondent had thought to do so.

The Panel considered that even if the Respondent had indeed suggested to the neighbours that the proposed extension could look out of place, doing so did not necessarily indicate that he had pre-judged the application in advance of the Local Review Body meeting. The Panel agreed with the ESC that it was implausible to suggest that a councillor would not have formed opinions on aspects of the application or some of the criteria it would be judged against after a site visit, just as they would upon reading the papers on the item prepared for the relevant meeting. The Panel noted, however, that this did not mean they had formed an overall view or pre-judged the whole application and / or would not be open to considering all relevant and material factors (including any verbal submissions) at the meeting or hearing itself. The Panel was of the view that a distinction could be drawn between expressing a view (such as “I think the extension could look out of place”) and demonstrating a closed mind (by, for example, stating “I think the extension would look out of place and I would never vote for an extension that looked out of place” or “I will never vote for an extension in this street”).

The Panel agreed with the ESC that the question of whether the Respondent’s conduct was material to the outcome of the planning decision and / or any subsequent appeal against the Council’s decision was irrelevant to the question of whether the Code had been contravened. This was because the Panel was satisfied that even if a councillor was biased (or to have failed to avoid any suspicion of bias), other elected members could disagree and vote differently to that councillor in respect of whether the application should be accepted or rejected (meaning the bias would not necessarily be material to, or affect, the outcome). The Panel nevertheless agreed with the Respondent’s representative that the question of whether a councillor had been unfair or biased, or had failed to avoid any reasonable perception of having done so, required to be considered objectively.

While the Panel considered the Respondent’s comment, if made, could be said to indicate that he had concerns about the extension and, therefore, the application to be considered, the Panel considered this to simply be a ‘preliminary view’ on one aspect. The Panel did not consider that it either demonstrated that the Respondent had completely closed his mind or was not prepared to consider the merits of the application at the Local Review Body meeting on 15 December 2021.

Having reviewed the webcast of the meeting, the Panel was satisfied that the Respondent gave the Complainer the opportunity to make statements in support of his application and afforded him an opportunity to comment on the question of whether the extension would look out of place (being the reason why the application had been rejected previously). In addition, the Panel was satisfied that the Respondent did not attempt to intervene when another elected member made comments in support of the application.

The Panel noted that the Complainer considered the Respondent had concealed his site visit and that this had influenced other elected members present at the meeting. For the reasons outlined above, the Panel was not satisfied that the Respondent deliberately concealed his visit or conversation with Neighbours 1 and 2. In any event, the Panel did not consider that there was any evidence to support the contention that other elected members could or would have been influenced by the failure to mention the visit. The Panel considered it was evident that the issue of whether the proposed extension would look out of place would always be considered by elected members, regardless of whether the Respondent had mentioned his visit or not, given it was an issue that had been raised by officers and included in the report before them.

The Panel was not satisfied, therefore, that it would be reasonable for a member of the public, with knowledge of the Respondent’s site visit and his conduct at the Local Review Body meeting on 15 December 2021 to conclude, objectively, that the Respondent had failed to ensure he was acting fairly, or that he had failed to avoid any suspicion of pre-judging, bias or a lack of fairness in relation to the application.

As such, the Panel concluded that it had not been established that the Respondent had breached Section 7 of the Code.

Date: 31 January 2024



**Helen Donaldson
Chair of the Hearing Panel**