

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at the Municipal Buildings, Greenock, on Wednesday 10 April 2024.

Panel Members: Ms Ashleigh Dunn, Chair of the Hearing Panel
Ms Helen Donaldson
Mr Paul Walker

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint reference LA/I/3764, concerning an alleged contravention of the Councillors' Code of Conduct dated December 2021 (the Code) by Councillor Innes Nelson (the Respondent).

The Respondent was represented by Mr Malcolm Cameron, of Cameron Macaulay Solicitors.

Referral

Following an investigation into a complaint received on 6 June 2022 about the conduct of the Respondent, the ESC referred a report to the Standards Commission on 14 December 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 and, in particular, that he had contravened paragraphs 3.26, 3.27 and 5.5, which were as follows:

Dealings with my council and Preferential Treatment

3.26 I will not use, or attempt to use, my position or influence as a councillor to:

- a) improperly confer on or secure for myself, or others, an advantage;*
- b) avoid a disadvantage for myself, or create a disadvantage for others; or*
- c) improperly seek preferential treatment or access for myself or others.*

3.27 I will avoid any action which could lead members of the public to believe that preferential treatment or access is being sought.

Declaration of Interests

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.

The ESC also considered whether any of the provisions in Section 7 of the Code had been breached. The relevant paragraphs considered by the Panel are as follows:

Taking Decisions on Quasi-Judicial or Regulatory Applications

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 [the] 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*

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 submitted an objection letter to the Council about the Local Development Plan on 31 May 2017 and, in particular, to the proposed redevelopment of an industrial site in the Spango Valley, Greenock.
- On 29 June 2018, the Respondent submitted a further letter to the Council in response to a consultation on the Local Development Plan and the proposed redevelopment of the site.
- A planning application for the development of the former industrial site (the application) was submitted on 10 February 2020.
- the Respondent attended a meeting of the Council's Planning Board, on 5 January 2022, at which the application was first considered. The Respondent moved that consideration of the application be continued in order to allow a site visit to take place. The Respondent's motion was carried, and site visits took place on 26 January and 15 February 2022.
- On 2 March 2022, the Respondent attended a further meeting of the Planning Board and moved an amendment to grant the application with conditions set out in the Council's report, which restricted the number of houses to be built on the site. The Respondent's amendment was carried.
- The Respondent did not declare any interests at either the meeting on 5 January or 2 March 2022.
- The shortest distance across the A78, from the development site boundary fence to the boundary of the Respondent's property is 28.14 metres. The distances from the Respondent's farm steading to the edge of the road and bottom of the road bank are 201.64 and 219.61 metres, respectively. The distances from the Respondent's farmhouse to the edge of the road and bottom of the road bank are 208.86 and 227.65 metres, respectively.

Submissions made by the ESC

The ESC advised that the complaint about the Respondent's conduct had been received on 6 June 2022, with subsequent further evidence being supplied by the Complainer's solicitors in November that year.

The ESC noted that, as outlined in the agreed joint statement of fact, the Respondent did not declare an interest in the application for the development of the site at Spango Valley, Greenock, at the Planning Board meeting on 2 March 2022. The ESC noted that the complaint was that the Respondent had failed to do so, despite the site being adjacent to his property and him having previously expressed concern at the development on the Site.

The ESC advised that the Respondent had recorded ownership of his farm on his Register of Interests under both the categories 'Houses, Land and Buildings' and 'Remuneration' as it generated an income for him.

The ESC noted that it was not in dispute that:

- The Respondent sent letters to the Council on 31 May 2017 and 29 June 2018 in which he raised concerns about development of the site as outlined in the proposed Local Development Plan.
- The Respondent attended a Planning Board meeting on 5 January 2022, at which a subsequent planning application for development of the site was considered. The Respondent did not declare any interests at that meeting and moved a motion to continue consideration of the application for a site visit to be undertaken, which was carried by five votes to four.
- At the Planning Board meeting on 2 March 2022, the Respondent moved an amendment to grant the application with conditions as outlined in the planning officers' report, which restricted the number of houses to be built on the site. The amendment was carried by five votes to four, with the Chair casting

a vote in favour of the motion after other members had voted by five to three in favour of the amendment.

The ESC advised, however, that the following matters, of potential relevance, were in dispute:

- that the Respondent assisted a third-party constituent to submit an objection, in 2017, to the development of the site as outlined in the proposed Local Development Plan; and
- that the Respondent was sent or received a copy of a Neighbour Notification (the Council defined this within the notice as one which is issued to the ‘owner, occupier or lessee’ of a property that was either adjacent to, or within 20 metres of, land affected by an application for planning permission) in respect of the application.

The ESC noted that while the Respondent’s position was that he had simply helped the constituent submit his objections, the constituent’s letter was sufficiently similar to the one submitted by the Respondent to support the view that the Respondent had assisted with its contents.

The ESC contended that it was evident that a Neighbour Notification to the Respondent had, at the very least, been prepared, as a copy of one addressed to the owner, occupier or lessee of the Respondent’s property had been found on the file. The ESC accepted that the associated checklist to confirm the Neighbour Notification had been sent had not been completed but contended that he had reached the view that it had been sent, nonetheless, as there would have been no point preparing it if it was not to be issued. The ESC highlighted that the Neighbour Notification on file contained a page entitled ‘Advice to Neighbours’, which stated that the notice had been sent because the recipient’s property was “either adjacent to or lies within 20 metres” of the site that was subject to a planning application and, therefore, the recipient had the right to make comments on the proposal.

The ESC noted that the Respondent had years of experience as a councillor in considering planning applications. While the ESC accepted that the Respondent’s property did not lie within 20 metres of the site that was the subject of the planning application, the Neighbour Notification was clear that his land is, in fact and in the view of the Council, adjacent to the site and could be affected by the proposed development. The ESC argued that, even if the Respondent had not received the Neighbour Notification, he would have been aware that his property was adjacent to the site, particularly as the planning officers’ report on handling, which was considered at both the meetings of the Planning Board in January and March 2022, made specific reference to, and named, his farm. The ESC noted that despite this, and despite him having registered the property on his Register of Interests, the Respondent made no mention of the fact that he owned the farm on either occasion, either by way of a transparency statement or a declaration of interest.

The ESC noted that the Respondent, in his letter to the Council dated 29 June 2018 responding to the consultation on the Local Development Plan consultation, highlighted how his interests as a local farmer would be affected if the proposal to develop housing on the site was agreed. This included problems arising from the increased use of the A78 road and the associated impact on access to the farm that increased congestion would cause, the risk of damage to buildings, and risk to livestock from potential nuisance and vandalism. The ESC noted that, while the Respondent mentioned “neighbouring farms” in his letter, he referred to “this farmhouse and steading”. The ESC contended it was evident from this that the Respondent was expressing concerns about the potentially direct impact the proposed development of the site could have on his own farm.

The ESC drew the Panel’s attention to an email from a Team Leader of the Council’s Planning Department to its then Monitoring Officer, in which he confirmed that there was no Neighbour Notification checklist on file for the application in question. The Team Leader noted that Scottish Government Guidance confirmed that a Neighbour Notification could be served even where the premises were more than 20 metres from the application site. The officer noted that while it was a “matter of judgement”, it was “better to take a precautionary approach”, as there was no requirement for the Council to undertake a Land Registry search

to establish if an area or plot of land was associated with any premises, for the purpose of Neighbour Notification. The ESC suggested that this evidence, when taken with the copy of Neighbour Notification and the Respondent's letter of 29 June 2018, demonstrated that both he, and the Council, considered his farm to be a neighbouring property to the proposed development.

Turning to the application of the facts to the Code, the ESC noted that the Respondent attended the Planning Board meeting on 2 March 2022 in his capacity as a councillor. As such the Code applied to his conduct at that time.

The ESC noted that the conclusion, in his report, that the Respondent should have declared an interest at the meeting on 2 March 2022 was based on the provisions of the Code and, in particular, the objective test that councillors were obliged to consider when determining whether or not they had an interest that required to be declared. The ESC observed that the Code did not make any reference to, or rely on, the Town and Country (Development Management Procedure) (Scotland) Regulations 2013 or the proximity of a property to a proposed development when outlining what constituted a declarable interest.

In this case, the ESC contended that a member of the public, in possession of the relevant facts, would not consider the fact that the Respondent's farm was located, at its boundary, 8.13 metres beyond that which required a Neighbour Notification to be sent, would exonerate him from his responsibilities under the Code.

The ESC noted that the Standards Commission's Guidance on the Code stated that the objective test, outlined in paragraph 5.5 of the Code, assumes that a member of the public has knowledge of the relevant facts. The question councillors were required to consider was whether a member of the public, with this knowledge, would reasonably regard any connection they had to a matter to be considered by the Council as so significant that it would be likely to prejudice their discussion or decision-making in their role as a councillor. The Guidance noted that if the answer was yes, the connection was an interest that required to be declared. The Guidance further noted that the test was an objective one about perception. It was not what a councillor knew about their own motivations and whether the connection would unduly influence them. Instead, it concerned what others would reasonably think, if they were in possession of the relevant facts.

The ESC advised that he considered the Respondent had a connection to the development site. The ESC noted that the Respondent has registered his interest in his farm, both as a financial interest and an interest in respect of houses, land and buildings. The ESC noted that the Respondent's farmland was 28.14 metres away from the development site and, therefore, there was no requirement for a Neighbour Notification to be issued (albeit it appeared one had, at least, been prepared). The ESC contended, however, that this would not lead a member of the public to reasonably conclude that the Respondent had no connection to the application. The ESC argued, instead, that a member of the public would simply be interested in whether the development would have an impact on the amenity of the Respondent's property and / or his income. The ESC argued that the owner or resident of any land immediately adjacent to the site of a planned housing development would normally be affected by it, both in terms of building works and the impact on common amenities and facilities in the vicinity resulting from the number of new families moving into the area. The ESC contended that it was evident, from its contents, that this was the reason why the Respondent had written to the Council, in the terms he had, in June 2018. The ESC highlighted that the Respondent did not state, in this letter, that it was submitted further to concerns raised with him by constituents. Instead, the focus of the letter was on the potential effect of the proposed development of the site on nearby farms and farmers.

The ESC argued that it was clear from the Respondent's 2018 letter that he was against any form of housing development at that time, for reasons related directly to the impact on the amenity of his own property. The ESC noted that such issues could all have had an impact on the income that his farm generated. The ESC contended that none of these potential impacts could have changed in the intervening period and, as such, the objective test was met, meaning that the Respondent had a connection which amounted to a declarable

interest. The ESC argued that the fact the Respondent accepted the planning officers' recommendation to grant the application with conditions, and whether his connection to the matter actually prejudiced his discussion or decision-making, were irrelevant. This was because a member of the public, with knowledge of the impact that the development could have on the Respondent's property and his income, would reasonably regard the connection as so significant that it would be *likely* to prejudice his discussion or decision-making in his role as a councillor when considering the planning application. The ESC contended, therefore, that the Respondent breached paragraph 5.5 by failing to declare an interest at the March 2022 Planning Board meeting and by proceeding to participate in the discussion and decision-making on the application.

The ESC noted that paragraphs 3.26 and 3.27 of the Code provide that councillors should not use, or attempt to use, their position or influence as a councillor to improperly secure an advantage or avoid a disadvantage for themselves, and that they should avoid any action that could lead members of the public to believe that preferential treatment was being sought.

In this case, the ESC argued that the Respondent would clearly be disadvantaged by housing being built on the development site, for the reasons he had outlined in his June 2018 letter to the Council about the Local Development Plan. The ESC contended that the Respondent had used his position as a councillor to propose the site visit at the Planning Board meeting on 5 January 2022 (when the alternative motion had been to grant planning permission subject to the conditions in the Council's Report on handling). The Respondent had also used his position as a councillor to move, at the meeting on 2 March 2022, that the application be approved, subject to the conditions in the planning officers' report that restricted the number of houses to be built on the site.

The ESC noted that the Respondent did not disclose, at any opportunity, the fact that he resided in a property on the other side of the dual carriageway from the site of the proposed development. The ESC contended, therefore, that members of the public with knowledge of the relevant facts, being that:

- the Respondent failed to declare that he lived on the opposite side of the dual carriageway;
- the potential negative impact of the development on the amenity of the Respondent's property; and
- that the Respondent suggested the site visit and subsequently proposed the number of houses to be restricted,

would be concerned by the Respondent's lack of candour. The ESC argued that, as such, the Respondent had breached paragraphs 3.26 and 3.27 of the Code.

The ESC noted that Section 7 of the Code is intended to ensure that councillors make decisions on quasi-judicial or regulatory matters (such as planning applications) in a fair and proper manner. The ESC advised that, having reviewed the Respondent's contribution at the Planning Board meeting on 2 March 2022 when the decision on the application was made, he was satisfied he appeared to have ensured it was given a proper and fair hearing.

The ESC noted that the Respondent's correspondence to the Council in 2017 and 2018 concerned its Local Development Plan, rather than the planning application (which was not submitted until 2020). The ESC acknowledged that the Code permits and, indeed, encourages councillors to participate in discussion and debate on policy and strategic issues. The ESC noted, in any event, that the position the Respondent expressed in 2017 and 2018 (which opposed the erection of housing at the application site), was contrary to that he ultimately voted for at the Planning Board meeting on 2 March 2022 (which was to permit housing on the site, to the extent proposed by planning officers). The ESC advised that he considered the Respondent's view on the development of the site, as expressed in 2017 and 2018, to be sufficiently different to the position and decision he reached on the planning application as to demonstrate there had not been any bias or pre-judging on his part. The ESC advised he had not found any evidence to suggest the Respondent advocated for (or objected to) the application. The ESC concluded, therefore, that the Respondent had not breached any of the provisions under Section 7 of the Code.

In response to a question from the Panel about whether his conclusion that there had been a breach of paragraphs 3.26 and 3.27 was based solely on the alleged lack of candour on the part of the Respondent in not being open about his connection to the application, the ESC advised that he considered it would be reasonable for a member of the public, with knowledge of:

- the Respondent's failure to apply the objective test and withdraw from the discussion and decision-making on the matter at both Planning Board meetings; and
- that the Respondent's property could be affected by the development of the site,

to conclude that he may have sought to use his position as a councillor to secure an advantage or avoid a disadvantage in respect of the decision to be made.

When asked whether it followed that, if the Respondent had breached paragraph 5.5 by failing to declare an interest at the Planning Board meeting on 2 March 2022, he would have also breached the corresponding provision in Section 7 (paragraph 7.4(b)), given the item under consideration (the decision on the planning application) was quasi-judicial in nature, the ESC confirmed he agreed that would be the case.

Witness Evidence

The Respondent, Councillor Nelson, gave evidence. The Respondent explained that he had first been elected at a by-election in June 2009 and, since then, served on various council committees including the Planning Board, the Environment and Regeneration Committee, the Policy and Resources Committee, and the Human Resources Appeals Committee. The Respondent advised that he had become a member of the Planning Board when he was elected in 2009 and that he had remained a member until the May 2022 local government election. The Respondent advised that he had a great deal of planning experience, having previously been the chair of a community council.

The Respondent confirmed that the former IBM site at Spango Valley, Greenock was located in his ward. The Respondent further confirmed that he had provided the Council with feedback on the site when it was consulting on its Local Development Plan in 2017 and 2018. The Respondent advised that, at that time, he had been concerned about the loss of industrial use of the site and the impact this may have on jobs in the local area. He had also been concerned about subsidence and flooding on the site, and the impact on the access road if the site was to be used exclusively for housing.

The Respondent accepted that he had made representations to the council on the proposals for the site as part of the consultation on the Local Development Plan. This had included outlining his concerns about the impact of the potential development of the site on the surrounding farmland. The Respondent advised that his comments had not solely concerned his farm and that his intention had been to ensure that planners were aware of, and considered, all issues that might arise following any development of the site. The Respondent stated that he had made his comments in his capacity as a councillor, which was why he had used his designation as 'councillor' in the sign-off to his correspondence. The Respondent confirmed that his representations had been submitted to the Council before the Local Development Plan was agreed in 2019, and long before the planning application was submitted in 2020.

The Respondent advised that he had not maintained his objections to the development of housing on the site. He had changed his position when it became obvious that in order to develop the site, some houses needed to be developed. The Respondent stated that he had been persuaded in 2018 that the worst possibility would be for the site to remain undeveloped and, as such, he no longer had any objection to the proposal to erect 420 houses on it.

The Respondent confirmed that, as a member of the Environment and Regeneration Committee, he had approved the Local Development Plan in 2018 that provided for the erection of 420 houses on the site. The Local Development Plan was then adopted by the council in 2019. The Respondent advised that he had voted in favour of the Local Development Plan at the Environment and Regeneration Committee meeting in

question, and it had been unanimously agreed. The Respondent confirmed that his position on the development of the site had not changed since then.

The Respondent advised that he had attended the Planning Board meetings on 5 January and 2 March 2022 at which the planning application had been considered. The Respondent confirmed that he had proposed a site visit at the meeting on 5 January 2022 and that he had taken part in the consequent site visit on 26 January 2022. The Respondent contended that no officers or fellow elected members had raised any concerns at any time about his involvement in the planning process, including his attendance during the site visit.

The Respondent stated that councils are required to serve a Neighbour Notification on any premises that are within 20 metres of an application site. It is, however, a matter of judgement as to whether a neighbour notification is served where it is only land (rather than buildings), that is within 20 metres of the red boundary identifying an application site. The Respondent confirmed that he did not consider that he was a neighbour of the proposed development site, within the definition of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 which define 'neighbouring land' as means an area or plot of land (other than land forming part of a road) which, or part of which, is conterminous with or within 20 metres of the boundary of the land for which the development is proposed.

The Respondent advised that the reasons he did not consider himself a neighbour of the development site were because:

- he had not received a Neighbour Notification;
- he had crossed the dual carriageway (the A78) to the site and estimated it was approximately 30 metres from his farmland;
- he had looked at Google Maps and noted the site appeared to be some 200 metres from his farm house; and
- the A78 trunk road separated his land from the site.

The Respondent accepted that the Council had provided a copy of the neighbour notification from its file. The Respondent reiterated that this had not been received and indicated that he considered it was only a draft that had not been sent. The Respondent advised that he had reached this conclusion as the box where the plan should have been remained blank and no signature appeared on the covering letter. The Respondent explained that standard Neighbour Notifications normally contained an outline of the plan and the surrounding area within 20 metres of the application site. In addition, the mandatory checklist showing that the Council had followed procedures, including sending any relevant Neighbour Notifications had not been completed and retained on the file.

The Respondent advised that he had previously recused himself from considering a planning application in the past where, despite not having received a Neighbour Notification, he had noticed that a field appearing on the bottom of the plan for an application site belonged to him. The Respondent stated that he would have declared an interest and withdrawn from considering the application in this case had he received a Neighbour Notification or encountered a planning checklist indicating his land might be affected by the proposed development.

The Respondent stated that, in determining whether he had a declarable interest in any planning application, he would always consider whether he was a neighbour in terms of the 2013 Regulations. He would also consider the objective test. The Respondent noted that the Code did not define 'neighbour' and for the reasons previously given, he did not consider himself to be one.

The Respondent advised that he had proposed the site visit as he considered it was important for members of the Planning Board to go and see the site for themselves, in order to be able to be fair to the applicant.

The Respondent noted that the site visit offered Planning Board members the opportunity to see the extent of the site, ask questions and understand what was envisaged in terms of the development. The Respondent confirmed that he was not serving any self-interest or trying to influence the decision on the planning application in any way by proposing the site visit. The Respondent further confirmed that he had not said or done anything during the site visit to detract from or undermine the application.

The Respondent confirmed that he had voted in favour of the application, as modified by the conditions recommended by planning officers, at the meeting on 2 March 2022. The Respondent explained that the applicant company only owned 60% of the site, with another company owning the remaining 40%. The Respondent advised that if the application had been accepted without the recommended conditions, the other company may have lost the opportunity to erect any houses of its own on the site, and this may have led to a legal challenge by that developer against the Council. The Respondent contended that he had been acting in good faith and had not been serving any personal interest when considering the application and acting as a member of the Planning Board. The Respondent reiterated that his concerns over the development of the site, as expressed in his correspondence to the Council in 2017 and 2018 had disappeared completely by the time he considered the application in 2022.

In response to cross-examination, the Respondent accepted that a file copy of a letter usually served as evidence it had been sent. The Respondent reiterated, however, that the absence of the outline of the plan in the copy of the Neighbour Notification on the Council's file and the fact that he had not received it, led him to believe that the document on the file was only an incomplete draft.

The Respondent advised it was his custom and practice to read the papers for the Planning Board in advance of its meetings. The Respondent confirmed that he had done so before the meeting on 2 March 2022 and accepted that his farm was mentioned in the paperwork on the application that was before the Planning Board. The Respondent advised, however, that he considered the farm had only been mentioned as part of an attempt to define the surroundings and that this had not caused him to consider he may have to declare an interest.

The Respondent acknowledged that in his 2018 letter to the Council he had referred to surrounding farmland and potential issues with the road that might be caused by the development. The Respondent accepted that his farm was mainly served by the road in question and that it would have been affected by the other issues he had raised, including the potential for vandalism.

When asked whether he would only have declared an interest in an application had he received a neighbour notification, the Respondent stated that he would have also declared an interest if he had any association to an applicant or objector. The Respondent accepted that objections could be received from anyone and not just recipients of neighbour notifications. The Respondent further accepted that developments could have an impact on all properties in the local area and not just those located within 20 metres of the site boundaries. In addition, The Respondent accepted that the income he received from his farm could potentially have been impacted negatively had some of the issues and concerns he had raised in his 2018 letter arisen.

In response to questions from the Panel, the Respondent confirmed that he had considered the objective test. The Respondent noted that a member of the public with knowledge of the relevant facts, would be aware of the fact that his property was more than 20 metres from the boundary of the development site, that he had agreed to the Local Development Plan in 2019 and, as such, that the concerns he had expressed in his earlier correspondence to the Council in 2017 and 2018 had been assuaged by the time the application was submitted.

The Respondent accepted that a file copy of such a neighbour notification would not necessarily be signed but reiterated that he would have expected it to contain an outline of the plan had it been sent.

Submissions made by the Respondent's Representative

The Respondent's representative noted that there was only one issue before the Panel which concerned the question of whether or not the Respondent should have declared an interest at the Planning Board meeting on 2 March 2022. As such, the Respondent's representative contended that it was illogical and unfair for the ESC to have referred to the Respondent's correspondence to the Council about the Local Development Plan in 2017 and 2018. The Respondent's representative submitted that these matters were unconnected to the subsequent consideration of the planning application, particularly given that the Respondent had subsequently voted in favour of the Local Development Plan that included the proposal to develop and erect 420 houses on the site.

The Respondent's representative reminded the Panel that the burden of proof rested with the ESC and that it was for him to establish, on the balance of probabilities, that his version of events was more likely than not to have occurred. The Respondent's representative contended that the ESC was also required to report the legal presumption of regularity. As the Respondent had been a councillor carrying out official duties in that capacity, as a member of the Planning Board, unless the contrary was proved, he would benefit from the presumption that he had complied with any necessary formalities.

The Respondent's representative noted that the charge against the Respondent, as outlined in the issue identified in the ESC's report, did not address or cover any alleged breach of paragraphs 3.26 or 3.27 of the Code, or any elements mentioned within these provisions. The Respondent's representative argued, in any event, that a breach of these provisions was not substantiated in the ESC's report. The Respondent's representative contended that the ESC had failed to identify any alleged advantage, disadvantage or inappropriate access gained, or avoided, by the Respondent in allegedly seeking preferential treatment, as required for a breach of either paragraph 3.26 or 3.27.

The Respondent's representative noted that, in his report, the ESC appeared to have criticised the Respondent's actions in proposing a site visit at the Planning Board meeting on 5 January 2022. The Respondent's representative contended, however, that proposing a site visit did not in itself demonstrate any bias in favour of or against a planning application, or serve to further any personal interest, given the purpose of such a visit was to provide Planning Board members with further information on which to base their decision. The Respondent's representative argued that there was no evidence that the Respondent had proposed the site visit with any intention of advantaging or disadvantaging the application. Instead, he had done so as he considered it would be beneficial for members of the Planning Board to see the site in question, in order to make an informed decision on the application. The Respondent's representative noted that the Respondent had suggested site visits in regard to other applications on a number of occasions, including another one at the 5 January 2022 meeting.

The Respondent's representative contended that it was evident that the Respondent had been persuaded by the planning officers' report at the meeting on 2 March 2022 and that his decision to propose it be accepted, with the associated conditions on the number of houses to be erected, was based on concerns about the adverse implications on the remainder of the development of the site. The Respondent's discussion and decision-making at the meeting had not been based on any element of self-interest whatsoever.

Turning to paragraph 5.5 of the Code and the objective test, the Respondent's representative argued that a member of the public would require to have knowledge of the context in which the decision was being made and all the relevant facts in order to determine whether the Respondent's connection to the planning application was so significant that it would be likely to prejudice his discussion or decision-making at the meeting. The Respondent's representative further argued that the member of the public would require to make such an assessment objectively, without bias or any preconceived notions, and that they would require to be rational, impartial and fair minded in making such an informed judgement.

In this case, the Respondent's representative argued that the relevant facts were:

1. the Respondent's previous flawless record as a councillor;
2. that, in all sincerity, he did not consider himself a neighbour for the purpose of the application;
3. in terms of the 2013 Regulations he was not an owner of neighbouring land;
4. that a Neighbour Notification had not been issued or received;
5. that he had recused himself in the past as appropriate, when dealing with other planning applications;
and
6. that no conflict of interest had been identified clearly and, as such, the Respondent had no personal motivation or interest in respect of the planning application.

The Respondent's representative contended that a member of the public with knowledge of these facts would not consider that any connection the Respondent had to the application was so significant that it would be likely to prejudice his discussion or decision-making. The Respondent's representative further contended that a member of the public, in making this assessment, would be swayed by the fact that the Respondent had accepted the site could only be developed if housing was erected on it and, further, that he was a member of the Economy and Regeneration Committee that had unanimously approved the Local Development Plan that provided for the erection of 420 houses on the site.

The Respondent's representative submitted that, on balance, the evidence and, in particular, the Council's failure to maintain the mandatory record to show it had been issued, demonstrated that the Respondent did not receive any Neighbour Notification. The Respondent's representative noted that the officer responsible for preparing the checklist that demonstrated that such a notification had been sent in respect of the application in question was no longer employed by the council and had not been interviewed by the ESC. The Respondent's representative noted, in any event, that there was no requirement for a Neighbour Notification to be issued in respect of property situated more than 20 metres from the boundary of the application site. The Respondent's representative noted that the adjacency of any land was not relevant in terms of the 2013 Regulations.

The Respondent's representative reiterated that the Respondent had not considered himself a neighbour for the purpose of determining the planning application. Had he done so, he would have applied the objective test and recused himself from the discussion and decision-making. The Respondent's representative noted that the Respondent had disclosed his interest in his farm twice on his Register of Interests, which demonstrated that there had been no attempt to conceal any potential connection. The Respondent's representative further reiterated that the Respondent had supported the application albeit subject to the condition that a reduced number of houses be erected, in accordance with the planning officers' recommendation and in line with the Local Development Plan.

The Respondent's representative noted that there was no evidence that the Respondent would personally benefit from or be disadvantaged by (either financially or otherwise), the development of the site or approval of the planning application; or that he had acted with anything other than good faith when taking part in consideration of the item at the Planning Board meeting on 2 March 2022.

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 Nelson.
2. The Respondent had breached paragraphs 5.5 and 7.4(b) of the Code.
3. The Respondent had not breached paragraphs 3.26 and 3.27 or any of the remaining provisions in Section 7 of the Code.

Reasons for Decision

The Panel noted that it was not in dispute that, at a Planning Board meeting on 2 March 2022, the Respondent did not declare an interest and, instead, took part in the discussion and decision-making on the Complainer's company's planning application for a development at the former IBM Site in Spango Valley, Greenock.

The Panel noted that it was alleged the Respondent should have declared such an interest because the site that was the subject of the planning application was located in close proximity to his property and because he had previously expressed concerns, in 2017 and 2018, over its development.

The Panel noted that it was not in dispute that, at the Planning Board meeting in question, the Respondent proposed that planning permission be granted subject to the conditions recommended by officers, as outlined in the Council's report (which restricted the number of houses on the site). The Respondent then voted in favour of granting the application, subject to the recommended conditions.

The Panel acknowledged that, while it was the nearest property to the proposed development, the Respondent's farmhouse was still some distance from the site. The Panel further acknowledged that the Respondent had changed his position entirely in respect of the erection of houses on the site, since his letters expressing concern in 2017 and 2018 and that he had, in 2019, supported the Local Development Plan proposing this, while sitting as a member of the Environment and Regeneration Committee. The Panel also acknowledged that the Respondent had supported the recommendation made by officers to grant the application at the Planning Board meeting on 2 March 2022, albeit in an amended form with conditions on the number of properties to be built.

The Panel noted that while there was evidence on the file to suggest that the Council had prepared a Neighbour Notification to advise the Respondent of the planning application and proposed development, and his right to make comments on the proposal (in his capacity as a private individual, rather than a councillor), the Respondent disputed having ever received this correspondence. The Panel accepted the Respondent's evidence in this regard as credible and reliable. Given this, and the fact that the copy of the Neighbour Notification on file was incomplete and no checklist confirming it had been issued had been retained, the Panel was unable to conclude, on the balance of probabilities, that it had been sent.

The Panel was nevertheless of the view that the Respondent had a connection to the planning application. This was because he owned a farm in the vicinity, in which he had registered both a financial and non-financial interest and because he had previously expressed concerns about the development of housing at the site. The Panel noted that the Respondent may have referred to himself as a councillor in the sign-off to his correspondence to the Council, in 2017 and 2018, when commenting on the intended erection of housing on the site, as proposed by the Local Development Plan. The Panel nevertheless considered it was evident, from the content of his letters and the references to the impact on farmers in the local area (of which he was one) that the Respondent was, at least in part, commenting and providing a perspective as a private individual.

The Panel considered that, having applied the objective test under paragraph 5.5 of the Code, the Respondent should have reached the view that his connection to the application would be reasonably regarded as being so significant that it would be considered as being likely to affect his potential discussion and decision-making on the application under consideration. The Panel noted that it did not have sufficient evidence before it to confirm whether the outcome of the decision on the matter would have had an impact, either detrimental or positive, on the value or use of the Respondent's property. It considered, nonetheless, that members of the public, with knowledge of the following relevant facts would reasonably consider that the Respondent's connection to the site of the development proposal would be sufficiently significant as to be likely to affect his discussion or decision-making. The Panel determined that the relevant facts were that:

- The Respondent had registered both a financial and non-financial interest in his property.
- The proximity of the Respondent's property to the development and the fact that it was adjacent to the site (separated only by the A78), meant that it could potentially be impacted by both the development

works (in terms of the use of the road and noise) and the increased number of families living in the area when the development was complete (with the associated effect on local resources).

- The fact that the Respondent's farm was named in the paperwork prepared by planning officers for consideration by the Planning Board at the meetings at which the application was considered.

The Panel agreed, therefore, that the Respondent should have declared an interest, withdrawn from the meeting and taken no part in the discussion and decision-making on the matter. The Panel concluded, therefore, that the Respondent had breached paragraph 5.5 of the Code.

The Panel noted that paragraph 7.4(b) of the Code provides that if a councillor has a declarable an interest, whether financial or non-financial, in a quasi-judicial or regulatory matter (such as a planning application), they must leave the meeting until the matter has been determined. The Panel concluded, therefore, that by failing to withdraw from the decision-making process, despite having a declarable interest, the Respondent had also breached the corresponding paragraph 7.4 of the Code.

The Panel agreed with the ESC, however, that it did not necessarily follow that a failure on the part of the Respondent to declare an interest meant he had also failed to comply with the requirement under Section 7 of the Code for councillors to avoid acting with bias or unfairness or any perception of such, when making quasi-judicial and regulatory decisions. The Panel did not consider that the fact the Respondent suggested a site visit was indicative of this, given:

- elected members on the Planning Board were entitled to suggest and make such visits; and
- the purpose of such a visit was to provide councillors with an opportunity to familiarise themselves with the site and its surroundings in order to understand the issues more clearly when considering the application at a planning board.

The Panel also recognised that the Respondent proposed the amendment to the planning application, but given this was in line with the officers' recommendation, it did not consider doing so was indicative of a failure to avoid any suspicion of unfairness, bias or improper conduct. The Panel was not satisfied that there was any evidence whatsoever to suggest that the Respondent took account of any irrelevant or immaterial considerations, or that he acted in anything other than good faith, when taking part in the discussion and decision-making on the application.

The Panel noted that the Respondent's representative had raised concerns that the charge against the Respondent, as outlined in the issue identified in the ESC's report, did not address or cover any alleged breach of paragraphs 3.26 or 3.27 of the Code. The Panel was satisfied, however, that the ESC's report included consideration and analysis of the question of whether these paragraphs had been breached by the Respondent. The Panel was satisfied, therefore, that the Respondent had received fair notice that an alleged breach of paragraph 3.26 and 3.27 was to be considered.

In any event, the Panel was not satisfied that there was evidence that the Respondent used his position as a councillor to influence others in respect of the decision, to obtain preferential treatment or to avoid a disadvantage, in breach of paragraphs 3.26 and 3.27 of the Code, or that he had taken any action that would lead members of the public to consider this had been the case. While the Panel acknowledged it had found that the Respondent should have declared an interest and taken no part in the consideration of the application, it noted that any member of the Planning Board could have suggested a site visit and, further, that the purpose of such a visit was to provide councillors with greater clarity. As such, it could not be said that a suggestion of a site visit in itself could be taken as a means of influencing others. Further, and in line with its reasoning above, the Panel did not consider that the fact the Respondent proposed the amendment to the planning application to be accepted, and voted for it, to be indicative of his using his position as a councillor in any way improperly, given Members of the Planning Board were entitled to move such motions and given it accorded with the planning officers' recommendations. While the Panel found that the Respondent should have declared an interest in the matter, it did not consider that a failure to do so demonstrated a lack of candour, given he had recorded his interests in his farm in his publicly available

Register of Interests. As such, the Panel found that the Respondent had not breached paragraphs 3.26 and 3.27 of the Code.

Evidence in Mitigation

The Respondent's representative asked the Panel to note, in mitigation, the Respondent's previous unblemished record as a councillor. The Respondent's representative further asked the Panel to note that the Respondent had acted reasonably and appropriately, in good faith, as he had not considered himself to be a neighbour or conflicted.

SANCTION

The decision of the Hearing Panel was to suspend the right of the Respondent, Councillor Nelson, to attend full Council meetings of Inverclyde Council, for a period of one month, with effect from 16 April 2024. The suspension will end at midnight on 15 May 2024.

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

Reasons for Sanction

In making its decision on sanction, the Panel had regard to the Standards Commission's Policy on the Application of Sanctions. A copy of the policy can be found on the Standards Commission's website at <https://www.standardscommissionscotland.org.uk/cases/hearing-rules>.

The Panel began by assessing the nature and seriousness of the breaches of the Code. The Panel noted that it had found the Respondent had breached the provisions in the Code requiring councillors to declare interests and refrain from taking part in any discussion and decision-making (including when making quasi-judicial decisions) where they have a declarable interest in a matter to be considered by the Council. The Panel noted that the requirement for councillors to declare interests is a fundamental requirement of the Code as it gives the public confidence that decisions are being made in the public interest, and not the personal interest of any councillor or their friends or family. A failure to comply with the Code's requirements in this regard can erode confidence in the Council and leave its decisions open to legal challenge. The Panel emphasised that it is a councillor's personal responsibility to identify and declare certain interests and to thereafter withdraw from the decision-making process. The Panel noted that the Respondent had agreed, as part of his acceptance of office as a councillor, that he would abide by the terms of the Code, which includes the requirement to declare certain interests.

In this case, the Panel considered the Respondent's failure to apply the objective test properly and to consider how his participation in the discussion and decision-making on the application could be perceived, could have had an adverse impact on the public's confidence in the Planning Board's decision. The Panel did not consider, therefore, that a censure was an appropriate disposal option.

The Panel accepted, nevertheless, that there was no evidence or suggestion that the Respondent had tried to conceal his interest, or that he had acted in anything other than good faith. The Panel was not satisfied that it had evidence before it that would lead it to conclude that the Respondent's interest had affected his discussion or decision-making as a member of the Planning Board. The Panel further noted that the Respondent had an unblemished record as a councillor, and that he had co-operated fully with the investigation and adjudication processes. As such, the Panel did not consider that a disqualification or lengthy suspension was warranted.

The Panel agreed, however, that it was necessary to impose a short suspension in order to reflect the seriousness of the breach, to promote adherence to the Code and to maintain and improve the public's confidence that councillors will comply with the Codes, and will be held accountable if they fail to do so.

The Panel considered imposing a two-month suspension under Section 19(1)(b)(ii) of the 2000 Act, which would have suspended the Respondent's entitlement to attend any quasi-judicial or regulatory decision-making committees of the Council. The Panel noted, however, that the Respondent was no longer a member of the Planning Board and was not a member of any other quasi-judicial or regulatory committees. In the circumstances, therefore, the Panel determined that it was appropriate and proportionate to suspend the Respondent's entitlement to attend full Council meetings for a one-month period, in accordance with Section 19(1)(b)(i).

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: 15 April 2024



**Ashleigh Dunn
Chair of the Hearing Panel**