

**Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Midlothian House, 40-46 Buccleuch Street, Dalkeith, EH22 1DN on 10 July 2019.**

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

The Hearing arose in respect of a Report by Mr Bill Thomson, the now former Commissioner for Ethical Standards in Public Life in Scotland (the ESC), further to complaint reference LA/Mi/2166 & 2169 (the complaint) concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Colin Cassidy (the Respondent). The Hearing commenced on 9 May 2019 but was adjourned until 10 July 2019 due to a lack of time, after it became apparent the parties had different interpretations of a joint statement that purported to outline facts that had been agreed between them.

The current ESC was represented by her Senior Investigating Officer, Mr Martin Campbell. Councillor Cassidy was represented by Mr Scott Martin, solicitor.

### **Complaint**

A complaint was received by the ESC about the alleged conduct of the Respondent. Following an investigation, the ESC referred the complaint to the Standards Commission for Scotland on 31 January 2019, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended.

The substance of the referral was that the Respondent had failed to comply with the provisions of the Code and, in particular, that he had contravened paragraphs 5.3, 5.12 and 7.12.

The relevant provisions are as follows:

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

*5.3 You may feel able to state truthfully that an interest would not influence your role as a councillor in discussion or decision-making. You must, however, always comply with the objective test ("the objective test") which is whether a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as so significant that it is likely to prejudice your discussion or decision making in your role as a councillor.*

#### ***The Non-Financial Interests of other persons***

*5.12 You must declare if it is known to you ANY NON-FINANCIAL INTEREST of:*

- (i) a spouse, a civil partner or a co-habitee;*
- (ii) a close relative, close friend or close associate;*
- (iii) an employer or a partner in a firm;*
- (iv) a body (or subsidiary or parent of a body) of which you are a remunerated member or director;*
- (v) a person from whom you have received a registrable gift or registrable hospitality; or*
- (vi) a person from whom you have received registrable election expenses.*

*There is no need to declare the interest unless it is clear and substantial.*

*There is only a need to withdraw from the meeting if the interest is clear and substantial.*

### **Decisions on Planning Matters**

#### **General**

7.12 *If you have an interest, whether financial or non-financial, in the outcome of a decision on a planning application, or a planning agreement, or on taking enforcement action, or in a Local Review Body, you must declare that interest and refrain from taking part in making the decision.*

#### **Preliminary Matters**

The ESC's representative indicated that a revised joint statement of facts had been agreed between the parties. The ESC's representative further advised that the ESC was no longer relying on a sentence in the report which referred to the Respondent having indicated at interview that he regarded his sympathy with the objectors' concerns as sufficient to require a declaration of interest. The ESC asked the Panel to disregard this sentence.

#### **Evidence Presented at the Hearing**

##### **Background**

The complaints about the Respondent concerned his attendance at a meeting of Midlothian Council's Planning Committee on 3 April 2018, at which a planning application by Dalkeith Lawn Tennis Club (the tennis club) for the erection of screen netting was considered. The Panel noted that while objections to the proposal had been submitted by the proprietors of a property adjacent to the tennis club, who were concerned about potential light depletion, the planners' recommendation was that planning consent should nevertheless be granted. The Panel was advised that the application was approved by the Committee, subject to a condition requiring the use of a different type of netting.

##### **Joint Statement of Facts**

The Hearing Panel noted the terms of the revised joint statement of facts that had been agreed between the parties. In this, the parties confirmed that the Respondent's position was that he had declared an interest in knowing both the objectors at the meeting on 3 April 2018, albeit it had been unnecessary for him to have done so as neither could be considered a 'close friend' under paragraph 5.12 of the Code.

The parties advised that the Respondent had undertaken work on the objectors' property on a no-fee basis in his capacity as a plant hire contractor. The parties advised that the work to move blaise material deposited on the property was undertaken at the instigation of the tennis club, following a complaint made to it by the objectors.

The parties advised that the Respondent was a former member of the tennis club and had friends who were members.

##### **Witness Evidence**

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

The Respondent confirmed that he had been elected as a councillor in May 2017. The Respondent advised that he had always lived in Dalkeith and, as such, had many friends in the town. The Respondent noted that it was a small community where everyone knew each other and that, in particular, he had made many connections through his role as an owner, and formerly as the manager, of a local plant hire business. The Respondent advised that, in addition, he had been a member of various community organisations and local charity boards.

The Respondent advised that he had no antipathy towards the tennis club and, in fact, had previously been a member of it for years, which included serving on its committee. The Respondent indicated he had many friends who were still members of the club and, indeed, was close friends with an individual who had been the president of it for nearly 20 years.

The Respondent advised that he had undertaken work on behalf of the club, which included putting up the netting between the tennis club and the objectors' property, working on fencing and renewing the blaise surface material. The Respondent advised that, approximately four years ago, he had undertaken work, for free, to level blaise material from the club that had been dumped on the objectors' land. The Respondent confirmed that he had done so at the request of the tennis club, after the objectors had threatened to bill it for the cost of employing a contractor to do the work.

The Respondent confirmed that he had known the objectors for a long time as he had served on a community council with one, and on a local community committee with both. The Respondent admitted that he had referred to the objectors as "good friends" during an interview with the ESC's staff, but stated that this was simply a loose description. The Respondent indicated he regretted using the term "good friends" as, in doing so, he had inadvertently given the impression that he was close friends with objectors, when they were simply acquaintances. The Respondent advised that his definition of a close friend was someone that you would have dinner or go on holiday with, or someone you would lend money to or ask for help. The Respondent confirmed that he had a circle of close friends who fell within such a definition, which did not include the objectors. The Respondent advised that he had been friends on Facebook with one of the objectors but that one or other of them had 'unfriended' the other as a result of comments made on the site during the run up to the 2014 Scottish independence referendum. The Respondent confirmed that he had dined at the objectors' restaurant on three occasions, but only as a paying customer.

The Respondent advised that, at the Planning Committee meeting on 3 April 2018, a number of other councillors had stated that they knew the objectors and had made site visits to see the fence and netting in place between their property and the tennis club. The Respondent indicated that this had made him think that he should also advise that he knew them and declare an interest. When one of the objectors entered the Council chamber, he had stood up to do so, with the intention of leaving the room, but the Chair had signalled that he should just sit down. The Respondent advised that he had therefore proceeded to take part in the discussion and decision-making. The Respondent indicated that, in doing so, he had been trying to find a solution that was acceptable to both sides.

In response to questions from the Panel, the Respondent confirmed that he had visited the objectors' property on three of four occasions to move the blaise material. The Respondent indicated that it was possible that he considered he could take part in the consideration of the

planning application as his relationships with both the applicants and objectors balanced each other out, but that he could not recall his exact thought process. The Respondent confirmed that he had sent a letter to the Planning Committee in 2011 (well before he had been elected as a councillor) in support of the objectors, in respect of an application they had made for replacement structures on their land. The Respondent advised, however, that he had only done so to draw attention to the need for perspective in respect of objections to planning application that were being lodged routinely at the time.

### **Submissions made by the ESC's Representative**

The ESC's representative noted that, at interview, the Respondent had admitted that he had described the objectors as being "good friends" of his, had accepted they had mutual friends and that he had seen them on social occasions. The ESC's representative further noted that the Respondent was on first name terms with the objectors, had undertaken work on their land (albeit as a favour to the tennis club), had submitted a letter in 2011 in support of the planning application they had made, and had served on community groups with them. The ESC's representative accepted, nonetheless, that in a small community such as Dalkeith, it was likely that the Respondent would know a lot of people and confirmed that there was no suggestion that the Respondent had dined at the objectors' restaurant on any basis other than as a paying customer.

The ESC's representative further accepted that it was a borderline case and noted that it was up to the Panel to determine what the Respondent had meant by "good friends" and whether it was satisfied, on the balance of probabilities, that his relationship with the objectors amounted to a close friendship or association. The ESC's representative noted that there did not appear to be any dispute that the objectors' interest in the planning application before the Committee was clear and substantial and argued that this meant that if the Panel determined that there had been a close friendship or association, it followed that the failure to declare the interest and withdraw from the meeting amounted to a breach of paragraph 5.12 of the Code.

The ESC's representative contended, in any event, that the Respondent should have had regard to, and considered, the objective test, as outlined in paragraph 5.3 of the Code. The ESC's representative noted it was not enough for the Respondent to have been satisfied that he was able to take part in the consideration and decision-making on the application objectively and on its merits alone. The ESC's representative noted that the Respondent should also have considered whether it was likely that a member of the public, with knowledge of all the relevant facts, being the work the Respondent had undertaken on behalf of the club and his relationships with both it and the objectors, would reasonably have regarded his interest in the planning application as potentially being so significant that it would be likely to prejudice his discussion or decision-making. The ESC's representative contended that, having done so, the Respondent should have formally declared an interest in the planning application and should have withdrawn from the meeting accordingly. The ESC's representative argued that the Respondent's apparent admission, when giving evidence, that he had been prompted to declare that he knew the objectors at the meeting as a result of other councillors doing so, demonstrated that he had not given the objective test sufficient consideration.

The ESC's representative noted that the fact that the Respondent had stood up at the meeting and made an ill-founded declaration, did not in itself mean he was obliged to withdraw from consideration of the item. The ESC's representative noted that the Respondent would only have had to withdraw if he had a clear and substantial interest that required to be declared. In this case, the

ESC contended the Respondent had a declarable interest through his close friendship or association with the objectors and, as such, he should have stated it and withdrawn from the meeting while the planning application was being considered. The ESC's representative argued that the failure to do so amounted to a breach of both paragraph 5.3 and paragraph 7.12 of the Code.

### **Submissions made by the Respondent's Representative**

The Respondent's representative noted that the Respondent had made a declaration of interest at the meeting on 3 April 2018, in respect of knowing the objectors, albeit it was not in dispute that he proceeded to take part in the discussion on the item. The Respondent's representative noted that it was not being suggested by the ESC that a councillor should be obliged to withdraw from a meeting by virtue of making an unnecessary declaration. The Respondent's representative argued that as the Respondent had not been close friends or associates with the objectors at the time of the meeting, there was no need for him to have made a declaration of interest under paragraph 5.12 of the Code and to have withdrawn from the meeting while the planning application was being considered. The Respondent's representative further argued that the Respondent had complied with the objective test under paragraph 5.3 of the Code by "weighing up" the different associations he had with both the applicants and objectors.

The Respondent's representative contended that paragraph 7.12 did not apply as it only concerned a councillor's own financial and non-financial interest in planning matters (as opposed to the financial or non-financial interests of others). The Respondent's representative argued that the paragraph was not qualified by the objective test and noted that this had been found to be the case by the Standards Commission at a previous Hearing<sup>1</sup>. The Respondent's representative noted that the Respondent did not have any financial or non-financial interest of his own in the planning matter and, as such, had not been required to declare an interest and to refrain from taking part in consideration of the application.

The Respondent's representative advised that it was accepted that the objectors had a clear and substantial interest in the application under consideration and indicated, therefore, that the core issue at stake was whether the Respondent was 'close friends' with them. The Respondent's representative noted that paragraph 5.2 of the Code emphasises that a councillor is in the best position to assess their own personal circumstances and to judge how they may affect their role. The Respondent's representative argued that while it would not be sufficient for the Respondent to simply assert the objectors were not close friends, the evidence he had given about the nature and degree of his relationship with them could only lead the Panel to conclude that they were not. The Respondent's representative contended that a 'close friend' was someone you might have dinner or share secrets with, and that the objectors did not even come close to reaching that threshold in terms of their relationship with the Respondent. The Respondent's representative argued, therefore, that there had not been any breach of paragraph 5.12.

The Respondent's representative noted that a finding of a breach of 5.3 of the Code would follow from a finding of a breach of paragraph 5.12, but accepted that the reverse was not necessarily true. There could be a breach of 5.3 of the Code even if paragraph 5.12 was not breached. The Respondent's representative argued, however, that the objective test under paragraph 5.3 was analogous to the judicial test developed by the Courts for apparent bias, as outlined in Lord Hope's judgement in the Supreme Court case of *Magill v Porter [2001] UKHL 67*. In this, Lord Hope had

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<sup>1</sup> LA/Fi/1501, 1516, 1518 & 1536 – decision made 14 July 2015

stated that, in determining whether a decision should be set aside, the question was whether a fair-minded and informed observer would conclude in all the circumstances, that there was a real possibility, or a real danger, of a Tribunal being biased. In this case, the Respondent's representative noted that the member of the public referred to in the objective test was not a member of the tennis club or one of the objectors, but rather was a fair-minded and reasonable individual who was considering the matter from an informed perspective. Such a fair-minded individual was not someone who was either unduly complacent or suspicious. The Respondent's representative argued that such an individual would weigh up their knowledge of the Respondent's relationship with the objectors (which he had been open and transparent about), with his connection to the tennis club, and would conclude that matters more or less balanced themselves out. As such, the individual would not reach the view that any interest the Respondent had in the matter was so significant as to be likely to prejudice his discussion or decision-making.

### **DECISION**

The Hearing Panel considered the evidence led, and the submissions given orally at the Hearing and in writing, and found as follows:

1. The Councillors' Code of Conduct applied to the Respondent, Councillor Cassidy.
2. The Panel was not satisfied, on the balance of probabilities, that the Respondent had contravened paragraphs 5.12 and 7.12 of the Code.
3. The Panel concluded, however, that the Respondent had breached paragraph 5.3 of the Code.

### **Reasons for Decision**

The Panel accepted that the Respondent had purported to declare an interest in the item in question at the Planning Committee on 3 April 2018 by virtue of knowing the objectors. The Panel did not accept, however, that this statement amounted to a formal declaration under the Code as, if it had been such, the Respondent would be aware that he was required to leave the room and take no part in the discussion or decision-making on matter, or to explain why the interest was not sufficiently clear and substantial. In this instance the Respondent had not then withdrawn from the room and, instead, had taken part in the discussion and decision-making on the application. The Panel noted that the Respondent's contribution had been to question how the impact of the netting had been assessed.

The Panel noted that paragraph 5.12 of the Code provides that councillors must declare any non-financial interests of close friends or associates and are obliged to withdraw from the meeting in question if the interest is clear and substantial. In making such an assessment, councillors must comply with the objective test under paragraph 5.3.

The Panel was satisfied that the objectors had a clear and substantial interest in the planning application and, as such, the question before it, in determining whether there had been a breach of paragraph 5.12, was whether the Respondent was a close friend or associate of them at the time of the meeting.

The Panel noted that the terms ‘friend’ and ‘associate’ are not defined in the Code. The Panel accepted that Dalkeith was a small community, which meant that it was inevitable that the Respondent would know people and attend the same events.

The Panel noted that the Respondent had:

- stated, at interview, that he was ‘good friends’ with the objectors, that he had mutual friends with them, and that he knew them from mutual membership of community groups; and
- written a letter of support in 2011 in respect of a planning application the objectors had submitted.

The Panel nevertheless noted the Respondent’s evidence that the objectors were not close friends and that while he had eaten in their restaurant it was only as a paying customer, that he had not had them round to his house and that he did not socialise with them. The Panel accepted the Respondent’s evidence that he had used the term “good friends” loosely. The Panel further accepted that the letter of support had been written in 2011, some six years before the Respondent was elected and was satisfied that its contents only disclosed an interest in planning matters in general, as opposed to any evidence of close friendship.

Having taken account of all the circumstances and evidence led, the Panel was not satisfied, on the balance of probabilities, that the Respondent’s relationship with the objectors was sufficiently familiar or intimate for it to conclude that they were close friends or close associates. The Panel concluded, therefore that the Respondent had not breached paragraph 5.12 of the Code.

The Panel noted that paragraph 7.12 is not qualified by the objective test and that it refers to councillors having an interest, whether financial or non-financial, in the *outcome* of any planning application. The Panel was not satisfied that there was evidence that the Respondent had such an interest in the outcome of the particular planning application under consideration that would have required him to make a declaration and refrain from taking part in the decision-making under paragraph 7.12.

The Panel noted, nevertheless, that the Respondent had admitted, in evidence, that he:

- had, in the past, been a member of the tennis club and had sat on its Committee;
- had undertaken work for the club in terms of renewing the fencing;
- had lent equipment to the club;
- still had friend who were members of it; and
- had been to the objectors’ property to move material at the request of the club.

The Panel further noted that the Respondent had previously put up and taken down the netting between the tennis club and the objectors’ property, and had also become familiar with the objectors while undertaking the work to move the blaise material and through their joint membership of community groups. The Panel, having taken the Respondent’s relationship with the tennis club and the objectors into account, considered that a member of the public, with knowledge of these relevant facts could reasonably have concluded that he had an interest in the matter before the Planning Committee that was sufficiently significant as to be likely to influence his discussion or decision-making. The Panel considered that the Respondent’s admission that he had been trying to find a solution that would be acceptable to both sides was evidence that he may have been so influenced.

The Panel noted the Respondent's admission that, at the meeting, he had been prompted, at least in part, to make his statement about knowing the objectors by the fact that other elected members present had announced that they had made site visits to the objectors' property. The Panel was of the view that this demonstrated that it was more likely than not that the Respondent had made his statement as a result of the actions of other's present, rather than because he had fully considered the objective test. In any event, as stated above, the Panel was of the view that the making of such a statement did not amount to a formal declaration of interest, given the Respondent had not then proceeded to withdraw from the room. The Panel was further of the view that it was a councillor's personal responsibility to ensure that he or she complied with the Code and, as they were in the best position to assess their own personal circumstances and to judge how they may affect their role, it was not sufficient for them to rely on any guidance or gesture from a Committee Chair.

The Panel was not satisfied, therefore, that the Respondent had complied with the objective test under paragraph 5.3 of the Code and that he had given it sufficient consideration. As such, the Panel concluded that the Respondent had breached paragraphs 5.3 of the Code.

### **Evidence in Mitigation**

The Respondent's representative advised that the Respondent was a well-regarded member, who worked hard for his community. The Respondent's representative provided letters of support which confirmed that the Respondent was a committed, approachable and diligent local representative.

The Respondent's representative invited the Panel to conclude that the breach of the Code at a less serious end of any spectrum, given that no apparent prejudice had been caused by any omission on the part of the Respondent and also given it was evident he had not sought to conceal his relationship or association with either the tennis club or the objectors.

The Respondent's representative further asked the Panel to note that the breach was a one-off incident and that there had been no benefit or personal gain to the Respondent, who had simply been trying to balance the interests of the tennis club with that of the objectors.

### **SANCTION**

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

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

### **Reasons for Sanction**

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

The Panel considered the Standards Commission's Policy on the Application of Sanction. In reaching its decision, the Hearing Panel noted, in mitigation, that the Respondent, Councillor Cassidy, had co-operated fully with the investigative and Hearing processes. The Panel further noted the letters of support lodged on behalf of the Respondent and accepted that they testified to him being a hard-working and diligent local councillor.



The Panel considered, however, that the requirement to apply the objective test is an integral part of the Councillors' Code as it ensures transparency in decision-making. This is because it ensures that councillors do not just consider whether their interests could affect their discussions and decision-making, but also requires them to think about how a member of the public, with knowledge of the relevant facts, could reasonably perceive any such an interest. The Panel emphasised that it was a councillor's personal responsibility to be aware of the provisions in the Code, to ensure that he or she complied with them and, noted that, in this respect, the Respondent had been negligent.

The Panel was nevertheless of the view that the Respondent's conduct did not warrant a more severe sanction. This was because it was satisfied that, in this case, that there was no personal gain to the Respondent and there was no evidence the breach was anything other than a one-off incident. The Panel further noted that there was no question of the Respondent having tried to conceal his relationship with either the tennis club or the objectors.

### **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 July 2019



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