

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on Wednesday 22 February 2023.

Panel Members: Mrs Patricia Stewart, Chair of the Hearing Panel
Ms Ashleigh Dunn
Mr Paul Walker

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Ethical Standards Commissioner (ESC), further to complaint reference LA/E/3651, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by former Councillors Maureen Child and Karen Doran (the Respondents).

Referral

Following an investigation into a complaint received about the conduct of the Respondents, the (then Acting) ESC referred a report to the Standards Commission on 19 December 2022, in accordance with the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The substance of the referral was that the Respondents had failed to comply with the provisions of the Councillors' Code of Conduct dated July 2018 (being the version in place at the time of the events in question) and, in particular, that they had contravened paragraphs 5.3, 5.7, 7.3, 7.4 and 7.12, which were as follows:

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.*

Your Non-Financial Interests

5.7 *You must declare, if it is known to you, any NON-FINANCIAL INTEREST if:*

- (i) that interest has been registered under category eight (Non-Financial Interests) of Section 4 of the Code or*
- (ii) that interest would fall within the terms of the objective test.*

There is no need to declare:

- (i) an interest where a general exclusion applies, but an interest where a specific exclusion applies must be declared; or*
- (ii) an interest which is so remote or insignificant that it could not reasonably be taken to fall within the objective test.*

You must withdraw from the meeting room until discussion of and voting on the relevant item where you have a declarable interest is concluded other than in the following circumstances.

There is no need to withdraw in the case of:

- (i) an interest covered by a general exclusion or a specific exclusion; or*
- (ii) an interest which is so remote or insignificant that it could not reasonably be taken to fall within the objective test.*

Fairness and Impartiality

7.3 *In such cases, it is your duty to ensure that decisions are properly taken and that parties involved in the process are dealt with fairly. Where you have a responsibility for making a formal decision, you must not*

only act fairly but also be seen as acting fairly. Furthermore, you must not prejudge, or demonstrate bias in respect of, or be seen to be prejudging or demonstrating bias in respect of, any such decision before the appropriate Council meeting. In making any decision, you should only take into account relevant and material considerations and you should discount any irrelevant or immaterial considerations.

7.4 To reduce the risk of your, or your Council's, decisions being legally challenged, you must not only avoid impropriety, but must at all times avoid any occasion for suspicion and any appearance of improper conduct.

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 Respondents were not present at the Hearing, having instead chosen to rely on written submissions previously submitted to the ESC and Standards Commission.

Evidence Presented at the Hearing

Submissions made by the ESC

The ESC advised that the Respondents were members of the Council's Transport and Environment Committee. The ESC explained that, at a meeting in January 2021, the Committee agreed to the introduction of an Experimental Traffic Regulation Order to close a road in the city.

By way of background information, the ESC advised that although former Councillor Doran had declared an interest in the matter at the January meeting, on the basis that she lived in the area, she had nevertheless participated in the discussion and decision-making on the agenda item. The ESC confirmed that former Councillor Doran's conduct at the January meeting did not form part of the complaint and had not, therefore, been investigated. The ESC advised that former Councillor Child had not been present at the January Committee meeting.

The ESC advised that the complaint concerned a further Committee meeting, held on 11 November 2021, at which both Respondents were present. One of the matters being considered at the meeting concerned the extension of the Experimental Traffic Regulation Order.

The ESC further advised that, on 10 November 2021, the Committee Clerk sent an email to the Committee members, attaching guidance on dealing with Traffic Regulation Orders (TROs). The ESC confirmed that Experimental Traffic Regulation Orders were a type of TRO and, as such, were covered by this guidance. The ESC advised that the guidance stated:

- as TROs were to be considered as being of a quasi-judicial nature, Section 7 of the Code (regarding taking decisions on quasi-judicial or regulatory applications) would apply;
- that whether deputations would be heard was for the Convener / Committee to decide, but that it was not desirable; and
- that councillors should not have indicated bias or implied support for or against a TRO before the meeting. The Guidance noted that doing so could mean they would need to make a declaration of interest and take no part in the decision or otherwise be in breach of the Code.

The ESC advised that two named local groups, being a Residents' Association and an Amenity Society had requested, but had been refused, the opportunity to make deputations on the agenda item in question.

The ESC advised that both Respondents declared non-financial interests in the agenda item in question, as follows:

- former Councillor Child stated that she was declaring an interest as she was a founder and member of the Residents' Association, a member of the Amenity Society and because she lived in the local area.
- former Councillor Doran stated that she was declaring an interest as she was a resident in the local area.

The ESC further advised that, in response, the Committee Convener stated that she was aware that former Councillor Doran had been involved in local discussions about the matter with the community.

The ESC advised that during the meeting, another councillor asked for clarification as to whether the agenda item being considered was quasi-judicial in nature and queried the participation of councillors who had previously expressed a public opinion on the issues at hand in the discussion and decision-making. In response to this query, the Convener noted that the Respondents had declared an interest, and stated that although she thought their declarations were enough to allow them to participate in the decision-making process, she would welcome clarification from the Committee Clerk. The Committee Clerk agreed that was also her understanding.

The ESC advised both Respondents proceeded to vote in favour of the motion. The motion to extend the Experimental Traffic Regulation Order was carried with seven votes for and four votes in favour of an amendment asking for another solution to be pursued.

The ESC advised that after reviewing the webcast of the November meeting, the council's Monitoring Officer and Head of Democracy, Governance and Resilience concluded that the Respondents should not have taken part in the consideration of the item and that the meeting should be re-run to avoid any risk of legal challenge. The ESC noted that a further meeting to consider the agenda item again was then held on 2 December 2021, with the Respondents being replaced by two other councillors.

The ESC accepted that the Respondents had not been specifically advised at the November meeting that they could not participate in the consideration of the item, having declared an interest. The ESC nevertheless noted that the Code stated that it was the sole responsibility of councillors to ensure compliance with its provisions. The ESC advised that the Code stipulated that where a councillor has a non-financial interest, they must declare that interest and refrain from taking part in the decision-making process. The ESC further noted that this was reiterated in the guidance circulated to all Committee members before the meeting.

The ESC contended that former Councillor Child, as a member of two groups that had sought to make deputations on the item, could expect that a member of the public, with knowledge of the relevant facts, would reasonably consider that her interest was sufficiently significant as to be likely to influence her discussion or decision-making. The ESC contended that, as such, she should not have participated in the discussion or vote on the agenda item.

The ESC noted that former Councillor Doran had not disagreed with the Convener's statement about her having had involvement in local discussions about the matter with the community. The ESC noted, therefore, that it was arguable that former Councillor Doran had shown her support for the Experimental Traffic Regulation Order before the November meeting. The ESC further noted that former Councillor Doran lived extremely close to the road that was the subject of the Experimental Traffic Regulation Order. As such, the ESC advised that a member of the public, with knowledge of the relevant facts, would reasonably consider that her interest was sufficiently significant as to be likely to influence her discussion or decision-making. The ESC contended, therefore, that former Councillor Doran should not have participated in the discussion or vote on the agenda item.

The ESC concluded that the Respondents had contravened paragraphs 5.7 and 7.12 of the Code by failing to withdraw from participation in an item in which they had declared an interest.

The ESC further concluded that, by failing to withdraw, the Respondents had failed to be seen to be acting fairly in terms of paragraph 7.3 of the Code, and had also, in terms of paragraph 7.4 of the Code, failed to avoid any occasion for suspicion and any appearance of improper conduct.

Submissions from the Respondents

Both Respondents outlined their positions on the complaint, in correspondence to the ESC and Standards Commission.

Former Councillor Child advised that she had declared an interest in the item for the sake of transparency. Former Councillor Child indicated that it was arguable that the vote she had cast at the meeting was against her own personal interest, as a resident in one of the streets that could be adversely affected by the decision to accept the Experimental Traffic Regulation Order and close the road in question. She noted that the outcome of the vote would have been the same, regardless of whether or not she had taken part. Former Councillor Child further noted she had not been advised by anyone present at the meeting that she could not participate, despite the Convener having sought advice from the Committee Clerk as to whether she could do so. Former Councillor Child advised, nevertheless, that she accepted the facts found and conclusions reached by the ESC, as outlined in his report.

Former Councillor Doran also indicated that she had voted in favour of the Experimental Traffic Regulation Order, despite it being arguable that the road closure would have a detrimental effect on her street. Former Councillor Doran explained she had been made aware of negative and personal social media comments in respect of her involvement in the matter, following the earlier Committee meeting at which she had participated in the decision to introduce the Experimental Traffic Regulation Order. As such, she had decided to declare an interest to be transparent about where she lived in order to address any concerns.

Former Councillor Doran also noted she had not been advised by anyone present at the meeting that she could not participate, despite advice having been sought on the matter. Former Councillor Doran confirmed that her participation in the vote to accept the Experimental Traffic Regulation Order had been based solely on her belief that doing so was in the best interests of the local community.

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 Respondents, former Councillors Child and Doran.
2. The Respondents had breached paragraphs 5.7, 7.3, 7.4 and 7.12 of the Code.

Reasons for Decision

The Panel noted there was no dispute that, at the meeting on 11 November 2021, the Respondents participated in the discussion and vote on the agenda item in question, despite both having declared a non-financial interest in the matter.

The Panel further noted that there was no dispute that the Respondents had been sent a copy of the Council's guidance on dealing with TROs the day before the meeting. The Panel noted that the guidance stated that as TROs were of a quasi-judicial nature, councillors should not indicate they were in favour of, or against, a specific TRO, before any meeting at which that TRO was to be discussed. The Panel noted that the Guidance

stated that if a councillor had done so, they would need to declare an interest and take no part in the decision-making on that TRO.

The Panel found that former Councillor Child had declared a non-financial interest in the agenda item on the Experimental Traffic Regulation Order and had explained at the meeting that this was because she:

- was a founder and member of a Residents' Association and a member of a local society, both of which requested, but had been denied the opportunity, to make representations to the Committee about the Experimental Traffic Regulation Order; and
- lived in the local area.

The Panel noted that former Councillor Doran had also declared a non-financial interest in the agenda item and had stated at the meeting that this was because she lived in the local area.

Having viewed the webcast of the meeting, the Panel noted that another councillor had questioned whether any councillors who had previously expressed a public opinion on the issue should take part in the discussion and vote. The Committee Convener noted, in response, that the Respondents had both spoken on the topic in the local community, but indicated she understood that the fact that they had both declared an interest, was sufficient to allow them to consider the item. The Panel noted that the Convener had sought clarification from the Clerk as to whether this was correct. The Panel found that while the Clerk had confirmed the matter was quasi-judicial in nature, no advice had been given to the effect that having both declared an interest, the Respondents would not be able to participate in this discussion and vote on the agenda item.

The Panel was satisfied with the ESC's contention that an Experimental Traffic Regulation Order is a type of TRO and therefore that the matter, as confirmed in the Council's own guidance, was quasi-judicial in nature. In support of this conclusion, the Panel noted that, in an email attaching the Council's guidance on dealing with TROs, sent to all councillors on 10 November 2021, the Committee Clerk confirmed that the item in question to be discussed at the meeting the following day, being the Experimental Traffic Regulation Order, was a TRO. The Clerk advised that the named Residents' Association and local society had asked to make deputations on the item.

The Panel acknowledged that the Respondents had not received clear advice at the meeting about whether or not they could participate in the agenda item, having both declared a non-financial interest. The Panel was satisfied, nonetheless, that they had been provided with guidance the day before that made it clear that councillors would not be able to take part in the decision-making if they had a declarable interest in the matter. The Panel noted, in any event, that it is a councillor's personal responsibility to comply with the Code, regardless of the nature of any advice provided (or, in this case, not provided).

In any event, the Panel considered that, having applied the objective test under paragraph 5.3, former Councillor Child should have reached the view, in terms of paragraphs 5.7, that her non-financial interest would not be perceived as being so remote or insignificant that it could not influence her potential discussion and decision-making on the agenda item under consideration. This was because the Panel considered that a member of the public, with knowledge of the relevant facts, namely her membership of the Residents' Association and the local society, as two organisations that wished to make deputations on the matter, would reasonably regard her interest to be sufficiently significant as to be likely to prejudice her discussion and decision-making on the agenda item. The Panel agreed that, having declared her interest, former Councillor Child should have withdrawn from the meeting and taken no part in the discussion and decision-making on the matter.

The Panel noted that former Councillor Doran lived in close proximity to the road in question. 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 a positive or negative impact on Councillor Doran's own road. The Panel nevertheless considered that, having applied the objective test under paragraph 5.3, former Councillor Doran should have

reached the view, in terms of paragraphs 5.7, that her non-financial interest would not be perceived by members of the public, considering the matter objectively, as being so remote or insignificant that it could not influence her potential discussion and decision-making on the agenda item under consideration. This was because it was evident that the decision would have a direct impact on her road. In addition, the Panel noted that the Convener stated, during the meeting, that she was aware that former Councillor Doran had been involved in local discussions about the matter with the community and that former Councillor Doran had not disagreed.

In any event, the Panel noted that former Councillor Doran had also declared a non-financial interest in the item. As such, the Panel noted that, in terms of paragraph 5.7 of the Code, she should have also withdrawn from the meeting and taken no part in the discussion and decision-making on the matter.

The Panel noted that, in their written submissions, both Respondents argued that they had only stated their interests in the matter for the sake of transparency. The Panel noted that the most recent version of the Councillors' Code, issued in 2021, makes specific reference to the fact that councillors can make transparency statements in circumstances where they have a connection to a matter but do not consider, having applied the objective test, that the connection amounts to a declarable interest. While the Panel accepted that the 2018 version of the Code in place at the time of the events in question did not contain an equivalent provision, the Standards Commission's Guidance on that version made it clear that making such a statement was an option. The Panel agreed, however, for the reasons outlined above, that both Respondents had a declarable interest (as opposed to simply having some form of connection to the matter).

The Panel noted that paragraph 5.3 of the Code stated that councillors must, however, always comply with the objective test and consider whether a member of the public, with knowledge of the relevant facts, would reasonably regard any interest they had in a matter as being so significant that it was likely to prejudice their discussion or decision-making in their role as a councillor. The Panel agreed that as both Respondents had in fact declared an interest in the matter, any finding that they had failed to comply with the objective test could not be made. As such, the Panel determined that neither Respondent had breached paragraph 5.3 of the Code.

The Panel noted that paragraph 7.12 of the Code stated that if a councillor had an interest, whether financial or non-financial, in the outcome of a decision on a planning application, or on taking enforcement action, they must declare it and refrain from taking part in making the decision. The Panel concluded that, by declaring non-financial interests in the agenda item and subsequently failing to withdraw from the decision-making process, the Respondents had breached paragraphs 5.7 and 7.12 of the Code.

The Panel further considered that by failing to withdraw from the decision-making process, having declared an interest, the Respondents failed to be seen to be acting fairly and to avoid being seen to be prejudging or demonstrating bias in terms of paragraph 7.3 of the Code, and, in terms of paragraph 7.4 of the Code, that they had failed to avoid any occasion for suspicion and any appearance of improper conduct.

SANCTION

The decision of the Hearing Panel was to censure the Respondents, former Councillors Child and Doran.

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

Reasons for Sanction

In reaching its decision on sanction, the Hearing Panel noted that both Respondents were no longer councillors. As such, the only sanctions available to the Panel were censure and disqualification. The Panel was of the view that the Respondents' conduct did not come close to warranting a disqualification. This was

because there was no evidence that either had attempted to conceal their non-financial interests in the matter.

The Panel further noted that while the Respondents had not attended the Hearing, they had co-operated with the investigation and adjudication processes.

The Panel acknowledged that the Respondents did not receive clear advice at the meeting as to whether they could participate and vote on the agenda item. The Panel also acknowledged that no concerns appeared to have been raised when former Councillor Doran had participated in the decision to introduce the Experimental Traffic Regulation Order at the earlier meeting, in January 2021. As such, the Panel had no reason to doubt the Respondents' position that any breach of the Code was inadvertent and that they had acted with the best of intentions.

The Panel emphasised, however, 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 requirement for councillors to withdraw from the room and take no part in the discussion and decision-making on any matter in which they have declared an interest 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.

The Panel further emphasised that Section 7 of the Code provides that quasi-judicial and regulatory decisions must be made solely on their merits. In order to give the public confidence that this is the case, councillors must not only act fairly and properly, but must be seen to be acting as such. 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 also noted that while the Committee's decision appeared to be based on the recommendation from council officers, the failure by the Respondents to withdraw from the decision-making meant that the Council had to hold a further Committee meeting, some three weeks later, for the decision to be re-made.

Date: 27 February 2023



**Patricia Stewart
Chair of the Hearing Panel**