



Northern Ireland

# Local Government Commissioner for Standards

## Local Government Act (Northern Ireland) 2014

### In the Matter of Alderman John Smyth - Antrim and Newtownabbey Borough Council Case Reference: C00434

The Northern Ireland Local Government Commissioner for Standards, Ms Margaret Kelly (the Commissioner), has appointed Mr Ian Gordon, OBE, QPM, as Assistant Local Government Commissioner (the Assistant Commissioner) in relation to the Adjudication Hearing process in respect of this complaint. Mr Gordon was assisted by Mr Michael Wilson, Solicitor, Legal Assessor.

#### 1. COMPLAINT

On 29 August 2019 the Commissioner received a complaint from Mr Robert Moore alleging that Alderman John Smyth (the Respondent), a member of Antrim and Newtownabbey Borough Council had, or may have, failed to comply with the Northern Ireland Local Government Code of Conduct for Councillors (the Code).

The allegation was investigated by Mrs Michaela McAleer, then Acting Deputy Commissioner for the Local Government Ethical Standards (LGES) Directorate of the Northern Ireland Ombudsman's Office. The Assistant Commissioner has no role in the receipt, assessment or investigation of a complaint.

The Acting Deputy Commissioner submitted a report, dated 15 March 2022, to the Commissioner in accordance with sections 55 and 56 of Part 9 of the Local Government Act (Northern Ireland) 2014, and it was accepted for Adjudication by the Assistant Commissioner on 30 June 2022.

The alleged breaches of the Code were:

#### Potential Breach 1

##### **Disrepute**

Paragraph 4.2

*'You must not conduct yourself in a manner which could reasonably be regarded as bringing your position as a councillor, or your council, into disrepute.'*

## Potential Breach 2

### **Obligations as a councillor**

Paragraph 4.3

*'You must review regularly (at least annually and when your particular circumstances change) your personal circumstances and to take steps to mitigate any conflict of interest in relation to your functions of councillor.'*

Paragraph 4.8

*'You must maintain and strengthen public trust and confidence in the integrity of your council. You must promote and support the Code at all times and encourage other councillors to follow your example'*

## Potential Breach 3

### **Use of your position**

Paragraph 4.16

*'You must not:*

*(a) use, or attempt to use, your position improperly to confer on, or secure, an advantage for yourself or any other person;*

*(b) use, or attempt to use, your position improperly to seek preferential treatment for yourself or any other person...'*

Paragraph 4.17

*'You must avoid any action which could lead members of the public to believe that preferential treatment is being sought.'*

## Potential Breach 4

### **Pecuniary interest**

Paragraph 6.1

*'Section 28 of the 1972 Act requires you to declare any pecuniary interest, direct or indirect, that you have in any matter coming before any meeting of your council. Such interests will be recorded in the register kept by your council for this purpose.'*

Paragraph 6.2

*'You must not speak or vote on a matter in which you have a pecuniary interest. If such a matter is to be discussed by your council, you must withdraw from the meeting whilst that matter is being discussed.'*

Paragraph 6.3

*You must also declare any significant private or personal non-pecuniary interest in a matter arising at a council meeting. In addition to those areas set out in paragraph 5.2, an interest will also be significant where you anticipate that a*

*decision on the matter might reasonably be deemed to benefit or disadvantage yourself to a greater extent than other council constituents. Any sensitive information mentioned in paragraphs 5.4 to 5.6 is not required to be given.*

#### Paragraph 6.4

*You must declare any significant private or personal non-pecuniary interests in a matter as soon as it becomes apparent. You must then withdraw from any council meeting (including committee or sub-committee meeting) when the matter is being discussed. It is your own personal responsibility to determine, having regard to council advice and guidance, whether you have any such interest.*

#### Potential Breach 5

#### **Rules relating to decision making**

##### Paragraph 8.1

*'When participating in meetings or reaching decisions regarding the business of your council, you must:*

*(a) do so objectively, on the basis of the merits of the circumstances involved, and in the public interest'*

The following principles of public life were also noted:

#### **Principle of 'Public duty':**

*'You have duty to uphold the law and act on all occasions in accordance with the public trust placed in you. You have a general duty to act in the interest of the community as a whole. You have a special duty to your constituents and are responsible to the electorate who are the final arbiter of your conduct as a public representative.'*

#### **Principle of 'Selflessness':**

*'You should act in the public interest at all times, and you should take decisions solely in terms of the public interest. You should not act in order to gain financial or other material benefits for yourself, your family, friends or associates.'*

#### **Principle of 'Openness':**

*'You should be as open as possible about the decision and actions that you take. You should give reasons for your decisions when required and restrict information only when the wider public interest clearly demands it.'*

### **Principle of ‘Honesty’:**

*‘You should act honestly. You have a duty to declare any private interest relating to your public duties. You should take steps to resolve any conflicts between your private interests and public duties at once and in a way that protects the public interest.’*

### **Principle of ‘Integrity’**

*‘You should not place yourself under any financial or other obligation to outside individuals or organisations, which might reasonably be thought by others to influence you in the performance of your duties as a councillor’.*

## **2. PRE-ADJUDICATION HEARING REVIEWS**

The management of the Adjudication process may include convening one or more Pre-Hearing Reviews (PHR). A PHR is a private meeting to determine procedural matters for the ongoing management of the matter up to and including the actual Hearing, but a PHR does not consider or determine the substance of the complaint.

On 7 November 2022 the Solicitors acting for the Respondent wrote to the Commissioner questioning the lawfulness of the delegated authority of the Assistant Commissioner to hear this complaint. On 30 November 2022, the Solicitor acting for the Commissioner replied stating that the Commissioner was satisfied that the delegation to the Assistant Commissioner to hear this complaint was lawful.

On 14 December 2022, the Respondent’s Solicitors, wrote to the Assistant Commissioner. In this letter they stated:

*“Ahead of the further pre-hearing review of the adjudication in this matter - scheduled for tomorrow (15 December 2022) - we are writing to advise that we maintain our position that Assistant Commissioner Gordon does not have lawful authority to conduct or to determine this adjudication. **As such, neither we nor the Respondent will be in attendance at the pre-hearing review tomorrow, nor will we take any further part in this unlawful process (emphasis added)**”.*

The Assistant Commissioner held a PHR to progress the case on 15 December 2022. The arrangements for this PHR had been agreed by all the parties (including the Respondent’s Solicitors) at a previous PHR held on 15 November 2022. The PHR on 15 December 2022 was attended by Ms Fiona Fee BL, representing the Deputy Commissioner, but neither the Respondent nor his Solicitors or his Counsel were present.

On 15 December 2022 the Assistant Commissioner replied to the Respondent’s Solicitors, confirming that the PHR had taken place and stating:

*“Notwithstanding, the content of your letter I am satisfied that I have lawful authority to conduct the Hearing and I am satisfied that it is both appropriate and proportionate to proceed with the Adjudication of the case.*

*In your letter you expressly state that Alderman Smyth will not attend or be represented at the Adjudication Hearing. It is for you to advise your client as you see fit; however, in light of this statement, it is now my intention to implement paragraphs 25 to 27 of the Adjudication Procedures in order to determine whether there has been a breach of the Code without holding an Adjudication Hearing. I do not consider that I require any further evidence and the circumstances set out at paragraph 25b which states: “if the Respondent states that he or she does not intend to attend or wish to be represented at the Adjudication Hearing” are clearly met.*

*I will now deal with Stage 1 (Findings of Fact) and Stage 2 (Determination) on paper. I have asked for the draft Statement of Facts prepared by the Deputy Commissioner and any response from your client to be sent to me for inclusion in my consideration. I will also take into account the contents of the final paragraph of your letter of 14 December 2022.*

*I will of course continue to correspond with you, as Alderman Smyth’s legal representative, and the Deputy Commissioner’s office throughout this process”.*

The Adjudication Procedures document, at page 7 paragraphs 25 to 27, sets out the procedure that permits the Commissioner to determine whether there has been a breach of the Code without holding an Adjudication Hearing:

**Paragraph 25: Determination of Adjudication without an Adjudication Hearing**

*“The Commissioner has the discretion to adjudicate to determine whether there has been a breach without an Adjudication Hearing if he considers that he requires no further evidence and any one of the following circumstances apply:*

***25a.** If no reply is received in response to the notification provided to the Respondent within the specified time or any extension of time allowed by the Commissioner; or*

***25b.** If the Respondent states that he or she does not intend to attend or wish to be represented at the Adjudication Hearing; or*

***25c.** The Respondent does not dispute the contents of the investigation report”.*

For the reasons outlined above, the Assistant Commissioner has exercised his discretion not to hold an Adjudication Hearing to determine if there has been a breach of the Code.

Paragraph 26 of the Adjudication Procedures requires him to:

*“send to the Respondent a list of the facts, together with any other supporting evidence, that he will take into account in reaching his decision. The Respondent will have 15 working days to submit any further written representations before the Assistant Commissioner makes his adjudication.”*

### **3. STAGE 1 – FACTS TO BE TAKEN INTO ACCOUNT**

At the direction of the Assistant Commissioner the Acting Deputy Commissioner submitted a proposed Statement of Facts which was sent to the Respondent's solicitors on 9 November 2022 and on 28 November 2022, having taken the Respondent's instructions, they replied as follows:

- With regard to paragraph 8, after the words '*was employed*', there should be inserted "*by Mr Clarke MLA*". This was agreed to by Acting Deputy Commissioner
- With regard to paragraph 22 the word 'planning', ought to be deleted and replaced with the word 'all'. This was agreed to by Acting Deputy Commissioner.
- Paragraphs 24 and 25 of the proposed Statement of Facts were disputed by the Respondent. Paragraph 24 has been removed by the Acting Deputy Commissioner, but Paragraph 25 remains as a 'disputed fact'.

As the Deputy Commissioner no longer sought to rely on either of them, both paragraphs 24 and 25 of the proposed Statement of Facts have been disregarded. All the other paragraphs of the proposed Statement of Facts were agreed between the parties and are now set out. This includes the amended paragraphs 8 and 22.

#### **STATEMENT OF FACTS**

1. At the relevant time (19 March 2019), Alderman John Smyth was a member of Antrim and Newtownabbey Borough Council ('the Council').
2. Alderman Smyth signed a Declaration of Acceptance of Office on 5 June 2014, stating that he had read and would observe the Local Government Code of Conduct for Councillors.
3. Alderman Smyth was first elected to the Council approximately 20 years ago. During this time, he has served as both Deputy Mayor (2018-2019) and Mayor (2019-2020).
4. At the relevant time (19 March 2019), Alderman Smyth also held the role of Deputy Mayor within the Council.
5. Alderman Smyth is a member of the Council's Planning Committee. He was appointed to the Planning Committee in 2014 and sat as a member since this time, with the exception of the period he served as Mayor (2019-2020).
6. Alderman Smyth commenced employment with Mr Trevor Clarke MLA in 2014.
7. Alderman Smyth recorded in the Council's Members' Register of interests on 21 January 2014 'Trevor Clarke MLA' under the heading 'financial and other personal interests.
8. At the relevant time (19 March 2019), Alderman Smyth was employed by Mr Clarke MLA for 12 hours per week. This has since increased to 24 hours per week.

9. At the relevant time, Mr Clarke had a planning consultancy business which bore the name 'Versatile Planning Consultancy'.
10. Alderman Smyth sat on the Council's Planning Committee at a meeting held on 19 March 2019.
11. Alderman Smyth did not declare an interest in respect of any matter under consideration at the Council's Planning Committee meeting on 19 March 2019.
12. Mr Clarke MLA made representations before the Council's Planning Committee on 19 March 2019, in respect of three applications.
13. Two of the applications in which Mr Clarke made representations were applications LA03/2018/1124/O and LA03/2018/1125/O.
14. Planning permission in respect of the two applications was refused due to the following votes cast:  
LA03/2018/1124/O - five in favour of recommendation to refuse: four against and one abstention.  
LA03/2018/1125/O - six in favour of recommendation to refuse: three against and one abstention.
15. One of the applications in which Mr Clarke made representations, application LA03/2018/0855/O, Mr Clarke was the Agent by virtue of his company Versatile Planning Consultancy.
16. Alderman Smyth asked a clarification question of Mr Clarke: *'Trevor is there a Farm ID for what we're shown at this moment in time?'*
17. Planning permission in respect of this application was also refused, with the Planning Officer's recommendation to refuse carried by seven votes to zero, with three abstentions.
18. The minutes of the Council's Planning Committee meeting do not record the vote cast by each Member in respect of each application.
19. The investigation carried out by the Director of Investigations found no evidence that Alderman Smyth had direct or implied knowledge of Versatile being in the ownership of Mr Clarke MLA.
20. Alderman Smyth does not recall Mr Clarke being referred to as 'the agent' at the PC meeting. When asked if he had done so, would it have prompted a different course of action, Alderman Smyth said *'Not particularly'* as Mr Clarke had not spoken to him on any planning issue.

21. Alderman Smyth had open access to Mr Clarke MLA's constituency office database containing information relating to Mr Clarke's constituency activities.
22. Following from this, Alderman Smyth had open access to information concerning all matters in which Mr Clarke MLA was involved as an MLA.
23. Alderman Smyth did not speak to Mr Clarke MLA prior to the Committee meeting regarding any of the three applications on which he made representations at the Council's Planning Committee on 19 March 2019.
24. Alderman Smyth's conduct received media attention in The Irish News on 1 August 2019 and 3 September 2019.

The Assistant Commissioner reviewed these proposed Facts and has also taken into account the supporting evidence contained in the Investigation Report and in correspondence from the Respondent's Solicitors dated 17 December 2021 and 21 June 2022. The Assistant Commissioner concluded that the Facts set out in paragraphs 1 to 24 above should represent the findings of Fact in this matter.

## **FINDING OF FACTS**

On 27 January 2023, the Assistant Commissioner sent the Respondent his proposed Findings of Fact in accordance with paragraph 26 of the Adjudication Procedures and afforded him 15 working days to submit any further representations before the Assistant Commissioner would make his Stage 1 adjudication on the Facts of this matter. No response was received from the Respondent or his solicitors.

In circumstances where the Respondent was not present nor represented, the Assistant Commissioner had been careful to ensure that the 'undisputed and agreed facts' were made out to his satisfaction. Taking into account that the parties had put these facts forward as undisputed, and agreed, and have carefully considered the supporting evidence contained in the Investigation Report and the correspondence from the Respondent's solicitors dated 17 December 2021 and 21 June 2022, the Assistant Commissioner was satisfied that the Facts numbered 1 to 24 inclusive had been made out to his satisfaction.

## **4. STAGE 2 – DETERMINATION ON BREACH**

In the process of coming to his Stage 2 conclusions on the alleged breaches of the Code of Conduct for Councillors ('the Code'), the Assistant Commissioner had again fully taken into account the response by the Respondent to the allegations, as provided in correspondence from his solicitors. This included their letters dated 17 December 2021 and 21 June 2022 and, in addition, a letter dated 14 December 2022.



The Finding of Facts, at paragraphs 1 to 24 inclusive, had been agreed by the parties and the Assistant Commissioner noted that these Facts were inclusive to his consideration of **all alleged breaches**.

The Code applies to councillors and councils established in accordance with Section 1 of the Local Government Act Northern Ireland 1972 as amended by the Local Government Boundaries Act Northern 27 Ireland 2008. The Code must be observed according to paragraph 2.7:

*"Where the councillor conducts the business or are present at meeting of the council, whenever the councillor acts, claims to act or gives the impression they are acting in the role of councillor and whenever the councillor acts, claims to act or gives the impression that they are acting as a representative of the council."*

In addition, the Code provides at 2.9 that the Code must be observed at all times in relation to:

*(a) Conduct which could reasonably be regarded as bringing the councillor's position as a councillor into disrepute or their council into disrepute.*

*(b) Conduct relating to the procuring, advocating or encouraging of any action contrary to the code.*

*(c) Conduct relating to the improper use or attempted use of the councillor's position to confer on or secure for the councillor or any other person an advantage or create or avoid for the councillor, or any other person, a disadvantage.*

*(d) Conduct relating to the use or authorisation of the use by others of the resources of the council.*

The Code is based on 12 principles of conduct: public duty, selflessness, integrity, objectivity, accountability, openness, honesty, leadership, equality, promoting good relations, respect and good working relationships.

The Respondent was alleged to have breached five aspects of the Code (as set out at pages 1 to 3 above)

## **1. REASONS FOR THE DECISION**

The Assistant Commissioner had established the facts of the case. The evidential test for consideration of a breach of the Code is whether the Deputy Commissioner had established to the satisfaction of the Assistant Commissioner, on the 'Balance of Probabilities', that there had been a failure to comply with the Code. The Assistant Commissioner applied that test to his determination.

The Assistant Commissioner considered a key factor in this case, and the core issue for determining any breach of the Code, lay in the analysis of any direct or indirect pecuniary interest, and/or significant non-pecuniary interest which the Respondent may have had, and, to that extent, a consideration of his attendance and conduct at the Council's Planning

Committee meetings (Potential Breach 4 above). The Code required the registration of such interests and, if such a matter was to be discussed by your Council, the Councillor having that interest must declare it and withdraw from the meeting.

The Assistant Commissioner referred to the Acting Deputy Commissioner's Report:

**Registerable Interest** - Paragraphs 2.9 and 43

*p.29 Alderman Smyth stated that he has worked for Mr Clarke since 2014 and that in 2019, he was employed for 12 hours per week. Alderman Smyth also stated his 'primary role is dealing with benefit application ..... since the increase in his number of hours worked per week, he now deals with general enquiries, social issues and housing in addition to benefit applications.*

*p.43 I considered paragraph 5.2 of the Code and conclude that Alderman Smyth had a clear registrable interest in his employment with Mr Clarke. The evidence suggests that this interest was properly registered on the Council's Register of Interests from 21 January 2014 under 'financial and other personal interests'. In consideration of paragraph 6.2 of the Code, I am satisfied that Alderman Smyth's employment constituted a pecuniary interest, in the continued remunerated employment and the desired continuation of that remuneration.*

The Assistant Commissioner determined that the Respondent, in working for Mr Clarke, had a registerable interest as defined in paragraphs 5.2 and 5.3 of the Code. This interest was properly registered in the Council's Register of Interests.

On the 19 March 2019, the Respondent sat on the Council's Planning Committee when his employer, Mr Clarke, made representations to the Committee on three planning applications. In one application, Mr Clarke was the Agent for the application via his firm Versatile Planning Consultancy. The Investigation Report found no evidence that the Respondent had direct or implied knowledge of Versatile being owned by Mr Clarke.

Prior to the Committee Meeting, the Respondent did not speak to Mr Clarke regarding any of the three applications on which he made representations. During the Committee Meeting the Respondent made no declaration of interest in respect of any matter.

The requirements to declare any pecuniary interests are set out at paragraph 6.1 of the Code, and paragraph 6.2 states that a councillor must not speak or vote on a matter in which they have a pecuniary interest, and they must withdraw from a meeting whilst that matter is being discussed.

Likewise, paragraph 6.3 of the Code requires a councillor to declare any significant private or personal non-pecuniary interest in a matter arising at a council (or committee) meeting, and paragraph 6.4 states that it is the personal responsibility of a councillor to declare such interest, and to withdraw from the meeting.

In the Investigation Report, the Acting Deputy Commissioner considered 'perception' in relation to the conduct of a councillor at the Committee Meeting:

**p.46** *In addition, the Code obliged Alderman Smyth to consider the perception of his actions. I consider that paragraph 4.17 of the Code and 4.13.13 of the Commissioner’s Guidance on the Code placed an obligation on Alderman Smyth to avoid actions which could reasonably lead to a perception of favourable treatment. The issue of perception was also addressed by the Commissioner in the decision of Rea<sup>1</sup> where the objective test was outlined:*

*‘The objective test requires Mr Rea Councillor to have considered not just whether he himself could be influenced by his employer’s interest in the matter under discussion (no decisions were made at the meetings in question) but also whether his actions might be perceived by a member of the public as being so influenced’<sup>2</sup>*

**p.47** *“I consider a member of the public’s conclusion that Alderman Smyth would be reluctant to vote against the views of his employer, due to the potential impact it may have on his employment, is a reasonable conclusion. The investigation found no evidence to suggest that Alderman Smyth considered public perception in not declaring an interest and leaving the room”.*

The Assistant Commissioner concurred with the Acting Deputy Commissioner’s conclusion that the Respondent had not considered the ‘public perception’ of his actions in the Committee Meeting. Further, the Guidance to the Code at paragraph 4.13.13 emphasised the relevance of considering the wider public perception:

*“The key consideration is therefore not whether your decision would be influenced by your interest but whether a member of the public – if he or she knew all of the relevant facts – would perceive that the interest is such that it would be likely to influence your decision”.*

In relation to Potential Breach 4, the Assistant Commissioner considered the Respondent’s response to the Investigation Report, through his legal representative, in their letter dated 17 December 2021:

*“In short, there is simply no evidence that Mr Clarke himself had an interest in the outcome of the planning applications in question. The fact that he was speaking in favour of them, does not mean that he himself had any interest in the outcome. It is submitted that for Mr Clarke to have had a pecuniary interest in the outcome of these planning applications, in accordance with how that is defined within section 146 of the 1972 Act, he himself would have had to have stood to gain from planning permission being granted. There is no evidence that that is the case here. In the event that this is not accepted, then Alderman Smyth prays in aid of section 146(1)(ii) of the 1972 Act and would state that any advantage to Mr Clarke MLA as a result of the planning applications being granted was so indirectly*

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<sup>1</sup> Northern Ireland Local Government Commissioner for Standards: 8 July 2019/ <https://nipso.org.uk/site/wp-content/uploads/2019/07/Decision-Notice-Mervyn-Rea-1.pdf>

<sup>2</sup> Ibid. Page 15 paragraph 4

*or remotely related to Mr Clarke MLA, that Alderman Smyth's judgment was not likely to have been affected or influenced thereby, and therefore that no question of a pecuniary interest, arises".*

The Assistant Commissioner accepted that, other than the Respondent's employment by Mr Clarke, no evidence was put forward to quantify a direct pecuniary interest with a consequent advantage to the Respondent being shown. In the application LA03/2018/0855/O, where Mr Clarke was the Agent, the Respondent was not aware of that fact. All three applications were refused. There is no evidence as to how the Respondent voted in the three applications: the Council do not record individual's votes and the Respondent cannot remember how he voted.

The Assistant Commissioner was satisfied on the facts that there was no evidence that this was a case which involved a direct or indirect pecuniary interest (as defined in section 146 of the Local Government Act (NI) 1972) and accordingly there had been no breach of paragraphs 6.1 and 6.2 of the Code.

The Assistant Commissioner found that the core of this case therefore related to the alleged breaches of paragraphs 6.3 and 6.4 of the Code.

### **Paragraphs 6.3**

*You must also declare any significant private or personal non-pecuniary interest in a matter arising at a council meeting. In addition to those areas set out in paragraph 5.2, an interest will also be significant where you anticipate that a decision on the matter might reasonably be deemed to benefit or disadvantage yourself to a greater extent than other council constituents. Any sensitive information mentioned in paragraphs 5.4 to 5.6 is not required to be given.*

### **Paragraph 6.4**

*You must declare any significant private or personal non-pecuniary interests in a matter as soon as it becomes apparent. You must then withdraw from any council meeting (including committee or sub-committee meeting) when the matter is being discussed. It is your own personal responsibility to determine, having regard to council advice and guidance, whether you have any such interest.*

The Respondent was interviewed, on 6 October 2021, by Ms Nicola McGuire, Senior Investigating Officer (SIO) from the Acting Deputy Commissioner's staff. Mr Brian Moss, the Respondent's legal representative was present.:

In interview, the Respondent acknowledged he was aware that Mr Clarke (his employer) was to speak to three planning applications before the Committee Meeting on 19 March 2019. The Respondent did not seek any advice or speak to Mr Clarke about the situation. The Respondent was asked by the SIO in relation to the Committee Meeting:

*Q. Okay, well, on that basis could you explain to us, on what basis you didn't declare an interest at that meeting and leave the room?*

*A. Because I'd declared an interest in my [register of interests], I've consistently done it from 2014, I've worked for Trevor Clarke MLA.*

*Q. Do you mean you registered your interest?*

*A. Yes*

*Q Okay, but you didn't declare it at that meeting or at the beginning of that meeting or during....*

*A. No*

*Q. Okay and what basis...*

*A. Also because Trevor Clarke had never spoke to me about it, about any planning issue so I see no reason why I should declare an interest in it.*

*Q. And is that what you consider the pertinent question within the Code?*

*A. Yes*

*Q. Whether he spoke to you about it?*

*A. Yes. He never raised any planning issue with me.*

*Q. Can I put to you that 5.2 of the Code makes an employment interest registerable and therefore it's automatically significant?*

*A. That's ... I had it registered that I worked with Trevor Clarke ..... I had consistently, since 2014, done that, that I worked for him.*

*Q. Okay, I was just going to put to you that, yes, registration is not an issue and..*

*A. Okay, fair enough.*

*Q. It is clear that your employment is registered, however, paragraph 6.3 and 6.4 of the Code, refer to registered employment interests and that automatically makes that interest significant where it relates to a matter that comes before a Council or Committee...*

At this point in the interview, the Respondent's legal representative commented that:

*"..under the Local Government Act [(NI) 1972], registration of an interest in the Council's register is sufficient to discharge the Councillor's duty and that the Code can't go further than the legislation on that. ...[R]egistration in the Council's Register of Interests by a member is sufficient to discharge any duties that the Councillor otherwise would owe".*

The Assistant Commissioner did not accept this proposition which conflated the obligation to 'register' an interest with the additional requirements in the Code, at paragraphs 6.3 and 6.4, for the declaration of a relevant significant private or personal non-pecuniary interest, and the withdrawal by the Councillor from the Committee meeting for the duration of the discussion of the matter. Likewise, at interview the following exchange took place:

*Q. Did you consider declaring your interest as an employee of Mr Clarke's?*

*A. No more than what I've done to register an interest.*

*Q. Okay*

*A. As Mr Moss alluded to, that's fulfilled my obligations.*

*Q. Okay. Do you believe it was possible to act impartially despite Mr Clarke, your employer, speaking in favour of this application?*

A. Yes. As I said, I've got my own mind and as part of our training you have to make up your own mind on the same reasons why it should be either for or against the planning application.

Q. Did you consider the Commissioner's guidance in relation to considering whether there may be a perception that your interest may influence how you would vote or decide on the matter?

A. No, because I'd declared my interest and felt that I'd obligated all my interests as such, to all parties concerned.

Q. You didn't consider that a member of the public, or whether a member of the public would perceive that the interest would be likely to influence your decision?

A. No, I felt I acted in a clear and professional way, as my responsibilities as a Councillor.

Q. Okay, and I'm just going to ask you again about the Department for Infrastructure guidance in relation to application of the Code with regard to planning matters, and again, I'll just refer you to paragraph 9, which states, 'where you have a significant private or personal non-pecuniary interest, for example, a planning application submitted by a close friend, close associate, body or organisation of which you are a member, you must declare this and you must then withdraw from the meeting when the matter is being discussed'.

A. No more than what I've done in my register of interest and as nobody had contacted me in regard to any planning issue from family or friends or anybody else, I'd no reason to [do so at the] meeting.

The Assistant Commissioner considered that the Respondent was mistaken in his view that the Code, in relation to declaration of non-pecuniary interests (and pecuniary interests) was only relevant where someone had contacted him regarding the meeting/application. This reinforces the Assistant Commissioner's belief that the Respondent had not fully understood the implication of perception, by a member of the public, of influence and prejudice arising if the Respondent failed to declare and leave the Committee room where an application involved his employer. As paragraph 6.4 of the Code noted, it is the personal responsibility of Councillors to determine, having regard to council advice and guidance, whether they have any such interest.

Paragraph 6.3 obliges Councillors to '*...declare any **significant private or personal non-pecuniary** interest in a matter arising at a council meeting etc...*'. A Council committee meeting falls within this definition.

To quantify, in non-pecuniary interests, the reason for the declaration and subsequent withdrawal process in p.64, the Assistant Commissioner drew upon the Guidance to the Code at:

**p.4.13.9**

*The Code requires that you declare "any significant private or personal non-pecuniary interests" in a matter coming before a meeting of your council as soon as it becomes apparent to you. Non-pecuniary interests are those that do not involve business or financial matters and can include, for example, those interests that arise through a*

*position of responsibility in, or membership of, a club, society or organisation. A non-pecuniary interest will be considered to be 'significant' if:*

- it is one that falls within any of the categories of interest listed in paragraph 5.2 of the Code; or*
- you anticipate that a decision on the matter coming before the meeting of your council might reasonably be considered by a member of the public to benefit or disadvantage you to a greater extent than other council constituents.*

This sets out what 'Non-pecuniary interests' are and makes clear that a non-pecuniary interest would be considered as '*significant*' if it is one that fell within any of the categories of interest listed in paragraph 5.2 of the Code, which created the requirement to register '*personal interests (both financial and otherwise)*' and identified employment as a category of interest. The Respondent had been employed by Mr Clarke since 2014.

In her Investigation Report, the Acting Deputy Commissioner referred to:

**p.65** I also took into account the Northern Ireland Audit Office (NIAO) 'Conflict of Interest Good Practice Guide' (March 2015) which at Section 2.9, states '*...a conflict of interest that is concealed, even if unintentionally through ignorance of proper procedure, or managed poorly, creates at best a risk of allegations or perceptions of misconduct*'.

**p.66** Further, I took account of relevant caselaw relating to conflicts of interest. In the case of Toner<sup>3</sup>, the Hearing Panel determined that '*the objective test... obliges councillors and members of public bodies to consider whether a member of the public, with knowledge of the relevant facts, would reasonably regard an interest as so significant it was likely to prejudice their discussion or decision-making*'.

I further noted the Panel determined '*in applying the objective test, therefore, the Respondent should have considered not only whether he could be influenced by his employer's interest in the matter, but also whether his actions might be perceived by a member of the public as being so influenced*'. I noted that this case can be distinguished to the present case as they did not involve the exercise of a quasi-judicial function, as Alderman Smyth was in sitting as a member of the PC.

## **2. DETERMINATION**

The Assistant Commissioner determined that 'risk of allegations or perceptions of misconduct' was a significant aspect in his consideration of the alleged breaches set out in Potential Breach 4. Further, Fact 11 showed the Respondent did not declare an interest in respect of any of these applications or leave the meeting.

The Assistant Commissioner found, on the balance of probability, that the Respondent's conduct was in breach of the Code in a number of respects based upon his failure to observe

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<sup>3</sup> Standards Commission Scotland, 29 November 2016

the requirements of the Code of Conduct consequent upon his non-pecuniary interests. For the avoidance of doubt, the Assistant Commissioner found that this case did not involve any direct or indirect pecuniary interests.

#### **POTENTIAL BREACH 1 – Disrepute**

Disrepute, which is alleged as a breach of paragraph 4.2 of the Code by the Respondent, is considered at paragraphs 4.5.2 to 4.5.4 in the Guidance to the Code. As a councillor, your actions and behaviour are subject to a higher level of expectation and scrutiny than those of other members of the public. The Guidance implies conduct which brings the role or the Council into disrepute as likely to be of a very serious nature, which goes to a person's fitness to hold office. Whilst the Respondent has misinterpreted the requirements of disclosure and requirement to leave the meeting, the Assistant Commissioner does not find a deliberate action on his part.

On the facts of this case, the Assistant Commissioner is not satisfied to the requisite standard that the **Respondent has breached paragraph 4.2 of the Code.**

#### **POTENTIAL BREACH 2 – Obligations as a Councillor**

**Paragraph 4.3** of the Code alludes to regular review by a councillor of their particular circumstances and take steps to mitigate any conflict of interest. The Investigation Report accepted that the Respondent had properly registered his interest as an employee of Mr Clarke, but found no evidence that he had taken steps to mitigate any conflict of interest in relation to his functions, including his membership of the Planning Committee, arising from this employment and the access to information relevant to Mr Clarke's constituency work which accompanied it.

Accordingly, the Assistant Commissioner found that the **Respondent has breached paragraph 4.3 of the Code.**

**Paragraph 4.8** of the Code alludes to maintain and strengthen public trust and confidence in their council, with promotion and support of the Code at all times.

The Assistant Commissioner **determined there was no evidence** to support a breach of paragraph 4.8.

#### **POTENTIAL BREACH 3- Use of your position**

**Paragraph 4.16** of the Code alludes to improper use of a Councillor's position to confer or secure an advantage and/or to use their position to seek preferential treatment.

The Assistant Commissioner **determined there was no evidence** to support a breach of paragraph 4.16.

#### **POTENTIAL BREACH 4 – pecuniary interests**

**Paragraphs 6.1 and 6.2** of the Code define pecuniary interest both direct and indirect.

On the facts of this case the Assistant Commissioner has determined that it does not involve any direct or indirect pecuniary interests and therefore the **Respondent has not breached paragraphs 6.1 and 6.2.**

**Paragraphs 6.3 and 6.4** of the Code define significant private or personal non-pecuniary interests.



The Assistant Commissioner considered the Respondent was mistaken in his belief that registration of his employment situation satisfied these parts of the Code. The Assistant Commissioner was satisfied that the facts established that the Respondent has a significant private and personal non-pecuniary interest as a consequence of his employment by Mr Clarke which gave rise to the additional need to declare that interest at the Planning Committee meeting, and to withdraw from the relevant parts of the meeting. In addition, the Respondent had not fully understood the implication of perception, by a member of the public, of influence and prejudice arising if he failed to declare this interest and leave the Committee room where an application involved representations by his employer. The Assistant Commissioner did not find that the Respondent's actions were deliberate on the night and it was apparent that they had had no detrimental effect on the outcome of the planning applications.

The Assistant Commissioner, on the facts of this case, found the **Respondent had breached paragraphs 6.3 and 6.4. of the Code.**

#### **POTENTIAL BREACH 5 - Rules relating to decision making**

The Assistant Commissioner was satisfied on the facts that in relation to Potential Breach 5, which engaged the rules relating to decision making, there was no evidence that the Respondent did not have an open mind on, or that he had pre-determined, any application. Consequently, the **Respondent has not breached paragraph 8.1 of the Code.**

This concluded Stages 1 and 2 of the Adjudication Hearing process, which then proceeded to Stage 3 (Sanction).

### **5. STAGE 3 – SANCTION**

On the 15 June 2023, the Assistant Commissioner opened the public Adjudication Hearing to determine Sanction. The Hearing was conducted by WebEx, and arrangements were made for member of the public who wished to attend to view the virtual Hearing at the offices of the Commissioner.

The Assistant Commissioner was accompanied by Michael Wilson, Solicitor, whose function was to provide independent legal advice and assistance during the Hearing, and to ensure that it was conducted fairly but he had no role in the Assistant Commissioner's decision making.

The Deputy Commissioner was represented by Ms Fiona Fee BL. Neither the Respondent nor his legal representatives were present.

As a preliminary matter the Assistant Commissioner addressed the absence of the Respondent and his legal representatives from the Sanctions Hearing. He noted that the Respondent's legal representatives had previously notified him that they had advised the Respondent not to participate in the Adjudication process which was the reason why the

Assistant Commissioner conducted Stages 1 (Finding of Facts) and Stage 2 (Determination on Breach) under paragraph 25(b) of the Adjudication Procedures.

The Assistant Commissioner noted that paragraph 48 of the Adjudication Procedures allowed him to either adjudicate in the absence of the Respondent, or to adjourn the Hearing to another date.

On that matter, the Assistant Commissioner asked Ms Fee, for her submission on adjudicating in the absence of the Respondent.

Ms Fee said that in light of the approach adopted by the Respondent, she thought it had been a consistent approach not to participate. In the circumstances her submission was that it was appropriate to continue with the hearing in his absence. She was mindful of the fact that there would then be a particular enhanced onus on her to draw the Assistant Commissioner's attention to both the aggravating and the mitigating factors of the case.

The Assistant Commissioner then asked Mr Wilson, as the Legal Assessor, for his advice on adjudicating in the absence of the Respondent.

Mr Wilson said the Assistant Commissioner had already referenced, paragraph 48 of the Adjudication Procedures, which permitted him to proceed in the absence of the Respondent. In this case the Assistant Commissioner would be entitled to take into account the letter of the 14 of December 2022 from the Respondent's Solicitors in which they said that they would not be participating further in the Hearing. Mr Wilson said the Assistant Commissioner should adjourn to consider his approach.

Following a brief adjournment the hearing resumed.

The Assistant Commissioner said he had considered the papers in the Hearing bundle and had taken into account the submissions from Ms Fee BL and the advice from Mr Wilson, his Legal Adviser. He was very aware that it was important to exercise the utmost care and caution in deciding whether or not to proceed in the absence of the Respondent.

The Assistant Commissioner was satisfied that the Respondent was fully aware of the arrangements for the Hearing. The Respondent and his legal representatives had been issued with a full bundle of papers for the Sanctions Hearing, which included his findings at Stages 1 and 2. The Respondent had had the benefit of legal advice and had chosen not to attend any part of the Adjudication process. The Assistant Commissioner concluded, therefore, that it was unlikely an adjournment would make any difference to the Respondent's decision not to attend in the future.

Therefore, on balance, the Assistant Commissioner said that public interest in having this matter concluded outweighed the option to adjourn to another date.

In proceeding in the absence of the Respondent, the Assistant Commissioner reminded Counsel for the Deputy Commissioner of her obligation to draw to his attention not only the evidence relied on by the Deputy Commissioner, but also any matters raised by the Respondent in his Councillor Response Form.

In Stage 1 of the proceedings, the Assistant Commissioner had established the Findings of Fact. These Facts (which are set out above) were then read into the record.

Having established these facts at Stage 1, the Assistant Commissioner had then considered all the available evidence before him in Stage 2, where he found:

The Code applied to the Respondent.

1. He was satisfied that the Respondent had failed to comply with the Code at:

▪ **Paragraph 4.3:**

*'You must not conduct yourself in a way which could reasonably be regarded as bringing your position as a Councillor into disrepute'.*

▪ **Paragraph 6.3**

*You must also declare any significant private or personal non-pecuniary interest in a matter arising at a council meeting. In addition to those areas set out in paragraph 5.2, an interest will also be significant where you anticipate that a decision on the matter might reasonably be deemed to benefit or disadvantage yourself to a greater extent than other council constituents. Any sensitive information mentioned in paragraphs 5.4 to 5.6 is not required to be given.*

▪ **Paragraph 6.4**

*You must declare any significant private or personal non-pecuniary interests in a matter as soon as it becomes apparent. You must then withdraw from any council meeting (including committee or sub-committee meeting) when the matter is being discussed. It is your own personal responsibility to determine, having regard to council advice and guidance, whether you have any such interest.*

The Assistant Commissioner's Determination on Stages 1 and 2 had been sent to both the Deputy Commissioner and the Respondent. The Assistant Commissioner had received written submissions on mitigation and sanction from the Deputy Commissioner; however, the Respondent had not provided any such submissions.

The Deputy Commissioner's written submissions are set out in full at Appendix A to this Decision Report. Ms Fee orally outlined the key submissions at the Hearing.

**Ms Fee's submissions:**

The sanctions guidelines at Appendix A set out factors that the Assistant Commissioner may take into account when determining the appropriate sanction. The sanctions guidelines themselves set out the purpose of sanction and the various options which were available to the Acting Commissioner. The written submissions addressed each of these starting with no action, then censure, partial suspension, suspension and disqualification

**Mitigating Factors:**

Ms Fee confirmed that the Respondent had no history of breaching the Code and that this provided some evidence of previous good service and compliance with the Code. The Respondent had engaged with the investigation process, which included making himself available for interview, and the Deputy Commissioner considered that this constituted cooperation with the investigation stage.

During the Deputy Commissioner's investigation, the Respondent had indicated that he had tried to rely on his interpretation of advice provided by the Borough Lawyer, which might provide some evidence of an honestly held, but mistaken, view that the action concerned did not constitute a failure to follow the provisions of the Code, particularly where such a view had been formed after taking appropriate advice,

Ms Fee noted that the Assistant Commissioner's determination on breach had not found that the Respondent's actions were deliberate, and also noted that it was apparent they had no detrimental effect on the outcome of the planning applications.

There had been an apology by the Respondent. Ms Fee also referenced the significant passage of time since the events complained of and that the Respondent had continued to engage with the process to an extent, for example by providing input into the statement of agreed facts although, on the basis of legal advice, he had not participated in the previous determinations at Stage 1 and Stage 2 and again at the Sanctions Hearing.

Ms Fee said there were other mitigating factors which were set out in her written submissions, but these were the most pertinent.

**Aggravating Factors:**

An important factor in this case was the protection of the public interest and public confidence in the institutions of Local Government through those who had been democratically elected.

The Respondent had full knowledge of his employment role with Mr Clarke he should have erred on the side of caution by absenting himself from a situation which could have given rise to a potential conflict of interest.

The Assistant Commissioner had determined that there was no evidence that the Respondent had taken any steps to mitigate any conflict of interest in this regard. She highlighted the Commissioner's Guidance on the Code and noted that this Guidance was the subject of consultation with Councillors and other stakeholders and that the Guidance made clear that familiarity and understanding of the Code and its obligations and responsibilities was a matter of personal responsibility for the Councillor.

Ms Fee referenced the specific guidance which the Department for Infrastructure had issued in respect of the Code with regard to planning matters which made clear that the Code required Councillors to declare any pecuniary interest and withdraw from the meeting and, where there was a significant private or personal non-pecuniary interest the Councillor must declare this and withdraw from the meeting when the matter was discussed.

Ms Fee noted the previous case-law referenced in her written submissions, in particular the case of *Mervyn Rea*<sup>4</sup>, which dealt with the importance of registering and declaring interests (albeit in a matter which involved a pecuniary interest).

### **Sanction:**

Regarding Sanction Ms Fee concluded:

1. **No action:** would not be a suitable outcome as the Respondent's breach of the Code was not an inadvertent failure by him.
2. **Censure:** it was questionable whether censure could adequately cater for the public interest in these circumstances and the breaches were not minor in nature.
3. **Partial suspension.** The Respondent was a member of the Planning Committee and, as the breaches arose in that context, a partial period of suspension from the Planning Committee might be considered to meet the public interest and be proportionate to the nature of these breaches.
4. **Suspension:** although these were serious breaches which related to aspects of the Code that were central to public confidence, nonetheless partial suspension might be considered to meet the public interest in this specific instance.
5. **Disqualification:** This would be the most serious sanction.

### **Determination on Sanction**

The Assistant Commissioner adjourned the Hearing to consider his decision.

When the Hearing resumed, Ms Fee said she had omitted to specifically refer the Assistant Commissioner to the Respondent's Councillor Response Form, and the letter of the 17th of December 2021 from his solicitors, which the Assistant Commissioner was also entitled to take into account, although both were primarily focused on disputing breach. She added that where there were points in that correspondence and Form, which touched on the issue of sanction, she had sought to draw those out in her submissions.

Mr Wilson, when asked to comment by the Assistant Commissioner, said that no issue arose from that, and these documents essentially dealt with matters that had already been determined in the Adjudication process.

The Assistant Commissioner said he had considered the Sanctions Guidelines and noted that the principal purpose of sanction was the preservation of public confidence in Local Government representatives. He noted that the Respondent had no history of breaching the code of conduct.

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<sup>4</sup> <https://nipso.org.uk/site/wp-content/uploads/2019/07/Decision-Notice-Mervyn-Rea-1.pdf>

**Mitigating factors:**

In terms of mitigating factors, the Assistant Commissioner noted the submissions by Ms Fee and stated:

- There was some evidence of a previous record of good service and compliance with the Code.
- The Respondent had engaged with the Investigation process, although he had disengaged from the adjudication process. In the particular circumstances of the case however, the Assistant Commissioner did not consider this to be an aggravating factor as the Respondent had done so on legal advice.
- The Respondent sought to rely on his interpretation of advice provided by the Borough Lawyer to members at the start of the PC meeting. This provided some evidence of an honestly held (although mistaken) view that the action concerned did not constitute a failure to follow the provisions of the Code, particularly where such a view had been formed after taking appropriate advice.
- The Respondent had apologised for his failure to declare an interest and his apology was reported in the media.
- There had been a considerable passage of time since the complaint arose.

**Aggravating factors:**

- The Assistant Commissioner concurred with Ms Fee's submission that the Respondent, who was an experienced councillor with approximately 20 years of service, had full knowledge of his employment role with Mr Clarke and should have erred on the side of caution by absenting himself from a situation which could rise to a potential conflict of interest. He found, in his Stage 2 decision, no evidence that the Respondent had taken any steps to mitigate any conflict of interest in this regard.
- The Commissioner's Guidance on the Code emphasised that familiarity and understanding of obligations under the Code and conduct was a matter of personal responsibility for the councillor. The Respondent had not demonstrated he had undertaken that responsibility.

- Of particular note was Ms Fee's submission about specific Departmental guidance on the application of the Code with regard to planning matters, which made clear at paragraph 9 :

*'The Code requires you to declare any pecuniary (financial) interest and withdraw from the meeting (for example, a planning application submitted by yourself, partner/spouse or family member). Where you have a significant private or personal non-pecuniary interest (e.g. planning application submitted by a close friend, close associate or body or organisation of which you are a member) you must declare this and you must then withdraw from the meeting when the matter is being discussed.'*

## **FINDING:**

The Assistant Commissioner said that any sanction imposed must also be justified in the wider public interest and should be designed to discourage or prevent any future failures to comply with the Code or to discourage similar conduct by other Councillors. This was a very important feature of the whole procedure in dealing with breaches of the Code.

The available sanctions were set out in paragraph 68 of the Procedures document:

1. NO ACTION - This was not an inadvertent failure - to take no action was not an appropriate sanction.
2. CENSURE – This was not a minor breach – perception and public interest in the Respondent's actions meant Censure was not an appropriate sanction on the Assistant Commissioner's findings in this case.
3. PARTIAL SUSPENSION - was more likely to be appropriate where the conduct related to a particular activity or Council business from which the Councillor could be easily removed. The Respondent's conduct, which led to this breach of the Code, was linked directly to his appointed role as a member of the Council' Planning Committee.
4. SUSPENSION - The Sanctions Guidelines stated that suspension was to be considered where the conduct was not sufficiently serious to warrant disqualification, but the conduct was of a nature that: it was necessary to uphold public confidence in the standards regime and/or local democracy.
  - a. there was a need to reflect the severity of the matter; and
  - b. there was a need to make it understood that the conduct should not be repeated.
5. DISQUALIFICATION - was the most severe option and the factors which may lead to disqualification were listed in the Sanction Guidelines at paragraph 19 a. to h. The Assistant Commissioner was satisfied that, having considered those Guidelines, the conduct in this case did not require disqualification.

The Assistant Commissioner had considered suspension was an appropriate sanction for the Respondent's failures to comply with the Code. He was, however, influenced by Ms Fee's submission that whilst these were serious breaches, 'on balance', the public interest could be met by the lesser sanction of Partial Suspension. The relevant case law, put forward in her submission, lent support to that finding, in particular the previously adjudicated cases of *Rea*<sup>5</sup> and *Boyle*<sup>6</sup>. The Assistant Commissioner also referred to the case *of Alderman J Rodgers*<sup>7</sup> and the Learning Points on the conflict of interest provisions of the Code set out by the Commissioner in that Case.

Paragraph 15 of the Sanctions Guidelines made clear that the "nature" of the conduct will be taken into consideration when considering whether the sanction was necessary to uphold public confidence, to reflect the severity, and make it understood that the conduct should not be repeated.

The Assistant Commissioner's decision was that a partial suspension, for the period from Monday 17 July 2023 to Sunday 15 October 2023 inclusive from the Council's Planning Committee, was both appropriate and proportionate to reflect the seriousness of the breaches and to maintain public confidence in local democracy. He was satisfied that this sanction was consistent with the approach taken in the previously decided cases in this jurisdiction and reflected a similar consideration of the underlying issues in this matter in other UK jurisdictions.

## **REASONS:**

The Assistant Commissioner had determined that 'risk of allegations or perceptions of misconduct' was a significant aspect of the alleged breaches set out in Potential Breach 4. Further, Fact 11 showed the Respondent did not declare an interest in respect of any of these applications or leave the meeting.

He had found, on the balance of probability, that the Respondent's conduct was in breach of the Code in a number of respects based upon his failure to observe the requirements of the Code of Conduct consequent upon his non-pecuniary interests (6.3 and 6.4). For the avoidance of doubt, The Assistant Commissioner found that this case did not involve any direct or indirect pecuniary interests.

In his Determination, the Assistant Commissioner had considered the Respondent was mistaken in his belief that registration of his employment situation satisfied these parts of the Code. He was satisfied that the Respondent had a significant private and personal non-pecuniary interest as a consequence of his employment by Mr Clarke which gave rise to the additional need to declare that interest at the Planning Committee meeting, and to withdraw from the relevant parts of the meeting.

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<sup>5</sup> <https://nipso.org.uk/site/wp-content/uploads/2019/07/Decision-Notice-Mervyn-Rea-1.pdf>

<sup>6</sup> <https://nipso.org.uk/site/wp-content/uploads/2022/03/Final-Decision.pdf>

<sup>7</sup> <https://nipso.org.uk/site/wp-content/uploads/2019/01/Alderman-Rodgers-Decision-ref-C00098-1.pdf>



In addition, the Respondent had not fully understood the implication of perception, by a member of the public, of influence and prejudice arising if he failed to declare this interest and leave the Committee room where an application involved representations by his employer. The Assistant Commissioner did not find that the Respondent's actions were deliberate on the night, where it was apparent from the Investigation Report that they had had no detrimental effect on the outcome of the planning applications.

Finally, in the course of the Respondent's interview (noted in the Stage 2 Determination above) the Respondent's legal representative commented that:

*"..under the Local Government Act [(NI) 1972], registration of an interest in the Council's register is sufficient to discharge the Councillor's duty and that the Code can't go further than the legislation on that. ...[R]egistration in the Council's Register of Interests by a member is sufficient to discharge any duties that the Councillor otherwise would owe".*

The Assistant Commissioner did not accept that proposition, which conflated the obligation to 'register' an interest with the additional requirements in the Code, at paragraphs 6.3 and 6.4, for the declaration of a relevant significant private or personal non-pecuniary interest, and the withdrawal by the Councillor from the Committee meeting for the duration of the discussion of the matter.

The sanction of a Partial Suspension was both necessary and proportionate to reflect the seriousness of the breaches and to maintain public confidence in local democracy.

## **LEAVE TO APPEAL**

Pursuant to section 59 (14) of the Local Government Act (Northern Ireland) 2014 Alderman Smyth may seek the permission of the High Court to appeal against a decision made by the Assistant Commissioner, which must be made within 21 days of the date that he receives written notice of the Assistant Commissioner's decision.

*Ian Gordon*

Assistant Northern Ireland Local Government Commissioner for Standards

## **APPENDIX A**

### **STAGE 3 - ADJUDICATION HEARING – SANCTION - Alderman John Smyth (C00434)**

Invitation by the Acting Commissioner for the Deputy Commissioner to set out previous history of breaches and draw out any mitigating and aggravating factors in the case which should be taken into consideration.

#### **Introduction**

1. I can confirm that Alderman John Smyth has no history of breaching the code of conduct.
2. In terms of mitigating and aggravating factors, there are some factors that I would draw attention to pursuant to paragraph 67 of the Adjudication Procedures. In doing so, I make reference to page 9 of the Sanctions Guidelines, Appendix A, headed: 'Factors that the [Acting] Commissioner may take into account when determining the appropriate sanction'
3. Obviously, these factors may or may not be to be taken into account in the exercise of the Acting Commissioner's discretion. I am also aware that the list provided is not an exhaustive list and that other factors may be taken into account by the Acting Commissioner in reaching his determination.

#### **Mitigating factors**

4. I would suggest that there are a number of potential mitigating factors in this case.
5. Alderman Smyth has no prior history of breaching in the code. This provides some evidence of 'Previous record of good service and compliance with the code.'
6. Alderman Smyth engaged with the Deputy Commissioner's investigation, including making himself available for interview and he therefore should be given some credit for his 'co-operation with the investigation'.
7. During the Deputy Commissioner's investigation, Alderman Smyth sought to rely on his interpretation of advice provided by the Borough Lawyer to members at the start of the PC meeting. This may provide some evidence of 'an honestly held (although mistaken) view that the action concerned did not constitute a failure to follow the provisions of the Code, particularly where such a view has been formed after taking appropriate advice'. It is relevant that the Assistant Commissioner, in his Stage 2 decision, "did not find that the Respondent's actions were deliberate on the night and it was apparent that they had no detrimental effect on the outcome of the planning applications".
8. Alderman Smyth has apologised for his failure to declare an interest and his apology was reported in the media.

9. At the time of making this written submission I am unaware if Alderman Smyth has submitted any character references. Where such references have been submitted they are a matter for the Acting Commissioner's consideration as to whether they provide additional evidence that should be taken into account when deciding on mitigation.
10. Finally, I would note the significant passage of time since the events complained of occurred and that Alderman Smyth continued to engage with the process to some extent e.g. by providing input into the Statement of Agreed Facts.

### **Aggravating Factors**

11. I turn now to the issues of potential aggravating factors. An important factor in this case is the protection of the public interest in terms of public confidence in the institution of local government, through those democratically elected to represent constituents. The legitimate aim being pursued by the code is to provide for and secure the high standards required from elected Councillors. In turn, the purpose of sanction is preservation of confidence in local government representation.
12. In terms of the list of aggravating factors, these are listed on page 9 of the Sanctions Guidelines.
13. Alderman Smyth had full knowledge of his employment role with Mr Clarke and should have erred on the side of caution by absenting himself from a situation which could rise to a potential conflict of interest. The Assistant Commissioner has found, in his Stage 2 decision, no evidence that Alderman Smyth had taken any steps to mitigate any conflict of interest in this regard.
14. I would also highlight that the extant Commissioner's Guidance (which was the subject of consultation with councillors and other stakeholders to ensure its relevance) makes clear that familiarity and understanding of obligations under the Code and conduct thereafter is a matter of personal responsibility for the councillor.
15. The Department for Infrastructure has also issued specific guidance on the application of the Code with regard to planning matters, which makes clear at paragraph 9:

*'The Code requires you to declare any pecuniary (financial) interest and withdraw from the meeting (for example, a planning application submitted by yourself, partner/spouse or family member). Where you have a significant private or personal non-pecuniary interest (e.g. planning application submitted by a close friend, close associate or body or organisation of which you are a member) you must declare this and you must then withdraw from the meeting when the matter is being discussed.'*

16. In the Commissioner's 2019 decision in the matter of Mervyn Rea, the Commissioner dealt directly with the importance of registering and declaring interests. The decision included a list of 'learning points' for councillors. These included:

*"The Commissioner wishes to highlight to councillors generally that a failure to declare a pecuniary interest (direct or indirect) may result in a sanction of disqualification. This is a serious conduct matter which is underpinned by 28 of the Local Government Act 1972. A breach of section 28 may in some cases be a criminal offence."*

It should be noted that the Rea case does differ from the present case, and involved a pecuniary interest, but it is none the less relevant in that it highlighted the importance of declaration of interests.

## **Outcome**

17. I make the following comments in full appreciation that the question of sanction is a matter for the Acting Commissioner in the exercise of his discretion. Pages 2-5 of the Sanctions Guidelines respectively notes the options open to the Acting Commissioner at this stage in ascending order of severity:
- a. No action
  - b. Censure - in such terms as the Acting Commissioner thinks is appropriate
  - c. Partial suspension - for such a period as the Acting Commissioner thinks is appropriate but not exceeding one year.
  - d. Suspension - for such a period as the Acting Commissioner thinks is appropriate but not exceeding one year.
  - e. Disqualification - for such a period that the Acting Commissioner thinks appropriate but not exceeding five years.
18. I also note, as per paragraph 6, page 2 of the sanctions guidelines, the Acting Commissioner will take account of the actual consequences that have followed as a result of the Respondent's conduct and will also consider what the potential consequences might have been, even if these did not occur.
19. No Action - I would respectfully suggest that 'no action' is not a suitable outcome to these proceedings, given the nature of the conduct which has given rise to the Acting Commissioner's determination on breach of the Code. This was not an inadvertent failure.
20. Censure - In setting out the aggravating factors in this case, I drew attention to the weight of the public interest in this case. This is not to say that this is the only interest at play here, rather it is a case of balancing out all of the interests in this

case. That said I would respectfully suggest that, given the weight of the public interest in this case as opposed to the minor failures envisaged under this outcome; it is highly questionable in my view, whether censure could adequately cater for the public interest in the circumstances. My view is that the breaches are not minor in nature.

21. Partial Suspension - Alderman Smyth is a member of the Planning Committee, and the issue in question arose in this context. It seems to me that this provision, allowing for partial suspension, was designed to meet circumstances in which a Councillor's conduct was such that it was limited to a particular activity or section of council business from which the Councillor could be easily extracted. In all the circumstances, I would suggest that a period of suspension from the planning committee might meet the public interest and be proportionate to the nature of the breaches found by the Acting Commissioner.
22. Suspension - I turn now to the possibility of suspension. I note that suspension may be adequate in addressing the public interest in so far as it: a) Upholds public confidence in the standards regime and/or local democracy b) Reflects the severity of the matter c) Conveys the matter should not be repeated.
23. Factors which may justify suspension include: a. That the respondent's conduct has brought the office of councillor (emphasis added) or his council into disrepute, without being found to have failed to comply with the any other rule contained in the Code, or without being disqualified from being a councillor under the terms of the Local Government Act (NI) 1972 (section 4(1)(cc)).3 b. The likelihood of further failures to comply with the Code by the respondent.
24. Page 4 paragraph 15 of the Sanctions Guidelines makes clear that the "nature" of the conduct will be taken into consideration when considering whether the sanction is necessary to uphold public confidence, to reflect the severity, and it make it understood that the conduct should not be repeated.
25. My view is that these are breaches of a serious nature, relating to aspects of the Code that are central to public confidence. I consider that suspension is an option validly open to the Acting Commission, given the breaches found, and have set out in the paragraphs below some of the relevant case law. While it is a matter for the Acting Commissioner, I suggest that while sanction is a viable option for sanction in this case, on balance the public interest can be met by the lesser sanction of partial suspension in this specific instance.
26. Page 2 of the sanctions guidelines paragraph 4 acknowledge that Councillors have been democratically elected to undertake certain tasks and that their ability to serve the public and perform those tasks should only be restricted where such a restriction is justified in the particular circumstances of a case.
27. In the case of Patrick Heesom v Public Services Ombudsman for Wales and the Welsh Ministers [2014] EWHC 1504 Admin, in considering the approach to sanction by the Adjudicating Panel for Wales, Mr Justice Higginbottom referred to the need to ensure that a sanction is in line with other similar cases.

28. The Deputy Commissioner has also considered jurisprudence from other jurisdictions in relation to Councillor's failures to declare an interest. In the case of Councillor Maskell Case No APW/002/2009-010/CT ('First reference') APW/012/2009- 010/CT ('Second reference') the Adjudication Panel for Wales imposed a sanction of 18 months suspension upon the Councillor for failure to declare an interest.
29. In the case of Councillor Haulwen Lewis, Case No APW/002/2014-015/CT the Adjudication Panel for Wales imposed a sanction of three months suspension upon the Councillor for failure to declare a personal and prejudicial interest in relation to a planning application.
30. In the case of Councillor Matthew Pollard, Case Reference LGS/2012/0578, the First Tier refused an appeal by the Councillor of the decision the North West Leicestershire District Council Standards Committee. The Tribunal upheld the finding that he was in breach of the Code of Conduct and in particular had misused his position, failed to leave the room when his prejudicial interest was engaged and brought his office into disrepute. Given the nature of the breaches, the Tribunal held that it was entirely justified that Councillor Pollard's original sanction of suspension be increased from three months (imposed by the Standards Committee) to six months.
31. In the case of Alan Nimmo Case Reference LA/Fa/1799,2016 the Standards Commission for Scotland (SCS) found that the Councillor's actions in asking council officers to deal with his enquiry about a planning application in which he had a personal interest and his seeking information not normally available to the public, breached the Scottish Code of Conduct. The SCS censured Councillor Nimmo.
32. In the case of Councillor Frank Toner, [https://www.standardscommissionscotland.org.uk/uploads/files/1480589991161129\\_WrittendecisionFINAL.pdf](https://www.standardscommissionscotland.org.uk/uploads/files/1480589991161129_WrittendecisionFINAL.pdf), the SCS imposed the sanction of censure for failure to declare a pecuniary interest.
33. In this jurisdiction, in the case of Meryn Rea, which involved declaration of interests, the Commissioner imposed a sanction of censure. The decision stated:
 

"On the facts of this case the Commissioner has determined that Mr Rea's conduct could not be considered as a minor failure to comply with the Code. The sanctions of partial and full suspension are not available to the Commissioner because Mr Rea has ceased to be a councillor." The Commissioner did not consider that the conduct was sufficiently serious, on the facts of that case, to warrant disqualification. The 'learning points' for Councillors incorporated in the Rea decision are of direct relevance to this case.
34. The case of Declan Boyle, also involving declaration of interests, was a case in which it was considered that suspension would have been the most appropriate sanction, but this was unavailable as he was not a serving councillor. Censure was deemed to be the most appropriate of the available options.

35. For all of these reasons including the relevant case law to which I have referred I think that a sanction of either partial suspension or suspension would be in line with the decisions on sanction in previous cases. While recognising that it is a matter for the Commissioner, I have suggested that on balance the lesser sanction of partial suspension may meet the public interest in this case.
36. Disqualification - The Acting Commissioner may wish to consider whether the conduct is of such gravity as to warrant disqualification. Page 5 paragraph 19 of the Sanctions Guidelines states: 'Disqualification is the most severe (emphasis added) of the options open to the Acting Commissioner.
37. This page goes on to list from a-h those circumstances in which disqualification may be an appropriate outcome. While there are aspects of the conduct at issue which might point towards disqualification, in all the circumstances of this case, my view is that the justice of the matter and the public interest can be met by means of the lesser sanction of suspension or partial suspension.
38. While the Alderman's conduct was not minor, given all the circumstances of the case, I respectfully submit that partial suspension is the most appropriate of the available sanctions. Public knowledge of the sanction itself, alongside an understanding of the factors that led to it, will help discharge the duty to the public in this case.

This is, however, ultimately a decision for the Acting Commissioner.