

## **Decision**

<b>CASE REF'S:</b>	<b>APE 0435 &amp; 0436</b>
<b>HEARING DATE:</b>	<b>7 &amp; 8 September 2009 and 21 October 2009</b>
<b>RE:</b>	<b>Reference in relation to a possible failure to follow the Code of Conduct</b>
<b>RESPONDENTS:</b>	<b>Councillor John McGhee and Former Councillor Terry Waters</b>
<b>RELEVANT AUTHORITY CONCERNED:</b>	<b>Forest Heath District Council</b>
<b>ESO:</b> (Ethical Standards Officer)	<b>Richard Owen</b>
<b>REPRESENTATIVE FOR THE ESO:</b>	<b>Galina Ward</b>
<b>REPRESENTATIVE FOR COUNCILLOR MCGHEE:</b>	<b>Don Smith</b>
<b><u>Case Tribunal Members:</u></b>	
<b>Chairwoman:</b>	<b>Melanie Carter</b>
<b>Member:</b>	<b>Richard Tyndall</b>
<b>Member:</b>	<b>David Billing</b>

- 1 In a letter dated 19 May 2009, the Adjudication Panel for England received two references from an Ethical Standards Officer ('ESO') in relation to allegations against Councillor McGhee and former Councillor Waters. A Case Tribunal of the Adjudication Panel for England was convened to hear these allegations on 7 & 8 September 2009.
- 2 It was alleged that Councillor McGhee and former Councillor Waters had failed to comply with Forest Heath District Council's Code of Conduct by:

### Councillor McGhee

- 2.1 using his position as a councillor improperly to secure an advantage for former Councillor Waters' son in relation to his planning application and bringing his authority into disrepute contrary to paragraphs 4 and 5 (a) of the 2002 Code of Conduct.

### Former Councillor Waters

- 2.2 using his position as a councillor improperly to secure an advantage for his son in relation to his planning application and improperly to influence the decision in relation to that application contrary to paragraphs 5 (a) and 12 (1)(b) of the 2002 Code of Conduct.
- 2.3 treating Mr McCurdy (Senior Planning officer) in a bullying and disrespectful manner, compromising his impartiality and using his position as a councillor improperly to gain an advantage for himself and his family contrary to paragraphs 2(b) 2(c), and 5(a) of the 2002 Code of Conduct and paragraphs 3 (1)(2) b & d, and 6(a) of the 2007 Code of Conduct.
- 2.4 bringing his office or authority into disrepute, contrary to paragraph 4 of the Council's 2002 Code of Conduct and paragraph 5 of the Council's 2007 Code of Conduct.

### 3 **Procedural Matters**

- 3.1 Former Councillor Waters had informed the office of the Adjudication Panel that he was not intending to attend the hearing and would not be represented. He had not indicated moreover that he was seeking an adjournment. The Case Tribunal decided in these circumstances that it would be in the interests of justice to proceed in his absence.
- 3.2 Councillor McGhee attended the hearing and was represented by Mr Don Smith. The ESO was represented by Counsel, Galina Ward.
- 3.3 The Case Tribunal reached the end of the first stage of proceedings, that is, it decided its findings of fact, by the end of 8 September 2009. The case was adjourned until 21 October 2009 for the remainder of the proceedings.

### **Relevant legislation and protocols**

- 4 On 17 April 2002, the Council adopted a Code of Conduct under the Local Authorities (Model Code of Conduct) Order 2001, in which the following paragraphs were included:
  - 4.1 Paragraph 2 (b): *"A member must treat others with respect."*
  - 4.2 Paragraph 2 (c): *"A member must not do anything which compromises or which is likely to compromise the impartiality of those who work for, or on behalf of, the authority"*
  - 4.3 Paragraph 4: *"A member must not in his official capacity, or any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute."*
  - 4.4 Paragraph 5: *"A member- (a) must not in his official capacity, or any other circumstance, use his position as a member improperly to confer on or secure for himself or any other person, an advantage or disadvantage; "*
  - 4.5 Paragraph 12: *"(1) Subject to sub-paragraph (2) below, a member with a prejudicial interest in any matter must-
    - a. withdraw from the room or chamber where a meeting is being held whenever it becomes apparent that the matter is being considered at that*

*meeting, unless he has obtained a dispensation from the authority's standard's committee;*

*b. not seek improperly to influence a decision about that matter."*

5 On 23 May 2007, the Council adopted a Code of Conduct under the Local Authorities (Model Code of Conduct) Order 2007, in which the following paragraphs were included:

5.1 Paragraph 3:

*"You must treat others with respect. You must not—*

*(b) bully any person;*

*(d) do anything which compromises or is likely to compromise the impartiality of those who work for, or on behalf of, your authority.*

5.2 Paragraph 5: *"You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute".*

5.3 Paragraph 6 (a): *"You must not use or attempt to use your position as a member improperly to confer on or secure for yourself or any other person, an advantage or disadvantage."*

6 The Relevant Authorities (General Principles) Order 2001, made under section 49 of the Local Government Act 2000, specifies general principles of conduct which the Code of Conduct must be consistent with. The first and second principles state:

### **Selflessness**

*"Members should serve only the public interest and should never improperly confer an advantage or disadvantage on any other person."*

### **Honesty and Integrity**

*"Members should not place themselves in situations where their honesty and integrity may be questioned, should not behave improperly and should on all occasions avoid the appearance of such behaviour."*

## **7 Findings of Fact**

The Case Tribunal has found the following facts:

### Councillor McGhee's official details

7.1 Councillor McGhee was first elected to office in May 1999. He was re-elected, for a further four year term, in May 2007. Councillor McGhee is also a member of Mildenhall Parish Council.

### Former Councillor Waters official details

7.2 Former Councillor Waters was first elected to office in May 1999. He was re-elected, for a further four year term, in May 2007.

7.3 Former Councillor Waters resigned from office on 26 August 2009.

## Facts relating to the allegations

- 7.4 In July 2006, Mr James Waters, son of former Councillor Waters, submitted a planning application in relation to a proposed development of new houses on land to the rear of 1 Aspal Close in Beck Row, Bury St Edmunds, which is situated in former Councillor Waters' ward.
- 7.5 Former Councillor Waters had a prejudicial interest in the planning application on account of it being the application of a close family member.
- 7.6 Mr McCurdy, the then Head of Planning, was involved in a series of pre-application discussions with the applicant's planning agent. His focus was the design and layout of the proposals and not the various other planning policy considerations which included the presence of an old oak tree on the site, that the site was designated as a County Wildlife Site and highways issues.
- 7.7 Former Councillor Waters and his son asked Councillor McGhee to become involved in the planning application. Between July and August 2006, Councillor McGhee discussed the application with former Councillor Waters who told Councillor McGhee that he and his son were having "*having troubles with planning*" and "*getting the application through to committee*" (taken from interview with Councillor McGhee).
- 7.8 The conversations between former Councillor Waters and Councillor McGhee were brief and at the margins of other Committee meetings whereas the son, Mr James Waters, approached Councillor McGhee formally for help.
- 7.9 Although Councillor McGhee represented a different ward he had some association with Beck Row as he had stood in for former Councillor Waters when he had previously been suspended from the Council, between 2004 and 2005, following an earlier separate Adjudication Panel hearing.
- 7.10 Councillor McGhee attended the Beck Row Parish Council meeting which considered and voted in favour of the application. Councillor McGhee told the Case Tribunal that he had become involved partly on account of agreeing with the Parish Council's views on the application and partly at the request of Mr James Waters. The Case Tribunal found that he had also become involved in response to former Councillor Waters' request.
- 7.11 On 8 August, Mrs Springham, a local resident, telephoned Councillor McGhee, on the advice of the Clerk of Beck Row Parish Council, to ask if he could assist her in relation to the application. Councillor McGhee asked if she was for or against the proposed development and, on learning that she opposed it, referred her to Councillor Newman, a Beck Row ward councillor. Councillor McGhee told Mrs Springham that if she had no success with Councillor Newman, she should revert to him. In the event, despite failing to find assistance from another councillor, she did not get back in contact with Councillor McGhee as, by then, she had ascertained from the council papers that he was supporting the application.
- 7.12 On 9 August 2006, Councillor McGhee telephoned Jayne Wells, the Planning Case Officer to enquire why the application was being recommended for refusal.
- 7.13 On learning that the application was to be considered by the council's delegation panel, Councillor McGhee attended the delegation panel meeting on 18 September 2006, as any councillor is able to do, and requested that the application be determined by the Planning Committee.

- 7.14 Mr James Waters made a complaint as to the Council's procedural handling of his planning application through Councillor Jaggard to the Chief Executive. This resulted in two meetings in the Chief Executive's office on 2 October and 27 November 2006. Former Councillor Waters who attended both meetings was also complaining more generally about the conduct of the planning department and in particular about Mr McCurdy. At the meeting on 2 October 2006, former Councillor Waters accused Mr McCurdy of telling lies in relation to Mr McCurdy's pre-application discussions with his son's planning agent.
- 7.15 Councillor McGhee attended the second of these meetings. The Case Tribunal made no finding as to whether he did or did not attend the first meeting. Councillor McGhee was invited by former Councillor Waters to be at the meeting as a witness. During the meeting Councillor McGhee commented that, in the context of planning: *"whenever the Waters name came up, it was like a red flag to a bull"*.
- 7.16 Prior to the Planning Committee meeting on 4 October 2006, former Councillor Waters asked Councillor McGhee to attend the meeting as his substitute for when his son's planning application was to be discussed. In other words he was asking Councillor McGhee to act as his substitute for a single item on the agenda whilst former Councillor Waters withdrew on account of his prejudicial interest. Following this request Councillor McGhee contacted Jayne Orton, a legal officer at the Council, by phone to enquire as to the legal position. The Case Tribunal found that Councillor McGhee used words in the telephone conversation with Jayne Orton that gave an impression, from Ms Orton's point of view, that he wanted to act as former Councillor Waters' spokesperson. The Case Tribunal accepted however that Councillor McGhee had only intended to convey that he wanted to put forward views that were consistent with those of former Councillor Waters.
- 7.17 In the event, Councillor McGhee substituted for a different Councillor, for the whole meeting.
- 7.18 Former Councillor Waters attended the Planning Committee meetings on 4 October and 8 November 2006. He withdrew at both meetings when the application was discussed.
- 7.19 Prior to the Planning Committee meeting on 4 October, Councillor McGhee visited the site three times, that is on the official site visit on the day of the Planning Committee meeting, and two separate previous occasions when he visited the site with two members of the Planning Committee. At the meeting itself, Councillor McGhee spoke in support of the application and moved a recommendation that the application be approved. However, he then withdrew this proposal, to allow instead the application to be deferred for further investigations to be undertaken by officers.
- 7.20 On 8 November 2006 the planning application was again considered by the Planning Committee. Councillor McGhee did not attend as a substitute member. A letter dated 7 November 2006 from the applicant's planning agent's was given to Committee members and read out in open session. This included the following paragraph:

*"Additional information, my client Mr J.Waters has discussed this application with Mr D.Burnip [Chief Executive of FHDC], who has asked for an enquiry as to the due diligence & conduct of your planning officers"*.

- 7.21 The Planning Committee decided it was minded to approve the application, the decision being deferred in order that officers might prepare a further report for Committee to consider. This was normal practice where members were minded to vote against an officer recommendation.
- 7.22 On 27 November 2006 the second meeting with regard to Mr James Waters' complaint took place. Mr Harris, the Audit and Complaints Manager tasked with investigating the complaint in relation to procedure sent an email to Mr McCurdy the next day following a telephone call from former Councillor Waters. This stated:
- "Terry [Waters] has just rung and wasn't satisfied with the outcomes of the 2[and half] hour meeting yesterday....and he asked me to tell you that he will prove that you lied at Ctite and if you want to take him to standards he will look forward to it."*
- 7.23 The outcome of the complaint was communicated to Mr James Waters in a letter from Mr Harris dated 30 November 2006. This detailed the shortcomings in the planning procedure in relation to the Aspal Lane planning application and gave an apology.
- 7.24 Councillor McGhee attended the Planning Committee on 6 December 2006 as a substitute for former Councillor Waters. He again spoke in support of the application and voted in favour of it. The application was approved.
- 7.25 It was the evidence of the Mrs Springham and Mrs Alexander-Dowd that when the application was approved Councillor McGhee turned round to Mr James Waters and his agent and that he extended his arm, making an open handed gesture as if to say "is that all right?" These matters were disputed in their entirety by Councillor McGhee who claimed that he was physically incapable of turning in the way alleged.
- 7.26 An application was made to the Case Tribunal, between the dates of the adjourned hearing and the final day of hearing, that is, after the Case Tribunal had determined and issued its findings of fact, to adduce medical evidence. The Case Tribunal declined to allow this on the basis that Councillor McGhee had had ample opportunity to adduce this evidence before the opening of the hearing and before the conclusion of the facts stage. In any event, given that it was admitted that Councillor McGhee was capable of turning, albeit with some discomfort, the Case Tribunal concluded that this evidence would not be sufficiently determinative. It noted further that the key events were approximately three years ago such that evidence as to his condition now would be of limited evidentiary worth when considering the position in December 2006.
- 7.27 The Case Tribunal did however consider that the evidence as to what happened at the meeting on the 6 December was in some ways contradictory. There was a difference in testimony as between the two women and Mr McCurdy, and as between that said to the Local Government Ombudsman (LGO), in a subsequent investigation, and that said to the Standards Board, as to the actual gestures made and when these happened. Mr McCurdy told the Case Tribunal that Councillor McGhee had made a hand gesture of a 'thumbs up'. Mr McCurdy recalled that either Councillor McGhee or Councillor Wheble who had been sitting next to him and had also spoken in favour of the application had mouthed words, but he could not recollect which councillor it was. The two women gave evidence that it had been an open handed gesture which they interpreted as an "is that alright?" message. Both women also testified that Councillor McGhee

had mouthed words to Mr Waters. There was some inconsistency between these three witnesses whether the gestures and mouthed words had taken place during the debate or after the vote had been taken. As against this, the Case Tribunal had Councillor McGhee's and Mr James Waters' evidence that there was no such communication by Councillor McGhee or any other councillor during the meeting.

- 7.28 The Case Tribunal took into account that the evidence of the three witnesses, Mrs Springham, Mrs Alexander-Dowd was broadly similar and that, in the absence of any evidence of such, there was a low likelihood of any kind of collusion between members of the public and a senior council officer. The Case Tribunal could not, on the evidence before it, determine what exactly had happened. It did find however that there had been some kind of non-verbal communication which may have been by way of gesture, a smile or mouthed words on the part of Councillor McGhee and at least one other councillor indicating to Mr Waters and his planning agent their support for the way the debate had gone. It was not clear whether this was during the debate or at the conclusion of the vote. The Case Tribunal did not however consider that this would make any difference to its views on whether this gave rise to a breach of the Code.
- 7.29 The Case Tribunal further found that Councillor McGhee shook Mr James Waters' hand at the end of the Planning Committee meeting partly for the purposes of congratulating him on the successful approval of the application. It was the last meeting before Christmas, such that the Case Tribunal accepted that the other purpose would have been a festive one.
- 7.30 Former Councillor Waters made further accusations of Mr McCurdy lying in letters to Councillor Jaggard, the Leader of the Council, between December 2006 and March and April 2007.
- 7.31 Councillor Jaggard asked former Councillor Waters to supply evidence to support his accusations but he failed to provide anything in this regard until August 2008, when he supplied documents as part of the Standards Board investigation. The documents in question, which related to other planning matters, failed to indicate any evidence of lying by Mr McCurdy.
- 7.32 Mr McCurdy attended former Councillor Waters' home on 18 July 2007. They had agreed to a "clear the air" meeting at former Councillor Waters' home. Nobody else was present. Mr McCurdy made a note of the meeting that same evening.
- 7.33 The note attested that former Councillor Waters made it clear that he had a number of documents which could prove that he (Mr McCurdy) had told lies. The note of the meeting stated that former Councillor Waters said "*The Waters have lots of land and property and connections to others and that there would be things coming across my desk in the future and that if you put one foot out of line I'll bucking have you*". Former Councillor Waters also told him that he was "*prepared to bet me anything I wanted, from £10-£10,000 that he could get me out of my job*". He also told Mr McCurdy that he knew where he lived. Former Councillor Waters made reference to an earlier Standards Board investigation which resulted in his suspension and said he would welcome another investigation. He said he thought he would be exonerated and felt he had been re-elected by people who wanted him to "*sort out those liars at the council*".

- 7.34 Former Councillor Waters went on to say that he expected to be able to discuss future planning applications with him even though he was no longer Head of Planning. Mr McCurdy's account of the meeting concluded by saying "*We parted pleasantly, shaking hands*".
- 7.35 Most of the contents of the note were denied by former Councillor Waters. Former Councillor Waters had submitted in correspondence that Mr McCurdy was not telling the truth and had put together this account in order to ensure his removal from office. He pointed to the fact that Mr McCurdy had not made a formal complaint at the time and indeed this had only come to light during the Standards Board investigation. The Case Tribunal noted that it was the ESO who had exercised his discretion to include this information in the referral and for this to form the basis of one of the allegations. Mr McCurdy had not been a complainant to the Standards Board.
- 7.36 In the absence of former Councillor Waters at the hearing and therefore any chance to probe him on what had happened the Case Tribunal questioned Mr McCurdy at some length about the nature of the meeting on the 18 July and subsequent events. In the light of his answers and his credible testimony, the Case Tribunal proceeded on the basis that Mr McCurdy's evidence was to be preferred. In particular, the Case Tribunal accepted his evidence that he had not made a formal complaint at the time, either to the Chief Executive or the Standards Board as he had been advised not to do so by his senior officers, the Chief Executive and the Monitoring Officer with whom he had discussed the matter in the following few days. Indeed Mr Burnip confirmed that the account of the meeting set out in the note was consistent with what he had been told in the next few days by Mr McCurdy. The Case Tribunal accepted Mr McCurdy's explanation that he did not 'relish' the idea of being involved in a complaint against former Councillor Waters given the way he had behaved towards him and particularly given former Councillor Waters' perceived failure to alter his behaviour following the earlier suspension.
- 7.37 Mr Waters subsequently sold the development site to another developer, making a profit on the sale.

## **8 Former Councillor Waters written submissions**

- 8.1 Former Councillor Waters believed there was a "vexatious, vindictive hidden agenda" behind this complaint. He submitted that Mr McCurdy had decided months earlier there was no way he was going to allow this application to go forward, no matter what it took him to do.
- 8.2 Insufficient account had been given to the very serious outcome of the independent investigation ordered by the Chief Executive.
- 8.3 Mr McCurdy had grossly misrepresented the material facts of the meeting of the 18 July. This was an attempt to discredit and ultimately have former Councillor Waters removed from Council as he, Mr McCurdy had become aware of members objecting to the findings of the LGO on this matter. It was this that had inflamed Mr McCurdy against former Councillor Waters and motivated him to lie.

## **9 The ESO's submissions on former Councillor Waters**

### **Improper influence and securing an advantage**



- 9.1 Mr James Waters clearly gained an advantage as a result of obtaining planning permission for the development as he was able to sell the land at a higher price than would have been possible without planning approval.
- 9.2 Given his prejudicial interest former Councillor Waters had a responsibility to ensure that he did not do anything which could be considered to be an attempt to use his position as a member to influence improperly the outcome of the application and secure an advantage for his son.
- 9.3 Former Councillor Waters' request to Councillor McGhee to substitute for him for the consideration of his son's planning application at the planning committee on 4 October 2006 was an attempt to influence improperly the outcome of the application in which he had a clear prejudicial interest, for the advantage of his son.
- 9.4 Former Councillor Waters denied that his complaint to Councillor Jaggard about the way his son's planning application had been dealt with and the subsequent meetings in Mr Burnip's office were an attempt to influence improperly the way the application was determined. Given the timing of the meeting in Mr Burnip's office, which took place two days before former Councillor Waters' son's planning application was due to be considered by the Council's planning committee, his attendance and participation in the meeting was highly inappropriate. Former Councillor Waters attended a further meeting in Mr Burnip's office on 27 November 2006, which was also attended by Mr Waters and his planning agent and Councillor McGhee. The purpose of the meeting was to discuss the outcome of Mr Harris' investigation into former Councillor Waters' complaint. This meeting took place nine days before the Planning Committee meeting at which the application was finally to be determined.
- 9.5 Even if, as former Councillor Waters claimed, he was not seeking to influence the outcome of his son's planning application, but was seeking to highlight what he considered to be the failings of the Council's planning department, his actions showed a disregard for and a failure to adhere to the tenets of the second general principle of honesty and integrity, which requires that the Code of Conduct should be consistent with members not placing themselves in "situations where their honesty and integrity may be questioned, should not behave improperly and should on all occasions avoid the appearance of such behaviour".
- 9.6 Whatever the reason for the meetings, former Councillor Waters should have known, as an experienced member, that the requirements of the Code of Conduct meant that his attendance at the meetings was inappropriate.
- 9.7 The ESO reached the view that former Councillor Waters attended these meetings, having in his mind the possibility that he could affect the way the application might be dealt with at the relevant Planning Committee meetings. In commenting on a draft of this report, former Councillor Waters admitted that he had intervened on his son's behalf as he felt an injustice was occurring.

### **Bullying and disrespect**

- 9.8 Former Councillor Waters' highly personal attack on Mr McCurdy at the meeting in Mr Burnip's office on 2 October 2006 was followed by his telephone call to Mr Harris on 28 November 2006 and his correspondence to Councillor Jaggard in December 2006 and March and April 2007 when former Councillor Waters again accused Mr McCurdy of telling lies. When Councillor Jaggard asked former

Councillor Waters to provide evidence to support his claim, former Councillor Waters failed to do so.

- 9.9 Former Councillor Waters' comments at the meeting on 18 June 2006 with regard to future planning applications in which his family had connections, carried an implication that Mr McCurdy should use his position as a director to influence the processing of those applications and, in effect, treat them favourably. Furthermore, former Councillor Waters made comments which suggested that if Mr McCurdy did not comply with his request regarding his future conduct, he could influence the situation to effect Mr McCurdy's dismissal from his position in the Council.
- 9.10 It is clear from Mr McCurdy's note that he found former Councillor Waters' comments to be bullying and threatening.
- 9.11 The evidence which former Councillor Waters eventually provided (during the course of the ESO investigation) to support his accusations that Mr McCurdy lied on previous occasions were unsubstantiated. If former Councillor Waters held the view that Mr McCurdy's conduct in relation to these matters fell below an acceptable standard, the appropriate course of action was for former Councillor Waters to raise this with the Chief Executive at the appropriate times. Instead he chose to repeatedly accuse Mr McCurdy of lying.

### **Disrepute**

- 9.12 A reasonable member of the public who became aware of former Councillor Waters' personal and unfounded criticism of Mr McCurdy and his bullying and disrespectful behaviour towards Mr McCurdy would have less confidence in former Councillor Waters' ability to carry out his duties and fulfil his role as a member in an appropriate manner.
- 9.13 Furthermore, former Councillor Waters' inappropriate and improper intervention in the authority's determination of his son's planning application could create the impression that planning applications could be improperly influenced by members applying pressure on officers and was capable of reducing public confidence in the authority being able to fulfil its functions and duties as a planning authority.

## **10 Submissions on behalf of Councillor McGhee**

- 10.1 Councillor McGhee was acting at all times properly. He was acting further to his agreement with Parish Council views and was helping Mr James Waters in the same way as he would any other constituent.
- 10.2 There were significant conflicts of evidence which led to a lack of credibility on the part of Mr McCurdy and Mrs Springham and Mrs Alexander-Dowd. In particular Mr McCurdy's evidence was not to be believed on account of his claiming, falsely that he had not spoken to Councillor McGhee prior to the Planning Committee meeting with regard to Mr Water's application. There were in addition sufficient changes in testimony and conversely commonality of phraseology in their eventual recall as between these three individuals to mean that their evidence as to what happened at the meeting on the 6 December 2006 Planning Committee meeting was not to be believed.
- 10.3 It was submitted that Councillor McGhee and other members had turned in response to Mrs Alexander-Dowd calling out (she shouted out "shame" at the conclusion of the consideration of this agenda item) not with the intention of

communicating with Mr Waters and the planning agent. It was also submitted that Councillor McGhee was not physically capable of carrying out a turn that would be sufficient to enable such communication.

- 10.4 In any event, Councillor McGhee should be given credit for offering to Mrs Springham that she could come back to him if she failed to find another Councillor to assist. Also, he should be given credit for attempting to obtain legal advice when asked to substitute for a single item on the agenda. It should also be taken into account that he had withdrawn his proposal for approval at the 4 October Planning Committee meeting. These together all indicated his good faith and that he had not been seeking to secure an advantage for Mr Waters or to seek to influence improperly officers.

## 11 The ESO's submissions on Councillor McGhee

### Improperly securing an advantage for another person

- 11.1 Councillor McGhee became involved in chasing the matter up after former Councillor Waters told him that he and Mr Waters were having problems with the application and that he was acting partly on their behalf.
- 11.2 Mr Waters clearly gained an advantage as a result of obtaining planning permission for the development as he was able to sell the land at a higher price than would have been possible without planning approval. His subsequent actions reinforced the impression that he was actively supporting Mr Waters' application and lobbying on behalf of it. In particular Councillor McGhee's telephone call to Ms Wells on 9 August 2006, attendance at the delegation panel meeting, that he visited the site on two separate occasions before the official site visit, each time accompanied by another member of the planning committee, his approach to Jane Orton prior to the planning committee on 3 October 2006, following former Councillor Waters' request, Councillor McGhee's attendance at the planning committee meeting on 4 October 2006 when he proposed that the application be approved, his attendance at the meeting in the Chief Executive's office on 27 November 2006 when former Councillor Waters' complaint about the Council's handling of the planning application was considered, and his comments at the meeting that "*whenever the Waters name came up, it was like a red flag to a bull*"; Councillor McGhee's substitution for former Councillor Waters at the planning committee on 6 December 2006; his support for the application at that meeting and his communication with Mr Waters during and at the end of the meeting.
- 11.3 Councillor McGhee was in a position of privilege compared to an ordinary member of the public, for example by having easier access to officers and members of the planning committee.
- 11.4 Taking all of the evidence into account, whilst the ESO considers Councillor McGhee was acting partly in support of the local parish council's views on the application; he was also acting partly for former Councillor Waters and James Waters. Councillor McGhee himself, appeared to suggest this when interviewed; he also stated that he had been told by former Councillor Waters that he and his son were "*having troubles with planning*" and "*getting the application through to committee*".
- 11.5 Taking into account all of the above, the ESO considers that Councillor McGhee failed to comply with paragraph 5 (a) of the Code of Conduct by using his

position as a member improperly, to confer on or secure an advantage for former Councillor Waters and Mr Waters.

## **Disrepute**

- 11.6 Paragraph 4 of the Council's Code of Conduct requires that members must not behave in a way which could reasonably be regarded as bringing their office or authority into disrepute. A member's conduct will bring that member's office into disrepute if the conduct could reasonably be regarded as:
- a) reducing the public's confidence in that member being able to fulfil their role, or,
  - b) adversely affecting the reputation of members generally, in being able to fulfil their role.
- 11.7 Conduct by a member which could reasonably be regarded as reducing public confidence in the authority being able to fulfil its functions and duties will bring the authority into disrepute.
- 11.8 The test as to whether a member's conduct could reasonably be regarded as reducing public confidence in the member's office or the authority is an objective one and it is not necessary to demonstrate that public confidence has been so affected, rather that the conduct is capable of such an effect.
- 11.9 Councillor McGhee's conduct in this matter created an impression that he was biased in favour of Mr Waters' planning application. A reasonable member of the public with knowledge of the relevant facts concerning Councillor McGhee's involvement in support of Mr Waters' planning application, as set out above, might have less confidence in Councillor McGhee's ability to fulfil the functions of his office in an appropriate manner. Consequently his conduct could reasonably be regarded as bringing his office into disrepute, and was a failure to comply with paragraph 4 of the Code of Conduct.

## **12 Case Tribunal Decision**

### Former Councillor Water

- 12.1 The Case Tribunal found the case against former Councillor Waters proven in relation to all allegations.
- 12.2 Thus, the Case Tribunal found that former Councillor Waters had used his position as a councillor improperly to secure an advantage for his son and to influence a decision in relation to his planning application contrary to paragraphs 5 (a) and 12 (1)(b) of the 2002 Code. He had had easier access to the assistance of other Councillors, Councillor McGhee in this case and meetings with the Chief Executive, than would an ordinary member of the public. Simply by attending the meetings with the Chief Executive he would have been using his position as councillor to influence the handling of the planning process in relation to his son's application. Given that both meetings happened shortly before Planning Committee meetings, it might also be concluded that his influence could have had a bearing on the outcome of the actual application. The Case Tribunal noted in this regard, that reference to the Chief Executive's investigation was made in a letter read out by the planning agent at one of the Planning Committee meetings. The meetings with the Chief Executive were, in the Case Tribunal's view, an attempt by former Councillor Waters to place pressure on officers to deal with his son's planning application in a more favourable way.

Given his close family relationship to the applicant this was a wholly inappropriate way to behave.

- 12.3 Former Councillor Waters ought not to have asked Councillor McGhee to substitute for him. The Case Tribunal saw this and the previous requests for assistance as simply an attempt by former Councillor Waters to get round the rules in relation to Councillors with prejudicial interests. The Code of Conduct restricts what such a Councillor may do in order to ensure that all functions of the Council are informed by the public and not the private interests of Councillors. Former Councillor Waters clearly thought these rules an inconvenience to be subverted by 'behind the scenes meetings' and the use of the substitution rules.
- 12.4 Through his treatment of Mr McCurdy both in calling him a 'liar' repeatedly, without foundation or explanation, and his comments to him at the meeting on the 18 July 2008, he had failed to treat him with respect and bullied him. Taken together this had been bullying and disrespect over a sustained period. Any accusation of lying is an extremely serious matter for a Councillor to make against an officer and this ought to have been taken up via the normal channels, that is, through senior officers not in the presence of Mr McCurdy and then immediately backed up with an explanation and evidence in support. Former Councillor Waters's comments to Mr McCurdy at the meeting on 18 July 2006 were in effect threats to have him removed from his job if he did not comply with his wishes. Former Councillor Waters had, by referring to 'knowing where he lived' backed this threat up with something close to menace.
- 12.5 In this way former Councillor Waters had not only bullied Mr McCurdy but also sought to compromise his impartiality and to secure an advantage for him and his family. The Case Tribunal found therefore that he had treated Mr McCurdy in a bullying and disrespectful manner, compromised impartiality and used his position as a councillor improperly to gain an advantage for himself and his family contrary to paragraphs 2(b) 2(c), and 5(a) of the 2002 Code of Conduct and paragraphs 3 (1)(2) b & d, and 6(a) of the 2007 Code of Conduct.
- 12.6 The Case Tribunal considered that former Councillor Waters' conduct during this period had fallen far below the standards expected of elected members. He had not only sought to subvert the planning process to his family's advantage but also felt free to treat an officer in an extremely unpleasant and wholly unprofessional way. The Case Tribunal concluded that his conduct would reduce the public's confidence in the planning applications being fairly and properly handled and also adversely affect the reputation of members generally. Taking all the points above together, the Case Tribunal was of the view that he had brought his office or authority into disrepute, contrary to paragraph 4 of the Council's 2002 Code of Conduct and paragraph 5 of the Council's 2007 Code of Conduct.

#### Councillor McGhee

- 12.7 The Case Tribunal found the case against Councillor McGhee less easy to determine. In its view, Councillor McGhee had acted with mixed motivation. It accepted that his involvement in Mr James Waters' planning application had been partly on account of his own views that the application should succeed, partly to assist a constituent and partly in furtherance of the view of the Parish Council. Had these factors been his sole motivation, there would not, in the Tribunal's view, have been a finding of breach. The facts were however that Councillor McGhee had been drawn into acting on behalf of Mr Waters, by his

father, former Councillor Waters. All along, former Councillor Waters had been requesting Councillor McGhee to be actively involved. The Case Tribunal was of the view that Councillor McGhee ought not to have allowed himself to be drawn in in this way, bearing in mind that former Councillor Waters had an obvious prejudicial interest in the matter. The effect of this was to subvert the rules on prejudicial interests and the limited way in which such Councillors may put their views across (ie: speaking for a limited time, withdrawing and not voting).

- 12.8 The Case Tribunal took the view that, acting as he did in part on behalf of former Councillor Waters, this rendered Councillor McGhee's involvement in the planning application improper. His attending the delegation meeting, the Chief Executive meetings, site visits and ultimately the Planning Committee meetings is likely to have had an advantageous effect on Mr Waters' planning application, both in terms of moving the procedure along more quickly and effectively and because Councillor McGhee ultimately voted in favour of the application.
- 12.9 That Councillor McGhee had not been absolutely determined to assist former Councillor Waters could be seen from the fact that he did not attend every relevant meeting and indeed withdrew his proposal at the Planning Committee meeting on the 4<sup>th</sup> October 2006. The Case Tribunal also gave him credit for the fact that albeit he had sent Mrs Springham away as she was opposing the application, he did say she should revert to him if she was not able to find assistance from a Councillor elsewhere. That said, the Case Tribunal did not place any weight on the fact that he had sought legal advice with regard to substitution on a single item as this was not the real issue at stake. The real issue had been whether it was permissible for him to act partially at the request of former Councillor Waters – whether as his substitute or as a substitute for another Councillor.
- 12.10 The Case Tribunal accepted however that Councillor McGhee had acted inadvertently and had honestly believed that what he was doing was not in breach of the Code. This was relevant, in the Case Tribunal's view, to the issue of disrepute. The test as to whether a member's conduct could reasonably be regarded as reducing public's confidence in the member's office or the authority is an objective one and would be based upon what a reasonable member of the public might think. The Case Tribunal considered that, on the basis that the reasonable member of the public was aware that Councillor McGhee had acted inadvertently and taking into account that he was only one of ten voting in favour of the planning application at Planning Committee (ie: it was doubtful that his influence alone would have secured such a majority), it concluded that this should not amount to a breach of the disrepute provision of the Code.
- 12.11 The Case Tribunal did carefully consider whether Councillor McGhee's conduct at the Planning Committee meeting on the 6 December 2006 – that is, non-verbal communication with Mr Waters – tipped the case against him into one of disrepute. In this regard it noted the Local Government Ombudsman's conclusion that there was an appearance of bias arising from his conduct at this meeting and also the submission of the ESO that predetermination as opposed to predisposition could in an appropriate case give rise to a finding of disrepute. The ESO did not however consider this to the case here. In the Case Tribunal's view, whilst regrettable that Councillor McGhee should have behaved in this way in a public meeting, given that the communication was with a constituent and not former Councillor Waters himself, it concluded this was not sufficient to give rise to a breach of disrepute.

## 13 Submissions as to the action to be taken

- 13.1 The ESO submitted that former Councillor Waters' breach of the Code was at the most serious end of improper conduct. The representative for the ESO brought to the attention of the Case Tribunal that former Councillor Waters had been suspended for 9 months by a differently constituted Case Tribunal in 2005. This had been for breach of the disrespect provision of the Code and related to former Councillor Waters' treatment, including unsubstantiated allegations of lying, of a planning officer. The representative for the ESO submitted that taking all the facts giving rise to the current breach with those of the previous breach, it indicated that former Councillor Waters was unrepentant. He had not changed his conduct with regard to compliance with the Code. Thus, in the ESO's view, disqualification was the appropriate sanction.
- 13.2 With regard to Councillor McGhee, the representative of the ESO submitted that albeit not as serious as the breaches by former Councillor Waters, Councillor McGhee's conduct was nevertheless a serious matter. Most importantly, his actions had had the effect of undermining the rules in relation to how Councillors with prejudicial interests were to behave.
- 13.3 Councillor McGhee's representative submitted that the Case Tribunal should accept that he had acted without malice. He drew attention to Councillor McGhee's previous RAF service and good character references provided on leaving the service. He mentioned his longstanding service as a Councillor and that he had the support in these proceedings of a broad range of other Councillors.

### 13.4 Case Tribunal decision on sanction

- 13.4.1 The Case Tribunal decided that former Councillor Waters should be disqualified from being, or becoming (whether by election or otherwise) a member of the relevant authority concerned, or any other relevant authority for a period of three years. This case was at the most serious end of matters given former Councillor Waters previous breach of the Code. That breach had had similarities to the current matter and indicated that he had learned nothing from his previous sanction. His treatment of officers in both cases had been deplorable. In addition, he had showed himself as being prepared to use the planning system for personal gain (his own and that of his family members). Former Councillor Waters was not fit to hold public office as a Councillor.
- 13.4.2 The Case Tribunal ordered that Councillor McGhee be censured. It took into account his long service as a Councillor and his character references. It noted moreover that the Standards Board had taken a regrettably long period of time to bring this matter to hearing. The Case Tribunal took into account that the Standards Board investigation (which post-dated a Local Government Ombudsman investigation), given the delays, would in itself have been a hardship for him.
- 13.4.3 The Case Tribunal accepted that Councillor McGhee had not fully appreciated the import of his actions. He had been unthinking and naïve. That said, he ought to have seen clearly that he should have nothing to do with former Councillor Waters' request for assistance. It was important moreover that the rules on prejudicial interest should not be subverted by the use of other Councillors to act effectively as the voice of the Councillor with the prejudicial interest. Councillor McGhee had

allowed himself to be used in this way and he should be censured accordingly. It recommended that Councillor McGhee receive training in the Code of Conduct.

13.4.4 The date such sanctions are to take effect is the date of this decision.

13.4.5 The Respondents may seek leave from the High Court to appeal against the decision of the Case Tribunal that there has been a failure to comply with the Code of Conduct and/or the decision as to sanction. The President of the Adjudication Panel for England may suspend the effect of the sanction if requested to do so by a Respondent who intends to seek leave to appeal to the High Court against the decision of the Case Tribunal. Applications for leave to Appeal must be made to the High Court within 21 days of this decision. The Respondent is directed to the provisions of Part 52 of the Civil Procedure Rules.

Melanie Carter

**Chairwoman of the Case Tribunal**

27 October 2009