

## **APPENDIX A**

### **FINAL REPORT OF A LOCAL INVESTIGATION FOLLOWING A COMPLAINT BY MR TIM COOKSON**

#### **1 BACKGROUND**

1.1. This report represents my final findings, for presentation to Hastings Borough Council's Standards Committee ("Standards Committee"), of a Local Investigation following a referral of a complaint to the Monitoring Officer at Hastings Borough Council pursuant to Section 57A(2)(a) of the Local Government Act 2000 ("2000 Act").

1.2 On the 22 July 2008 the Standards Committee received a written allegation ("Complaint") pursuant to Section 57A(1) of the 2000 Act from Mr Tim Cookson ("the Complainant") Borough Planning Officer and Deputy Director Regeneration and Planning of Hastings Borough Council ("Council") concerning the alleged conduct of Councillor Sue Palmer ("the Councillor") of the Council. The Complaint is attached at Appendix 1.

1.3 The following is a summary of the general nature of the allegation:

- That on the 16 April 2008 the Councillor circulated an email to local residents that made derogatory references about the Complainant. This email was copied that day to the Complainant, by one of the recipients of the email, a Mr Mike Rosenberg, to the Complainant's email address.
- The Complainant has complained that certain comments in that email showed a serious disregard and disrespect to him and fellow professional planning advisors to the Council. Also the comments were personally offensive and undermined his authority. He also considered that these comments were aggravated by the fact that the Councillor was a member of the Planning Committee at the time, where reports by the Complainant were presented to this Committee, making recommendations in relation to planning and related applications.

1.4 On the 5 June 2008 the Standards Committee adopted the processes and procedures for the Local Assessment of Complaints Alleging Breach of the Member Code of Conduct ("Local Assessment Procedure") pursuant to the Local Government and Public Involvement in Health Act 2007, the Standards Committee Regulations 2008 and supporting guidance issued by the Standards Board for England.

1.5 In accordance with the Local Assessment Procedure a meeting of the Assessment Sub Committee of the Council was held on the 12 August 2008 and they received a report from the Council's Borough Solicitor and Monitoring Officer, Ms Jayne Butters, on the Complaint. It was resolved (unanimously) that the Complaint be

referred to the Monitoring Officer for further investigation for the reason that this could be a serious breach of the Code of Conduct.

1.6 On the 19 August 2008 Ms Butters wrote to the Councillor informing her of the Assessment Sub Committee's decision and paragraphs of the Code of Conduct that may apply to the alleged conduct namely:-

- Failing to treat others with respect
- Bullying
- Bringing an office or authority into disrepute.

1.7 The Assessment Sub Committee also considered that paragraphs 45-53 of the Protocol for Relationships between Members and Officers were relevant, in particular:-

“45. The key elements are recognition of and respect for each others roles and responsibilities. These should be reflected in the behaviour and attitude of each to the other, both publicly and privately.”

1.8 On the 8 September 2008 the undertaking of the investigation was formally delegated to me by the Council's Borough Solicitor and Monitoring Officer, Ms Jayne Butters, pursuant to section 82A of the 2000 Act.

1.9 On the 22 September 2008, Ms Butters wrote to the Councillor informing her that I had been appointed as the Investigating Officer. The letter also set out the procedure that would be adopted during the investigation and asked the Councillor, amongst other things, to notify me in writing whether she admitted or denied the alleged breaches of the Code of Conduct.

1.10 On the 16 October 2008 the Councillor wrote to me to confirm that she denied the alleged breach of the code of conduct. She did not consider that any comments in a “confidential and private email from her personal email address should have become the subject of any complaint”. She believed the Complainant was already in breach of paragraph 44 of the Protocol for Relationships between Members and Officers i.e. “The conduct of Members and Officers should be such as to instil mutual confidence and trust” when she was contacted by “angry residents unable to get information from, or a meeting with, Senior Planning Officers”. The Councillor said that at the time she was contacted by residents, there was a “clear issue of lack of communication within the Planning Department which had led to many members of the public voicing doubts about the integrity and competence of the Council's staff in that department” and that she concluded “that the Planning Department's record of “delay, indecision and failure to communicate effectively with residents and their Councillors showed that confidence had already been eroded, leading to a breakdown of trust”. She also forwarded to me an email she had received from Mike Rosenberg dated the 28 August 2008 saying he was “horrificed” to discover he had forwarded the email to the Complainant. He also said that he couldn't think why such an inoffensive remark had caused such a reaction unless the recent complaints to the ombudsman have put the council officers on the defensive. He thought the Complainant must have a very narrow back if he thought he was above any criticism and took the Councillor's

remarks so personally, and that he was making a mountain out of a molehill. This email is at Appendix 2.

1.11 Apart from Mike Rosenberg the Councillor also identified a number of residents who she asked me to contact as part of the investigation. She also referred to four complaints to the Local Government Ombudsman regarding decision making procedures in the Council's Planning Department, relating to the concerns from local residents referred to in the previous paragraph.

## **2. CODE OF CONDUCT AND PROTOCOL FOR RELATIONSHIPS BETWEEN MEMBERS AND OFFICERS**

2.1 The Council's Members' Code of Conduct was adopted by the Council on the 25 July 2007("2007 Code") A copy of that Code is attached at Appendix 3.

2.2 I consider the paragraphs of the 2007 Code (which I explore in detail in paragraph 4) to be taken into account in respect of this Complaint are Paragraphs 2(1), 2(2), 3(1),3(2)(b) and 5.

2.3 I shall also consider the Protocol for Relationships between Members and Officers ("Protocol") adopted by the Council as part of the Council's Constitution, and in particular paragraphs 44 to 53, 135 and 137. A copy of that Protocol is attached at Appendix 4.

## **3 FINDINGS OF FACT**

3.1 126 Harold Road and the rear of 248-282 Harold Road Hastings (the latter is referred to in correspondence by residents as 284 Harold Road but this is not strictly correct) are two sites where planning consent has been granted for residential development and the implementation of the schemes has been underway. There have been issues with the acceptable discharging by the developers of planning conditions on both sites, which have been of considerable concern to a number of local residents in the Harold Road area.

3.2 With regard to 126 Harold Road the main concern was the commencement of some work on site prior to the discharging of some planning conditions and in particular the impact on existing badger sets located on the edge of the site.

3.3 With regard to site at the rear of 248-282 Harold Road the main concern has been the inability to discharge a drainage condition, because the wording of the condition has proved to be unenforceable. This has been subsequently confirmed by Counsel's Opinion obtained by the Council.

3.4 At the time of the application, Southern Water were concerned about the impact of the development on the capacity of the drainage system, so they requested the insertion of a drainage condition to cover their concerns. This was inserted in the planning consent. However, in essence, the advice of Counsel was that the drainage condition, as drafted, could not force the developer to upgrade the drainage system, which was what local residents were anticipating. There were also other conditions which had allegedly not been discharged, particularly the creation of a new play area.

3.5 A number of the residents had contacted the Councillor claiming that these two sites in Harold Road were not being effectively monitored by the Planning Department at the Council and that the developers were flouting planning conditions, without adequate enforcement by the Planning Department. The chief recipient of the email from the Councillor of the 16 April 2008, Mike Rosenberg, was particularly concerned about the drainage condition, as his property had suffered flooding from an overflow of the drainage system.

3.6 These concerns of local residents have resulted in 3 local residents, including Mike Rosenberg, making complaints to the Local Government Ombudsman. A summary of those complaints is attached at Appendix 5. The Council sent a detailed rebuttal to the complaints and the decision of the Ombudsman is also attached at Appendix 5. It is to be noted that a full response has been received from the Ombudsman to the complaints about 248-282 Harold Road but that he has sought further responses from the Council about the complaints regarding 126 Harold Road.

3.7 As a result of their concerns, the residents formed themselves into what they called the Harold Road Action Group and the Councillor emailed Mike Rosenberg on the 14 April 2008 asking him for a list of questions he would like answered by the Planning Department in relation to the two sites. That email is attached to the written Complaint (Appendix 1).

3.8 It is alleged by the residents that the Complainant had, up until they contacted the Councillor, indicated that he was not prepared to meet them to discuss their concerns, and that is why they involved the Councillor to see what she could do on their behalf. That resulted in a meeting between Councillors' Palmer and Stevens, the Complainant and Planning Officer colleagues on the 15 April 2008 where, amongst other things, the questions posed by Mike Rosenberg were raised.

3.9 On the 16 April 2008 the Councillor responded by email to Mike Rosenberg and 5 other Harold Road Action Group residents with a detailed response on the questions that had been raised. It was in that response that statements were made by the Councillor of which the Complainant has complained i.e.

“Cookson will drive you mad!! he couldn't make a decision to save his life”

“All in all a very frustrating and irritating meeting- when you meet Cookson you will know what I mean”.

3.10 It was in responding to that email from the Councillor , that Mike Rosenberg sent a copy of the Councillor's email to the Complainant, and 8 local residents, which has led to the Complaint.

3.11. In undertaking my investigation, I have clarified certain planning issues with the Complainant by email correspondence. I have also undertaken a face to face interview with the Councillor and undertaken telephone interviews with a number of Harold Road Action Group residents.

3.12 Of the interview with the Councillor I summarise the main issues, as I see them, arising from that interview:-

- She had been a Hastings Borough Councillor since May 2006, and had served on the Planning Committee from her election until April 2008. She had quite a lot of prior experience on Planning issues being a volunteer on a Conservation group for a number of years.
- The Councillor had had some induction training on Standards related matters when she was elected and a half day's training in this area in June/July 2008.
- She had been contacted by residents concerned about development in Harold Road, claiming that the sites were not being monitored by the Planning Department and the residents were seriously concerned, amongst other things, with flooding issues. The residents said that they could not get any meaningful response from the Planning Department. They had asked for meetings but had been denied. She said that the residents had approached her as a last resort to help them.
- The Councillor was concerned that she had had no prior notification of the Complaint by the Complainant until she received the Monitoring Officer's letter of the 19 August 2008 informing her of the decision of the Assessment Sub Committee. This was over 4 months after the email of the 16 April 2008, which led to the Complaint.
- She was also concerned that the two Councillor members of the Assessment Sub-Committee, Councillors' Fawthorp and Daniel, were leading members of the Planning Committee( the former being the current Chairman) whom she said had close links with the Complainant.
- She was very surprised that the Complainant had not lodged his complaint until 22 July 2008. She felt that if he had been genuinely offended by the words she had used, why had he waited in excess of 3 months to lodge his complaint and why had no-one approached her for an apology. She was conscious that a number of residents had at this time made complaints to the Local Government Ombudsman about the Planning Department, over these issues of the development in Harold Road.
- The Councillor said that she was very frustrated in dealing with the Complainant over the residents' concerns. She felt that from the body language of the officers at the meeting on the 15 April 2008, that she attended with Councillor Stevens, that the barriers had been put up. That Officers' led by the Complainant were not being forthright with her about the issues and the residents' complaints. She genuinely felt that respect had broken down with the Complainant over this issue. She had noticed a distinct change in the way that Officers' in the Planning Department, with whom she had a good relationship, now dealt with her since the Complainant had become the Head of Planning in 2004.( Mr Cookson has confirmed that he actually commenced employment with the Council in June 2005) They were much less forthcoming in their dealings.

- She confirmed that over the years she felt she had a good working relationship with a number of Planning Officers with whom she had contact over Planning issues. However, with regard to the Complainant she had had very little dealings with him and therefore did not know him well.
- On the remarks that the Councillor had made which had offended the Complainant, she said that they were a “flippant response rather than an in depth analysis” of the Complainant, caused by the frustrations of dealing with the Complainant over these issues. It had been a real battle to get answers to the questions that the residents, who were also frustrated and concerned, had raised with her.
- On the references to “Cookson,” when other Officers had been given their first names in the email correspondence, she said it was only a form of short hand identification for the correspondence with residents, because she did not know the Complainant well and was not meant to be disrespectful. Where she had used first names it was because she had known these officers for a long time
- The Councillor commented that the Assessment Sub Committee had referred to paras 45-53 of the Protocol for Relationships between Members and Officers but had not referred to Paragraph 44. This said that “The conduct of members and officers should be such as to instil mutual confidence and trust”. She was of the view that the Complainant’s conduct over this issue meant that that confidence had broken down. She had been minded to make a complaint against the Complainant invoking paragraph 44 but because, in her view, there were very unclear procedures for bringing complaints against Officers, she did not think there was any point going down this route.
- She said that her correspondence was not done on the Council’s email system. It was a private email, only intended for the few residents to whom it was addressed, to seek to provide some answers for the very real concerns of the residents.

3.13 I have also been in contact with the Complainant and on the issue of the delay between the email of the 16 April 2008 and his complaint of the 22 July 2008 he has commented as follows:-

“ When I found out the procedures and decided to make a complaint I made a submission to the Standards Board for England in early May but the post was returned on the 12 May and I found out the procedures had changed and the matter had now to be dealt with at Hastings Borough Council. I waited for the formation of the relevant Assessment Sub-Committee to be set up and then made the complaint again. The first meeting of the Committee was on the 14 July which I just missed due to time pressures but it was considered at the second meeting of the Committee on the 11 August”. This reference to the 11 August is a mistake, as referred to earlier the Sub-Committee actually sat on the 12 August.

3.14 I also sought clarification from the Council’s Monitoring Officer of the comments of the Councillor that she was not aware of the complaint until receiving details of the outcome of the Sub-Committee in the Monitoring Officer’s letter to her

of the 19 August 2008. Under the Local Assessment Procedure at Paragraph 13 the Monitoring Officer has discretion to:-

- Inform the subject that a complaint has been made about him/her by sending notification to the subject matter stating:
  1. a complaint has been made;
  2. the name of the complainant ( unless confidentiality has been requested by the complainant and the Assessment Sub-Committee has not yet considered whether or not to grant it);
  3. the relevant paragraphs of the Code that may have been breached;
  4. that a written summary of the complaint will be provided to the subject member only if and when the Assessment Sub-Committee has met to consider the complaint, as only the Assessment Sub-Committee has power, under Section 57(2) of the Local Government Act 2000, to give a summary of the allegation to the subject member;
  5. the date of that meeting if known.

3.15 The Monitoring Officer has provided me with a copy of a letter dated the 30 July 2008 which she says was sent to the Councillor. A copy is annexed at Appendix 6. She said “This was addressed c/o The Town Hall and the letter would have been placed in Councillor Palmer’s pigeon hole. Councillors often pick up their mail from their pigeon holes. The 30 July was a Wednesday. If it was not picked up by the Councillor on that day, it would either go out by courier or by post on the Thursday”. The Councillor has commented that she can assure me that she did not receive this letter, though she is not questioning that Mrs Butters did send it.

3.16 As mentioned, in the course of my investigation, I have also made contact with a number of local residents belonging to the “Harold Road Action Group” or residents with association with that Group. Those residents I interviewed over the telephone on the 14 November 2008 are included in the list at Appendix 7.

3.17 Each of these residents expressed their concerns about what they believed were failings by the Council, through its Planning Department , to properly enforce planning conditions on either the development at 126 Harold Road and/or the land at the rear of 248-282 Harold Road. The alleged failure to enforce the planning condition relating to the connection to the sewerage system at the rear of 248-282 Harold Road was of particular concern to the residents I spoke to.

3.18 As to the involvement of the Councillor in these matters I received the following comments from different residents:-

- “Councillor Palmer has been the only one who has really tried to help the residents. She was the one ward councillor who was really good. Her frivolous email has been leapt upon because she was a really good person with a lot of support and the Council do not like it”.
- “Councillor Palmer was acting absolutely in the interests of residents and was bending over backwards to help. She was trying to sort out the concerns

of a lot of residents who were genuinely very frustrated and concerned about all these breaches of conditions”.

- “We felt we had been shoddily treated and Councillor Palmer bore the brunt of this. It was clear to us that Councillor Palmer was becoming frustrated as well because of the pressure we were putting her under because she was unable to get any results”.
- “I have a great deal of respect for Councillor Palmer. She is very good and is not a bully. She is a very hard working Councillor who tries to help people”.
- “One of the major concerns in Hastings is the very sub-standard Victorian drainage system. Nobody checks the drainage system, conditions are put on but never enforced and monitoring of the sites is one of the major problems. The Council cannot keep up with the conditions it imposes.”

## 4. REASONING

### Freedom of Expression

4.1 Article 10 of the European Convention of Human Rights (“ECHR”) confers a right of freedom of expression including the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

4.2 However, this is a qualified right carrying with it duties and responsibilities and Article 10(2) says the right “ may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, **for the protection of the reputation or rights of others** (my emphasis), for the preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

4.3 This question of Freedom of Expression as embodied in Article 10 of the ECHR has been considered in a number of recent judicial pronouncements on cases involving the Code of Conduct for Members.

4.4. His Honour Justice Keith in the case of *Murphy v Ethical Standards Officer of the Standards Board for England* 2004 said:-

- “The exercise of one’s right to freedom of expression is expressly subject to such conditions as are necessary in a democratic society and for the protection of the rights of others. There is an obvious need to protect the reputation of local authorities as one of the democratic elements of society. In that connection, there is a need to maintain public trust in the decision-making process of local authorities....”

4.5 In the case of *Sanders v Kingston* 2005 a Councillor sought to rely on Article 10 when he had been found to have breached the Code of Conduct in that he had failed to treat others with respect and his conduct could reasonably be regarded as bringing his office or authority into disrepute. His Honour Justice Wilkie in coming to his



determination accepted submissions about the higher level of protection afforded to political expression when quoting from the European Court of Human Rights case of *Jerusalem v Austria* 2003 which said:-

- “while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to its pre-occupations and defends its interests. Accordingly, interference with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the court.”

4.6. In the case of *Livingstone v Adjudication Panel for England* 2006 His Honour Justice Collins said:-

- “ Anyone is entitled to say what he likes of another provided he does not act unlawfully and so commits an offence under, for example , the Public Order Act. He also quoted passages from His Honour Lord Justice Hoffman in *R v Central Television plc* 1994:-
- “Freedom means....the right to say things which ‘right thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.....”
- Collins J then went on to say:- “The burden is on the defendant to justify the interference with freedom of speech. However offensive and undeserving of protection the appellant’s outburst may have appeared to some, it is important that any individual knows he can say what he likes, provided it is not unlawful, unless there are clear and satisfactory reasons within the terms of Article 10(2) to render him liable to sanctions”.

4.7 In the *Sanders* case Wilkie J applied the Article 10(2) test whether the provisions of the Code of Conduct were “necessary in a democratic society for the protection of the rights of others”.

He said “this calls for the following questions to be asked:

- (a) was the legislative objective behind these provisions sufficiently important to justify limiting freedom of speech?
- (b) were the measures adopted rationally connected to the legislative objective?  
and
- (c) were the means used to impair the right or freedom of speech no more than is necessary to accomplish the legislative objective?.....

The purpose of the legislation was to encourage and impose certain minimum standards of behaviour in respect of local government. No challenge is made by Councillor Sanders to the scheme. It is, therefore, implicit that he accepts that the system whereby members are obliged to undertake that they will comply with the code of conduct and will be subject to the jurisdiction of the Case Tribunal in the event that they are not satisfied, in principle, the three conditions for a lawful interference with free speech. I have concluded that the words and writing of the appellant amounted to no more than expressions of personal anger and personal abuse and did not constitute political expression which attracts the higher level of protection”

## **2007 Code**

4.8 The 2007 Code was adopted by the Council on the 25 July 2007 and all elected Hastings Borough Councillors, including the Councillor , have accepted and are subject to that 2007 Code.

4.9 I consider that the following paragraphs and sub- paragraphs of the Code are relevant to this matter:-

“2(1) Subject to sub-paragraphs (2) to (5), you must comply with the Code whenever you

- a. conduct the business of your authority( which, in this Code, includes the business of the office to which you were elected or appointed); or
  - b. act, claim to act or give the impression you are acting as a representative of your authority,
- and references to your official capacity are construed accordingly.

(2) Subject to sub-paragraphs (3) and (4), this Code does not have effect in relation to your conduct other than where it is in your official capacity.

3(1) You must treat others with respect.

3(2)(b) You must not bully any person.

5. You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.”

### **Protocol for Relationships between Members and Officers**

4.10 In coming to their decision to refer this matter to the Monitoring Officer for Investigation the Assessment Sub Committee took the view that paragraphs 45 to 53 of the Protocol were relevant. Councillor Palmer takes the view that paragraph 44 of the Protocol is also relevant and I concur with that view. In fact it is clear that paragraphs 44 and 45 are actually linked provisions.

4.11 Paragraph 44 says “The conduct of members and officers should be such as to instil mutual confidence and trust” Paragraph 45 then goes onto explain how that mutual confidence and trust is exemplified by saying “The key elements are a recognition of and respect for each other’s roles and responsibilities. These should be reflected in the behaviour and attitude of each to the other, both publicly and privately.”

4.12 These sentiments are central to the Protocol and referred to throughout the document eg :-

“1. Mutual trust and respect between Members and Officers is at the heart of a council’s good governance. They are essential if the partnership necessary for the effective running of a local authority is to succeed.

15. Members and Officers must always respect the roles and duties of each other. They must show respect in all their dealings by observing reasonable standards of courtesy, and by not seeking to take unfair advantage by virtue of their position.

16. Whilst Members and Officers are indispensable to one another, their responsibilities are distinct. Members are accountable to the electorate..... Officers are accountable to the Council as a whole. Their job is to give advice to Members...and to carry out the Council’s work under the direction of the Council.”

4.13 In addition I consider that paragraphs 135 and 137 of the Protocol are also relevant to this investigation.

“135 A Member who is unhappy about the actions taken by, or conduct of, an Officer should:

- avoid personal attacks on, or abuse of, the Officer at all times,
- ensure that any criticism is well founded and constructive
- never make a criticism in public, and
- take up the concern with the officer privately

137 If direct discussion with the officer is inappropriate (eg because of the seriousness of the concern or because the Officer is a junior member of staff) or fails to resolve the matter, the Member should raise the issue with the Officer’s manager or the relevant senior officer.”

## **GUIDANCE FROM THE STANDARDS BOARD FOR ENGLAND (“SBE”)**

4.14 The Case Review 2007 published by the SBE gives a paragraph by paragraph analysis of the present model Code of Conduct, in the form as now adopted by the Council.

4.15 In their Case Review 2008 Paragraph 2 the SBE under the heading “Applying the Code of Conduct to members working in a private capacity or representing authorities” the SBE state as follows:-

“We would like to add that the issue of whether a member has been representing an authority or acting in a private capacity is something that must be established. This is because it decides whether the Code applies to a member at all “

4.16 Question 9 in The Case Review 2007 asks “When does the Code of Conduct apply? In answer the SBE state “This means whenever members conduct the business of their authority, or act, claim to act or give the impression they are acting in their official capacity or are representing their authority. Question 11 asks “Do private discussions about authority business come under “official business” and the answer is “The SBE is likely to view any private discussion of

authority business...as carrying out the business of the member's office. Only where there is clear evidence that the conversation was not concerned with performing authority business will it fall outside paragraph 2(1) of the Code of Conduct".

4.17 On the question of treating others with respect, the SBE in the Case Review 2007 say that this provision "is not intended to stand in the way of lively debate in local authorities. Such discussion is a crucial part of the democratic process. Differences of opinion and the defence of those opinions through members' arguments and public debate are an essential part of the cut and thrust of political debate". This is really just another way of capturing the provisions of the right in Article 10 of the ECHR relating to the freedom of expression of political opinion. However, in recognising that right the SBE also recognises that it is a qualified right where the reputation or rights of others need to be protected. Thus, expressing a view that is aimed at the person and their personal characteristics would be likely to be treating a person with disrespect. Whereas the expression of disagreement with how a person has put forward an argument or is dealing with a matter, even if put forward in an offensive way, recognising the test put forward by Collins J in the Livingstone case at para 4.6 above, is likely to be an acceptable expression of disagreement.

4.18 The Case Review 2007 also says that "Members should note that an Adjudication Panel hearing has decided that you can be the victim of disrespect even if you did not witness the disrespectful behaviour. Therefore, a member's disrespectful treatment of an officer who is not present may amount to a failure to comply with the Code".

4.19 Here are some recent examples of Adjudication Panel decisions on disrespect cases :-

- A councillor wrote to an officer, the chief executive, in rude terms demanding action where she had no authority to do so. Here the Panel decided that the member had not shown disrespect to the chief executive. Sufficient weight had to be given to the fact that the officer was a chief executive, and it was significant that there was no direct personal attack on that officer.
- In another case the Panel found that there had been disrespect shown to a senior police officer. Here the councillor did not address him respectfully in email correspondence and referred to him by his surname outside of the expected norms of such relationships. This was compounded by the circulation of the offending emails to junior and senior officers within both organisations.
- A councillor made comments about the town clerk at a parish meeting saying that an officer found her "difficult to get on with". The member added that "this is also the view of many town's people who say that when they try to contact the town clerk, she is downright rude to them".

- The Panel considered, in this latter case, that the threshold for a failure to treat another with respect has to be set at a level that allows for the passion and frustration that often accompanies political debate and the discussion of the efficient running of a council. It should also be set in the context of who was involved in the exchange. In this case, the comments were opinions of other individuals which the member honestly believed to be true. The member's conduct was not unfair, unreasonable or demeaning to the town clerk and not made in a malicious or bullying manner. The town clerk was very experienced in her dealings with councillors and given her seniority was entirely able to defend her position. So the Panel decided that the threshold had not been met.

4.20 I now turn to the 2007 Code's requirement that a member must not bully any person. This is a new provision in the 2007 Code. The SBE defines it as "offensive, intimidating, malicious, insulting or humiliating behaviour by an individual or group of individuals, based on abuse or misuse of power or authority, which attempts to undermine an individual or group." The SBE says "Conduct is unlikely to be considered as bullying when it is an isolated incident of a minor nature, or when the behaviour by both the complainant and member contributed equally to the breakdown in relations". In deciding whether someone has been bullied the SBE advise ".....the conduct will be looked at through the eyes of a notional reasonable member of the public who looks at the conduct objectively"

4.21 On the question of whether members can criticise officers, the SBE advise as follows:-

- "In some cases, officers have been known to reject reasonable criticism appropriately made and describe it as bullying. The government did not intend the Code of Conduct to constrain members' involvement in local governance, including the role of members to challenge performance. Members are able to question and probe poor officer performance provided it is done in an appropriate way. In the everyday running of a local authority, it is inevitable that members may have disagreements with officers from time to time.
- This paragraph does not mean that members cannot express disagreement with officers. This disagreement might, in the appropriate context, manifest itself in criticism of the way in which an officer or officers handled particular matters.
- It is important that members raise issues about poor performance in the correct way and at the proper forum, such as in a private meeting with a senior manager, and not in a public meeting or through a published attack in the media.
- If a member's criticism is a personal attack or is offensive in nature it is likely to be unacceptable. Councils' should have clearly defined policies,

procedures and occasions where those sorts of issues can properly be raised. It is only where members' conduct is unfair, unreasonable or demeaning that paragraph 3(2)(b) will be relevant"

#### **Involvement of Councillors Fawthorp and Daniel with the Assessment Sub Committee on the 12 August 2008**

4.22 At paragraph 3.12 I have mentioned that the Councillor was concerned that Councillors Fawthorp and Daniel were members of the Assessment Sub-Committee on the 12 August 2008, who determined that the Complaint should be referred to the Monitoring Officer for Local Investigation. She said that she believed they had close links to the Complainant. Councillor Fawthorp was the present Chairman of the Planning Committee and Councillor Daniel was a long standing member of that Committee who had been on the Appointment Panel when the Complainant was appointed Borough Planning Officer.

4.23 The Local Assessment of Complaints provides at paragraph 5.9 that a member of the Standards Committee should not participate in the processes on either the Assessment Sub-Committee or the Review Sub-Committee if he/she is.... "(b) closely associated with someone who is a complainant."

4.24 Apart from their working relationship I am not aware of any other relationship between the Complainant and the two Councillors mentioned above. As a Senior Officer and Head of Service the Complainant is, through his job, bound to have an impartial working relationship with a considerable number of members, including those sitting on the Planning Committee. I am thus not persuaded that there was any particular conflict of interest in this matter, pursuant to paragraph 5.9(b), which prevented Councillors Fawthorp and Daniel from participating in the Assessment Sub-Committee meeting on the 12 August 2008.

#### **IS THE 2007 CODE APPLICABLE?**

4.25 As previously stated, the Code will only apply when a member conducts the business of their authority, or acts, claims to act or gives the impression they are acting in their official capacity or are representing their authority.( Paragraphs 2(1) and 2(2) of the 2007 Code). It is only if the Councillor had been acting in a private capacity that the 2007 Code would not apply in this case. Private discussions on Council business will be caught by the Code.

4.26 Residents had contacted the Councillor to help them on the matter of development approved by the Council and planning conditions relating thereto. The Complainant mistakenly was sent a copy of the email of the 16 April 2008. It was intended only to be private and confidential information for the residents to whom it was addressed. However, the Councillor was quite clearly acting in her official capacity as a Councillor when writing that email. The Councillor accepted that was the position in my interview with her.

4.27 Therefore, as there is clear evidence that the Councillor was performing Council business, in writing that email, I consider that paragraph 2(1) of the 2007 Code applies and thus the 2007 Code is engaged in this matter.

#### **DISREGARD AND DISRESPECT TO THE COMPLAINANT'S FELLOW PROFESSIONAL ADVISORS TO THE COUNCIL?**

4.28 The Complainant says in his Complaint that the comments in the email of the 16 April 2008 from the Councillor showed a serious disregard and disrespect to him and fellow professional advisors to the Council.

4.29 As to the contents of that email correspondence I can see no evidence of any "disregard or disrespect" shown to the Complainant's colleagues. The Councillor is critical of the outcome of her meeting with the Officers. However the comments that the Complainant has complained about refer to the Complainant specifically.

4.30 It will be noted that at paragraph 3.12 that the Councillor said she had a "good working relationship" with Planning Department officers but "She had noticed a distinct change in the way that officers with whom she had a good relationship now dealt with her since the Complainant had become the Head of Planning".

4.31 I therefore do not consider that there has been any breach of any part of the 2007 Code by the Councillor to any of the Complainant's fellow professional advisors to the Council, in respect of this Complaint.

#### **DISRESPECT TO THE COMPLAINANT?**

4.32 The Councillor has stated that at the time she was contacted by residents there was "a clear issue of lack of communication within the Planning Department which had led to many members of the public voicing doubts about the integrity and competence of the Council's staff in that department". She had concluded "that the Planning Department's record of delay, indecision and failure to communicate effectively with residents and their Councillors showed that confidence had already been eroded, leading to a breakdown in trust".

4.33 My interviews with the residents clearly supports this argument that residents in Harold Road and the surrounding area had lost faith with the ability of the Planning Department to, in their view, effectively control the developments that were taking place in this road. That is why they had involved the Councillor and other Councillors in the matter. So it is clear that the Councillor is right when she says that certain residents had lost confidence in the Planning Department. That is also evidenced by the complaints that certain residents had made to the Local Government Ombudsman.

4.34 There have been comments made, both express and implied, in my investigation that this Complaint has been prompted by the complaints that

have been made by residents to the Local Government Ombudsman. In essence a “tit for tat”. There was a suggestion made that the three month delay in filing the Complaint was evidence that this was a strategic move on the part of the Complainant, because of all the Ombudsman complaints, rather than a genuine offence at what had been said about him.

4.35. As I set out in paragraph 3.13 the Complainant has given an explanation that he made a complaint very shortly after the email was received but that the new procedural changes for Local Assessment meant that he had to resubmit his complaint and this prevented an earlier filing. I find this explanation cogent and reasonable. In any event, once a complaint has been made and the Monitoring Officer has been requested to carry out a Local Investigation, my remit is to carry out that Investigation to see whether there has been a breach of the Code, rather than to examine any suggested motives for filing a complaint.

4.36 That being said, I think these allegations of “tit for tat” underscore the breakdown that has occurred between residents and the Council over these issues. Whatever the final outcome of the Ombudsman’s investigations there is clearly an issue for the Council in restoring confidence in the Planning processes within this section of its community.

4.37 It is also perhaps unfortunate that the Councillor did not apparently become aware of the complaint until after the Assessment Sub-Committee had made its decision. By then the die was cast. This comment is not to take away the Complainant’s right to make a complaint to the Standards Committee that he believes there has been a breach of the Code. However, an early reference of the concerns of the Complainant to the Councillor could possibly have led to some bridge building, which I feel is a vitally important required outcome for the Council.

4.38 The Councillor was of the view that the Complainant had already breached paragraph 44 of the Protocol before she sent her email. The relevant paragraph is quoted in paragraph 4.11 above. Also I mention that this paragraph is, in my view, clearly linked to Paragraph 45, they are not mutually exclusive paragraphs ie There should be mutual trust and confidence between an officer and a councillor and the key elements of this are a recognition of each others roles and responsibilities, which is reflected in their behaviour and attitude to each other, both publicly and privately.

4.39 There is no doubt that the Councillor’s trust and confidence in the Complainant, just like the residents, had broken down over this matter, as she has clearly stated in this investigation. However, I have not seen any evidence that the Complainant’s trust and confidence in the Councillor had equally been lost. There is no evidence that his behaviour towards her as a Councillor was inappropriate, either publicly or privately. As the Councillor said when I asked her about her dealings with the Complainant she said that she did not know him well. Her comments about him in the email and what I have gleaned from my investigation show that she has concerns about the Complainant’s performance in his role as Borough Planning Officer, based on her



involvement with him on this matter. However, that is a totally separate issue, in my view, from the Complainant's behaviour and attitude towards the Councillor, as a Councillor.

4.40 Even if I was wrong about that and the Complainant's behaviour and attitude towards the Councillor was inappropriate, there is a clear procedure laid down in the Protocol as to how that should be handled. I have set down at Paragraph 4.13 the relevant provisions, in particular paras. 135 and 137 of the Protocol.

4.41 The Councillor indicated to me that she believed there were very unclear procedures for Councillors to bring complaints about Officers and that she therefore decided that there was little point going down this route.

4.42 It is appreciated that the Councillor is a relatively new Councillor but the procedure set down in the Protocol, if the Officer's actions or conduct warrant it, is clearly set down in the paragraphs mentioned. The Complainant's line manager is Mr Hubbard, the Executive Director for Regeneration and Planning, who would have been required to deal with any complaint about the actions or conduct of the Complainant, if addressed to him under para.137 of the Protocol. As the Councillor said she was not clear about this procedure, she could have raised her concerns with her political colleague, Councillor Richard Stevens, who was also involved in this matter, and is a Councillor of long standing.

4.43. The Councillor said in her interview with me that her comments about the Complainant of which he has complained were "a flippant response rather than an in depth analysis" of the Complainant. She did not know the Complainant well. Also one of the residents I interviewed on the 14 November 2008 said it was a "frivolous email". Mike Rosenberg in his email of the 28 August 2008 (Appendix 2) also refers to it as an inoffensive remark and that the Complainant must have a very narrow back if he thinks he is above any criticism.

4.44 It is quite clear that it is perfectly legitimate for members to criticise officers in the way they are handling matters on behalf of the authority for whom they work. This is particularly so in the case of Senior Officers and Heads of Service, like the Complainant, with a high profile role for the authority, who are accountable to Councillors and the general public for the Service for which they are responsible.

4.45 Recognising the right to Freedom of Expression (Article 10(1) of the ECHR) that criticism can be very robust but the right carries with it responsibilities for the protection of the reputation or rights of others.

4.46 The case of *Sanders v Kingston* deals with this qualified right and the responsibility to protect the reputation of others. It held that the Code of Conduct and the Protocols for relationships between members and officers adopted by local authorities satisfied the following tests:-

- a) was the legislative objective behind these provisions sufficiently important to justify limiting freedom of speech?
- b) were the measures adopted rationally connected to the legislative objective and
- c) were the means used to impair the right to freedom of speech no more than is necessary to accomplish the legislative objective?

If these questions are answered in the affirmative then the question has to be asked, were the comments made aimed at the person and their personal characteristics rather than an expression of political opinion. The former is likely to be a breach of the Code of Conduct, the latter not.

4.47 As I have mentioned the Councillor was clearly very frustrated by how this matter was being dealt with in the Planning Department and how, as the Head of Service, the Complainant was responding to the complaints from residents. As she said in her email of the 16 April, presumably referring to Councillor Richard Stevens “Richard stays calm but I get very cross.....”.

4.48 As was made clear to me by the residents I interviewed, they had a very high regard for the Councillor but recognised the pressure they were putting her under and that she shared their frustration (see paragraph 3.18)

“Councillor Palmer was acting absolutely in the interests of residents and was bending over backwards to help. She was trying to sort out the concerns of a lot of residents who were genuinely very frustrated and concerned about all these breaches of conditions”

“We felt we had been shoddily treated and Councillor Palmer bore the brunt of this. It was clear to us that Councillor Palmer was becoming frustrated as well because of the pressure we were putting her under because she was unable to get any results”.

4.49 The Councillor has said that her comments were intended to be private and in any event were only sent to 8 people out of a total population in Hastings of 90,000. From my interviews, it is clear that there are now some other people who are aware of the contents of the email, although I have no reason to doubt that those numbers are small. However, the Councillor fully accepts that her comments were related to the official business of the Council. Therefore it is not the number of members of the public that became aware of the comments, nor the fact that her comments were intended to only go to those residents, nor how those comments were communicated, that is significant. It is what is said to those members of the public, on a matter related to the official business of the Council, that is relevant, as far as the issue of disrespect under the Code is concerned.

4.50 I have received no other evidence of any other remarks made by the Councillor about the Complainant’s performance. Therefore they do appear to have been one-off remarks. However, although they were said to be “flippant” or “frivolous” remarks they are quite a serious indictment of the

Complainant's performance as a Senior Officer with a high profile role for the Council.

4.51 They were said in a highly charged environment where the residents were putting pressure on the Councillor to get results. For a Councillor, who is highly regarded by residents and was seeking to act in their best interests, I think that that pressure and conscientiousness could have clouded her judgement, as to what was in the best interests of the Council, when making her public criticisms of the Complainant.

4.52 Although the roles of Councillors and Officers are different, as elected and employee representatives, they both have a responsibility to act in the interests of the Council they serve when undertaking the business of that authority.

4.53 A central plank of preserving the integrity and reputation of the Council is, as the Protocol says at paragraphs 44 & 45, that the conduct of members and officers should be such as to instil mutual confidence and trust. The key elements of that trust being a recognition of and respect for each others' roles and responsibilities which is reflected in the behaviour and attitude of each to the other, both publicly and privately.

4.54 Residents have made it clear to me that their confidence in the Council and, in particular their confidence in how the Complainant was dealing with the issues, had been seriously undermined. The comments made by the Councillor, in my view, could only confirm or exacerbate that loss of confidence. Comments made about a person's characteristics and abilities even if you accept they were made in a "frivolous" or "flippant" way can be damaging to a person's reputation.

4.55 Thus in a situation where residents were wanting the Complainant to make decisions to enforce conditions in planning agreements, to say to the public (particularly without confronting the person first about his alleged failings and giving him an opportunity to respond) "Cookson will drive you mad!! he couldn't make a decision to save his life" and "All in all a very frustrating and irritating meeting, when you meet Cookson you'll know what I mean" are comments that are showing disrespect to that person, in my view.

4.56 It has been stated that what the Councillor said about the Complainant was fair comment. That is, however, not the relevant issue when it comes to the question of disrespect under the Code of Conduct. In view of the concerns held about the Complainant's competence in decision making, that were expressed by the Councillor, those concerns should have been articulated through the clear procedures that are available and set down in the Protocol, not in a public forum.

4.57 At Paragraph 4.19 I comment on the case where the Adjudication Panel found that disrespect had been shown to a senior police officer where a Councillor had addressed him in emails by his surname outside of the

expected norms of such relationships. This was compounded by the circulation of the offending emails to junior and senior officers.

4.58 The Councillor explained in her interview why she referred to the Complainant as “Cookson” and that she was not intending to be disrespectful, and that it was just a form of identification of an officer she did not know well. I accept that explanation. It is also reinforced by the fact that she referred to other officers by their surnames in that email and even in some cases, referred to them by their first names and at other times by their surnames. As I have already indicated that I consider that the comments of which the Complainant complains were disrespectful in themselves, I do not think that in the context of the email as a whole, and the different shorthand forms of address used, any additional negative inference can be drawn from this form of address of the Complainant.

### **BRINGING OFFICE OR AUTHORITY INTO DISREPUTE?**

4.59 Paragraph 5 of the 2007 Code says that you must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.

4.60 This can only apply when a Councillor is acting in his/her official capacity ie whenever they conduct the business of their authority or act, claim to act , or give the impression they are representing their authority. (see the Livingstone case)

4.61 I have already stated that it is clear that the Councillor was acting in her official capacity when she sent the email of the 16 April 2008.

4.62 As the SBE says in its publication Case Review 2007 “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”

4.63 The test is objective and does not rely on any one individual’s perception. There will often be a range of opinions that a reasonable person could have towards the conduct in question. Members will have failed to comply with the Code if their conduct “could reasonably be regarded” by an objective observer as bringing their office or authority into disrepute.

4.64 The residents who commented that the comments were frivolous or inoffensive or that the Complainant must have a narrow back to not be able to take such criticism, are probably not the most objective viewers of the issues under scrutiny.

4.65 I accept that the comments made by the Councillor were one off and were said in a climate of pressure and frustration. However, I believe, an objective observer, would take the view, that these comments about the Head of Service for the Planning Department, probably the most high profile department in the

Council, would have the effect of diminishing public confidence or harming the reputation of the Council. Thus I believe that these comments by the Councillor could reasonably be regarded as bringing her Office or the Council into disrepute.

## **BULLYING?**

4.66 The 2007 Code says at Paragraph 3(2)(b) “ You must not bully any person”. I have covered this provision at paragraph 4.20 of the report.

4.67 As mentioned the SBE advise that conduct is unlikely to be considered as bullying when it is an isolated incident. I am also conscious that these were comments about a Senior Officer, able to stand up for himself, with considerable experience, who is unlikely to consider that these one off comments amounted to bullying. The reaction of the local resident who said that he did consider the Councillor was a bully, is also material. I also consider that the words used by the Councillor are not comments that you would normally associate with bullying, they are disrespectful but not bullying.

4.68 I therefore do not consider that the Councillor has breached Paragraph 3 (2)(b) of the Code.

## **MEMBER OF THE PLANNING COMMITTEE**

4.69 The Complainant said in his Complaint that the comments were aggravated by the fact that the Councillor was a member of the Planning Committee at the time, where reports by himself were presented to this Committee making recommendations in relation to planning and related matters.

4.70 I do not consider the situation was aggravated because the Councillor was at that time a member of the Planning Committee. I do not see that this presented the Councillor with an increased responsibility towards the Complainant. The relationship for all Councillors and all Officers is one of equal respect at all times, whatever their respective roles.

## **5. CONCLUSION**

5.1 For the reasons I have set out in this report at Section 4, I am of the opinion that the Councillor did breach paragraphs 3(1) and 5 but did not breach 3(2)(b) of the 2007 Code in respect of her comments:-

“Cookson will drive you mad!! he couldn’t make a decision to save his life”.....All in all a very frustrating and irritating meeting-when you meet Cookson you’ll know what I mean” contained in her email to Mike Rosenberg and 5 other residents of the 16 April 2008.

5.2 I am also of the opinion that the Councillor did not breach any part of the 2007 Code in respect of her comments in that email about the Complainant’s

fellow professional advisers to the Council, for the reasons set out in paragraphs 4.28-4.31 of this report.

5.3 I also do not consider that any part of the 2007 Code was breached or that the situation was aggravated by the fact that the Councillor was a member of the Planning Committee at the time, for the reasons I have set out in paragraphs 4.69-4.70.

5.4 Finally, as I make clear in this report the relationship between residents in the Harold Road area and the Council have seriously broken down over the planning issues relating to these developments in Harold Road. I would therefore recommend that the Council give very serious thought as to how it may reconstruct that relationship with this section of its community.

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Trevor Smith  
12 January 2009