

**REPORT TO:** East Lothian Council

**MEETING DATE:** 15 May 2012

**BY:** Monitoring Officer

**SUBJECT:** Decision of Standards Commission for Scotland in  
Hearing of Complaint against Councillor Barry Turner

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## **1 PURPOSE**

- 1.1 To fulfil the statutory duty on the Council under Section 18(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 to consider the findings of the Standards Commission for Scotland within 3 months of receipt by the Council of their decision and to respond to the direction given by the Secretary of the Commission, by advising the Secretary of any decision made by the Council in relation to the findings of the Standards Commission.

## **2 RECOMMENDATIONS**

- 2.1 That the Council considers the attached decision of the Standards Commission for Scotland following the Hearing held on 20 February 2012 into a complaint concerning the conduct of Councillor Barry Turner and to agree that any decision of the Council in relation to the findings of the Commission be advised to their Secretary.

## **3 BACKGROUND**

- 3.1 A complaint was made to the Standards Commission for Scotland about the conduct of Councillor Barry Turner alleging that he had breached the Councillor's Code of Conduct and in particular, Section 7 which relates to "Taking Decisions on Quasi-Judicial or Regulatory Applications". The Chief Investigating Officer (CIO) of the Standards Commission, Mr D Stuart Allan investigated the complaint. Following receipt of the report of the CIO, the Standards Commission decided to hold a hearing into the allegations and hear evidence on 20 February 2012 at the Maitlandfield Hotel, Haddington.
- 3.2 The Council has a statutory duty under Section 18(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 to consider the findings

of the Standards Commission within 3 months of receipt of their decision and has been directed by the Secretary of the Commission under Rule 10.9 of the statutory Rules for the Conduct of Hearings of the Standards Commission, to advise the Secretary of any decision made by the Council.

3.3 There is no guidance given in the legislation as to the options open to the Council in the decision which the Council is required to take. The Council's Standing Orders do not contain any specific guidance.

#### **3.4 Breach of Councillor's Code of Conduct by Councillor Turner**

3.4.1 The findings of the Standards Commission are set out in Paragraphs 1-5 of their Decision Report in which they found that Councillor Turner had breached the Councillors' Code of Conduct as set out in their Decision. A copy of the Standards Commission's findings is attached at Appendix 1.

#### **Sanction**

3.4.2 The Standards Commission Panel decided to suspend for three months Councillor Turner's entitlement to attend the Committee/Committees in East Lothian Council that are responsible for making planning decisions. The suspension was imposed from 27 February 2012 and in accordance with Section 19 (2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 comes to an end at the start of election day, 3 May 2012.

### **4 POLICY IMPLICATIONS**

4.1 There are no direct policy implications.

### **5 EQUALITIES IMPACT ASSESSMENT**

5.1 This report is not applicable to the well being of equalities groups and Equality Impact Assessment is not required.

### **6 RESOURCE IMPLICATIONS**

6.1 Financial - None

6.2 Personnel – None

6.3 Other - None

## 7 BACKGROUND PAPERS

- 7.1 Ethical Standards in Public Life, etc (Scotland) Act 2000
- 7.2 Rules for the Conduct of Hearings by the Standards Commission For Scotland
- 7.3 Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing into allegations of breach of the Councillors' Code of Conduct by Councillor Barry Turner.

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<b>DATE</b>	23 <sup>rd</sup> April 2012

**Decision of the Hearing Panel of the Standards Commission for  
Scotland following the Hearing held at the Maitlandfield House  
Hotel, Haddington, on 20 February 2012**

**Panel Members:** Mr Ian Gordon OBE, QPM, Chairman  
Mr Matt Smith OBE  
Mrs Julie Ward

This Hearing arises in respect of a Report by D Stuart Allan, Public Standards Commissioner for Scotland ("the PSC") further to complaint Nos. LA/EL/1133 and 1138 ("the Complaints"), concerning alleged contraventions of the Councillors' Code of Conduct ("the Code") by Councillor Barry Turner of East Lothian Council ("the Respondent").

The PSC was represented by Mr David Sillars, Senior Investigating Officer, accompanied by Mrs Anne Mahoney, Investigating Officer. The Respondent attended the Hearing and represented himself.

**The Complaints**

The Complainants in this case were Messrs Maclay Murray and Spens, on behalf of their client Sirius Sport & Leisure Limited, and Mr David Barrett. The Complainants alleged that the Respondent contravened the Councillors' Code of Conduct, and in particular, Section 7 which relates to 'Taking Decisions on Quasi-Judicial or Regulatory Applications'.

The PSC investigated the complaint and concluded that the Respondent had contravened:

(1) paragraph 7.3 of the Councillors' Code of Conduct in respect of an e-mail the Respondent issued to members of the East Lothian Council Administration on 18 February 2011, showing he was biased against, and had pre-judged, a planning application which was due to be decided upon on 22 February 2011; and

(2) paragraphs 7.10 and 7.11 of the Councillors' Code of Conduct by seeking to privately lobby those councillors in receipt of the e-mail who had a responsibility for deciding the application, and indicating his opposition to the application.

The relevant provisions are:

### **Councillors' Code of Conduct**

#### **Section 7: Taking Decisions on Quasi-Judicial or Regulatory Applications**

##### **Fairness and Impartiality**

*7.3 In such cases, it is your duty to ensure that decisions are properly taken and that parties involved in the process are dealt with fairly. Where you have a responsibility for making a formal decision, you must not only act fairly but also be seen as acting fairly. Furthermore, you must not prejudge, or demonstrate bias in respect of, or be seen to be prejudging or demonstrating bias in respect of, any such decision before the appropriate Council meeting. In making any decision, you should only take into account relevant and material considerations and you should discount any irrelevant or immaterial considerations.*

##### **General**

*7.10 You must never seek to pressure planning officers to provide a particular recommendation on any planning decision and you should not seek privately to lobby other councillors who have a responsibility for dealing with the application in question.*

*7.11 If you propose to take part in the decision making process you must not give grounds to doubt your impartiality. You must not make public statements about a pending decision, to ensure that you are not seen to be prejudging a decision which will be made at the meeting where it can be anticipated that the information required to take a decision will be available. You must not indicate or imply your support or opposition to a proposal, or declare your voting intention, before the meeting. Anyone who*

*may be seeking to influence you must be advised that you will not formulate an opinion on a particular matter until all available information is to hand and has been duly considered at the relevant meeting.*

The PSC's Report ("the Report") (in full at Appendix I) was submitted to the Standards Commission for Scotland in accordance with section 14 of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

### **Joint Statement of Facts**

The PSC and the Respondent lodged as a production a Joint Statement of Facts signed on 20 February 2012. In the agreed Joint Statement, Parts 1 to 3 of the PSC's report were accepted. Parts 4 and 5 of the PSC's report were broken down into areas which were accepted and areas which were in dispute. The Appendices and Annexes to the PSC's report were agreed, with the exception of the comments made by the PSC on the representations submitted by the Respondent, which were not.

### **Evidence presented at the Hearing**

Mr Sillars presented his case on behalf of the PSC to the effect that by sending an e-mail which to members of the Administration on 18 February 2011, in which he made clear his opposition to the planning application due to be decided upon on 22 February 2011, and inviting other Councillors to vote against the application, the Respondent breached paragraphs 7.3, 7.10 and 7.11 of Councillors' Code of Conduct.

Mr Sillars asked the Hearing Panel to adopt the findings and conclusions contained in the PSC's Report.

The Respondent led one witness, namely Provost Sheena Richardson, and also gave evidence on his own behalf.

## **The Decision**

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

1. The Councillor's Code of Conduct applied to the Respondent
2. The Panel considered that, on the balance of probabilities, in compiling the content and then sending the e-mail dated 18 February 2011, to the Administration Group of Councillors, the Respondent had breached Paragraphs 7.3, 7.10 and 7.11 of the Code of Conduct.

The Respondent is the Convener of the Planning Committee for East Lothian Council and in that capacity he had a responsibility to ensure that planning applications made to the Council were dealt with in accordance with Planning Law, Regulations and the relevant policies and procedures of the Council.

Whilst the Panel accepted there were new procedures in relation to planning applications and, in particular for major developments, its view was that this did not detract from the clear responsibility on all Councillors to execute their duties in line with the provisions of the Code. The Code had been specifically revised to reflect the changes to the planning regulations.

Paragraphs 7.3, 7.10 and 7.11 of the Code of Conduct relate to the need for a fair hearing and so avoid any impression of bias in relation to statutory decision-making processes; not only for planning application decisions but also for any other quasi-judicial or regulatory process.

There was a planning application to be determined by the whole Council on 22 February 2011. The Panel did not accept the Respondent's proposition that an earlier Pre-Determination Meeting on 1 February 2011, where all members of the Council were invited to attend, had been the relevant meeting in terms of decision makers acquiring knowledge of the merits of the application. The Respondent argued that no new information would be introduced at the actual Council Meeting and so Councillors would have come to that Meeting

having made up their minds on the application. This proposition ignored the fact that Council Meetings are the forum for debate on such sensitive issues and other Councillors are entitled to influence or be influenced in that debate. The Respondent's witness, Provost Richardson gave evidence that supported the importance of debate in the Council Chamber.

The Minutes of the Pre-Determination Meeting held on 1 February 2011 recorded that, as Convener, he stated that the decision on the planning application would be made at the full Council Meeting. The Respondent's e-mail, in which he sought to lobby Councillors to oppose the application, pre-dated this Council Meeting.

Paragraph 7.3 of the Code states:

***"Where you have a responsibility for making a formal decision, you must not only act fairly but also be seen as acting fairly. Furthermore, you must not prejudge, or demonstrate bias in respect of, or be seen to be prejudging or demonstrating bias in respect of, any such decision before the appropriate Council meeting"***.

The Panel considered Paragraph 7.3 clearly outlines a Councillor's responsibility to act fairly and be seen as acting fairly, to ensure that decisions were made without being prejudged. An objective test could be applied: how would a member of the public, with knowledge of the relevant facts, have reasonably expected a Councillor to act in the circumstances? The Panel considered that in compiling and sending the email, the Respondent had not acted in accordance with Paragraph 7.3 of the Code.

The Respondent conceded he was in breach of Paragraph 7.10 of the Code and sought to explain why this might not be regarded as a breach. He said as a professional planner, experienced in making high-level decisions on planning matters, he had a particular expertise in this field. He said that he also had a duty, as Convener of Planning, to protect the people of East Lothian from inappropriate planning decisions. Whilst the Panel acknowledged his experience and commitment, it asserted that none of this placed him in a special position either in relation to the Code or the decision making process. The Code is explicit at Paragraph 7.10:



***“You should not seek privately to lobby other Councillors who have a responsibility for dealing with the application in question”***

The Code does not differentiate on the particular roles of Councillors and the Panel had no hesitation in concluding that Councillor Turner had breached Paragraph 7.10 of the Code.

Paragraph 7.11 states:

***“If you propose to take part in the decision making process you must not give grounds to doubt your impartiality...you must not indicate or imply your support or opposition to a proposal, or declare your voting intention, before the meeting”.***

The Respondent suggested that his duty to act, as Convener of the Planning Committee and the representative of the people of East Lothian, outweighed the requirement for impartiality in the face of considering an application that, to his mind, was wholly contrary to Council Planning Policy and Local Plans. In his evidence, the Respondent emphasised the powerful argument put forward by the Director of Planning that the application should be refused. He fully agreed with that argument and he believed that he had to act immediately, to send his e-mail, as it would be too late to try and change minds at the Council Meeting.

The Panel did not agree with the Respondent's subjective interpretation of other parts of the Code of Conduct in an attempt to support his claim that the element of duty he owed to the Council was superior to Paragraph 7.11. The Panel recognised the concerns expressed by the Respondent and accepted that he was not motivated by personal gain. The e-mail may have been compiled and sent by the Respondent in the personal belief that he was only doing his job but the Panel was satisfied that his belief was wrong and his action in compiling and sending the e-mail was a clear breach of Paragraph 7.11 of the Code.

For the reasons outlined above the Hearing Panel concluded that the Respondent had breached Paragraphs 7.3, 7.10 and 7.11 of the Councillor's Code of Conduct.

## Sanction

The Panel decided to suspend for three months Councillor Turner's entitlement to attend the Committee/Committees in East Lothian Council that are responsible for making planning decisions. This sanction is made under the terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 section 19 (1) (b) (i) and (ii). The date on which the suspension is imposed and will commence is 27 February 2012.

## Reasons for Sanction

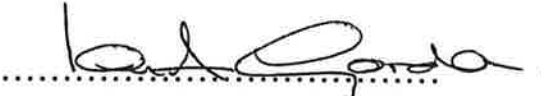
In reaching their decision the Panel had taken into account:

1. The issue before the Panel demonstrated a serious lack of impartiality as Convener of a quasi-judicial Committee.
2. The respondent had made a subjective interpretation of the Code of Conduct that did not equate to the purpose for which the Code was intended.
3. He displayed a lack of judgment by failing to seek advice from the Monitoring Officer or legal representative of the Council before sending the e-mail.
4. The Panel accepted the Respondent thought his actions were well intended but, on this occasion, he failed to demonstrate the sound judgment that should have been expected from his extensive public service experience.

## Conclusion

The attention of the Respondent is drawn to Section 22 of Ethical Standards in Public Life etc. (Scotland) Act 2000 which details the Right of Appeal in respect of this Decision.

Date: 27 February 2012

  
Ian Gordon OBE, QPM  
Chairman of the Hearing Panel

## **Complaints number LA/EL/1133 and 1138 concerning an alleged contravention of the Councillors' Code of Conduct by Councillor Barry Turner of East Lothian Council**

### **1.0 Introduction**

- 1.1 Complaints numbers LA/EL/1133 ('the first complaint') and LA/EL/1138 ('the second complaint') allege a contravention of the Councillors' Code of Conduct ('the Code'). The Code was issued by the Scottish Ministers in terms of section 1 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 ("the 2000 Act"); it came into effect on 1 May 2003 and was revised in December 2010. From 1 April 2011, the Office of the Chief Investigating Officer was subsumed into the new Office of the Public Standards Commissioner for Scotland, and it is in the latter capacity that I have determined this complaint.
- 1.2 The complaints have been lodged respectively by Messrs Maclay Murray and Spens on behalf of Howard Wallace, the principal of Sirius Sport and Leisure Limited ('the first complainant'), and by Mr David Barrett ('the second complainant') who both allege a contravention of the Code by Councillor Barry Turner ('the respondent'). The respondent is an elected member of East Lothian Council ('the Council').
- 1.3 It is alleged that the respondent has contravened the key provisions of sections 6 and 7 of the Code. Section 6 of the Code deals with 'Lobbying and Access to Councillors' and Section 7 relates to 'Taking Decisions on Quasi-Judicial or Regulatory Applications'.

Paragraphs 6.3, 6.4, 7.1, 7.3, 7.4, 7.10, 7.11, 7.12 and 7.13 of the Code respectively state:

6.3 You may be lobbied by a wide range of people including individuals, organisations, companies and developers. As a general rule, it is an essential element of the democratic system that any individual should be able to lobby the Council or a councillor. However, particular considerations apply when you are dealing with applications under regulatory powers such as planning and with matters of a quasi-judicial nature such as the determination of certain licence applications. If you are lobbied on such matters you should make it clear that you are not in a position to lend support for or against any such application that you will have a responsibility for making a decision on in due course. Representations to councillors on such applications should be directed, by the councillor, to the appropriate department of the Council. This does not prevent you from seeking factual information about the progress of the case.

6.4 Political group meetings should not be used to decide how councillors should vote on such applications, or on individual staffing matters such as the appointment or discipline of employees. It is a

breach of this Code to comply with political group decisions on such matters where these differ from your own views.

7.1 The Code's provisions relate to the need to ensure a proper and fair hearing and to avoid any impression of bias in relation to statutory decision making processes. These provisions apply not only to those made under planning legislation but to a number of others of a quasi-judicial or regulatory nature which the local authority may also have to consider. These will include applications for taxi, betting and gaming, liquor, theatres, cinemas and street trader licences and a range of other similar applications where the issuing of a statutory approval or consent is involved. This also includes where the local authority is acting in an enforcement, disciplinary or adjudicatory role.

7.3 In such cases, it is your duty to ensure that decisions are properly taken and that parties involved in the process are dealt with fairly. Where you have a responsibility for making a formal decision, you must not only act fairly but also be seen as acting fairly. Furthermore, you must not prejudge, or demonstrate bias in respect of, or be seen to be prejudging or demonstrating bias in respect of, any such decision before the appropriate Council meeting. In making any decision, you should only take into account relevant and material considerations and you should discount any irrelevant or immaterial considerations.

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

7.10 You must never seek to pressure planning officers to provide a particular recommendation on any planning decision and you should not seek privately to lobby other councillors who have a responsibility for dealing with the application in question.

7.11 If you propose to take part in the decision making process you must not give grounds to doubt your impartiality. You must not make public statements about a pending decision, to ensure that you are not seen to be prejudging a decision which will be made at the meeting where it can be anticipated that the information required to take a decision will be available. You must not indicate or imply your support or opposition to a proposal, or declare your voting intention, before the meeting. Anyone who may be seeking to influence you must be advised that you will not formulate an opinion on a particular matter until all available information is to hand and has been duly considered at the relevant meeting.

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

## **Representations**

7.13 Where you will be participating in making the appropriate decision, you should not organise support for, or opposition to, or lobby other councillors or act as an advocate to promote a particular recommendation on a planning application, on a planning agreement, on taking enforcement action, or on a review by the Local Review Body.

- 1.4 The respondent has signed a declaration of acceptance of the office of councillor under the Local Authorities (Councillors) (Declaration of Acceptance of Office) (Scotland) Order 1990, as amended, in terms of which the respondent has undertaken to meet the requirements of the Councillors' Code of Conduct in the performance of his functions in that office.
- 1.5 For the purpose of this investigation I was assisted by Mr David Sillars, Senior Investigating Officer.
- 1.6 This report has been prepared for submission to the Standards Commission for Scotland in terms of section 14(2) of the 2000 Act. The report was submitted in draft form to the respondent for any representations.

## **2.0 Outline of the Complaint and the Response**

### **The Complaints**

- 2.1 The first complaint is set out in a letter dated 12 April 2011 on behalf of the complainant. The second complaint is set out in a letter and complaint form dated 7 April 2011. In each complaint it is alleged that in the period between the pre-determination hearing held on 1 February and the further consideration of a planning application (no. 10/00341/PPM – residential development and associated works at Victory Lane Stadium) by East Lothian Council at their meeting on 22 February 2011, the respondent, Councillor Turner:
  - a. lobbied other councillors by e-mail dated 18 February to vote against the application; and
  - b. acted in a manner which gave rise to doubts about his impartiality, contrary to paragraphs 7.11 and 7.13 of the Code.

The second complaint contains allegations in respect of the behaviour of other councillors which have been determined separately.

### **The Response**

- 2.2 The response to this allegation is set out in a letter (and supporting material) from the respondent. By reference to 3 main criteria the respondent justifies his action stating that:

a. In his roles as Planning Convener and Cabinet Member for the Environment within the Council, and indeed as a board member of the Edinburgh and South East Scotland Strategic Development Planning Authority ('SESPlan'), he has a duty to defend the integrity of a plan-led development control regime.

b. Any lobbying which he undertook was designed to secure the legitimate interests of the planning system. He was not motivated by malice or personal gain. He acted as he did "because he was Planning Convener and not in spite of it".

c. He believed he was acting legitimately. The process he says was new and unfamiliar. The respondent explains that this application was going through a relatively new procedure for major applications (in terms of recent statutory amendments to the planning framework) whereby a pre-determination meeting held was held (on 1 February 2011) before all Council members. At this meeting the applicant and objectors made their case orally to members and members were able to ask questions. There was no debate about the issues. At a subsequent Council meeting (held on 22 February 2011) a full report from the officers would be available, with recommendations, and the debate would take place prior to a decision being made. Neither the applicant nor objectors would be given a further opportunity to speak at the meeting. This was only the second or third case of its kind heard in this way in East Lothian. It was the belief of the respondent that in these circumstances, unlike the procedure at a planning committee, members would be coming to the Council meeting having made up their minds about the application because they had already heard from the applicant and objectors, had seen the officer report with its recommendations and would not hear any further representations. The respondent concedes that he made a mistake in this respect. Whereas he thought the relevant parts of the Code related only to the planning committee and its procedures, it also applied to any quasi-judicial Council decision under the new procedures. He says he should have checked the Code but his defence is that his "eye was taken off the ball by the particular and almost unique set of circumstances of this case".

### **3.0 The Investigation**

3.1 To establish the background to the complaint, the Senior Investigating Officer sought and received information from East Lothian Council.

3.2 Having considered the documentary evidence, the Senior Investigating Officer proceeded to interview individually the complainants (accompanied by their representatives), the respondent and relevant witnesses. The interviews took place on 12 July and 9 and 11 August.

### **4.0 Consideration of the Evidence**



## **4.1 The Respondent**

- 4.1.1 Councillor Barry Turner has been a councillor since his election in 2007, and is Convener of the Planning Committee and a member of the Council's Employee Appeals, Licensing and Tenancy Sub-Committees. He is a qualified Chartered Surveyor and Chartered Town Planner and was formerly Head of Planning for Barnet Council until he retired in 1995. He subsequently worked as a Panel Chairman for Examinations in Public for Structure and Regional Plans, a senior quasi-judicial position in the English planning system.
- 4.1.2 The respondent is a Liberal Democrat Councillor. There are 23 elected members of East Lothian Council in total. The Administration group in the Council is a coalition of the Scottish National Party (currently 9 elected members) and the Liberal Democrats (currently 4 elected members, of whom the respondent is one). The political affiliations of the remaining councillors are as follows: Scottish Labour, the largest opposition group (7 councillors), Scottish Conservatives (2 councillors) and one Independent, Councillor John Caldwell.
- 4.1.3 The respondent has substantial experience in the planning system in England having worked as a chief officer for some time in Barnet Council. Because of that experience his fellow members in the Administration group in East Lothian Council looked to him for guidance in planning matters.
- 4.1.4 Both the Monitoring Officer and the Council's Corporate Legal Adviser confirmed that members involved in planning issues had received training and guidance on the recent amendments to the planning system in Scotland.

## **4.2 Planning Background - Barbachlaw Farm Site Wallyford**

- 4.2.1 The planning history for the development of a greyhound stadium and a residential estate near Barbachlaw Farm, Wallyford form the background to this complaint. The continuing planning and legal controversies surrounding the final determination of the latest application relating to the site are irrelevant to the determination of the complaints.

## **4.3 The 2004 Consent – Victory Lane Stadium**

- 4.3.1 In December 2004 East Lothian Council granted planning permission ('the 2004 consent') for a mixed use development on the site, comprising housing, leisure, business park elements, and in particular providing for the erection of a greyhound stadium. Through a Section 75<sup>1</sup> agreement involving David Wilson Homes Ltd and the first complainant, it was provided that the adjacent housing development would not be commenced until the stadium reached a particular stage of construction and the adjacent business park had utility services installed. The first complainant advised the Council that funds to be

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<sup>1</sup> Section 75 of the Town and Country Planning (Scotland) Act 1997

paid to him by David Wilson Homes Ltd when housing development commenced would be used by him to complete the construction of the stadium.

4.3.2 The construction of houses was thereafter commenced by David Wilson Homes despite the failure on the part of the first complainant to fully fulfil the requirements of the Section 75 agreement. When challenged about this apparent breach of the Section 75 agreement, the first complainant advised the Council that, in terms of the arrangement between the first complainant and David Wilson Homes Ltd, it was necessary to have the Section 75 agreement obligations discharged so that there would be a release of funds to enable progress to be made on the development of the stadium and to meet the cost of servicing the associated business park. In a letter to East Lothian Council on the 22 July 2005, the first complainant stated "It is important for me to make you aware that the discharge of the Section 75 will trigger the release of funds from David Wilson Homes Limited to allow me to progress construction of the stadium to completion. Without the cross-funding the stadium construction cannot proceed beyond its present steel structure stage".

4.3.3 Accordingly, in October 2005 the Council agreed to a Minute of Variation of the original Section 75 agreement whereby it removed the restriction on housing construction prior to the servicing of the business park and agreed that the business park had to be serviced by 1 April 2006. Notwithstanding this concession by the Council, no further development of the greyhound stadium took place.

4.3.4 In the event (and despite the relaxation by the Council of the Section 75 obligations on the first complainant) the stadium was left only partly built, the construction costs of completion (according to the first complainant) proving prohibitive.

4.3.5 The incomplete state of the stadium continued to be a matter of public and political controversy over the intervening years.

#### **4.4 The 2010 Application**

4.4.1 In 2010 the first complainant made a further and different application ('the 2010 application') for planning permission for the erection of some 94 houses adjacent to the original site. His stated intention was to finance the completion of the stadium from the proceeds from the sale of this land with the benefit of planning permission for housing.

4.4.2 No further on-site activity had taken place as at February 2011 when the 2010 application (no. 10/00341/PPM (residential development and associated works at Victory Lane Stadium) came to be considered by East Lothian Council.

4.4.3 Section 14 of the Town and Country Planning etc. (Scotland) Act 2006, by the addition of Section 38A to the Town and Country Planning (Scotland) Act 1997 introduced a new development management procedure for the determination of applications for a national



development or for a major development that is significantly contrary to the local development plan. On the basis alone that the site of the 2010 application had an area greater than 2 hectares, the proposed development was, in terms of the provisions of the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009 defined as a major development. Furthermore both the residential and the relocated parking components of the proposed development were significantly contrary to the approved Structure Plan and the adopted Local Plan. Accordingly a pre-determination hearing for the 2010 application was held at the Planning Committee meeting of 1 February 2011.

- 4.4.4 At the pre-determination hearing, the agent for the applicant (and complainant) put forward the following rationale for the development: "Mr Salter opened his presentation by stating that he was representing his client Sirius Sport & Leisure Ltd and Howard Wallace who sought planning permission for 94 homes, a business park and car park on a green belt site in Wallyford. He stated that approval of this application would enable Sirius to sell land to house builders with substantial benefits for the East Lothian economy and the funds raised would be used to complete the greyhound stadium."
- 4.4.5 In support of the development of the land for housing, the applicant, Mr Howard Wallace, the principal of Sirius Sport and Leisure Limited and the first complainant, argued that the economic benefits from realising the completion of the greyhound stadium outweighed continuing to support business development on the northeast part of the site now proposed for residential development. He suggested that there was no real prospect of business development in the medium term. In this regard, the applicant provided a draft Section 75 agreement that, in his view, gave the Council comfort that the funds realised from the sale of the housing land would be applied to ensure the completion of the stadium.
- 4.4.6 The draft Section 75 agreement was reviewed by the Council's Corporate Legal Adviser, who took the view, however, that there were a number of significant problems with the draft agreement as it stood. The draft agreement proposed that development of the residential units could commence on the award of the construction contract for completion of the stadium. Clearly, in her view, this did not ensure completion of the stadium, as a construction contract could be terminated for a number of reasons. The draft provided that the net sale proceeds after deduction of "all associated costs" would be applied towards the completion of the stadium but there was no definition of or restriction on what these costs might comprise. In addition, as drafted, there was no restriction on a sale of the land in question to a related entity for a nominal sum. Finally, the proposed agreement did not address the issues of education contribution, affordable housing and any contribution which might have been required by Transport Scotland.
- 4.4.7 The first complainant and his advisers were aware that the 2010 application was contrary to the development plans approved by

Ministers and adopted by the Council. They sought to justify departure from the development plans by reference to a planning statement submitted for consideration by the Council when sitting as planning authority to determine the application on 22 February 2011. The statement suggested that the following would be material considerations:

- a. It was necessary that further land be made available for housing if the Council were to meet the requirements of Scottish Planning Policy to maintain a five year supply of land for housing; and
- b. The application would realise the economic benefits that would flow from completion of the stadium

The statement included an undertaking on behalf of the complainant that funds raised from the housing element would be directed towards the completing of the partially erected stadium.

4.4.8 The first complainant recognised that a satisfactory Section 75 agreement would be required to underpin the cross subsidisation proposal. While the application was pending there were preliminary exchanges between the first complainant's advisers and Council officers about the content and efficacy of any such agreement as noted in paragraph 4.4.6 above. The respective parties, the complainant and the Council, disagree about the competence and enforceability of a Section 75 agreement.

4.4.9 The history of the previous application and the 2010 application were matters of intense public interest in the Council area. The issue of the partially completed stadium was also a highly contentious matter. In addition the respondent and senior planning officers in the Council took the view that the application challenged the integrity of the relevant strategic plans approved by Ministers and by the Council to regulate development in the area.

#### **4.5 The Pre-determination Hearing**

The agenda which was issued on 24 January 2011 for the pre-determination hearing for Planning Application No.10/00341/PPM: Planning Permission in Principle for residential development together with construction of relocated parking from Victory Lane Stadium and associated engineering and landscape works at Barbachlaw Farm, Wallyford on 1 February was accompanied by a factual report by the Principal Planner on the application. The minute of the pre-determination hearing held on 1 February 2011 records that the Convener (the respondent) reminded members of the pre-determination hearing process, advising that this first stage would be an information gathering opportunity, where the applicant / agent (the first complainant), supporters and objectors would make representations. Members could question the speakers, but there must be no debate on the merits of the application. The next stage of the process would be dealt with at Council on 22 February 2011; the

officer's report on the planning application, including a planning assessment and recommendation in respect of the application, would be provided for this meeting, along with a note of the representations made at the pre-determination stage. At Council, members would be able to debate the issue and a decision would be made.

4.5.2 The Principal Planner introduced his report on the 2010 application, informing members that as the site of application had an area greater than 2 hectares it fell within the definition of a major development for the purposes of planning legislation. The residential component and relocated parking component of the proposed development were also significantly contrary to the development plan. The application was therefore brought before the Planning Committee for a pre-determination hearing prior to consideration of the merits and determination of the application by the Council. The report provided the Committee with a description of the development proposal and summaries of the development plan policies and other material considerations, consultation responses and public representations applicable. The report contained no planning assessment or recommendation; these would form part of the report to Council.

4.5.3 The first complainant's representative, Mr Salter, explained that planning permission was sought for 94 homes, of which 24 would be affordable homes, along with construction of relocated parking from Victory Lane Stadium and other associated works. The intention was to sell the site to a house builder to fund development of completion of the stadium, which already had planning consent. He advised that an economic assessment had been carried out and highlighted the key economic benefits. The target date for completion of the stadium was spring 2012; when operational the stadium would generate 183 jobs; 365,000 visitors per annum were predicted, which would inject £10 million per annum into the East Lothian economy - £100 million over a 10 year period. During the construction phase up to 200 jobs would be created. The intention was to build 30 homes per annum, which would create 120 jobs, over a 3 year period. Mr Salter concluded that although the application was contrary to the development plan he had highlighted a number of material considerations. The application had the support of Wallyford Community Council. He indicated that this was a good opportunity for East Lothian Council; the development would provide a substantial and on-going boost to the East Lothian economy. He then responded to a number of questions from members on various aspects of the application including the Section 75 agreement, the infrastructure required in relation to the number of houses proposed; the commitment to affordable housing, the education contribution, road improvements, the business park, interest from house builders and the strategic land supply. Having heard various representations from objectors and the applicant's representative in response, the Convener confirmed that the application would be determined at Council on 22 February 2011 and thereafter brought the pre-determination hearing to a close.

4.5.4 On 18 February prior to the meeting of the full Council on 22 February the respondent sent an e-mail to twelve other Council members (being

members of the Administration) who would be involved in the determination of the application. The text of the e-mail reads as follows:

"Hi all

In what is, I appreciate, an unusual step, as Planning Convener and as someone with long experience in this field, I am contacting you to say that I cannot over-estimate the need to support the officer recommendation for refusal in this case, regardless of the view you hold about the stadium. I urge you to read thoroughly the officer report which sets out the very significant and serious planning implications if this development were to get permission. I also want to stress that there is no assurance that the Section 75 on offer will deliver a completed stadium. Indeed I have seen further advice from the council's legal team that it would not be possible in legal terms to seek a Section 75 agreement which would guarantee the completion of the stadium. There is significant risk here. I will be speaking at some length on the application at the council meeting. If it seems that there is some support for granting permission I shall be requesting a recorded vote because I believe that there could be serious repercussions for the Council, possibly financial, if the development - by totally undermining regional strategy and local policy - were to have an impact on the viability and deliverability of development sites.  
Regards, Barry Turner"

#### **4.6 The Council Meeting**

4.6.1 The minutes of the Council meeting of 22 February 2011 narrate that a report was submitted by the Executive Director of Environment which advised that the site of the 2010 application had an area greater than two hectares, and consequently the proposed development was, under the provisions of the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009, defined as a major development. Furthermore, both the residential component of the proposed development and the relocated parking component of the proposed development were significantly contrary the local development plan. Accordingly, a pre-determination hearing for the 2010 application having been held at the Planning Committee meeting of 1 February 2011 (see section 4.5 above) the minute records that the Council were advised in terms of the amended planning legislation that the application must be decided by a meeting of the Council.

4.6.2 In his report to the Council the Executive Director of Environment, Mr Peter Collins, recommended refusal of the application for the following reasons:

a. The proposed housing development would result in the loss of business land that is part of the business land supply of Wallyford to the detriment of East Lothian's economy and the greater Lothian economy, contrary to Policy ECON1 of the approved Edinburgh and the Lothians Structure Plan 2015, Policy BUS2 of the adopted East Lothian Local Plan 2008, and Government policy guidance given in Scottish Planning Policy: February 2010.

b. If approved the proposed housing development would set an undesirable precedent for the development of new housing and other uses not within Class 4 and 6 of the Town and Country Planning (Use Classes) (Scotland) Order 1997 on land elsewhere in East Lothian that is allocated for such business and industrial uses, the cumulative effect of which would be the depletion of Council's supply of allocated land for business and industrial use to the detriment of the economy of East Lothian and the greater Lothian economy.

c. The proposed car park would result in a harmful encroachment of development into the Edinburgh Green Belt, and was therefore contrary to Policy ENV2 of the approved Edinburgh and the Lothians Structure Plan 2015 and Policy DC2 of the adopted East Lothian Local Plan 2008.

d. If approved the proposed car park would set an undesirable precedent for development to further encroach beyond the western settlement boundary of Wallyford, the cumulative effect of which would further undermine the objectives of the Edinburgh Green Belt.

4.6.3 In addition Mr Collins prepared an advice note for members prior to the Council meeting in which he offered the following analysis of the 2010 application:

"This is not an application for planning permission to build a greyhound stadium. The stadium has planning permission and the use of the site for a stadium is supported by the Local Plan.

What you have to determine is an application to develop for housing land allocated in the Local Plan for business use and to build a car park within the Green Belt, as designated in the Local Plan.

The description of the application makes no reference to the proposed housing being enabling development for the stadium. The background is essential to understand the planning history relevant to this application.

The East Lothian Local Plan 2000 adopted a strategy to promote regeneration of Wallyford. The strategy had 3 components:

- 250 houses including some affordable units
- Land for business use to provide additional opportunities for jobs
- Land for a stadium - again to promote employment

The mix of uses proposed was viewed by the Reporters who conducted the Local Plan Inquiry as critical to their decision to support the Council and to reject rival proposals. The adopted Local Plan required that an overall masterplan be prepared for the area and measures be put in place to ensure all 3 components would be delivered.

The Council had to resist considerable pressure from housebuilders to ensure other components came forward. In particular the Council refused to allow a start on the housing until the stadium had reached specified stage. It is clear from correspondence that the stadium developers received assistance from the housebuilders that allowed the stadium to reach the stage specified by the Council as the trigger to allow housebuilding to start - it is equally clear that nothing of substance has been added to the stadium since then.

Members might ask why the project was divided into two separate contracts (one for the work up to trigger for housing and the other for the remainder of the stadium construction) and why only the first contract was put out to tender. Normal practice would have been to tender for the whole project so that the developer would have been informed of the total cost to be incurred prior to his starting the development.

### **Existing planning policy**

The strategy to regenerate Wallyford has been continued in 2008 Local Plan that allocates 1000 houses to the village. In drawing up the proposals for Wallyford the Council took into account the existing land allocations in the village. No new provision was made for employment because of the land that had been allocated for that purpose in the 2000 Local Plan. The role in the long term strategy for Wallyford is the real importance of the allocation, rather than its contribution to the overall land supply in East Lothian.

The applicant suggests that the business land allocation can readily be replaced so as to safeguard the strategy; this is not correct. First, the relocation of the business allocation does not form part of this application; it is no more than a suggestion. Second, the location proposed for the replacement land would constitute a major incursion into the Green Belt - a course of action resisted by the Council and rejected by the Reporter at the Inquiry into the 2008 Local Plan. Approval of this application would mean that Wallyford would lose its supply of land for employment uses.

The applicant seeks to present employment at the stadium as being a preferable alternative to that from business land; this is a misrepresentation. The strategy first adopted in 2000 is based on securing employment from the stadium and from the business land. Members should use great caution in placing any weight on the economic case presented in support of application. In common with most studies the estimates of both direct and indirect employment are skewed to give the most favourable view of the proposal. The evidence from any review of recent commentary on greyhound racing is that the estimates of employment are unrealistic.

### **Section 75**

The competence of the proposed Section 75 is questionable because the stadium does not form part of the application. Setting that concern

aside the terms of proposed Section 75 provides no guarantee that stadium will be built. The best the agreement might offer is an unspecified contribution toward the cost; it does not and could not ensure the stadium will be completed. Members must also bear in mind that developers now have the ability to request that the terms of Section 75 agreements be varied and the right of appeal to Ministers if their request is denied.

### **Retrospective enabling development**

Whilst retrospective enabling development is not illegal, it will undermine confidence in the planning system because the full implications of major proposals will no longer be apparent to the Council and the public at the time they are first considered. Approval of this application will make it very difficult if not impossible to advise the Council on major developments and will likely lead to applications from other developers who have not achieved the return they expected or required from their original planning permission.

### **Conclusion**

This is a thoroughly bad proposal that seeks to compromise a strategy developed through two cycles of the Local Plan. The planning system is based on decisions being taken that comply with the development plan. This is necessary to provide the certainty needed for investment by businesses and individuals and to ensure that obligations, such as developer contributions to education or to affordable houses can be extracted from often unwilling developers- ignore the development plan and you no longer have a viable planning system."

- 4.6.4 Prior to the report being presented to members, Councillor Caldwell pointed out that a member had been lobbying other members on this application but had not declared an interest. He sought clarification on this issue from the Corporate Legal Adviser, who stated that, as outlined in the Councillors' Code of Conduct, members should not lobby others in advance of the meeting at which the matter is considered, and that should members wish to make representation then they should do so at the appropriate stage in the proceedings, provided that they declare an interest and subsequently do not take part in the vote.
- 4.6.5 The minute records that the respondent: "admitted that he had sent an e-mail regarding his views on the application to other members of the Administration, but believed he had been acting properly on the grounds that this meeting was not a meeting of the Planning Committee. He argued that as members had heard from the applicant and the objectors and had received a full report from officers, all the facts on the application were already available. However, he accepted the advice given by the Corporate Legal Adviser that the Code of Conduct prohibited lobbying in respect of any planning decision, regardless of the forum, and agreed to withdraw from the Chamber during the debate and vote on this item."

- 4.6.6 A lengthy debate followed on the merits of the application and on its relationship with the potential for securing the completion of the part built Victory Lane Stadium. As part of that debate in response to a question by a member as regards the relationship between this application and the previous application for the greyhound stadium, the Principal Planner advised that the only linkage between the applications was that the applicant had stated that the proceeds from the sale of this proposed housing development (the 2010 application) would enable him to complete the stadium.
- 4.6.7 In elaboration the Corporate Legal Adviser explained that, if members were minded to approve the application, the Council could propose a Section 75 agreement for the completion of the stadium prior to the commencement of the houses, but pointed out that the applicant may not accept that. The Corporate Legal Adviser advised that, in her view, it would not be competent for the Council to require a Section 75 agreement in this case as the need to complete the greyhound stadium did not arise as a consequence of this application housing.
- 4.6.8 The decision on the application was taken by roll call, the result of which was as follows: In favour of the report recommendations (and refusal of the application): 12 - Councillors Bell (Lib Dem), Berry (SNP), Broun-Lindsay (Conservative), Caldwell (Independent), R Currie (SNP), S Currie (SNP), Knox (SNP), MacKenzie (SNP), Rankin (Conservative), Richardson (Lib Dem), Trotter (SNP), Williamson (SNP); against the report recommendations (and in favour of the application): 8 (Councillors Forrest (Labour), Gillies (Labour), Grant (Labour), Innes (Labour), Libberton (Labour), MacKinnon (Lib Dem), McLennan (SNP), McLeod (SNP).

The minute records that after consideration of this item Councillor Turner returned to the Chamber.

The recommendations as set out in the report were therefore carried, the decision being that:

The Council agreed that planning permission in principle should be refused for the following reasons:

- a. the proposed housing development would result in the loss of business land that is part of the business land supply of Wallyford to the detriment of East Lothian's economy and the greater Lothian economy, contrary to Policy ECON1 of the approved Edinburgh and the Lothians Structure Plan 2015, Policy BUS2 of the adopted East Lothian Local Plan 2008, and Government policy guidance given in Scottish Planning Policy: February 2010;
- b. if approved, the proposed housing development would set an undesirable precedent for the development of new housing and other uses within Class 4 and 6 of the Town and Country Planning (Use Classes) (Scotland) Order 1997 on land elsewhere in East Lothian that is allocated for such business and industrial uses, the cumulative effect of which would be the depletion of the Council's



supply of allocated land for business and industrial use to the detriment of the economy of East Lothian and the greater Lothian economy;

c. the proposed car park would result in a harmful encroachment of development into the Edinburgh Green Belt, and is therefore contrary to Policy ENV2 of the approved Edinburgh and the Lothians Structure Plan 2015 and Policy DC2 of the adopted East Lothian Local Plan 2008; and

d. if approved, the proposed car park would set an undesirable precedent for development to further encroach beyond the western settlement boundary of Wallyford, the cumulative effect of which would undermine the objectives of the Edinburgh Green Belt.

#### **4.7 The Complainants**

- 4.7.1 At interview both complainants expanded upon their written submissions. The first complainant narrated his lengthy attempts (spanning the years over which the applications for the greyhound stadium and related housing proposals had been in preparation and under consideration by East Lothian Council) to develop the site. He provided a broad history of greyhound racing in Scotland, emphasising the opportunities for social cohesion offered by the sport. He provided a range of newspaper articles confirming the high profile nature of the issue within the East Lothian Council area.
- 4.7.2 A particularly controversial aspect of the 2010 application related to the content, competence and potential effectiveness of any associated Section 75 agreement. The position of the first complainant and his advisers was to the effect that such a mechanism could be drafted so as to provide the Council with comfort that proceeds from the sale of housing on the site could indeed be 'ring fenced' to fund the works needed to complete the partially erected greyhound stadium.
- 4.7.3 The first complainant explained the approaches he had made (out with the formal development control process) to political groupings and individuals within the Council with a view to promoting his 2010 application. In particular he made a presentation to the Labour Group on 16 November 2010 and to the SNP - Lib Dem Administration on 31 January 2011. Neither of these meetings formed part of the planning application process, nor were they official Council events. There were no Council officers in attendance at the first although the Council's Corporate Legal Adviser, Morag Ferguson was present as an observer at the latter meeting. No formal minute was taken or made publicly available in relation to either meeting.
- 4.7.4 The first complainant was and remains profoundly dissatisfied with the merits of the decision to refuse the 2010 application across a range of planning and legal dimensions (including the controversy about the Section 75 agreement) and has initiated judicial review proceedings against the Council in the Court of Session and lodged an appeal

against the refusal of planning consent with the Scottish Directorate for Planning and Environmental Appeals.

4.7.5 The second complainant sits in a context of even deeper general criticism of the planning process in East Lothian Council. An audit of the various administrative, procedural, policy and ethical shortcomings alleged are beyond the scope of the Code and are not relevant to the determination of the complaint. As part of the portfolio submitted, however, the second complainant refers to the respondent as having been involved in "jury tampering" to "fix the outcome of a planning decision (in respect of the 2010 application by Sirius Sport and Leisure Limited) at a full Council meeting concerning a major development project." In support of that part of his complaint the second complainant also refers to the terms of and circumstances surrounding the circulation by the respondent of the e-mail dated 18 February 2011 (see paragraph 4.5.4).

#### **4.8 The Response**

4.8.1 In his submissions the respondent relies on three main points (set out also in paragraph 2.2 above) before addressing the events which led to him having to leave the council chamber at the Council meeting on 22 February 2011 which considered this application.

4.8.2 First of all the respondent considers his role as Planning Convener and Cabinet member for Environment with the responsibilities these offices carry for strategic and local planning. He asserts that the Council has a duty to administer an effective planning regime across East Lothian and he is currently the Cabinet Member with the lead role in that respect. He is also on the board of SESPlan with an additional responsibility, alongside colleagues from other councils, for ensuring effective planning across the whole Edinburgh city region. He says that he if he believes that the delivery of a well defined and tested strategy in the best interests of all residents of East Lothian is seriously threatened by a specific proposal, he must think carefully about all actions he can legitimately take in advising his colleagues in the Administration of that threat, given their overall responsibility for the wellbeing of the populace.

4.8.3 The second point relates to lobbying which he believes has to be seen in the above context. Lobbying of colleagues on planning matters may come about where particular personal or local interests have been drawn to the attention of an elected member by a constituent or group of constituents. In the case under consideration there were no such interests. It was the interests of all the communities in East Lothian that were at stake. The respondent says that there was no malicious intent and certainly no personal gain involved. He did what he did because he was the Planning Convener and Cabinet Member for Environment, not in spite of it.

4.8.4 His third point is that he believed that he was acting legitimately. This application was going through a relatively new procedure for major applications whereby a pre-determination meeting was held before all

Council members. At this meeting the applicant and objectors made their case orally to members and members were able to ask questions. There was no debate about the issues. At a subsequent Council meeting a full report from the officers would be available, with recommendations, and the debate would take place prior to a decision being made. Neither the applicant nor objectors would be given a further opportunity to speak at the meeting. This was only the second or third case of its kind heard in this way in East Lothian. His belief was that in these circumstances, unlike the planning committee, members would be coming to the Council meeting having made up their minds about the application because they had already heard from the applicant and objectors, had seen the officer report with its recommendations and would not hear any further representations. The respondent concedes, however that in this respect he made a mistake. He says he thought the Code of Conduct related to the Planning Committee and its procedures, not to Council meetings and the new procedures. He admits he should have checked the applicability of the Code but in his defence says "that my eye was taken off the ball by the particular and almost unique set of circumstances of this case".

4.8.5 The respondent elaborates on these circumstances by reference to a series of events leading up to the Council meeting on 22 February. The applicant and objectors made their case at the pre-determination hearing which took place at the beginning of a Planning Committee. All members of the Council were invited to attend. Members would have been made aware in the initial officer report available at that time only of the details of the proposal, objections and relevant policy context. The respondent expressed no view at the hearing but did ask some questions.

4.8.6 The officer assessment report was made available to all parties a week or so before the Council meeting, by way of a detailed report with clear and fully explained recommendations to refuse permission. The language of the report was indeed strong and unequivocal. Members could be left in no doubt about the serious implications of granting permission. The respondent explains that the first complainant and applicant, Mr Wallace, then undertook some fairly sophisticated lobbying of all members of the Council, making presentations to them in their separate political groupings. (This he says may have commenced prior to the officer report being available, for Mr Wallace would have had prior knowledge of the reasons for refusal). Mr Wallace had been told by the officers many months before that his proposal would not be recommended for approval and was aware that only by persuading elected members to support him might he be able to get the decision he wanted. He was given the opportunity to do so at the pre-determination hearing. At the briefings he and his agent extolled the virtues of the greyhound stadium and pointed to the projected economic and social benefits to the area. They made it very clear that the only way to achieve completion of the stadium, in their view, was to permit the housing development and thus create the necessary capital. A glossy publication was tabled which rebutted the various policy points made by the officers in their report. In this way

Mr Wallace was able to 'circumnavigate' the agreed procedures of the Council which precluded further representations at the Council meeting, an opportunity not afforded to objectors. This might be considered a subversive act. The respondent stresses that he did not authorise any presentation to Administration members by Mr Wallace. His understanding is that this came from the Leader of the Council. The respondent did, however, insist that the council's legal adviser on planning matters be present at that presentation to ensure fair play.

- 4.8.7 The respondent says that he heard 'through the grapevine', from a member of the Administration, that the Labour Group, following the complainant's presentation, had decided to support his proposal and go against the officer recommendations in spite of the implications spelled out in the report. He points out that this was a private meeting between the Labour Group (the main opposition party) and Mr Wallace, and as far as he is aware no Council officer was present. It is not accepted practice in the Council that an applicant meets with groups of elected members privately to discuss a live planning application. He speculates that those of any political persuasion not familiar with the intricacies of planning could easily have been influenced by Mr Wallace's presentation and glossy hand-out. The respondent, however, as an experienced planner, was not, but he worried that other members would be so influenced. From his experience at the highest levels in planning he was only too aware of the serious implications for East Lothian if this scheme were to go ahead. He explains that his political colleagues had asked him to take on the role of Planning Convener for the very reason that he had this knowledge and perception.
- 4.8.8 The respondent thinks that at this point that there must have been some collusion within the Labour ranks. Regardless of the consequences, they voted as one against the officer recommendations as he had learned that they would. Their stance contrasts with that of the Administration where, in spite of what they had heard from the respondent, members continued to exercise discretion in that three voted against the officer recommendations.
- 4.8.9 There was a Council agenda briefing meeting for Administration members in the week prior to the Council meeting. Before the officers came in to brief the Administration on the various reports, the respondent and his cabinet colleagues met to discuss issues around the reports. The respondent stresses that this does not happen for the Planning Committee but it is customary for Council meetings and it served to reinforce his belief that a different system was at play here in respect of the Code. Prior to this briefing he had been copied into an e-mail from the Council's legal team to the Director which concluded that it would not be competent, for legal reasons, to enter into a Section 75 agreement which would ensure delivery of a completed stadium on the back of the proposed housing development. This led the respondent to believe that even if permission were granted, with all the implications for planning, it would not necessarily deliver what members had been told it would by the applicant. This,

the respondent emphasises, is the information he had at the time and as far as he is aware this advice has not changed.

- 4.8.10 The respondent also refers to another important development brought to his attention by Councillor Stuart Currie, Cabinet Member for housing. According to the respondent, Councillor Currie, had raised with him concerns that the development could prejudice the delivery of large strategic housing developments that are a key component of the Local Plan, particularly the 1000 homes planned for Wallyford. The respondent shared this concern. It was Councillor Currie's contention that, given the levels of investment being undertaken by developers in these areas, with Council support and encouragement, they could make a financial claim against the Council, and possibly individual members, if they lost out financially as a result of the development under consideration and the precedent it would set. It was this that led the respondent to the conclusion that there should be a recorded vote.
- 4.8.11 The respondent was asked to comment on the application at the agenda briefing meeting and did so in the light of all the above information. As Planning Convener and Cabinet Member for Environment he stressed the very real and serious dangers if planning consent were to be granted. Only about half the members of the Administration were present and the Leader of the Council asked if the respondent if he would brief the others separately by e-mail given the serious concerns. Being of the view that the Code did not apply – and the respondent thinks he would have expressed this view at the briefing meeting – he undertook to do so.
- 4.8.12 In briefing his Administration colleagues the respondent says he was simply seeking to do his job as Planning Convener and Cabinet Member by safeguarding the interests of all East Lothian's residents through the maintenance of an effective planning regime. It could be argued (he says) that he has a duty in this respect and would be failing in that duty if he did nothing to alert and advise colleagues given the particular circumstances of the application as outlined above, and especially the information he had received about the Labour Group's voting intentions. That said, he concedes that he nevertheless made a mistake in respect of the applicability of the Code of Conduct, but as soon as this was drawn to his attention he did the right thing and withdrew from the Council meeting.
- 4.8.13 He was pre-occupied by the particular set of circumstances around the application which distracted him to the extent that he failed to observe the Code of Conduct. These he summarises as follows:
- A new and relatively unfamiliar process involving a pre-determination hearing and decision by full Council
  - A very strongly worded officer report which drew attention to the serious planning consequences and implications of this development across East Lothian supported by an impassioned note from the Director circulated to all members

- Strong lobbying of members by the applicant giving the impression that there was no alternative if the stadium was to be completed
- Advice from the legal team that it would not be competent to enter into a legal agreement which would guarantee delivery of a completed stadium - so a huge risk in this respect
- Concern that the Council, and possibly individual members, could face financial challenge from developers if granting permission led to difficulties in delivering strategic housing allocations

4.8.14 The respondent takes the view that it would not have been appropriate to wait until the full Council meeting to make all these points. It was his belief that it would have been too late. As he has indicated, members would be coming to the meeting with their minds made up having weighed up the officer report and the applicant's view of things based upon his lobbying. There was also the risk that he might not be there due to unforeseen circumstances. He feels he must point out that if the Council had voted against the officer recommendations in this case, and granted planning consent, he would have given serious consideration to resigning his position as Planning Convener, and possibly as Cabinet Member for Environment. This would have been on the basis that he would have had no confidence in the Council's continuing ability to maintain an effective planning regime in East Lothian, a situation which would have made his personal position untenable.

4.8.15 The respondent makes the point that the Code of Conduct appears to be based on the premise that everybody involved abides by all the rules, including developers. In this particular case there was lobbying by the applicant in the form of a private meeting with a group of members who then appear to have been persuaded to support, en bloc, the applicant's case prior to the meeting at which the application was to be decided. This kind of activity puts those who stick to the Code of Conduct on planning applications at a disadvantage which can, arguably, lead to a negative impact on the interests of the general population whilst offering advantage to the applicant.

4.8.16 The Council's Monitoring Officer reported that as far as he was aware, no advice was sought by or given to the respondent concerning the applicability of the Councillors' Code of Conduct in connection with the 2010 application generally, the pre-determination or Council meeting on 22 February. However on the morning of 22 February 2011 about an hour before the meeting of the full Council which met to determine the 2010 application and other matters, Councillor John Caldwell attended at his office to discuss the application. During this conversation Councillor Caldwell raised a hypothetical scenario of "what if (in relation to relevant parts of the Councillors' Code of Conduct) a Councillor, prior to the determination of a planning application, had urged other Councillors who were to determine the application at such a meeting to vote in a certain way". In discussion

with Councillor Caldwell and with reference to the current Councillors' Code of Conduct, the Monitoring Officer identified in particular the provisions within Sections 7.10 and 7.13 of the Code which regulates lobbying activities and also section 7.11. Because Councillor Caldwell was rather guarded in putting to him this "hypothetical scenario", the Monitoring Officer began to wonder whether it had been Councillor Caldwell himself who had written to other councillors who were to take the decision, lobbying them to vote in a certain way. With that in mind, he briefed his colleague, Corporate Legal Adviser, Morag Ferguson on the issues identifying the pertinent parts of the Code as Ms Ferguson was to be attending the Council Meeting that morning in his place, knowing she would be expected to provide advice on Code of Conduct matters. He advised her to have a word with Councillor Caldwell prior to the meeting and advise him that should he have actually lobbied other councillors on which way to vote, that he should be advised to declare an interest and to leave the Chamber. As it later transpired it was the respondent Councillor Barry Turner who became the focus of attention as the councillor who had allegedly sent an e-mail lobbying other councillors.

## **5.0 Findings and Conclusions**

### **The Complaints and the Response**

#### **5.1 The Complaints**

5.1.1 The complainants allege that Councillor Barry Turner has contravened the Councillors' Code of Conduct, as outlined in paragraphs 1.3 and 2.1 of this Report.

5.1.2 In each complaint it is alleged that in the period between the pre-determination hearing held on 1 February and the further consideration of a planning application (no. 10/00341/PPM – residential development and associated works at Victory Lane Stadium) - the 2010 application - by East Lothian Council at their meeting on 22 February 2011, the respondent, Councillor Turner:

a. lobbied other councillors by e-mail dated 18 February to vote against the application; and

b. acted in a manner which gave rise to doubts about his impartiality contrary to paragraphs 7.13 and 7.11 of the Code.

The second complaint contains further allegations in respect of the behaviour of other councillors which have been the subject of separate determination.

#### **5.2 The Response**

The response to this allegation is set out in a letter (and supporting material) from the respondent and is described in paragraph 2.2. By

reference to 3 main criteria the respondent justifies his action stating that:

a. In his roles as Planning Convener and Cabinet Member for the Environment within the Council, and as a board member of the Edinburgh and South East Scotland Strategic Development Planning Authority ('SESPlan'), he has a duty to defend the integrity of a planned development control regime.

b. Any lobbying which he undertook was designed to secure the legitimate interests of the planning system. He was not motivated by malice or personal gain. He acted as he did "because he was Planning Convener and not in spite of it".

c. He believed he was acting legitimately. The process he says was new and unfamiliar. The respondent explains that this application was going through a relatively new procedure for major applications (in terms of recent statutory amendments to the planning framework) whereby a pre-determination meeting held was held (on 1 February 2011) before all Council members. At this meeting the applicant and objectors made their case orally to members and members were able to ask questions. There was no debate about the issues. At a subsequent Council meeting (held on 22 February 2011) a full report from the officers would be available, with recommendations, and the debate would take place prior to a decision being made. Neither the applicant nor objectors would be given a further opportunity to speak at the meeting. This was only the second or third case of its kind heard in this way in East Lothian. It was the belief of the respondent that in these circumstances, unlike the procedure at a planning committee, members would be coming to the Council meeting having made up their minds about the application because they had already heard from the applicant and objectors, had seen the officer report with its recommendations and would not hear any further representations. The respondent concedes that he made a mistake in this respect. Whereas he thought the relevant parts of the Code related only to the planning committee and its procedures, it also applied to any quasi-judicial Council decision under the new procedures. He says he should have checked the Code but his defence is that his "eye was taken off the ball by the particular and almost unique set of circumstances of this case".

### **Findings and conclusions**

- 5.3 The importance of the planning history of the site at Barbachlaw Farm, Wallyford is identified in section 4.2 of this Report. The specifics of the 2004 consent and the 2010 application are dealt with respectively in sections 4.3 and 4.4. By virtue of the 2004 consent, the complainant had partly built the Victory Lane Stadium (a greyhound track) but had been unable to fully complete the infrastructure of the arena. The Section 75 agreement associated with the 2004 consent had been the subject of amendment between the parties but its effect had not secured the completion of the arena. Through the 2010 application the intention of the complainant (see paragraph 4.4.1) was to cross



subsidise the funding of the completion of the stadium by securing planning permission at Barbachlaw Farm for the erection of housing. Again a Section 75 agreement was suggested by the complainant as a mechanism for ring fencing the proceeds from the sale of housing land and its application to the construction costs needed to fund the completion of Victory Stadium. The Council's Corporate Legal Adviser clearly had reservations about the competence and desirability of entering into such an agreement (see paragraph 4.4.6) and expressed those reservations at the Council meeting on 22 February (paragraph 4.6.7). The complainant and his advisors were and remain at odds with the Council about the planning merits of the 2010 application and the detail of the section 75 agreement and its efficacy in providing a mechanism to ring fence funding for the completion of the greyhound stadium. There is, however, no dispute as to the course of events which have led up to the consideration and determination by the Council of the 2010 application.

- 5.4 Although the planning history of the Brabachlaw Farm site has been complex and contentious, the determination of this complaint turns on the circumstances and content of the e-mail sent by the respondent on 18 February. The text of the e-mail which was sent to his fellow members of the Administration (Councillors Dave Berry, Ruth Currie, Stuart Currie, Roger Knox, Peter McKenzie, Paul McLennan, Kenny McLeod, Tom Trotter, John Wilson, Jacqui Bell, Stuart MacKinnon, and Sheena Richardson) read as follows:

"Hi all

In what is, I appreciate, an unusual step, as Planning Convener and as someone with long experience in this field, I am contacting you to say that I cannot over-estimate the need to support the officer recommendation for refusal in this case, regardless of the view you hold about the stadium. I urge you to read thoroughly the officer report which sets out the very significant and serious planning implications if this development were to get permission. I also want to stress that there is no assurance that the Section 75 on offer will deliver a completed stadium. Indeed I have seen further advice from the council's legal team that it would not be possible in legal terms to seek a Section 75 agreement which would guarantee the completion of the stadium. There is significant risk here. I will be speaking at some length on the application at the council meeting. If it seems that there is some support for granting permission I shall be requesting a recorded vote because I believe that there could be serious repercussions for the council, possibly financial, if the development - by totally undermining regional strategy and local policy - were to have an impact on the viability and deliverability of development sites.

Regards, Barry Turner"

- 5.5 There is no doubt that the e-mail was about a planning application actively under consideration by the Council and that the recipients were to be involved in its determination. Despite his suggestion that he was unfamiliar with, and to some extent confused by the new planning system (paragraphs 4.8.4 and 4.8.13), the respondent acknowledges that his intervention represents 'an unusual step'.

Nonetheless in the knowledge that his action was questionable the respondent proceeded to send the e-mail.

- 5.6 In part the e-mail is entirely appropriate. The respondent says, for instance, "I urge you to read thoroughly the officer report which sets out the very significant and serious planning implications if this development were to get permission", which is indicative of an appreciation that other members should fully acquaint themselves of the issues and make up their own minds. Arguably he is again raising the difficulties surrounding the Section 75 agreement to allow members to better equip themselves in making an assessment of the risk associated with that mechanism.
- 5.7 Initially the respondent concedes, however, that its dispatch is "an unusual step". He goes on to exhort his colleagues that they support the planning officer's recommendations of refusal by stating that he "cannot over-estimate the need to support the officer recommendation for refusal in this case...". In its culmination there also appears to be a threat that individual members who might vote for the development should be identified through the voting process, so as to be held accountable for the financial consequences of a claim against the Council and for "totally undermining regional strategy and local policy". In that context paragraph 7.10 of the Code clearly states that a councillor "... should not seek privately to lobby other councillors who have a responsibility for dealing with the application in question."
- 5.8 Although the realities of local government life might mean that the respondent had a policy-driven disposition to refuse the application, I find that the fair minded observer would be of the view that the respondent had excluded the possibility that he might be persuaded by events at the Council meeting to take a different view of the 2010 application. In other words he had a closed mind. The Code emphasises that councillors should not act in a way which gives rise to their impartiality. Paragraph 7.3 makes it clear that the respondent was under a duty not only to act fairly but also to be seen to be acting fairly. In addition paragraph 7.11 provides 'If you propose to take part in the decision making process you must not give grounds to doubt your impartiality....You must not indicate or imply your support or opposition to a proposal, or declare your voting intention, before the meeting.....'. In the circumstances as set out in paragraphs 5.4 to 5.8 of this Report I find that the respondent failed to maintain a perception of objectivity as required by paragraphs 7.3 and 7.11 of the Code.
- 5.9 At the Council meeting on 22 February prior to the report being considered by members (see paragraph 4.6.4), Councillor Caldwell pointed out that a member had been lobbying other members on this application but had not declared an interest. The Corporate Legal Adviser gave advice to the effect that, as outlined in the Councillors' Code of Conduct, members should not lobby others in advance of the meeting at which the matter is considered.
- 5.10 The minute of the Council meeting goes on to record (paragraph 4.6.5) that the respondent: "admitted that he had sent an e-mail regarding his views on the application to other members of the Administration,

but believed he had been acting properly on the grounds that this meeting was not a meeting of the Planning Committee. He argued that as members had heard from the applicant and the objectors and had received a full report from officers, all the facts on the application were already available. However, he accepted the advice given by the Corporate Legal Adviser that the Code of Conduct prohibited lobbying in respect of any planning decision, regardless of the forum, and agreed to withdraw from the Chamber during the debate and vote on this item." It is perhaps unfortunate that the respondent's action was not spontaneous, and was prompted only by the intervention of another member of the Council, but in recognising the difficulty and acting as he did I find that the respondent complied with the requirements of paragraph 7.12 of the Code.

- 5.11 By way of justification the respondent says (paragraph 4.8.3) that in his actions there was no malicious intent and certainly no personal gain involved. He did what he did because he was the Planning Convener and Cabinet Member for Environment not in spite of it. I find that the respondent was not motivated by personal gain.
- 5.12 Again in exculpation the respondent highlights what he describes as unusual features of the 2010 application (indeed he refers – see paragraph 4.8.4 – to the "almost unique set of circumstances of this case"). I find, however, that it was clearly identifiable as a quasi-judicial or regulatory application of the sort susceptible to the provisions of the Code, and in particular those set out in section 7. In that context the respondent says he was confused about the applicability of the Code in respect of the proceedings at the Council meeting on 22 February (see again paragraph 4.8.4). His position is, however, at odds with the minute of the pre-determination meeting held on February 2011 (see paragraph 4.5.1) which records that the Convener (the respondent) 'reminded members of the pre-determination hearing process, advising that this first stage would be an information gathering opportunity, where the applicant / agent (the complainant), supporters and objectors would make representations. Members could question the speakers, but there must be no debate on the merits of the application. The next stage of the process would be dealt with at Council on 22 February 2011; the officer's report on the planning application would be provided for this meeting, along with a note of the representations made at the pre-determination stage. At Council, members would be able to debate the issue and a decision would be made'. In any event the respondent (given his experience perhaps more so than most) should have known that the Code clearly applied to the consideration and determination of the 2010 application and he conceded as much in his responses during the investigation.
- 5.13 The respondent was keen to ensure that his less experienced colleagues were not manipulated by a wily or "sophisticated" (see paragraph 4.8.6) applicant. He speculates (paragraph 4.8.7) that any councillor of whatever political persuasion not familiar with the intricacies of planning could easily have been influenced by Mr Wallace's presentation and glossy hand-out. These concerns were heightened by a series of informal meetings held between the first complainant and political groups within the Council. In particular the

first complainant confirms (paragraph 4.7.3) that he made a presentation to the Labour Group on 16 November 2010 and to the SNP - Lib Dem Administration on 31 January 2011. Neither of these meetings formed part of the planning application process, nor were they official Council events. There were no Council officers in attendance at the first although the Council's Corporate Legal Adviser, Morag Ferguson, was present as an observer at the latter meeting. No formal minute was taken or made publicly available in relation to either meeting. It was unwise of members to engage in private meetings with the applicant while his application was before the Council. Even so I find it did not justify the respondent's attempt to redress the situation by issuing a response in terms of his e-mail of 18 February.

- 5.14 The respondent also makes the point (paragraph 4.8.15) that the Code of Conduct appears to be based on the premise that everybody involved (in the processing of a planning application) abides by all the rules, including developers. In this particular case there was lobbying by the applicant in the form of a private meeting with a group of members who then appear to have been persuaded to support, en bloc, the applicant's case prior to the meeting at which the application was to be decided. This kind of activity, argues the respondent, puts those who stick to the Code of Conduct on planning applications at a disadvantage which can, arguably, lead to a negative impact on the interests of the general population whilst offering advantage to the applicant. I do not accept the respondent's analysis. Paragraph 6.3 of the Code recognises the reality of lobbying ('You may be lobbied by a wide range of people including individuals, organisations, companies and developers'). It is the responsibility of members to comply with section 7 of the Code which is designed to regulate the conduct of members while acting in a quasi-judicial role. The applicant and first complainant is simply in a different position and does not have the same obligations imposed on him. He is self evidently in a position with a direct personal interest in the application and the outcome of the planning process. Again I do not accept the respondent's view as a justification for the release of his e-mail of 18 February.
- 5.15 The 2010 application had a high profile, the potential to facilitate the completion of the Victory Lane Stadium (a problematic development in the Council area) and as a result was contentious. The respondent clearly felt a personal responsibility (see paragraphs 4.8.11, 4.8.12 and 4.8.14) to ensure that members of the Administration fully understood the consequences for the integrity of the plan led policies of the Council if they voted against the strong recommendations of the officer recommendations to refuse the application. His anxiety increased when he learned that the Labour opposition intended to vote against the officer recommendation and grant the application (paragraphs 4.8.7 and 4.8.8). Genuine as those concerns were, again they did not justify the dispatch of the e-mail of 18 February.
- 5.16 I appreciate that the roll-call vote of the Council meeting (paragraph 4.6.8) shows that all five of the Labour Group in attendance uniformly voted against the officer recommendation and in favour of granting the 2010 application. On that basis alone I would not, however, be

justified in concluding that there was any improper inference to be drawn about the motivation of those councillors.

5.17 I have also noted the reference to the issue brought to the respondent's attention by Councillor Stuart Currie, Cabinet Member for housing (see paragraph 4.8.10). According to the respondent, Councillor Currie, had raised with him concerns that any development flowing from the 2010 application could prejudice the delivery of large strategic housing developments that were a key component of the Local Plan, particularly the 1000 homes planned for Wallyford. It was Councillor Currie's contention that, given the levels of investment being undertaken by developers in these areas, with Council support and encouragement, they could make a financial claim against the Council, and possibly individual members, if they lost out financially if the 2010 application were to be granted. Even although the opportunities for builders to develop other sites suitable for housing was touched on, the specific concerns of Councillor Currie were not explored at the Council meeting. In any event, again, I do not consider that any exchange the respondent had with Councillor Currie in that connection justified the sending of the e-mail of 18 February.

5.18 I summarise my key findings and conclusions as follows:-

- a. the planning application (no. 10/00341/PPM - residential development and associated works at Victory Lane Stadium) was received by East Lothian Council on 23 April 2010, was considered at a pre- determination hearing of the Council on 1 February 2011 and was due to be determined at a meeting of East Lothian Council on 22 February 2011
- b. section 7 of the Code applies to councillors in relation to the consideration of the said application
- c. on 18 February 2011 the respondent sent an e-mail to members of the Administration as set out in para 5.4 above
- d. the e-mail exhorts his colleague councillors to support the planning officer's recommendations of refusal of the planning applications
- e. at the time of the e-mail, the respondent had every intention of participating in the decision on the application to be taken at the meeting of East Lothian Council to be held on 22 February 2011.
- f. by sending the e-mail, the respondent showed he had prejudged the application before the meeting on 22 February and was biased against the application, contrary to para 7.3 of the Code
- g. by sending the e-mail, he was seeking privately to lobby the councillors in receipt of the e-mail who had a responsibility for deciding the application and he indicated his opposition to the application contrary to paragraphs 7.10 and 7.11 of the Code
- h. and, therefore, the respondent was in contravention of the Councillors' Code of Conduct.

5.19 In relation to LA/EL/1133 and 1138, I have come to the conclusion that, having regard to the findings in section 5 and in particular paragraphs 5.3 to 5.18 of this Report, Councillor Barry Turner has contravened paragraphs 7.3, 7.10 and 7.11 of the Councillors' Code of Conduct.

**Other matters**

5.20 Although senior officers in the Council were able to confirm that training (general and in respect of particular issues – see paragraph 4.1.4) had been provided in relation to the national review of planning law and procedures, the Council may think it prudent to revisit, rerun or otherwise reinforce their training programme for members in the light of the respondent's apparent initial confusion.

5.21 It is evident that the first complainant as proponent of the 2010 application lobbied politicians and political groups during the period when the application was under consideration by the Council. These activities present difficulties in terms of transparency and perceptions of equity and fairness, both for the Council as a corporate entity and for members individually. Again the Council may wish to revisit its policies and protocols in that regard.

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14 December 2011