

**PRIVATE AND CONFIDENTIAL**

**FINAL**

**Case Reference: SCMG**

Report of an investigation under Section 59 of the Local Government Act 2000 by Ian Curtis appointed by monitoring officer for South Ribble Borough Council into an allegation concerning Councillor Melvyn Gardner.

**DATE: 20 March 2009**

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### **1 Executive summary**

- 1.1 The allegation is that Councillor Melvyn Gardner made comments about Ms Wendy Gudger, a council officer, at a planning appeal hearing on 2 September 2008, that constituted an attack on the officer's integrity and professionalism. This is said to be in breach of the following paragraphs of South Ribble Borough Council's Code of Conduct: 3(1), 5 and 6(a).
- 1.2 There was no dispute that Councillor Gardner made the comments alleged. I found that, taken together, the comments did attack the integrity and professionalism of the officer and that Councillor Gardner failed to comply with paragraph 3(1) of the Code of Conduct. I do not find that he breached paragraphs 5 or 6(a) of the Code.
- 1.3 I recommend that the Standards Committee censure Councillor Gardner and require him to apologise in writing to Ms Gudger.

### **2 Melvyn Gardner's official details**

- 2.1 Melvyn Gardner was elected to office on 3 May 2007 for a term of four years. Councillor Gardner is also a member of Penwortham Town Council.
- 2.2 Councillor Gardner currently serves on the following committees: Community Watchdog Scrutiny Committee, Licensing Act Committee and Penwortham Area Committee.
- 2.3 Councillor Gardner gave a written undertaking to observe the Code of Conduct following his election in 2007.
- 2.4 Councillor Gardner received awareness training on the Code of Conduct in 2007.

### **3 The relevant legislation and protocols**

- 3.1 The council has adopted a Code of Conduct in which the following paragraphs are included:
  - 3(1): You must treat others with respect
  - 5: You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute
  - 6(a): You must not use or attempt to use your position as a member improperly to confer on or secure for yourself or any other person, an advantage or disadvantage.

### **4 The evidence gathered**

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- 4.1 I have taken account of oral evidence from Mr John Dalton, Mr Steven Brown, Mr Alan Green, Mr Chris Sowerby, Councillor Melvyn Gardner and Ms Wendy Gudger.
- 4.2 I have also taken account of documentary evidence provided by Mr David Whelan on behalf of the Monitoring Officer, and papers proactively provided by Councillor Gardner.

### 5 Summary of the material facts

- 5.1 The allegation concerns comments said to have been made by Councillor Gardner on 2 September 2008 at an informal hearing into a planning appeal. All of the witnesses, including Councillor Gardner himself, agree that he made the comments.
- 5.2 Paragraphs 5.3 to 5.13 set out my findings of fact. Paragraphs 5.3 to 5.9 set out the background to the comments. Paragraph 5.10 to 5.11 set out the comments. Paragraphs 5.12 to 5.14 consider why Councillor Gardner said what he did.

#### The planning decisions

- 5.3 On 5 September 2007, the Planning Committee of South Ribble Borough Council considered a planning application relating to land to the rear of 1 Giller Drive, Penwortham. The report described the application as "*Outline application for residential development for 11 No. two storey dwelling houses and associated access*".
- 5.4 The officer recommendation was to approve the application, subject to conditions. The decision of the committee was recorded as being: "*the decision be delegated to the Head of Planning and Regeneration in consultation with the Chairman or Vice Chairman of the Planning Committee, upon the successful completion of a section 106 agreement to secure a payment to facilitate off-site public open space in lieu of on-site public open space*". In practice, this meant that the council would issue the outline planning permission once the relevant planning agreement had been completed. The outline planning permission was eventually issued on December 12 2007.
- 5.5 The outline planning permission meant that the principle of the development of 11 dwellinghouses on the Giller Drive site was deemed to be accepted, together with details of access, but that layout, scale, appearance and landscaping were reserved for later consideration.
- 5.6 The Planning Committee considered those reserved matters on 26 March 2008. The officer recommendation was for approval. The Committee refused the application.
- 5.7 The applicants appealed against the refusal. An independent inspector heard the appeal at an informal hearing on September 2 2008.

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- 5.8 The application was controversial. Many local people were against it. Twenty-five members of the public were at the 5 September 2007 meeting. Forty-three were present at the 26 March 2008 meeting. Around a dozen came to the hearing.
- 5.9 Councillor Melvyn Gardner was the borough councillor for the ward containing the application site. He was not a Planning Committee member. But he went to both meetings and to the hearing.

### What Councillor Gardner said

- 5.10 The hearing lasted a full day. The atmosphere at the hearing was difficult. A number of members of the public and Councillor Gardner wanted the inspector to consider the principle of the development of the site with eleven houses. The inspector regarded that issue as having been decided by the Planning Committee at its meeting of 5 September 2007. His starting point was that the development of the site with eleven houses was permitted, and the hearing was to decide only on the layout, scale, appearance and landscaping of the development.
- 5.11 During the afternoon of the hearing, Councillor Gardner made the three separate comments that have been complained about. The inspector, the council officers and members of the public who were present could hear the comments. The comments were these (or words to substantially the same effect):

*“There has been skulduggery here and somebody is covering somebody else’s back”*

*“Wendy Gudger should be here to defend herself”*

*“This has gone through on the nod”*

### Why Councillor Gardner said it

- 5.12 Councillor Gardner had misunderstood the decision that had been made at the 5 September 2007 Planning Committee meeting. He had believed that the 5 September decision only dealt with the means of access to the Giller Drive site, and not to the principle of residential development or the number of houses to be built there. He thought that the 26 March 2008 Planning Committee meeting would be able to decide that the site should not be developed with 11 houses. That misunderstanding was shared by some other councillors and by some local people.
- 5.13 The officers’ report for the 5 September contained phrases such as *“the only matter applied for is access”*, *“access is the only matter applied for at this time”* and *“the applicant is seeking to obtain planning permission*

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*for access only*". These could have contributed to Councillor Gardner's misunderstanding and that of others.

- 5.14 Wendy Gudger was the council's interim Development Control Manager. She had approved and presented (but had not written) the officer reports on the Giller Drive application at the two planning committee meetings. Councillor Gardner principally blamed Ms Gudger for his misunderstanding.

### **6 Melvyn Gardner's additional submissions**

- 6.1 Councillor Gardner considers that his comments at the hearing were a legitimate way of expressing his profound dissatisfaction with the way that the Giller Drive application had been handled to that time. The comments also reflected his dissatisfaction about the resources deployed by the council to defend the appeal.
- 6.2 Councillor Gardner says that his comments were not intended to call into question the Ms Gudger's integrity or professionalism. He says they were made impulsively, borne out of a sense of frustration. He does not consider that making them amounted to treating her with disrespect.

### **7 Reasoning as to whether there have been failures to comply with the Code of Conduct**

#### Official capacity

- 7.1 The breaches of the code of conduct alleged do not amount to criminal offences and thus can only be committed by a member acting in his official capacity. A member acts in his official capacity whenever he conducts the business of his authority or acts, claims to act, or gives the impression he is representing his authority.
- 7.2 Councillor Gardner's concern about the Giller Drive application sprang from his wish to represent the views and aspirations of people living in his ward. He attended both of the planning meetings and the hearing with that intention. In doing so, he was carrying out the functions of a ward member and was therefore acting in his official capacity.

#### The complaint under paragraph 3(1)

- 7.3 Paragraph 3(1) can be breached even if the person treated with disrespect is not present to witness the disrespectful treatment. Wendy Gudger was not present at the hearing on 2 September 2008. Nevertheless, Councillor Gardner's comments could still have amounted to disrespectful treatment of her.
- 7.4 Three comments made by Councillor Gardner are material. They are set out in paragraph 5.10 of this report. I consider in turn whether each of the comments amounted to treating Ms Gudger with disrespect. I

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then consider whether the comments when considered together amounted to disrespectful treatment.

- 7.5 *"There has been skulduggery here and somebody is covering somebody else's back"*. The Collins Concise English Dictionary defines skulduggery as "underhand dealing" or "trickery".
- 7.6 The clear inference to be drawn from the first part of this comment is that some person or persons, probably planning officers, had been involved in unlawful or improper conduct, which had resulted in the Giller Drive application being granted outline planning consent in circumstances where it would otherwise have been refused.
- 7.7 The second part of this comment suggests that some other person or persons not involved in the conduct impugned as "skulduggery" were wrongfully attempting to conceal it.
- 7.8 The comment as a whole impugns the integrity and professionalism of a class of persons, which may include all those at South Ribble Borough Council who had had dealings with the Giller Drive application. However, Adjudication Panel case law suggests that disrespect for a class of persons will not amount to a breach of paragraph 3(1) of the code.
- 7.9 *"Wendy Gudger should be here to defend herself"*. This is the only one of the three comments that specifically names the complainant. In the first five words, Councillor Gardner must be taken to be expressing dissatisfaction that Ms Gudger was not present at the hearing and, by natural extension, expressing a criticism of her judgment in deciding not to be present. While the code of conduct is concerned with protecting council officers from inappropriate criticism in public, not every criticism of an officer by a councillor will amount to a breach of the code, even if spoken in public. The first five words of this comment are not criticism of the kind that would amount to a breach of the code.
- 7.10 The final three words of this comment may be interpreted as suggesting that there was some conduct or matter for which Ms Gudger should be held accountable. But they could equally have meant that Councillor Gardner considered that Ms Gudger should have been presenting the council's case and giving evidence in support of it instead of Mr Sowerby, who was a considerably junior officer to Ms Gudger. It is therefore not clear that these three words amount to a breach of the code.
- 7.11 *"This has gone through on the nod"*. I find it difficult to understand what Councillor Gardner was trying to convey by this comment. Clearly, the decisions on the Giller Drive application had not been made "on the nod", in the sense of not having been the subject of appropriate discussion. Both the outline and reserved matters applications had

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been the subject of extensive discussion in the Planning Committee and the latter had been refused.

- 7.12 It seems to me that, taken individually, none of the comments was disrespectful towards Wendy Gudger or any other specific individual.
- 7.13 However, the comments were not made in isolation. The subject matter and context of the comments (all made towards the end of the hearing and to the same audience) mean that they need to be considered as a whole as well as individually.
- 7.14 Taken together, the comments suggest Councillor Gardner was stating not just that the Giller Drive application was handled improperly and was the subject of a cover-up, but that Ms Gudger was responsible for the impropriety or the cover-up, and that she should be held accountable for it. Councillor Gardner says that this was not his intention, but that was the effect of the words that he used.
- 7.15 Ms Gudger is a professional planning officer with experience at a number of local authorities as well as in private practice. The comments made by Councillor Gardner, taken together, were unfair and unreasonable and therefore disrespectful to Ms Gudger in that, without foundation, they publically called into question her integrity and therefore her suitability to continue as a member of her profession.
- 7.16 The code of conduct does not prevent councillors from challenging the views or performance of council officers. However, such challenge should be via appropriate channels. Councillor Gardner had raised his concerns about the handling of the planning application with the appropriate corporate director by letter in May 2008, as required by the relevant council protocol. There had been no reply to his letter by the time of the hearing. This was unfortunate, but the failure to reply did not give Councillor Gardner the right to raise his concerns in a wholly inappropriate way in a public hearing.

### The complaint under paragraph 5

- 7.17 Paragraph 5 of the code is concerned with behaviour that which could reasonably be regarded as bringing a member's office or authority into disrepute. Conduct by a member that could reasonably be regarded as reducing public confidence in the authority being able to fulfil its functions and duties will bring the authority into disrepute.
- 7.18 As discussed in paragraphs 7.5 to 7.8 of this report, Councillor Gardner's first comment at the hearing impugned the integrity and professionalism of a class of persons, which may include all those at South Ribble Borough Council who had had dealings with the Giller Drive application.



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- 7.19 However, a member is only guilty of a breach of paragraph 5 if he “*conducts himself in a manner*” which could reasonably be regarded as bringing his office or authority into disrepute. This appears to be directed at situations where public confidence in the office or authority of a member has been reduced by the culpable action of that member.
- 7.20 This appears to contrast with the present allegation where Councillor Gardner may have reduced public confidence in his authority by suggesting a state of affairs that (if it existed) would make it less worthy of such confidence. It is submitted that this situation is not covered by paragraph 5. If it were, any member acting as a whistleblower, whether justified in his actions or not, would be likely to be in breach of the code of conduct.

### The complaint under paragraph 6(a)

- 7.21 Councillor Gardner’s involvement with the application, including his attendance at and comments at the hearing, was intended to promote the views of persons living in his ward and, by opposing the Giller Drive application, to attempt to confer on them what they saw as an advantage.
- 7.22 However, it is an important part of the function of a ward councillor to seek to further what he sees as the interests of the inhabitants of his ward. It was not improper for Councillor Gardner to seek to influence the outcome of the application in those ways.
- 7.23 I have considered whether, by making his “*skulduggery*” comment, Councillor Gardner could be said to have used his position to improperly confer a disadvantage on the planning officers of the council or on Wendy Gudger in particular. I have concluded that he did not.
- 7.24 In my view, “*improperly conferring*” an advantage or disadvantage necessarily involves a motivation to confer such an advantage or disadvantage. I am not convinced that Councillor Gardner’s remarks, regrettable and inappropriate though they were, were framed by him with the intention of disadvantaging those they referred to.

## 8 Findings

- 8.1 Councillor Gardner was in breach of paragraph 3(1) of the Code of Conduct in that his comments at the hearing on September 2 2008, taken together, constituted an attack on the integrity and professionalism of Ms Wendy Gudger. Saying the things that he said, in the context in which he said them, amounted to treating Ms Gudger with disrespect.
- 8.2 Councillor Gardner was not in breach of paragraphs 5 or 6(a) of the Code of Conduct.

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- 8.3 I do not consider that Councillor Gardner regrets his comments. Although he has said that he did not intend to question Ms Gudger's professionalism or integrity, I find this is at odds with the comments themselves and with his general attitude to the matter, which is that his comments were appropriate and justified. This is an aggravating factor.
- 8.4 On the other hand, I do not find Councillor Gardner to have been motivated by personal malice towards Ms Gudger. However, he allowed his conception of his duty to his electors, together with his misunderstanding of the September 2007 decision, to seriously affect his judgment of how he should conduct himself as a councillor.
- 8.5 My view is that, if it agrees that Councillor Gardner has been in breach of the Code of Conduct, the Standards Committee ought to impose a sanction on Councillor Gardner. This would impress upon him the seriousness of using a public platform to make an unwarranted attack on a council officer. However, given Councillor Gardner's record of public service and good conduct, that sanction could be limited to:
- Censuring him; and
  - Requiring him to apologise, in writing, to Ms Gudger in a form specified by the Standards Committee.