



Coimisiún um Chaighdeáin in Oifigí Poiblí **Standards in Public Office Commission**

Investigation by the Standards in Public Office Commission
of Alleged Contraventions of
the Ethics in Public Office Acts 1995 and 2001

Councillor Cyril Burke
Mayo County Council

12 December 2018

Report under section 24 of the Ethics in Public Office Act 1995,
as amended by the Standards in Public Office Act 2001

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Foreword

The Standards in Public Office Commission (the “**Commission**”), in accordance with section 23 of the Ethics in Public Office Act 1995 as amended by the Standards in Public Office Act 2001 (the “**Ethics Act**”), has carried out an investigation to determine whether Councillor Cyril Burke, Mayo County Council, has contravened Part 15 of the Local Government Act 2001 (the “**Local Government Act**”). The Commission, in accordance with section 24 of the Ethics Acts, has prepared the following report which outlines the result of that investigation, copies of which, in accordance with section 24(1) of the Ethics Acts, and section 180(3) of the Local Government Act, are being furnished to:

1. Councillor Cyril Burke, the subject of the investigation;
2. The Cathaoirleach of Mayo County Council, and
3. The Minister for Finance and Public Expenditure and Reform.

Mr Justice Daniel O’Keeffe
Chairperson

Mr Seamus McCarthy
Comptroller and Auditor General

Mr Peter Tyndall
Ombudsman

Mr Peter Finnegan
Clerk of Dáil Éireann

Mr Martin Groves
Clerk of Seanad Éireann

Mr Jim O’Keeffe
Commissioner

12 December 2018

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1. Introduction

- 1.1 The Commission was established by section 21 of the Ethics in Public Office Act 1995, as amended by section 2 of the Standards in Public Office Act 2001, as brought into operation by the Standards in Public Office Act 2001 (Commencement) Order 2001. The members of the Commission for the purposes of this investigation are:
- Mr Justice Daniel O'Keeffe (Chairperson)
 - Mr Seamus McCarthy, Comptroller and Auditor General
 - Mr Peter Tyndall, Ombudsman
 - Mr Peter Finnegan, Clerk of Dáil Éireann
 - Mr Martin Groves, Clerk of Seanad Éireann
 - Mr Jim O'Keeffe, former member of Dáil Éireann
- 1.2 As stated in the foreword to this report the Ethics in Public Office Act 1995 was amended by the Standards in Public Office Act 2001. These Acts are cited together as the Ethics in Public Office Acts, 1995 and 2001 and are referred to in this report as **“the Ethics Acts”**.
- 1.3 The Commission's role, briefly, is to supervise the operation of the Ethics Acts in so far as they concern office holders, an Attorney General who is not a member of a House of the Oireachtas, Ministerial special advisers, designated directors and employees of specified public bodies and certain civil servants; to provide guidance and advice on the applicability of the Ethics Acts and to carry out investigations into possible contraventions of the Ethics Acts and/or Part 15 of the Local Government Act.
- 1.4 The investigative function of the Commission is a formalised procedure giving its Chairperson statutory powers that include the power to compel the attendance of witnesses and to procure documents or other material. The Ethics Acts oblige the Commission to hold sittings for the purpose of investigations. The detailed procedure determined by the Commission for the conduct of investigations is available on the Commission's website at <http://www.sipo.gov.ie/en/About-Us/Our-Policies/Investigation-Protocol/>
- 1.5 Having carried out an investigation under section 23 of the Ethics Acts to determine whether there has been a contravention of the Ethics Acts or of Part 15 of the Local Government Act, the Commission, pursuant to section 24 of the Ethics Acts and section 180 of the Local Government Act, is required to prepare a report and to furnish a copy of the report to:

- the person the subject of the investigation,
- the person who made the complaint (if section 22 or section 4 of the Ethics Acts apply),
- where a report relates to a member of a local authority, to the Cathaoirleach and Chief Executive of the local authority, and
- the Minister for Public Expenditure and Reform.

1.6 In addition, section 24(2) of the Ethics Acts provides that, where the Commission is of the opinion that a person the subject of an investigation may have committed an offence relating to the performance of his or her functions, it shall prepare a report in writing in relation to the matter and furnish it to the Director of Public Prosecutions.

1.7 This report, under section 24 of the Ethics Acts, sets out the findings of the Commission together with its determinations in relation to:

- (a) whether there has been a contravention of Part 15 of the Local Government Act,
- (b) where no contravention of Part 15 has been found, whether the Commission is of the opinion that the complaint made was frivolous or vexatious or that there were no reasonable grounds for it, and
- (c) where a contravention of Part 15 has been found,
 - (i) if the determination is that the act is continuing, the steps required to be taken to secure compliance, and the period of time within which such steps should be taken,
 - (ii) whether the contravention was committed inadvertently, negligently, recklessly or intentionally,
 - (iii) whether the contravention was, in all the circumstances, a serious or a minor matter, and
 - (iv) whether the person being investigated acted in good faith and in the belief that his or her action was in accordance with guidelines published or advice given in writing by the Commission under section 25 of the Ethics Acts.

1.8 In making its determinations, the Commission must apply an appropriate standard of proof. Submissions on this matter were made by two of the parties to the investigation and the Commission's determination on this matter is dealt with at section 4.1 of this report.

2. Background to the Investigation

- 2.1 The Commission received a complaint dated 24 September 2015, from the then, Cathaoirleach of Mayo County Council, Councillor Michael Holmes, which enclosed three reports prepared by Ms Martina Walsh, Ethics Registrar for Mayo County Council, pursuant to section 174 of the Local Government Act¹. The reports concerned Councillor Frank Durcan, Councillor Cyril Burke and Mr Peter Hynes, Chief Executive of the Council. The Commission was also provided with associated memory sticks/audio files and transcripts of same. Following the investigation hearing, further detailed at Section 3 of this report, the Commission found there was no evidence presented to support any findings against Mr Peter Hynes.
- 2.2 In her report in relation to Councillor Burke, Ms Walsh stated that, having considered all the material provided to her, she was of the view that Councillor Burke may have contravened Part 15 of the Local Government Act, by breaching several provisions of the Code of Conduct for Councillors of Local Authorities (“**Code of Conduct**”).
- 2.3 Part 15 of the Local Government Act outlines the Ethical Framework for the Local Government Service. Under Part 15, section 169 deals with the Code of Conduct for members² and employees of local authorities. Section 170 of the Local Government Act provides, among other things, that an employee or a member of a local authority shall not seek any favour for anything done, or not done, by virtue of his employment or office. Section 180 of the Local Government Act provides for the application of the Ethics Acts to a local authority.
- 2.4 The Commission considered the correspondence received from the then Cathaoirleach of Mayo County Council and appointed an Inquiry Officer on 12 April 2016 to conduct a preliminary inquiry under section 6(2) of the Ethics Acts³. The role of the Inquiry Officer is to conduct a preliminary inquiry and to prepare a report in writing of the results of said inquiry, including an opinion as to whether there is *prima facie* evidence to sustain the complaint. On receipt of the report, the Commission may then determine whether to proceed to a full investigation.
- 2.5 In March 2017, the Inquiry Officer provided a report in respect of Councillor Burke to the Commission for consideration. Having examined the provisions of the Ethics Acts and the Local Government Act and having taken account of the report of the Inquiry Officer, the Commission decided on 13 March 2017 that it was appropriate to carry out an investigation under section 23 of the Ethics Acts to determine whether Councillor Burke had contravened Part 15 of the Local Government Act in the manner set out in the Statement of Alleged Contraventions.

¹ Part 15 of the Local Government Act, 2001, including sections 169, 170 and 174, is at Appendix 1

² Code of Conduct for Councillors is at Appendix 2

³ Section 6 of the Ethics Acts is at Appendix 3

2.6 The Commission carries out its functions under the Ethics Acts in accordance with the principles of natural justice. All persons who are subject to an investigation hearing are afforded fair procedures including the right to take part and be represented, the right to have access to relevant documents, the right to call and cross examine witnesses and the right to make closing submissions.

3. Investigation Hearing of the Commission

- 3.1 The Commission, having considered the reports and circumstances of the complaint, determined that all three matters complained of should be heard together. The parties were notified accordingly.
- 3.2 The investigation hearing was conducted over seven days between 23 October 2017 and 16 February 2018.
- 3.3 Following an application made to the Commission at the commencement of the hearing, it was determined that the sittings would be in held private.
- 3.4 At the hearing, the parties involved were represented as follows:
- Mr Remy Farrell SC and Ms Kate McCormack BL (instructed by Ms Madeleine Delaney, the Commission's Legal Advisor) appeared for the Commission.
 - Mr Michael Carroll BL (instructed by Mr James Ward, Patrick J Durcan & Co Solicitors) appeared for Councillor Frank Durcan.
 - Mr Patrick Leonard SC and Ms Louise Beirne BL (instructed by Cahir O'Higgins Solicitors) appeared for Councillor Cyril Burke.
 - Mr Michael McDowell SC and Mr David Staunton BL (instructed by Mr Michael Lanigan, Poe Kiely Hogan Lanigan Solicitors) appeared for Mr Peter Hynes.
- 3.5 The following witnesses were called and examined:
- Mr Willy O'Doherty, Inquiry Officer
 - Mr John McHale, FOI Officer, Mayo County Council
 - Mr John Condon, FOI Deciding Officer, Mayo County Council
 - Ms Martina Walsh, Ethics Registrar, Mayo County Council
 - Mr Michael Holmes, former Cathaoirleach, Mayo County Council
 - Mr Damien Ryan, former Chair, Mayo County Council
 - Mr Iain Douglas, Senior Planner, Mayo County Council
 - Councillor Paul McNamara, Mayo County Council
 - Mr Paddy Mahon, former Director of Services, Mayo County Council
 - Mr Philip Ryan, Journalist, Independent Newspapers
 - Councillor Frank Durcan, Mayo County Council
 - Councillor Cyril Burke, Mayo County Council
 - Senator Paddy Burke
 - Mr Ger Deere
 - Mr Michael Maloney

3.6 On the final day of the hearing, 16 February 2018, it was agreed that all parties would provide written submissions to the Commission for consideration, which they duly did.

4. Preliminary and Legal issues

4.1 Standard of Proof

- 4.1.1 The Commission has consistently adopted the civil standard of the balance of probabilities as the standard of proof in all its investigations under the Ethics Acts.
- 4.1.2 Counsel on behalf of Councillor Burke and Councillor Durcan have challenged the reliance on the civil standard of proof and argued that the appropriate standard of proof is the criminal standard of beyond a reasonable doubt. The main thrust of the argument presented is that investigations by the Commission are regulatory in nature and more akin to a fitness to practise inquiry, where the criminal standard applies, than to a tribunal of inquiry where the civil standard is deemed appropriate.
- 4.1.3 In support of this proposition, the Commission was referred to the case of *O'Laoire v the Medical Council*⁴ (*O'Laoire*) where the High Court held that as the Medical Council had power to impose serious sanctions on a registered medical practitioner, the appropriate standard of proof was proof beyond a reasonable doubt. Counsel for Councillor Burke argued that an investigation by the Commission under the Ethics Acts is likewise a statutory investigation into a person's conduct with the possibility of sanction by the elected council members. It is further argued that any type of sanction, even admonishment, merits the application of the higher criminal standard. Counsel cites the Supreme Court decision in *Corbally v Medical Council*⁵ in recognising the significance, in terms of impact on the reputation and career, of even the lowest of sanctions being imposed.
- 4.1.4 Section 180(4) of the Local Government Act provides as follows in relation to a report prepared by the Commission pursuant to section 24 of the Ethics Acts:
- (a) Where a report.....is furnished to a local authority, it shall be considered by the elected council. The elected council shall decide on such action to be taken as may be considered appropriate in all the circumstances including, in the case of [the Chief Executive], the exercise of powers of suspension or removal pursuant to section 146.*
- 4.1.5 It is submitted that this is a very broad power and any action would represent at least admonishment in relation to a councillor. Finally, it is argued that it

⁴ Unreported 27 January 1995

⁵ [2015] IR 304

would be absurd to apply one standard to the Chief Executive upon whom a sanction of suspension or removal can be imposed, and another (lower) standard on a council member where there is no specific power to suspend or remove. Counsel for the Commission submits that the civil standard is the correct standard to apply. Counsel argues that there is a fundamental difference as between a tribunal or body engaged in a disciplinary process that has erasure or suspension as its logical end point and an investigation such as the present one where the Commission has no power of sanction of any sort. He submits that the conclusions and report of the Commission are broadly similar to the report of a Tribunal of Inquiry which operates to the civil standard.

- 4.1.6 This comparison is rejected by Counsel for Councillor Burke who argues, quoting from the Supreme Court in *Lawlor v Planning Tribunal*⁶ (*Lawlor*) that the parameters of a tribunal of inquiry are its terms of reference, the objective of which is to ascertain, as a matter of public interest, what occurred in a particular situation. This, it is argued, is in contrast to an investigation by the Commission, the parameters of which are set by the statutory scheme which empowers the Commission to conduct inquiries into the conduct of identified individuals and to make findings in respect of those individuals.

4.1.a Decision of the Commission

- 4.1.7 The Commission is not persuaded by the submission that its investigation hearings are like fitness to practise inquiries. There is no sanction provided for in the Ethics Acts and the link to a possible sanction under the provisions of the Local Government Act is a tenuous one.
- 4.1.8 The report of an investigation hearing is not evidence that can be used in a criminal trial. The Commission if it considers a criminal offence may have been committed can notify the DPP, and the matter may or may not be investigated by An Garda Síochána. Otherwise, the outcome is a report which is furnished to the parties specified in section 24(1) of the Ethics Acts and published.
- 4.1.9 Counsel for Councillor Burke places considerable emphasis on the provisions of section 180(4) of the Local Government Act which provides for the elected members of a Local Authority to take any action on foot of a report as may be considered appropriate. In the Commission's opinion, the only significance of the provision is that it requires the elected members to consider a report of the Commission. Counsel for Councillor Burke also draws attention to the power

⁶ [2010] 1 IR 170

of elected members to suspend or remove a Chief Executive. Again, the Commission does not see any particular significance in this provision as it connects to the general provision regarding the suspension and removal of a Chief Executive pursuant to section 146 of the Local Government Act. Section 146 mandates a procedure to be undertaken before any decision on suspension or removal can be taken. Accordingly, if, following consideration of a report by the Commission, the elected members were minded to take action in the form of suspension or removal of the Chief Executive, the procedures under section 146 would have to be complied with.

4.1.10 Therefore, the Commission maintains the view that its findings do not directly lead to a recommendation or the imposition of a sanction akin to the committees who sit on fitness to practise inquiries. At the same time, the Commission is mindful its findings can nonetheless have a significant impact on the reputation of an individual. For this reason the Commission ensures that fair procedures are employed to enable individuals, subject to its scrutiny, to vindicate their constitutional rights.

4.1.11 The Commission considers that it is not inconsistent with the decision of the High Court in *O’Laoire* for it to apply the civil standard in relation to its investigation hearings. It is notable that O’Flaherty J in the Supreme Court, commenting on the application of the criminal standard by the Medical Council and the High Court Judge, stated “*It seems to me that it is better that we preserve the civil standard for civil proceedings and leave the criminal standard to the area to which it is best suited*”. This view was confirmed by the Supreme Court in *Georgopoulos v Beaumont Hospital Board*⁷ (*Georgopoulos*). The Supreme Court in *Lawlor* affirmed the application of the balance of probability standard by the Tribunal. In doing so, it held that a standard of proof of beyond a reasonable doubt is not required to make a finding of misconduct.

4.1.12 Counsel for Councillor Burke argues that in the event the Commission does not apply the criminal standard then it should be flexible in how it applies the civil standard and he relies on the judicial pronouncements of the Supreme Court in *Georgopoulos* and *Lawlor*. It is submitted by Counsel for Councillor Burke that given the potential serious reputational damage which would inevitably flow from negative findings by the Commission in relation to the allegations, a high degree of probability will be required in order for the allegations to be proven.

⁷ [1998] 3 I.R. 132

- 4.1.13 The Supreme Court in *Georgopoulos* and in *Lawlor*, suggested that a sliding scale in respect of the standard of proof could apply in some circumstances – *“In principle, evidential requirements must vary depending upon the gravity of the particular allegation. This is simply to recognise, as an integral part of fair procedures, that a finding in respect of a serious matter which may involve reputational damage must be proportionate to the evidence upon which it is based. For example, a finding that a particular meeting occurred on one day rather than another may be of such little significance that a tribunal could make a finding in that respect on the bare balance of probabilities. A finding of criminal behaviour on the other hand would require a greater degree of authority and weight derived from the evidence itself”*.⁸
- 4.1.14 This could be construed as something of a departure from previous judgments which ruled out a blurring of the lines between the two standards – for example, in *Banco Ambrosiano SPA & Ors v Ansbacher & Co. Ltd. & Others*⁹, the Supreme Court held that to opt for some intermediate standard of probability between civil and criminal standards would lead to confusion and uncertainty. However, it is, in the view of the Commission, feasible and appropriate to apply the standard in the manner enunciated in *Georgopoulos* and *Lawlor* without creating a new intermediate standard. It is not a finding on the bare balance of probabilities.
- 4.1.15 Ultimately, the Commission is guided by the following dicta of O’Flaherty J in his commentary on the standard of proof in the civil proceedings in *O’Laoire* - *“The graver the allegation the greater will be the care which the tribunal or court will take to make sure that the case has been brought home against the person whose conduct is impugned”*. The Commission accepts that the degree of probability should always be proportionate to the nature and gravity of the issue being investigated. This does not mean that a formal intermediate standard of probability must be applied. In the words of Murray CJ in *Lawlor*, *“[t]he findings made must clearly be proportionate to the evidence available. Any such findings of grave wrongdoing should in principle be grounded upon cogent evidence”*.

The Commission adheres to the principles enunciated in *O’Laoire* in the application of the balance of probabilities to the evidence presented during the investigation hearing.

⁸ [2010] 1 IR 170, at paragraph 39

⁹ [1987] I.L.R.M. 669

5. Alleged Contraventions

- 5.1 The issues to be determined by the Commission were whether Councillor Cyril Burke contravened Part 15 of the Local Government Act as set out in the Statement of Alleged Contraventions issued to Councillor Burke on 8 June 2017. The alleged contraventions were as follows:

5.1.1 Alleged Contravention 1

That being a member of a local authority you contravened the provisions of Section 168 of the Local Government Act by failing to maintain proper standards of integrity, conduct and concern for the public interest in that you asked Councillor Frank Durcan to withdraw a Freedom of Information (“FOI”) request in exchange for which he was to receive favourable zoning of land he owned at Aghalusky, County Mayo.’

Particulars of Alleged Contravention

- a) On 3 September, 2014 you visited Councillor Frank Durcan and asked him to withdraw a FOI request he had made in relation to [a senior council official] in exchange for the favourable zoning of his lands at Aghalusky.
- b) At the meeting of Castlebar Municipal Council of 10 September, 2014 you raised an issue in connection with the variation of Castlebar Town and Environs Plan. This was by way of attempting to secure favourable planning for Councillor Durcan’s lands at Aghalusky.
- c) At the meeting of Castlebar Municipal Council of 9 October, 2014 you raised issues concerning the zoning of lands in the area of Castlebar. This was by way of attempting to secure favourable planning for Councillor Durcan’s lands at Aghalusky.
- d) On various dates between 3 September, 2014 and 28 October, 2014 you spoke with Councillor Durcan and assured him that you were taking steps to ensure that his lands would be favourably zoned in exchange for his withdrawal of his FOI Request in respect of a senior council official.

5.1.2 Alleged Contravention 2

That being a member of a local authority you contravened the provisions of Section 168 of the Local Government Act by failing to maintain proper standards of integrity, conduct and concern for the public interest in that you asked Councillor Frank Durcan to vote for a Fine Gael Chair of Mayo County

Council in 2015, in exchange for which he was to receive favourable zoning of land he owned at Aghalusky, County Mayo.

Particulars of Alleged Contravention

- a) On 3 September, 2014 you visited Councillor Frank Durcan and asked him to vote for a Fine Gael Chair of Mayo County Council in 2015 in exchange for the favourable zoning of his lands at Aghalusky.
- b) At the meeting of Castlebar Municipal Council of 10 September, 2014 you raised an issue in connection with the variation of Castlebar Town and Environs Plan. This was by way of attempting to secure favourable planning for Councillor Durcan's lands at Aghalusky.
- c) At the meeting of Castlebar Municipal Council of 9 October, 2014 you raised issues concerning the zoning of lands in the area of Castlebar. This was by way of attempting to secure favourable planning for Councillor Durcan's lands at Aghalusky.
- d) On 22 October, 2014 you repeated the request that Councillor Frank Durcan would vote for a Fine Gael Chair of Mayo County Council in 2015 as a condition of an agreement that he was to receive favourable planning of his lands at Aghalusky.

5.1.3 Alleged Contravention 3

That being a member of a local authority you contravened the provisions of Section 170 of the Local Government Act by seeking a favour from Councillor Frank Durcan in the form of his withdrawal of a FOI request in exchange for which he was to receive favourable zoning of land he owned at Aghalusky, County Mayo.

Particulars of Alleged Contravention

- a) The particulars set out at 1(a) – (d) above are repeated.

5.1.4 Alleged Contravention 4

That being a member of a local authority you contravened the provisions of Section 170 of the Local Government Act by seeking a favour from Councillor Frank Durcan in the form of asking Councillor Frank Durcan to vote in favour of a Fine Gael Chair of Mayo County Council in exchange for which he was to receive favourable zoning of land he owned at Aghalusky, County Mayo.

Particulars of Alleged Contravention

- a) The particulars set out at 2(a) – (d) above are repeated.

5.1.5 Alleged Contravention 5

That being a member of a local authority you contravened the provisions of Section 169(3) of the Local Government Act in that you failed to have regard to and be guided by the Code of Conduct insofar as you asked Councillor Frank Durcan to withdraw a FOI request in exchange for which he was to receive favourable zoning of land he owned at Aghalusky, County Mayo.

Particulars of Alleged Contravention

- a) The particulars set out at 1(a) – (d) and 2(a) – (d) above are repeated.
- b) The said conduct amounted to a failure to make decisions based solely on consideration of the public interest and common good (Section 2.2 of the Code of Conduct).
- c) The said conduct amounted to a failure to ensure that your conduct did not bring the integrity of your office or of local government into disrepute (Section 2.3 of the Code of Conduct).
- d) The said conduct amounted to a conflict of interest of the sort described at Section 3.6 of the Code of Conduct.
- e) The said conduct amounted to a failure to ensure that planning decisions and processes are based on relevant considerations (Section 4.1 of the Code of Conduct).

6. Factual context relevant to the Alleged Contraventions

6.1 Mayo County Council's approach to "phasing" of land zoning

- 6.1.1 In order to encourage sustainable development the Council applied a sequential approach ("phasing") in the County Local Area Plans to the zoning and release of undeveloped zoned lands.
- 6.1.2 *Phase 1 Lands* – These were lands comprising of unfinished housing estates and lands that had planning permission for two or more housing units and had not yet commenced development.
- 6.1.3 *Phase 2 Lands* – These were lands located further from the town centres than Phase 1 lands. They were lands which had been zoned residential but deemed to be excess to housing requirements. The policy was that Phase 2 lands would not be considered for development until 70% of Phase 1 lands had been fully developed or unless there was an overriding justification for development on Phase 2 lands.

6.2 The position with regard to a material contravention of a development plan.

- 6.2.1 The decision on whether to approve a planning application which involves a material contravention of the development plan is a reserved function of the Council Members. Not less than three quarters of the members of the Council must vote in favour of the material contravention for it to proceed. Material contraventions must be submitted for public consultation. Following the public consultation process the Chief Executive must prepare a report on the submissions received. The report must give the Chief Executive's response to the issues raised, taking account of the proper planning and sustainable development of the area, the local authority's obligations and any relevant Government policies or objectives.

6.3 The lands at Aghalusky, Co Mayo

- 6.3.1 Councillor Durcan owned 6.5 hectares (16.2 acres) of land at Aghalusky, Castlebar, Co Mayo. Prior to May 2008, his lands lay outside the boundary of the Castlebar Town Development Plan. The lands were regarded as rural and the accepted use was agricultural, in accordance with the Mayo County Development Plan. In May 2007 the Castlebar Electoral Area Committee resolved to amend the proposed draft development plan for Castlebar (the

Castlebar & Environs Development Plan 2008 – 2014) and to include certain parts of the townlands of Aghalusky and Liscromwell within the plan boundary. It was also proposed to designate these lands for Low Density Residential zoning. The lands proposed for rezoning included Councillor Durcan's lands at Aghalusky.

- 6.3.2 In January 2008, there was a proposal (in the context of amendments to the draft Development Plan) to change the zoning of certain lands, including Councillor Durcan's lands at Aghalusky from Low Density Residential to Residential / Commercial. The Mayo County Council Area Committee considered the proposed amendments to the Development Plan and proposed instead that these lands be zoned as "rural character". The lands at Aghalusky were zoned as "rural character" in the Development Plan adopted by the Council on 6 May 2008. Therefore, while Councillor Durcan's lands were now included within the Castlebar & Environs Development Plan boundary, they were still zoned as "rural character".
- 6.3.3 In October 2010, a pre-planning enquiry was submitted to the Council for a Nursing Home and 20 Residential Units on the land at Aghalusky owned by Councillor Durcan. In response, by letter dated 3 December 2010, the Council indicated that the development was premature having regard to the zoning objectives for the area, the lack of public services and traffic safety concerns.

6.4 The FOI Requests

- 6.4.1 On 12 August 2014, Councillor Durcan submitted two FOI requests to the Council seeking information in relation to the appointment of a senior official. Under the Freedom of Information Act 2014 a person has the right to access information held by a public body.
- 6.4.2 The Council acknowledged Councillor Durcan's FOI request on 13 August 2014 and advised that he could expect a decision in relation to his request by 10 September 2014. An internal deadline of 27 August 2014 was set within the Council by which any records in relation to the FOI request were to be provided to the FOI Officer.
- 6.4.3 On 3 September 2014, Councillor Durcan withdrew his FOI request stating he no longer required the information requested and that both files should be closed. On 30 October 2014, the Council received two new FOI requests from Councillor Durcan. Both requests were replicas of the original requests submitted by Councillor Durcan on 12 August 2014. The FOI Officer issued a decision on 19 November 2014 to grant the request and release the information sought by Councillor Durcan.

7. Evidence relating to the particulars of the Alleged Contraventions

- 7.1. **Contravention 1 - (a) On 3 September, 2014 you visited Councillor Frank Durcan and asked him to withdraw an FOI request he had made in relation to a senior council official in exchange for the favourable zoning of his lands at Aghalusky.**
- 7.2. A meeting took place between Councillor Durcan and Councillor Burke sometime in or around 3 September 2014. It was some time after the FOI requests were submitted by Councillor Durcan on 12 August 2014 and before Councillor Durcan sent the letter dated 3 September 2014 withdrawing them. It took place in Councillor Durcan's office in Castlebar. There is no record of this meeting. The fact that a meeting took place is agreed between Councillor Durcan and Councillor Burke but the events giving rise to the meeting and what was discussed at the meeting are in dispute.
- 7.3. Councillor Durcan alleges he had an "*unannounced visit*" from Councillor Burke and that he hadn't spoken to him in years. The fact of a meeting having taken place in Councillor Durcan's office is not disputed by Councillor Burke but he claims that Councillor Durcan called him and asked him to come to his office and look at maps of his land.
- 7.4. Telephone records established that there was contact between Councillor Burke and Councillor Durcan prior to the meeting in or around 3 September 2014. Councillor Burke gave evidence that there was telephone communication with Councillor Durcan in advance of the meeting on 3 September 2014 and that the calls related to Mr Durcan's land - "*They were in relation to Mr Durcan's, the zoning of this land, or his planning application*". Councillor Burke also confirms in his evidence that, prior to the meeting on 3 September 2014, he spoke to the Chief Executive of Mayo County Council, Mr Peter Hynes, in relation to his discussions with Councillor Durcan regarding Councillor Durcan's potential planning application: "*I just said 'By the way, Councillor Durcan has been on to me about his planning application and, you know, would you' – 'planning application for a nursing home' and I said 'would you consider looking at it'*".
- 7.5. Councillor Durcan alleged in his written statement and again in oral evidence that Councillor Burke called to his office unannounced and said "*I've good news for you. The County Manager is prepared to grant you planning permission for the Nursing Home on condition that you withdraw the FOI question on the senior official and that I vote for the Chair for FG in 2015*". Councillor Burke denies he said this or anything to this effect. In his written statement Councillor Burke says "*[t]he allegation that I asked Cllr Durcan to withdraw FOI's in relation to the appointment of [a senior official] is simply not borne out by any of the correspondence in this case. Indeed, I did not know the contents of any requests that had been made by way of FOI by Cllr Durcan*".

- 7.6. However, Councillor Burke later accepted in his oral evidence that when he met Councillor Durcan in his office in or around 3 September 2014 he knew that FOI's had been lodged, from his conversation with Mr Hynes; *"I asked him did Councillor Durcan have FOI's lodged"*. Mr Hynes, according to Councillor Burke, confirmed the existence of Councillor Durcan's FOI requests *"Sure hasn't he always"*. During Councillor Burke's cross examination, he states in relation to his knowledge of the content of the FOI's, *"I didn't know before 3rd September"*. He also queried the existence of any FOIs with Councillor Durcan *"I asked him had he FOIs lodged. And he said he had. And I said to him 'well, would you not consider, you know, maybe taking them out?'"*. When asked what Councillor Durcan said in response to this he says *"I think he made all sorts of allegations about people working in the council and all that kind of thing."* Under cross examination, Councillor Burke accepted that the withdrawal of the FOIs by Councillor Durcan on 3 September 2014 was on foot of what he, Councillor Burke, had said to him. *"I take it that's on foot of what you said to him? Well it must have been"*.
- 7.7. Councillor Burke confirms that at this meeting they discussed the lands at Aghalusky and the possibility of obtaining planning permission. Councillor Burke's statement reads *"[W]e had a conversation about the lands which had never been zoned 'residential' at any stage"*. In his direct evidence he describes it as *"a hypothetical conversation"*.
- 7.8. ***Contravention 1 – (b): At the meeting of Castlebar Municipal Council of 10 September, 2014 you raised an issue in connection with the variation of Castlebar Town and Environs Plan. This was by way of attempting to secure favourable planning for Councillor Durcan's lands at Aghalusky.***
- 7.9. The minutes and recording of the Castlebar Municipal Council meeting of 10 September 2014 are available to the Commission. It is a matter of record that Councillor Burke raised the issue of a possible variation to the Castlebar Town and Environs Plan in respect of land around the town that was ready serviced by water and sewerage that was zoned as "Rural Character". This was not an agenda item and was raised by Councillor Burke after the discussion on item 3 of the agenda, which was a specific planning application. It is also a matter of record that once Councillor Burke raised the issue of a possible variation to the Castlebar Town and Environs Plan, Councillor Durcan (erroneously) stood up to declare a private interest and to suggest that he should absent himself from the meeting. As a result of Councillor Burke's suggestion, it was proposed and resolved that an item be included on the Agenda for the next meeting to discuss the Castlebar Town and Environs Plan and that as part of this there would be a presentation by the Executive.
- 7.10 The former Director of Services, Paddy Mahon, gave evidence that Councillor Burke had contacted him before the meeting to indicate he was going to raise

the issue in keeping with normal protocol. He did not mention the lands at Aghalusky to Paddy Mahon. The senior planner, Iain Douglas, was not put on notice that this issue was going to be raised. He said in his evidence that “[u]sually if there is a change of policy to the development plans, I would have been made aware of any discussions”. However, he went on to say “[b]ut there were thoughts among the Executive even before that meeting that it may be necessary to change the zoning but not to the rural character zoning.” He agreed that this discussion was not specifically in relation to what Councillor Burke appeared to be proposing on 10 September 2014.

- 7.11 In his direct evidence before the Commission, Councillor Burke says the reason for his making the suggestion at the Municipal Council meeting on 10 September 2014 was because a number of people had contacted him in relation to lands around the town which were serviced by water and sewerage which had the potential to be developed if the land was re-zoned. He identified some of the developers and individuals concerned. Iain Douglas, Senior Planner, gave evidence of himself and the area planner being approached in the preceding months by different agents and applicants making “*informal preplanning inquiries about the possibility of building lands or in rural character and in Phase 2 lands as well*”.
- 7.12 Councillor Burke also agreed under cross-examination by Counsel for Mr Hynes, with the proposition put to him that the purpose of raising the motion at the meeting on 10 September 2014 was to pursue an interest he (Councillor Burke) had at the time in lands connected with Phase 1 and Phase 2 of the Castlebar Town and Environs Plan (unconnected with Councillor Durcan’s land at Aghalusky). Councillor Burke further agreed that he knew by raising the motion Councillor Durcan would think he was assisting his bid for planning permission at Aghalusky: “*I have got to suggest to you that somehow he (Councillor Durcan) believed that your motion would be of benefit to him and would concern his lands and that’s why we heard on loudspeaker his attempt at that meeting to declare an interest in your motion; isn’t that right? “That’s correct”*”. This was not put forward as explanation by him in his earlier evidence.
- 7.13 ***Contravention 1 – (c) At the meeting of Castlebar Municipal Council of 9 October, 2014 you raised issues concerning the zoning of lands in the area of Castlebar. This was by way of attempting to secure favourable planning for Councillor Durcan’s lands at Aghalusky.***
- 7.14 The minutes and recording of the meeting of 9 October 2014 are available to the Commission. It is a matter of record that at that meeting the report of Mr Alan DiLucia, which had been prepared as a result of Councillor Burke’s proposal at the last meeting, was included under item number 4 on the Agenda. According to Iain Douglas, Senior Planner, this report was prepared following a discussion between himself and the then Director of Services, Paddy Mahon after the meeting of 10 September 2014, at which the rezoning of ‘Rural

Character' lands was proposed and which Iain Douglas considered was unlikely to be successful owing to the Ministerial Direction in 2008. Mr Douglas instructed Mr DiLucia to prepare a report on the implications of releasing some Phase 2 lands but no rural character lands. Mr Douglas, in his written statement says *"[i]t was my opinion that the correct approach would be to release Phase 2 Residential Lands rather than opt for wholesale re-zoning of 'Rural Character' lands"*.

- 7.15 The audio recording of the meeting evidences Councillor Burke suggesting that Mayo County Council take action to encourage development in areas other than on Phase 1 lands. He is heard to ask if Mayo County Council could make a variation of the Development Plan to change the level of lands that must be developed in Phase 1 before the Council goes onto Phase 2. Councillor Burke also suggested that there were huge areas of Phase 2 lands that would not be developed for all sorts of reasons. He suggested that the planners be allowed to decide that any lands which were serviced by water and sewerage be opened up for development on a case-by-case basis. The response of Iain Douglas, Senior Planner, was that there was three times the amount of land zoned than needed. For any land rezoned other lands would have to be dezoned in accordance with the planning strategy. Phasing was the preferred option to dezoning and accordingly it was more appropriate to look at the option of opening up Phase 2 lands for development. The following was proposed by Councillor Burke, although the minutes state it was Councillor Al McDonnell and seconded by Councillor Kilcoyne, *"[t]hat Phase 2 residential land zoned in the Castlebar Town and Environs Plan would be opened up and that the Executive of the Council would investigate the appropriate means of achieving this"*.
- 7.16 Councillor Burke gave evidence that the proposal that was made at that meeting would in no way impact the lands at Aghalusky. During cross-examination, it was put to Councillor Burke that it was in his *"interest to create a picture for Councillor Durcan that you were effectively working on his side in this matter, isn't that right? Correct"*. It was also put to Councillor Burke during cross-examination by Counsel for Mr Hynes, that he held out to Councillor Durcan *"the prospect that his long awaited desire to have his own lands at Aghalusky rezoned would be advanced in some way if the Phase 1 and Phase 2 lands were effectively brought back into potential use for developments; is that right?"* to which Councillor Burke answered *"Yeah, you could say that. The only thing I would say is that Councillor Durcan is a councillor for 40 odd years, he knows the planning laws inside out"*.
- 7.17 ***Contravention 1 – (d) On various dates between 3 September, 2014 and 28 October, 2014 you spoke with Councillor Durcan and assured him that you were taking steps to ensure that his lands would be favourably zoned in exchange for his withdrawal of his FOI Request in respect of a senior council official.***

7.18 The following recordings of contacts between Councillor Burke and Councillor Durcan and one telephone conversation between Councillor Durcan and Mr Hynes were available to the Commission.

Item Number	Date	Details
1	Unknown	Voice message left by Councillor Durcan for Councillor Burke.
2	9 October 2014	Telephone call Councillor Burke to Councillor Durcan.
3	22 October 2014	Telephone call Councillor Durcan to Councillor Burke.
4	22 October 2014	Meeting between Councillor Durcan and Councillor Burke.
5	28 October 2014	Telephone call Councillor Durcan to Mr Hynes.
6	29 October 2014	Telephone call Councillor Durcan and Councillor Burke.
7	15/16 October 2014	Screen shots of text messages between Councillor Durcan and Councillor Burke.

7.19 In the telephone conversations on 9 October 2014 and the meeting on 22 October 2014, Councillor Burke is heard providing assurances to Councillor Durcan that he was taking steps to obtain planning permission for Councillor Durcan’s lands at Aghalusky. Councillor Burke was unaware that he was being recorded.

7.20 In the telephone conversation on 9 October 2014, Councillor Burke tells him that he had telephoned the Senior Planner, Iain Douglas about *‘the presentation’* on the town plan. He tells Councillor Durcan *“we’ll have to consider making changes to it (the town plan) and all that you know”*. In response to Councillor Durcan telling him to keep his, (Councillor Durcan’s), name out of it, Councillor Burke says, *“oh absolutely so, there’s like a bit of a game to be played here like but eh like I said that he’ll facilitate it whatever way he can and he’ll let it through and he won’t object to it or anything like that”*. (The ‘he’ being Mr Hynes). Later on Councillor Burke says it will be necessary to go through the process of re-zoning the land. When Councillor Durcan expresses concern about the time involved in such a process and queries why the Executive cannot just give him planning, Councillor Burke says *“I’ll start this process anyways today so when you come back I better have a look at that with ya.”* When asked by Councillor Durcan if he was being *‘set up by the Manager’*, Councillor Burke responds *“No, I don’t think so, no, no, no, no, no.”*

- 7.21 In text messages exchanged between Councillor Burke and Councillor Durcan on 15 and 16 October 2014, Councillor Burke suggests to Councillor Durcan that he put in the planning application in someone else's name. In his direct evidence Councillor Burke says the reason for sending this text message was *"I'd say just to respond to him. Like he had already said that he didn't want his name in it. Apart from that, I cannot say why I might have said that to him."* When Councillor Durcan suggests they forget the whole thing and that he will resubmit the questions withdrawn *"plus more"*, Councillor Burke replies *"Sure I am trying to help you achieve the end game, I will check that (the possibility of a preliminary discussion with Iain Douglas) today"*.
- 7.22 In the course of the brief telephone call on 22 October 2014, Councillor Burke tells Councillor Durcan that he has spoken with Mr Hynes that day and that *"it (the planning application) has to go in in a certain way"* which he wants to talk to Councillor Durcan about, but not over the phone. When Councillor Durcan suggests that he might put back in the questions, Councillor Burke responds *"Ah now, there's no need"*. Councillor Durcan says *"wait now"* and Councillor Burke says again *"[t]here's no need to do that. It needs to go in in a certain fashion"*.
- 7.23 At the meeting that took place shortly after on 22 October 2014, the following exchange takes place:

Councillor Burke: *"I've spoken to Hynes and I said 'Look it this thing didn't work the last day, when I tried it you weren't there but the best I could do was open up Phase 2 lands which was no good because yours isn't zoned. So I went back to him again after that and said look it this thing didn't work. Right I said there's two things, he said he can't put in the application in his own name. In fact, he said if you could put the land in to someone else's name it would be better and he said 'I'll do it' but..."*

Councillor Durcan: *He'll give....the planning permission*

Councillor Burke: *Yeah but he said you'll have to do it in this fashion and he said 'he has to stick to the agreement'.*

Councillor Durcan: *I'll stick to the agreement.*

Councillor Burke: *That's fine.*

Councillor Durcan: *I gave him the agreement. I'll stick to the agreement.*

Councillor Burke: *Yeah he said 'he can't be abusing me and all that' kind thing I said 'its fine, look it he understands that'. I said 'the man just wants to get fucking planning permission for a bit of ground and I said I just need to know how he can do it'. So I said 'it is going to have to be material contravention now'. 'Yes it is', he said. And 'you're going to probably have a bit of work to win over everyone else' (Hynes said). Well I said 'I'll handle my own crowd and I'd*

say if it is sold as pro jobs most of the others....' You have to get two thirds majority.

Councillor Durcan: *Two thirds majority, yeah.*

Councillor Burke: *So I said I think we'd achieve that like.*

Councillor Durcan: *Yeah.*

Councillor Burke: *So he said 'it has to be as far away as possible from himself'.*

Councillor Durcan: *That I have to dispose of the lands to somebody else? Or to get somebody else a buyer a prospective buyer.*

Councillor Burke: *Exactly it has to go in in his name and you stay away from hell from it."*

7.24 Later in the same meeting, when Councillor Durcan queries having to put the application in someone else's name, the following ensues:

Councillor Burke: *"Yeah. Is that difficult to do? Sure anyone can apply for planning permission. My next door neighbour can apply for planning on my field. Councillor Durcan: Yeah but I have to stand up at a council meeting and declare my interest and walk out for the material contravention. I have to stand up.*

Councillor Burke: *Yeah.*

Councillor Durcan: *And declare my interest that I own the land. This application refers to my land and I'm absenting myself. And not alone that, I have to, if I don't go to the meeting I have to write to the secretary and to the chairman, I think.*

Councillor Burke: *Yeah possibly.*

Councillor Durcan: *To say that*

Councillor Burke: *Yeah I know but that would be the easiest way through.*

Councillor Durcan: *But the bottom line is that if I don't play his game, I don't get planning permission?*

Councillor Burke: *Well, that's not the way he's putting it. He said 'look it*

Councillor Durcan: *Well its*

Councillor Burke: *No, but like I can see where he's coming from. They're wondering why is he granting it to him now, do you know what I mean?*

Councillor Durcan: *Right*

Councillor Burke: *So if it's not in your name then that question doesn't arise. That is my view, right.*

Councillor Durcan: *Right*

Councillor Burke: *So like you didn't challenge him on the issues. I'm sure Tom Kelly (Connaught Telegraph) is probably wondering that. Now if Kelly sees material contravention going in in your name*

Councillor Durcan: *Well he'll have to recommend the material contravention*

Councillor Burke: *He will yeah. That's why it would be easier for him in someone else's name."*

- 7.25 The journalist, Philip Ryan, was present in an adjoining room to Councillor Durcan's office for this meeting and also made a recording of it. Councillor Durcan admitted in his evidence that Mr Ryan had advised him on the type of questions to put to Councillor Burke to get him to incriminate himself.
- 7.26 Councillor Burke's explanation for what he is heard to say on the recordings is that this was just his "*way of discussing things with Councillor Durcan*" and that he was generally just going along with Councillor Durcan for the sake of it in these conversations.
- 7.27 Councillor Burke, under cross examination by Counsel for Mr Hynes, agreed with the suggestion that he entertained the idea of planning permission being possible at Aghalusky in order to keep Councillor Durcan on-side for Councillor Burke's own interests in progressing Phases 1 and 2 of the Castlebar and Environs Development Plan. It was suggested to him that "*it was in your interest to maintain that sense that you were a person who could do him a big favour; isn't that right?*" To which he answered, "*Yes, you could say that*". This was echoed later in the same cross-examination where it was put to Councillor Burke that he "*wanted to create in Councillor Durcan's mind the idea that you still believed that there was a prospect of him getting this planning permission with the assistance of Mr Hynes?*" to which Councillor Burke replied "*yes I led him to believe that*". Again, this is not an explanation put forward by Councillor Burke in any of his earlier evidence.
- 7.28 Evidence was also given by the Senior Planner, Iain Douglas, of a telephone conversation, other than the one on the morning of 9 October 2014 (to which Councillor Burke referred in his conversation with Councillor Durcan), when Councillor Burke asked him specifically how planning permission could be approved for Councillor Durcan's plans for his lands at Aghalusky. Mr Douglas stated that he informed Councillor Burke that the only way that planning permission could be granted for a nursing home on Councillor Durcan's lands at Aghalusky was by way of a material contravention of the Development Plan. He says that he also told him that this was unlikely to be forthcoming in view of the pre-planning advice given in 2010. Councillor Burke appears to have taken up this suggestion by suggesting a material convention in a conversation with Councillor Durcan on 22 October 2014 "*He (Hynes) will (have to recommend the material contravention). That's why it would be easier for him in someone else's name*".

- 7.29 ***Contravention 5 – (b) “The said conduct [Contravention 1 (a) – (d)] amounted to a failure to make decisions based solely on consideration of the public interest and common good (Section 2.2 of the Code of Conduct for Councillors)”.***
- 7.30 In relation to any possible consideration of the public interest and common good by Councillor Burke in the events described above, the following evidence is relevant. Councillor Burke’s claim in his written statement that he told Councillor Durcan that if he (Councillor Burke) felt it created jobs and enhanced the locality he would support it. This sentiment is not however reflected in the recordings. It is evident even from the extracts from the recordings outlined above, that the primary topic of discussion between Councillor Burke and Councillor Durcan was the means by which they could get around the planning obstacles, namely the fact that the Aghalusky lands were zoned “Rural Character” and whether re-zoning to a residential use was possible by way of straight forward rezoning or a material contravention to the Castlebar and Environs Development Plan.
- 7.31 During the investigation hearings the issue of whether a request or a suggestion that an FOI request be withdrawn was examined and whether this could be deemed to be in the public interest. The purpose of the FOI regime is to provide for greater transparency and accountability in relation to the activities of public bodies. Anyone can make an FOI request and the Freedom of Information legislation expressly prohibits an FOI decision maker from taking account of the motive of the requester.
- 7.32 It was acknowledged in evidence by Councillor Durcan himself and by officials from Mayo County Council that Councillor Durcan was a regular requester under FOI legislation. Councillor Burke agrees in his evidence that at the very least he suggested to Councillor Durcan to withdraw the FOI requests as part of an agreement or understanding that Councillor Durcan would be better behaved in and around Council meetings at Mayo County Council. Councillor Burke also acknowledges that to Councillor Durcan’s mind it is reasonable to imagine that he thought a quid pro quo agreement of the withdrawal of the FOI in exchange for favourable planning was in existence. Councillor Burke was asked by Counsel for the Commission, *“Could there have been any doubt in your mind, at that point but that Councillor Durcan certainly was under the clear impression that there was a quid pro quo in terms of him withdrawing FOI requests and getting favourable planning treatment?”* Councillor Burke answered *“He may have”*.
- 7.33 Councillor Burke agreed under cross-examination that it is not in the public interest to ask for an FOI request to be withdrawn. When asked *“Do you think it’s in the public interest, asking another Councillor to withdraw FOI’s when you don’t know what the content of them is?”* He replied *“No”*.

7.34 **Contravention 5 – (c) The said conduct [set out at Contravention 1 (a) – (d)] amounted to a failure to ensure that Councillor Burke’s conduct did not bring the integrity of his office or of local government into disrepute (Section 2.3 of the Code of Conduct for Councillors)”.**

7.35 Section 2.3 of the Code of Conduct provides as follows: *“More generally, Councillors should in all matters seek to ensure that their conduct does not bring the integrity of their office or of local government into disrepute”.* The main tenet of this requirement is to ensure that *“as holders of elected office they have a duty to keep faith with the public trust placed in them”* (Section 2.1 of the Code of Conduct).

7.36 The alleged agreement between Councillor Durcan and Councillor Burke, to the effect that Councillor Durcan would withdraw his FOI requests in exchange for favourable planning must be considered in this context. The manner in which the two councillors discuss how to go about getting a material contravention, as evidenced in the recordings, is particularly relevant. For example, during their meeting on 22 October 2014:

Councillor Burke: *“I’ve spoken to Hynes and I said “look it you know this thing didn’t work the last day when I tried it you weren’t there but the best I could do was open up phase two lands which was no good because yours isn’t zoned. So I went back to him again after that and said look it this thing didn’t work. Right I said. There’s two things, he said he can’t put an application in his own name. In fact, he said if you could put the land into someone else’s name it would be better and he said “I’ll do it” but...”*

Councillor Durcan: *“He’ll give...the planning permission”.*

Councillor Burke: *“Yeah but he said you’ll have to do it in this fashion and he said “he has to stick to our agreement”.*

Later in the same meeting:

Councillor Burke: *“Have you a developer in mind?”*

Councillor Durcan: *“Well I have to pick one now.....”*

Councillor Burke: *“And if you get planning?”*

Councillor Durcan: *“Wait now there can be no ifs or bus about this thing”*

Councillor Burke: *“Sorry when you have planning. Is the intention to build it?”*

Councillor Durcan: *“It will be my intentions to sell it or build it”.*

Councillor Burke: *To sell it or build it? The developer’s name that goes in, would he be building it?*

Councillor Durcan: *Well I don't know, I don't know. It's whatever pans out best for me"*

Councillor Burke: *I'm only thinking out loud here (laughs) – [a named councillor]*

Councillor Durcan: *Could get [a named councillor]*

Councillor Burke: *Do you see where I'm coming from?*

Councillor Durcan: *He's Fianna Fail*

Councillor Burke: *Yeah but do you see where I'm coming from?*

Councillor Durcan: *To use his name Yeah*

Councillor Burke: *"Yeah it mightn't be a bad idea. Share it.*

Councillor Durcan: *"Right. But I have to do all this or else I don't get planning permission. It's as simple as that*

Councillor Burke: *"Well...."*

Councillor Durcan: *"According to Hynes".*

Councillor Burke: *"Yeah well it's the easiest way. You have to plan these things like for them to work so if [a named councillor] was in it would nearly guarantee the Fianna Fail vote. You have to get two thirds vote."*

7.37 ***Contravention 5 - (d) The said conduct [set out at Contravention 1 (a) – (d)] amounted to a conflict of interest of the sort described at Section 3.6 of the Code of Conduct for Councillors".***

7.38 Section 3.6 of the Code of Conduct provides that private or personal interests, not necessarily involving financial matters, can pose a real potential for conflict of interest or damage to public confidence in local government. It states *"such interests could include family, close friends, or business associates, as well as those arising through a position of responsibility in a club, society or other organisation. Private or personal interests of this kind must not be allowed to conflict with public duty or improperly influence the decision making process"*.

7.39 There was no evidence tendered as to what private or personal interest, if any, that Councillor Burke might have been acting in pursuance of, and no evidence of any conflict or improper influence on his participation in the decision making process. In particular, there is no such evidence in relation to his participation in the Municipal Council meeting of 9 October 2014 and the passing of the resolution in favour of opening up Phase 2 lands in accordance with the recommendation contained in the report of Mr DiLucia.

7.40 ***Contravention 5 – (e) The said conduct [set out at Contravention 1 (a) – (d)] amounted to a failure to ensure that planning decisions and processes are based on relevant considerations (Section 4.1 of the Code of Conduct for Councillors)".***

- 7.41 Section 4.1 outlines that any planning decisions made by elected individuals of the local community must be *“in the interests of the common good and the proper planning and sustainable development of the area”*. It further states the importance of the consideration of planning matters by councillors be *“carried out in a transparent fashion; follows due process; and is based on what is relevant while ignoring what is irrelevant within the requirement of the statutory planning framework”*.
- 7.42 The recordings of the conversations between Councillor Durcan and Councillor Burke indicates an agreement being in place in order to achieve re-zoning of land, or a material contravention, in a non-transparent manner with no regard to what would be considered relevant in the statutory planning framework. This is demonstrated by the telephone conversation on 22 October 2014:

Councillor Burke: *“It has to go in in a certain way so that’s what I want to talk to you about it”*.

Councillor Durcan: *“He wants me to do what?”*

Councillor Burke: *“I don’t want to do this over the phone like I need to sit down and talk to ya”*.

In the meeting after this telephone call the following exchanges take place:

Councillor Burke: *“Well you see the first thing was I wanted to see how we’d get on with that fecking thing”*.

Councillor Durcan: *“With which fecking thing?”*

Councillor Burke: *“Proposing that wherever the water sewer was that we would be able to zone those lands”*

Councillor Durcan: *“Yeah”*

Councillor Burke: *“But the regional guidelines didn’t allow us to do that. The regional guidelines state....we would have to de-zone a load of land to zone yours...and jaysus that would go down like a lead balloon. You’d have an awful job putting that out on public display and people saying – why are you de-zoning my land and zoning Frank Durcan’s like. Sure it would be wicked.”*

Councillor Durcan: *“So its “material contravention”*.

Councillor Burke: *“So its material contravention”*.

8 Commission’s Findings and Determinations

- 8.1 In making its findings and determinations, the Commission had regard to the written statements and documentation obtained during the inquiry, the recordings of meetings and telephone conversations as proffered during the

investigation hearing, the transcript of the investigation hearing and the legal submissions of counsel on the conclusion of the investigation hearing.

- 8.2 Counsel for Councillor Burke submits that it is not safe for the Commission to rely on any of Councillor Durcan's evidence in support of the allegations against Councillor Burke.
- 8.3 The Commission is of the view that the evidence of Councillor Durcan is unreliable due to the many contradictions between his original statement and in his oral evidence. For example, in his written statement and again in his direct evidence before the Commission, he insisted that Councillor Burke had called to see him '*out of the blue*' until he was presented with telephone records evidencing the fact that he had made telephone calls to Councillor Burke before the meeting took place. It was only at this point that he accepted that his account of how the meeting came about could not be correct. Therefore, the Commission have chosen not to rely on his evidence in order to consider the alleged contraventions in respect of Councillor Burke.
- 8.4 It is also argued by Counsel for Councillor Burke that Councillor Durcan's ill will and improper motives taint the recordings made by Councillor Durcan, in a similar manner to his oral evidence. The Commission is satisfied that it is appropriate for it to consider the content of the recordings, as in doing so they have also taken into account the explanations provided by Councillor Burke in relation to the contents of the recordings in his evidence before the Commission.
- 8.5 Councillor Burke's counsel further submits that the recordings illustrate conversations where Councillor Durcan is seeking to trap Councillor Burke. The Commission has had the benefit of hearing at length the recordings, as well as having the transcripts of the recordings. Councillor Burke did not identify to the Commission any specific interactions in which Councillor Durcan dictated the conversation or led Councillor Burke to answer to questions in a particular manner. The Commission is therefore satisfied that it is fully entitled to rely on the recordings as they are, and that they represent a free-flowing conversation between two individuals, each of whom had their own motivations and objectives for the exchanges. The Commission further notes that in advance of the investigation hearing, the recordings were assessed by an independent forensic expert who found that the recordings tendered as evidence were not manipulated or altered.
- 8.6 Counsel for Councillor Burke urges the Commission to take in to account the fact that Councillor Burke chose to give evidence at the investigation hearing even though he was not obliged to, and to accept his explanation for what he is heard to say on the recordings as being his way of dealing with a very difficult individual in Councillor Durcan. The explanations provided by Councillor Burke to the Commission were unsatisfactory and lacking in clarity and consistency.

His acceptance of a new and different explanation for his actions when presented with it by Counsel for Mr Hynes under cross examination, having failed to proffer such rationale during his direct evidence and earlier cross examination, diminished his credibility further.

Alleged Contravention 1

8.7 *That being a member of a local authority you contravened the provisions of Section 168 of the Local Government Act by failing to maintain proper standards of integrity, conduct and concern for the public interest in that you asked Councillor Frank Durcan to withdraw a FOI request in exchange for which he was to receive favourable zoning of land he owned at Aghalusky, County Mayo.*

8.8 **Decision:** In relation to this alleged contravention, the Commission is satisfied, on the totality of the evidence before it that Councillor Cyril Burke contravened Section 168 of the Local Government Act, in the manner alleged in the Statement of Alleged Contravention. The Commission is satisfied, on the balance of probabilities, that the contravention was committed recklessly and that it was, in all the circumstances, a serious matter. The Commission finds the contravention is not continuing. The basis for this determination by the Commission is set out below:

The meeting with Councillor Durcan on 3 September 2014:

8.9 Councillor Burke gave oral evidence at the investigation hearing on 16 February 2018 of his knowledge of Councillor Durcan's previous efforts to obtain favourable planning treatment of his lands at Aghalusky. This included Councillor Burke's attempt in 2008 to assist him in having the lands zoned as residential by proposing same as an amendment to the "Castlebar and Environs Development Plan 2008. This was ultimately unsuccessful as the lands remained zoned as that of 'rural character'.

8.10 The Commission does not accept Councillor Durcan's allegation that Councillor Burke visited him unannounced on 3 September 2014. Despite Councillor Durcan's contention that there had been no contact with Councillor Burke for some time prior to the meeting, telephone records support the assertion that there was contact before this meeting. Therefore, in the Commission's opinion this meeting was not an 'unannounced' visit by Councillor Burke.

8.11 Irrespective of how the meeting was arranged, the Commission is satisfied that a meeting took place in or around 3 September 2014. Based on Councillor Burke's own evidence, he reviewed the planning maps with Councillor Durcan, in relation to his lands at Aghalusky. It also followed that subsequent to the meeting, Councillor Durcan withdrew his FOI requests. The Commission is

satisfied that as a result of the meeting, in or around 3 September 2014, there was an agreement between Councillor Durcan and Councillor Burke which involved the withdrawal of the FOI requests in expectation of favourable planning. It was made clear in Councillor Burke's own evidence, that although he was unaware of the content of the FOI requests, he was aware of their existence due to prior discussions with Mr Hynes and queries he put to Councillor Durcan at the meeting. The assertion by Councillor Burke that he had simply suggested to Councillor Durcan to be more amenable at Mayo County Council meetings, and as such his planning aims would be assisted, is not supported by the evidence.

Knowledge of FOIs:

- 8.12 Councillor Burke, in his written statement says *"I did not know of the contents of any requests that had been made by way of FOI by Cllr Durcan."* In his direct evidence at the investigation hearing on 12 February 2018, Councillor Burke confirms that he asked Mr Hynes *"did Councillor Durcan have any FOIs lodged?"* to which he said Mr Hynes replied *"sure hasn't he always, or 'doesn't he always have a number of them in'"*. Councillor Burke denies that he had knowledge of the content of the FOIs at the time he met with Councillor Durcan, in or around 3 September 2014. The Commission is of the view that it is of relevance in terms of his credibility that Councillor Burke, in his written statement, denies any knowledge of the content of the FOI request. Councillor Burke accepts, however, during his cross-examination that by at least 9 October 2014, he was aware of the content of the FOI request. This is borne out by the recordings of telephone conversations and meetings which discuss the parties, mentioned in the FOI request.
- 8.13 Staff from Mayo County Council gave evidence at the investigation hearing on 27 October 2017 in relation to how FOIs are dealt with administratively within the Council. John McHale, the FOI Officer in Mayo County Council, explained how someone, other than those contacted directly in the search for records, could know about an FOI. He said that a number of people could have known about the FOI's as they were opened in the post room located in the Corporate Affairs office of Mayo County Council and anywhere between 10 and 12 people would have been in the Corporate Affairs office when they were opened. He told the Commission that one of 3 or 4 people would actually open the post. This, he agreed, in addition to the number of people that would have been contacted in the search for records on the FOI's submitted by Councillor Durcan on 12 August 2014, meant that it was impossible to say how many people knew about the FOI requests. This was confirmed by John Condon, FOI Deciding Officer when he said *"a large number of people would be aware of these requests"*.

8.14 Counsel for Councillor Burke queries what motivation his client could have for participating in the alleged agreement (which he likens to a conspiracy). He argues that the content of the FOI requests was wholly innocuous and that if Mr Hynes had no reason to get involved in such a conspiracy then Councillor Burke had less of a reason. This is in contrast to the oral evidence given by the FOI Officer, John McHale, who said that he brought the FOI requests to the attention of the Chief Executive immediately because of the fact that he considered them sensitive. He said *“I would regularly inform the Chief Executive of request that he might be interested in or that might be sensitive because I would be conscious of the fact that these requests cause us to release information which might not yet be out in the open. I wouldn’t want the Chief Executive to be caught off guard at a meeting or something.”*

The Agreement:

8.15 Councillor Durcan alleges that at the meeting in or around 3 September 2014, Councillor Burke offered that he would get planning permission for his lands at Aghalusky in return for him withdrawing the FOI requests of 12 August 2014. This is denied by Councillor Burke

8.16 Councillor Burke admits that he discussed the lands at Aghalusky with Mr Hynes before this meeting with Councillor Durcan, *“I just said ‘by the way, Councillor Durcan has been on to me about his planning application and, you know, would you’ ‘planning application for a nursing home’ and I said ‘would you consider having a look at it?’”*. He says that in response Mr Hynes asked *“[h]as he a planning application lodged?”* When asked if Mr Hynes said anything else Councillor Burke said *“[h]e said, I suppose the general comment was that he said ‘[b]y the way, Councillor Durcan would want to behave himself a bit more at meetings’ and not be, I suppose, taking up council time having a go at staff and all that kind of thing, that he’d be inclined to be disruptive at the meeting.”*

8.17 His explanation as to why he asked Mr Hynes if Councillor Durcan had any FOIs in was *“[b]ecause he used FOIs to target people or different things. And I just thought, I suppose, in my own mind if I was to say to Councillor Durcan if he was to show goodwill by withdrawing an FOI, it might show him in a better light.”*

8.18 Councillor Burke accepted in his oral evidence that the outcome of the meeting with Councillor Durcan, in or around 3 September 2014, was that there was an ‘agreement’ or ‘understanding’, and that this was that Councillor Durcan was to behave himself at Mayo County Council meetings and in exchange Councillor Burke would try to help him get planning in the normal course. In direct

evidence Councillor Burke said, *“I told him that I had spoken to the manager and that he’d have a look at it. And I told him that he’d want to, I suppose, have a mind to be more civil at meetings. That was kind of the general gist of what I’d said to him. And he said he’d take that into consideration”*. This is confirmed later during his cross examination, *“I suppose my understanding, if there was an agreement, was that the manager would have a look at his planning application objectively and that Councillor Durcan, would be more civil at council meetings”*.

- 8.19 The Commission is of the view that there is little evidence to support Councillor Burke’s suggestion that the agreement related to assistance with planning in exchange for better behaviour at council meetings. Councillor Durcan’s behaviour is not the main subject of discussion in the recordings or in the text messages, it is barely mentioned. Overall, the Commission concludes that the evidence of the interactions exhibit an agreement involving the withdrawal of the FOIs. The Commission is cognisant of references such as *“if you want that off the table”* (telephone call of 9 October); *“I will submit the questions withdrawn plus more”* (text message 16 October); *“I was thinking you know putting back the questions in”* (telephone call of 22 October); and the discussion generally in the meeting of 22 October 2014.
- 8.20 In relation to the meeting on 22 October 2014, the Commission accepts that at this point in time Councillor Durcan was arranging a situation whereby Councillor Burke might incriminate himself. However, Councillor Burke does not challenge him regarding references to the FOI withdrawal or the agreement. Councillor Burke says by way of explanation in evidence that he *“often let him ramble on and say things”* and that he never checked him on it.
- 8.21 In his written statement Councillor Burke says that *“at no point was there ever any real or serious contention that Cllr Durcan would be rewarded with support for his planning permission if he withdrew FOIs”*. This sentiment is not reflected in the content of the recorded conversations or text messages.
- 8.22 The Municipal Council Meetings: The fact of what was raised by Councillor Burke at the two meetings is not disputed, but whether this was in furtherance of the alleged agreement is at issue. When asked under cross examination if what occurred in the Municipal Council meeting on 10 September and 9 October was part of him agitating on behalf of Councillor Durcan for his planning, Councillor Burke replied *“I had other people that were looking for zoning of their lands.”* When pressed *“But it related also to Councillor Durcan; isn’t that right, that’s what you’re telling him?”* He replied *“[t]hat’s what I am telling him”*. This was in reference to an extract from the recorded meeting between Councillor Burke and Councillor Durcan on 22 October 2014 when he

says *'[y]ou weren't there but the best I could do was open up Phase 2 lands which was no good because yours isn't zoned'*.

- 8.23 Councillor Burke telephoned Iain Douglas on the morning of the meeting of 9 October 2014. Mr Douglas, in his written statement, said that Councillor Burke did not ring him very often, and that he had probably spoken to him about six times in total on planning matters. He says that Councillor Burke *"sought my views on the proposal to rezone the "rural character" areas"*. In his oral evidence Iain Douglas goes on to say that during the telephone conversation, it would have been made clear that there wouldn't be any rezoning of the "Rural Character" lands. He agreed that as a result of the conversation he had formed the impression that Councillor Burke had given up on the idea of opening up rural character lands. (Mr Douglas gave evidence that he had spoken to Councillor Burke at a different time about the Aghalusky lands and that Councillor Burke had asked how a nursing home could be put on these lands.) Mr Douglas confirmed that there was no mention of the lands at Aghalusky during the telephone call of 9 October 2014.
- 8.24 It is the Commission's view that Councillor Burke's conduct and in particular the content of the recordings, falls short of the standards of integrity that would reasonably be expected for an elected member. Councillor Burke asked Councillor Durcan to withdraw an FOI request he had made and he is heard on recordings with Councillor Durcan planning ways of getting planning permission for lands zoned as 'rural character' in a less than transparent manner and without any apparent concern for the public interest or the position of trust he occupies.
- 8.25 The Commission is satisfied that Councillor Burke entered in to an agreement with Councillor Durcan to the effect that Councillor Durcan would withdraw his FOI requests and Councillor Burke would help him get planning permission. The fact that there was ultimately no evidence of involvement on the part of the Chief Executive does not mean there was no agreement, as argued by Counsel on behalf of Councillor Burke. Councillor Burke admitted at the Investigation Hearing that he misled Councillor Durcan as to the involvement of the Chief Executive.

Alleged Contravention 2

- 8.26 *That being a member of a local authority you contravened the provisions of Section 168 of the Local Government Act by failing to maintain proper standards of integrity, conduct, and concern for the public interest in that you asked Councillor Frank Durcan to vote in favour of a Fine Gael Chair of Mayo*

County Council in exchange for which he was to receive favourable zoning of land he owned at Aghalusky, Co Mayo.

- 8.27 **Decision:** Following careful consideration, the Commission found there was insufficient evidence before it to support, on the balance of probabilities, a finding of this alleged contravention. The Commission is of the opinion that there is no evidence to demonstrate that the complaint made was frivolous or vexatious or that there were no reasonable grounds for it.

Alleged Contravention 3

- 8.28 *That being a member of a local authority you contravened the provisions of Section 170 of the Local Government Act by **seeking a favour** from Councillor Frank Durcan in the form of his withdrawal of a FOI request in exchange for which he was to receive favourable zoning of land he owned at Aghalusky, County Mayo.*

- 8.29 **Decision:** In relation to this alleged contravention, the Commission is not satisfied, on the evidence before it that Councillor Burke contravened Section 170 of the Local Government Act in the manner alleged in the Statement of Alleged Contravention. However, the Commission is of the opinion that there is no evidence to demonstrate that the complaint made was frivolous or vexatious or that there were no reasonable grounds for it. The Commission has detailed below its assessment as to why a breach of contravention 3 was not found.

- 8.30 Section 170 of the Local Government Act states a member of a local authority (which includes a Councillor) *“shall not seek, exact or accept from any person, other than from the local authority concerned, any remuneration, fee, reward or **other favour** for anything done or not done by virtue of his or her employment or office, and a code of conduct under section 169 may include guidance for the purposes of this subsection”.*

- 8.31 No evidence was presented to suggest Councillor Burke sought or was in receipt of remuneration, a fee or a reward, as a result of his dealings with Councillor Frank Durcan.

- 8.32 The Commission is also of the view that there is no evidence to suggest that Councillor Burke sought a ‘favour’ from Councillor Durcan. ‘Favour’ is not defined in the Local Government Act or the Code of Conduct. The Commission had regard, however, to the general guidance provided by the Code of Conduct prepared under Section 169 of the Local Government Act. ‘Favour’ is referenced in the Code of Conduct at Section 5.1 under the heading ‘Gifts’ which explains the appropriate behaviour in relation to the acceptance of official

gifts or tokens. As a result, the Commission is of the opinion that to constitute a favour for the purposes of Section 170 of the Local Government Act there must be a personal benefit to the recipient. Section 3.9 of the Code of Conduct furthers this view in stating “*Councillors must not seek to use their official position so as to benefit improperly themselves, their professional or business interests, or others with whom they have personal, family or other ties*”. On the evidence, Councillor Burke was not a recipient of a favour as there was no apparent personal gain for him in his request to Councillor Durcan to withdraw the FOI request and no evidence was presented in relation to any personal gain that might accrue from such a withdrawal to any other person with whom Councillor Burke had a personal, family or other tie.

Alleged Contravention 4

8.33 *That being a member of a local authority you contravened the provisions of Section 170 of the Local Government Act by seeking a favour from Councillor Frank Durcan in the form of asking Councillor Frank Durcan to vote in favour of a Fine Gael Chair of Mayo County Council in exchange for which he was to receive a favourable zoning of land he owned at Aghalusky, Co Mayo.*

8.34 **Decision:** Following careful consideration, the Commission found there was insufficient evidence before it to support, on the balance of probabilities, a finding of this alleged contravention. The Commission is of the opinion that there is no evidence to demonstrate that the complaint made was frivolous or vexatious or that there were no reasonable grounds for it.

Alleged Contravention 5

8.35 *That being a member of a local authority you contravened the provisions of Section 169(3) of the Local Government Act in that you failed to have regard to and be guided by the Code of Conduct for Councillors (“Code of Conduct”) insofar as you asked Councillor Frank Durcan to withdraw a FOI request in exchange for which he was to receive favourable zoning of land he owned at Aghalusky, County Mayo.*

8.36 **Decision:** In relation to this alleged contravention, the Commission is satisfied, on the evidence before it that Councillor Burke contravened Section 169(3) of the Local Government Act, and specifically Section 2.2, Section 2.3 and Section 4.1 of the Code of Conduct for Councillors. The Commission is satisfied, on the balance of probabilities, that the contravention was committed recklessly and that it was in all the circumstances a serious matter. The contravention is not

continuing. The basis for this determination by the Commission is set out below.

- 8.37 The stated object of the Code of Conduct is: *“to set out principles and standards of conduct and integrity for councillors, to inform the public of the conduct it is entitled to expect and to uphold public confidence in local government”*. The introduction to the Code of Conduct states, *“[t]he public is entitled to expect conduct of the highest standards from all those involved in the local government service.*
- 8.38 The Commission is mindful of this underlying proviso in its consideration of the evidence in relation to Councillor’s Burke’s conduct as against the requirements of the Code of Conduct.
- i) *Section 2.2 of the Code of Conduct: The said conduct amounted to a failure to make decisions based solely on the consideration of the public interest and common good.*
- 8.39 The Commission finds that based on the evidence available to it, none of Councillor Burke’s interventions, either at the Municipal Council meetings, in relation to zoning, or in his discussions with Councillor Durcan regarding how best to obtain planning permission by way of material contravention, display consideration of the public interest or the common good. The only potential such reference is in Councillor Burke’s written statement to the Commission that he was prepared to assist Councillor Durcan due to the potential for the creation of employment.
- 8.40 It is the Commissions’ view that Councillor Burke’s alleged aim in the form of creation of local employment is not supported by the evidence. There is only a limited reference to the potential for employment creation in the recording of the 22 October 2014 meeting with Councillor Durcan. The point of the discussion was how to entice other councillors to support the material contravention in order to re-zone the lands at Aghalusky and the possibility of job creation was mentioned in this context. In one particular exchange between Councillor Burke and Councillor Durcan, Councillor Burke asserts that he stated (to Mr Hynes) *“I said ‘the man just wants to get fucking planning permission for a bit of ground and I said I just need to know how he can do it’. So I said ‘it is going to have to be material contravention now’.”* Councillor Burke later in the same exchange said *‘I’ll handle my own crowd and I’d say it is sold as pro jobs most of the others....’ You have to get two thirds majority”*.

ii) *Section 2.3 of the Code of Conduct: The said conduct amounted to a failure to ensure that your conduct did not bring the integrity of your office or of a local government into disrepute.*

- 8.41 Section 2.3 of the Code of Conduct provides that *“the general conduct and behaviour of councillors in carrying out their role is an important yardstick by which the honesty, integrity, impartiality and performance of local government is judged and public trust maintained. It is important therefore that these core values underpin all actions of councillors affecting local authority business. This is a personal responsibility and requires them to observe the highest ethical standards in the performance of their role”*.
- 8.42 Counsel for the Commission argues in his submission that the *“recordings are replete with references to sticking to an agreement and the clear implication that there would be a quid pro quo”* in relation to favourable planning treatment. Counsel for the Commission argues that the 22 October recordings *“explicitly links the fact of an agreement with the possibility of planning permission”*:
- 8.43 Counsel for Councillor Burke argues there was a *“long standing desire of Cyril Burke to assist Frank Durcan in achieving planning permission for his property”*, instead of an agreement being in place regarding favourable planning. This standpoint by Councillor Burke during his examination in chief and in his statement, is at odds with his evidence during cross-examination by Counsel for Mr Hynes. During this cross-examination Councillor Burke agreed that in fact his communications with Councillor Durcan were not to aid his quest for rezoning of Aghalusky, but to further his own aim of progressing development in the Phase 1 and Phase 2 lands of the Castlebar and Environs Development Plan 2008.
- 8.44 Counsel for Councillor Burke argues that the recordings should not be relied upon as they *“depict conversations where one party is seeking to trap the other party”*. However, the Commission is of view that the recordings are persuasive evidence given Councillor Burke was not aware he was being recorded and as such it can be seen as a frank discussion between the two councillors.
- 8.45 In particular, the Commission is of the view that Councillor Burke’s conversations with Councillor Durcan in which he strongly suggested to Councillor Durcan that he withdraw his FOI requests and/or continue to keep them withdrawn is, in the opinion of the Commission, in complete contradiction of acting in the public interest and the common good. The FOI legislation is important in ensuring transparency and upholding the confidence of the public in how public affairs are managed by public bodies.

8.46 The content of the recordings do not reflect core values set out in the Code. At the very least they tend to show partiality and, even by his own account, a certain lack of honesty on the part of Councillor Burke. The recordings, notwithstanding Councillor Burke's attempted explanations, are sufficient to bring the integrity of the office of Local Authority Member in to disrepute.

iii) Section 3.6 of the Code of Conduct, the said conduct amounted to a conflict of interest.

8.47 There was no evidence proffered during the investigation hearing that Councillor Burke had any personal or private interest in the matter complained of which conflicted with his public duty or which improperly influenced his actions in this matter.

iv) Section 4.1 of the Code of Conduct: The said conduct amounted to a failure to ensure that planning decisions and processes are based on relevant considerations.

8.48 Section 4.1 of the Code of Conduct states:

"Key decision on planning matters such as the making of development plans are vested in the elected council as representatives of the local community acting in the interests of the common good and the proper planning and sustainable development of the area. The planning system is a very open one allowing for input by all parties. It is all the more important therefore that consideration of planning matters by councillors is carried out in a transparent fashion; follows due process; and is based on what is relevant while ignoring that which is irrelevant within the requirements of the statutory planning framework. The same applies as regards input by individual councillors in relation to planning applications, decisions on which vest in the executive".

8.49 Counsel for the Commission argued in his submissions that the main concern of the recorded conversations between Councillor Durcan and Councillor Burke "is the existence and implementation of an agreement where the withdrawal of the FOI requests had been sought and procured in exchange for favourable planning treatment". Further, even if it was not Councillor Burke's sole intention to secure favourable zoning or planning for the lands at Aghalusky he was actively giving that impression to Councillor Durcan. The following extract from 22 October is illustrative:

Councillor Burke: *"Yeah well it's the easiest way. You have to plan these things like for them to work so if [a named councillor] was in it would nearly guarantee*

the Fianna Fáil vote. You have to get two thirds vote. Whether Hynes wanted to go down on bended knee and give it to you, you still have to have two thirds to get it across the line”.

Councillor Durcan: *“For material contravention”*

Councillor Burke: *“Yeah”.*

Counsel for Councillor Burke references the following exchange also in the Track 4 recording:

Councillor Durcan: *“Will Douglas be expecting that or will Hynes have told him?”*

Councillor Burke: *“I doubt it”.*

Councillor Durcan: *“What?”*

Councillor Burke: *“I doubt it.”*

Councillor Durcan: *“Well then he might tell my fellow to get lost”.*

Councillor Burke: *“I doubt it. I don’t think he will...”*

- 8.50 Counsel for Councillor Burke argues the above exchange is evidence that no agreement was in place to *“grant favourable zoning, or planning in relation to the lands at Aghalusky”*. He notes that later in the recording Councillor Burke says *“and if you get planning”*. It is submitted that this *“demonstrates that he did not consider there to have been any agreement that there would be favourable zoning, or indeed planning”*.
- 8.51 The submissions on behalf of Councillor Burke suggest that with Councillor Durcan making statement after statement in the recording, *“Councillor Burke simply assents leaving him continue”*. It is further added that the Commission should have consideration to *“Councillor Durcan’s mixture of anger, accusation, indignation, attack and the “changeling” nature of his evidence”* in order to give some insight into *“how Cyril Burke could be party to such conversations”*.
- 8.52 The Commission is not persuaded by this argument. The telephone calls and meetings between Councillor Durcan and Councillor Burke evidence engagement by Councillor Burke in trying to formulate a strategy to obtain the re-zoning and/or planning approval of the Aghalusky lands. Councillor Burke makes contact with the Senior Planner to ask him in general terms about it. It is Councillor Burke that comes up with the idea of putting the planning application in the name of a developer who is a Fianna Fáil Councillor as a way of securing support. He is also heard willingly explaining why the Chief Executive could not be seen to approve a material contravention in favour of Councillor Durcan especially when there would be some curiosity as to why Councillor Durcan had kept quiet about certain issues in the first meeting of the new Mayo County Council in September 2014.

Good Faith

- 8.53 Where the Commission has determined that there has been a contravention, section 24(2)(C)(iv) requires that the Commission also consider “*whether the person acted in good faith and in the belief that his or her action was in accordance with guidelines published or advice given in writing by.... the Commission under section 25*”.
- 8.54 As the Commission has found that Councillor Burke has contravened provisions of the Code of Conduct for Councillors, as set out in Alleged Contravention 5, the Commission is required to consider whether or not he acted in good faith.
- 8.55 Each year, councillors are required to complete and return an annual declaration of interests, including the following declarations:
- “I hereby declare that I have received a copy of and read the Code of Conduct for Councillors and further declare that I understand its meaning”,*
- and
- “I hereby undertake to have regard to and be guided by the Code of Conduct for Councillors in the exercise of my functions.”*
- 8.56 The Commission is of the view that Councillor Burke did not act in good faith when he recklessly engaged in conduct, over a sustained period of time, in contravention of various provisions of the Code of Conduct for Councillors.

Appendices

Appendix 1. Part 15 of the Local Government Act 2001

<http://www.irishstatutebook.ie/eli/2001/act/37/enacted/en/print#part15>

Appendix 2. Code of Conduct for Councillors

<https://www.housing.gov.ie/local-government/governance/standards-public-life/code-conduct-councillors>

Appendix 3 - The Ethics Acts

[The Ethics in Public Office Act, 1995](#)

[The Standards in Public Office Act, 2001](#)