



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 Frank Durcan
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 (the “**Ethics Act**”) as amended by the Standards in Public Office Act 2001 (the “**Standards Act**”), has carried out an investigation to determine whether Councillor Frank Durcan, 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 Act, has prepared the following report of the result of that investigation, copies of which, in accordance with section 24(1) of the Ethics Act, and section 180(3) of the Local Government Act, are being furnished to:

1. Councillor Frank Durcan, the subject of the investigation;
2. the Cathaoirleach of Mayo County Council, who made a complaint to the Commission pursuant to section 174 of the Local Government Act, and
3. The Minister for 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 Act, as amended by section 2 of the Standards Act, 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.

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 Mayo County 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 no evidence was presented to support any findings against Mr Peter Hynes.
- 2.2 In her report in relation to Councillor Durcan, Ms Walsh stated that, having considered all the material provided to her, she was of the view that Councillor Durcan may have contravened Part 15 of the Local Government Act, by breaching several provisions of the Code of Conduct for Members (Councillors) (“**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 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.

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

- 2.5 In March 2017, the Inquiry Officer provided a report in respect of Councillor Durcan 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 Act to determine whether Councillor Durcan had contravened Part 15 of the Local Government Act in the manner set out in the Statement of Alleged Contraventions.
- 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 held in 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 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 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 Unreported 27 January 1995

⁵ [2015] IR 304

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 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 which 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

⁶ [2010] 1 IR 170

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 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 committee 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

⁷ [1998] 3 I.R. 132

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.

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 Court 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 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”.

⁸ [2010] 1 IR 170, at paragraph 39

⁹ [1987] I.L.R.M. 669

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

4.2. Transcript of interview of Inquiry Officer

4.2.1 Counsel for Councillor Durcan submits that the transcript of the Inquiry Officer's interview with Councillor Durcan be disregarded by the Commission, as the recording was not played and the transcript was not verified. The Commission sees no need to rely on this transcript as it has sufficient evidence on which to base its findings. Therefore, the Commission has not considered the transcript of the interview as part of its deliberations.

4.3. Absence of complaint against Councillor Durcan

4.3.1 It is submitted by Counsel for Councillor Durcan that there is no "complaint" against his client and that the Cathaoirleach for Mayo County Council was simply forwarding complaints made by Councillor Durcan to the Commission. Counsel for Councillor Durcan relies on the Cathaoirleach's letter to the Commission which used the heading 'Complaints of Frank Durcan in respect of both Councillor Burke and Peter Hynes'. This argument was put forward at the outset of the investigation hearing and again in written submission.

4.3.2 The Commission rejects Councillor Durcan's submission and finds that it is the duty of the Ethics Registrar in a Local Authority to bring possible contraventions of which s/he becomes aware to the attention of the Cathaoirleach and Chief Executive. This is what the Ethics Registrar did in this instance. The emphasis by Counsel on the use of the word 'complaint' and the cross examination of the Ethics Registrar about the absence of a complaint against Councillor Durcan, is, in the Commission's view, misconceived and irrelevant. During her evidence, the Ethics Registrar confirmed that she did consider that Councillor Durcan may have contravened Part 15 of the Local Government Act as set out in her report to the Cathaoirleach of Mayo County Council. The Cathaoirleach in turn submitted the three reports onto the Commission for investigation. The fact that the word complaint is not used does not appear relevant to the Commission. It was clear it was a referral of a possible breach of Part 15 of the Local Government Act which comes within the remit of the Commission to investigate under Section 23 of the Ethics Acts.

4.4. In the alternative, that Cllr Durcan is entitled to immunity from investigation

4.4.1 Counsel for Councillor Durcan argues, that in the event that the Commission determines that there is a complaint against him, then his client, as the original complainant to the Council, is immune from investigation by the Commission. He relies on the provisions of section 5 of the Ethics Acts and the fact that he made the initial complaint to the Ethics Registrar of Mayo County Council.

Section 5 of the Ethics Acts states:

(1) Where a person (“the Complainant)-

(a) In good faith makes a complaint under this Act or the Principal Act to the Commission....., and

(b) Reasonably believes that the complaint has been made to the appropriate person and is one that falls to be investigated under the Principal Act, no cause of action shall lie against the person, and no disciplinary action shall be taken against him or her, in respect of, or of any matter arising from-

(i) The complaint,

(ii) The furnishing of information to the Commission, a Committee, a Clerk or an inquiry officer in relation to the complaint,

(iii) The performance by the Commission, a Committee, a Clerk or an inquiry officer of a function of it or his or hers under this Act or the Principal Act in relation to the complaint.

4.4.2 It is argued that Councillor Durcan’s complaint to the Ethics Registrar of Mayo County Council is captured by this section as he followed the direction of the Commission in its Statement of Intended Procedures, which expresses the view that an alleged contravention should be brought to the Ethics Registrar of the relevant Local Authority in the first instance.

4.4.3 Counsel on behalf of the Commission contends the immunity does not include immunity from investigation by the Commission. He submits that immunity granted under Section 5 of the Ethics Acts is immunity from civil and disciplinary proceedings brought as an indirect result of the making of a complaint and that it does not extend to immunity from a Commission investigation. Counsel for the Commission also argues that as an investigation gives rise to no actionable finding, result, censure, penalty or sanction it is impossible to regard it as amounting to either a cause of action or a disciplinary action. He says that the fact that Sections 5(3) and (4) of the Ethics Acts are specifically addressed to

employers underlines that the true purpose of the immunity provision is to render complainants immune from civil or disciplinary action.

4.4.4 Counsel on behalf of Councillor Durcan argues to the contrary that the immunity is very wide, extending to “*any matterarising from the complaint*”. He asserts that there is, pursuant to the provisions of section 180 of the Local Government Act, a possibility of the imposition of censure, penalty or sanction. He disputes that Section 5(4) of the Ethics Acts is specifically addressed to employers, relying on the definition in section 5(5) of the Ethics Acts “*disciplinary action*” as an act “*that is done in relation to a complainant, whether as respects the employment of the complainant or otherwise*”.

4.4.5 It is the Commission’s view that this Section 5 of the Ethics Acts does not confer immunity from investigation by the Commission in respect of Councillor Durcan. It is immunity from civil suit or disciplinary proceedings that is envisaged by the section. The Commission considers ‘cause of action’ to mean right of action or civil suit, as in the grounds entitling a plaintiff to bring a suit for a legal remedy. The type of action that most readily springs to mind in such a context would be an action for defamation. Subsections 5(3), (4) and (5) of the Ethics Acts in relation to “*disciplinary action*” are, in the view of the Commission, designed to protect the complainant against punishment or retaliation by an employer, or equivalent other, for the making of the complaint. An investigation by the Commission cannot be classified as a punishment or retaliation for the making of a complaint. It is an independent investigation mandated by statute.

5 Alleged Contraventions

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

5.2 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 agreed with Councillor Cyril Burke to withdraw a Freedom of Information (“FOI”) request in exchange for which you were to receive favourable zoning of lands you owned at Aghalusky, County Mayo.

Particulars of Alleged Contravention

- (a) On 3 September 2014 you were visited by Councillor Cyril Burke who asked you to withdraw an FOI request you had made in relation to [a senior Council official] in exchange for the favourable zoning of your lands at Aghalusky. You agreed to the request and in writing withdrew the FOI request.
- (b) On various dates between 3 September 2014 and 28 October, 2014 you spoke with Councillor Burke and sought assurance from him that he was taking steps to ensure that your lands would be favourably zoned in exchange for the withdrawal of your FOI Request in respect of [a senior Council official].
- (c) You sought and encouraged Councillor Burke to take active steps with a view to procuring favourable zoning for your lands at Aghalusky. These included Councillor Burke’s interventions at meetings of Castlebar Municipal Council of 10 September 2014 and 9 October, 2014.
- (d) You resubmitted the FOI request which had previously been withdrawn. This was done on 29 October 2014. The purpose of doing so was to put pressure on Councillor Burke and Peter Hynes for the purpose of securing favourable planning for your lands.

5.3 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 agreed with Councillor Cyril Burke to vote for a Fine Gael Chair of the Council in 2015 in exchange for which you were to receive favourable zoning of lands you owned at Aghalusky, County Mayo.

Particulars of Alleged Contravention

- (a) On 3 September 2014 you were visited by Councillor Cyril Burke who asked you to vote for a Fine Gael Chair of the Council in 2015 in exchange for the favourable zoning of your lands at Aghalusky. You agreed to the request.
- (b) On 22 October 2014 you were again asked by Councillor Burke to vote for a Fine Gael Chair of the Council in 2015 as a condition of an agreement that you were to receive favourable planning of your lands at Aghalusky. You again agreed to this.
- (c) You sought and encouraged Councillor Burke to take active steps with a view to procuring a favourable zoning for your lands at Aghalusky. These included Councillor Burke's interventions at meetings of Castlebar Municipal Council of 10 September 2014 and 9 October 2014.

5.4 Alleged Contravention 3

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 insofar as you agreed with Councillor Cyril Burke to withdraw an FOI request in exchange for which you were to receive favourable zoning of lands you owned at Aghalusky, County Mayo.

Particulars of Alleged Contravention

- (a) The particulars set out at 1(a) – (d) and 2(a) – (c) 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 an attempt to use your official position to improperly benefit yourself (Section 3.9 of the Code of Conduct)
- (f) 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 The Council's approach to "phasing" of land zoning

6.1.1 In order to encourage sustainable development Mayo County 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 of the Council 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, Castlebar, 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 Mayo County 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 Mayo County 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 Mayo County 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 Mayo County Council acknowledged Councillor Durcan's FOI requests on 13 August 2014 and advised that he could expect a decision in relation to his requests 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 requests were to be provided to the FOI Officer.

6.4.3 On 3 September 2014, Councillor Durcan withdrew his FOI requests stating he no longer required the information requested and that both files should be closed. On 30 October 2014, Mayo County 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 requests 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, Councillor Durcan was visited by Councillor Cyril Burke who asked him to withdraw FOI requests he had made in relation to [a senior Council official] in exchange for the favourable zoning of his lands at Aghalusky. Councillor Durcan agreed to the request and in writing withdrew the FOI requests”.

7.1.1 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.

7.1.2 Councillor Durcan gave evidence in his written statement and in his oral testimony that a meeting took place in his office with Councillor Burke in or around 3 September 2014. Paragraph 5 of Councillor Durcan’s written statement states “*the unannounced visit from Cllr Burke was on Wednesday 3 September 2014. It was evening time about 3 to 4pm*”. At paragraph 5 of his written statement, Councillor Durcan states that Councillor Burke called to his office 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*”. This is repeated by him in his direct evidence at the investigation hearing on 1 December 2017. Councillor Burke denies he said this or anything to this effect. In his written statement Councillor Burke states “*[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*”.

7.1.3 Councillor Burke agrees a meeting took place in Councillor Durcan’s office but was unable to confirm definitively whether or not it was on 3 September 2014. Councillor Burke disagrees with Councillor Durcan that it was an “*unannounced*” meeting.

7.1.4 Councillor Durcan says in his statement that “*Burke never came to me about anything. He made some contact with me in 2008 during the time of the Ministerial Directive on the County Development Plan, but nothing of any consequence since then*”. Councillor Burke’s oral evidence at the hearing outlined that Councillor Durcan had telephoned him on two occasions in late August 2014 and asked him to come to his office to look at maps of Aghalusky. Telephone records produced at the investigation hearing established that there was telephone contact between

Councillor Burke and Councillor Durcan leading up to 3 September 2014. Councillor Durcan accepted during cross examination that he telephoned Councillor Burke at the end of August 2014 but denied that he called him in relation to his lands at Aghalusky or that he asked Councillor Burke to call to his office to look at maps of the lands. Councillor Durcan did accept, however, that they may have looked at maps of the lands at this meeting.

7.1.5 Councillor Burke 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 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'".* He also confirmed with Mr Hynes whether Councillor Durcan had any FOIs lodged at that time; *"I asked him did Councillor Durcan have FOI's lodged"*. He said that Mr Hynes confirmed the existence of FOI requests from Councillor Durcan.

7.1.6 Councillor Burke gave evidence that when he met Councillor Durcan in or around 3 September 2014 he knew that FOIs had been lodged by Councillor Durcan and he had a discussion with him about that. His evidence was *"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?"*. Councillor Burke denies that he knew the content of the FOIs at the time of this meeting.

7.1.7 Councillor Burke confirms that they discussed Councillor Durcan's lands at Aghalusky and the possibility of obtaining planning permission at this meeting. In his written statement Councillor Burke states that at this meeting *"[W]e had a conversation about the lands which had never been zoned 'residential' at any stage"*.

7.1.8 The fact that Councillor Durcan withdrew his FOI requests (dated 12 August 2014) by letter dated 3 September 2014 is uncontested. This is proven by way of evidence from staff of Mayo County Council who confirm that a withdrawal was received.

7.2 *Contravention 1 – (b): "On various dates between 3 September 2014 and 28 October 2014 Councillor Durcan spoke with Councillor Burke and sought assurance from him that he was taking steps to ensure that his lands would be favourably zoned in exchange for the withdrawal of his Freedom of Information Request in respect of [a senior Council official]"*

7.2.1 The following recordings of contacts between Councillor Durcan and Councillor Burke 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.

7.2.2 In the telephone conversation of 9 October 2014 and the meeting of 22 October 2014 Councillor Durcan is heard seeking assurances from Councillor Burke that steps are being taken to obtain planning permission for his lands at Aghalusky. Councillor Durcan now states that all of these conversations were part of his subterfuge and that he was fishing for information in order to expose corruption. However, the following extracts from telephone conversations and text messages between Councillor Durcan and Councillor Burke are not supportive of this explanation.

7.2.3 In the telephone conversation on 9 October 2014, Councillor Durcan is heard saying *“I put all my cards, you come back to me, you asked me to do something and that you have spoken to Hynes and that eh Iain Douglas was on board and Al McDonnell, if I withdrew the questions regarding [a senior council official] and that I’ve done and I want to see things happening because I want to go to my architect next week and start him”*. Again, later in the same conversation Councillor Durcan says in response to Councillor Burke’s suggestion that they have to try to get the land re-zoned, *“ [y]ou’re talking about 6 months. I’m not going to wait that long. I cannot in my financial position. I have to move immediately and they could move on [named third party]”*.

7.2.4 A number of text messages were exchanged between Councillor Durcan and Councillor Burke on 15 and 16 October 2014. Councillor Durcan, initiating the exchange, writes on the 15 October 2014 *“Cyril, I thought that you would have been back to me after consulting with the manager that I could instruct my Architect contact Iain Douglas to have a preliminary discussion re my proposal to lodge a planning application in respect of my lands at Aghalusky. Time is pushing on and I am anxious to have an application logged as soon as humanly possible.”* On 16 October, in reply to a suggestion by Councillor Burke that the application be made in someone else’s name Councillor Durcan writes, *“on consideration we don’t have to decide whose name the PP application is applied for all I want to know is that my (sic) Architect can have a preliminary discussion with Iain Douglas on what we can get planning permission for. Is there a problem with that simple request. If there is let’s just forget the whole thing and I will submit the questions withdrawn plus more”*.

7.2.5 In the course of the brief telephone call on 22 October 2014, Councillor Durcan puts it to Councillor Burke that *“it’s now over two months ago since we started this thing”* and *“we haven’t got no further with this thing”*. Councillor Durcan suggests that he might put back in the questions *“if I haven’t something”*. A meeting took place shortly after with the following exchange:

Councillor Durcan: *Now, now taking that’s going ahead when can my architect go to meet Iain Douglas*

Councillor Burke: *Whenever you’re ready*

Councillor Durcan: *What?*

Councillor Burke: *Whenever you’re ready*

Councillor Durcan: *If I make an appointment with my architect to go to Iain Douglas next week will he be given/shown the door? Will Hynes have spoken to Iain Douglas in the meantime?*

Councillor Burke: *I’ll ring Hynes and I’ll tell him you’ve a developer that’s going to put in the application*

Councillor Durcan: *Right*

Councillor Burke: *Okay and he wants to make an appointment with Iain Douglas and he’s going to be proposing a material contravention and I’ll see what he says then in terms of.....*

Councillor Durcan: *Right when will you do that?*

7.2.6 The journalist, Philip Ryan, was present in an adjoining room for this meeting and also made a recording of it. Councillor Durcan states that Mr Ryan had advised

him on the type of questions to put to Councillor Burke so that Councillor Burke would incriminate himself.

7.3 *Contravention 1 – (c): “Councillor Durcan sought and encouraged Councillor Burke to take active steps with a view to procuring a favourable zoning for his lands at Aghalusky. These included Councillor Burke’s interventions at meetings of Castlebar Municipal Council of 10 September, 2014 and 9 October, 2014”.*

7.3.1 The recording of the Municipal Council meeting on 10 September 2014 shows Councillor Burke suggesting that a variation to the Castlebar Town And Environs Plan be considered, as there was a lot of serviced land around the town zoned as ‘rural character’. Councillor Durcan stands up when Councillor Burke starts to speak to declare that he has *“a beneficial pecuniary interest in lands in the immediate vicinity of Castlebar”* and that *“he has to declare his interests”*. He was advised by other members to sit down as the proposal was a general one, not specific to his lands. As it happens his lands were not ‘serviced’ and could not have benefited from Councillor Burke’s proposal. The outcome of Councillor Burke’s suggestion was that a presentation on the issue was to be prepared by the Executive for the next meeting.

7.3.2 Councillor Burke telephones Councillor Durcan before the meeting on 9 October 2014 and talks about the presentation and says he has spoken to Iain Douglas by telephone that morning. Councillor Burke is heard trying to reassure Councillor Durcan by explaining to him, *“I have to start the process today in re-zoning it”*. At the Municipal Council meeting on 9 October 2014, the report of the Executive, by Mr. DiLucia, made it clear that opening up serviced lands as per Councillor Burke’s suggestion at the previous meeting was not an option. The recording and minutes of the meeting show that Councillor Burke proposed that Phase 2 residential lands be opened up for development. The lands did not include the lands at Aghalusky as they were not zoned residential. Councillor Durcan was not present at that meeting.

7.3.3 As rezoning was not possible, the only option available was to submit a planning application by way of a material contravention of the Development Plan. This would have required a positive direction from the Chief Executive as well as a two thirds majority in the Council chamber. The Senior Planner, Iain Douglas, gave evidence of having spoken to Councillor Burke and confirming that this was the only route available. Nothing further appears to take place until 15 October 2014

when Councillor Durcan texts Councillor Burke to say, *“Cyril, I thought that you would have been back to me after consulting with the manager that I could instruct my Architect contact Ian Douglas to have a preliminary discussion re my proposal to lodge a planning application in respect of my lands at Aghalusky”*.

7.3.4 In a text message on 16 October 2014, Councillor Burke suggested to Councillor Durcan that the application for planning permission be submitted in someone else’s name. This discussion continues at the meeting which is recorded on 22 October 2014.

7.4 Contravention 1 – (d): “Councillor Durcan resubmitted FOI requests which had previously been withdrawn. This was done on 29 October, 2014. The purpose of doing so was to put pressure on Councillor Burke and Peter Hynes for the purpose of securing favourable planning for his lands”.

7.4.1 The fact that the FOI requests were resubmitted by Councillor Durcan on 29 October 2014 is not contested.

7.4.2 Councillor Durcan says in his written statement that having telephoned Peter Hynes on 28 October 2014 he knew there was nothing happening in relation to progressing any planning application in respect of his land. He says *“Mr Hynes’ response to me that day was quite cautious. He is very cautious by nature”*.

7.4.3 Councillor Durcan threatened to resubmit the FOI requests during the telephone conversation on 9 October 2014 and the text messages to Councillor Burke on 15 and 16 October 2014. The FOI requests were processed and records ultimately provided to Councillor Durcan by Mayo County Council on 14 November 2014.

7.5 Contravention 2 – “Councillor Durcan agreed with Councillor Cyril Burke to vote for a Fine Gael Chair of Mayo County Council in 2015 in exchange for which he was to receive favourable zoning of lands he owned at Aghalusky, County Mayo”.

7.5.1 Insufficient evidence was presented in respect of this contravention.

7.6 Contravention 3 – 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 insofar as you agreed with Councillor Cyril Burke to withdraw an FOI request in exchange for which you were to receive favourable zoning of lands you owned at Aghalusky, Co Mayo.

Contravention 3 – (a) The particulars set out at 1(a)-(d) and 2(a)-(c) above are repeated.

7.6.1 The evidence relating to contravention 3(a) is as set out under contravention 1(a) – (d) above. The Commission did not consider the particulars set out at contravention 2(a)-(c) as there was insufficient evidence presented to the Commission in respect of this contravention.

7.7 Contravention 3 – (b): “The said conduct [set out at 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)”.

7.7.1 In relation to any possible consideration of the public interest and common good by Councillor Durcan in the events described above, the following evidence is relevant. Councillor Durcan asserts in his direct evidence that in submitting the FOI requests he was acting in the common good and that later in engaging in a kind of undercover operation he was trying to expose corrupt practices in planning in Mayo County Council.

7.7.2 This is evidenced when Councillor Durcan was under cross examination and stated that he was acting for the common good in withdrawing the FOI requests as it was part of his plan to expose the actions Mr Hynes and Councillor Burke.

7.7.3 Councillor Durcan’s stated reasons for putting in the FOI requests in the first place vary from “*I don’t know what prompted me to seek the records*” in his written statement, to “*I was just searching and getting the answers to questions that nobody else would ask and none of the staff in Mayo County Council could ask*”, to “*curiosity*” as to what the response would be because he already knew the answers. Finally, it transpired in evidence that the journalist, Philip Ryan, had been in contact with Councillor Durcan in the days leading up to the requests

being submitted (early August 2014) and had sent Councillor Durcan draft FOI requests for submission.

7.7.4 Councillor Durcan gave evidence that he had never before or since withdrawn an FOI request. Similarly, the staff from Mayo County Council said the withdrawal of the request was most unusual and they could not recall it ever happening other than on this occasion in September 2014.

7.7.5 The FOI requests were eventually resubmitted by Councillor Durcan on 29 October 2014. There was an earlier version dated 12 September 2014 which Councillor Durcan is unable to explain and cites “*reasons unknown*” as to why they sat on his desk having been printed up on 12 September. As to the actual resubmission, Councillor Durcan gives the following explanation in his written statement, “*I re-submitted my FOI Request on 29 October 2014. This was following my conversation with Mr Hynes on 28 October 2014. Mr Hynes suggested that I pursue the (planning) process with Burke. There was nothing happening so I put the questions in again*”.

7.7.6 The recordings of the conversations between Councillor Durcan and Councillor Burke and the text messages do not support the contention that there was any real consideration of the public interest or the common good by Councillor Durcan. He asserts that he was fishing for information and baiting Councillor Burke but he does not point to any particular exchange that demonstrates this was his motive or modus operandi. When asked “[w]ill you point us to any part of any of those text messages where you’re fishing for information?”, he answers “[w]ell I think it’s all kind of there”. Councillor Durcan suggests resubmitting the FOI questions “*plus more*” as a sort of a threat. He says in his written statement “*I was looking for a reaction*”. Councillor Durcan denies under cross examination that the reaction he was looking for was to secure planning for his lands at Aghalusky.

7.8 Contravention 3 - (c): “*The said conduct [set out at Contravention 1(a) – (d)] amounted to a failure to ensure that Councillor Durcan’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)*”.

7.8.1 Section 2.1 of the Code provides as follows:

“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. As holders of elected office they have a duty to keep faith with the public trust placed in them. This is a personal responsibility and requires them to observe the highest ethical standards in the performance of their role.”

7.8.2 The account of the meeting of 3 September 2014 and the agreement that Councillor Durcan entered into and in particular, the content of the subsequent recordings and the text messages referenced above in relation to Contravention 1 are applicable. Other than Councillor Durcan’s explanations, also referenced above, there was no evidence presented demonstrating concern on the part of Councillor Durcan for the integrity of the office of a Local Authority Member or for the proper functioning of local government.

7.9 **Contravention 3 - (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”.*

7.9.1 The conduct of Councillor Durcan in withdrawing and resubmitting the FOI requests could, if established, represent a calculated attempt to exert pressure on the Executive of Mayo County Council in order to procure planning permission for his lands. The interactions with Councillor Burke reflect a preoccupation with the promotion of his own interests for his potential financial benefit in conflict with his duty as a public representative. His attempt to declare his interest at the Municipal Council meeting on 10 September 2014 supports this proposition. Councillor Durcan believed he was a party to a covert arrangement which involved attempting to improperly influence the decision making process in relation to planning and the said lands.

7.10 **Contravention 3 - (e):** *“The said conduct [set out at Contravention 1 (a) – (d)] amounted to an attempt to use Councillor Durcan’s official position to improperly benefit himself (Section 3.9 of the Code of Conduct for Councillors)”.*

7.10.1 The arrangement which Councillor Durcan had entered into with Councillor Burke had not been pursued to the point where he himself was involved in taking action in his official capacity as a Councillor. His entitlement to make an FOI request is the same as for any member of the public and he did not participate in any resolution or vote relevant to the impugned agreement. No evidence was presented of Councillor Durcan using his position as an elected member to improperly benefit himself within the meaning of the Code.

7.11 Contravention 3 - (f): “*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)*”.

7.11.1 The agreement as described to secure planning permission for land that was zoned as ‘rural character’ in return for the withdrawal of an FOI request, would, if established, not be consistent with the requirement on elected members under section 4.1 of the Code to act in the interests of the common good and the proper planning and sustainable development of the area.

7.11.2 In the recorded conversations Councillor Durcan appears concerned solely with his financial position, and his ability to get planning permission to improve his financial position, and to get the permission as soon as possible. Considerations such as sustainable development, transparency and due process in relation to planning matters do not feature in the discussions.

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.

Alleged Contravention 1

- 8.2 *"That being a member of a local authority Councillor Durcan 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 he agreed with Councillor Cyril Burke to withdraw a Freedom of Information request in exchange for which he was to receive favourable zoning of lands he owned at Aghalusky, County Mayo".*

- 8.3 **Decision:** In relation to this alleged contravention, the Commission is satisfied, on the evidence before it, that Councillor Durcan 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 intentionally 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.

The FOI Requests:

- 8.4 Councillor Durcan's case is that he was trying to expose corrupt planning practices in Mayo County Council by engaging in an undercover operation and baiting Councillor Burke and Mr Hynes into incriminating themselves.
- 8.5 As to his reason for submitting the FOI questions in the first place, Councillor Durcan says in his written statement *"I don't know what prompted me to seek the records on 12 August 2012"*. In his direct evidence to the Commission in relation to the submission of the FOI requests he says *"I was acting at all times in the common good and teasing out things that were not explained either at public meetings of the council"*. He went on to state that *"I have to look for the common good, look after the common good, that is the way I saw my role in politics"* and *"I*

have a track record of exposing many corrupt things and proving them beyond a shadow of a doubt”.

- 8.6 On being asked where he thought the FOI questions might lead to, Councillor Durcan said he was searching for answers for various members of staff of Mayo County Council and asking the questions they couldn't ask.
- 8.7 However, under cross examination Councillor Durcan stated that he put the requests in out of curiosity and that he knew the answers to the questions before he put them in. He stated, *“I just wanted to see what the answers would be”.*
- 8.8 Following a direction for discovery issued by the Commission in the course of the investigation hearing, it came to light that journalist, Philip Ryan, had supplied Councillor Durcan with drafts of two FOI requests by email on 9 August 2014, just 3 days before Councillor Durcan's requests were submitted. The email from Philip Ryan starts with *“Thanks again for your help this week and sending these letters into the council”.* It was also accepted by Councillor Durcan, having been presented with the relevant telephone records, that he had been in telephone contact with Philip Ryan in the week before he submitted the FOI requests. He continued to deny that he put in the FOI requests at Philip Ryan's direction or suggestion.

The first meeting with Councillor Burke:

- 8.9 In his written statement and direct evidence before the Commission, Councillor Durcan refers to the visit by Councillor Burke to his office in late August/early September as being “unannounced”. He also claimed that prior to this meeting that it had been months since he had contact with Councillor Burke for months or years even. He says in his written statement *“[t]he las time Cllr Burke spoke to me **before** he visited me in my office on Wednesday 3 September 2014 was years ago, months ago. I had no contact from him that I can recall. It could have been years ago”.* He specifically reiterates at the end of his statement *“I only called him after 3 September 2014”.* In his oral testimony he referred to the visit as hitting him *“like a bolt of lightning”.*
- 8.10 On cross examination, however, Councillor Durcan accepted that he had been in telephone contact with Councillor Burke prior to or in and around the time of the meeting, contrary to what he had said in his statement and direct evidence. Telephone records show that Councillor Burke telephoned Councillor Durcan on 27 August 2014; Councillor Durcan called Councillor Burke on 28 August 2014; Councillor Burke called Councillor Durcan on 1 September and 2 September 2014.

8.11 The date that the meeting took place is not certain. It was after 12 August 2014 and on or before 3 September 2014. It most likely took place sometime between 27 August and 3 September 2014. Neither Councillor Durcan nor Councillor Burke were in a position to identify the precise date. However, both parties agree that the lands at Aghalusky were discussed at the meeting, but Councillor Burke denies that he made the offer as alleged. Councillor Burke claims he suggested to Councillor Durcan that he withdraw the FOIs as a gesture of goodwill and that he, Councillor Durcan, also needed to improve his behaviour at council meetings if he wanted to have any hope of having a planning application receive favourable consideration.

The Agreement:

8.12 Councillor Durcan alleges that at the 3 September meeting Councillor Burke proposed to Councillor Durcan that he would obtain planning permission for his lands at Aghalusky if he withdrew the FOI requests of 12 August 2014. This is denied by Councillor Burke.

8.13 Councillor Durcan says in his written statement that *“[t]he proposal came completely out of the blue”*. In his direct evidence he says *“[t]hey were offering me planning permission for taking out an FOI. I consider that to be blackmail”*. When asked what his response was to the offer at the time Councillor Durcan said *“I gave him a – I think it was on the day, I gave him the offer that day that I wanted to see the thing how it would progress and what was going to happen. Curiosity got the best of me and I consented to withdraw the questions”*. Councillor Durcan did in fact withdraw the requests on 3 September 2014.

8.14 In his written statement Councillor Durcan says that he felt he was being *“stitched up”* from 3 September 2014 or within days of that. He says in his direct evidence, *“I was being stitched up, you know. And I decided that I better get a recorder to record any further conversations with Councillor Burke or anything else”*. Councillor Durcan says this realisation was after he received a text from Councillor Burke on 15 October 2014 suggesting he put the planning application in someone else’s name.

8.15 In explaining the content of the text messages he exchanged with Councillor Burke on 15 and 16 October 2014, he says that he was *“just drawing him out”* and *“just fishing for to see how far we would get with this thing”*.

8.16 As to whether or not Councillor Durcan was just playing along with Councillor Burke from the outset or did in fact reach a genuine agreement with him in relation to the proposal, the following appears to the Commission to be relevant:

(1) He withdrew the FOI requests by letter dated 3 September 2014 thereby, fulfilling his part of the agreement;

(2) He refers in his direct evidence on two occasions to "*when subsequent things happened*" and "*I viewed it also that subsequently the more I thought about it...*" which would indicate that he did enter into an agreement with Councillor Burke in relation to the FOI requests;

(3) Under cross examination he confirms he had had no concern, worry or thought prior to the suggestion by Councillor Burke that he put the application in someone else's name; and

(4) He insists in response to questions posed by Counsel for Councillor Burke that "*[t]here was an agreement, as I accepted, at the initial stages that if I withdrew the FOI request that the manager would grant the permission. So I deemed that to be an agreement at that particular time.*"

8.17 As to when or whether he became suspicious and felt the need to protect himself, Councillor Durcan provides different dates and reasons for deciding he was being set up and purchasing the recording equipment. When asked why he didn't get the recording device if his plan was to expose the rottenness of planning he says, "*[w]ell I didn't see any reason for doing it at the very start from once he, the preliminary approach by Councillor Burke, I didn't see any reason for recording anything at that time*".

[Submission by Counsel on behalf of Councillor Durcan:](#)

8.18 Counsel for Councillor Durcan maintains that Councillor Durcan was at all times candid in his recounting of events to the Commission and that he was a '*talented actor*' who had convincingly portrayed himself as a willing participant in the agreement with Councillor Burke when in reality he was trying to elicit evidence of corruption.

8.19 In relation to the making of the FOI requests in the first instance, Counsel for Councillor Durcan argues that Councillor Durcan was acting against a background of disquiet expressed to him by staff of Mayo County Council. There was no evidence proffered in support of this, other than Councillor Durcan's own assertion in his direct evidence which was contradicted by his earlier written statement when he said he didn't know who or what prompted him, and also by his later evidence under cross examination when he said it was out of curiosity. There was also

evidence produced that showed that he had been in contact with and discussed the submission of FOI requests with the journalist, Mr Ryan, in the days before he submitted the requests.

- 8.20 With regard to the efforts since 2008 to have his lands at Aghalusky rezoned and/or to obtain planning permission, Counsel for Councillor Durcan is adamant that Councillor Durcan did not seek favourable planning after the events of September and October 2014. The Commission does not consider this to be correct. Under cross examination before the Commission Councillor Durcan accepted that he instructed his architect to prepare an application for a housing development in late 2014 and that he approached Councillor Gerry Coyle about it in 2015 on foot of which the Councillor went to see the site. Furthermore, in April 2016 Councillor Durcan put forward a motion for consideration by Mayo County Council *“that the members agree to amend the County Development Plan to rezone to their former status of zoning all lands dezoned or rezoned under the directive of the former Minister of the Environment Mr Gormally (sic) of the Green Party”*. Although none of these attempts came to fruition they are illustrative of Councillor Durcan’s ongoing aspirations in relation to the lands and securing planning permission.
- 8.21 Counsel on behalf of Councillor Durcan submits that as a Councillor with 46 years of experience in political matters and with a thorough knowledge of planning and zoning legislation, Councillor Durcan was fully aware that what was offered by Councillor Burke was impossible to deliver and from the outset he was highly suspicious of what the real agenda might be. While that argument holds some weight at an objective level, it appears, from the evidence before the Commission, that Councillor Durcan did not accept this. This is demonstrated by his various efforts to obtain planning since 2008 (including the incurring of considerable expenses), and his belief that the lands at Aghalusky were suitable for development and his belief that it was only antipathy towards him in Mayo County Council that was preventing lands owned by him obtaining planning permission. Councillor Durcan confirms in his oral evidence his conviction that senior politicians in the country could get planning for him if they wanted to and that the Chief Executive could have got planning for him if he wanted to. This is a repetition of a belief clearly expressed in the recording of the telephone conversation of 9 October 2014 with Councillor Burke when Councillor Durcan says *“planning isn’t a matter for councillors, it’s a matter for the Executive and the Manager can grant planning permission for anything he likes”*.

8.22 Despite Councillor Durcan being equivocal and unconvincing in his oral evidence before the Commission as to whether planning permission would have been of financial benefit to him, the Commission believes that the value of the land would have increased substantially if it had been rezoned and/or planning permission for a mixed or housing development granted. Councillor Durcan admits as much himself in his written statement when he explains *“I had a good motive to take the planning permission. I could have repaid the bank the loan I took out for the 3 commercial premises I bought for my children. The value of the land, at Aghalusky, without planning permission was €40,000. In 2007 with planning permission, it was worth about €6.8 million. I had borrowed €2.5 million against the lands in Aghalusky. In 2014, with planning permission, it was worth about €1.5 million.”* When questioned whether he thought his participation in the purported agreement would be unethical, he made a distinction between ‘lining the pocket’ of his bank as opposed to lining his own pocket.

8.23 The Commission is not persuaded by the submissions of Counsel for Councillor Durcan or by Councillor Durcan’s own explanations in relation to the agreement and the recorded exchanges between himself and Councillor Burke. Councillor Durcan’s evidence was inconsistent and contradictory even between his written statement and oral testimony. Whilst making allowances for the passage of time, the Commission was unconvinced by Councillor Durcan’s evidence, which it found to be unreliable. The Commission rejects the evidence of Councillor Durcan and references the following three instances as examples of where Councillor Durcan’s direct evidence was clearly refuted:

1. In relation to communication with the journalist, Philip Ryan, regarding the FOI requests before they were made, having said in his written statement and direct evidence that he discussed the requests with no one;
2. He denied that he had raised the issue of planning at Aghalusky with Ger Deere and this was later contradicted in evidence given by Mr Deere and accepted by the Commission; and
3. He denied asking Senator Paddy Burke to ask the then Minister for the Environment, Community and Local Government, Phil Hogan, to direct the County Manager to provide him with planning permission. Senator Burke gave robust evidence to the contrary which is accepted by the Commission.

8.24 Overall, the Commission is satisfied that Councillor Durcan entered into the agreement to withdraw his 12 August 2014 FOI requests in the expectation that in

return he would obtain favourable planning treatment for his lands at Aghalulsky. His conduct in entering the agreement and seeking to further the agreement as evidenced in the recordings and text messages was directed wholly towards his own benefit and represented a failure by him to maintain proper standards of integrity, conduct and concern for the public interest as required by section 168 of the Local Government Act.

Alleged Contravention 2

8.25 *“That being a member of a local authority Councillor Durcan 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 he agreed with Councillor Cyril Burke to vote for a Fine Gael Chair of Mayo County Council in 2015 in exchange for which he was to receive favourable zoning of lands he owned at Aghalusk, County Mayo”.*

8.26 **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

8.27 *“That being a member of a local authority Councillor Durcan 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 insofar as he agreed with Councillor Cyril Burke to withdraw an FOI request in exchange for which he was to receive favourable zoning of lands he owned at Aghalusk, County Mayo”.*

8.28 **Decision:** In relation to this alleged contravention, the Commission is satisfied, on the evidence before it, that Councillor Durcan contravened Section 169(3) of the Local Government Act in the manner alleged in the Statement of Alleged Contraventions. The Commission is satisfied, on the balance of probabilities, that the contravention was intentional 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.

8.29 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. The introduction goes on to explain that “the core principles underlying democratic local government are based on councillors acting in good faith and with fairness and impartiality for the common good and to promote the public interest”*. Importantly, in order to *“uphold public confidence”*. Councillors must be *“seen to act solely in the public interest and within the law”*.

8.30 The Commission is cognisant of the purpose of the Code of Conduct in its consideration of the evidence in relation to Councillor Durcan’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.

8.31 Counsel for Councillor Durcan submits that his actions, being directed at exposing corruption, were based solely on consideration of the public interest and common good. For the reasons set out above the Commission has found that Councillor Durcan was acting for his own benefit and it does not accept his evidence that he was acting at all times to expose corruption in the public interest. In the course of his evidence before the Commission Councillor Durcan gave various different accounts, as evidence below, as to when he started his alleged ‘sting’ operation:

- 1) He suggests in direct evidence that it was at the very outset;
- 2) Under cross examination he says it was shortly after the 3 September meeting; and
- 3) At another stage he says it was when Councillor Burke suggested he put the planning application in someone else’s name. None of his testimony displaced the clear inference from the recordings and text messages that Councillor Durcan was someone who was acting without consideration of the public interest or of the common good.

- 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.*

Section 2.1 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.”

8.32 These core values are further emphasised at Section 2.3 of the Code of Conduct provides that *“councillors should in all matters seek to ensure that their conduct does not bring the integrity of their office or local government into disrepute”*.

8.33 It is argued by Counsel for Councillor Durcan that Councillor Durcan was a convincing actor whose actions, being directed at exposing corruption, were intended to prevent the integrity of his office and of local government being brought into disrepute. The Commission could not discern any element of acting on the part of Councillor Durcan in the recordings or the text messages. The Commission does not accept that Councillor Durcan’s actions were directed at exposing corruption. The Commission considers the conduct displayed by Councillor Durcan to be such as to bring the integrity of his office and that of local government in to disrepute. Although, the Commission is not of the view that Councillor Durcan was engaged in an undercover operation, it is similarly concerned that Councillor Durcan would view this as a method to uncover alleged corruption and that this in itself damages the integrity of his office.

- iii. *Section 3.6 of the Code of Conduct. 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”*

Section 3.6 of the Code states:

“The law as mentioned above sets out a framework for disclosure of what are termed ‘pecuniary or other beneficial interests’. However there may be other private or personal interests (not necessarily involving financial matters) which can

also pose a real potential for conflict of interest or damage to public confidence in local government. Such interest 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. Where such interests, of which a councillor is aware, arise in relation to a matter which comes before a meeting for consideration they should be dealt with in a transparent fashion. This is necessary so that public trust and confidence in local government is upheld – disclosure of such an interest is invariably appropriate except where it is of a remote or insignificant nature; if in doubt disclosure should be made. The public perception of the way a councillor is seen to deal with such matters is important for the maintenance of trust in local government.”

- 8.34 Counsel for Councillor Durcan asserts that his client’s actions, being directed at exposing corruption, and being open to scrutiny by an investigative journalist did not amount to a conflict of interest as described in section 3.6 of the Code of Conduct.
- 8.35 In addition to rejecting Councillor Durcan’s claim that he was at all times running an undercover operation to expose corruption, the Commission is not convinced by his Counsel’s argument that Councillor Durcan had made his arrangement with Councillor Burke, including his alleged covert operation, known to Philip Ryan from an early stage. The evidence indicates that having discussed the making of the FOI requests with Philip Ryan in early August 2014, he then took advantage of Councillor Burke’s offer and withdrew the requests in order to attain the benefit of the planning permission. It is the Commission’s view that it is only when he became suspicious and started to doubt that the planning permission would be forthcoming that he subsequently confided in Philip Ryan.
- 8.36 Councillor Durcan was silent in relation to Philip Ryan’s involvement until it was raised as a preliminary issue at the commencement of the Investigation Hearing. The Commission finds that Councillor Durcan’s conduct represented the pursuit by him of a private or personal interest, that to attain planning permission for his lands at Aghalusky, which conflicted with his duty as a public representative. This is also confirmed by conversations with Councillor Burke in which he agreed it would be better if he kept his name off the planning application to avoid questions being asked.

- iv. *Section 3.9 of the Code of Conduct. The said conduct amounted to an attempt to use Councillor Durcan's official position to improperly benefit himself:*

8.37 It is argued by Counsel for Councillor Durcan that his client's actions, being directed at exposing corruption and being open to scrutiny by an investigative journalist was not an attempt to use his official position to improperly benefit himself in breach of section 3.9 of the Code.

8.38 While the Commission is satisfied that Councillor Durcan's conduct represented an attempt by him to attain a personal benefit and that the said conduct was improper and tended to bring his office in to disrepute, there is no evidence of Councillor Durcan using his official position, as an elected member participating in exercise of a reserved Council function, to further the arrangement with Councillor Burke.

- v. *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*

Section 4.1 of the Code states:

"Key decisions 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."

- vii. The next section, 4.2, goes on to provide:

"[E]xtra care must therefore be observed in dealing with planning matters and in this context the provisions of this Code particularly as regards conflict of personal and public interest (see Section 3) are very relevant."

- 8.39 Counsel for Councillor Durcan argues that his client's actions, being directed at exposing corruption and being open to scrutiny by an investigative journalist was not a failure to ensure that planning decision and processes are based on relevant considerations but on the contrary was directed at ensuring that planning decisions and processes are solely based on relevant considerations.
- 8.40 The Commission having already held that there was no evidence presented to it, in particular in relation to the period before 22 October 2014, to support the claim by Councillor Durcan that this was a genuine undercover operation, is satisfied that Councillor Durcan acted in breach of section 4.1 of the Code. Far from being transparent, the arrangement he entered into with Councillor Burke was a covert one. From the point of view of proper planning and sustainable development, it was not demonstrated how the proposal to rezone/develop his land would contribute to the sustainable development of the area. Councillor Durcan's attempt to secure planning at all costs for his lands at Aghalusky was in direct contradiction to the response by the Executive in December 2010 to a pre-planning enquiry in relation to the site and indeed all subsequent approaches on behalf of Councillor Durcan. The only consideration that appeared to be relevant to Councillor Durcan was his financial circumstances and that planning permission would improve the value of his lands.

Good Faith

- 8.41 Where the Commission has determined that there has been a contravention, section 24(2)(c)(iv) of the Ethics Acts 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*".
- 8.42 As the Commission has found that Councillor Durcan has contravened provisions of the Code of Conduct for Councillors, as set out in Alleged Contravention 3, the Commission is required to consider whether or not he acted in good faith.
- 8.43 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.”

8.44 The Commission is of the view that Councillor Durcan 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](#)