



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

Mr Peter Hynes
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 Acts**”), has carried out an investigation to determine whether Mr Peter Hynes, Chief Executive of 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 of 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. Mr Peter Hynes, the subject of the investigation;
2. The Cathaoirleach, 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 Mayo County Council. The Commission was also provided with associated memory sticks/audio files and transcripts of same.
- 2.2 In her report in relation to Mr Hynes, Ms Walsh stated that, having considered all the material provided to her, she was of the view that Mr Hynes may have contravened Part 15 of the Local Government Act, by breaching several provisions of the Code of Conduct for Employees 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 members and employees of local authorities². 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 Mr Hynes 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

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

² Code of Conduct for Employees is at Appendix 2

³ Section 6 of the Ethics Acts is at Appendix 3

whether Mr Hynes 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 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 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.

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

⁶ [2010] 1 IR 170

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 imposition of a sanction akin to 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

⁷ [1998] 3 I.R. 132

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 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”.

4.1.16 The Commission adheres to the principles enunciated in *O’Laoire* in the application of its 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

4.2 Publication of Report

4.2.1 Counsel for Mr Hynes, in his written submission, argues against the publication of the investigation report. He relies on the following arguments:

- The Commission is not required to publish or circulate the report, other than to circulate it to the parties specified in the legislation;
- The ruling by the Commission, that the investigation hearing be conducted in private should also apply to the fullest extent possible with respect to the report;
- In the same way that it would have been impractical to hold the hearing part in private and part in public it equally applies to the nature and the content of the report in the context of redaction;
- The rationale that gave rise to the ruling to hold the hearing in private, i.e. the protection of innocent third parties, applies in the same way to the report;
- Even the most cursory of details in a published report will undermine the protection of these third parties;
- The damage caused to Mr Hynes by the very fact of the investigation will be exacerbated by the publication of the report; and
- Any advice and guidance arising from the investigation can be published as appropriate, pursuant to section 25 of the Ethics Acts, without the publication of a report *in toto*.

4.2.2 It is correct that the Ethics Acts do not stipulate that an investigation report be made public. It has however been the practice of the Commission to publish reports prepared under section 24 of the Ethics Acts as it considers it to be in the public interest to do so. Public trust in Local Authority members and employees is at the heart of this investigation where breaches of the Codes of Conduct and the provisions of Part 15 of the Local Government Act are alleged. Public trust will not be enhanced by keeping the investigation findings private. The public interest necessitates the publication of an investigation report, unless to do so would significantly undermine the rights of other private individuals.

4.2.3 It is also the practice of the Commission to hold investigation hearings in public and this was the first occasion in which a hearing was held in private. As Counsel for Mr Hynes points out, in acceding to the application to have the hearing held in private, the Chairman of the Commission noted that different considerations would apply to the report and its publication.

4.2.4 The Commission believes that the ruling in relation to holding the hearing in private can be applied to the greatest extent possible to the report by implementing the following measures:

- A separate report will be prepared in respect of each of the three individuals the subject of the investigation hearing;
- The detail contained in each of the reports will be confined to that which is considered relevant and necessary for the fair representation of and determination of the matter;
- The appendices to the report will be similarly limited; and
- Each of the parties will be reminded, again, of the obligation of confidentiality under section 35 of the Ethics Acts and the consequences of breaching same.

4.2.5 The Commission considers these measures to be sufficient to protect the rights of third parties and prevent against the possible harms identified to the Commission at the outset of the investigation hearing. This being so, the balance lies in favour of publication of the individual reports, including in relation to Mr Hynes.

5. Alleged Contraventions

5.1 The issues to be determined by the Commission were whether Mr Peter Hynes had contravened Part 15 of the Local Government Act, as set out in the Statement of Alleged Contraventions issued to Mr Hynes on 8 June 2017. The alleged contraventions were as follows.

5.1.1 *Alleged Contravention 1*

That being an employee of a local authority Mr Hynes 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 arranged for Councillor Cyril Burke to ask 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, Co Mayo.

Particulars of Alleged Contravention

- a) On 3 September 2014, Councillor Burke visited Councillor Frank Durcan and asked him to withdraw a FOI request he made in relation to a [senior council official] in exchange for the favourable zoning of his lands at Aghalusky. This meeting was done at Mr Hynes’s instigation.
- b) On various dates thereafter between 3 September 2014 and 19 October 2014, Mr Hynes spoke with Councillor Burke for the purpose of pursuing the agreement with Councillor Durcan to the effect that the latter’s lands would be favourably zoned in exchange for his withdrawal of his FOI request in respect of a [senior council official].
- c) Mr Hynes sought to conceal his communication with Councillor Burke in that he failed to provide details of same to a FOI request submitted by Philip Ryan dated 3 November 2014.

5.1.2 *Alleged Contravention 2*

That being an employee of a local authority Mr Hynes 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, Co Mayo.

Particulars of Alleged Contravention

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

5.1.3 *Alleged Contravention 3*

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

Particulars of Alleged Contravention

- a) The said particulars set out at 1(a) – (c) above are repeated.
- b) The said conduct amounted to a failure to act in a way that enhances public trust and confidence (Section 2.2 of the Code of Conduct).
- c) The said conduct amounted to a failure to act in a way that did not bring the integrity of Mr Hynes' position or of local government into disrepute (Section 2.2 of the Code of Conduct).
- d) The said conduct amounted to a failure to ensure that Mr Hynes' conduct did not bring the integrity of his office or of local government into disrepute (Section 2.3 of the Code of Conduct).
- e) The said conduct amounted to a conflict of interest of the sort described at Section 3.4 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 Mayo County 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.

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, 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 Lischromwell 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, Mayo County 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 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 Mayo County 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, 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 request and release the information sought by Councillor Durcan.

7. Commission's Findings and Determinations

- 7.1 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.
- 7.2 Counsel for Mr Hynes submitted at the end of the investigation hearing that *"there is absolutely no evidence of any kind whatsoever in respect of the three charges against my client"*. Counsel for the Commission in written submissions agreed with this standpoint noting that *"it would appear that there is now no direct evidence of Mr Hynes' involvement in any agreement"* (that being an agreement in relation to the subject matter of alleged contraventions 1 to 3.)
- 7.3 Following careful consideration of the complaint and also the relevant materials before it, the Commission agrees that no evidence was presented at the investigation hearing to sustain the allegations against Mr Hynes. Accordingly, the Commission makes no finding against Mr Hynes in respect of the alleged contraventions 1 to 3.
- 7.4 Counsel for Mr Hynes further submitted that in the event that there was no finding against his client then the Commission should proceed to make a determination under section 24(3)(b) of the Ethics Acts that the complaint against him was *'frivolous or vexatious or that there were no reasonable grounds for it.*
- 7.5 Section 24(3) of the Ethics Acts sets out the matters in respect of which the Commission must make a determination in addition to its findings in relation to the alleged contraventions. Specifically, section 24(3)(b) of the Ethics Acts state that in the case of a determination that there has not been a contravention, *"whether the Commission is of opinion that the complaint was frivolous or vexatious or that there were no reasonable grounds for it."*
- 7.6 The complaint against Mr Hynes was received from the Cathaoirleach of Mayo County Council acting on foot of a report, prepared under section 174(7) of the Local Government Act, by the Ethics Registrar. The Ethics Registrar had initially received a complaint from Councillor Frank Durcan. The Commission has determined that the complaint, the subject of the investigation hearing, was the complaint of the Cathaoirleach on behalf of Mayo County Council, and not that of Councillor Durcan.

- 7.7 Traditionally the Courts have shied away from providing a complete definition of what is meant by frivolous or vexatious. While the terms are sometimes used interchangeably they can also be considered in their own right and on their own merits.
- 7.8 In the Supreme Court judgment of *Farley v Ireland and others*¹⁰, Barron J. explained the legal definition of frivolous and vexatious, as opposed to any pejorative meaning they might have. He said “[i]t is merely a question of saying that so far as the plaintiff is concerned, if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious”.
- 7.9 In *Nowak v Data Protection Commissioner*¹¹ (*Nowak*) the High Court reaffirmed the notion that the term “frivolous or vexatious” does not carry any pejorative connotations. Instead the term “frivolous” refers to a situation where a complaint can be described as “*futile, misconceived or hopeless in the sense that it was incapable of achieving the desired outcome*”.
- 7.10 In *Kelly v The Information Commissioner*¹² (*Kelly*) the High Court, in referring to *Nowak*, held that “*where a person engages in a pattern which not only comes with the descriptions as outlined in Nowak but can be said to be actuated by ill-will or bad faith, such conduct may be described as vexatious...*”
- 7.11 In *Fox v McDonald and Ors*¹³, the Court of Appeal held that “frivolous” or “vexatious” proceedings are proceedings that are clearly destined to cause irrevocable harm to a defendant.
- 7.12 In terms of motive, in *Kelly*, the High Court held that there is no obligation to prove the applicant’s state of mind in determining whether a complaint can be classified as “vexatious”. Instead inferences may be drawn on a common sense basis from a pattern of conduct.
- 7.13 Likewise in the Scottish case of *Mazur v Scottish Legal Complaints Commission*¹⁴ the Inner House held that when considering whether a complaint is vexatious, it is

¹⁰ [2000] 10 I.C.L.M.D. 12

¹¹ [2012] IEHC 449

¹² [2014] IEHC 479

¹³ [2017] IECA 189

¹⁴ [2018] CSIH 45

not always necessary to consider the motive of the person making the complaint. Instead, the Court held that the test of a vexatious claim is an objective one which can be satisfied by an assessment of all the facts and circumstances. It is not necessary to establish the subject motive of the instigator of the claim, although in some cases, such motive may emerge from the evidence about the circumstances.

7.14 However, it should be noted that in *Grange v The Information Commissioner and Anor*¹⁵, the High Court held that an abuse of the FOI process to prosecute a personal grievance can legitimately be classified as vexatious in accordance with *Nowak*.

7.15 The letter and report comprising the complaint against Mr Hynes were, in the view of the Commission, substantive and considered documents. They were neither hopeless nor futile, nor actuated by ill-will or bad faith on the part of Mayo County Council. It was sufficient to warrant a preliminary inquiry under the Ethics Acts and, thereafter, an investigation. Accordingly, the Commission does not find that the complaint against Mr Hynes was either frivolous or vexatious.

¹⁵ [2018] IEHC 108

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 Local Authority Employees

<https://www.housing.gov.ie/local-government/administration/code-conduct/code-conduct-employees-jan-2007>

Appendix 3 - The Ethics Acts

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

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