



# Commissioner for Ethical Standards in Public Life in Scotland

## REPORT

**Complaint number NPA/LLT/1781  
concerning an alleged contravention of  
the Code of Conduct for Board Members of Loch Lomond and the  
Trossachs National Park Authority**

**by**

**Owen McKee, Linda McKay, Lindsay Morrison, David McKenzie, David  
Warnock, Willie Nisbet, David McCowan, Colin Bayes, Petra Biberbach,  
Angus Allan, Councillor Fergus Wood, Councillor Marin Earl, Councillor  
James Robb, Councillor George Freeman,  
Councillor Hazel Sorrell and Councillor Bob Ellis**

**of**

**Loch Lomond and the Trossachs National Park Authority**

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## 1.0 Introduction

- 1.1 Complaint number NPA/LLT/1781 alleges a contravention of the Loch Lomond and the Trossachs National Park Code of Conduct ("the Code").
- 1.2 The complaint has been lodged by Mr Nick Kempe ("the complainant") who alleges a contravention of the Code by Mr Owen McKee ("the first respondent"), Ms Linda McKay ("the second respondent"), Mr Lindsay Morrison ("the third respondent"), Mr David McKenzie ("the fourth respondent"), Mr David Warnock ("the fifth respondent"), Mr Willie Nisbet ("the sixth respondent"), Mr David McCowan ("the seventh respondent"), Mr Colin Bayes ("the eighth respondent"), Ms Petra Biberbach ("the ninth respondent"), Mr Angus Allan ("the tenth respondent"), Councillor Fergus Wood ("the eleventh respondent"), Councillor Martin Earl ("the twelfth respondent"), Councillor James Robb ("the thirteenth respondent"), Councillor George Freeman ("the fourteenth respondent"), Councillor Hazel Sorrell ("the fifteenth respondent") and Councillor Bob Ellis ("the sixteenth respondent"). The respondents are, variously, elected and appointed members of the Loch Lomond and the Trossachs National Park Authority ("the Authority").
- 1.3 It is alleged that the respondents have contravened the Authority's Code of Conduct and, in particular, section 2 key principles, section 4 Register of Interests, section 5 Declaration of Interests and section 7 Taking Decisions on Quasi or Regulatory Applications.
- 1.4 At the time of the alleged breaches, the Authority was acting under a Code of Conduct approved by the Scottish Ministers in 2011. Although a revised Code prepared by the Authority was approved by the Ministers in December 2014, prior to the complaint being received, I have addressed the alleged breaches in terms of the 2011 Code. The references in the complaint relate to the new Code and I have shown the 2014 Code paragraph numbers in brackets for ease of reference, where these differ from the earlier version.

Paragraph 2.1 the Code states:

### **Selflessness**

You have a duty to take decisions solely in terms of public interest. You must not act in order to gain financial or other material benefit for yourself, family or friends.

### **Integrity**

You must not place yourself under any financial, or other, obligation to any individual or organisation that might reasonably be thought to influence you in the performance of your duties.

### **Accountability and Stewardship**

You are accountable for your decisions and actions to the public. You have a duty to consider issues on their merits, taking account of the views of others and must ensure that the Loch Lomond & The Trossachs National Park Authority uses its resources prudently and in accordance with the law.

### **Openness**

You have a duty to be as open as possible about your decisions and actions, giving reasons for your decisions and restricting information only when the wider public interest clearly demands.

### **Honesty**

You have a duty to act honestly. You must declare any private interests relating to your public duties on behalf of Loch Lomond & The Trossachs National Park Authority and take steps to resolve any conflicts arising in a way that protects the public interest.

Paragraphs 4.19 and 4.20 of the Code state:

4.19 You have a registerable interest where you have an interest in shares which constitute a holding in a company or organisation which may be significant to, of relevance to, or bear upon, the work and operation of the Loch Lomond & The Trossachs National Park Authority. You are not required to register the value of such interests.

4.20 The test to be applied when considering appropriateness of registration is to ask whether a member of the public acting reasonably might consider any interests in shares and securities could potentially affect your responsibilities to the Loch Lomond & The Trossachs National Park Authority and to the public, or could influence your actions, speeches or decision-making. If in doubt, you may consult with the Standards Commission.

Paragraphs 5.6 (5.8), 5.7 (5.6) and 5.8 (4.19) of the Code state:

5.6 Any financial interest which is registerable must be declared. If, under Section 4 of this Code you have registered an interest as a Councillor of a Local Authority within the area of the National Park Authority or a Member of another Devolved Public Body (where the other Devolved Public Body has nominated, appointed or approved you as a Member of the Board) you do not, for that reason alone, have to declare that interest.

### **Shares and Securities**

5.7 You may have to declare interests in shares and securities, over and above those registerable under category five of Section 4 of this Code. You may, for example, in the course of employment or self-employment, be engaged in providing professional advice to a person whose interests are a component of a matter to be dealt with by the Loch Lomond & The Trossachs National Park Authority.

5.8 You have a declarable interest where an interest becomes of direct relevance to a matter before the Loch Lomond & The Trossachs National Park Authority and you have shares comprised in the share capital of a company or other body and the nominal value of the shares is:

(i) greater than 1% of the issued share capital of the company or other body; or (ii) greater than £25,000.

Paragraph 5.22 (5.3) of the Code states:

5.22 In the final analysis the conclusive test is whether, in the particular circumstances of the item of business, and knowing all the relevant facts, a member of the public acting reasonably would consider that you might

be influenced by the interest in your role as a member of a public body and that it would therefore be wrong to take part in any discussion or decision-making. If you, in conscience, believe that your continued presence would not fall foul of this objective test, then declaring an interest will not preclude your involvement in discussion or voting. If you are not confident about the application of this objective yardstick, you must play no part in discussion and must leave the meeting room until discussion of the particular item is concluded.

With regard to paragraphs 7.3 (7.4) and 7.11 (7.12) the Code states;

7.3 To reduce the risk of planning applications being legally challenged, in your dealings with planning applications you must not only avoid impropriety, but must at all times avoid any occasion for suspicion and any appearance of improper conduct.

7.11 If you have an interest, whether financial, non financial, or personal, in the outcome of a decision on a planning application, or a planning agreement, or on taking enforcement action, you must declare that interest and refrain from taking part in the consideration of the application.

- 1.5 The first, fourth, fifth, sixth and seventh respondents (Owen McKee, David McKenzie, David Warnock, Willie Nisbet, David McCowan) were elected to represent respectively the following areas within the National Park Area: Breadalbane and Trossachs, Cowal and North Loch Lomond, Callander, East Loch Lomond and Port of Menteith, and West Loch Lomond and Balloch for a period of four years to the end of June 2018. In the case of the first respondent he has resigned as a member of the Authority with effect from 4 August 2015. The second, third, eighth, ninth and tenth respondents (Linda McKay, Lindsay Morrison, Colin Bayes, Petra Biberbach, and Angus Allan) were all appointed to the Authority by the Scottish Ministers on 1 October 2014 for a period of four years. The eleventh and twelfth respondents (Councillors Fergus Wood and Marin Earl) were nominated as members of the Authority by Stirling Council. The thirteenth and fourteenth respondents (Councillors James Robb and George Freeman) were nominated as members of the Authority by Argyll and Bute Council. The fifteenth respondent (Councillor Hazel Sorrell) was nominated as a member of the Authority by West Dunbartonshire Council. The sixteenth respondent (Councillor Bob Ellis) was nominated as a member of the Authority by Perth and Kinross Council. The local authority nominations were made under the National Parks (Scotland) Act 2000 on 1 October 2012 and subsist for a period of 5 years.
- 1.6 For the purpose of this investigation, I was assisted by Ian Mackay, Investigating Officer.
- 1.7 This Report has been prepared for submission to the Standards Commission for Scotland in terms of section 14(2) of the 2000 Act. The Report was submitted in proposed form to the respondent for any representations. Details of the representations received and the extent to which the representations have been accepted or otherwise are set out in **Appendices G and H**. Minor amendments have also been made.

## 2.0 Outline of the Complaint and the Response

## **The Complaint**

- 2.1 The complaint is set out in letters and a complaint form which are attached as **Appendix A**. The complainant is levelled against the respondents as follows:

### **Mr Owen McKee – the first respondent**

The first respondent had a shareholding in a company, Scotgold Ltd (“Scotgold”), which had received planning permission in relation a proposed gold mine at Cononish Farm near Tyndrum and had submitted an application for variation of that permission. He allegedly failed to register the shareholding in terms of paragraph 4.19 (4.19, 4.20 and 5.8(i)) and subsequently failed to declare this registrable interest in terms of paragraph 5.8 (5.6, 5.7 and 5.8) at a meeting of the Authority’s Board held on 8 December 2014. He is further alleged to have breached paragraphs 7.3 (7.4) and 7.11 (7.12) regarding his participation in the discussion and decision at the Board meeting on 8 December 2014. Finally, the complaint alleges that the first respondent breached the key principles of integrity, accountability, openness and honesty as set out in paragraph 2.1 of the Code.

### **Ms Linda McKay – the second respondent**

The second respondent is the Convener of the Authority’s Board and is alleged to have breached the key principles of integrity, openness, honesty, accountability and stewardship, in her failure to act upon information held by her in regard to the shareholding of the first respondent and his alleged failure to comply with the Code in respect of that shareholding. It is alleged that the second respondent considered the matter of the shareholding as one of reputational risk to the Authority rather than in terms of the Code. Finally, she did not involve the complainant in an investigation under the Code once she was in possession of the information regarding the shareholding.

### **Mr Lindsay Morrison – the third respondent**

The third respondent is the Chair of the Authority’s Audit Committee. He is alleged to have breached the key principles of honesty and accountability as set out in paragraph 2.1 of the Code, in that, having carried out an investigation into the shareholding of the first respondent and the implications for any decisions taken by the Authority relative to the planning application that was considered at the meeting of 8 December 2014, he requested the other Board members to refrain from making any reference to that investigation at public meetings of the Board which followed. He is also accused of denying the members access to the full investigation report, in breach of the key principles of the Code.

### **The Board – the fourth to sixteenth respondents**

The complainant has alleged that the remaining respondents have breached the key principles of selflessness, integrity, objectivity, accountability, honesty and openness, as set out in paragraph 2.1 of the Code. The allegation is that, having been made aware of the irregularities

with the first respondent's failure to register and declare his shareholding, they failed to publicly record this fact and participated in a cover up. The cover up allegedly included their failure to challenge the terms of reference of the investigation undertaken by the third respondent and, having been made aware of the conclusion of that investigation, their failure to refer the matter to me to undertake an investigation under the Code.

## **The Response**

- 2.2 The responses are set out in letters and emails received from and on behalf of all the respondents which are attached as **Appendix B**. The respondents have made the following points.

### **Mr Owen McKee – the first respondent**

The first respondent confirmed that his shareholding in Scotgold was acquired between May 2012 and March 2014. He stated that his investment was motivated by a desire to bring much needed all year round employment to his community, where employment tends to be low paid, seasonal work. He acknowledged that the planning application by Scotgold which was proposed in July 2014 made him realise that there could be an adverse public perception of his investment in the company. As a result of comments from fellow Board members, he had sold his shares in Scotgold before the meeting on 8 December 2014, and consequently did not require to declare any interest. Following the meeting of the Board on 8 December 2014, he resigned as Chair of the Authority's Planning Committee and as Vice Convener of the Authority. He later intimated his resignation as a member of the Authority with effect from 4 August 2015.

### **Ms Linda McKay – the second respondent**

Ms McKay refuted the allegations and pointed out that the complainant only referred to the key principles of the Code which of themselves do not constitute a breach of the Code. In any event, she contended that, once she was aware of the first respondent's interest in Scotgold Ltd, she sought advice from officers of the Authority on the Authority's position regarding decisions taken in connection with Scotgold Ltd. She considered that at all times she had acted with integrity, her only concern being for the Authority.

### **Mr Lindsay Morrison – the third respondent**

Mr Morrison also refuted the alleged breaches of the Code. He stated that he had acted at all times with honesty and integrity. He denied that he attempted to silence the Board members from asking questions at the meeting in January 2015.

### **The fourth to sixteenth respondents**

The remaining respondents submitted a collective response to the complaint. They accepted their personal obligation to comply with the Code, but argued that this did not extend to a duty on members to ensure that non-registration and non-declaration were properly considered. They

also observed that the allegations only referred to the key principles, and not to any of the substantive parts of the Code.

### **3.0 The Investigation**

3.1 To establish the background to the complaint, the Investigating Officer sought and received information from the Authority.

3.2 Having considered the documentary evidence, the Investigating Officer proceeded to interview the first respondent. The interview took place on 26 October 2015. I did not consider it was necessary to interview any of the other respondents as I had received sufficient information from the Authority to assess the complaint against these other respondents. A list of those interviewed is attached as **Appendix C**.

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

4.1 The complainant, Mr Nick Kempe, takes an interest in access to the countryside and participated in the development of the Access Code. He is a former president of the Mountaineering Council of Scotland and Board member of Scottish Natural Heritage.

4.2 The respondents are all members of the Authority's Board.

4.3 The Authority has planning powers as provided for under section 10 of the National Parks (Scotland) Act 2000. On 25 and 26 October 2011, the Authority granted planning permission for the establishment of a gold and silver mine at Cononish Farm, Tyndrum with the consent being issued on 13 February 2012. At the time of the application, the first respondent was the Chair of the Authority's Planning Committee.

4.4 On 16 May 2012, the first respondent (Owen McKee) purchased 20,000 shares in Scotgold. Subsequent purchases of this company's shares were made by the first respondent between August 2012 and 12 March 2014, by which time the shareholding had increased to 520,000 shares. The first respondent has confirmed that the purchase value of these shares amounted to £11,902.35. The company's Annual Report for 2015, records the issued shares as at 30 June 2014 being 483,889,318, of which the first respondent's holding represented 0.11%. There were discussions between Scotgold and officers of the Authority relating to the planning consent over a period of time resulting in the submission of a pre-application for variation of the planning conditions relative to Cononish, on 29 July 2014. Discussions took place between the planning officers and the developers following which, the then Director of Operations, (now the Chief Executive) advised the first respondent by email on 5 November 2014 that the consent to Scotgold would be revisited and as the Convener would be absent at the time of the meeting to deliberate on the application, the first respondent, as Vice Convener would take the Chair. The first respondent sent an email to the Director of Operations on 5 November 2014 stating that *'I will have to declare an interest on the Cononish application as I have a shareholding which was acquired after the original planning was granted'*.

4.5 At interview the first respondent stated that he had bought shares in Scotgold Ltd to encourage local employment and support the local



community. The area had predominately seasonal and part time employment at that time. He also confirmed that his shares in Scotgold Ltd were only purchased after Scotgold had received their planning permission for the gold and silver mine development.

- 4.6 The first respondent did not register his Scotgold shareholding at any time up to 12 November 2014, when, following the intimation of the pending application by Scotgold, he wrote to the Authority's Director of Corporate Services in the following terms: *"Dear [REDACTED], May I please update my notice of interests. Please record that I have a holding of 520,000 shares in Scotgold. For the record all this holding was acquired after Scotgold had received permission for the Cononish development. Please also record that I am now the Chair of the Rural and Island Housing Association Forum. Yours sincerely, O McKee"*. This letter was received by the Authority on 14 November 2014.
- 4.7 A meeting followed on 3 December 2014 between the first and second respondents (Owen McKee and Linda McKay), the latter in her capacity as Convener of the Authority, at which she expressed concern over the first respondent's shareholding. Linda McKay then wrote by email to the first respondent on 7 December 2014, requesting a meeting to discuss the issue before the Board meeting which was to be held on 8 December 2014. Later that evening, the first respondent sent a reply email in which he set out the details of the shares purchased through the Royal Bank of Scotland as nominee. In that email he set out the total cost of acquiring the shares, £11,902.35 and the current market value of £2,340.00. He also commented as follows: *Under the rules governing registrable interests, shareholdings need only be placed on the register of members if investment is £25,000 or more than 1% or more of the share capital. My holding is less than 1%. I confirm that I was aware of those rules and as my holding is well below the relevant limits I saw no reason to register it. However in view of our conversation and the possibility that others may perceive a conflict of interest in my case, I duly placed the information on the Register of Interests. Owen'*.
- 4.8 At the business meeting of the Authority's Board which was held in the morning of 8 December 2014, the first respondent indicated his intention to declare an interest in the business of Scotgold as a result of his shares held in that company. A number of the Board members were concerned about this disclosure and the first respondent indicated at that time that, in view of the comments from other members, he would sell his shares in Scotgold.
- 4.9 The first respondent confirmed at interview that he instructed the sale of the shares at whatever price could be obtained, and that this instruction was given online.
- 4.10 The meeting of the Board commenced at 2.00pm and, following a welcome from the second respondent, declarations of interest were invited in respect of the business of that meeting. No declarations were made or noted in the minutes of that meeting. The agenda records that under item 6 the Director of Operations presented a report entitled – *"Special Board Meeting – Cononish Goldmine"*. The purpose of the report was to request Members' agreement *"to hold a Special Board Meeting on Monday 26<sup>th</sup> January 2015 to consider a "section 42" planning application for an*

amendment to condition 15 of permission reference 2011/0166/MIN for a gold and silver mine at Cononish Farm near Tyndrum. This paper explains the background to the application and the context within which this decision requires to be taken". The recommendation as submitted by the officer was that "Members are asked to approve the arrangement of a Special National Park Board Meeting to be held on Monday 26<sup>th</sup> January 2015 to determine "section 42" planning application reference 2014/0258/DET and the associated section 75A application to modify the planning obligation". The paper also advised that "Scotgold are very anxious to see the planning application determined in good time before the current planning consent expires on 12 February 2015. This is important in order to avoid a lapse of consent for the mining operations". Later in the report it states, "A board decision is required in good time in order for a period for checks to be made to ensure the revised planning obligation agreement is in force before issuing a revised planning consent". The report is shown in **Appendix E**.

- 4.11 The minute of the board meeting on 8 December 2014 records that "GW (the Director of Operations) introduced this paper requesting member's agreement to hold a Special Board meeting on Monday 26<sup>th</sup> January 2015 to consider a "section 42" planning application for an amendment to a condition for a gold and silver mine at Cononish Farm near Tyndrum. GW advised that planning consent would expire on the 13<sup>th</sup> February 2015 therefore this meeting would require to be held to ensure that a revised legal agreement is in place before this deadline. GW advised members that, if approved, the planning application would be to extend permission for a further three years as of the date of the new revised consent. **DECISION:** Members approved the recommendation to hold a Special Board meeting on Monday 26<sup>th</sup> January 2015." The minute is shown in **Appendix E**.
- 4.12 The Governance and Legal Manager of the Authority wrote to the first respondent, Owen McKee, by email at 10.44 on 9 December 2014 confirming receipt of his email to the second respondent (Linda McKay) on 7 December 2014 disclosing the details of his shareholding with Scotgold Ltd and his explanation for not having previously registered the shareholding, as set out in paragraph 4.5 above. The Governance and Legal Manager pointed out as follows, "You must always comply with the objective test outlined in the Code of Practice. This test is whether a member of the public, with knowledge of the relevant facts would reasonably regard the interest as so significant that it is likely to prejudice your discussion or decision making in your role as a member of a public body (and in particular, Depute Convener/Chair of the Planning and Access Committee). As discussed yesterday, the shareholdings referred to below (the notification from the first respondent on 7 December 2014) should be included in the public Register of Interests and declared in relation to any agenda items relating to Scotgold. However, I understand that after reflecting on your position, you instructed the sale of these shares yesterday. Please can you confirm to Linda and I in writing when you instructed the sale of these shares? If you are able to confirm in writing that you no longer own the shares, I will not update the public Register."
- 4.13 The first respondent replied by email at 11.09 on 9 December 2014, stating: "the order to sell the holding was placed yesterday, and I have

*this morning received confirmation that the sale has been finalised. I no longer have any holding in Scotgold. Owen".*

- 4.14 Following the Board meeting on the afternoon of 8 December 2014, the Governance and Legal Manager wrote to Linda McKay, the second respondent, at 21.51 on 9 December 2014, expressing concern that, due to the wording of the first respondent's email of 9 December 2014 as set out in paragraph 4.13 above, as at the time of the Board meeting he was merely instructing a sale and consequently was still a shareholder and should have declared an interest. Her concerns related to the wording of the first respondent's email of 9 December as it appeared to her that the shares had not been sold until the Tuesday and that he knew he was merely instructing a sale. She also pointed out that he had not therefore declared his shareholding and that they should discuss how the Board members should be advised on the position.
- 4.15 On 12 December 2014, the second respondent met with the first respondent expressing her loss of confidence in his position on the Board. Later that day, at 21.10, the first respondent sent an email to the second respondent and the Authority's Chief Executive, in which he stated, "*With the considerable benefit of hindsight I have been re-examining my position with regard to the agenda item at the Board's meeting on 8 December 2014 proposing a special Board Meeting to consider the Cononish application from Scotgold. Although the decision to dispose of my holding in Scotgold was taken prior to the meeting the sale was not effected until the 9<sup>th</sup> December. Technically, therefore, I still had an interest at the time of the meeting and should have declared an interest. My apologies. Owen.* 10 minutes later the first respondent sent another email to the same recipients, in which he stated, "*Linda, It is with considerable regret that I tender my resignation, with immediate effect, from the posts as Vice Convener and Chair of the Planning and Access Committee. Please be assured that I will, as a directly elected member of the Board, continue to do all I can to assist the Authority and The National Park. Owen McKee*".
- 4.16 The second respondent, as Convener, thereafter wrote to all the remaining Board members on 14 December 2014 setting out the circumstances and the actions which she had taken following from the Board meeting on 8 December. She advised then that the first respondent had resigned as Vice Convener and Chair of the Authority's Planning and Access Committee. The email is shown in **Appendix A**.
- 4.17 On 16 December 2014, the second respondent in her capacity as Convener of the Authority wrote to the third respondent, Lindsay Morrison, advising that she was "*commissioning an urgent piece of work to be overseen by you, in your role as Chair of Audit. It should investigate all aspects of Authority business and business which might be open to challenge - now that we are aware of Owen's Scotgold shareholding*". The officers of the Authority provided terms of reference for this investigation. As part of the investigation, the first respondent was requested to provide details of all share purchases and the sale details. The first respondent submitted the sale contract note to the Authority, which disclosed that the sale realised £1937.50.

- 4.18 A draft report was prepared and submitted on behalf of the third respondent. He wrote on 24 January 2015 to all Board members with a summary of the investigation, its terms of reference, findings and recommendations. As part of the findings, the report stated that any shareholding in Scotgold was therefore a registrable and declarable interest. The email is contained in Appendix A. He requested that the members treat this information as confidential. The full investigation report is also attached at **Appendix A**.
- 4.19 The Board meeting held on 26 January 2015 considered a report from a senior officer of the Authority, in which it recommended that planning permission be extended for the gold and silver mining operation for a further three years and that the section 75 Agreement be adjusted accordingly. The first and second respondents did not attend that meeting, it being chaired by the eighth respondent. The report to and the minute of that meeting are contained in **Appendix E**.
- 4.20 The first respondent (Owen McKee), in response to the allegations of breach of the Code, advised at interview that he did not consider that he had failed to comply with the Code, as the shares had been acquired after planning permission for the development had been granted on 25 October 2011. His first block of shares in Scotgold Ltd was purchased on 21 May 2012. He stated the Authority did not consider any matters relating to Scotgold until the meeting on 8 December 2014. In answer to the claim that he still owned the shares at the time of the meeting on the afternoon of 8 December 2014, the first respondent stated that he was, as at 8 December 2014, of the view that once he had instructed the sale he no longer owned them and therefore did not require to declare an interest in respect of that matter.
- 4.21 The first respondent also pointed out that his entire holding was less than 1% of the total issued share capital and had a value less than £25,000. He also said that, in considering the position, he had applied the objective test as set out in paragraph 4.20 of the Code applying at that time.
- 4.22 The first respondent confirmed at interview that he resigned as Vice Convener and Chair of the Planning and Access Committee following the meeting on 8 December, because of public perception of his shareholding in Scotgold and misinterpretation of his actions. Finally he stated that had any matters relating to Scotgold arisen while he held the shares, he would have not taken part in any decision on that matter.
- 4.23 The second respondent (Linda McKay) advised that once she was aware of the fact that the first respondent had still owned the shares when the decision was taken at the meeting on 8 December 2014, she sought advice from officers on the legal implications for the decisions taken at that meeting. She also advised that, as the first respondent had resigned and that no decisions taken required to be reconsidered, she felt that no further action was required. The advice she received confirmed that there was no obligation on the Board to make public any alleged breach of the Code. She denied any failure to comply with the key principles of the Code.
- 4.24 The third respondent (Lindsay Morrison) denied any breach of the key principles of the Code. He advised that his reason for asking the members

not to raise or discuss the conclusions of the investigation was to ensure that, at the meeting of 26 January 2015, they focussed on the matter before them. He was of the view that other matters would not be competent business for that meeting or material to the planning decision. In regard to the allegation that he denied members access to the full report, he advised that the report was available to all members upon request. Finally, it was his view that as the outcome of the investigation required no action to be taken, it did not require to be put to a Board meeting for a decision.

- 4.25 The remaining respondents, with the exception Councillor James Robb, the thirteenth respondent, submitted a collective response in which they all refuted the allegation of breach of the key principles of the Code. They accepted that there is a personal obligation to comply with the Code, but argued that their obligation did not extend to reporting suspected breaches. They denied that some members of the Board encouraged the first respondent to sell his shares in Scotgold. It was accepted that there was some discussion on the matter at the business meeting held on the morning of 8 December 2014, but this did not extend to selling shares.
- 4.26 The remaining respondents considered that there was no obligation to discuss all matters in public and in fact there were many situations where it would be unsuitable to do so. In this situation, they considered that it would have been inappropriate to discuss the matter in public while there was an investigation in progress about the validity of the decision concerning the planning application.
- 4.27 The remaining respondents also denied that the investigation was incorrectly tasked to investigate organisational risk and should have focussed on potential breaches of the Code. It was their view that it was quite proper for the Chair of the Audit Committee to oversee an investigation into the risk to the Authority. They added that one of the conclusions of the investigation was that the first respondent had breached the Code.
- 4.28 On 4 August 2015 the first respondent (Owen McKee) resigned as a member of the Authority.
- 4.29 Councillor Robb responded to the complaint, advising that he refuted the allegation of breach of the key principles and that he had been advised that the first respondent had sold his shares prior to the board meeting taking place.

## **5.0 Findings and Conclusion**

- 5.1 The complainant alleges that Mr Owen McKee, Ms Linda McKay, Mr Lindsay Morrison, Mr David McKenzie, Mr David Warnock, Mr Willie Nisbet, Mr David McCowan, Mr Colin Bayes, Ms Petra Biberbach, Mr Angus Allan, Councillor Fergus Wood, Councillor Martin Earl, Councillor James Robb, Councillor George Freeman, Councillor Hazel Sorrell and Councillor Bob Ellis contravened the Loch Lomond and the Trossachs National Park Code of Conduct, as outlined in paragraphs 1.3 and 2.1 of this Report.

- 5.2 The complaint alleges that the first respondent breached the provisions of the Code relating to registration of shares in Scotgold Ltd and the requirement to declare his interests in respect of those shares. The complainant also alleges a breach by the first respondent of the provisions of the Code relating to the taking of decisions on quasi-judicial or regulatory applications as well as the key principles of integrity, accountability, openness and honesty.
- 5.3 The remaining respondents are all alleged to have breached the key principles of integrity, openness, honesty, accountability and stewardship selflessness and objectivity as outlined in paragraph(s) 4.27 to 4.29 above.
- 5.4 The respondents are all members of the Loch Lomond and the Trossachs National Park Authority deriving their membership as follows; as community elected members, as local authority nominees and as appointees of the Scottish Ministers all in compliance with the terms of the National Parks (Scotland) Act 2000. The Authority is a planning authority and determines planning applications in respect of developments within the Authority area.
- 5.5 In 2011, planning permission was granted by the Authority for a gold and silver mine development at Cononish Farm near Tyndrum. The consent was approved at a meeting of the Authority's Board on 25 and 26 October 2011, with the consent being issued to the developer on 13 February 2012.
- 5.6 Between 21 May 2012 and 12 March 2014, the first respondent acquired a total of 520,000 shares in Scotgold Ltd, the company which had received planning permission for the mine development at Cononish in 2012. During this same period, the first respondent did not disclose the shares held in Scotgold.
- 5.7 In July 2014, Scotgold indicated that it wished to seek an amendment to their planning consent. Following discussions with the Authority's officers it was decided to present a report to the Authority's Board. On 12 November 2014 the first respondent, having been advised of the impending meeting to discuss the Scotgold application, wrote to the Director of Corporate Services of the Authority advising her that he held 520,000 shares in Scotgold, requesting his interests to be updated. Thereafter the second respondent, having been made aware of the shareholding, met with the first respondent and on 7 December 2014 the first respondent wrote to the second respondent advising her that, despite his opinion that he did not require to register the shareholding, in applying the threshold provisions as set out in paragraphs 5.8 and 5.9 of the Code, he had placed information on the shareholding on the Register.
- 5.8 At the business meeting of the Board which was held on the morning of 8 December 2014, there was some discussion among the Board members about the first respondent's shareholding in Scotgold and following this he advised that he would sell the shares. At the meeting that afternoon, the first respondent did not declare any interest in the item of business relating to the Scotgold planning application.

- 5.9 The agenda for the Board meeting on 8 December 2014, shows the business to be considered included a paper on a proposal to hold a special meeting to consider the proposed amendment to the Scotgold planning permission. The purpose of the discussion and decision at this meeting was to agree to hold a special meeting of the Board to consider a section 42 planning application allowing the holders of a planning consent to extend the duration of that consent. The report advised that the planning consent would expire on 13 February 2015. It was not intended to discuss the application at the meeting in December, but only to agree to hold a special meeting. Nevertheless it is clear that if the Board had not agreed to hold the special meeting on 26 January 2015, there would have been a risk that the planning consent would expire on 13 February 2015.
- 5.10 The Board agreed to convene a special meeting on 26 January 2015. The minute of the meeting on 8 December 2014, does not record any individual member's comments and only shows the decision.
- 5.11 Following this meeting the first respondent received written confirmation that the sale of his holding in Scotgold had been concluded at 09.39 on 9 December 2014, with a settlement date of 11 December 2014. This meant that at the time of the Board meeting on 8 December 2014, the first respondent was still the holder of shares in Scotgold.
- 5.12 Once this fact became known, the second and third respondents expressed concern over the implications for the decision taken by the Authority relative to the application by Scotgold, and agreed that an investigation be undertaken by the third respondent in his capacity as Chair of the Authority's Audit Committee. The conclusion of this investigation was that there had been no risk to the decision taken in relation to the Scotgold application and that it appeared that the first respondent had failed to register and declare his shareholding in Scotgold.
- 5.13 The first respondent having realised that he was still a shareholder in Scotgold at the time of the meeting on 8 December 2014, tendered his resignation as Vice Convener of the Authority and as Chair of the Planning and Access Committee, by email addressed to the first respondent on 9 December 2014. He later resigned as a member of the Authority, on 4 August 2015.

#### **Mr Owen McKee – the First Respondent**

- 5.14 The complainant alleged that the first respondent failed to register his shareholding in Scotgold contrary to the provisions of paragraph 4.19 of the Code. The respondent, in defence of his position, pointed to the terms of paragraph 4.20 which sets out the objective test to be applied to whether a member is required to register a shareholding. The Code, as it applied at the time of the decision on 8 December 2014, did not apply a de minimis threshold nor a time limit for the purposes of registering interests, albeit that there was a threshold in respect of declaration of interests (which is considered at paragraph 5.19 below).
- 5.15 The objective test, as set out in paragraph 4.20, relating to the requirement to register shares and securities, requires a member to consider what a member of the public, "*acting reasonably*" might consider that such holding might influence his actions. In this case, the actions to

which the complaint relates are the decisions of the Authority on the planning application by Scotgold. It is noted that the board of the Authority did not deal with any matters relating to Scotgold's planning consent between February 2012 and December 2014, the period during which the first respondent acquired his shareholding in Scotgold. His register of interests during that period did not disclose the purchase of any Scotgold shares. I consider that the shareholding could reasonably be regarded as not being significant or of relevance to the work or operation of the Authority's Board during the period between 13 February 2012 and 5 November 2014. Nevertheless, once he was aware of the forthcoming application from Scotgold, the first respondent took action to update the register, namely his letter to the Director of Corporate Services on 12 November 2014 (see paragraph 4.6 above), in which he requested his register be updated to disclose the shareholding. The Code requires that a member's interests are registered with the Authority and contained in the Authority's register; it does not expand on this. I consider that it would be unreasonable to expect a member to do any more to fulfil this obligation other than to notify an appropriate officer within the Authority. The first respondent wrote to the Authority on 12 November 2014, and the letter was received on 14 November.

- 5.16 In these circumstances, I am satisfied that the first respondent had taken all reasonable steps to notify the Authority of his shareholding in Scotgold in advance of the meeting of 8 December 2014, and accordingly that his actions do not amount to a breach of the terms of paragraph 4.19 of the Code.
- 5.17 The second allegation against the first respondent is that he failed to declare an interest in the business of Scotgold which was considered at the Board meeting on 8 December 2014.
- 5.18 The first respondent appears to have held a genuine belief that, having instructed the sale of the shares prior to the meeting commencing at 2.00pm on 8 December 2014, he no longer owned those shares and although aware of the requirement to declare an interest, did not then need to do so. It is noted that the sale note for the entire shareholding discloses the time and date of the sale as 09.39 on 9 December 2014. This postdates the Board meeting. Therefore, despite his intentions and as he subsequently realised, the first respondent owned Scotgold Ltd shares at the time of the meeting and in such circumstances, required to consider whether to declare an interest.
- 5.19 Paragraphs 5.7 and 5.8 of the Code as it applied at that time required a member to declare an interest *"where an interest becomes of direct relevance to a matter before the Loch Lomond & The Trossachs National Park Authority and you have shares comprised in the share capital of a company or other body and the nominal value of the shares is: (i) greater than 1% of the issued share capital of the company or other body; or (ii) greater than £25,000."*
- 5.20 The requirements as to declaration are a) that the interest is of direct relevance to a matter before the Authority, and b) that the shareholding exceeds the threshold of 1% or £25,000.



- 5.21 I am of the opinion that the first criterion applied in this case. The subject matter being considered at the meeting on 8 December 2014 was the arrangement of a special meeting of the Authority's Board. It could be argued that, as no decision was to be taken relating to the detail of the Scotgold planning application, there was no direct relevance between the shareholding and the arrangements for a special meeting of the Board. However, I am not so persuaded. The purpose of requiring a special meeting of the Board was explicitly to consider Scotgold's application for an extension of their existing consent before it expired on 12 February 2015. Had the Board not agreed to hold the special meeting before that date, it is possible that their decision could have been considered to be detrimental to the interests of Scotgold. I have concluded, therefore, that the terms of the first part of paragraph 5.8 are relevant to this complaint.
- 5.22 The second requirement set out in paragraph 5.8 must also be considered. I note that the first respondent's shareholding in Scotgold Ltd did not amount to either more than 1% of the issued capital or have a value in excess of £25,000. As both parts of paragraph 5.8 have not been satisfied, it seems to me that there was no requirement under paragraph 5.8 for the first respondent to declare his interest. In terms of the Code as then written, the objective test did not apply in these circumstances. For these reasons, I have concluded that the first respondent's decision not to declare an interest did not constitute a breach of paragraph 5.8 of the Code.
- 5.23 Notwithstanding that the first respondent did not require to declare an interest under paragraph 5.8 of the Code, there was also an obligation under paragraph 5.6 to declare *a financial interest which is registrable*. As stated in paragraph 5.16 above, the first respondent had an obligation to register his shareholding in Scotgold, as a financial interest. He still held the shareholding at the time of the meeting on 8 December 2014. Therefore, a declaration should have been made, and the first respondent should not have participated in the item of business relating to the setting of a meeting to consider the Scotgold planning application. I have therefore concluded that the first respondent has breached the provisions of paragraph 5.6 of the Code.
- 5.24 Finally, the complainant alleges that the first respondent did not comply with the terms of paragraphs 7.3 and 7.11 of the Code, as they apply to decisions relating to planning applications. As has been discussed above, the purpose of the meeting on 8 December 2014 was to arrange a special meeting to allow the Authority to deal with a planning application under s. 42 of the Town and Country Planning (Scotland) Act 1997. As already noted, at the meeting on 8 December 2014 the Board did consider matters relating to the Scotgold application, namely the timing of a special Board meeting to consider the application. Paragraph 7.3 of the Code deals with impropriety or suspicion of improper conduct when taking planning decisions. I do not consider that the first respondent's failure to declare his shareholding would fall within the scope of improper conduct, because I am satisfied that he was genuinely of the view that he no longer held the shares. Accordingly I have concluded that the first respondent was not in breach of paragraph 7.3 of the Code.
- 5.25 Turning to paragraph 7.11 of the Code, this imposes a strict obligation to take no part in the consideration of the application if a declaration of

interest is required. There is no objective test to assess the relevance of that interest: the requirement is absolute. As the purpose of the meeting on 8 December 2014 was to consider setting a timely meeting to consider the planning application by Scotgold, it follows that the terms of paragraph 7.11 applied. In the circumstances having regard to paragraph 5.23 above, I find that the first respondent has contravened paragraph 7.11 of the Code.

- 5.26 The first respondent is also alleged to have contravened the key principles of integrity, accountability, openness and honesty as set out in section 2 of the Code. Paragraph 2.1 of the Code and the Guidance issued by the Standards Commission for Scotland make it clear that section 2 provides a context for and underpins the Code. However contravention of any of the key principles does not in itself constitute a breach of the Code. In order to constitute a breach, there must be contravention of one or more of sections 3 to 7.

#### **Mrs Linda McKay – the second respondent**

- 5.27 The allegations against the second respondent are in relation to the key principles of integrity, openness, honesty accountability and stewardship, as set out in section 2 of the Code. Paragraph 2.1 of the Code and the Guidance issued by the Standards Commission for Scotland make it clear that section 2 provides a context for and underpins the Code. However contravention of any of the key principles does not in itself constitute a breach of the Code. In order to constitute a breach, there must be contravention of one or more of sections 3 to 7. As the complainant has not referred me to any of the substantive provisions of the Code I have concluded that the complaint does not amount to a breach of the Code by the second respondent.

#### **Mr Lindsay Morrison – the third respondent**

- 5.28 The complaint against the third respondent relates to alleged breaches of the key principles of honesty and accountability as set out in section 2 of the Code. Paragraph 2.1 of the Code and the Guidance issued by the Standards Commission for Scotland make it clear that section 2 provides a context for and underpins the Code. However contravention of any of the key principles does not in itself constitute a breach of the Code. In order to constitute a breach, there must be contravention of one or more of sections 3 to 7. As the complainant has not referred me to any of the substantive provisions of the Code I have concluded that the complaint does not amount to a breach of the Code by the third respondent.

#### **The fourth to sixteenth respondents**

- 5.29 The complaint against the fourth to the sixteenth respondents also relate to alleged breaches of the key principles of selflessness, integrity, objectivity, accountability, honesty and openness, as set out in section 2 of the Code. Paragraph 2.1 of the Code and the Guidance issued by the Standards Commission for Scotland make it clear that section 2 provides a context for and underpins the Code. However contravention of any of the key principles does not in itself constitute a breach of the Code. In order to constitute a breach, there must be contravention of one or more of sections 3 to 7. As the complainant has not referred me to any of the

substantive provisions of the Code I have concluded that the complaint does not amount to a breach of the Code by any of the fourth to the sixteenth respondents.

### **Summary**

5.30 In relation to NPA/LLT/1781 which relates to 1) the failure of the first respondent to register and declare an interest in the shareholding of Scotgold and his failure to withdraw from the Authority's Board meeting on 8 December 2014, and 2) the remaining respondents to comply with the key principles of the Code, I have come to the conclusion that:

- having regard to the findings in section 5 and in particular paragraphs 5.23 and 5.25 of this Report, Owen McKee has contravened paragraphs 5.6(5.8) and 7.11(7.12) of the Authority's Code of Conduct.
- that, having regard to the findings in section 5 and in particular paragraphs 5.16, 5.22 and 5.24 of this Report, Owen McKee has not contravened paragraphs 4.19, 5.8(4.19) and 7.3(7.4) of the Authority's Code of Conduct.
- that, having regard to the findings in section 5 and in particular paragraphs 5.27 to 5.29 of this Report, Linda McKay, Lindsay Morrison, David McKenzie, David Warnock, Willie Nisbet, David McCowan, Colin Bayes, Petra Biberbach, Angus Allan, Councillor Fergus Wood, Councillor Martin Earl, Councillor James Robb, Councillor George Freeman, Councillor Hazel Sorrell and Councillor Bob Ellis have not contravened the Authority's Code of Conduct.

Bill Thomson  
Commissioner

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14 December 2015