



Cunningham Swan

LAWYERS

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CONFIDENTIAL

December 20, 2023

SENT BY EMAIL TO: hmartin@pembroke.ca

Council
c/o Heidi Martin, Clerk
City of Pembroke
1 Pembroke Street East
Pembroke, ON, K8A 3J5

Dear Council:

**RE: Code of Conduct Complaint – Final Report
Our File No. 33136-13**

This public report of our investigation is being provided to Council in accordance with Section 223.6(1) of the *Municipal Act*. We note that Section 223.6(3) of the *Municipal Act* requires that Council make the report public. The Clerk should identify on the agenda for the next open session Council meeting that this report will be discussed. Staff should consider whether it is appropriate to place the full report on the agenda in advance of Council deciding how the report should otherwise be made public.

Should Council desire, the Integrity Commissioner is prepared to attend virtually at the open session meeting to present the report and answer any questions from Council.

At the meeting, Council must first receive the report for information. The only decision Council is afforded under the *Municipal Act* is to decide how the report will be made public. Council does not have the authority to alter the findings of the report, only consider the recommendations.

The Integrity Commissioner has included only the information in this report that is necessary to understand the findings. In making decisions about what information to include, the Integrity Commissioner is guided by the duties set out in the *Municipal Act*. Members of Council are also reminded that Council has assigned to the Integrity Commissioner the duty

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to conduct investigations in response to complaints under the Code of Conduct, and that the Integrity Commissioner is bound by the statutory framework to undertake a thorough process in an independent manner. The findings of this report represent the Integrity Commissioner's final decision in this matter.

Timeline of Investigation

The key dates and events during the course of this investigation are as follows:

- Complaint Received – April 3, 2023
- Complaint Fee paid – May 25, 2023
- Conducting Preliminary Review – June 2023
- Complaint sent to Member requesting Response – July 6, 2023
- Response received from Member – August 15, 2023
- Member's Response sent to Complainant – August 17, 2023
- Complainant's Response received – August 29, 2023
- Complainant's Response sent to Member – September 12, 2023
- Member's Response received – September 12, 2023
- Interview request sent to Complainant – September 15, 2023
- Response from Complainant confirming their unavailability for an interview – September 15, 2023
- Interview with Member – September 19, 2023
- Complainant Follow-Up re Scheduling Interview – October 24, 2023
- Interview with Complainant – November 15, 2023

Complaint Overview

The Complaint alleged that the Complainant spoke with Mayor Ron Gervais (the "Member") regarding an issue with their property and the Member informed the Complainant they would look into the matter.

It was alleged that following this conversation, the Complainant received a letter dated February 2, 2023 from the law firm of Sheppard & Gervais regarding the issue with their property and noting that Sheppard & Gervais acted as solicitor for the Municipality.

The Complaint alleged that the Member was in a conflict of interest regarding:

1. This matter pertaining to the Complainant's property; and

2. Being a member of Sheppard & Gervais while also being a Member of Council.

Limitation Period

We note that this investigation took place under the Code of Conduct only.

Breaches of the *Municipal Conflict of Interest Act* (“*MCLA*”) were not considered as part of this investigation as *MCLA* complaints must be submitted within six weeks of a Complainant becoming aware of an alleged contravention.

We were without jurisdiction to conduct an investigation under the *MCLA* as the Complainant was aware of the allegation that formed the basis of the Complaint on February 2, 2023 and did not make a Complaint until April 3, 2023.

We comment in this report for information purposes on the requirements of the *MCLA*, but our investigation was limited to determining if the Member breached the Code of Conduct.

Code of Conduct

The Complaint engages the following sections of the Code of Conduct:

9.3 In addition to pecuniary interests, Members must perform their duties impartially, such that an objective, reasonable observer would conclude that the Member is exercising their duties objectively and without undue influence. Each Member shall govern their actions using the following as a guide:

- a. In making decisions, always place the interests of the taxpayers and the Municipality first and, in particular, place those interests before your personal interests and the interests of other Members, staff, friends, business colleagues or Family Members;
- b. Do not make decisions that create an obligation to any other person who will benefit from the decision;
- c. Do not make decisions or attempt to influence any other person for the purpose of benefitting yourself, other Members, Staff, friends, business colleagues, or Family Members, or any organization that might indirectly benefit such individuals; and
- d. Do not promise or hold out the prospect of future advantage through your influence in return for a direct or indirect personal benefit.

9.5 Every Member has the following obligations:

- a. To make reasonable inquiries when there is reason to believe that a conflict of interest may exist;
- b. To make Council or the Board or Committee aware of the potential conflict of interest and where appropriate declare the interest;
- c. To refuse to participate in the discussion of Council, the Board or Committee and to not vote on the matter or seek to influence the vote of any other Member where a conflict of interest exists;
- d. To refuse to be involved in any way once the conflict is identified, including without limitation participating in meetings, facilitating meetings or introductions to Staff or Members or providing advice to any person that would materially advance the matter; and
- e. If the matter which creates the conflict of interest is discussed in closed session, the Member may not attend that portion of the closed session where that matter is discussed.

Investigation Process

As part of our investigation, we reviewed the Complaint and the written responses exchanged from the Member and the Complainant. We also conducted interviews with the Member, the Complainant and staff.

Factual Findings

Our investigation determined several key facts regarding the Member's interaction with the Complainant and the matter pertaining to the Complainant's property. We reviewed documentation regarding the Member's actions with respect to the matter and find as a fact that the Member spoke with the Complainant regarding her complaint about her property. Following this telephone call, the Member referred the matter to Municipal staff for resolution. The Member was not involved in the decision to retain external legal counsel regarding the matter and was not otherwise involved in any steps taken by staff or external legal counsel. The matter did not come before Council for a decision or vote.

Our investigation also determined the nature of the Member's relationship with Sheppard & Gervais. We find that the Member is an employee of the firm Sheppard & Gervais. Despite having his name appear in the firm name, the Member is not a partner in the law firm.

Conflicts of Interest Overview

Conflicts of interest can arise when a Member has a pecuniary or non-pecuniary interest in a particular matter. If a Member is found to have a pecuniary or non-pecuniary interest, the Member must take certain steps to remain compliant with the *MCLA* and Code of Conduct.

It is important to highlight that the existence of a pecuniary or non-pecuniary interest in a matter is not in and of itself a breach of either the *MCLA* or the Code of Conduct. If a pecuniary or non-pecuniary interest exists, a Member is then obligated to take (or not take) certain actions with respect to the matter to remain compliant with the requirements of the *MCLA* and the Code.

The “MCLA”

The *MCLA* deals with pecuniary interests of members of Council and local boards and committees. A pecuniary interest exists when a member has either a direct, indirect or deemed financial interest in a matter before Council or the Board or Committee. What constitutes a direct, indirect or deemed financial interest is defined in the legislation.

If a member has a pecuniary interest in a matter, they are obligated to follow certain requirements of the *MCLA*. For example, Section 5(1) of the *MCLA* requires that the member:

- a) Prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
- b) Not take part in the discussion of, or vote on any question in respect of the matter; and
- c) Not attempt in any way whether before, during or after the meeting to influence the voting on any such question.

Even where an actual pecuniary interest exists, a member is compliant with the *MCLA* provided they comply with the applicable requirements of the legislation. The *MCLA* does not prohibit having a pecuniary interest; the Act prohibits participating in the debate and voting on the matter or attempting to influence Council.

The Code of Conduct

The Code of Conduct for the City incorporates the *MCLA* by reference but also deals with non-pecuniary conflicts of interest. Sections 9.3 and 9.5 are relevant to this investigation and apply to interests that are both pecuniary and non-pecuniary in nature. Non-pecuniary interests arise when a member may be influenced by or benefit from an interest in a matter even if the interest is not financial in nature.

Similar to the *MCLA*, the Code of Conduct is not breached by the mere existence of a member’s pecuniary or non-pecuniary interest. A breach occurs when a member takes an action or fails to take an action prescribed by the Code in the circumstances where an interest has arisen. For example, as excerpted above, a member with a pecuniary or non-pecuniary interest in a matter is required to make Council aware of the potential conflict of interest and where appropriate declare the interest and then not participate in the debate and vote thereafter.

Investigation Findings

The Matter Regarding the Complainant's Property

We found no breach of the Code of Conduct by the Member with respect to the specific matter regarding the Complainant's property and his interactions with the Complainant.

The facts presented in this situation did not require a determination of whether the Member had a pecuniary or non-pecuniary interest in the matter specific to the Complainant's property.

We reviewed the actions taken by the Member with respect to the matter and found they were limited in nature. It is our finding that, even if the Member did have an interest in the matter (which we have not specifically found), the Member complied with the Code of Conduct.

Specifically, we found no breach of Section 9.3 of the Code of Conduct. This finding is based on the following:

- The Member's involvement in the matter was limited to receiving a complaint from the Complainant about Municipal staff and passing the Complaint on to the appropriate staff members;
- The Member had no further involvement in the matter once it was referred to staff;
- Municipal staff later retained external legal counsel without the knowledge of the Member;
- The Member did not make any other decisions, attempt to influence any person or take any other actions with respect to the matter.

We further find no breach of Section 9.5 of the Code of Conduct. As the matter did not come before Council and was dealt with by staff, only Sections 9.5(a) and 9.5(d) apply.

With respect to Section 9.5(a), the Member had no obligation to make any inquiries as their involvement in the matter was limited to passing a complaint from a member of the public on to staff. The Member had no reason to believe a conflict of interest existed as they were not involved in any decision to refer the matter to external legal counsel.

With respect to Section 9.5 (d), the Member was not involved in any way beyond referring the matter to staff. Even if the Member could be said to have a pecuniary or non-pecuniary interest in the matter once it was referred to external legal counsel (which is not specifically found), the Member no longer had any involvement in the matter once this occurred.

As a result of the foregoing, this portion of the Complaint is dismissed.

The Member's Employment with Sheppard & Gervais

The Complaint indicated that, in addition to the specific situation regarding the Complainant's property, the Member was alleged to be in a conflict of interest because of his role as both a Member of Council and a member of the law firm of Sheppard & Gervais.

Conflicts of interest investigations require specific fact situations to determine whether a member did or did not breach the *MCLA* or Code of Conduct requirements. The Member holding office while also being employed by the firm Sheppard & Gervais is not in and of itself a breach of the *MCLA* or the Code of Conduct. The situation simply creates the potential for a conflict of interest to occur, which would then trigger obligations under the *MCLA* and the Code of Conduct that the Member must abide by when those situations arise.

Based on our understanding of the Member's employment relationship, we find that the Member's employment with Sheppard & Gervais has the potential to create a conflict of interest in matters for which the Municipality retains Sheppard & Gervais.

As previously noted, the existence of an interest in a matter is not in and of itself cause for concern or a breach of the *MCLA* or Code of Conduct requirements. The relevant point for consideration is the Member's actions where a potential interest is identified.

Our investigation determined that the Member is mindful of the potential for pecuniary and non-pecuniary interests in matters for which the City retains Sheppard & Gervais. We are advised that the Member declares any interest as required and takes other steps to ensure that he is compliant with the *MCLA* and the Code of Conduct requirements. As noted, we were not presented with any specific incidents in which the Member was found to have breached his obligations under the Code of Conduct because of his employment with Sheppard & Gervais.

As a result of the foregoing, this portion of the Complaint is dismissed.

Conclusion

As the investigation revealed no breach of the Code of Conduct the Complaint is dismissed and no further steps will be taken with respect to this investigation.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



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