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INTEGRITY COMMISSIONER REPORT ON MCIA APPLICATIONS 2023-01 & 2023-02

THE CORPORATION OF THE TOWNSHIP OF CENTRE WELLINGTON

Aird & Berlis LLP

John Mascarin

November 16, 2023

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**INTEGRITY COMMISSIONER REPORT
MCIA APPLICATIONS 2023-01 & 2023-02
MAYOR SHAWN WATTERS AND COUNCILLOR KIMBERLEY JEFFERSON**

A. INTRODUCTION

1. Aird & Berlis LLP is the appointed Integrity Commissioner for The Corporation of the Township of Centre Wellington (the “**Township**”).
2. Two (2) formal applications pursuant to subsection 223.4.1(2) of the *Municipal Act, 2001*¹ were filed directly with our office on November 8, 2023 (the “**Applications**”).
3. The Applications are similar in nature and both allege that Mayor Shawn Watters (the “**Mayor**”) and Councillor Kimberley Jefferson (the “**Councillor**”) (collectively the “**Members**”) contravened section 5 of the *Municipal Conflict of Interest Act*² by failing to declare a pecuniary interest in and voting on a matter related to Termite Management Services (the “**Services**”) at a meeting of Council held on September 25, 2023.³
4. The Applications assert that the Members have a pecuniary interest in the Services because the Members’ personal residential properties fall within or just outside of certain zones for servicing, which would benefit their personal properties.
5. The Applications were accompanied by two complaints made pursuant to the Township’s Code of Conduct for Members of Council and Members of Local Boards, alleging a breach of Section 11.0 – Conflicts of Interest. The allegations were the same as in the current Applications. Both complaints were summarily dismissed on November 10, 2023.⁴
6. Subsection 223.4.1(15) of the *Municipal Act, 2001* provides that upon completion of an inquiry, the Integrity Commissioner may, if he or she considers it appropriate, apply to a judge under section 8 of the *Municipal Conflict of Interest Act* for a determination as to whether a member has contravened the statute and the possible imposition of penalties.

¹ *Municipal Act, 2001*, S.O. 2001, c. 25.

² *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50.

³ This is not made express in the Applications as none of the three possible sections that may be contravened in the *Municipal Conflict of Interest Act* (ss. 5, 5.1 and 5.2) were checked in the form. However, the description was contained in two accompanying complaints under the Code of Conduct for Members of Council and Members of Local Boards.

⁴ Section 11.1 of the Conduct of Conduct provides:

11.0 Conflicts of Interest

- 11.1 A Member is required to comply with the requirements of the *Municipal Conflict of Interest Act* with respect to obligations relating to pecuniary interests. A contravention of the *Municipal Conflict of Interest Act* by a Member shall not constitute a breach of the Code of Conduct but may be enforced in accordance with the provisions of the statute and section 223.4.1 of the *Municipal Act, 2001*.

7. Subsubsection 223.4.1(17) *Municipal Act, 2001* provides that the Integrity Commissioner shall publish written reasons for the decision. This report contains our decision regarding our inquiry into the Applications and is issued pursuant to subsection 223.4.1(17) of the *Municipal Act, 2001*.

8. It is our view that the requirement of subsection 223.4.1(17) is satisfied by including this report in the agenda materials for an open meeting of Council.

B. APPOINTMENT AND AUTHORITY

9. Aird & Berlis LLP was appointed Integrity Commissioner for the Township pursuant to subsection 223.3(1) of the *Municipal Act, 2001* on February 27, 2023 by By-law No. 2023-14 wherein Council assigned to us all of the functions set out in subsection 223.3(1) of the *Municipal Act, 2001*. The Integrity Commissioner accordingly has authority to consider the application of sections 5, 5.1, 5.2 and 5.3 of the MCIA to members of council and local boards and to receive and consider applications (i.e., complaints) pursuant to 223.4.1 of the *Municipal Act, 2001*.

10. We have reviewed the Applications in accordance with our authority as Integrity Commissioner and as set out in section 223.4.1 of the *Municipal Act, 2001* and the Township's Complaint Protocol (which is Appendix B to the Code of Conduct for Members of Council and Members of Local Boards).

C. PRELIMINARY MATTERS

(a) Standing to File Application

11. Pursuant to subsection 223.4.1(2) of the *Municipal Act, 2001*, only an "elector" or a "person demonstrably acting in the public interest" may file an application to the Integrity Commissioner for an inquiry to be carried out concerning an alleged contravention of the *Municipal Conflict of Interest Act*. We are satisfied that the Applicant in this matter is an elector of the Township.

(b) Time Limit to File Application

12. Subsection 223.4.1(4) of the *Municipal Act, 2001* requires that an application to the Integrity Commissioner be made within six (6) weeks after the applicant becomes aware of the alleged contravention. This provision replicates the time limit set out in subsection 8(2) of the *Municipal Conflict of Interest Act*. The strict time limit is meant to protect elected officials and ensure that applications are brought forward on a timely basis.⁵

13. The Applications apply to a matter dealt with by Council on September 25, 2023. The Applications were both filed with our office by email transmittal on November 8, 2023. As such, the Applications were filed six (6) weeks and two days from the date of the alleged contraventions. However, the Applications contained an attestation by way of two statutory declarations that the Applicant became aware of the facts constituting the alleged contraventions not more than six (6) weeks from the date of the declarations which were commissioned on November 2, 2023. Although the Applications were not filed until November 8, 2023 and without explanation, we have nevertheless decided to review the Applications and consider the substance of the allegations that the Members contravened section 5 of the *Municipal Conflict of Interest Act*.

⁵ *Hervey v. Morris*, 2013 ONSC 956, 9 M.P.L.R. (5th) 96 (Ont. S.C.J.).

D. MCIA PROVISIONS AT ISSUE

14. The Applications allege that the Members contravened section 5 of the *Municipal Conflict of Interest Act*, which provides as follows:

When present at meeting at which matter considered

5 (1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,

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

15. The Members are alleged to have failed to declare pecuniary interest and to have voted on direction to staff regarding the Services at the meeting on September 25, 2023 because they own residential properties within identified zones referred to as Red Zone (where definite evidence found of live terminate or shelter tubes) or as Blue Zone (Inactive Perimeter area).

E. REVIEW OF MATERIALS

16. In order to undertake our inquiry into the Applications, we have reviewed the following:

- the Applications and materials referred to therein, including attachments;
- a report to the Committee of the Whole entitled “Termite Survey Report for Fergus and Elora”, dated May 17, 2021 (the “**Termite Survey Report**”); and
- a report to Council entitled “RFP#27-23 Termite Management Services”, dated September 25, 2023 (the “**Report**”), and minutes of the Council meeting of same date.

17. We have also reviewed, considered and had recourse to such applicable jurisprudence and secondary source materials that we believe to be pertinent to the issues under consideration.

F. BACKGROUND

(a) Members

18. The Mayor and the Councillor were elected to their current respective offices in the 2022 Municipal Election. Neither Member was previously on Council.

19. All seven (7) current members of Council were not on the previous Council last term.

(b) Termite Management Services

20. The Report recommended that Council authorize staff to enter into negotiations and enter an agreement with a service provider for Termite Management Services “to propose a safe and effective course of treatment to treat, eliminate or significantly reduce termites on the properties identified in the Red and Blue Zones in Fergus and Elora.”

21. The Red and Blue Zones include properties identified in a map contained as Figure 3 of a report appended to the Termite Survey Report. A copy of the map is appended to this report as Appendix “A”.

22. Properties in the Red Zone are described as “Definite evidence found, live termites or shelter tubes”.

23. Properties in the Blue Zone are described as “Inactive Perimeter area.”

(c) Members’ Residences Alleged to be Adjacent to and within Red Zone

24. The Applications were accompanied by a copy of a map depicting the Red and Blue Zones referred to in the Termite Survey Report, which identified the Councillor’s residence as being located within the Red Zone. The Mayor’s residence (as described by the Applicant) was described as being “adjacent” to the Red Zone (identified to be in the Blue Zone). As will be detailed below, neither Member’s property was correctly identified.

(d) Allegations

25. The Applications both allege that the Members contravened their obligations under section 5 of the MCIA by failing to declare pecuniary interests [clause 5(1)(a)] and by voting [clause 5(1)(b)] on the directions provided to municipal staff respecting the Services. The allegations are similar in both Applications in asserting that the Members participated and voted “for a termite policy that would have tax dollars use [sic] to cover termite treatment on private property.”

26. With respect to the Application against the Mayor, the allegation is that even though the Mayor’s property did not fall within the Red Zone, “His personal residence is on the edge of the termite zone which grows every year. If the zone expands, which is should, tax payer [sic] will be paying to protect his property.”

(e) Earlier Advice to Councillor

27. A member of Council is entitled to request advice from the Integrity Commissioner as to their obligations under the Code of Conduct or the *Municipal Conflict of Interest Act*) pursuant to subsection 223.3(2.1) of the *Municipal Act, 2001*. The Councillor did just this on September 25, 2023 and requested our advice with respect to the subject matter of the Report that was to be considered by Council that day. She identified her property, which falls outside of the zones identified on the map.

28. Given that the meeting was that evening, we provided brief written advice to the Councillor in accordance with our authority under subsection 223.3(2.2) of the *Municipal Act, 2001*. We advised the Councillor that she would be entitled to participate and vote on the matter of the Report because her property was not within an identified zone for termite service.

29. We also advised that we were of the view that she could take part in the decision-making on the Report pursuant to a specific exception in section 4 of the *Municipal Conflict of Interest Act*. The Councillor followed our advice and voted on the recommendations in the Report.

(f) Review and Consideration

30. Section 11(1) of the Complaint Protocol sets out a specific process for the inquiry or investigation by an Integrity Commissioner (of either a complaint under the Code of Conduct or an application under the *Municipal Conflict of Interest Act*) which typically entails a procedure similar to what is generally followed in a litigation process where an originating document asserts that a member has contravened an obligation or requirement. The responding member is then provided with an outline of the substance of the allegations made against them and is offered an opportunity to file submissions. The initiating party is then allowed to file submissions in reply.

31. However, Section 11(1) of the Complaint Protocol does allow the Integrity Commissioner to proceed otherwise if the Integrity Commissioner is of the opinion that it has a full factual record and that no additional information is required.

32. In reviewing the materials that were filed, we determined that we did have a full factual record from the Applications and the public materials, including the Report and the minutes of the meeting of Council, to proceed to make a determination of the Applications without requiring additional submissions, representations, responses and submissions, and the attendant time, effort and costs to be incurred by the parties and the Township. We only requested that the Applicant confirm the properties that they believed that Members owned and asked the Members to verify where they reside.

G. ANALYSIS

(a) Pecuniary Interests

33. Despite its central importance to the statute, the *Municipal Conflict of Interest Act* does not define the term "pecuniary interest." However, it is well-accepted that a "pecuniary interest" is any financial interest related to or involving money.⁶

34. The jurisprudence has interpreted "pecuniary interest" to include a financial, economic or monetary benefit that will be received or could be received, either in cash or in an increase in the value of some asset, but can also entail the avoidance of a financial loss. The pertinent question to be asked is as follows:

Does the matter to be voted upon have the potential to affect the pecuniary interest of the municipal councillor?⁷

35. The fatal flaw with both Applications is that they misidentify the properties of both Members as included in the Red Zone and "adjacent" to the Red Zone. This was clarified by the Applicant at our request on November 15, 2023 although the Applicant took the position that the properties were in "the upper portion of the termite zone."

⁶ *Mondoux v. Tuchenhagen* (2011), 88 M.P.L.R. (4th) 234 at para. 31 (Ont. Div. Ct.); *Magder v. Ford* (2013), 7 M.P.L.R. (5th) 1 at para. 6 (Ont. Div. Ct.); *Cauchi v. Marai*, 2019 ONSC 497.

⁷ *Greene v. Borins* (1985), 28 M.P.L.R. 251, at para. 42 (Ont. Div. Ct.).

36. To be clear, neither of the Members' respective residential properties fall within either the Red or Blue Zones nor do they appear to be "adjacent" to the Red Zone referred to in the Termite Survey Report.

37. In any event, the misconceived allegation against the Mayor is entirely speculative as to the receipt of any potential pecuniary interest or benefit for him or his family. The Application is based on a future contingent event (i.e. the Red Zone expanding and the Services being provided thereto). A pecuniary interest must exist at the time of the vote⁸ and cannot be predicated on future contingencies.⁹ The Application against the Mayor could have been dismissed on this basis alone.

38. The Councillor's property also does not fall within the Red Zone as set out in the Application – her property is not in the vicinity of any of the identified zones on the map. The Application against the Councillor could have been dismissed on this basis alone.¹⁰

39. Notwithstanding our conclusions in both Paragraphs 37 and 38, we have nevertheless reviewed both matters as if the Mayor and the Councillor had potential pecuniary interests with respect to the Services. We are of the view that our reports have an education component to them – to both members and to the public – and we accordingly determined, since this is our first report to the Township with respect to the application of the *Municipal Conflict of Interest Act*, to provide a comprehensive report that might assist members and the general public understand how the obligations and exceptions under this statute operate.

(b) Statutory Exceptions

40. The *Municipal Conflict of Interest Act* recognizes a number of exceptions that serve to make a member's pecuniary interests not subject to the requirements of section 5 of the statute. Section 4 of the statute lists eleven exceptions, two of which we have considered to be applicable to the Members in response to the allegations in the Applications:

⁸ *Lorello v. Meffe* (2010), 99 M.P.L.R. (4th) 107 (Ont. S.C.J.) at para. 59: "To have a conflict under s. 5 of the MCIA, there must be a pecuniary interest existing *at the time of the vote*." See also *Cauchi v. Marai*, *supra* at note 6, at para. 33:

The pecuniary interest must be definable and real with the potential to affect the interests of the member and not simply a hypothetical or speculative interest.

⁹ *Yorke et al. v. Harris*, 2020 ONSC 7361 at para. 47.

¹⁰ Clause 9(2)(b) of the *Municipal Conflict of Interest Act* provides:

Same

(2) In exercising his or her discretion under subsection (1) the judge may consider, among other matters, whether the member or former member,

...

(b) disclosed the pecuniary interest and all relevant facts known to him or her to an Integrity Commissioner in a request for advice from the Commissioner under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* and acted in accordance with the advice, if any, provided to the member by the Commissioner;

Exceptions

Where ss. 5, 5.2 and 5.3 do not apply

4 Sections 5, 5.2 and 5.3 do not apply to a pecuniary interest in any matter that a member may have,

...

- (b) by reason of the member being entitled to receive on terms common to other persons any service or commodity or any subsidy, loan or other such benefit offered by the municipality or local board;

...

- (j) by reason of the member having a pecuniary interest which is an interest in common with electors generally;

(i) **Exception for a “User of a Service on Terms Common to Other Persons”**

41. Clause 4(b) of the *Municipal Conflict of Interest Act* provides an exception where a matter under consideration may entitle a member of a council or local board to receive, *inter alia*, any service or other such benefit that other persons in the municipality may be entitled to receive.

42. Council directed that staff negotiate and enter into an agreement with a specified service provider to provide the Services to all persons affected. Accordingly, had the Mayor and the Councillor been entitled to receive the Services (or the benefit of the Services) on terms common with the other persons in the affected zones or areas, they would have been entitled to rely on the exception.

43. It is our opinion that the exception under clause 4(b) would have been applicable to both Members if they fell within any zone that would be provided the Services so that the obligations under section 5 of the *Municipal Conflict of Interest Act* are not applicable to them.

(ii) **Exception for “Interests in Common with Electors Generally”**

44. The exception for “interests in common” recognizes that the *Municipal Conflict of Interest Act* should not be an impediment to a member’s participation in decision-making where the financial interest is shared, in general, by other ratepayers in the community.

45. The exception does not necessarily require that a member have the same interest as every elector within the *entire* municipality. This is made clear in the definition of the term in section 1 of the *Municipal Conflict of Interest Act*:

“interest in common with electors generally” means a pecuniary interest in common with the electors within the area of jurisdiction and, where the matter under consideration affects only part of the area of jurisdiction, means a pecuniary interest in common with the electors within that part;

46. The exception in clause 4(j) for an interest in common applies where a matter before council affects the pecuniary interests of the member in the same manner as others in the

municipality as a whole or those affected in a particular area. The interest may vary in degree or amount, but must be the same in kind or type.¹¹

47. It is our opinion that the Members share the same interest in the matters that were voted upon in the meeting of Council on September 25, 2023 as those electors in the Red and Blue Zones. The Members have no different pecuniary interest in those matters than do any of the other residents that reside in the Red and Blue Zones.

48. In our opinion, if the Members had had a pecuniary interest in the Services, it is one that they share an interest in common with a significant number of electors generally as intended by the definition and the exception in clause 4(j) of the *Municipal Conflict of Interest Act*.¹²

H. FINDINGS

49. We have carefully and fully considered the Applications. For the reasons set out above, we find that neither of the Members has contravened section 5 of the *Municipal Conflict of Interest Act* when they did not declare a pecuniary interest and voted on the directions to staff respecting the Services at the meeting of Council on September 25, 2023.

50. While the Members did not have a pecuniary interest in the directions to staff respecting the Services at the meeting, we proceeded to consider whether the Members might nevertheless be subject to any of the exceptions set out in section 4 of the *Municipal Conflict of Interest Act* if they had potential financial interests in the eventual provision of the Services.

51. In our view, both Members would be entitled to rely on the exceptions set out in clause 4(b) (entitlement to a service or benefit in common with other persons) and clause 4(j) (an interest in common with electors generally) so that the requirements to declare a pecuniary interest and to not vote pursuant to section 5 of the *Municipal Conflict of Interest Act* were not applicable to them with respect to the Council directions to staff related to the Services even if it could be argued that their properties might benefit from the Services in some way.

I. CONCLUSIONS

52. Subsection 223.4.1 of the *Municipal Act, 2001* provides that, upon completion of an inquiry, the Integrity Commissioner may, if the Integrity Commissioner considers it appropriate, apply to a judge under section 8 of the *Municipal Conflict of Interest Act* for a determination of whether the member or members have contravened section 5, 5.1, 5.2 or 5.3 of the statute.

53. Subsection 223.4.1(15) of the *Municipal Act, 2001* provides as follows:

Completion

223.4.1 (15) Upon completion of the inquiry, the Commissioner may, if he or she considers it appropriate, apply to a judge under section 8 of the *Municipal Conflict of Interest Act* for a determination as to whether the member has contravened section 5, 5.1, 5.2 or 5.3 of that Act.

¹¹ *Ennismore (Township), Re* (1996), 31 M.P.L.R. (2d) 1 (Ont. Gen. Div.).

¹² *Biffis v. Sainsbury*, 2018 ONSC 3531 at para. 14. See also *Re Ennismore (Township)* at paras.15-19.

54. Unlike an investigation report related to an alleged contravention of the Code of Conduct where the Integrity Commissioner reports its opinion on the matter and council may need to make a decision on the imposition of any penalties or remedial measures/corrective actions that may be recommended, the decision-making power under section 223.4.1 of the *Municipal Act, 2001* resides solely with the Integrity Commissioner. Council is simply advised of the Integrity Commissioner's decision and it receives the report for information – council is not asked to, nor is it empowered to make a decision on whether a matter will be brought before a judge.

55. For all the reasons set out above, we have determined that neither the Mayor nor the Councillor have contravened section 5 of the *Municipal Conflict of Interest Act*, as alleged.

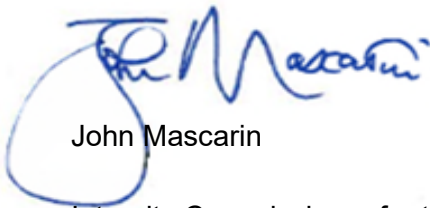
56. In view of the foregoing, we will not be exercising our discretion to apply to a judge of the Ontario Superior Court of Justice under section 8 of the MCIA for a determination of whether the Members have contravened the *Municipal Conflict of Interest Act*.

57. As required by subsection 223.4.1(16) of the *Municipal Act, 2001*, we have provided notice to the elector who filed the Applications that we will not be making an application to a judge. We have also provided notice to the Members of both the filing of the Applications and of our disposition of same.

58. We recommend that a copy of our written reasons in this report be posted by the Township on its website.

Respectfully submitted,

AIRD & BERLIS LLP



John Mascarin

Integrity Commissioner for the Township of Centre Wellington

Dated this 16th day of November, 2023

APPENDIX "A" Red and Blue Zone Map

