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CONFIDENTIAL

October 21, 2024

SENT BY EMAIL TO: municipalclerk@townshipofthenorthshore.ca

Mayor and Council
c/o Rachel Jean Schneider, Clerk
Township of The North Shore
P.O. Box 108, 1385 Hwy 17
Algoma Mills, ON
P0R 1A0

Dear Ms. Schneider:

**RE: Code of Conduct Complaint – Report
Our File No. 36669-15 and 36669-17**

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, and whether to adopt any recommendations made by the Integrity Commissioner. Council does not have the authority to alter the findings of the report, only consider the recommendations.

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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 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

- Complaints received July/August, 2024
- Provide Member with complaint package August, 2024
- Response from Member August, 2024
- Response from complainants August, 2024
- Further response from Member September, 2024
- Interviews October, 2024

Complaint Overview

Two complaints were received about the same issue. We combined both complaints for purposes of the investigation and this report.

The complaints allege that Councillor Richard Welburn (the "Member") had a conflict of interest related to the Cookhouse Boat Launch. The Member owns a property on an island and parks his truck and boat trailer at the boat launch and moors his boat (when it is not on the island) at a dock he accesses from the parking area.

The issue arose when the budget was presented with a line item identifying a possible gazebo to be built at the boat launch and staff marked the potential area for a gazebo with caution tape. The area identified for the gazebo was where the Member routinely parked his truck and trailer. In addition, a complaint was received by the Township about illegal boat and truck/trailer parking at the boat launch.

It is alleged that Councilor Welburn failed to declare a pecuniary interest and voted to suspend a by-law that would impact where he parks his boat/vehicle and potentially subject him to fines. The complaint also alleges that Councillor Welburn was using his influence as a Councillor for private gain.

It is alleged that Councillor Welburn spoke to an agenda item relating to the gazebo and by-law enforcement at a council meeting on July 17, 2024 and voted to suspend the By-law and thereby not enforce parking restrictions at the Cookhouse Boat Launch.

Relevant Policy Provisions

The Code of Conduct

The Complaint engaged the following provisions of the Code of Conduct:

Section 13 – No Improper Use of Influence

13.2 No Member shall use his or her office or position to influence or attempt to influence the decision of any other person, for the Member's private advantage, the private advantage of the Member's parent, child, spouse, staff member, friend or associate, business or otherwise or the disadvantage of others. No Member shall attempt to secure preferential treatment beyond activities in which Members normally engage on behalf of their constituents as part of their official duties. No Member shall hold out the prospect or promise of future advantage through the Member's supposed influence within Council in return for any action or inaction.

13.3 For the purposes of this provision "private advantage" does not include a matter:

- a) That is an interest in common with electors generally as defined in the Municipal Conflict of Interest Act;
- b) that affects a Member, his or her parents/children or spouse, staff, friends or associates, business or otherwise, as one of a broad class of persons; or
- c) that concerns the remuneration or benefits of a Member.

13.4 This provision does not prevent a Member from requesting that Council grant a lawful exemption from a policy.

The Complaint engaged the following sections of the *Municipal Conflict of Interest Act*:

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

...

- (j) by reason of the member having a pecuniary interest which is an interest in common with electors generally; or
- (k) by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

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.

Factual Findings

There is no dispute that the Member parks his truck and trailer at the Cookhouse Boat Launch and moors his boat at a dock accessed from the launch (at times when he and his family are not mooring the dock at their island property). The parking space the Member typically uses is not “reserved” for the Member and he does not pay the municipality for parking – no member of the public is required to pay for parking. The dock the Member uses is not owned by the Township. We were unable to determine who owns or formerly owned the dock in question. The dock does is accessed through the Township property at the boat launch.

The Township has a policy that prohibits parking where parking is prohibited by signage and any owner illegally parked will be liable for costs to tow the vehicle. It appeared that there were no signs at the boat launch prohibiting overnight parking.

The Township also has a by-law regulating public docks and boat launches. This by-law prohibits using a “public dock” for the “long term docking of boats” as well as docking a boat; the public docks may be used for loading and unloading only. The by-law prohibits parking vehicles and trailers in non-designated areas. Enforcement can include prosecution and removal of offending vehicles/boats.

Public dock is defined in the By-law as, “any structure located on land owned by the Township and used as a dock or boat launching or recovery area together with all adjacent and underlying lands”. We have no evidence that the water lot on which the dock in question is located is owned by the Township. We also have no evidence that any portion of the dock that allows access to the land is located on Township property. The land immediately adjacent to the dock appears to be owned by the Township. At no time during the debates at Council was the existing dock identified as a municipal dock or a “public dock” as defined in the By-law.

The information gathered in the investigation confirmed that the dock that the Member uses is not generally used by the public – it appears no one considers this dock to be part of the municipal boat launch.

The consideration by Council as to whether to budget for a gazebo is relevant to the Member only if the Member has no other place to park should the Gazebo be built – we find as a fact that the Member, as well as the public generally, have alternative parking spaces.

At the Council meeting of July 17, 2024 the Member participated in and voted on a report on the Cookhouse Boat Launch related to adding a public dock and possibly other amenities. The Member, the mayor and other Councillors commented that they wanted Council to take the time to have the information they needed to address amenities and funding. Council agreed that the item would be deferred to obtain other information.

The By-law Enforcement Officer raised the issue that if he enforced the By-law, he would be issuing tickets the next day. Until Council decided about docks and parking signage they decided not to enforce the By-law to recognize the difference at the Cookhouse Boat launch compared to other launches.

The By-law Enforcement Officer confirmed that no enforcement had been conducted at the Cookhouse Boat Launch historically. The issue was raised because a complaint had recently been filed. The deferral maintained the status quo of non-enforcement at the boat launch.

MCIA and Code of Conduct Findings

Municipal Conflict of Interest Act

The starting point for assessing a conflict under the *Municipal Conflict of Interest Act* (MCIA) is to determine whether the Member has a pecuniary interest. The MCIA does not define pecuniary interest, but it is universally accepted that it is a financial interest, either positive or negative. In this case, the allegation is that the Member had a financial interest as he was attempting to avoid a fine under the by-law for illegally parking his truck/trailer and boat and also had a possible financial interest because finding alternative parking would be an expense the Member did not current have.

Avoiding a parking fine in this context is not a pecuniary interest as the Member simply needed to park in another area of the boat launch parking area to avoid a fine (which we understand has happened).

Avoiding a fine for mooring his boat at the dock is more complicated. In order to establish a pecuniary interest, we need to first determine if the dock that the Member uses is a “public dock” as defined in the By-law. The Township has not taken a position on this issue and the facts as we understand them are not determinative. We have no evidence that the water lot on which the dock in question is located is owned by the Township. We also have no evidence that any portion of the dock that allows access to the land is located on Township property. The land immediately adjacent to the dock appears to be owned by the Township. At no time during the debates at Council was the existing dock identified as a municipal dock or a “public dock” as defined in the By-law.

What the Member is accused of is attempting to avoid a ticket for illegally mooring his boat at a “public dock”, contrary to the By-law. The fine can only be imposed after a ticket is issued and a conviction is entered by the court. There are obvious factual gaps that do not allow us

to conclude that the mooring is illegal – it may very well be illegal, but we do not have the facts to establish that is the case.

In the absence of facts to confirm the ownership of the dock, we cannot find that there is a pecuniary interest in this matter. Therefore there is no breach of the MCIA

Code of Conduct

We then considered the Township Code of Conduct:

13.2 No Member shall use his or her office or position to influence or attempt to influence the decision of any other person, for the Member's private advantage... No Member shall attempt to secure preferential treatment beyond activities in which Members normally engage on behalf of their constituents as part of their official duties. ...

13.3 For the purposes of this provision "private advantage" does not include a matter:

(a) that is an interest in common with electors generally as defined in the Municipal Conflict of Interest Act;

...

13.4 This provision does not prevent a Member from requesting the Council grant a lawful exemption from a policy.

The Code of Conduct creates a non-pecuniary conflict of interest provision. Therefore, even though we find that the Member did not have a pecuniary interest in the parking/mooring issue, we must still consider these provisions. The question we must answer is whether a reasonable person apprised of all of the relevant facts would perceive the Member's participation in this matter to be a conflict?

In order to answer that question, we looked at section 13. This section allows members of Council to be advocates for their constituents, and even allows Members to ask Council to give them an exemption from policies. It further states that a private advantage is not found in situations where the Member is part of a group that shares an interest or where the interest is held in common with others in the municipality.

The vote at Council was not to exempt the Cookhouse Boat Launch from enforcement, it was to defer any decision until Council had consulted with the public and gathered more information about what improvements might be made to the boat launch to recognize the long-standing use of the parking area and docking by residents that was not consistent with the By-law.

If the Code of Conduct allows a member to request that Council grant an exemption for them personally, it cannot be intended to prevent a member from advocating that Council not decide a matter until it has all of the information necessary to understand what, if any, improvements might be made. This exception would not allow the Member to decide whether to enforce in future, but the decision to defer was not a final decision that created a conflict of interest.

We also considered the exception in section 13.3 that allows a member to deal with matters where the interest is one in common with electors as defined in the MCIA. The MCIA has been considered by various courts and those decisions confirm that “electors” is not every elector, it includes smaller groups of electors who have an interest in common. In this case everyone who uses the boat launch does have an interest in parking and docking. However, this is a decision that was limited to one boat launch only. The number of people with that interest is not large enough to create a group of electors that could entitle the Member to rely on the exception. In a municipality the size of the North Shore, where water access is important to portions of the population, the interest held by everyone who uses all boat launches would be an interest in common with the electors; because this decision was specific to one boat launch the exception is not available.

While the Member was not entitled to take advantage of the 13.3 exemption in these circumstances, his participation and vote was not a breach of the Code of Conduct because the decision was to defer to allow Council to obtain relevant information to consider how to regulate the boat launch in the future. We also rely on the finding above that there is no clear understanding of how the dock will be treated under the By-law. In all of the circumstances we are satisfied that participating in the July decision was not a conflict of interest.

Conclusions

As a result of the analysis above the complaint is dismissed. No Application will be commenced to enforce the MCIA and no penalty is recommended to Council.

Although we dismissed the complaint, the facts have the potential to change and Council’s future decisions may create new potential conflicts. Because of the uncertainty, we want to give some guidance to the Member and Council to avoid a further complaint.

The investigation revealed that Council considered this boat launch to be unique among other boat launches because of the history and use of the launch – and Council is entitled to treat this boat launch differently because of that history. The fact that the dock in question may or may not be a “public dock” as defined in the By-law was an important consideration in our finding.

If Council determines in the future that the dock is subject to the By-law, then the Member would have a pecuniary interest as finding alternative docking is likely to be an expense. Until that determination is made, the facts cannot support an MCIA breach.

If Council does determine that the dock is subject to the By-law, the Member will not be able to rely on the exemption for an interest in common under the MCIA as only a few people use the dock.

The Member would be able to ask Council for an exception to the By-law and rely on the exemption under section 13.4 in the Code of Conduct; but the Member would not be able to advocate for that relief (debate in Council) or vote on the matter at Council.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP

A handwritten signature in black ink, appearing to read 'C.S.', with several horizontal strokes extending to the right.

Tony E. Fleming, C.S.
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TEF:sw