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INTEGRITY COMMISSIONER REPORT ON CODE OF CONDUCT COMPLAINT – 2020-03 COUNCILLOR MAT SISCOE

SUMMARY

A formal complaint was filed with the Office of the Clerk of The Corporation of the City of St. Catharines (the “**City**”) on September 18, 2020 (the “**Complaint**”). The Complaint alleges that Councillor Mat Siscoe (the “**Councillor**”), a member of Council for the City (the “**Council**”), contravened Section 10.0 of the City’s Code of Conduct for Members of Council, Local Boards and Advisory Committees (the “**Code**”).

The Complaint alleges that the Councillor became involved in a City enforcement decision regarding certain landscaping boulders placed into the municipal boulevard adjacent to a residential property on account of a personal relationship with a City resident, and that his actions constitute an improper use of influence in contravention of Section 10.0 of the Code.

APPOINTMENT & AUTHORITY

Aird & Berlis LLP was appointed as Integrity Commissioner for the City and its local boards pursuant to subsection 223.3(1) of the *Municipal Act, 2001*¹ on January 28, 2019 by By-law No. 2019-13.

The Complaint was validly filed. As such, we have reviewed the Complaint in accordance with our authority as Integrity Commissioner pursuant to the Code and with the process for hearing complaints as set out in the City’s Complaint Protocol..

CODE PROVISIONS AT ISSUE

The Complaint alleges that the Councillor has contravened Section 10.0 of the Code:

10.0 Improper Use of Influence

- 10.1 A Member shall not use the influence of their office or appointment for any purpose other than the exercise of his or her official duties in the public interest.
- 10.2 A Member shall not use the status of their position to influence the decisions of another person to the private advantage or non-pecuniary interest of themselves, their parent, children or grandchildren, spouse, or friends or associates, or for the purpose of creating a disadvantage to another person or for providing an advantage to themselves.

¹ S.O. 2001, c. 25.

REVIEW OF MATERIALS & INVESTIGATION

In order to prepare this Report, we have undertaken the following steps:

- Review of the Complaint and all attachments and materials referred to therein;
- Review of the Councillor's response, dated October 22, 2020, and all attachments and materials referred to therein;
- Review of the Complainant's reply, dated November 4, 2020;
- A telephone interview with one key witness who had direct involvement in the matters dealt with in the Complaint; and
- Review of relevant City by-laws and policies.

This is a report following the investigation of the Complaint and is being provided to Council in accordance with subsection 223.6(2) of the *Municipal Act, 2001*.

BACKGROUND

(a) Introduction

After completing our standard intake process and preliminary review of the Complaint, we wrote to the Complainant on September 30, 2020 to seek additional information in support of the allegations contained in the Complaint. Upon receiving such information from the Complainant, we determined that the Complaint was validly filed in accordance with the Code and that the Complaint dealt with a matter within our jurisdiction as Integrity Commissioner.

On the basis of the above, we determined that the Complaint fell within our jurisdiction and accordingly exercised our authority under Section 1(2) of the of the Formal Complaint Protocol to commence an investigation.

Notice of the Complaint was provided to the Councillor on October 15, 2020. We disclosed the nature of the Complaint therein and provided the Councillor with our preliminary findings with respect to the Complaint.

In accordance with Section 7(1)(b) of the Formal Complaint Protocol, we provided the Councillor with an opportunity to respond in writing to the allegations in the Complaint. The Councillor responded in writing by a letter dated October 22, 2020. The Councillor's response was forwarded to the Complainant on October 29, 2020 in accordance with Section 7(1)(c) of the Formal Complaint Protocol. The Complainant submitted a written reply on November 4, 2020.

In accordance with our authority under Section 7(3) of the Formal Complaint Protocol, we provided a draft version of our report of findings to the Complainant and the Councillor on December 30, 2020. We did not receive comments from either party.

(b) Councillor

The Councillor is the duly-elected member of Council representing Ward 4 – St. Patrick's Ward. The Councillor is a three-term member of Council, having been first elected in 2010, and re-

elected for the 2014-2018 and 2018-2022 terms of Council. In addition to his duties as a member of Council, the Councillor is also employed full-time as a secondary school teacher at Saint Paul Catholic High School in the City of Niagara Falls.

(c) Role of Relevant City Departments

As set out above, the background of the Complaint deals with an enforcement decision of the City regarding certain landscaping boulders placed into the municipal boulevard without permission. Given this context, we find it necessary to provide a brief overview of the City's relevant department and enforcement processes.

The City's Municipal Works Department ("**Municipal Works**") oversees the maintenance and operations of all City property, except arenas. This includes municipal facilities, parks, and infrastructure such as roads and water systems. Municipal Works is led by the Director of Municipal Works, who reports directly to the City's Chief Administrative Officer.

Municipal Works houses one of two branches of by-law enforcement for the City. By-law Enforcement, Municipal Works deals with matters relating to municipal property, facilities and roads. By-law Enforcement, Municipal Works reports directly to and is instructed by the Director of Municipal Works.

(d) Enforcement of Encroachments on Municipal Property

Much of the conflict underlying the Complaint stems from a misunderstanding of the relevant enforcement protocols. Given the role that this misunderstanding may have played in exacerbating conflict identified in the Complaint, it is necessary to explain the enforcement policy framework.

Although common in other municipalities, the City does not maintain a particular by-law dealing with encroachments onto municipal property. Instead, the City enforces against encroachments in trespass as a matter of its rights as a property owner under common law.

The City does maintain a policy in respect of encroachments on municipal road allowances. The City adopted a policy for exercising its right to remove obstructions from the municipal road allowance (the "**Encroachment Enforcement Policy**").²

The Encroachment Enforcement Policy permits certain landscaping within a municipal road allowance, provided that it does not pose any hazard to public safety and also that it does not pose a hazard to municipal infrastructure.

The Enforcement Encroachment Policy also authorizes City staff to take enforcement action against certain encroachments. However, witnesses interviewed in this investigation characterized the Encroachment Enforcement Policy as being "not very strong" due to its relative age, lack of specificity, and ambiguous language.

As is the case with many municipalities in Ontario, enforcement of the City's by-laws is complaint-driven. This is also true of the Encroachment Enforcement Policy. The City only takes action to

² By resolution dated April 9, 1984.

investigate and enforce the Encroachment Enforcement Policy based on credible sources or complaints; the City does not proactively conduct inspections.

This leads to situations in which City staff has to make highly discretionary decisions about what types of enforcement situations it will prioritize. To make efficient use of its scarce resources, City staff will generally only take enforcement action against an encroachment into the municipal boulevard where it poses a hazard to public safety, or where it poses a hazard to municipal infrastructure. This determination is made by the Director of Municipal Works in conjunction with by-law enforcement staff. Encroachments without these elements of hazard are not prioritized for enforcement, though the City does have the technical right to enforce.

During the course of our investigation, it became apparent that there was some misunderstanding about the City's decision to enforce in this particular instance. For example, the Complaint in several instances notes that some Ward Councillors described the landscaping boulders in ambiguous terms such as being "okay" or that they would be allowed to remain in place. This was ostensibly due in part to a misunderstanding of the relevance of whether the landscaping boulders constituted a "hazard."

To be clear, considerations of whether the landscaping boulders constituted a hazard were only relevant insofar as the City's enforcement priorities; this matter is not determinative of whether there is an encroachment. The evidence is clear that at all relevant times, the landscaping boulders were placed into the municipal boulevard without the City's permission.

(e) Sequence of Events Leading to Enforcement

The allegations in the Complaint revolve around the City's enforcement decision with respect to a residential property in the City's Grantham neighbourhood (the "**Property**"). The Property is located in Ward 5 – Grantham Ward. At all material times, the representatives of Ward 5 – Grantham Ward were Councillors Dawn Dodge and Bill Phillips.

In or around May 2016, the owner of the Property undertook a landscaping project to improve the front yard of the Property. This entailed, among other things, the placement of certain large landscaping boulders along the east portion of the front yard of the Property, ostensibly as an erosion control measure. Through inadvertence or otherwise, several landscaping boulders were placed into the municipal boulevard abutting the front lot line of the Property. These lands form part of a public highway which is owned by the City. At all material times, the landscaping boulders were placed onto the municipal boulevard without the City's permission.

(i) Neighbour's Complaint to City and Subsequent Investigation

In or around the summer of 2018, the neighbouring owner to the east of the Property (the "**Neighbour**") made a formal complaint to the City about the landscaping boulders. On or about October 26, 2018, two members of City staff, a By-law Enforcement Officer, Municipal Works, and Roads Supervisor, attended the Property to conduct a site inspection based on the complaint.

After attending the Property, City staff made two determinations. First, City staff determined that the landscaping boulders—being in the municipal boulevard—had in fact been placed on City property. Second, City staff also determined the placement of the landscaping boulders did not pose a hazard to public safety or the safety of municipal infrastructure. Accordingly, City staff took no further actions at this time as enforcement was not a priority.

After the Neighbour felt that their complaint had not been adequately addressed by City staff, they reached out to the Councillor for his assistance. The Neighbour reached out to the Councillor, and not the Grantham Ward Councillors, because they had some level of familiarity with the Councillor. Our investigation revealed that the Neighbour is a colleague of the Councillor at his place of full-time employment. However, there was no evidence to suggest any close, personal relationship other than the fact of their shared place of employment.

By way of email to the City's Chief Administrative Officer dated October 31, 2018, copying one Grantham Ward Councillor, Councillor Phillips, the Councillor brought the issue of the landscaping boulders to City staff's attention. This was the first instance in which the Councillor had raised the issue with City staff.

(ii) June 10, 2019 Meeting

No further enforcement actions were taken until June 2019. A meeting was called on June 10, 2019 by the Mayor's Office to discuss the matter. Attendees at the meeting were the Councillor, the Mayor, the Chief Administrative Officer, Deputy Chief Administrative Officer, and the Director of Municipal Works. Councillor Phillips was invited to attend, but was not present.

The topic of discussion at the meeting was the lack of enforcement of the Encroachment Enforcement Policy. Although the placement of the landscaping boulders in the municipal boulevard was an encroachment, City staff had not taken any enforcement steps to date.

When asked why City staff had not taken any enforcement action, the Director of Municipal Works maintained the position that enforcement was not a priority in this instance because the landscaping boulders did not pose a hazard to either public safety or municipal infrastructure. That is not to say that there was not an encroachment; the Director of Municipal Works readily conceded that the landscaping boulders were placed into the municipal boulevard. However, the Director of Municipal Works expressed that it was his opinion that if the City's enforcement actions were challenged in court, or if the City brought an application for an injunction to restrain the encroachment, the City would not be successful. This was due at least in part to the lack of clarity and strength of the Encroachment Enforcement Policy. The Director of Municipal Works informed those at the meeting that this was why no enforcement action had been taken.

The Director of Municipal Works likened the situation to the thousands of other instances of landscaping in a municipal boulevard that the City did not enforce. From a traffic safety perspective, there was no difference between the landscaping boulders and a flower bed in the municipal boulevard.

The Director of Municipal Works was asked at the meeting whether he would change his mind that the situation constituted a hazard. The Director of Municipal Works maintained his position that as a professional engineer, he would not be able to change his professional opinion absent additional facts. Despite this, the Director of Municipal Works conceded that there was an encroachment onto City property, and that he did have the technical right to enforce. At the conclusion of the meeting, the Director decided that a compliance order would be sent to the owner of the Property directing that the landscaping boulders be removed from the municipal boulevard.

(iii) Enforcement Actions Following June 10, 2019 Meeting

Following the meeting on June 10, 2019, the City sent a letter to the owner of the Property requiring that the landscaping boulders be removed from the municipal boulevard. The City required that this work be undertaken by July 15, 2019.

Further to a meeting between the owner of the Property and the Director of Municipal Works on July 23, 2019, the City granted an extension through November 2019 to allow time to complete this work. By November 2019, however, it was clear that no work had been undertaken to remove the landscaping boulders.

On November 12, 2019, the Councillor emailed the Chief Administrative Officer to follow up on the status of the compliance order. The Councillor's email noted that the landscaping boulders had not been removed five months following the issuance of the June 11, 2019 order. By reply email dated November 13, 2019, the Chief Administrative Officer's office indicated that the owner of the Property had been granted an extension, that the landscaping boulders had not been removed, and that City staff again served the compliance order and denied a further request for an extension.

Enforcement lay dormant until May 2020. We take notice that at this time, the City and City staff were dealing with considerable stress in the midst of a global pandemic.

On May 12, 2020, the City's Manager of Operations sent an email to the owner of the Property indicating that the City was aware that the landscaping boulders had not been removed, and requiring that removal be completed by May 19, 2020.

The landscaping boulders were not removed by May 19, 2020. On May 20, 2020, the Neighbour emailed Grantham Ward Councillors Phillips and Dodge inquiring as to why the landscaping boulders had not been removed despite the City's orders, and requesting that the situation be rectified.

On May 22, 2020, the Neighbour emailed the Mayor directly, expressing frustration that the landscaping boulders had not been removed nearly a year after the City ordered the owner of the Property to do so.

On May 23, 2020, the Mayor emailed the Chief Administrative Officer, copying the Director of Municipal Works, forwarding the Neighbour's email indicating that the landscaping boulders had not been removed. The Mayor requested that the Mayor and Chief Administrative Officer connect to resolve the issue, or otherwise he would call a virtual meeting with the Chief Administrative Officer, Director of Municipal Works, the Neighbour and all councillors involved, including the Councillor, so that City staff could explain why the owner of the Property had not been forced to follow the City's direction to remove the landscaping boulders.

In response to this email from the Mayor, the Director of Municipal Works decided at this time that he would direct City forces to attend the Property to remove the landscaping boulders. Before this email, the Director of Municipal Works contemplated this action, but had not yet given City staff final direction to do so.

By reply email on May 23, 2020, the Director of Municipal Works indicated that removal was to take place the following week. This reply email was satisfactory to the parties involved, and no further meetings or actions were taken in respect of this issue.

On May 25, 2020, the Director of Municipal Works directed City staff to undertake removal of the landscaping boulders. On May 27, 2020, at approximately 7:00 AM, a City work crew attended the Property and removed the landscaping boulders from the municipal boulevard.

Based on the record of our investigation, there is no evidence to suggest that the Councillor in any way directed or intimidated City staff to make a decision, or acted as the primary driver to have City staff enforce the Encroachment Enforcement Policy. Other than his participation in the June 10, 2019 meeting and email correspondence to City staff through the office of the Chief Administrative Officer, there is no evidence that the Councillor engaged in any direct communication with individual members of City staff responsible for enforcement.

THE POSITION OF THE PARTIES

(a) Complainant

The Complainant takes issue with the Councillor's involvement in the City's enforcement decision. The Complainant submits that the Councillor acted improperly "by virtue of having a personal relationship [and becoming] invested in an issue that was not in his ward."

The Complainant further submits that the Councillor's actions were improper as he was not requested to become involved by either of the Grantham Ward Councillors. The Complainant contends the Councillor's and Neighbour's shared place of employment is evidence of an improper motivation.

The Complainant also infers that the City's enforcement actions resulted from the Councillor's "undue pressure on City Staff to achieve the outcome he was looking for."

In summary, the Complainant asks us to infer that the fact that the Councillor was a colleague of the Neighbour constituted conclusive proof that the Councillor had acted improperly.

The Complainant submits that when approached by the Neighbour, the Councillor should have completely recused himself from any participation in the matter and should have referred the issue to the Grantham Ward Councillors to deal with the matter.

(b) Councillor

The Councillor submits that at all times, he "acted both in the public interest as well as within the confines of [his] official duties..." as a City councillor. He submits that it is his role as a councillor to bring to City's staff's attention allegations of by-law violations and ensure that these situations are investigated and remedied. To this end, the Councillor cites Section 2.0 of the Code, which directs that "Members shall uphold the spirit and the letter of...the laws...adopted by Council."

Responding to the submission that his involvement in a matter outside his ward constitutes "improper influence", the Councillor submits that it is his experience that where a resident has an issue related to a municipal matter, they will reach out to someone they know or have previously met. This is precisely why the Neighbour reached out to him for assistance dealing with City staff rather than the members of Council who directly represent Grantham Ward.

Furthermore, the Councillor submits that although councillors are elected to represent a particular ward, there is no formal responsibility to deal only with matters in those wards. In any event, the Councillor did notify the appropriate councillors of the Neighbour's complaint, and his further involvement was only as a result of him bringing the matter to the attention of City staff. Evidence of engagement of other Councillors, City staff, and the Mayor further indicate that the Councillor did not "act alone" in the City's decision to enforce the Encroachment Enforcement Policy.

Lastly, the Councillor did concede in his response submissions that the Neighbour is a colleague of his at their mutual place of full-time employment. The Councillor submits however that this relationship "carries no more significance than the that [sic] of the hundreds of others across our community that I have come to know through public life, volunteer work or through involvement in community activities." Other than a bald assertion that "this description is otherwise untruthful" in reply submissions, the Complainant has not raised any additional grounds or evidence to suggest otherwise.

FINDINGS

For the reasons detailed below, on a preponderance of the evidence and on a balance of probabilities we find that the Councillor has not contravened Section 10.0 of the Code.

(a) Role of Council Members and Staff in By-law Enforcement Matters

The role of an individual member of municipal council comprises a number of different functions.

The Ministry of Municipal Affairs and Housing in its publication *The Ontario Municipal Councillor's Guide 2018* outlines three main roles of a municipal councillor: as a representative of the views and wishes of constituents, as a policy-maker in providing direction for municipal operations, and as a steward of the municipality's financial and administrative resources.³

In contrast, it is the role of municipal staff to implement the decisions of council and carry out other statutory duties assigned to them.⁴ For some members of staff, this includes the enforcement of municipal by-laws and policies.

While municipal staff have a duty to enforce municipal by-laws and policies, this job often involves a considerable degree of discretion. In order to perform this role properly, staff must be able to exercise this discretion with independence. This is a principle that underpins the rule of law.⁵ Law enforcement officers cannot be subject to political direction in deciding whether or not to lay a charge or what enforcement measures are appropriate in the circumstances. A councillor's representative role must respect the independence of this function.⁶

³ The Ministry of Municipal Affairs and Housing, *The Municipal Councillor's Guide 2018*, "1. Role of council, councillor and staff" <https://www.ontario.ca/document/ontario-municipal-councillors-guide-2018>. However, a member of council has no executive or ministerial duties and no authority to direct staff except in conjunction with other members of council constituting a quorum: Ian MacF. Rogers, *The Law of Canadian Municipal Corporations, 2nd ed.* (Toronto: Thomson Reuters: 2019) (loose-leaf update 2020-10) (online) at ch V, § 32.1

⁴ Section 227 of the *Municipal Act, 2001*.

⁵ See e.g. *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C.).

⁶ See e.g. *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 33.

The fact that a member of Council communicates with municipal staff about a by-law enforcement matter does not necessarily mean that the councillor has overstepped their role. An essential role of a councillor is to liaise between residents of the municipality and the edifice of municipal government. This could include seeking clarification on why or why not the City was taking enforcement measures in any particular case. In the circumstances of the Complaint, the answer lies in whether the Councillor impermissibly interfered with the City's enforcement decision, or whether his communications were directed through the proper channels.

Much was made of the fact that the Councillor was not one of the Grantham Ward Councillors. It may be that the expectation that those two ward councillors may have taken the lead in the matter given that the Property was located within their ward (and this is not to be read in any way as a criticism of those two Council members). However, there is no formal restriction against a member of council involving themselves in matters outside of their own ward.⁷ Irrespective of whether they are elected based on a ward system or elected at-large, a member of an elected municipal council is representative of the electors of the *entire municipality* and not just those persons in their particular ward (or those that cast ballots for them).

(b) Councillor's Actions were Not Improper

Based on the record of our investigation, there was no evidence to suggest that the Councillor engaged in any improper course of action in dealing with the City's enforcement decision. There is no evidence that the Councillor engaged directly with individual members of City staff responsible for the decision, nor did he make attempts to exert any pressure to change their position. When the Councillor did communicate with City staff, he did so at all times through the proper channel of the office of the Chief Administrative Officer. This is recognized in the City's "Staff-Council Relations Policy", which provides that Members of Council must "respect the administrative and managerial chain of command by...directing any questions or concerns in relation to the general administration and management of the City to the Mayor or the CAO for their consideration."⁸

The fact of the Councillor's attendance at the June 10, 2019 meeting does not itself constitute "improper influence." It was the evidence of our investigation that the Councillor "did not say much" and was not the driving force behind the meeting. There was no evidence to suggest that the Councillor pressured, intimidated, or purported to direct City staff to take enforcement actions. To the extent the Councillor brought the Neighbour's issues to the attention of City staff, he did so for the purpose of seeking clarification as to why no enforcement action had been taken despite a clear encroachment into the municipal boulevard.

Although the matter was outside his own ward, the Councillor was invited to attend the meeting as he was the councillor who initially raised the Neighbour's complaint to City staff. His continued involvement and receipt of updates from City staff is also explained as such. The Councillor was included in subsequent correspondence as a courtesy and to keep him informed about the progress of the matter. There is no evidence that he directed City staff to carry out enforcement measures or to do so in any particular manner.

⁷ See e.g. City of Toronto, Integrity Commissioner David Mullan, *Report on Involvement of Members in Matters Arising in Other Members' Wards*, (September 12, 2005):

There are clearly occasions on which it is perfectly appropriate for a Councillor to respond to a request for assistance from a constituent of another ward.

⁸ City of St. Catharines, Policy # LCS2019-01, *Staff-Council Relations Policy* (February 11, 2019).

(c) Councillor's Connection to the Neighbour Not Caught by Code

The connection between the Councillor and the Neighbour is not one that falls within the scope of Section 10.2 of the Code. It is evident and was conceded that the Councillor and Neighbour share a common workplace, and that this was why the Neighbour reached out to the Councillor for assistance in the first place. However, we are of the view that the Complaint does not establish that this connection is of sufficiently close proximity for Section 10.2 of the Code to apply.

Section 10.2 of the Code applies to specific relationships: "parents, children or grandchildren, spouse, or friends or associates..." The reference to "friends or associates" must be interpreted in the context of the other relationships listed in that section. It would be inappropriate to construe "friend" or "associate" to include the scope of relationships suggested by the Complainant. In our view, this would lead to an overly broad application of the Code. If this were so, there could be potentially thousands of individuals the interests of whom this Code provision would prevent any councillor from representing or advancing. Despite this, it is not our interpretation that colleagues can never have a relationship captured by these provisions. In the present circumstances, there simply is insufficient evidence to draw this conclusion.

In any event, there was nothing to establish that the Neighbour and the Councillor have a "close personal relationship" that would fall within the ambit of these Code provisions. Despite a bald assertion of a personal friendship, the Complaint does not provide any cogent or demonstrable evidence or make any submission as to why the fact that the Councillor and Neighbour work at the same place has any special significance in this context. While it is one thing to have some personal connection to an elected member of Council, it is another to suggest that the fact of this connection ought to place special obligations on that member of Council.

CONCLUSION

For the reasons set out above, we have concluded that the Councillor did not contravene Section 10.0 of the Code.

The Complaint is hereby dismissed.

AIRD & BERLIS LLP



John Mascarin

Integrity Commissioner for the City of St. Catharines

Dated this 7th day of January, 2021