



Cunningham Swan
LAWYERS

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Confidential

June 23, 2020

BY E-MAIL: ccalder@northstormont.ca

Council Members – Township of North Stormont
c/o Craig Calder, CAO
Township of North Stormont
15 Rue Union St., P.O. Box 99
Berwick, ON K0C 1G0

Dear Members of Council:

RE: Complaint to Integrity Commissioner – Preliminary Review
RE: Code of Conduct - Received February 13, 2020
Our File No: 26503-0009

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 be made public. There is no discretion as to whether it will be made public – the *Municipal Act* requires that it be made public – the issue is how.

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 debate the findings of the report, only 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

CUNNINGHAM, SWAN, CARTY, LITTLE & BONHAM LLP

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.

BACKGROUND

On February 13, 2019, a complaint under the Code of Conduct (the "Complaint") was forwarded to our attention alleging that Deputy Mayor Frank Landry had breached the Code of Conduct. The complaint had been submitted previously, but the complainant previously asked that it be held in abeyance. The complaint was formally re-submitted on February 13, 2020, however our office spent some time corresponding with the complainant to determine the exact nature of the allegations.

We determined that certain allegations were without merit and did not proceed with a preliminary review of those allegations.

PRELIMINARY REVIEW

The Township's Code of Conduct and the *Municipal Act* provide the Integrity Commissioner with powers which include the ability to interview witnesses and review documents deemed relevant to the investigation process. In conducting the preliminary review, our process included:

- Reviewing the Township's complaint protocol;
- Reviewing the relevant provisions of the *Municipal Act*;
- Providing a copy of the request for inquiry and supporting materials to Deputy Mayor Landry, with a request for any written response to be provided within 10 business days;
- Providing a copy of Deputy Mayor Landry's response to the complainant, with a request for any written response to be provided within 10 business days;
- Providing a copy of the complainant's response to Deputy Mayor Landry with a request for any written response to be provided within 10 business days; and
- Reviewing all submissions and analyzing the merit of the request for inquiry.

During the preliminary review we assume that the facts as set out in the complaint are true. We do this not for purposes of finding a breach, but to test the merit of the complaint. In other words, if the alleged behaviour in fact occurred, would that amount to a breach of the Code of Conduct? If the behaviour would constitute a breach, we undertake a full investigation to determine whether the allegations are true. If the behaviour, even if true, would not constitute a breach there is no reason to undertake a full investigation. It is important to understand that we make no finding of fact during the preliminary review and

we have not determined that the allegations are in fact true - we simply assume that they are true as a method to assess the merit of the complaint at this stage.

After conducting the preliminary review, the Integrity Commissioner found that Deputy Mayor Frank Landry did not breach the Code of Conduct for a number of the allegations. Our detailed conclusions that lead to the decision to not undertake an investigation are set out below.

We determined that one of the four allegations did require an investigation. As part of that investigation we obtained additional information from the Member and from the Municipality.

ANALYSIS

Allegation 1 – Conduct to be Observed – Communicate Decisions of Council

The complainant alleges that Deputy Mayor Landry has failed to “accurately and adequately communicate the attitude and decisions of Council”. The allegation is that Deputy Mayor Landry has not conducted himself in a manner that supports the resolution of Council that the municipality is an unwilling host for wind turbines. His behaviour is alleged to fail to “foster respect for the decision-making process”, contrary to section 2 of the Code of Conduct, “Conduct to be Observed”, which provides:

All Members of Council shall accurately and adequately communicate the attitudes and decisions of the Council, even if they disagree with Council’s decision, such that respect for the decision-making process is fostered. If Council has taken a position in a Local Planning Appeal tribunal, or other tribunal or court, and instructed the Municipal Solicitor to appear at a hearing, no Member of Council who disagrees with such position shall give evidence at such hearing or otherwise work against the will of Council expressed in its direction to the Municipal Solicitor in such matter.

The conduct alleged to breach the Code of Conduct is that Deputy Mayor Landry has been vocal in his opposition to the fire suppression by-law and other by-laws and matters before Council related to the wind turbine project intended to impose restrictions on the project. The Complaint alleges that Deputy Mayor Landry did not support efforts to pass by-laws and resolutions that were consistent with the by-law declaring the Municipality an unwilling host, thereby breaching the Code of Conduct.

It is not necessary to undertake detailed research into the various by-laws or resolutions presented to Council on any topic related to the wind turbine project. We accept as a fact that Council passed an unwilling host by-law. We also accept as a fact that Deputy Mayor Landry voiced opposition to and voted against by-laws or resolutions that were perceived by the complainant as supporting the unwilling host by-law. Again, we remind the reader that

we are accepting these statements as factual only for the purpose of this preliminary review, and have not made factual findings in this regard after any investigation.

Members of Council are entitled to have political views and opinions, and may voice them in support of or in opposition to issues before Council. The fire suppression by-law is not and could not be intended by Council to frustrate the wind turbine project – see our analysis below under Allegation 4 below. Deputy Mayor Landry was not obligated to vote in favour of every by-law related to the wind turbine project simply because Council initially passed an unwilling host by-law. To make such a finding would be to deprive an elected member of a municipal council of the freedom of choice to vote their conscience. This aspect of the complaint had no merit and it is dismissed.

Allegation 2 – Offensive Comment to a Member of the Public

The complainant alleges that Deputy Mayor Landry made an offensive comment to a member of the public at a May 28, 2019 Council meeting that was witnessed by another member of the public who reported it in an email to Deputy Mayor Landry on May 29, 2019, thereby breaching section 4(ii), (iii), (iv) of the Code of Conduct, “Standards of Conduct”, which provides:

4. Members of Council shall refrain from behaviour that:

...

(ii) is an abuse of power;

(iii) Discrimination, intimidation, harassment, verbal abuse, or the adverse treatment of others, and

(iv) prejudices the provision of a service or services to the community.

Deputy Mayor Landry confirmed that the comment was in fact made. These are facts that constitute a breach of section 4(iii) of the Code of Conduct, verbal abuse or adverse treatment of others.

We were advised by the complainant and Deputy Mayor Landry that at the next Council meeting the Deputy Mayor acknowledged that his comments could have offended the recipient and apologized. The recipient of the comments was not in attendance at that meeting, but we are advised that the apology was made known to the recipient. We are also advised that at a subsequent private meeting the apology was repeated to the recipient personally.

The apology is an acceptable resolution of the complaint and no further action is required by Deputy Mayor Landry.

Allegation 3 – Conduct to be Observed – Litigation

The complainant alleges that Deputy Mayor Landry “is reported to have regularly interacted directly and without the support of full council with EDPR senior officers”, contrary to the Code of Conduct, Conduct to be observed in Section 3 re: Litigation or Possible Litigation Matters.

The complaint does not contain any evidence that litigation was initiated or threatened by EDPR. The complaint states that litigation had “reportedly” been threatened by EDPR, “should council impede their Renewable Energy Approval”. If this allegation were true, and if Deputy Mayor Landry did meet to discuss those matters with representatives of the wind turbine company that would constitute a breach of the Code of Conduct. As such, we engaged in an investigation of this aspect of the complaint.

We interviewed witnesses to determine whether there was in fact threatened litigation. We also investigated what, if any, interaction the Deputy Mayor had with any person involved in threatened litigation.

Section 3 of the Code of Conduct, “Conduct to Be Observed” provides:

No Member of Council shall communicate in any way with any party who has initiated or suggested that legal action may be initiated against the township. All inquiries are to be referred to the Chief Administrative Officer or the solicitor who represents the Township on the particular matter.

The complainant indicated in responses to inquiries from our office that the Deputy Mayor met with the Province and landowners – which is not prohibited. The Member acknowledged that he had certain meetings with EDPR, but that those meetings were held with the knowledge of the Township and he was not aware of any threatened or actual litigation. We confirmed with the Township that there was no litigation or formal threats of litigation from EDPR. The only litigation was between citizen groups and EDPR, which is not relevant to the complaint.

In the absence of any actual or threatened litigation, there is no breach of the Code of Conduct and this aspect of the complaint is dismissed.

Allegation 4 – Conflict of Interest

The complainant alleges that Deputy Mayor Landry has a perceived or real conflict of interest as he has family members (as defined in the Code of Conduct) that own some of the 20 properties that executed lease agreements with the Nation Rise wind project and therefore could have profited from the project. The complainant states that the conflict of

interest ought to have been declared by Deputy Mayor Landry and he ought not to have participated in any discussions or votes related to the wind project.

The relatives included an aunt and uncle of Deputy Landry's spouse, and Mr. Landry's spouse's first cousins who also may have had an interest in the lands under lease.

The matters before Council related to the wind project were described by the complainant as numerous, but specific emphasis was placed on:

- discussions related to fire suppression associated with the turbines and Council's deferral of action on this topic;
- informing the Province of potential concerns with the project associated with wells; and
- addressing impacts on property values;

The Code of Conduct defines Family Member as including aunts and uncles and first cousins, by birth or marriage. Therefore, for purposes of the preliminary review the Integrity Commissioner deemed that Deputy Mayor Landry's spouse's aunt, uncle and first cousins were captured by this section of the Code of Conduct. The Integrity Commissioner also assumed for purposes of the preliminary review that these family members had a pecuniary interest in the wind turbine project, even though no specific evidence was tendered in support.

The Code of Conduct states that a pecuniary interest of a family member of a Member of Council is deemed to be an indirect pecuniary interest of the Member. Where an indirect pecuniary interest exists, the Member shall declare that interest whenever a matter comes before Council that could impact that pecuniary interest. The Member shall not participate in the discussion of the matter or the vote on the matter.

Therefore, in order to find a conflict of interest it is necessary that a matter before Council has the ability to impact the financial (pecuniary) interest of the Deputy Mayor's family members. The allegation in this complaint is that any matter that related to the wind turbine project created a conflict of interest. This is too broad an interpretation of conflict of interest. It is also important to remember that the Code of Conduct was adopted by Council on March 26, 2019 – any action prior to that date cannot create a breach of the Code.

While the Integrity Commissioner accepts certain facts as true for purposes of conducting the preliminary review, we do not accept as true the allegations. Simply because a pecuniary interest is assumed to exist, that is not sufficient to find a breach; the matter before Council must have the ability to affect the financial interest of the family member. Therefore, in order to find that a pecuniary interest existed that triggered the obligations to declare and not participate/vote under the Code of Conduct, the matter must have been capable of causing the wind turbine project to be cancelled or to be so significantly affected that the proponent would reduce lease payments.

Even accepting as true that Deputy Mayor Landry was not in favour of a fire suppression by-law (even though this matter was not voted on by Council) does not create a pecuniary interest. There is no evidence that the wind turbine project was in jeopardy if a fire suppression by-law were passed, or that any financial implication would be felt by holders of leases.

More directly to the point, a municipal council does not have the legal jurisdiction to pass by-laws that directly or indirectly prohibit or frustrate the completion of a renewable energy project. The Ontario Divisional Court has ruled conclusively that municipalities do not have the legal authority to pass a by-law that has the effect of frustrating a renewable energy project or preventing it from being constructed. This is so even if the by-laws do not directly regulate the renewable energy project.

In *East Durham Wind Inc. v. the Municipality of West Grey* the Court quashed municipal by-laws that required entrance permits and oversized load permits that indirectly impacted a wind turbine project. In *Suncor Energy Products v. the Town of Plympton-Wyoming* the Superior Court quashed a number of by-laws that purported to impose setbacks and noise limits for wind turbines, impose fees and charges, security deposits and development charges.

Therefore, if the fire suppression by-law (if passed) had the effect of forcing the wind turbine project to withdraw or otherwise frustrated the ability of the proponent to construct the project, that by-law would have been illegal. If the by-law was passed and it did not frustrate the project, there is no evidence that the lease with the family members would have been cancelled or that it would impact the lease payments. Because the discussion of fire suppression and the by-law that might have been passed could not affect the financial interest of the family members in either scenario, there is no conflict of interest.

While our analysis above is specific to the fire suppression by-law, the analysis is equally applicable to any matter brought to Council after March 2019 related to the wind turbine project. Township council had no jurisdiction to force the termination of the renewable energy project or to affect the financial terms of the leases, and as such any discussion to that effect or decision designed to achieve that result would have been of no force and effect – and therefore it could not affect the pecuniary interest of the family members.

It appears to the Integrity Commissioner that the complainant was in support of the group who were staunchly opposed to the wind turbine project. The complainant made a number of comments in the complaint and in responses to the Integrity Commissioner that confirmed that they disagreed with the political views of Deputy Mayor Landry on issues associated with the wind turbine project. The complainant believed that the Deputy Mayor's view was not in the public interest – but that is a subjective view not related to the Code of Conduct.

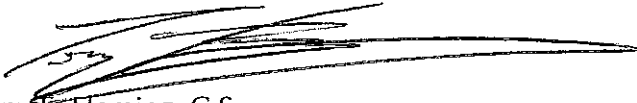
In this case there is no pecuniary interest and therefore no breach – no investigation is necessary, and the complaint is dismissed.

SUMMARY/CONCLUSION

With the exception of the inappropriate remarks at a public meeting that singled out an individual, there are no breaches of the Code of Conduct found in this inquiry. Deputy Mayor Landry apologized for the offensive comments and that is sufficient to resolve that complaint; no further penalty or sanction is necessary.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP

A handwritten signature in black ink, appearing to read 'Tony E. Fleming', written over a horizontal line.

Tony E. Fleming, C.S.
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