

## CITY OF BARRIE CODE OF CONDUCT COMPLAINT 0214

### Background

1. On July 10, 2014, I received a Formal Complaint under the City of Barrie Code of Conduct (the “Code”). The Complaint was dated June 25, 2014. The delay between the date of the Complaint and the receipt by my office was caused by a miscommunication between my office and the City Clerk’s Office, which has since been resolved. I explained the miscommunication to the Complainant advising that the delay in receipt did not affect my review of the matter, as the Complainant had previously commenced an informal complaint process on June 9, 2014.
2. Sections 25.1 and 25.2 of the Code contain the provisions that address the Informal and Formal Complaint Processes. I acknowledge that the Complainant had initially brought forward an Informal Complaint and notified the Member of Council of his intention to pursue the matter informally. He then decided to file a Formal Complaint with my office.
3. Section 25.2 of the Code states that:

*Any individual who has identified or witnessed behaviour or activity by a member that appears to be in contravention of the Code may address their concerns through the formal complaint process set out below (a-f)...*

*e) The complaint shall be filed with the Integrity Commissioner who shall confirm that the information is complete as to a), b), c) and d) of this section. The Integrity Commissioner will determine whether the matter is, on its face, a complaint with respect to non-compliance with the Code and not covered by other legislation or policies...*

4. Section 25.7 of the Code states that if any time, following the receipt of a formal complaint [...] the Integrity Commissioner believes that an opportunity to resolve the matter may be successfully pursued without a formal investigation, and both the complainant and the member agree, efforts may be made to achieve an informal resolution
5. In the complaint before me, the Complainant states the following as reasons for his belief that the Member of Council has contravened the Code:
  - a) The Member of Council has contravened sections 5.2, 5.12(d) and 15.1 of the Code;
  - b) That at the City Council meeting of June 2, 2014, Councillor Strachan declared a potential pecuniary interest as to motions 14A 105 and 14A 106;

- c) That these motions dealt with City assistance for the David Busby Centre. Councillor Strachan notified Council that she was being paid by the Busby Centre as an employee;
  - d) By accepting employment with the David Busby Centre during her term as the Councillor for Ward 2, Councillor Strachan was in contravention of Section 5.2 as she knew or should have known that she would become unable to ‘serve or be seen to serve’ her constituents of Ward 2;
  - e) Councillor Strachan also contravened the Code of Conduct section 5.12(d) by accepting employment with the David Busby Centre, she failed to ‘must avoid conflict of interest’. This conflict of interest did not pre-exist her terms as Councillor but instead should have been foreseen to exist as the David Busby Centre was very interested in a Downtown Ward 2 location;
  - f) Councillor Strachan again breached the Code of Conduct when at the June 16, 2011 City Council meeting failed to declare a conflict of interest as per the Municipal Conflict of Interest Act, section 6(1);
  - g) Councillor Strachan also chose to answer question on behalf of Pathways, some of which had been given to Members of Council to be asked on behalf of Ward 2 constituents.
  - h) By joining the Pathways group and answering questions at a City Council meeting on their behalf, it could also be argued that Councillor Strachan not having declared a conflict of interest at the meeting that evening contravened section 15.1 of the Code of Conduct
6. It is my position that after having received several inquiries to my office regarding the same matter subject of this Formal Complaint and after having looked into this matter in detail as part of my review subsequent to members of the public bringing this matter to my attention, while I did open an investigation file, a lengthy formal investigation is not required in order to dispose of this Formal Complaint. The information that I have received from members of the public and from the Member of Council has provided me with the substantive information that reasonably would be expected to have been obtained if there had been a prolonged investigation process.
  7. Section 27.2 of the Code states that “[i]f during the investigation process, the complaint is withdrawn, sustained or resolved, the Integrity Commissioner shall report to Council outlining the findings, the terms of any resolution and any recommended action within thirty days.”
  8. While conducting a review during the course of an informal complaint, I spoke with the Member of Council who has confirmed with me her understanding of Code obligations in relation to her actions also described in this Formal Complaint.

### **Relevant Sections of the Code**

9. Section 5 of the Code is entitled General Standards of Conduct. In particular, subsection 5.2 states that Members shall at all times serve and be seen to serve their constituents in a conscientious and diligent manner.
10. Subsection 5.12(d) of the Code states that Members of Council must avoid conflicts of interest.
11. Section 15.1 of the Code states that no member shall act as a paid agent before Council, its committees, or an agency, board or commission of the City except in compliance with the terms of the *Municipal Conflict of Interest Act* as amended from time to time.

### **Analysis of Relevant Sections of the Code**

12. The wording of subsection 5.2 of the Code underscores the requirement and commitment of Members of Council to carry out their official City activities in a way that will foster and enhance respect for government and demonstrate respect for members of the public.
13. When a Member of Council is elected, she or he ceases to represent a particular group or matter of interest and becomes one part of the governing body recognized by the Municipal Act, as the decision-maker of the municipality.
14. What this means is that a Member of Council will not participate in activities that grant, or appear to grant, any special consideration, treatment or advantage to an individual or group which is not available to every other individual or group in the City that they represent, irrespective of being a Councillor for a particular ward.
15. Subsections 5.12(d) and 15.1 of the Code both make reference to conflicts of interest. The first provision speaks generally about the avoidance of conflicts of interest and the second speaks specifically about avoiding participation as a paid agent before Council except in compliance with the *Municipal Conflict of Interest Act*.
16. While the Code does not contain a commentary section to assist readers with the correct application and interpretation of its rules, it is a widely supported view among Ontario municipal integrity commissioners, that the provisions of the *Municipal Conflict of Interest Act*, do not currently fall within the investigative jurisdiction of municipal integrity commissioners.
17. However, the inclusion of section 5.12(d) of the Barrie Code points to the intent of City Council to have Members of Council understand that it is the responsibility of each Member to be familiar with and adhere to the provisions of the *Municipal Conflict of*

*Interest Act* (the “MCIA). In addition, recognizing the importance of avoiding even the appearance of a conflict of interest, Members are encouraged to interpret the phrase “conflict of interest” in its broadest possible terms, and shall avoid taking any action or making any decision where there are grounds for a reasonable person to think that a conflict exists between the Member’s personal interests and the public interest.

18. I concur with the position outlined by Justice Cunningham in his Report of the Mississauga Judicial Inquiry: Updating the Ethical Infrastructure, in which he states that “the MCIA is restricted to the pecuniary interests of members of council in the deliberative and legislative contexts, but the common law is much broader and recognizes conflicts of interest involving non-pecuniary interests.”
19. It is my position as Integrity Commissioner for the City of Barrie, that neither the provisions of the Municipal Act nor of the Code confer upon me the authority to review or investigate matters governed by the MCIA. If the complaint is an allegation with respect to matters under the MCIA, the complainant shall be advised to review the matter with their own legal counsel.
20. However, I do believe that the decision of the City of Barrie to include sections in the Code in addition to the section entitled Municipal Conflict of Interest Act (section 13.1), was based on an understanding that situations may occur where factors other than or in addition to a financial interest may appear to have an undue influence on an elected official’s participation in a matter before Council. It is based on this reasoning that the Barrie Code should be interpreted to mean that subsection 5.12(d) relates to matters in addition to pecuniary interests and subsection 15.1 not only prohibits Members from acting as a paid agent before Council for an individual or group *but also* triggers the provisions of the MCIA should the situation explained in subsection 15.1 occur.
21. Therefore, *if* a Member of Council has a financial interest in a matter before Council, this situation is governed by the rules of the MCIA and the enforcement of these rules lies within the jurisdiction of the courts, not within the jurisdiction of the Integrity Commissioner to investigate.
22. However, the mention in the Code of the MCIA points out that it is the ethical responsibility of all elected officials of the Council of Barrie to familiarize themselves with the rules contained in the MCIA so that they may act diligently to avoid participating in the vote of a matter for which they have a direct or indirect pecuniary interest.

23. Conversely, a non-pecuniary conflict of interest exists when an individual Member of Council could be influenced or appears to be influenced by a personal interest (bias or pre-judgment based on a relationship with an individual or group), when carrying out their public duty. When considering whether or not this type of conflict exists, it is important to consider whether there are any grounds for a reasonable person to think that a conflict exists.
24. In a 2012 decision of the Divisional Court of Ontario (*Amaral v. Kennedy*), the words “reasonably be regarded as likely to influence” establish an objective standard, which means when evaluating the actions of an elected official, the Court will ask if the pecuniary interest would be *likely to influence* the politician’s actions.
25. As stated above, while I do not have authority to review matters governed by the rules of the MCIA, the above-noted decision gives guidance when evaluating the rules contained in 5.12(d) and 15.1 of the Barrie Code. In fact, it is helpful to be guided by the objective standard used by the courts when they make evaluations in relation to pecuniary conflicts of interest. As a result, when I evaluate the actions of a Member of Council in relation to allegations of non-pecuniary conflict of interest, I will have regard for whether the non-pecuniary interest, objectively viewed by a reasonable person, would be likely to influence the politician’s actions.

## **Facts**

26. While conducting a review of an informal complaint in relation to Councillor Strachan, she stated that she declared a conflict of interest under the MCIA on the matter subject of the informal complaint (substantively the same as the matter subject of this Formal Complaint) on February 10, 2014 – Motion 14-G-029, June 2, 2014 – Motion 14-A-105 and June 2, 2014 – Motion 14-A-106.
27. Councillor Strachan further stated to me in her response to the informal complaint that she “accepted a position of project manager through the David Busby Street Centre under a Trillium Grant in November of 2012 [and she] responded to a job posting and was part of a competitive process and was awarded the position following a hiring process. Councillor Strachan stated that she “learned about this employment opportunity as [she] was currently still employed by the David Busby Street Centre in the position of Resource Development Manager and [she] has held this position since 2011.
28. Councillor Strachan stated in response to the informal complaint that her professional work has always been with non-profit organizations in roles of program management and/or development.

29. Councillor Strachan stated in response to the informal complaint that “[a]s a member of council [she is] entitled to seek full time employment in the community and that it is [her] wish to work with the not for profit sector. The Member further states that [she] went to school to pursue an education in community outreach and development.”.
30. On June 16, 2014, Barrie Pathways made an informational update community presentation to Barrie City Council. At that Council meeting, Councillor Strachan asked the Mayor and Members of Council if they would agree to excuse her from the Council table to join the Pathways delegation in the Gallery. In response to the informal complaint, Councillor Strachan stated that she asked to be excused to join the delegation “as I am employed by the organization and I was motivated to answer questions because I felt that I had the most accurate information in the group and I wanted the residents who were present and interested in the item to get the best information possible”.
31. Councillor Strachan stated that “Members of the public are not procedurally allowed to ask questions at a council meeting and that [she] did relay to constituents that if they had specific questions they could email them prior to the meeting and a member of council could likely ask the questions”.
32. Continuing in the explanation of her behaviour and actions, Councillor Strachan stated in her response to the informal complaint, that “[i]n hindsight and after further review [...] of the Code of Conduct I regret that I chose at that time to speak on behalf of Pathways during the presentation. I was motivated to answer questions because I felt that I had the most accurate information in the group and I wanted the residents who were present and interested in the item to get the best information possible. Once I declared a conflict on the matter before council, I should have recognized that a conflict works both ways and I apologize for what in retrospect seems like it was a bad decision.

## **Conclusions**

33. Councillor Strachan stated in response to the informal complaint that “[w]ithin the organization of Barrie Pathways, I was in the best position having the full spectrum of knowledge on the project to answer the questions. I believed that I was providing a service to the public via a public presentation sharing the information that I had with the community.”

34. While I believe that Councillor Strachan was acting in good faith, by asking to be excused from her position at the Council table and moving to sit with the Barrie Pathways delegation, she took the position of wearing two hats: that of a Member of Council representing Ward 2 and that of an employee of the David Busby Street Centre.
35. Section 5.12(d) of the Code relates to personal interests not only of a pecuniary nature. The underlying premise of subsection 5.12(d) of the Code is that municipal elected officials may not act in a manner that would cause a reasonable person to think that she/he would show favor toward someone or that she/he can be improperly influenced. Section 5.12(d) requires a Member of Barrie Council to consider whether her or his relationships and affiliations could prevent her or him from acting fairly and objectively when performing their duties for the City. If she or he cannot be fair and objective because of a relationship or affiliation with a group, the Member should refrain from participating in the discussion and decision-making, not insofar as any potential financial gain, but rather in relation to a real or perceived granting of favor towards the group.
36. Elected officials do not come to a position on Council without interests or personal perspectives. In fact, it is this spectrum of knowledge and viewpoints that make the coming together of individual Members of Council as one decision-making body, a strength for the community. However, an elected official must avoid pecuniary and non-pecuniary conflicts of interest. The former falls outside of the realm of jurisdiction of the integrity commissioner. The latter can be evaluated by the integrity commissioner and generally can be avoided by a Member of Council by making a public disclosure of the facts and avoiding any participation in Council discussions when the group to which the Member is affiliated is before Council.
37. Councillor Strachan is correct when she states that she is entitled to seek full time employment in her community. The provincial rules requiring elected officials to avoid certain employment are not found in the laws governing municipal elected officials. However, section 15 of the Code states that:
- 15.1 No member shall act as a paid agent before Council, its committees, or an agency, board or commission of the City except in compliance with the terms of the Municipal Conflict of Interest Act as amended from time to time.
38. While Councillor Strachan was not engaged specifically for the purposes of speaking on behalf of the delegation before Council at a particular meeting, her request to move to sit with the delegation, coupled with the fact that she is a paid employee of the

organization, creates for the reasonable person, a perception of the Councillor acting as a paid agent of the organization in relation to a matter in which the City has an interest.

39. As I had previously reviewed this matter with the Member of Council in relation to an informal complaint and given that Councillor Strachan has indicated to me that she a) understands that her actions gave rise to an apparent non-pecuniary conflict of interest and b) regrets having made the decision to sit with the delegation and answer questions before Council, I am in a position to dispose of this matter without further review or investigation.
40. Councillor Strachan has given me her assurances that she understands that she cannot wear 2 hats at a Council meeting. Further, the Councillor has confirmed that she understands that as long as she is employed by or acts as a volunteer for the David Busby association, when a matter regarding the group is discussed at a meeting of Council, she will not only be required to declare a conflict under the MCI (for which I have no jurisdiction to investigate), but she must refrain from speaking on behalf of the group.
41. The Code deals with non-pecuniary interests such as pre-judgment and bias and for a complaint investigation to arrive at a finding of wilful contravention, a complainant would have to provide evidence in their supporting documentation to the complaint that the position taken by the Member was immovable and that they were incapable of changing their position even after hearing positions of members of the public and/or staff. This would require a demonstration that a Member was not amenable to persuasion by speakers and evidence, such that their minds were so closed that they were incapable of being persuaded to change. The fact that a Member of Council holds a particular position on a matter, does not in and of itself, mean that the Member has an entrenched and immovable position.
42. In the 1990 Supreme Court decision, *Old St. Boniface Residents Association. Inc. v. Winnipeg*, the court stated that, “[s]ome degree of prejudgment is inherent in the role of a municipal councillor...” In the above-noted case, the Supreme Court outlines the common law objective test for bias and stated that “[t]he applicable test is that objectors or supporters be heard by members of Council who are capable of persuasion. This test is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor. The party alleging disqualifying prejudgment must establish that any representations at variance with the adopted view would be futile”.



43. It is incumbent upon me to point out that Councillor Strachan is not without any understanding of how her actions could have been perceived. To be clear, this is not Councillor Strachan's first term as a Member of Council. For some in the public, to see a Member of Council requesting to be excused from the Council table to join the Pathways Association could have been perceived as the Councillor still acting in an official City capacity. The lines of representation were blurred and even though Councillor Strachan left the Council table, the fact that she is a Member of Council added a level of official standing to her comments made thereafter.
44. I accept the assertion made by the Complainant in the complaint before me that a reasonable person may have had, and still may perceive the councillor's work with Pathways as "likely to influence" her political actions" However, whether the Member of Council would be "unable to serve or be seen to serve her constituents of Ward 2", is a matter that is more appropriately decided by the voters at the ballot box and not through the adjudication of a Code of Conduct complaint.

### **Findings**

45. Councillor Strachan's action of requesting to be excused from the Council table and to be allowed to join the delegation of the David Busby/Barrie Pathways Association, contravened section 5.12(d). However, I find that Councillor Strachan committed the breach through an error of judgment made in good faith. To be clear, the term "good faith" used here, is the language used by the drafters of the *Municipal Act* and does not mean that I find the actions of the Member to have been an innocent mistake. Rather, I believe that her actions were serious but not made with an intent to deceive or contravene her ethical obligations.
46. I do not find that the Member contravened section 5.2 or 15.1 of the Code.

### **Recommendation**

As I have found that the Member committed the breach through an error of judgment made in good faith, I do not recommend that any penalty be imposed. However, I do recommend the following remedial action:

That Councillor Strachan make a statement on this matter to clarify her role with the David Busby/Barrie Pathways Association at the Council meeting following the receipt of the this report by Barrie City Council.

Sincerely,

*Suzanne Craig*

Suzanne Craig

Integrity Commissioner

Dated: July 26, 2014