

DATE: Thursday, June 24, 2021

FROM: Suzanne Craig, Integrity Commissioner and Lobbyist Registrar

RE: Formal Code of Conduct Complaint #020821 – Written Reasons

Summary:

Pursuant to section 12 of the Complaint Protocol for the Code of Ethical Conduct for Members of Council and Local Boards (the “Complaint Protocol”), upon completion of an inquiry of a *Municipal Conflict of Interest Act* (the “*MClA*”) complaint, the Integrity Commissioner shall advise the Complainant whether the Commissioner will be making an application to a judge for a determination if there has been a violation of the *MClA*. The Integrity Commissioner shall publish written reasons for her decision within 90 days of such decision. This report presents my reasons for the decision to not make an application to a judge for a determination in this matter pursuant to the City of Vaughan Code of Ethical Conduct for Members of Council and Local Boards (the “Code”), in connection to the Complaint which alleges that:

- that three communications submitted by private interests in mid-October 2020 appeared on Council agenda less than two weeks through a Member’s Resolution from the Mayor. The Complaint sets out that Councillors were asked to endorse large development projects and give minimal time for review (hours by their own admission). The attention that these proposals have commanded from staff and Council in a short time is disconcerting. The requests have been treated with urgency that is not typical in government decision making. Justification for the urgency, above other items before Council and priority projects being placed ahead of all others in process, has not been reasonably explained. There are vague inferences to economic benefits, but all development projects provide economic benefits. Affordable housing has been shoehorned into Member’s Resolutions and praised by Council but actual requirements surrounding these commitments are vague at best.
- It is remarkable the prompt attention that Addendum Item 3 on Council’s October 21, 2020 Agenda (Addendum 3) received, from both Council and the Minister. It was less than two weeks from the time of receipt to Council endorsement; less than four weeks from the time of receipt to Minister MZO approval. This is concerning and suggests, whether intentional or not, an

improper use of political influence and positive bias towards special interests. In this instance, the applicant companies are owned by well-known members of the community who have been officially recognized by the City for significant donations.

This Office conducted an initial classification of the Complaint pursuant to Part B section 6(i) of the Complaint Protocol and made the decision that additional information was required before a determination could be made on whether the matter was, on its face, a complaint with respect to non-compliance with the Code. I commenced an investigation, however while the Complaint did raise allegations about the reasons for which the Member's Resolution was brought forward by the Mayor (the "Member"), the Complaint more specifically alleged inconsistent application and/or the absence of a process at the City that guides the submission of Member's Resolutions by Members of Council.

I. The Code Complaint:

The Complaint set out the following questions:

1. Is the Member's conduct by putting forth Minister Zoning Orders ("MZOs") in conflict (Code or otherwise) due to Council voting on an approval of a MZO that is contrary to the municipality's Official Plan;
2. Can the [Member] put forth these MZOs, that are bypassing the official planning approval process, for which the EW timelines are built in to address fulfilling conditions, agency, and public comment, etc.? What is the City's procedural rule that allows an individual Member of Council (and Council) to circumvent this process?
3. Should the [Member], when putting forth MZOs, follow a specific MZO process? If a stakeholder — i.e., a Gas Plant — opposes a development and takes their concerns to LPAT, is voting against the Official Plan or approving the MZO, voting in favour of the developer;
4. Does the [Member] who put forth the MZO's need to follow a specific MZO process? Can the [Member] who put forth the MZO's have staff work on a Member's resolution to craft the "whereas clauses"? If so, if a Member of Council goes to staff and requests assistance with a Member's Resolution, does staff have a responsibility to advise the Member a) that the matter is currently before LPAT and the resolution would be interfering with a quasi-judicial process; b) that only Council as a Whole can direct staff?;
5. Is it ethical and fair for the [Member] to prioritize and choose to support a developers' request by putting a Member's Resolution with recommendations for Council to endorse developments (some with known well documented planning conflicts) without following a consistent transparent process that reasonably explains why Council should support the development, ahead of all other open development applications in process and circumvent the planning process, including public consultation and appeal rights?
6. Is it ethical and compliant with the City's Code of Conduct for the [Member] to take direct recommendations from developers and place them on Member's Resolution for all of Council to support and endorse? These are developers'

request/recommendations (private interests) now receiving written direct access to become agenda items on Council's agenda/meetings that can be voted upon. As an example, the Member's Resolution put forth before Council on October 21, 2020 stated: "It is therefore recommended".

The Complaint goes on to set out that a Member's Resolution contained the condition for 10% of units to be affordable housing. The Complaint states that "this is not reflected in the developers request nor approved MZO" and thus it was unclear how or why this item came to be included in the Member's Resolution. The Complaint states that "Staff Communications contain a recommendation suggesting in exchange for MZO endorsement an LPAT appeal will be withdrawn. It was clarified in a subsequent communication that subject lands did not have an open appeal.

The Complaint also sets out that:

The City's Code of Ethical Conduct, Rule 1 (i) and Rule 16 state "...that only Council as a whole can direct staff". The City Managers' analysis indicates: "We assisted the Mayor in preparing the Member's Resolution as we would support any Member of Council...". Preparation of these items would not be insignificant, subject land would have to be reviewed and senior management were likely consulted to ensure informed responses. Is it appropriate for staff to be assisting with the preparation of Member's Resolution and preparing staff communications, on requests from private interests that have not yet been presented publicly or decided upon by the whole of Council?

I determined that the issues raised in the Complaint, while relative to transparency in decision-making at the City, did not raise a matter that, on its face, was a complaint under the Code.

II. Conflict of Interest or Undue Influence:

Commissioner J. Douglas Cunningham, in the *Report of the Mississauga Judicial Inquiry: Updating the Ethical Infrastructure*¹ set out that the *Municipal Conflict of Interest Act* ("MCIA") did not constitute a complete codification dealing with conflicts of interest, but rather the common law also applies. The MCIA is restricted to the pecuniary interests of members of council at a meeting of council and the common law expands the principle of conflict to include non-pecuniary interests. Since March 2019, Municipal codes of conduct now expressly mandate under s. 233.2 of the *Municipal Act, 2001*, "non-pecuniary" interests that are usually included in the codes, the sections of which may engage a member's personal or private interests as opposed to financial interests.

¹ *Report of the Mississauga Judicial Inquiry: Updating the Ethical Infrastructure* (Mississauga: The Honourable J. Douglas Cunningham, 2011) at 146.

During the preliminary review of this complaint, I spoke with staff of the City, of the Region, subject-matter experts at the provincial level and Members of Council. I have determined that simply pointing out the benefits to a municipality of a particular planning perspective, e.g. development that will bring forward affordable housing – does not trigger a Code conflict. A conflict situation may arise where a Member of Council, uses their position on Council to bring forward a Member’s Resolution that takes a position on a matter, e.g. affordable housing, **but is also advantageous to the Councillor’s private interest**. Based on the review of the information before me, the Member does not have a private interest that has been triggered insofar as there is no information on its face, that links the bringing forward of the Member’s Resolutions to a promise to afford preferential treatment to an individual or group or benefit to the Member, e.g. a promise of future benefit.

To constitute a pecuniary interest under the MCIA, there must be something more than the possibility of future business or benefit.² In the matter subject of this Complaint, the Member’s Resolution encouraged City Council to take a position in respect of development that would facilitate the creation of affordable housing units. The Member subject of this Complaint, as have other Members of Council, brought forward this position in fulfilment of what was believed to be the role of Council to bring forward through Provincial mechanisms, opportunities both in tune with the social housing concerns in the City of Vaughan, as well as in alignment with the intent of the Official Plan. The relevant City staff, as well as Members of Council noted that the Vaughan Official Plan is a broad statement of planning policies and objectives and not a strict inflexible marker. This Office takes no position on the veracity of this position and makes no finding in this regard. In fact, both the City of Vaughan and York Regional strategies adhere to the position that through the policies to be developed in the Official Plan, there will be encouragement towards a mix of housing types and that affordability is a consideration in planning. Without a link that creates a private interest, the position being advanced through the Resolution is a representational interest which speaks to the role of a Member of Council. In a 2019 decision, the court held that a political interest is not captured by the provisions of the MCIA and would not be a basis for finding that the respondent had a [...] pecuniary interest.³ With reference to the presence of undue influence or inappropriate influence of staff requiring them to write the Member’s Resolution, I am advised that staff did not write the Resolution but rather provided advice on whether the matter was allowable under the City policies and relevant legislation. I do not have sufficient information to determine that the Member Resolutions were brought forward for any reason other than what was believed to be the best interests of the community. This Office received no evidence that there was any personal interest in the success of the zoning applications or that staff was compelled to craft the instruments for consideration by Council.

The courts have confirmed that “[p]ersons for or against a development proposal should feel free to discuss it with their Municipal Councillor, and the Councillor should be free to

² *Lorello v. Meffe*, 2010 ONSC 1976, at para. 59; *Darnley v. Thompson*, at para. 59

³ *Cauchi v. Marai*, 2019 ONSC 497, 87 M.P.L.R. (5th) 318

express an initial reaction without running the risk of being disqualified from subsequent participation in the decision-making process.”⁴ The question that lies at the feet of the City is whether all constituents have equal access to their Council representatives. The Code rules disallow a Member to afford preferential treatment to one group or individual over another. However, it is unclear if the Procedure By-law contains criteria that facilitates equal opportunity for all residents and groups to bring forward their positions to a Member of Council for submission through a Member’s Resolution.

Commissioner’s Considerations:

Based on the preliminary review, I have determined that Rules 1 and 16 of the Code have not been triggered because there has not been conduct of an individual Member of Council that has run afoul of the Code. I have determined that simply being the mover of a Member’s Resolution is insufficient to determine that the moving Member should be the Respondent of the Complaint if the Member is following an approved procedure of the City. Rather, the Complaint raises the issue that the Member did not find himself in a situation where certain actions or conduct is prohibited, The City’s Procedure By-law allows any Member of Council to bring forward a Member’s Resolution for any reason. During this review, I have found no evidence that there exists criteria in the Procedure By-law to determine whether a Member’s Resolution be put on a Committee or Council agenda. Members are not expected to be experts on procedural matters and criteria for bringing forward certain meeting initiatives. Committee and Council agenda items should have criteria for which a matter will be considered as appropriate for consideration. If the only criteria to determine that a matter will be placed on a Council agenda is the number of items and the duration of meetings, there is the real risk that a Member’s Resolution may be perceived as affording preferential treatment. This Office did not need to and did not consider the substantive issues surrounding the legitimacy of MZO’s, as this is not my role. However, I do not believe that there is or should be any obligation under the Code for a Member to individually perform “due diligence” on procedural matters. The procedural rules should have the outcome of fairness and staff as subject matter experts, should be tasked with applying these rules.

Staff have advised that in respect of the October 21st, 2020 Council meeting, the Procedure By-law of the City of Vaughan sets out the rules for Member’s Resolutions in section 5.6.

The Procedure By-law (the “By-law”) provides the following with respect to Member’s Resolutions:

⁴ *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 2 M.P.L.R. (2d) 217.

5.6 MEMBER'S RESOLUTION

- (1) Members of Council may submit recommendations on matters within the jurisdiction of a Standing Committee by submitting a Member's Resolution in a format satisfactory to the City Clerk.
- (2) Member's Resolutions that are received by the City Clerk after the printing of the agenda for a Committee may be added to the agenda as an addendum.

This Office has been further advised that this section of the By-law provides the Members:

“with a great deal of flexibility to bring forward their own resolutions. There is no specific deadline to get one on an agenda – Members can even introduce them at the meeting. Ideally the Office of the City Clerk have them in advance of a meeting so that they can be posted to the website to allow the public an opportunity to review them, and for distribution to the Members and staff.”

This Office has been advised that staff noted that the Member's Resolutions subject of this Complaint were brought directly to a Council meeting, rather than a Standing Committee (i.e. Committee of the Whole). Staff advised that the Procedure By-law does not restrict this practice and provides a means by which to consider addendum items at a Council meeting not previously considered at a Standing Committee. While this process may not afford public consultation on matters of community relevance, this Office has been advised that the Procedure By-law in its current form allows flexibility in meeting management and ease regarding what will be included on the Committee or Council agenda.

All five addenda for the Council meeting to which this Complaint relates, including Addenda #3, 4 and 5, being the Member's Resolutions subject of this Complaint were approved for addition to the agenda by a unanimous vote of Council.

The Procedure By-law provides opportunities for Members of Council to bring forward Member Resolutions as a means to address items that may not be brought forward through a staff report. This Office has been advised that it is the position held by Councillors and staff at the City of Vaughan that this is an important tool for a Member of Council in their role as representatives of their constituents, as not every matter important to the constituents may be the subject of a staff report. Staff also have advised that it also provides an expedient means by which to get a matter in front of Council.

I have been advised that the Procedure By-law also addresses the need for addenda to an agenda, whether for Committee or Council meetings, because business of the City does not always “fit neatly within the established meeting cycles and their associated submission deadlines. The ability to have addenda on a meeting agenda is an important tool for Council and staff to continue the business of the City.”

In reviewing the requirements of the By-law, I have determined that the Member's Resolutions brought forward by the Member were done in accordance with the rules of the City.

Council Meeting Agenda Preparation

With respect to the preparation of the Council meeting agenda, the Procedure By-law provides the following (emphasis added):

6.3 PREPARATION OF AGENDA

Prior to each regular meeting, the City Clerk shall prepare an agenda of all the business to be brought before the meeting. No matter shall be placed on the Council agenda unless it has already been considered by a Standing Committee, is a Communication in respect of an item, *is an Addendum item*, is a By-law whose authority has been previously passed or is anticipated to be passed at the meeting, or is a Ceremonial Presentation authorized by the City Manager.

As the Member's Resolutions had not been previously considered at a Standing Committee, they were considered to be Addendum Items for the Council meeting agenda.

Addendum Items for a Council Meeting

The Procedure By-law contains a provision for addendum items on the Council meeting agenda:

6.4 ADDENDUM ITEMS

An item that is not on the agenda for Council as printed shall require a unanimous vote of the members present to be added to the agenda.

With the review of the questions raised by this Complaint, there appears to be an urgent need to address the decision of what criteria are adopted for bringing forward Member's Resolutions since Council may not possess the necessary expertise to decide what information should be provided in a Resolution. It appears that the existing process allows placement of significant matters on the Council agenda that may require staff input prior to inclusion on the agenda. Staff have confirmed with my Office that any Member of Council may bring forward a Member's Resolution to put matters before Council for consideration. Members and staff view this process as part of the democratic process with the built-in safeguard of the requirement of the confirmation of agenda items by Council, to protect against matters of significant cost and deviation from City policies coming forward for debate. Further, staff advise that should there be a need for further information to be provided to Council to facilitate an informed decision, Council may direct staff to bring back an information or options report at a later date.

Conclusion:

This Complaint raises questions and concerns around governance, in particular regarding transparency in the City planning process and public consultation requirements. In addition, in the absence of criteria for when the public can request that a Member of Council bring forward a matter of interest to them through a Member's Resolution, there appears little that would prevent the granting of special consideration, treatment or advantage to one individual or group over another. With reference to the Complaint referencing allegations that the actions at Council triggered the application of the rules of the MCIA, to determine whether the Member bringing forward the Member's Resolution had a pecuniary interest, I engaged in an analysis of what, precisely, was considered at the Council Meeting. I concluded that the substance of what was considered by council did not relate to a pecuniary interest of any Member of Council.

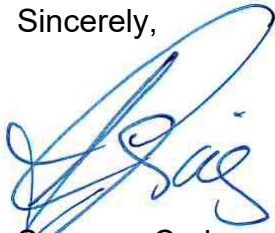
My role as Integrity Commissioner and Lobbyist Registrar for the City is limited to the application and enforcement of the rules of the Code and the Lobbying By-law. The Complaint Protocol, section 6(3)(e) provides that if a Complaint is, for any reason not within the jurisdiction of the Integrity Commissioner, the complainant shall be so advised and provided with reasons and referrals as the Integrity Commissioner considers appropriate. The City (in fact, all municipalities in Ontario) intends for a Member of Council to be free to bring forward any matter of importance to the City Council through a Member's Resolution, in accordance with the rules of the Procedure By-law. A determination on whether a municipality can bring forward a MZO with a planning application requiring further public consultation or one that is under appeal at LPAT, or having any other subject, is not a decision of this Office. The Integrity Commissioner does not have authority to review or make recommendations in respect of actions and decisions of Council as a Whole or staff, or gaps in City processes. As a result, I have decided to terminate this investigation and I do not make findings in regard to the allegations raised in the Complaint pursuant to section 8 of the Complaint Protocol which states that if at any time during the investigation it appears that there are insufficient grounds to continue the investigation, the Integrity Commissioner shall terminate the investigation.

I have concluded that there was no pecuniary interest in the matters considered at the Council Meeting. As a result, the *MCIA* provisions were not triggered for the actions of any Member of Council at the meeting subject of this Complaint. Pursuant to section 12 of the Complaint Protocol, these are my reasons for which I will not apply to a judge to determine if there has been a violation of the *MCIA*.

As part of my role as accountability officer for the City, one of my duties is to work with City staff on the intersection of Code rules and City policies. In this regard, I have determined that there is a need to provide greater clarity on the process for bringing forward a Member's Resolution. However, since it is not the role of this Office to determine City policy or meeting management rules, this Office will make itself available to relevant City staff to assist Members in carrying out their representative role. If any matter on any subject may come forward for consideration by Council through a Member's Resolution, then that should be clearly stated in the Procedure By-law so that

Members of Council and the public are aware of this alternate route for bringing matters forward for debate and approval. This Office will be providing the City Clerk's Office with recommendations on facilitating greater clarity around the criteria for Member's Resolutions going forward to Committee and Council.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Suzanne Craig', with a large, stylized flourish above the name.

Suzanne Craig
Integrity Commissioner and Lobbyist Registrar