



City of North Bay Report to Council

Report No: CORP-2021-141

Date: November 19, 2021

Originator: Peter E.G. Leckie

Business Unit:

Department:

Corporate Services

Legal Department

Subject: Recommendations of the Acting Integrity Commissioner

Closed Session: yes no

Recommendation

That the attendance of The Honourable George Valin before Council for the purpose of discussing the recommendations stated in his report dated December 11, 2020, "Report to Council on an Inquiry Respecting the Conduct of a Member of Council and Report to Invest North Bay Development Corporation on an Inquiry Respecting the Conduct of One of its Members" is not required.

Background

On December 21, 2020 Council received a Report from the Acting Integrity Commissioner, the Honourable George Valin (the "Acting Integrity Commissioner"), dated December 11, 2020, "Report to Council on an Inquiry Respecting the Conduct of a Member of Council and Report to Invest North Bay Development Corporation on an Inquiry Respecting the Conduct of One of its Members (the "Report"), which was attached to Report to Council CORP 2020-128 from Karen McIsaac. Pursuant to Resolution 2020-40(a) that Report was received for information purposes.

In his Report, the Acting Integrity Commissioner made four recommendations under the following headings, namely: (i) Code of Conduct Protocol; (ii) Effective Date of Code of Conduct; (iii) Is Invest North Bay Development Corporation a Local Board?; and (iv) Conflict of Interest.

Council also passed Resolution 2020-408(b) which provided that the motion be amended to provide that The Honourable George Valin be invited to a Council meeting in the new year to discuss his recommendations as set out in his report dated December 11, 2020.

This report to Council is strictly intended to address the Acting Integrity Commissioner's four (4) recommendations and is not intended to review or comment on his findings of fact or his conclusion with respect to the conduct complained of.

The City Solicitor, with the assistance of the Assistant City Solicitor/City Prosecutor specifically as to the Acting Integrity Commissioner's second recommendation with respect to the effective date of the City's Code of Conduct for Members of Council of The Corporation of the City of North Bay and Certain Local Board (the "Code of Conduct"), has reviewed the Acting Integrity Commissioner's recommendations. The City Solicitor wishes to provide the Council with his review of those recommendations in order that Council may further direct staff as to the necessity of having The Honourable George Valin appear before Council in relation thereto.

On February 14, 2019, following the appointment of Mr. Guy Giorno as the City's Integrity Commissioner ("Integrity Commissioner"), the City Solicitor provided him with a copy of the draft Code of Conduct for his review. Mr. Giorno did not provide any comments or recommendations in response.

In preparing this report, the City Solicitor reviewed sixty-one (61) codes of conducts of municipalities ("Municipal Codes of Conduct").

(i) Code of Conduct Complaint Protocol

Acting Integrity Commissioner's Recommendation:

"Most Ontario municipalities that have adopted a code of conduct for members of council and local boards have developed a code of conduct complaint protocol. This does not appear to have been done in North Bay. Such protocol would be of assistance to members of council and local boards, as well as to members of the public and the Integrity Commissioner. It would deal with such things as how complaints are prepared, where they are filed, how they are processed, how they are investigated by the Integrity Commissioner, and what occurs at the end of an investigation. In addition, it would inform members about the procedure for them to follow to obtain advice from the Integrity Commissioner concerning the interpretation of and compliance with the Code of Conduct. I recommend that City Council invite Integrity Commissioner Giorno to develop a Code of Conduct Protocol."

The Acting Integrity Commissioner is correct in stating that most Ontario municipalities that have adopted a code of conduct for members of council and local boards have developed a code of conduct complaint protocol. The review of the Municipal Codes of Conduct demonstrate that there are complaint protocols of varying detail. On the other-hand there are municipalities which, like the City, do not have a code of conduct complaint protocol but instead leave it to the Integrity Commissioner to define the process to be followed.

The Code of Conduct is based on the Model Form of Code of Conduct ("Model Form") for Members of Council that was prepared for the Integrity Commissioners Association of Ontario by George H. Rust-D'Eye. Mr. Rust-D'Eye developed the Model Form based on the Code of Conduct of the City of Toronto and those of other municipalities.

Pursuant to O.Reg. 55/18, for the purposes of s.223.2 of the *Municipal Act, 2001*, (the "Act") the following are the prescribed subject matters that a municipality is required to include in the codes of conduct for members of council of the municipality and of its local boards:

1. Gifts, benefits and hospitality.

This is addressed in the Code of Conduct in Article X - Gifts and Benefits.

2. Respectful conduct, including conduct towards officers and employees of the municipality or the local board, as the case may be.

This is addressed in the Code of Conduct in Articles VII - Conduct at Meetings, Article VIII - Conduct Respecting Others, and Article IX - Conduct Respecting Staff.

3. Confidential Information

This is addressed in the Code of Conduct in Article X - Confidential Information.

4. Use of property of the municipality or of the local board, as the case may be.

This is addressed in the Code of Conduct in Article XII – Use of City Property, Services and Other Resources.

In short, the Code of Conduct is in compliance with O.Reg. 55/18. The regulation and the *Act* are otherwise silent on the specific procedural aspects of lodging a complaint with the Integrity Commissioner for a Code of Conduct investigation.

The City's website with respect to the Integrity Commissioner has been updated in October 2020 to provide the following information:

1. A statement that Provincial legislation requires that municipalities establish a code of conduct for members of the Council and certain local boards.
2. A link to the Code of Conduct.
3. A statement that the Code of Conduct is overseen by the City's appointed independent Integrity Commissioner, Guy Giorno, who is

responsible to:

- provide information and direction to Committee and Council members on the Code.
 - coordinate education and procedural training on policies, Code and Municipal Conflict of Interest Act to Council, staff and members of the community.
 - conduct investigations and provide reports on alleged breaches of the Code.
 - provide annual reports to Council on any requests of the Integrity Commissioner.
4. Contact information for Mr. Giorno including his e-mail address, mailing address, telephone number, toll free telephone number and fax number.

The website also includes information about the application for inquiry (complaint form):

- The complainant is invited to file their Code of Conduct Complaint by completing the Application for Inquiry Form to which a link is provided. The instructions go on to state that once you press submit, the information is then sent to Mr. Giorno and no data is stored by the City.
- The Integrity Commissioner will use the contact information provided to communicate with the complainant about the request for inquiry.
- If the Integrity Commissioner conducts an investigation, the complainant, the Member(s) and other persons may be asked for more information. At the end of the investigation, the Integrity Commissioner will report to Council about whether the Member(s) contravened the Code of Conduct.
- The Integrity Commissioner may disclose in the report such matters as in his opinion are necessary for the purposes of the report. Reports to Council become public documents.

The online application form includes complainant's name, address, telephone number, e-mail address, requests the complainant to describe in detail the particulars of the alleged contravention of the Code of Conduct and invites the complainant to add an attachment to the complaint if they so desire.

The Integrity Commissioner does follow a methodology and work plan that was submitted to the City in response to the City's Request for Proposals for Integrity Commissioner Services, R.F.P. 2018-56. The Integrity Commissioner's Complaint Handling Work Plan and Time Lines can be broken down into three main headings, namely: A. Intake; B. Investigation; and C. Reporting.

A. Intake

- 1) Initial intake and review of complaint – 3 days.
- 2) If necessary, communication back to complainant to clarify complaint.
- 3) Reviews, classification and screening of complaint (Grounds to Investigate, Relates to Law or Process other than Code (e.g., MFIPPA), or Frivolous, Vexatious, Bad Faith or No Grounds to Investigate), and then
 - a) Dismissal (no investigation) and matter wrap up - Immediately
 - b) Investigation
 - c) Referral Elsewhere - Immediately

B. Investigation

- 4) All notifications:
 - a) Notice to the Clerk that an investigation is commencing – 1 day
 - b) Notice to Respondent (including copy of complaint and request to respond) – 1 day
 - c) Notice to Complainant that investigation is proceeding – 1 day
- 5) All communications with Complainant, respondent, witnesses and municipal officials
 - a) Respondent responds – 10 days
 - b) Reason to believe contravention of statute – suspend; refer to police – immediately
 - c) Share response with Complainant and invite reply – 10 days
 - d) Complainant replies – 10 days
 - e) Share Complainant's reply with Respondent – 1 day
 - f) If possible attempt settlement – ongoing. Once settled, terminate investigation – immediately
- 6) Investigation
 - a) Decide on Interviews and/or evidence gathering – 3 days
 - b) Schedule interviews. Issue requests for records/information
 - c) Reason to believe contravention of statute – suspend; refer to police – immediately
 - d) Conduct interviews and review evidence – 14 days

C. Reporting

- a) Draft report and share with parties – 7 days
- b) Complainant and Respondent comment on draft – 10 days
- c) Finalize report and add recommendation – 7 days
- d) Deliver Report to Council via Clerk – same day

The Integrity Commissioner does use a "Notice of Inquiry by Integrity Commissioner", that he sends to the parties which sets out the process and some of the timelines.

On April 18, 2019, the Integrity Commissioner made a presentation to North Bay City Council entitled "Member's Responsibilities: Code of Conduct and *Municipal Conflict of Interest Act*". In that presentation, the Integrity Commissioner discussed (i) the *Municipal Conflict of Interest Act*; (ii) *Code of Conduct*; (iii) *Gifts and Benefits*; and (iv) *Advice*. With respect to members of Council and local boards obtaining advice he advised, among other things, that requests must be in writing and advice is given in writing and how such advice may be released.

The City Clerk has confirmed that in review of the accounts rendered by the Integrity Commissioner, it would appear that Members of Council know how to contact and obtain advice from him as well as members of the public looking to file a complaint.

(ii) Effective Date of Code of Conduct

Acting Integrity Commissioner's Recommendation:

"In the event there is concern about my ruling on the defence of retrospective application of the Code of Conduct, if it chooses to do so, Council could amend the Code of Conduct to state that the Code became effective as of February 26, 2019, and that no complaints that occurred before the effective date will be received or considered. That effective date could be reinforced by a similar statement in the Code of Conduct Complaint Protocol, in the event Council decides to adopt one."

Council passed Resolution 2019-70 at its meeting on February 26, 2019, authorizing that the Code be adopted. By-law 2019-16 states, at paragraph 2 thereof, that "This By-Law shall take force and effect upon being passed."

Of the Municipal Codes of Conduct reviewed by the City Solicitor, he could only identify four (4) saw the need to include provisions with respect to retroactive complaints. As example, Code of Conduct for Members of Council of The Municipality of Chatham-Kent, at paragraph 23 states "**No Retroactivity** This *Code of Conduct* shall not apply retroactively to any alleged transgressions occurring prior to the date on which this *Code of Conduct* is approved by Council." Similarly, the City of Cambridge, the City of Kitchener and Waterloo Region each have statements with respect to their complaint protocols, which are:

City of Cambridge: "This complaint protocol shall not apply retroactively to any alleged transgressions occurring prior to the date on which the Code of Conduct was formally approved."

City of Kitchener: "The complaint protocol shall not retroactively apply to any alleged transgressions occurring

prior to the date on which the Code of Conduct was formally adopted by Council.”

Waterloo Region: “12.1 This complaint protocol shall not apply retroactively to any alleged transgressions occurring prior to the effective date of the Code of Conduct.”

The author of the Model Form apparently did not see the need to include a similar provision. That said, a small number of municipalities have included a limitation period that provides complaints will not be addressed after the passage of a stated length of time, which varies from six (6) weeks, six (6) months, sixty (60) days, ninety (90) days and one (1) year.

(iii) Is INBDC a Local Board?

Acting Integrity Commissioner’s Recommendation:

“In the event there is an concern about the correctness of my decision on the issue of whether INBDC is a “local board”, and in the event Council is of the view that INBDC should be deemed to be a local board for the purpose of being subject to the Code of Conduct, I recommend that Council instruct the City Solicitor to take whatever steps are necessary to achieve that result.”

In his Memorandum to Councillor Dave Mendicino, from Integrity Commissioner Guy W. Giorno, dated February 15, 2021, which was made public, the Integrity Commissioner stated that Invest North Bay is not a local board under the Municipal Act and By-Law No. 2016-16. The Integrity Commissioner stated:

“Section 203 empowers the Cabinet to make regulations governing corporations established under that section, including regulations, “providing that specified corporations are deemed to be or are deemed not to be local boards for the purposes of any provision of this Act.”²⁵ Cabinet has used the power to make O.Reg.599/06 which deems certain section 203 corporations **not to be local boards** (subject to few exceptions, discussed below, that do not alter the result in this case). Invest North Bay is one of those corporations, and is deemed not to be a local board.

...The purpose of the above, lengthy review is to establish that section 21 of O.Reg. 599/06 applies to Invest North Bay. That section reads as follows:

- (1) A corporation is not a local board for the purposes of any Act.
- (2) Despite subsection (1), a corporation shall be deemed to be a local board for purposes of subsection 270(2) of the Act, and for the purposes of the *Environmental Assessment Act*,

the *Municipal Conflict of Interest Act*, the *Emergency Management and Civil Protection Act*, and subsection 56.2(3) of the *Capital Investment Plan Act, 1993*.

- (3) Despite subsection (1), if a corporation is wholly-owned, it shall be deemed to be a local board for the purposes of the *Development Charges Act, 1997*.

Section 21 is clear. With few exceptions, Invest North Bay is not a local board. It is not a local board established under section 1 of the *Municipal Act*, and in particular is not a local board under Part V.1 of the *Municipal Act*. (It is a local board only under subsection 270(2) of the *Municipal Act*, which is not relevant here.²⁸)

Ontario Regulation 599/06, which contains section 21, is a powerful provision that overrides any contrary provisions of other laws. If there is a conflict between O.Reg. 599/06 and a provision of the *Municipal Act*, other than section 203, or any other Act or regulation, then O.Reg. 599/06 prevails.²⁹

In his letter of March 19, 2021 to The Corporation of the City of North Bay with respect to North Bay (City) Closed Meeting Investigation 2021-01, Notice of Termination of Investigation for Lack of Jurisdiction, John George Pappas of Aird Berlis, LLP, the City's Closed Meeting Investigator stated, in part:

"One of the specific matters in section 203 of the *Municipal Act, 2001* delegated to Cabinet is the power to provide that "specified corporations are deemed to be or are deemed not to be local boards for the purposes of any provision of this Act."¹¹ O.Reg. 599/06 operationalizes this authority by providing a general rule, with certain limited exceptions

Section 21 of O.Reg. 599/06 is an express, overriding general rule that offers a complete answer in these circumstances. It provides as follows:

Status of corporation

21.(1) A corporation is not a local board for the purposes of any Act.

Section 21 of O.Reg 599/06 also enumerates the circumstances in which a municipal services corporation is deemed to be a "local board":

- (2) Despite subsection (1), a corporation shall be deemed to be a local board for purposes of subsection 270(2) of the Act, and for the purposes of the *Environmental Assessment Act*, the *Municipal Conflict of Interest Act*, the *Emergency Management and Civil Protection Act*, and subsection 56.2(3) of the *Capital Investment Plan Act, 1993*.
- (3) Despite subsection (1), if a corporation is wholly-owned, it shall be deemed to be a local board for the purposes of the *Development Charges Act, 1997*.

It is our opinion that section 21 provides a complete answer to our inquiry. Invest North Bay is expressly deemed to be a local board for the purposes of a number of statutes. However, Invest North Bay is not deemed to be a local board for the purposes of section 239 of the *Municipal Act, 2001*. We will elaborate on a few additional points in support of our conclusion.

There are clear but narrow exceptions to the general rule. For example, subsection 9(2) of O.Reg. 599/06 provides that despite the general rule in section 21, where a municipality designates an "economic development corporation" that corporation is a "local board" for the purposes of section 326 of the *Municipal Act, 2001*.¹² This section permits a municipality to recoup the costs of a "special service" provided by an "economic development corporation"; absent this provision, services provided by a corporation could not meet the definition of a "special service" as they would not be provided by a local board."

At footnote 12 the Closed Meeting Investigator states:

"We note the Acting Integrity Commissioner's report, dated December 11, 2020 (at para. 57), cites section 9 of O.Reg. 599/06 as supporting the conclusion that Invest North Bay is a "local board." With the utmost respect to the Acting Integrity Commissioner, we disagree with his assessment. His conclusion overlooks the concluding portion of subsection 9(2), which provides that a designated economic development corporation is only a local board "for the purposes of section 326 of the Act." When read in their entire context, the portions of O.Reg. 599/06 specifying when a corporation is and is not a local board, subsections 9(2) and 21(2) and (3) operate as limited exceptions to the general rule. This is supported with a view to the qualifying language in these provisions "Despite section 21 of this Regulation..." and "Despite subsection 1...".

(iv) Conflict of Interest

Acting Integrity Commissioner's Recommendation:

"Given (a) my decision that the rule against improper use of influence does not contemplate or include conduct amounting to conflict of interest, and (b) the interest in and concern for ensuring transparency and accountability expressed, as noted earlier, by both Council and the INBDC board, Council may have some interest in amending the Code of Conduct to include a rule requiring members to avoid conflicts outside the scope and application of the Municipal Conflict of Interest Act. In such event, I recommend that the City Solicitor discuss any proposed amendment with Integrity Commissioner Giorno."

The Code of Conduct states at Article II – Principles, in part, as follows:

"The principles that underline this Code of Conduct are as follows:

- (b) Members must be committed to performing their functions with integrity, avoiding the improper use of influence of their office, and *conflicts of interest.*"

Clearly, the Code of Conduct addresses conflict of interest without limitation.

Of the Municipal Codes of Conduct reviewed, approximately one-half (1/2) of those codes contain a statement with respect to conflict of interest while the balance are silent on the issue. Of those codes that did contain a statement with respect to conflict of interest, the provisions varied in scope from statements identical or similar to that of the City's Code of Conduct to only a very small number having identical and more extensive provisions with respect to the avoidance of conflicts of interest.

Financial/Legal Implications

Financially, the Acting Integrity Commissioner charged the City \$600 per hour plus HST (for a total of \$45,233.95 including HST). It would be expected that the Integrity Commissioner would charge a similar rate to appear.

Corporate Strategic Plan

- Natural North and Near
- Affordable Balanced Growth
- Responsible and Responsive Government
- Economic Prosperity
- Spirited Safe Community

Specific Objectives

Ensure continuous improvement of governance and administration.

Options Analysis

Option 1: That the attendance of The Honourable George Valin before Council for the purpose of discussing the recommendations stated in his report dated December 11, 2020, "Report to Council on an Inquiry Respecting the Conduct of a Member of Council and Report to Invest North Bay Development Corporation on an Inquiry Respecting the Conduct of One of its Members" is not required.

This is the recommended option.

Option 2: That the attendance of The Honourable George Valin before Council for the purpose of discussing the recommendations stated in his report dated December 11, 2020, "Report to Council on an Inquiry Respecting the Conduct of a Member of Council and Report to Invest North Bay Development Corporation on an Inquiry Respecting the Conduct of One of its Members" is required.

This is not the recommended option

Recommended Option

That the attendance of The Honourable George Valin before Council for the purpose of discussing the recommendations stated in his report dated December 11, 2020, "Report to Council on an Inquiry Respecting the Conduct of a Member of Council and Report to Invest North Bay Development Corporation on an Inquiry Respecting the Conduct of One of its Members" is not required.

Respectfully submitted,

Name: Peter E.G. Leckie, B.A. (Hons.), LL.B.

Title: City Solicitor

I concur with this report and recommendation

Name Christina A. (Tina) Robertson

Title: Assistant City Solicitor/City Prosecutor

Name David Euler, P.Eng., PMP

Title: Chief Administrative Officer

Personnel designated for continuance:

Peter E.G. Leckie, B.A. (Hons.), LL.B.

City Solicitor