



Cunningham Swan

LAWYERS

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CONFIDENTIAL

May 29, 2024

SENT BY EMAIL TO: marmstrong@prescott.ca

Mayor and Council
c/o Matthew Armstrong, CAO
Town of Prescott
360 Dibble Street West
Prescott, ON K0E 1T0

Dear Mr. Armstrong:

**RE: Code of Conduct Complaint – Report
Our File No. 23476-48**

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 otherwise be made public.

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 alter the findings of the report, only consider the recommendations.

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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 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.

Timeline of Investigation

The key dates and events for this investigation are as follows:

- Complaint Received – January 22, 2024
- Preliminary Review Conducted
- Complaint sent to Member – April 10, 2024
- Response received from Member – April 11, 2024
- Response sent to Complainant – April 15, 2024
- Response received from Complainant – April 22, 2024
- Interviews Conducted – May 2024

Complaint Overview

The Complaint was made against Luis Zelayeta (the “Member”) who is a Member of the Town of Prescott (the “Town”) Heritage Committee (the “Committee”).

The following events were alleged to have breached the Code of Conduct:

- December 11, 2023: The Member made an unregistered delegation to Council as a private resident regarding the declaration of vacant property (the “Lands”) as surplus lands (the “Declaration”);
- December 23, 2023: The Member started a “Save the Park” online petition regarding the Lands;
- December 28, 2023: the Member made a request to have a Heritage Committee Meeting regarding the Lands and circulated the link to the online petition;
- January 5, 2024: the Member made a request to staff for a copy of the land deed transfer for the Lands;
- January 10, 2024: The Member posted comments to the online petition detailing his opposition to the Declaration and questioning the rationale behind the Declaration; and

- January 11, 2024: the Member participated in and spoke at a meeting of the Heritage Committee with respect to the Lands.

Code of Conduct Provisions

The Complaint engaged the following provisions of the Code of Conduct:

Section 4.0 – General Conduct

4.4 Every Member shall abide by the following principles:

- (a) Members shall at all times act ethically;
- (b) Members shall perform their functions with integrity, accountability, and transparency; and
- (c) Members shall comply with all applicable legislation, by-laws, and Municipal policies, including this Code of Conduct.

Section 7.0 – Conflicts of Interest

7.3 In addition to pecuniary interests, Members must perform their duties impartially, such that an objective, reasonable observer would conclude that the Member is exercising their duties objectively and without undue influence.

7.5 Every Member has the following obligations:

...

- (c) To refuse to participate in the discussion of Council, the Board or Committee and to not vote on the matter or seek to influence the vote of any other Member where a conflict of interest exists; and
- (d) To refuse to be involved in any way in the matter once the conflict is identified, including without limitation participating in meetings, facilitating meetings or introductions to staff or Members or providing advice to any person that would materially advance the matter.

8.0 – Communications and Media Relations

8.1 Members, when communicating with the public and media, will accurately and adequately communicate the attitudes and decisions of the Council, Board or Committee, even if a Member disagrees with a majority decision, so that there is respect for and integrity in the decision-making process.

8.2 It is not the intent of this Code of Conduct to restrict the ability of a Member to express a personal opinion on matters of general interest. In such cases, the Member must make it clear that the comment is being made in their capacity as a private citizen, and not as a representative of the Municipality. In no event should a Member express a position that is disrespectful of the decision of the majority of Council, a Board or a Committee.

Factual Findings

No factual findings were required in this investigation. We were provided with supporting documentation, video footage and email correspondence for the allegations which confirmed that the events occurred as alleged.

Application of the Code of Conduct

At the outset of our investigation we determined that, although the Member is not a Member of Council, he is still required to abide by the Code of Conduct provisions.

The Code specifically defines “Member” to include “all members of Boards and Committees of the Municipality”.

As the Member is a Member of the Heritage Committee of the Municipality, he is bound by the Code of Conduct requirements.

Code of Conduct Findings

Section 4.0 – General Conduct

Section 4.0 of the Code of Conduct was identified in the Complaint as being engaged by the allegations.

We did not find any breach of this section as these provisions are policy guidelines as opposed to objective standards that are capable of breach by a Member. They provide guidelines for Members that clarify the Municipality’s goals in passing the Code of Conduct and serve as a guide for interpreting other Code of Conduct provisions. They do not in and of themselves, however, create clear and objective obligations that can be breached and form the basis of an investigation.

We considered these provisions as interpretative tools for the remaining Code of Conduct sections engaged by this investigation but find no breach of Section 4.0 on a standalone basis.

Section 7.0 - Conflict of Interest

Pecuniary Interest in the Lands

We note that this investigation considered but found no evidence of any financial benefit or interest on the part of the Member regarding the Lands.

As such, the *Municipal Conflict of Interest Act* and the Code of Conduct provisions dealing with pecuniary conflicts of interest were not considered to be relevant.

Personal (Non-Pecuniary) Interest in the Lands

The Code of Conduct also addresses personal or non-pecuniary and apparent conflicts of interest.

Specifically, Section 7.3 requires that Members be impartial such that an objective, reasonable observer would conclude the Member is exercising their duties objectively.

The Member confirmed that he lives in the same neighbourhood and in close proximity to the Lands that are the subject of the Complaint and the allegations.

This finding is supported by comments the Member made during the Heritage Committee meeting on January 11, 2024 where he questioned his ability to be impartial and stated that for him there was “an emotional aspect” to the matter before the Committee.

As a result, we find that the Member has a personal interest in the Lands and that an objective, reasonable observer would not conclude that the Member is objective with respect to matters concerning the Lands and specifically the decision of Council that the Lands be declared surplus.

Exception in Section 7.4(b)

We considered Section 7.4(b) of the Code of Conduct in determining whether or not the Member has a personal interest in the Lands. Specifically, we considered whether the Member is one of a broad class of persons that is affected by the interest.

We concluded that the Member cannot rely on this conflict of interest exception. Specifically, the Member lives across the street from the Lands and can see the Lands from his house. As a result, the impact of the potential sale and development of the Lands is specific and unique to the Member. The Member cannot be considered to have the same interest as a broad class of persons in the area and we therefore find that he does not benefit from this exception.

Breach of Section 7.3 of the Code of Conduct

As noted, this Section requires that Members be impartial such that an objective, reasonable observer would conclude the Member is exercising their duties objectively.

We find that the Member breached this obligation on December 28, 2023 and January 11, 2024.

On December 28, 2023 the Member sent an email in his capacity as a Member of the Heritage Committee suggesting that a Heritage Committee Meeting should take place, stating “it is worth having as a last ditch effort to bring more public awareness.” The Member in the email also provided a link to the online petition he started. This communication was sent by the Member to the Heritage Committee to arrange a meeting of the Committee as part of his duties as a Member of the Committee. It was a breach of the Code of Conduct for the Member to set up a meeting where the purpose of the meeting was to deal with the Lands and the Declaration passed by Council. As indicated, we found that the Member would not be considered to be objective in this matter. As such, we find a breach of Section 7.3 on this occasion.

Similarly, the Heritage Committee met on January 11, 2024. The Member participated in the meeting and discussion regarding the Lands despite his personal interest. Participation in this meeting is a breach of Section 7.3 of the Code of Conduct for the same reason.

Breach of Section 7.5(b)

Section 7.5(b) requires that where a conflict of interest exists, the Member must make Council or the Board or Committee aware of the potential conflict of interest and where appropriate declare the conflict of interest.

As a result of the personal interest identified in this investigation, the Member should have declared a conflict of interest and made the Heritage Committee aware of the conflict of interest when carrying out his duties as a member of that committee. The Member did not do so at the January 11, 2024 meeting of the Heritage Committee concerning the Lands.

As such, we find that the Member breached Section 7.5(b) of the Code of Conduct on January 11, 2024.

Breach of Section 7.5(c)

Section 7.5 (c) requires that where a conflict of interest exists, the Member must refuse to participate in the discussion of Council, the Board or Committee, not vote on the matter or seek to influence the vote of any other Member where a conflict of interest exists.

As indicated above, the Heritage Committee met on January 11, 2024 and the Member participated on the matter concerning the Lands in which he had a conflict. As such, we find that the Member breached Section 7.5(c) of the Code of Conduct on January 11, 2024.

Section 7.5 states, in addition to refraining from voting or participating in meetings, a member must refrain from seeking to influence the vote of any other Member where a conflict of interest exists.

The types of actions that are considered to be “seeking to influence” by a member when a conflict of interest exists has been considered in case law. It has been found that attempting to influence includes any form of advocacy or persuasion by a member even when they are presenting the advocacy or persuasion through another role. For example, in *Jaffary v Greaves*¹, the Court found that the respondent contravened the *Municipal Conflict of Interest Act* requirement not to influence the voting of members for a matter in which he had an interest by writing a letter to the finance and administration committee even though the letter was written in his capacity as Secretary of the company making the request under consideration.

The Member in this investigation engaged in various forms of advocacy and persuasion of other members regarding the Lands in contravention of the prohibition against seeking to influence another member’s vote as a result of his conflict of interest. The Member made delegations to Council, started an online petition to gather support in opposition of Council’s decision, sent correspondence to the Heritage Committee regarding the petition and his opinion with respect to the Lands and participated in a Heritage Committee meeting.

The Member indicated during the investigation and on some of the above occasions that he was acting as a “private citizen” and not a member of the Heritage Committee. It is our finding, consistent with the case law, that advocacy or persuasion directed at other members such as the actions taken above constitutes an attempt to influence in contravention of the Code of Conduct requirements regardless of the capacity in which the member indicates they are acting.

It is not reasonable to conclude that a member can circumvent the Code of Conduct or *Municipal Conflict of Interest* requirements by simply declaring they are doing so as a “non-member”. This would create an absurd result whereby members could declare a conflict but still seek to influence votes by communicating with other members if they simply declare they are doing so as a private citizen. If a member has a conflict of interest they must refrain from attempting to influence the vote of other members through any form of advocacy or persuasion in any capacity.

As a result of the foregoing, we find that the member attempted to influence the voting of other members in contravention of Section 7.5(c) on the following occasions:

- December 11, 2023: The Member made an unregistered delegation to Council;

¹ *Jaffary v Greaves*, 2008 CanLII 28055 (ONSC).

- December 23, 2023: The Member started a “Save the Park” online petition regarding the Lands;
- December 28, 2023: the Member emailed the Heritage Committee regarding the Lands and circulated the link to the online petition; and
- January 11, 2024: the Member participated in and spoke at a meeting of the Heritage Committee with respect to the Lands.

Breach of Section 7.5(d)

Section 7.5 (d) requires that where a conflict of interest exists, the Member must refuse to be involved in any way in the matter once the conflict is identified, including not participating in or facilitating meetings or introductions to staff or Members or providing any advice that would materially advance the matter.

We find that the Member breached this provision on December 28, 2023 and January 11, 2024.

As a result of the Member’s conflict of interest, the Member should have refrained from any involvement in the matter as part of the Heritage Committee.

However, on December 28, 2023, the Member communicated with the Heritage Committee, circulating the online petition, and suggesting a meeting be scheduled. On January 11, 2024, the Member participated on the matter on the Committee. It is our finding that these incidents constitute breaches of Section 7.5(d).

Section 8.0 – Communications and Media Relations

Section 8.1 of the Code of Conduct requires Members to accurately and adequately communicate the attitudes and decisions of the Council, Board or Committee so that there is respect for and integrity in the decision-making process.

Section 8.2 of the Code of Conduct clarifies that Members are permitted to express a personal opinion on matters of general interest if they indicate they are doing so as a private citizen. However, this exception is qualified by the requirement that, “in no event should a Member express a position that is disrespectful of the decision of the majority of Council, a Board or a Committee.”

With respect to the Lands, Council voted to make the Declaration on December 11, 2023. Following this decision of Council, the Member took the following actions:

- Started an online “Save the Park” petition in opposition of the Declaration;
- Posted a comment to the online petition detailing his opposition and questioning the rationale behind the Declaration; and

- Through his role as Member, requested a meeting of the Heritage Committee regarding the Lands and participated in and spoke at the meeting.

We found that all three of the above actions constitute a breach of the Code of Conduct provisions regarding communications and media relations.

The Online Petition

The Member agreed during the investigation that he started the “Save the Park” petition.

A link to the petition was reviewed as part of the investigation. The petition is located at www.change.org and is titled “Petition to keep the land behind Town Hall as Public Land/Park” and it indicates it was started by the Member.

The online petition notes:

The Prescott Town Council has passed a recommendation to declare the land behind Town Hall as surplus land. If this proceeds by January 26, 2024 this land can be sold off for development. This is the only public green space in the west end of town. It has been used for many generations as a playing field for kids, a skating rink in the winter and a place for people to walk their dogs and themselves or just read a book from the library. This green space is significant to the Town’s heritage preservation, and the physical and mental wellness of our residents. What better way to combat climate change than by keeping our green space for the public.

It is our finding that the creation of the above petition was a direct attempt to gather support in opposition of the Declaration and not just an expression of the Member’s personal opinion on the matter. It was noted in the petition description that the petition was created in response to the Declaration.

It is our finding that creating a petition to campaign against a decision of Council violates the Member’s obligations to maintain the respect for and integrity of the decision-making process.

We acknowledge that Members are permitted to express personal opinions on matters of general interest when they indicate they are doing so as a private citizen. However, it is our finding that creating a petition to actively campaign against a decision of Council goes beyond merely expressing a personal view or opinion. It is our finding that it represents disrespect for a decision of the majority of council.

As a result of the foregoing, we find that the Member breached Section 8.1 and 8.2 of the Code of Conduct by creating the online petition.

The Comment on the Petition

On January 10, 2024 the Member made the following comment to the online petition page:

This is a vital green space that has been used by the general public since Prescott Town Hall took over the old high school in 1957. In communicating to the Mayor and Council, they are all aware that Augusta Township has a full scale subdivision in the works that will house over 300 homes, on the same street as this green space. These will be various detached and multi family affordable housing. Therefore as we have voiced our opinion to Council and Mayor, why rush to remove a green space that is used daily that promotes physical and mental health care when housing will be built on the same street 800 metres away. Could there be personal interest that goes above ethical reasons or a lack of knowledge and leadership to make rushed decisions. We have the support from two councilors to save this beautiful park and we are gaining the interest and attention from the other councilors. Lets keep voicing our concerns and positive ideas for what this green space can be better utilized, so it shapes the life's of many for generations to come.

The Member agreed during the investigation that he posted the above comment.

It is our finding that posting the above comment on the online petition page is a breach of the requirement to show respect for and maintain the integrity of the decision-making process. Again, a Member is permitted to voice their personal opinion on a matter of general interest. However, when doing so they must not make comments that are disrespectful of the decision of the majority of Council. The Member expressing that they do not agree with the Declaration is not a breach of the Code of Conduct. However, doing so in a manner that is disrespectful of Council's decision is not acceptable. In this case, the comment, "Could there be personal interest that goes above ethical reasons or a lack of knowledge and leadership to make rushed decisions" goes beyond merely expressing disagreement with Council's decision. It is a direct attack on the integrity of Council members that voted for the Declaration and is disrespectful and not acceptable for a Member who is bound by the Code of Conduct.

As such, we find that the Member breached Sections 8.1 and 8.2 of the Code of Conduct with the comment made on the online petition on January 10, 2024.

The Use of the Heritage Committee

On December 28, 2023 the Member corresponded with the Heritage Committee and proposed a meeting regarding the Lands and circulated the link to the online petition. On January 11, 2024 the meeting of the Heritage Committee occurred and the Member participated.

The Member noted in his December 28, 2023 correspondence, “If a Heritage Committee Meeting on this matter would be allowed, it is worth having as a last ditch effort to bring more public awareness” and then provided a link to the online petition.

It was alleged that the Member was attempting to use the Heritage Committee to subvert a decision of Council. The Member indicated in his correspondence that the meeting was intended to be a “last ditch effort to raise more awareness” and provided a link to the online petition.

Further, during the meeting, the following exchange occurred between the Member and staff:

Staff: Getting very concerned that the only reason we are considering this building is so that we can protect what could be lost in the land at the back which he just stated....and trying to use this as a publicity item to sway council and the public to meet the objective of what you’re leading which is to save the back lot. This now gets into a very murky area of objectivity, of impartiality and using this committee to achieve a result that is for something other than heritage.

Member: No, you know what...you’re not wrong. But she did say Council does not need to listen to the Heritage Committee on the sale of that land if it does go through...

Staff: But if you are trying to use the heritage committee...

Member: I’m not though...

Staff: But you just said you were...

Member: No, I said ...we may be here because we never thought about this building to be heritage until that land got brought up for sale and now that that land is potentially for sale it brings up the question of this building that perhaps maybe if we do consider this building for heritage we protect the land.

Staff: That’s where the problem is...

This exchange is evidence of the Member’s intent to use the Heritage Committee to challenge the decision of Council to declare the Lands surplus so that they may be sold. We find that this is an inappropriate use of the Member’s role on the Committee and a violation of the Code of Conduct.

The Member is required to maintain the respect for and the integrity of the decision-making process. The only exception to this requirement is if the Member is indicating their personal opinion on a matter of general interest in their capacity as a private citizen. We find that the Member's use of the Heritage Committee goes beyond merely asserting an opinion as a private citizen. The Member sent a link to the online petition to the Committee along with a request to arrange a meeting to see if the committee could be used to challenge the majority decision of Council. Further, the Member in the quoted exchange indicated that he was attempting to protect the Lands and prevent the sale of the Lands by Council. These actions are well beyond merely expressing an opinion as a private citizen and represent an attempt by the Member to use his role as a member of the committee to "bring more public awareness" and challenge the Declaration and decision of Council.

We find that the Member using the Heritage Committee as a platform to further support for the campaign against the Declaration and to challenge the decision of Council was a breach of Section 8.1 and 8.2 of the Code of Conduct.

Recommendation

The Member breached various provisions of Section 7.0 and Section 8.0 of the Code of Conduct on numerous occasions. We find that the Member not only acted in violation of the conflict of interest provisions of the code of conduct but actively campaigned against a decision of the majority of Council including making disrespectful comments online about Council's intentions.

We find that these breaches reflect a serious disregard or lack of awareness for the Code of Conduct requirements and expectations of Members. The penalty and sanctions we recommend are reflective of this seriousness.

As such, we recommend that the Member be subject to a reprimand pursuant to Section 15.3(a) of the Code of Conduct and be removed from the Heritage Committee pursuant to Section 15.4(c) of the Code of Conduct.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



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