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MEMORANDUM

To: Council
Municipality of Clarington

From: Guy W. Giorno
Integrity Commissioner

Date: October 15, 2020

Re: Council Members and Follow-Up Communication with Bylaw Enforcement

This memorandum is written further to my June 8 report, “Council Members and Alleged By-law Infractions.” It specifically addresses the question of whether, and how, a Council Member should follow up about a property standards concern that the Member believes has not been addressed. More generally, it addresses the appropriate role of Council in the by-law enforcement process.

Summary and recommendations

I support the staff’s initiative to develop a transparent policy or procedure on by-law enforcement. I have reviewed and provided comment the section of the draft policy dealing with “Council Interactions with Enforcement Officers,” and find that it is consistent with my previous recommendations. However, as discussed below, it is also open to Clarington to address additional issues in a policy on by-law enforcement, and I have offered comments to the Municipal Clerk and the Director of Legislative Services on other sections of the draft.

Any involvement of Council in by-law must be exercised by Council as a whole, not individual Members. I confirm my previous advice that individual Members should not involve themselves in specific enforcement matters. Non-involvement means, among other things, that a Member should not be copied on communication about an enforcement matter.

Despite the general principle of non-involvement, my view remains that an individual Member has the same right as a member of the public to complain personally about an alleged by-law infraction. The Member who does this, acts in an individual capacity and must be treated the same as any other complainant. The Member who files a by-law complaint must refrain from the exercise of any official function that could affect the complaint and investigation.

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Independence of municipal by-law enforcement officers

The observations I made about independent by-law enforcement are not mine alone. The legal principle that enforcement decisions must not be subject to political involvement or interference has been adopted and confirmed in a number of places, including the City of Oshawa.

The Preamble to Oshawa’s Enforcement By-law recognizes that:

Council considers it appropriate to ensure the proper administration of justice, to respect the roles of Council members, complainants, staff investigators and prosecutors in the administration, enforcement and prosecution of alleged contraventions of municipal bylaws and other applicable provincial legislation, and to ensure that such investigations and prosecutions occur in a fair and unbiased way, free from any improper influence or interference.¹ [emphasis added]

The Oshawa by-law obliges a municipal law enforcement officer to report immediately any contact from a Council Member related to a complaint or investigation, except in the case of a complaint made by or against the Council Member or an investigation in which the Member is a witness.² The report of Council Member contact must be made to the by-law officer’s director, who then must inform the City Solicitor, who, in turn, may inform City Council.³

The principle of independent by-law enforcement has been incorporated into the policy statements of several other municipalities. For example, the Town of Mono and the Town of Shelburne have confirmed, as policy, that, “Council ... shall not be involved individually in day to-day by-law enforcement decisions.”⁴

Meanwhile, the policy of the Town of Amherstburg is that, “Municipal Council is not involved in any way with the sanctioning of an investigation or making a decision on who shall be investigated.”⁵

In the Township of Wainfleet, Council has approved the following rule:

Once an investigation is underway: no Complainant, Member of Council, Staff or other person shall attempt to influence, obstruct or hinder any investigation, or provide direction on who shall or shall not be investigated – other than through their rights in the filing of a Complaint.⁶

¹ City of Oshawa, By-law 92-2014, Being a by-law to establish a transparent, consistent, fair, unbiased, and effective process for the enforcement and prosecution of alleged contraventions of municipal standards, Preamble, para. 5.

² *Ibid.*, section 11.

³ *Ibid.*, section 11.

⁴ Town of Mono, Bylaw Enforcement Policy (approved May 12, 2020), section 3.21; Town of Shelburne, Policy Number 2019-07, By-law Enforcement Policy, section 3.23.

⁵ Town of Amherstburg, Municipal By-law Enforcement Policy, section 6.2 d).

⁶ Township of Wainfleet, Corporate Policy Manual, Policy 3-1, By-law Enforcement Policy (approved October 22, 2019), para. 3-1 d.

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The connection between enforcement officers' discretion and their independence from Council Members was explained in this manner in a staff report to Toronto City Council:

Once officers determine the permitted tools, they use their discretion to determine the tool that will achieve compliance most effectively. Officers consider the seriousness of the violation, the impact of the violation on public safety, the likelihood of the person to repeat the violation, and the impact of the enforcement activity on business and community in Toronto. The decision to take enforcement action must be free from bias and political interference. The tool used should be proportional to the harm caused by the violation.⁷ [emphasis added]

This specific issue was considered at great length by the British Columbia Ombudsperson, whose observations (in a 2016 special report) represent the most detailed review of the independence principle in a Canadian context:

... council establishes overall priorities for enforcement, enacts bylaws, and adopts bylaw enforcement policies and standards of conduct for bylaw enforcement staff. Council may also provide direction on types of bylaw enforcement issues. For example, council may direct its enforcement staff to prioritize enforcement of certain bylaws, or to issue warnings rather than tickets for specific categories of violations.

Within this framework, everyday enforcement decisions are delegated to staff. Defining and maintaining separation between council and front-line enforcement staff is essential to an administratively fair bylaw enforcement system. It is important for council members to be aware of how their own actions can affect the fairness of an enforcement process. This means that while council sets policy and provides general direction on enforcement priorities, its individual members should not become directly involved in enforcement action by directing enforcement against specific residents, groups or businesses, or by directing that enforcement action not occur in a particular circumstance. Rather, individual enforcement decisions should be made by delegated bylaw enforcement staff or contractors.

It can be difficult for council members to remain a step removed from the day-to-day enforcement process when they are a main point of contact for members of the public who have complaints or who have been the subject of enforcement. It is understandable that council members want to be responsive to the concerns of those who elected them. In such situations, it is certainly appropriate for a member of council to seek assurance that bylaw enforcement staff have fairly responded to a person's concerns.

However, even if motivated by good intentions, council members should not advocate either publicly or privately for a particular result in a specific case. Doing so can create the appearance of bias, particularly if council later hears an appeal on the same matter after bylaw enforcement action is taken. Moreover, any action by a council member that is motivated by favouritism or personal animosity toward an individual may be perceived as an improper use of discretion. Each member of council should strive to remain uninvolved in a specific bylaw enforcement decision unless and until the matter is put on the agenda for the entire council to consider.⁸

⁷ City of Toronto, Executive Director, Municipal Licensing and Standards, "Tools Available to Municipal Licensing and Standards for Enforcement" (September 7, 2016), at 3.

⁸ British Columbia, Office of the Ombudsperson, "Bylaw Enforcement: Best Practices for Local Governments" (March 2016), Special Report No. 36, at 15-16.

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A policy on by-law enforcement

Many municipalities, in Ontario and across Canada, have adopted policies on by-law enforcement. Here in Clarington, the staff has been engaged in development of a policy or procedure on law enforcement, and will present it to Council. In my view, this is a welcome initiative.

Among other aspects of the policy under development, the Municipal Clerk specifically asked me to review the section, “Council Interactions with Enforcement Officers.” In my view, this draft section is consistent with my previous recommendations, and consistent with the Canadian principle of the independence of law enforcement from political interference. I provided to the a few comments on that draft section. I also made comments on the rest of the draft policy/procedure.

Council should note that Members’ involvement in the process is just one of many topics that could be covered in a policy on by-law enforcement. For example, some of the issues addressed by the enforcement policies of other municipalities include the following:

- Complaint intake process
- Confidentiality/privacy
- Priority of response / hierarchy of alleged contraventions
- Identification of “hotspots” for priority enforcement
- Investigation process
- Communication with complainants
- Record keeping
- Enforcement options
- “Spite complaints” / Frivolous and vexatious complaints

This is an incomplete list.

As elaborated below, my recommendations on by-law enforcement include: (a) treating individual Council Members who complain exactly the same as residents who complain, and (b) defining the role of Council as a whole. A formal enforcement policy would assist in meeting these objectives.

The role of individual Members

I confirm my previous advice that individual Members should not involve themselves in specific enforcement matters. In an official capacity, a Member should not attempt to influence who does or does not get investigated or ticketed.

At the same time, an individual who, in a personal capacity, witnesses an alleged contravention, might also happen to be a Council Member. Getting elected to office does not deprive an individual of the benefit of law enforcement. Despite the general principle of non-involvement, my view is that an individual Member has the same right as a member of the public to complain personally about an alleged by-law infraction.

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When this occurs, the complaining Member acts in an individual capacity and must be treated the same as any other complainant. For example, this means that the individual (who also happens to be a Member) must complain in the same manner as anyone else, and must receive the same level of disclosure as anyone else.

The policies of several municipalities require that anyone, including a Council Member, who wishes to complain about a by-law contravention must file a formal written complaint. Municipalities that expressly require Council Members to follow the same intake process as members of the general public include: Amherstburg, Edwardsburgh Cardinal, Greater Napanee, Penetanguishene, and Wainfleet.

I recommend the same here. A Council Member who wishes to complain about an alleged contravention should do so in a personal capacity and be subject to the same process as anyone else.

It must be stressed that making a complaint is a personal act, not something that one does in the capacity of elected official. Only if the Council Member possesses direct knowledge of an alleged contravention, and wishes to trigger the enforcement process, should the Member make a complaint. If the goal of an elected official be merely to assist constituents, then the way to do so is to make them aware of the enforcement process, including how to file a complaint.

If a Council Member complains about an alleged contravention, then the Member should not participate in any Council or committee consideration of the matter. The Member who files a by-law complaint must refrain from the exercise of any official function that could affect the complaint and investigation. (Withdrawal from Council decision making is also required if a Member happens to be the *subject* of a complaint or investigation, such as one involving alleged non-compliance with a property standard on the Member's property.)

Communication about a particular enforcement matter

If a Council Member has made a complaint to municipal law enforcement, then the Member is entitled to no more (and no less) disclosure than any other resident who complains.

Confidentiality and disclosure are topics addressed in many municipal by-law enforcement policies. Among other reasons, some municipalities find it desirable to be transparent about how much information will be provided to someone who submits a by-law enforcement complaint. The appropriate amount of disclosure to a complainant is beyond the scope of this memo. I note, however, that some municipalities only give the complainant (a) acknowledgement of receipt of the complaint, and (b) an eventual statement of the fact that action or no action has been, or will be, taken, or the fact that the investigation and enforcement action have been completed. My understanding is that Clarington's current practice is similar.

Regardless of how much disclosure Clarington provides to complainants, a Council Member who has submitted a complaint should receive the same amount of disclosure as anyone else.

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Many municipal policies also protect the confidentiality of complainants and their complaints.⁹ (This is subject, of course, to the possible need to disclose information as part of the legal process.) A Council Member should receive no greater access to complaint and complainant information than the access of anyone else. Some municipalities make explicitly clear that the complainant's name and personal information shall not be disclosed to any Council Member, the news media, or any municipal employee who does not need to know.

In hindsight, in this respect, my previous guidance should have been more clear. When I previously addressed the question of Council Member access to information about by-law enforcement, I should have pointed to the importance of an overall policy framework that addresses, among other topics, confidentiality during the complaint and investigation process. Specific questions about Members' access to information must be considered in the context of confidentiality generally, on the basis of the enforcement policy that Council will be asked to consider.

Absent that larger context, I can only respond conceptually to some of the specific questions that have been raised about communication, including this one: *If a Member has relayed to Municipal Law Enforcement facts that the Member believes violate the property standard by-law, and the facts remain unchanged one year later, may the Member follow-up with Municipal Law Enforcement?*

If the Council Member *is* the complainant, then the Member should receive the same amount of disclosure that any other complainant would receive in the same circumstance (disclosure that is, ideally, spelled out in Clarington's formal statement of policy on enforcement). Since in theory a member of the public may request information on the status of the individual's complaint, a Member should also be allowed to ask the status of the Member's own complaint. The ability to ask, does not, however, mean entitlement to an answer, beyond what any other complainant in the same circumstance would be told.

If the Member *is not* the complainant, then presumably the complainant is a constituent or a member of the public who approached the Member. Such complainant should receive the same amount of disclosure as any other complainant. Aside from the very real concern that Member involvement could interfere with independence of the investigation, it would also be a problem if different complainants were to receive different amounts of disclosure based on their degrees of access to elected officials.

In all cases, a request for a status update must be confined to that request. At no time should the Member express an opinion on how Municipal Bylaw Enforcement should conduct or conclude an investigation into a complaint. For example, in a prior case, communicating the opinion that a

⁹ See, for example, Township of Scugog, By-Law Enforcement Policy (effective March 30, 2009), at 2: "The Investigator assures the complainant that their name and any personal information provided by them will remain in the strictest of confidence, in accordance with the *Municipal Freedom of Information and Protection of Privacy Act* and will not be revealed to anyone unless so ordered by a Court or other tribunal or body of competent jurisdiction."

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certain situation should not be allowed was considered an attempt to influence or interfere with the law enforcement staff contrary to Section 8.3(c) of the Code.¹⁰

The role of Council (as a whole)

Restrictions on the involvement of individual Members are not meant to apply to Council, which is the ultimate authority of the municipality in law making, policy making, services determination, and financial stewardship.

Council makes, amends, and repeals the by-laws that officers enforce. It can also, through policy, address general matters related to by-law enforcement, including, but not limited to: principles/processes for communication with complainants and property owners; principles to be taken into account in the exercise of discretion; and required internal consultation and approval before escalation. I understand that the draft policy/procedure being developed by staff, for consideration by Council, will address most of those topics.

As mentioned above, Clarington's new policy should also – as proposed in the “Council Interactions with Enforcement Officers” section that I reviewed – define the roles of Council Members and the staff, and protect the independence of the administration of law enforcement.

Political interference in the administration of law enforcement is never acceptable. Operational direction should never be given in a particular case. However, within the scope of that principle, some municipalities formally provide for certain by-law enforcement matters to be brought to the attention of Council.

For example, some municipalities identify specific decisions with financial consequences of which their councils must be informed.

Some municipal policies state generally that the staff may report a particular by-law enforcement matter to Council. I agree that a municipal by-law enforcement policy should address the circumstances in which reporting to Council would occur, but I recommend that both the circumstances and the Council role be clearly and specifically described, and not be general or vague, in order to avoid any possibility or perception of interference in the independence of by-law enforcement.

(The Ombudsman of Ontario agrees that municipalities should adopt by-law enforcement policies, and that the policies should address the circumstances of updates to Council. He has also stressed the distinct roles of Council and staff, and the principle of the exercise of discretion by the staff.¹¹ He has not, to my knowledge, addressed which particular circumstances he feels would justify or require reporting to Council.)

¹⁰ In *Re Partner*, 2018 ONMIC 16 at 61, the Respondent expressed the opinion that the reported facts violated Clarington's bylaws and expressed shock that the reported facts could be allowed.

¹¹ Paul Dubé, Ombudsman of Ontario, “By-Law Surprise: Investigation into the reasonableness and transparency of by-law enforcement and billing practices in the Township of St. Clair and the County of Lambton” (April 2018), at 27-28.

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Following the adoption of a Clarington policy on by-law enforcement that includes the specific role (if any) of Council as a whole, Members should respect the policy and limit their involvement accordingly.

All of which is respectfully submitted.