REPORT ON ALLEGATIONS OF IMPROPER INFLUENCE AND DISRESPECTFUL CONDUCT CONCERNING COUNCILLOR ORLIKOW

Gregory J Levine, Acting Integrity Commissioner

Summary of the Complaints and Findings

This complaint involved a general complaint about bias by the council member against a developer who was attempting to get a development approved.
This was seen essentially as a complaint about political bias which was not investigated because such investigation is not the role of the Commissioner as is discussed more fully below. However, there were complaints about improper influence and disrespect involving three incidents and alleged actions which were subject to investigation:
1. Assuming that a presentation by a well known planner at the University of Manitoba was going to be about the developer's development and thus discouraging other members of council from attending
2. Engaging with protesters and encouraging a protest on the developer's lands thus encouraging trespass (that is encouraging an illegal act)
3. Attempting to drag the developer into real estate negotiations to sell his land

The findings are as follows:
1. The council member having contacted the Deputy Clerk and a fellow council member did not act disrespectfully or use improper influence in respect of the presentation or council members' attendance. Council members asked the Deputy Clerk for advice respecting whether or not it would be improper for council members to attend the presentation especially those involved in a decision respecting the developer's land. An email was subsequently sent by the Deputy Clerk expressing caution. The council member had communication with other council members about this and the complainant is correct that there was a presumption about what the planner was going to discuss. This incident does not constitute improper influence on the part of the council member nor was it disrespectful.
2. There is simply no evidence showing that the council member encouraged an illegal act, that is, a trespass. Having said that though, there is evidence to show that the council member's role in discussing matters with protesters, when he accompanied the mayor to see the situation and meet with the protestors and in his contact by email and otherwise with those involved in the protest, is fraught with ambiguity. This ought to give pause about what a council member's role is exactly when a dispute which involves an illegal act arises. This is discussed more fully in the report. It is troubling for a council member to assume the role of potential mediator in such a dispute when parties to it have not agreed on such an arrangement. To be sure council members need to know what is going on in their wards but where an

illegality is concerned they ought to tread carefully. This is not exactly improper influence in a general sense but the confusion over what the council member was doing as illustrated by his responses to the Integrity Commissioner can be seen to constitute disrespect to both the complainant and the Commissioner. In terms of the 1994 Code no improper influence can be found here as no personal benefit or personal interest of the council member was involved.
3. The e-mail exchanges between the complainant and the council member can be seen to show that the council member was attempting to have the City buy back lands. The council member argues he was exploring an option but really the wording is more than that even if that was his intent. Is such an action within the purview of a council member without council approval? It is a fair question and might be seen to be improper influence in a general sense and certainly also raises questions about the appropriate role of a council member, but again, in terms of the 1994 Code no personal interest or benefit was involved and hence no improper influence can be found.

Discussion:

On February 1, 2018 the complainant wrote to Council Member Orlikow complaining of his bias in dealing with him and his attempt to develop property. On February 23, 2018 the complainant submitted a formal complaint to the Integrity Commissioner which incorporated the letter which had been sent to the council member. In addition to the general issue of bias in the letter to the council member he complained in the complaint form about improper influence of office as well as disrespectful conduct. The Integrity Commissioner requested that an Acting Integrity Commissioner handle this particular complaint and I was chosen to do so.

The following report considers part of the complaint raised by the complainant but for reasons outlined below not the whole of it. The investigation had several delays not least of which was the election blackout period. Early on there was delay getting started which falls to me and for which I apologize. There was some delay getting answers from the Council Member, delays which I probably ought not to have accepted but did so because the Integrity Commissioner functions are new and relatively unknown to members. The campaign period blackout of course has been the longest delay. I informed both the complainant and the council member that they were entitled to counsel. In considering this complaint I have contacted and questioned the council member, civic officials and others. I have also requested written responses from some of them. I have reviewed a great deal of material – civic reports, news reports and the like. Further, the council member was given an opportunity to see a draft of this report and to submit comments on it.

Preliminary Issues

The initial letter complaint raised preliminary issues of both procedural and substantive nature which bear comment. On the procedural side, the complaint falls into the interim complaint category anticipated by section 4 of City of Winnipeg By-

Law 19/2018. Subsection 4(2) creates a transitional system for Code of Conduct Complaints and the Commissioner. It states:

4(2) *Despite subsection (1), the Complaint Protocol and the amendments to the City Organization By-law and the Procedure By-law apply with necessary changes to conduct of members of Council if: (a) the conduct took place between February 22, 2017 and the date this By-law came into force;*

(b) a complaint concerning the conduct was filed prior to the date this By-law came into force; and

(c) the conduct appears to contravene the Code of Conduct adopted by City Council on September 21, 1994.

It should be noted that the former Code of Conduct (1994) had no complaint mechanism and no method of filing a complaint. It is my view that the letter to the Council Member dated February 1 2018 can be seen as the filing of a complaint. It was directed to the councillor as a member of council. It was sent prior to the enactment of the current by-law and while the complaint form was sent the day after enactment, the letter stands as a complaint in my view.

Beyond that, the letter refers to various incidents which do occur more than 60 days prior to the complaint as required by the current Code (which applies “with necessary changes”). However, one incident clearly falls within the 60 day time frame and, as well, the complaint amounts to a complaint about continuing behavior and so events prior to the timeline in the current Code are pertinent and in my view are subject to investigation. Moreover, in relation to those incidents the complainant raised objections at the time via email and these could, in their own way, be seen as complaints. Therefore, I was and am of the view that incidents in the letter could be investigated.

As to substance, the general allegations of bias as raised in the letter of February 1 are not within the purview of the Integrity Commissioner. Political bias is not an issue in the Code of Conduct nor should it be. Elected officials take positions on matters, that is the nature of their work and often their positions are deeply held. The Commissioner cannot investigate allegations respecting what amounts to political bias. If the complainant believes that council has made a biased decision it is open to him to judicially review the decision. I have not investigated this aspect of the complaint although I briefly comment on the standard council members must meet when performing administrative and quasi-judicial functions (see section of Role of Council Members).

The complaint raised issues concerning improper influence of office and disrespectful conduct. The 1994 code contains the following guiding principle:

> *Members shall not use influence of office for any purpose other than his/her official duties.*

This rule also occurs in the current Code (s.4). However it is important to note that, in the commentary to the 1994 rule on improper influence, there is a focus on whether or not influence was used to gain a personal benefit or to further a personal interest.

The current code contains a section dealing with respectful conduct and treating the public with respect (s.8). The 1994 Code did not have such a section but it did have the following principle:

> *Members shall not engage in any activity, financial or otherwise, which is incompatible with the proper discharge of his/her official duties in the public interest.*

While this rule may be broad enough to encompass behavior which shows disrespect for a member of the public, it must also be acknowledged that the focus of the commentary is around issues of conflict of interest.

The complaint about improper influence encompasses several events – an event respecting alleged misinformation about a presentation of a planning expert held in, January, 2018 at the University of Manitoba and allegedly attempting to dissuade other councillors from attending the presentation; engaging with protesters and allegedly encouraging trespass on the developer's lands and attempting to "drag" the complainant into negotiations when he had not indicated any previous desire to sell his lands. Elements of these events could also be characterized as disrespectful (and were so characterized by the complainant).

The Role of Council Members

In this complaint, the role of the Council member is pivotal because whether or not improper influence has occurred may at least in part be assessed through an understanding of what the council member's roles were in given situations - in the complaint respecting the presentation by an expert planner, in the complaint respecting trespass and in the complaint respecting a potential real estate deal. The Code of Conduct commentary indicates that the Code is not to prohibit the engagement of council members in activities on behalf of their constituents – but what are those activities and how do they fit into the broad roles which council members appear to have.

Council exercises the powers of the municipality and does so through by-laws and resolutions[1]. In Manitoba the role of council is stated in the Municipal Act as follows:

> *82. A council is responsible*
>
> *(a) for developing and evaluating the policies and programs of the municipality;*
>
> *(b) for ensuring that the powers, duties and functions of the municipality are appropriately carried out; and*

[1] Municipal Act C.C.S.M. c. M225, s.77, 140(1); City of Winnipeg Charter Act S.M., 2002, c.39, s.6(1), 54(1)

(c) for carrying out the powers, duties and functions expressly given to the council under this or any other Act.

The City of Winnipeg Charter does not have a similar section. The purposes of municipal government are broadly similar in both the Municipal Act and the Charter.

But what is the role of the councilor in this? The council member on his or her own does not wield the power of council. The member is one of several who constitute quorum at any given time and who make decisions for the municipality or City[2]. Clearly municipal council members are expected to participate in council decisions. But what is their role beyond this?

The Municipal Act in Manitoba outlines the role of a council member as follows:

> *83(1) Each member of a council has the following duties:*
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> *(a) to consider the well-being and interests of the municipality as a whole and to bring to the council's attention anything that would promote the well-being or interests of the municipality;*
>
> *(b) to participate generally in developing and evaluating the policies and programs of the municipality;*
>
> *(c) to participate in meetings of the council and of council committees and other bodies to which the member is appointed by the council;*
>
> *(d) to keep in confidence a matter that is discussed at a meeting closed to the public under subsection 152(3) and that the committee decides to keep confidential until the matter is discussed at a meeting of the council or of a committee conducted in public;*
>
> *(d.1) to comply with the code of conduct for members of council;*
>
> *(e) to perform any other duty or function imposed on the member by the council or this or any other Act.*[3]

Again, the Winnipeg Charter has nothing like this. Yet still it constitutes a useful way of looking at core duties of council members. Subsection 83(1)(a) may be seen as broad enough to encompass a number of roles particularly with respect to information gathering and representation.

Other provinces including British Columbia, Alberta, Saskatchewan, Manitoba and New Brunswick have similar sections outlining the duties of members of council[4]. Again while

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[2] See quorum rules: Municipal Act, s.135; Winnipeg Charter, s. 71

[3] Notes this section is essentially reproduced in the Council Members Guide 2014-2018 produced jointly by the Manitoba Government and the Association of Municipalities of Manitoba. See pages 12 and 13. This guide apparently is not used for instruction of Winnipeg councillors in orientation and training and it is unclear how many such council members would consult it on their own.

[4] Community Charter, S.B.C. 2003, c. 26, s.115; Municipal Government Act R.S.A. 2000, c. M-26, s.153; Municipalities Act S.S. 2005, c. M-36.1, s. 92; Local Governance Act, S.N.B. 2017, c. 18, s.48(6)

some have explicit reference to policy making and the representative function, all have the general reference to considering the well being of the municipality. New Brunswick's statute also indicates that one duty is to bring to attention of council matters which may promote the well being and interests of the municipality.

The remaining provinces do not define the role of a council member. Ontario provides guidance through a councillor's guide[5]. It outlines three roles of council members which also provide a useful window to the function of members of council. These roles include representation, policy-making and stewardship. The guide says that, while the representation role seems clear, it is not so easy in operation because one cannot represent each of one's constituents all of the time on every issue and because there is some obligation to see issues broadly[6]. Policy making and stewardship roles also convey a sense of a broad responsibility to the corporation and the inhabitants of the municipality.

There is some literature which deals with constituency work which provides insight into the representational role fulfilled by elected officials. There is a dearth of research on the nature of ward work by councillors and its part in defining the representational role of council members. There are two broad representational roles held by elected officials: to represent the views and interests of the people in the wards to councils (or constituencies to legislatures) and to hear out and act on concerns of people in their interaction with the municipality. The balance of policy to case work may vary by area and makeup of the area; by country and legislative institution and by how elected officials see their role[7]. The Ontario guide noted above refers to case work and cautions that such work must be done in the context of civic policy and established complaint processes – both internal and external. This is an important caution and is reflected in comments below respecting two of the incidents at the heart of the complaint at issue here.

Case law deals with the role of councillors and potential bias and with fiduciary and trust relationships in special circumstances. Most of the case law respecting council members focuses on whether or not a council member is biased or may be seen to be biased when making a decision which affects a person directly, that is when the council member is acting in concert with others in a quasi-judicial or administrative capacity. This has ultimately been settled in two Supreme Court of Canada decisions concerned with zoning decisions and which found that even if a council member had voiced an

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[5] Ministry of Municipal Affairs and Housing (Ontario), The Municipal Councillor's Guide, 2018 https://www.ontario.ca/document/ontario-municipal-councillors-guide-2018

[6] Ibid., p. 5

[7] E.g. see J Griffin and P Flavin "How Citizens and their Legislators Prioritize Spheres of Representation" (2011) 64 Political Research Quarterly 520. See also R Searing "The Role of the Good Constituency Member and the Practice of Representation in Great Britain (1985) 47 Journal of Politics 348" and D. Studlar and I MacAllister "Constituency Activity and Representational Roles among Australian Legislators (1996) 58 Journal of Politics 69. There are other articles exploring these issues of course – some Canadian and some from other places as those cited here but a detailed review and analysis is beyond the scope of this report. These examples only serve to show that there are various factors affecting representation. What it means and how it is practiced.

opinion previously so long as s/he was “susceptible to persuasion” bias would not be a reason to quash a decision or disqualify the member[8]. Another iteration of the test is to say that a council member must not approach a decision with a closed mind[9]. From a perspective of roles though it is clear that part of the tasks of council members may be to sit on tribunals or tribunal like bodies and make decisions which affect individual rights. Obviously this must be done with propriety.

The fiduciary and trust role is part of what Ontario’s guide calls stewardship. Without belaboring this, there is a clear role articulated through cases and outlined in texts which requires that members of council acting in council and beyond behave in a fiscally prudent way[10]. Legislation often prohibits members from contracting with the municipality they serve. Conflict of interest legislation typically focusses on pecuniary interests[11]. Councillors are not trustees unless given a function or task specifically by council which makes them so[12] Similarly council members are not agents of municipalities unless, again specifically, given a role by council which gives them some agency[13]. That they are not employees is also clear[14].

It is the representational role which is perhaps most critical in relation to the complaint at issue here although responsibility in respect to the stewardship role could also be seen to come into play. The bounds of the representational role, in particular how one deals with ward work and residents and their interests and concerns, are not always so apparent. The complaints may help to define those boundaries and, whatever else comes of this case, council ought to consider discussing the role of council members in a training context as well as petitioning the Province to include an outline of council member duties in the Winnipeg Charter. For now, I shall briefly consider each complaint.

Review and Analysis of the Complaints

As noted above there were three incidents or behaviours investigated as part of the complaint – the council member’s behaviour in respect of a presentation at the University of Manitoba, actions of the council member in relation to a dispute over land which included trespass on that land, and actions of the member in respect of an attempt to have the complainant sell his land.

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[8] For a discussion of two critical Supreme Court cases see J. Mascarin “Tolerance for the Biased Municipal Councillor: The Amenable to Persuasion Test- A Case Comment on the Old St Boniface and Save Richmond Farmland cases” (1991), 11 MPLR 2nd 322

[9] E.g. see C Amsterdam et.al “Principles of Administrative Justice: Reasonable Apprehension of Bias in Administrative Law and Municipal Conflicts” 2014 27 Can. J. Admin. L and P 241 at 250, 251.

[10] E.g. see I.M. Rogers The Law of Canadian Municipal Corporations (updated to 2018), §32

[11] E.g. see The Municipal Conflict of Interest Act C.C.S.M. M255

[12] E.g. see I.M. Rogers Law of Canadian Municipal Corporations (updated to 2018), §32.2 — Trustees

[13] Ibid., §32.3 — Agents or Employees

[14] Ibid.

The Presentation

The presentation took place in January of 2018 at the University of Manitoba. The presentation was made by a well know planner who also happened to be retained by the complainant for his development project. The advertised title to the presentation led the council member to believe that the planner would be speaking on the very issue which was to be discussed by the council committee reviewing the development. The council member was concerned that this might have an inappropriate influence on council members who had to make a decision on the project.

Rumours abounded that the council member wanted to shut down the presentation and that he had contacted the University to have the presentation changed. The council member denies this. In one e-mail to a fellow councillor the council member did say the "presentation reflects an application". The council member came to understand that a senior official at the City did in fact contact the University and request a change although he came to this understanding after the fact and indeed the official in question denies having done this.

Council members sought advice and the Deputy City Clerk sent out an e-mail cautioning members about attending. The e-mail by the Deputy Clerk indicated that he did not know whether the application and so-called secondary plan issues would be discussed but also warned that the presentation was billed as a conversation and that members involved in decision-making respecting the application must not engage in discussion outside the hearing. The e-mail advised that out of an "abundance of caution" it would be prudent for those members not to attend.

While the wording of the council member in an e-mail may have been presumptuous it does not reflect disrespect or indicate "improper" influence and does not reflect improper influence being brought to bear for personal benefit or to further a personal interest as required by the 1994 Code.

The Trespass

In 2017 the complainant's land was occupied by protesters who did not want the land developed. An injunction was granted and enforced. The council member involved himself in this matter through communication with the protesters and the complainant. An example of this involvement was an email the council member sent to the complainant in July of 2017 in which the council member attempted to have the complainant withdraw the injunction by making some type of agreement which would protect trees. The council member did not instigate or encourage the trespass but he did want to become involved resolving the dispute which gave rise to that trespass.

In responses to questions about his involvement, the council member indicated he had hoped to mediate the situation. He also stated that he did not have to have council authorization to familiarize himself with incidents and events in his ward or to become

involved in them. Indeed he stated that it was his duty to become familiar and to become involved. While one readily agrees with the former, the latter is more problematic. Gathering information as when the council member accompanied the Mayor to speak with the protestors seems appropriate at some level whereas attempting to mediate a matter which involves an illegal activity, that is trespass, without being asked by the police, parties or council seems more problematic.
The council member suggested that the March 2016 Report of McKay Finnigan and Associates indicated that the complainant's firm had requested that he mediate a settlement between community representatives and the complainant's firm respecting issues surrounding the development or proposed development. The Report does not actually say this. The Report indicates that the complainant's firm would be more likely to participate in a mediated settlement if the request to do so came from the City and more particularly from the council member.[15] Being part of process to request a mediated settlement is different than being asked to be a mediator. It is also quite different from attempting to assume a mediator role in a concrete dispute involving a trespass situation. While there is no doubt that the representative role and the boundaries of ward or constituency work are ambiguous, there is little precedent in case law or legal literature or political science writing which would lead one to the conclusion that, involving oneself in disputes between parties generally without those parties' specific and clear request and consent, and, more particularly, involving oneself in disputes in which an illegal act is ongoing, is the role of a council member. Jumping into the fray in this way simply seems inappropriate..

Personal gain and the furtherance of a personal interest beyond a concern with the well being of the ward are not evident here. Hence the finding of improper influence of office cannot be made as required by the 1994 Code.

The actions do show a measure of disrespect for the complainant and the complainant's rights vis a vis his own land. While it cannot be required under the 1994 Code, an apology seems appropriate.

Buying Back the Lands

A media report in February of 2016 indicates that the council member had a preference to buy back the land or part of it to protect trees. The complainant has made indicated that he did not want to sell the land and he did not raise this with the council member. It appears that a member of a citizen's group raised this possibility and then the council member indicated that, if he was interested, the complainant should contact the appropriate official and copied this message to other officials. While this superficially this may seem a small problem, it is easy to see why the complainant felt he was being dragged into something in which he wanted no involvement.

In response to questions about the interactions with the complainant, the council member indicated he was trying to determine if there was interest, not trying to

[15] McKay Finnigan & Associates "Phase One: Public Outreach on Potential Development of the Parker Lands May, 2016, p. 16

negotiate a purchase. Yet he did discuss having discretionary funds which could possibly be used for the purchase which seems a little more than determining interests. As well if the set of interactions were solely about determining whether or not the complainant wanted to sell the land, why not simply ask the complainant?
The interactions seem round about and one does get a sense that the council member would have liked to have the complainant sell. Is determining an interest in land purchases sales in his ward really part of the council members role. Possibly although one would be hard pressed to find precedents. There is real potential for misuse of office and improper influence in such activities.

Again there is no personal benefit or furthering of personal interests in this so the council member cannot be seen to have breached the 1994 Code. There is an element of disrespect in the way the council member dealt with the complainant in this – a kind of coercive quality to the interaction. Again, nothing can compel an apology as the 1994 Code contains no such power but an apology again by the council member seems appropriate.

Conclusion

No breaches have been found respecting improper influence have been found. This in part reflects the nature of the 1994 Code which governs this complaint. It also reflects though the ambiguity in the role of council members. If there is a general lesson to be learned here, and I submit that there is, it is that the role of a council member generally ought to be more fleshed out in both legislation and training. Council may wish to consider taking the time both to approach the provincial government about including a stated role for council members in the Winnipeg Charter as well as taking the time to develop guides to appropriate council member behaviour for members of Council.

The 1994 Code may be read such that disrespect is not a problem. Still it is difficult to assume or presume that the Council of the day would have wanted to encourage disrespect. In two instances noted above, apologies seem appropriate but cannot be compelled in any way.