



John Mascarin  
Direct: 416.865.7721  
E-mail: [jmascarin@airdberlis.com](mailto:jmascarin@airdberlis.com)

# **INTEGRITY COMMISSIONER REPORT ON CODE OF CONDUCT COMPLAINT 2021-07**

**THE CORPORATION OF THE CITY OF ST. CATHARINES**

**John Mascarin**

**Aird & Berlis LLP**

**May 31, 2022**

**INTEGRITY COMMISSIONER REPORT ON  
CODE OF CONDUCT COMPLAINTS 2021-07 & 2022-01  
FORMER COUNCILLOR MAT SISCOE & MAYOR WALTER SENDZIK**

**SUMMARY**

Two formal complaints pursuant to the *Code of Conduct for Members of Council and Local Boards* (the “**Code**”) of The Corporation of the City of Catharines (the “**City**”) were received by our office in December 2021 and January 2022 (the “**Complaints**”), as well as two applications pursuant to subsection 223.4.1(2) of the *Municipal Act, 2001* for an inquiry into compliance with the *Municipal Conflict of Interest Act*<sup>1</sup> (the “**MCIA Applications**”).

The Complaints allege that former Councillor Mat Siscoe (the “**Councillor**”), a former member of the City’s Council (the “**Council**”), and Mayor Walter Sendzik (the “**Mayor**”) contravened the Code on account of their actions and conduct in relation to a decision by Council to recommend the filling of a vacancy on the Council of The Regional Municipality of Niagara (“**Regional Council**”).

The Complaints deal with the same matter as the MCIA Applications, and were considered and investigated jointly and concurrently. Our findings on the MCIA Applications are set out in our companion report to this Report.

**APPOINTMENT & AUTHORITY**

Aird & Berlis LLP was appointed as Integrity Commissioner for the City pursuant to subsection 223.3(1) of the *Municipal Act, 2001*<sup>2</sup> on January 28, 2019 by By-law No. 2019-13. As the City’s Integrity Commissioner, we have jurisdiction to review complaints made against members of Council.<sup>3</sup>

The Complaints were validly filed. As such, we reviewed them in accordance with our authority as Integrity Commissioner pursuant to the *Municipal Act, 2001* and the Formal Complaint Protocol, being Appendix “B” to the Code. The Complaints complied with the formal requirements of the *Municipal Act, 2001* and the Formal Complaint Protocol, dealt with matters within our jurisdiction to investigate, and did not appear to be frivolous or vexatious.

On February 1, 2022, we exercised our discretion under the *Municipal Act, 2001* and the Formal Complaint Protocol to terminate our inquiry and summarily dismiss portions of the Complaints which did not disclose sufficient grounds for an investigation and/or which did not warrant a full investigation. Notice, with reasons, was provided to the Complainants.

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<sup>1</sup> *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 [“**MCIA**”].

<sup>2</sup> *Municipal Act, 2001*, S.O. 2001, c. 25.

<sup>3</sup> *Municipal Act, 2001*, ss. 223.3(1) 1 and 223.4(1)(a).

## CODE PROVISIONS AT ISSUE

The Complaints allege a contravention of the following sections of the Code:

### **4.0 General Obligations**

4.1 In all respects, a Member shall:

...

(c) seek to advance the public interest with honesty;

(d) seek to serve their constituents in a conscientious and diligent manner;

...

### **10.0 Improper Use of Influence**

...

10.2 A Member shall not use the status of their position to influence the decision of another person to the private advantage or non-pecuniary interest of themselves, their parents, children or grandchildren, spouse, or friends or associates, or for the purpose of creating a disadvantage to another person or for providing an advantage to themselves.

### **11.0 Conflicts of Interest**

11.1 A Member shall avoid conflicts of interest, both pecuniary and non-pecuniary. A Member shall take proactive steps to mitigate conflicts of interest in order to maintain public confidence in the City and its elected officials. Members are encouraged to seek guidance from the Integrity Commissioner when they become aware that they may have a conflict between their responsibilities to the public as a Member and any other interest, pecuniary or non-pecuniary.

## REVIEW OF MATERIALS & INQUIRY

In order to undertake our inquiry into the Complaints and make a determination on the allegations therein, we have undertaken the following steps:

- Review of the initial Complaints, and all materials referred to therein;
- Review of the video of the open session of Council's Meeting on December 13, 2021;
- Review of relevant Council and Regional Council documents and materials;
- Providing the Complainants a Notice of Partial Termination and Commencement of Inquiry, dated February 1, 2022, terminating portions of the Complaints which, in our discretion, did not set out reasonable and probable grounds for a contravention;
- Email correspondence and a telephone conversation with the Councillor regarding the Complaint, and timeline for response;

- Review of the Councillor's response, dated March 4, 2022;
- Review of the Mayor's response, dated March 2, 2022; and
- Review of reply submissions from a Complainant, dated March 21, 2022.

We have also reviewed, considered and had recourse to such applicable case law and secondary source material, including other integrity commissioner reports, that we believed to be pertinent to the issues at hand.

A draft of this Report was provided to the Councillor, the Mayor, and the Complainants on May 3, 2022 to allow them to review and comment on the factual accuracy of the Report. We received comments on our report from a Complainant, which have been considered and addressed herein as we deemed necessary before finalization of our Report.

## **BACKGROUND**

### **(a) Introduction**

The Councillor is a former member of Council, having resigned from Council effective January 6, 2022. Prior to his resignation from Council, the Councillor was one of two representatives for Ward 4, St. Patrick's Ward, in the central-west portion of the City. The Councillor was first elected to Council in 2010, and was re-elected for the 2014-2018 and 2018-2022 terms of Council.

As will be set out in this Report, the Councillor is currently an appointed member of Regional Council representing St. Catharines, having been appointed by Regional Council on January 6, 2022. In addition to his role as a member of Regional Council, the Councillor is also a full-time secondary school teacher.

The Mayor is the duly-elected Mayor for the City and its head of council. He was first elected Mayor in 2014, and subsequently re-elected as Mayor for the 2018-2022 term of Council.

### **(b) Multi-Tier Local Governance in Niagara**

Local government in Niagara is characterized by two autonomous but closely related levels of government. The City is a "local" or "lower-tier" municipality. Its Council is comprised of twelve (12) members, elected on a ward structure, and one (1) elected head of council (i.e., a mayor).

The Region is the corresponding "upper-tier" municipality, whose geographic area extends beyond that of the City. Regional Council is comprised of thirty-two (32) seats. Of those seats, twelve (12) seats are held *ex officio* by the heads of council of all lower-tier municipalities that comprise the Region, one (1) Regional Chair (i.e., the head of council), and nineteen (19) members of Regional Council.

Members of Regional Council are directly elected at-large by voters to represent the areas of the lower-tier municipalities that comprise the Region. For example, St. Catharines has been allocated six (6) seats on Regional Council. Those representatives are chosen by the electors of the City in an election process which is administered by the City. However, members of Regional Council do not hold a seat on the council of the lower-tier municipality which they represent.

**(c) Background to Meeting on December 13, 2021**

Former Regional Councillor Sandie Bellows was elected to Regional Council as a representative of St. Catharines in the municipal elections held in 2018. Regional Councillor Bellows passed away on October 11, 2022. Her passing automatically created a vacancy on Regional Council for the office of a member of Regional Council for St. Catharines.<sup>4</sup>

Pursuant to the *Municipal Act, 2001*, where a member's seat becomes vacant, the municipality is required to take certain steps to fill that vacancy. The council must first declare the member's seat to be vacant, and subsequently decide how the vacancy will be filled.<sup>5</sup> The *Municipal Act, 2001* provides two options: the municipality may either directly appoint a person to council, or require a by-election to be held in accordance with the *Municipal Elections Act, 1996*.<sup>6</sup> The municipality is required to act within 60 days of the declaration of vacancy to either fill the vacancy, or pass a by-law requiring the by-election be held.<sup>7</sup>

**(i) Regional Council's Actions in Respect of the Vacancy**

At its November 18, 2021 meeting, Regional Council passed the following resolution:

10.2.1 CL-C 82-2021

Declaration of Vacant Regional Council Seat

Moved by Councillor Sendzik

Seconded by Councillor Darte

That Correspondence Item CL-C 82-2021, being a memorandum from A.-M. Norio, Regional Clerk, dated November 18, 2021, respecting Declaration of Vacant Regional Council Seat, **BE RECEIVED** and the following recommendations **BE APPROVED**:

1. That, pursuant to Section 262(1) of the *Municipal Act, 2001*, the seat held by Sandie Bellows, Regional Councillor for the City of St. Catharines, **BE DECLARED** vacant; and
2. That Regional Council **REQUESTS** the City of St. Catharines advise of its preferred method of filling the vacancy on Regional Council by December 15, 2021.

**Carried**

Regional Council's resolution was passed in accordance with its Policy C2-001, which provides that in the event of a vacancy, the Region shall request that the lower-tier municipality advise of its recommended method of filling the vacancy, and that Regional Council will approve the recommendation, subject to compliance with the *Municipal Act, 2001* and the *Municipal Elections Act, 1996*. Policy C2-001 is a discretionary policy which is not required to be adopted pursuant to any statute.

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<sup>4</sup> *Municipal Act, 2001*, s. 259(1)(h): the office of a member of council becomes vacant if the member dies.

<sup>5</sup> *Municipal Act, 2001*, s. 262.

<sup>6</sup> *Municipal Act, 2001*, s. 263(1).

<sup>7</sup> *Municipal Act, 2001*, s. 263(5) 1.

While Regional Council requested that the City advise of the preferred method for filling the vacancy, in no way did it abdicate or delegate its statutory decision-making authority to the City. The final decision rested solely and exclusively with the Region.

**(ii) City's Vacancy Policy**

The City has its own discretionary policy (as opposed to a mandatory policy<sup>8</sup>) in respect of filling vacancies, being Policy LCS 2015-9 – “Filling a Vacancy on Council” (the “**Policy**”).

By way of background, the Policy arose from issues related to Council's filling of a vacancy in early 2014. In January 2014, Council established an *ad hoc* committee to develop a process for filling future vacancies. The committee studied the matter and made recommendations that would ultimately inform the Policy.

A report from the City Clerk on the then-draft Policy entitled “Process for Filling a Vacancy on Council,” dated April 24, 2014, provided as follows:

The committee recognizes that this process does not bind future Councils' decisions, however, they felt that having a process in place responds to Council's request for one and it represents the discussions that this Council had with respect to filling vacancies on Council.

The Policy was approved by Council on May 12, 2014, and City staff were directed to implement this policy “as a Corporate Policy.” During Council's deliberation, former Mayor McMullin stated that the Policy was “not intended to bind future Councils...it was only a guideline.” The Policy was later amended in January 2015 to also apply to vacancies on Regional Council.

As applicable to the current circumstances, the Policy provides that if the vacancy occurs within the first three (3) years of the term of Council, the next placed finisher in the election “**may**” be appointed if they received 70% of the votes achieved by the sixth-place finisher on Regional Council. If the vacancy occurs within the last year of the term of Council, the next placed finisher “**shall**” be appointed if they received 70% of the votes achieved by the sixth-place finisher on Regional Council.

**(iii) City Staff Report in Respect of the Vacancy**

City staff prepared a report titled “Filling a Vacancy on Regional Council – Sandie Bellows,” dated November 5, 2021 (the “**Vacancy Report**”), summarizing the options available to Council for filling the vacancy on Regional Council. City staff explained the situation, reviewed the relevant legislation, and set out the options for filling the vacancy in accordance with the Policy.

The Vacancy Report made two recommendations: (i) that Council recommend to Regional Council that the vacancy be filled by appointment, and (ii) that Council recommend that Regional Council appoint the individual who was the next-placed finisher for the office of Regional Councillor in the 2018 Municipal Election (the “**Candidate**”).

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<sup>8</sup> *Municipal Act, 2001*, s. 270(1).

The Vacancy Report recommended against initiating an at-large appointment process, stating as follows:

Although Council may, staff do not recommend Council appoint an eligible elector from the community. This process involves several steps and could potentially be a failed search, all the while the seat remains vacant and St. Catharines continues to have reduced representation at the Region, while the Region risks being in contravention of their legislated obligation to fill the seat within 60 days.

City Staff's recommendation was based on practical considerations and timing concerns.

**(d) The Meeting**

Council considered the Vacancy Report at its meeting held on December 13, 2021.<sup>9</sup>

Council's consideration of this item began with a delegation from one member of the public, who suggested that Council ought to hold a by-election to fill the vacancy. Following the delegation, several members of Council asked questions of the delegate, which suggested there was some dispute on the interpretation of the Policy due to an ambiguity.

Council considered several other matters at the meeting before returning to this matter.

Council's consideration of the Vacancy Report began with a motion to refer the matter to Regional Council requesting information on whether the vacancy could remain unfilled. There was a desire among some members of Council to leave Former Regional Councillor Bellows' seat vacant to recognize her legacy. That motion to refer was lost:

Motion to refer to Niagara Region for information on whether the vacancy on Regional Council needs to be filled. If the vacancy does not need to be filled, that the item come back to City Council.

Yeas: Councillors Harris, Phillips, Siscoe, and Townsend

Nays: Councillors Dodge, Garcia, Kushner, Littleton, Miller, Porter, Sorrento, Williamson, and Mayor Sendzik

**Motion to Refer Lost**

Council then deliberated on the recommendation from City staff in the Vacancy Report. One particular topic of discussion was an ambiguity in the Policy as to whether or not the Policy required the appointment of the Candidate, based on the timing of when the vacancy occurred.

In addition, Council also discussed the merits of recommending the appointment of the Candidate, who had run in the municipal elections in 2018 but had not expressed their views and positions on more recent issues such as public health measures, regional transit, and affordable housing.

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<sup>9</sup> Video Recording of City Council Meeting, December 13, 2021:

<https://www.youtube.com/watch?v=hl4raAZL-uE>



During deliberations, the Councillor suggested that if members of Council wished to make comments about an identifiable individual, that it would be more appropriate to consider the matter in closed session. Another member of Council moved a motion to convene in closed session to discuss the matter, specifically as it related to an identifiable individual.

Council met in closed session for approximately one hour, where it considered the matter of the vacancy as it related to information about an identifiable individual, as well as an unrelated litigation matter.

During the closed session, Council discussed matters relating to an identifiable individual. In addition, the Councillor indicated that he would be interested in being appointed to serve on Regional Council.

Following closed session, Council dealt with one other matter before returning to the matter of the vacancy. Following further discussion, a friendly amendment was moved requesting that City staff work with equity-seeking groups to update the Policy.

The City staff's recommendations were put to separate votes on each separate clause. Council first voted unanimously to recommend that Regional Council fill the vacancy by appointment.

Council then considered the second portion of the recommendation, being the recommended appointment of the Candidate. The motion was lost by a vote of six (6) to seven (7).

A member of Council then moved that Council recommend the appointment of the Councillor to Regional Council. The member spoke to the Councillor's experience with matters relating to the Region's jurisdiction (such as regional transit), stating their belief that the Councillor's appointment would be in the best interests of the City.

As part of the motion, the member also requested that the City reach out to the next-placed contender in the municipal elections in 2018 for the Councillor's ward (the "**Prospective Appointee**"), to determine their interest in being appointed to Council in the event the Councillor resigned to accept a seat on Regional Council.

Members of Council subsequently discussed the proposed motion. Council then passed the following resolution to recommend the appointment of the Councillor to Regional Council:

That Council appoint Councillor Mathew Siscoe to fill the vacant seat of Regional Councillor for the City of St. Catharines; and

That upon the Region of Niagara accepting the City's recommendation that City staff reach out to the third-place candidate for the St. Patrick's Ward from the 2018 Municipal Election (Robin McPherson) to determine their interest in serving as the City Council representative for the St. Patrick's Ward for the remainder of this term of City Council.

Yeas: Councillors Porter, Miller, Harris, Kushner, Littleton, Phillips, Siscoe, Sorrento, Townsend, and Mayor Sendzik

Nays: Councillors Dodge, Garcia, and Williamson

**Carried**

Council's resolution respecting the appointment was communicated to the Region.



**(e) Events Subsequent to the Meeting**

On December 24, 2021, the Councillor submitted a letter of conditional resignation to the City Clerk, indicating that if appointed by Regional Council, he would resign his seat on Council.

On January 6, 2022, Regional Council voted to accept the City's recommendation, and voted to appoint the Councillor to fill the vacant seat. The Councillor immediately swore the Oath of Office, and assumed his seat on Regional Council.

At its meeting on January 17, 2022, Council declared the Councillor's seat vacant pursuant to subsection 262(1) of the *Municipal Act, 2001*, and appointed the Prospective Appointee to Council.

**THE POSITION OF THE PARTIES**

**A. The Councillor**

**(i) Position of the Complainants**

The Complainants allege that the Councillor's conduct related to Council's decision on the vacancy contravened Sections 4.1(c) and (d), Section 10.2, and Section 11.1 of the Code.

The Complainants take a different view of the circumstances surrounding Council's vote. In particular, the Complaints allege that the Councillor participated in a "clearly orchestrated" "conspiracy" to subvert the application of the Policy and to have the Councillor appointed to Regional Council.

The Complainants allege that with respect to Sections 4.1(c) and (d), the Councillor failed to advance the "public interest" with honesty and failed to serve his constituents conscientiously and diligently by voting against the appointment of the Candidate. The Complainants take the position that the appointment of the Candidate – and by fiat, the Policy – was the clearly defined "public interest" in the matter. The Councillor instead voted in favour of his own appointment, thus contravening the Code.

The Complainants submit that the Councillor's actions also contravene Section 10.2 of the Code by using his position on Council to obtain a benefit for himself, namely, his appointment to Regional Council.

Lastly, the Complainants take the position that the Councillor contravened Section 11.1 of the Code, alleging the Councillor acted in a conflict of interest by voting against the recommendation to suggest the Candidate for appointment to Regional Council, and voting in favour of nominating himself for appointment to Regional Council.

In support of their assertions, the Complainants make reference to the provisions of the MCIA, arguing that the Councillor had a pecuniary conflict of interest in the matter on account of the potential increase in remuneration that that the Councillor would receive if he was appointed to Regional Council.

**(ii) Position of the Councillor**

The Councillor denies that he contravened any provision of the Code.

The Councillor acknowledges that in the weeks leading up to Council's consideration of the Vacancy Report, he spoke with other members of Council about the potential options to fill the vacancy. He indicated that he initially preferred to leave former Regional Councillor Bellows' seat vacant for the remaining term of Regional Council as a way to recognize her legacy. The Councillor also acknowledges having a conversation with the Mayor (who corroborates this fact) about this option. However, the Councillor learned this was not a statutorily permitted option, given that Regional Council was required to fill the vacancy. During their discussion, the Councillor and the Mayor suggested appointing an "experienced candidate," or former Regional Councillor, in order to overcome a potential learning curve.

The Councillor further acknowledges that in the week before the meeting of Council on December 13, 2021, the Mayor asked him if he would consider accepting an appointment to Regional Council. The Councillor indicated he would have to consider the matter, but that his preference remained to leave the seat vacant.

The Councillor submits that his vote against City staff's recommendation in the Vacancy Report was not related to his later vote on his own appointment to Regional Council. The Councillor points to the fact that he earlier voted to request that the matter be referred back to the Region on the potential to leave the seat vacant, against the recommendation of City staff.

The Councillor denies that he (nor any other member of Council that he is aware) engaged in a "planned conspiracy" or participated in an "orchestrated maneuver." The Councillor submits that these suspicions are explained by the timeline of events before and during the Council meeting, which included a closed session discussion on the matter.

The Councillor also submits that he was aware of the eligibility rules in the *Municipal Act, 2001* and the *Municipal Elections Act, 1996* as it related to holding more than one office. To that point, the Councillor indicates the Council resolution passed on December 13, 2021 was only a recommendation to the Region, and that, in any event, he submitted notice of his conditional resignation before he was ultimately appointed to Regional Council.

As to the alleged pecuniary conflict of interest, the Councillor relies on the exception in clause 4(g) of the MCIA, taking the position that it entitles a member to vote for themselves to fill a vacancy. The Councillor also submits that the various aspects of a conflict in the matter are inextricable from the MCIA, and that the Code should not be used to punish a conflict of interest where an exemption applies under the MCIA.

Lastly, while the Councillor acknowledges that there is a pay difference between the two positions, the Councillor's own personal circumstances will require him to incur personal expenses in order to fully participate in proceedings of Regional Council. He advised that meetings of Regional Council are ordinarily scheduled to take place during the work day (as opposed to the evening). As such, the Councillor will be required to take unpaid leave from his full-time employment as a secondary school teacher in order to attend many meetings at the Region, which would result in a financial loss to him.

## **B. The Mayor**

### **(i) Position of the Complainants**

The Complainants allege that the Mayor's conduct pertaining to Council's decision on the vacancy contravened Section 4.1(c) and Section 10.2 of the Code.

The Complainants make the same allegation against the Mayor as they make against the Councillor, being that the Mayor participated in a "clearly orchestrated" "conspiracy" to subvert the application of the Policy and to have the Councillor appointed to Regional Council.

In addition, the Complainants also allege that the Prospective Appointee is a "well-known associate and friend" of the Mayor, having worked on his past election campaign team, and also having a personal friendship with her. In that regard, the Complainants allege that the Mayor participated in a "conspiracy" to fill the vacancy that would be left by the Councillor with the Prospective Appointee, an alleged political ally.

The Complainants allege that with respect to Section 4.1(c) of the Code, the Mayor failed to advance the "public interest" with honesty by voting against the appointment of the Candidate, which the Complainants maintain is the clearly defined "public interest" in the matter.

The Complainants also contend that the Mayor contravened Section 10.2 of the Code by using his position as Mayor to benefit his "well-known associate and friend," providing her a position on Council in the immediate term, and also providing her the benefit of incumbency in the upcoming municipal elections, should the Prospective Appointee chose to run for office. In this regard, the Complainants allege that the Mayor "lobbied" other members of Council to vote against City staff's recommendation in the Vacancy Report, and used his vote on Council to the benefit of the Prospective Appointee.

### **(ii) Position of the Mayor**

The Mayor denies that he contravened any provision of the Code.

The Mayor submits that his conduct does not constitute a contravention of Section 4.1(c) of the Code. Rather, the Mayor submits that his actions were based on what he viewed to be in the best interests of the citizens in the circumstances, and that his leadership role as head of Council required him to consider all the ways to help advance the public interest.

The Mayor takes the position, expressed by many other members of Council who spoke to the matter at the meeting on December 13, 2021, that the City was going through extraordinary times, with unprecedented new issues since the previous municipal election in 2018. The complexity of the issues now being faced by the community required a strong and experienced appointee to Regional Council. The Mayor's opinion was that the Councillor would be best suited for the position, given his experience on Regional matters, his work in addressing social and public health issues, and his role as the Chair of the City's Budget Committee.

The Mayor submits that based on what he believes to be in the best interests of the community, he inquired of the Councillor whether he would be interested in being appointed to Regional Council.

In addition, the Mayor submits that his actions did not contravene Section 10.2 of the Code. Although he concedes that the Prospective Appointee is a personal friend, he did not use his position to influence their selection by Council for appointment to fill the Councillor's vacancy. The Mayor denies that this had anything to do with a personal relationship, or an alleged "conspiracy" to subvert the City staff recommendation and to place a "political ally" on Council. The Mayor also denies "lobbying" members of Council to the benefit of the Prospective Appointee. The Mayor submits that the identification of the Prospective Appointee was based on the application of the Policy, given that they were the third-place finisher in the St. Patrick's Ward in the 2018 municipal election by a close margin.

Furthermore, the Mayor submits that interpreting Section 10.2 in the manner suggested by the Complainants would result in absurd outcomes. He indicates that having been born and raised in the City, having previously worked as the CEO of the Greater Niagara Chamber of Commerce, and having been Mayor for nearly 8 years, it would be difficult to find himself in a circumstance where he does not know someone in a personal or professional capacity. Interpreting the Code to prevent him from ever making decisions which implicate such individuals would be illogical.

The Mayor also submits that, like any other member of Council, he is only entitled to a single vote, and that he has no other "great powers" to override or influence Council decisions. In addition, in accordance with Council's procedure by-law, the Mayor does not have the authority to "break" a tied vote, which is considered defeated. In each of the votes at issue, the Mayor participated and voted in the majority of votes.

## **FINDINGS**

We have fully considered the submissions of the parties and the complete evidentiary record from our investigation. For the reasons set out below, based on a preponderance of the evidence and on a balance of probabilities, we find that the Councillor has not contravened Sections 4.1(c) and (d), Section 10.1, and Section 11.1 of the Code. We also find that the Mayor has not contravened Section 4.1(c) or Section 10.2 of the Code.

### **A. The Councillor**

It is our determination that the Councillor's conduct does not contravene the Code.

#### **(a) The Councillor's Conduct was not Improper**

We find that the Councillor's conduct pertaining to Council's decision to fill the vacancy on Regional Council did not contravene his general obligations under Section 4.1 of the Code.

##### **(i) Section 4.0 of the Code**

Section 4.0 of the Code sets out the general obligations of members of Council. These obligations are set out in general terms, as positive obligations rather than prohibitions. We observe that while other sections of the Code which are meant only as interpretive guides (e.g., Section 2.0), Section 4.0 is separately enforceable. However, these provisions must be interpreted and applied reasonably and within the context of the entire Code. The general obligations under Section 4.0 cannot be elasticized to such a degree or selectively deployed to make any action or conduct appear to contravene the Code.

Section 4.1(c) requires a member of Council to advance the public interest with honesty. These words must be read in their entire context and cannot be selectively parsed. For example, this provision cannot be reasonably interpreted as requiring the pursuit of one singular “public interest,” while ignoring the obligation of honesty. Honesty entails conduct and speech which is sincere, and free of deceit or deception. It does not strictly regulate factually incorrect statements.

Section 4.1(d) requires that a member of Council serve their constituents in a conscientious and diligent manner. Again, these words must be read in their entirety, and cannot be parsed into individual components. Conscientiousness and diligence entail conduct which shows a high degree of care for and thoroughness in carrying out one’s duties. By contrast, conduct which is careless, indiscrete, or thoughtless may contravene this general obligation.

**(ii) Conduct Complained of in Light of Councillor’s Duties**

The crux of the Complainants’ allegations against the Councillor are that his conduct in the lead-up to Council’s decision and the vote against the recommendation in the Vacancy Report was not in the “public interest” and did not constitute conduct that is conscientious and diligent. In our view, neither allegation of contravention can be made out in the circumstances.

Applying this reasoning to the extreme, this position suggests that members of Council should never discuss City business with one another outside of a duly-constituted meeting. This is not how municipal business is conducted.

In its Annual Report 2014-2015, the Ontario Ombudsman reported as follows:

Our office has always maintained it is healthy in a democracy for government officials to share information informally. To expect council members never to talk to one another outside of a meeting is unrealistic and would have an unnecessary chilling effect on free discourse.<sup>10</sup>

In our opinion, there is nothing inappropriate about members of Council discussing Council business with colleagues. This view is supported by the Ontario Ombudsman in another report as follows:

To be clear, the *Municipal Act, 2001* does not create an absolute prohibition against members of council discussing city business outside chambers. It is a healthy thing in a democracy for government officials to share information informally before making policy decisions. I agree that to expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.<sup>11</sup>

In order to research, consider, and formulate their position on matters that come before Council, it is reasonable to expect that members of Council will discuss matters with one another informally.

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<sup>10</sup> Ontario Ombudsman, *Open Meeting Law Enforcement Team Annual Report 2014-2015*, p. 9. See also *St. Cloud Newspapers, Inc. v. Dist. 742 Community Schools* (1983), 332 N.W.2d 1 (Supreme Court of Minnesota) (per J. Simonett).

<sup>11</sup> Ontario Ombudsman, *City of London – “In the Back Room”* (October 22, 2013), at p. 25.

There is nothing inherently wrong when members of Council discuss their position and anticipated vote on Council business.<sup>12</sup>

What is more, there is nothing specifically unethical or unreasonable about individual members forming allegiances based on a common set of values, or making pragmatic agreements. It is even accepted that a block of members may confer with one another to vote together to achieve a desired result provided that a quorum of members do not convene together to do this. This is the lifeblood of politics.

**(iii) Councillor's Actions did not Contravene General Obligations**

In our review, the Councillor's conduct did not contravene Section 4.1(c). In our view, he did not fail to serve the public interest with honesty.

First, there was no evidence to suggest that there was a "planned conspiracy" or "clearly orchestrated maneuver" to somehow override or subvert what the Complainants assert was a "certain outcome" (i.e., staff's recommendation in the Vacancy Report to appoint the Candidate).

Second, while discussions did take place prior to Council's decision, we disagree with the Complainants' characterization of such discussions as a "conspiracy." It remained open for Council to determine how it would recommend the vacancy on Regional Council should be filled. To this end, it was open to members of Council to consider and discuss the matter with fellow colleagues, as with any matter of Council business. This is an acceptable and normal part of the municipal political process.

The Councillor acknowledges having a discussion with the Mayor and another member of Council concerning how the vacancy on Regional Council should be filled. Through those discussions, there was some level of understanding that an "experienced" individual should be recommended for appointment in order to ensure the interests of the City were well represented. In so doing, we fail to see how the Councillor did not advance "the public interest with honesty."

We also find that the Councillor's conduct did not contravene Section 4.1(d). There is no reason to suggest that the Councillor failed to serve his constituents in a conscientious and diligent manner. The grounds advanced by the Complainants tend to seize on the word "serve their constituents" in Section 4.1(d) without regard to the modifiers "conscientious" and "diligent".

While the Complainants disagree with (and even take great umbrage to) the conduct and votes by the Councillor, there is no reason to suggest the Councillor took action which was careless or indiscrete in serving residents of his Ward or the electors of the City generally. The Councillor voted in a manner that the Complainants disagree with. There are other residents that certainly concur with the Complainants. On the other hand, there certainly are residents that agree with the Councillor. Such is local democracy. Disagreement with a vote of a member or a decision Council does not equate to unethical conduct. Absent some activity that serves to contravene the provisions of the Code, the Integrity Commissioner has no authority to question such votes or decisions.

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<sup>12</sup> Aird & Berlis LLP, *Code of Conduct Complaint and MCIA Application 2020-10* – Integrity Commissioner Report – City of Thorold, November 24, 2020 at page 5.



### **(b) Allegations of Improper Influence**

In our view, the Councillor did not contravene Section 10.2 of the Code. We wish to note at the outset of our analysis that the Code as a whole must be interpreted reasonably and within its entire context. To that end, each individual provision of the Code must be seen as serving a separate and discrete purpose. Any interpretation of the Code which renders another provision redundant or duplicative is to be avoided.<sup>13</sup>

Section 10.2 of the Code prohibits members of Council from using the “status of their position” in order to “influence the decision of another person” to some private advantage. This provision prohibits a member of Council from using the power or clout associated with their position to influence a decision to be made by another person which benefits themselves or a related individual. The purpose of this provision is to prevent members of Council from using their notoriety to exercise undue or improper influence on decision-makers.

This provision must be interpreted as having a distinct meaning and purpose from the other provisions of the Code relating to bias and conflict of interest, which govern voting in one’s own interest.

The Complainants alleged that the Councillor contravened Section 10.2 of the Code by “using his position on Council” to obtain a benefit for himself, namely, an appointment to Regional Council. What the Complaints mean by the Councillor’s “position on Council” is the fact of his voting. At its core, this is an allegation of a conflict of interest, not the improper use of influence.

While the Councillor did speak to other members of Council about the vacancy on Regional Council, there was no evidence to suggest that he pressured or exerted any undue influence on other members of Council. In fact, the record of our investigation supports an opposite conclusion. The Councillor advocated for leaving the seat on Regional Council vacant to acknowledge the legacy of former Regional Councillor Bellows. This was also corroborated by the Councillor’s initial vote in favour of requesting that the Region advise whether the seat could be left vacant.

### **(c) Conflict of Interest**

Lastly, the Complaints allege that the Councillor contravened Section 11.1 by voting in a conflict of interest, firstly against the recommendation that the Candidate be appointed to Regional Council, and secondly in favour of his own appointment to Regional Council. The Complainants take the position that the Councillor had a pecuniary conflict of interest by virtue of the remuneration to be paid to the Councillor if he was appointed to Regional Council.

In our view, consistent with our findings in our companion report on the MCIA Applications, there has been no contravention of Section 11.1.

Where a pecuniary conflict of interest is alleged, we are bound to consider the provisions of the MCIA. That statute represents a “complete code” for dealing with pecuniary conflicts of interests.<sup>14</sup> The Code (like many other codes of conduct) adopts the obligations under the MCIA as ethical duties. While the obligations under the MCIA are separately considered and enforced by an

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<sup>13</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada Inc., 2014) (online) Ch. 8 Part 1, §8.32.

<sup>14</sup> See, for example, *Ruffolo v. Jackson* (2010), 71 M.P.L.R. (4th) 43, at para. 14 (Ont. C.A.).



integrity commissioner (as is this present case), there can be no separate and distinct analysis of pecuniary interests. This would have the potential to create several inconsistencies in the permitted scope of conduct of members of Council, and result in unwieldy and inconsistent results.

For example, while the MCI A defines a scope of exceptions to the general rules related to pecuniary interests, Section 11.1 of the Code does not. A member could, for instance, comply with the MCI A on account of an exception in section 4, while simultaneously contravening the Code. This inconsistent interpretation is undesirable and should be avoided.

To this end, we adopt and commend our findings in the companion report on the MCI A Applications dealing with this matter. For the reasons stated therein, we find that the Councillor has not contravened Section 11.1 of the Code.

## **B. The Mayor**

### **(a) Mayor's Conduct in Selection of Candidate was not Improper**

We find that the Mayor's conduct surrounding Council's decision to fill the vacancy on Regional Council did not contravene Section 4.1(c) of the Code.

We adopt our comments on the proper interpretation of Section 4.0 of the Code set out above in relation to the Councillor's conduct.

Similarly, the primary assertion of the Complainants is that members of Council (including the Mayor) should not have discussed their opinions on filling the vacancy on Regional Council with one another. In our view, this assertion ignores the realities of how elected representatives carry out their roles, which includes discussing council business outside of duly-constituted meetings, and taking pragmatic steps to achieve a desired result.

In our review of the matter, we find that the Mayor did not contravene Section 4.1(c) of the Code. First, there is no evidence to suggest that members of Council and the Mayor improperly participated in a "conspiracy" or "clearly orchestrated maneuver" as alleged by the Complainants.

The Mayor has acknowledged that he did in fact have conversations with the Councillor and other members of Council regarding the vacancy on Regional Council. These discussions are part of the normal political process in a representative democracy. The Mayor, as head of Council, acted in his leadership role to consider and advance what he viewed as being within the best interests of the community. Absent some Code-transgressive conduct, the Integrity Commissioner does not sit in judgment of what members of Council view as being within the public interest.

### **(b) Mayor Did Not Use his Position to Benefit an Individual**

We find that the Mayor's conduct respecting Council's decision to fill the vacancy on Regional Council, and resulting vacancy on Council which was filled by the Prospective Appointee, did not contravene Section 10.2 of the Code. We make this finding for two primary reasons.

First, there is no evidence to suggest that the Mayor used the "the status of [his] position to influence the decision of another person" [emphasis added]. The Prospective Appointee was not selected to fill the vacancy at random or by the sole suggestion of the Mayor. The Mayor did not pressure or lobby City staff to recommend their name for appointment. Again, this language must mean something more than the Mayor's entitlement to one vote on Council.

The identification of the Prospective Appointee to fill the future vacancy on Council was based on the application of the Policy. The Prospective Appointee was the third-place finisher in the St. Patrick's Ward in the 2018 municipal election. There is no line of reasoning or evidence to suggest that the Mayor somehow used his position as Mayor to secure a "benefit" for the Prospective Appointee. Rather, they were simply "next in line" based on the Policy.

Second, we are not convinced that the relationship between the Mayor and the Prospective Appointee is one that falls within the scope of the Section 10.2 of the Code. Section 10.2 of the Code applies to specific relationships: "parents, children or grandchildren, spouse, or friends or associates...". The reference to "friends or associates" must be interpreted in the context of the other relationships listed in that section.<sup>15</sup>

An overly-broad interpretation could potentially implicate the thousands of individuals in the professional network of members of Council and possibly render any vote made by the Mayor as one that is susceptible to challenge. This is not the result that was intended by the inclusion of Section 10.2 into the Code.

It is not disputed that the Prospective Appointee has assisted the Mayor in his past electoral campaigns, given their professional experience in marketing and communications. It is reasonable to believe that the Mayor, like many other elected officials, meet and interact with many people in their professional and political lives. There is great benefit in elected officials having a broad range of experience and involvement in business and professional settings. However, the professional networks of elected officials should not be seen as an impediment to making decisions involving their connection.<sup>16</sup>

In the present circumstances, we find that there has been no contravention of the Code.

## CONCLUSIONS

For all of the reasons set out in detail above, we find that the Councillor and the Mayor have not contravened any of the provisions of the Code in the manner asserted in the Complaints.

We understand that the Complaints take great issue with the conduct of members of Council in relation to Council's decision regarding the vacancy on Regional Council. That disagreement is fair and necessary to sustain healthy political discourse. That being said, it is our conclusion that the conduct alleged in the Complaints is not transgressive of the Code.

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<sup>15</sup> See *Sullivan on the Construction of Statutes*, *supra* note 13, at §8.58.

<sup>16</sup> We note that that such community association and connectivity is an enunciated principle under s. 1.1 of the MCI: A:

### Principles

1.1 The Province of Ontario endorses the following principles in relation to the duties of members of councils and of local boards under this Act:

...

4. There is a benefit to municipalities and local boards when members have a broad range of knowledge and continue to be active in their own communities, whether in business, in the practice of a profession, in community associations, and otherwise.

The Complaints are hereby dismissed.

Since there has been no finding of a contravention, the Report is being provided to Council solely for information as there is no authority for Council to make any decision.

Respectfully submitted,

AIRD & BERLIS LLP



John Mascarin

Integrity Commissioner for the City of St. Catharines

Dated this 31<sup>st</sup> day of May, 2022

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