

**INTEGRITY COMMISSIONER REPORT ON CODE OF CONDUCT
COMPLAINT 2021-06**

THE CORPORATION OF THE CITY OF ST. CATHARINES

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INTEGRITY COMMISSIONER REPORT ON CODE OF CONDUCT COMPLAINT 2021-06 COUNCILLOR DAWN DODGE

SUMMARY

A formal complaint 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**”) was filed directly with our office in November 2021. A revised version of that complaint was re-submitted to our office on December 5, 2021 (the “**Complaint**”).

The Complaint alleges that Councillor Dawn Dodge (the “**Councillor**”), a member of City Council (the “**Council**”), contravened the Code on account of the her attendance and participation in a hearing of the City’s Committee of Adjustment (the “**Committee**”) held on October 20, 2021 (the “**Hearing**”).

APPOINTMENT & AUTHORITY

Aird & Berlis LLP was appointed as Integrity Commissioner for the City pursuant to subsection 223.3(1) of the *Municipal Act, 2001*¹ 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.

The Complaint, as initially filed, was incomplete with respect to the information required under the Formal Complaint Protocol, forming Appendix “B” to the Code, and was unclear as to the sections of the Code at issue. Upon conducting our standard intake and review procedure in accordance with our authority, we exercised our discretion to request further particulars from the Complainant. The Complaint was subsequently revised to address these deficiencies and re-submitted to our office.

CODE PROVISIONS AT ISSUE

The Complaint alleges that the Councillor contravened Sections 4.1(e), Section 9.2 and Section 10.1 of the Code. Those sections of the Code provide as follows:

4.0 General Obligations

4.1 In all respects, a Member shall:

...

- (e) respect the individual rights, values, beliefs and personality traits of any other person recognizing that all persons are entitled to be treated equally with dignity and respect for their personal status regarding gender, sexual orientation, race, creed, religion, ability and spirituality;

¹ S.O. 2001, c. 25.

9.0 Discrimination and Harassment

...

9.2 A Member not use indecent, abusive or insulting words, phrases or expressions toward any member of the public, another Member or staff. A Member shall not make comments or conduct themselves in any manner that is discriminatory to any individual based on the individual's race, colour, ancestry, citizenship, ethnic origin, place of origin, creed or religion, gender, sexual orientation, marital status, family status, disability, age or record of offences for which a pardon has not been granted.

10.0 Improper Use of Influence

10.1 A Member shall not use the influence of their office or appointment for any purpose other than the exercise of his or her official duties in the public interest.

REVIEW OF MATERIALS & INQUIRY

In order to undertake our inquiry into the Complaint and make a determination on the alleged contraventions of the Code, we have undertaken the following steps:

- Review of the initial complaint and all materials referred to therein;
- Further email correspondence and telephone conversations with the individual who filed the Complaint (the "**Complainant**") requesting further particulars and clarification;
- Review of the Complaint, as revised;
- Email correspondence and a telephone conversation with the Councillor regarding the Complaint, and timeline for response;
- Review of the Councillor's response, dated January 4, 2022;
- Further telephone conversations with both the Complainant and the Councillor;
- Review of the materials dealing with the Application;
- Review of a video recording of the Hearing;

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.

Our investigation process was temporarily paused to explore opportunities for alternative resolution.

A draft of this Report was provided to the Councillor and the Complainant on March 28, 2022 to allow them to review and comment on the factual accuracy of the Report. The Councillor and the Complainant provided comments which have been considered and addressed in this Report.

BACKGROUND

(a) Introduction

The Councillor is one of two representatives for Ward 5, Grantham Ward, in the northeast portion of the City. The Councillor is not a member of the Committee, nor does she have any staffing role in relation to the Committee's statutory mandate.

The Committee is a municipal "committee of adjustment" established by the City under section 44 of the *Planning Act*.² The Committee's statutory mandate is to hear applications for minor variances from the provisions of the City's zoning by-laws, and may grant or refuse applications on a case-by-case basis. The Committee functions as a quasi-judicial body by hearing and making decisions. Importantly, the Committee is statutorily authorized to operate independently of Council's views or directions on specific applications.

The Committee is comprised of five members, appointed by Council for a four-year term. The Committee is assisted by specific City staff. City planning staff also often write reports to the Committee advising on the planning merits of applications.

Since the start of the pandemic, the Committee has been holding its hearing by virtual means.

(b) The Application

The factual background of the Complaint relates to a specific application heard by the Committee on October 20, 2021 for the property municipally known as 617 Vine Street (the "**Property**"). The Property is located within the Councillor's Ward.

The owners the Property filed an application for minor variances from the City's zoning by-law to facilitate the construction of an accessory dwelling unit in the basement of the existing single detached dwelling (the "**Application**").

The Application sought variances from the provisions of the zoning by-law restricting the maximum floor area of an interior accessory dwelling unit, and the maximum floor area of an interior accessory dwelling unit as a percentage of the floor area of the dwelling. In essence, the Application proposed to create an additional dwelling unit in the basement of the existing dwelling above what was permitted as-of-right in the zoning by-law.

City staff authored a Technical Report, dated October 15, 2021, providing a planning analysis of the merits of the Application. It recommended that the Committee approve the Application. The report also notes that while the Application was circulated to all appropriate departments and agencies, no objections to the Application were received.

(c) Local Opposition to the Application

Despite City staff's support, the Application was not well received by local residents. Several residents wrote to the Committee to voice their opposition to the Application. In general terms, those objections dealt with the proposed increase in density on the Property, potential impacts of the additional dwelling units, and a potential increase in traffic in the neighbourhood. In addition,

² *Planning Act*, R.S.O. 1990, c. P.13.

there were also specific concerns that the Property would be used for student rentals, and concerns associated with an “absent landlord” and perceived nuisances from student tenants.

The specific objections and concerns from residents are detailed in the correspondence attached to the Committee’s Agenda for the Hearing, which is publicly available for download from the City’s website.³

(d) The Hearing

In accordance with the provisions of the *Planning Act*, the Committee held a statutory public hearing on October 20, 2021 by virtual means (i.e., the “Hearing”) to consider the Application. The Hearing was video-recorded, and made available for viewing at the City’s YouTube channel.⁴ Based on our review of the video recording of the Hearing, the Councillor attended the Hearing, and self-identified as “Councillor Dawn Dodge” in her screen name, which we understand was her default screen name on ZOOM.

The Committee’s consideration of the Application began with a brief deputation from the owners’ architectural consultant, who explained the nature of the proposal and addressed concerns from residents.

The Hearing proceeded with several deputations from residents in opposition to the Application. In addition to these deputations by residents, the Councillor made an oral deputation to the Committee.⁵ In general terms, the Councillor’s deputation to the Committee was made in opposition to the Application, reiterating the position of residents that the Application should be refused. Through her deputation, the Councillor is quoted as making the following statements:

“Don’t allow it to go bigger than allowed. Maybe not as many people would live there.”

“6 bedrooms means those residents could be students.”

“I’m asking not to give them any more space.”

“It’s on a bus route that could very easily be taken to either Brock University or Niagara College...and that makes a difference to what type of people who could possibly want to stay there.”

At one point during the Councillor’s deputation, the Chair of the Committee interjected to clarify that on consideration of the Application, the Committee could not consider the types of individuals who could potentially inhabit the Property, to which the Councillor responded “uses then, okay, of who they could rent to or not rent to.”

The Committee ultimately voted to refuse the Application in a divided 4-to-1 vote. We understand that the owners appealed the Committee’s refusal to the Ontario Land Tribunal.

³ <https://stcatharines.civicweb.net/filepro/documents/83048?preview=91378>

⁴ <https://www.youtube.com/watch?app=desktop&v=BpQxuzpgeMc>

⁵ The Councillor’s deputation can be viewed between timestamps 0:54:46 and 0:57:39.

THE POSITION OF THE PARTIES

(i) *Position of the Complainant*

The Complainant alleges that the Councillor's conduct in attending the Hearing and making submissions to the Committee constitute a contravention of Section 10.1 of the Code.

The Complainant takes the position that the Councillor's attendance at the Hearing as anything more than an observer is inappropriate. The Complainant submits that the Councillor contravened the Code by using her position as an elected official in an attempt to influence the decision-making process of the Committee, with such influence not falling within the proper role of a member of Council.

The Complainant also alleges that the Councillor's statements disapproving of "students" or "renting to students" constitutes a contravention of Section 4.1(e) and 9.2 of the Code.

With respect to Section 4.1(e), the Complainant take the position that students are entitled to be treated equally and with respect, that "students should not be maligned by an elected politician wielding control over their options to find a place to live, particularly during a housing crisis..." and that the Councillor's statements "were clear that she did not want students to reside in this neighbourhood which is deliberately and explicitly exclusionary.

With respect to Section 9.2, the Complainant takes the position that the Councillor's comments were discriminatory against students, and were made not to comment on the land-use planning merits of the Application but specifically to deny housing to students.

(ii) *Position of the Councillor*

The Councillor provided her explanation for her conduct in her responding written submissions. The Councillor acknowledged that she spoke to the Application during the Hearing, but that she did so to represent the constituents of her Ward as she had many calls from residents about the matter. She asserts that she wanted to ask the Committee to support "Council's policy" expressed through the City's planning instruments.

The Councillor admitted that she used the example of "students" as possible tenants of the Property. She asserts that her comments were no way intended to mean that students were not welcome as residents of the neighbourhood, but that she is now aware that the City "cannot zone tenants or residents."

The Councillor also advised us that following the Hearing, she spoke with City staff who advised the Councillor that attending a hearing to speak to a particular application was "strongly discouraged." In response to our draft Report however, the Councillor commented that City staff's advisement to her was not as explicit as she would have liked, as no one had told her not to attend. We note that the Councillor did not seek advice from our office in our capacity as Integrity Commissioner.

The Councillor also advised us that she was prepared to make a public apology at the meeting of Council following the Hearing. However, in light of the owners' appeal and in consultation with City staff, the Councillor determined that the best course of action would be to wait to issue an apology.

FINDINGS

We have carefully and fully considered the submissions of the parties and the 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 contravened Section 10.1 of the Code. We find that the Councillor did not contravene sections 4.1(e) or 9.2 of the Code.

1. Participation at Committee Hearing

We find that the Councillor's conduct at the Hearing contravened Section 10.1 of the Code.

Section 10.1 of the Code provides as follows:

10.0 Improper Use of Influence

10.1 A Member shall not use the influence of their office or appointment for any purpose other than the exercise of his or her official duties in the public interest.

This section prohibits a member of Council from using the power associated with their position for any purpose other than for the exercise of their duties as a member of Council. In the present case, it is important to consider the function of the Committee and role of members of Council.

To be as explicit as possible in our findings and interpretation, this section of the Code prohibits a member of Council from appearing before and making representations to an independent, quasi-judicial decision-making body of the City in their capacity as a member of Council.

(a) Role of Councillors

Generally speaking, there are three main roles of a member of council: representative, policy-making, and stewardship. Of these three roles, the "representative" role connotes a councillor's role in representative democracy: advancing the views and interests of those whom the member was elected to represent.

A member of municipal council bears a unique role in local democracy. Individually, a municipal councillor has no authority whatsoever to bind the municipal corporation or give direction to municipal staff. They can only make decisions and take action with a majority vote of the other members of council at a duly-constituted meeting. This forum is where the "representative" role of democratically elected individuals comes into play; a member of council is to represent the views and interests of their constituents in council's decision-making process.

The Province's publication "The Ontario Municipal Councillor's Guide" characterizes this portion of a councillor's role as representing the views and opinions of constituents when issues are brought before council. However, the publication also provides a caution against using one's role to influence independent municipal processes:

There may also be circumstances where decisions are made by designated staff who operate at arm's length from the council, and where it could be inappropriate for elected officials to interfere or be seen to be interfering. Examples of this include decisions made by statutory officers such as the clerk, treasurer, fire chief, chief building official or medical officer of health. These individuals may also be acting

in accordance with accountability provisions under other pieces of legislation, which may impact their advice to council.⁶

The Ontario Municipal Councillor's Guide recognizes that a councillor's representative role should heed to the role of independent statutory officers or decision-makers.

In addition, municipal councillors are only "representatives" of the views and interests of their constituents insofar that they have been democratically elected to reflect those views and interests in the decisions made by municipal council. That being said, municipal councillors are not "advocates." They do not bear a duty to represent the specific interests or concerns of specific individuals. A councillor owes their duty to the public at large and the municipal corporation.⁷

(b) Role of the Committee

A municipal committee of adjustment is an quasi-judicial body. It is required by law to hold a hearing to adjudicate requests for relief from municipal zoning by-laws. Although its proceedings may fall on the less-formal side of the spectrum, a committee of adjustment is intended to operate completely independently of Council.

Although a committee of adjustment is appointed by a municipal council,⁸ it is not answerable to it. A committee of adjustment is statutorily empowered to make decisions independent of a municipal council.⁹ A committee of adjustment is not bound in any way in its dealing with an application by any decision or direction given by a municipal council, municipal staff, and specifically, municipal councillors.

Those appearing before adjudicative bodies such as a committee of adjustment are entitled at common law to procedural fairness. An important component of procedural fairness is the independence of tribunals in a process which is free from political interference.¹⁰ This is especially true where the appointment, re-appointment, or continued engagement of individual members of that body is at the will of a political entity, such as municipal council.

In order for the public to have trust in the administrative processes of the City, not only must these processes be free from political influence, but must also be *seen to be* free from political influence. The public must have confidence that decisions are made on the merits of the case, and not any extraneous factors or political influence. Any actions taken by the City, its staff, or individual members of Council must respect this independence.

(c) Interactions between Councillors and the Committee

Despite the degree of independence a committee of adjustment has over matters within its statutory mandate, it is inappropriate for individual members of council to appear before the

⁶ Ontario, *The Ontario Municipal Councillor's Guide, 2018*, Part 1. "Role of council, councillor and staff"; online: <https://www.ontario.ca/document/ontario-municipal-councillors-guide>

⁷ See Ian MacF. Rogers, *Law of Canadian Municipal Corporations, 2nd ed.* (Toronto, Thomson Reuters: 2019) (loose-leaf release no. 3, March 2022) (online), ch. 5 l. § 5:1.

⁸ See *Planning Act*, s. 44.

⁹ See *Planning Act*, s. 45(1).

¹⁰ See e.g. Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto, Thomson Reuters, 2013) (loose-leaf release no. 4, December 2021)(online), ch. 11, § 11:16

committee in their capacity as a municipal councillor. Not only must independence be upheld, but must also be seen to be upheld. Written or oral submissions to the Committee may suggest that members of the Committee are in a compromised position, having been subjected to influence or extraneous factors. This poses the risk that decisions are not seen as being made on the objective merits of the case.

There has been recognition in several jurisdictions that politicians should refrain from appearing before administrative decision-makers. For example, in Ontario, it is a parliamentary convention of the Ontario Legislative Assembly that members of cabinet are prohibited from appearing as an advocate or supporter of a decision to be made by a provincial agency, board, commission or tribunal.¹¹

The importance of independence of adjudicative bodies was also discussed by the City of Toronto's Integrity Commissioner in an advisory report to its City Council on the then-proposed creation of the Toronto Local Appeal Body, an independent tribunal with the same powers and function as the Ontario Land Tribunal under the *Planning Act*.¹² In that report, Toronto's Integrity Commissioner provided the following guidance to members of City Council:

5. Members of City Council and their staff should not appear before or make representations of any kind to the TLAB in relation to a specific matter.

The Toronto Integrity Commissioner did recognize that in some circumstances, it may be appropriate that members of council seek a decision of council to take a particular position on an appeal proceeding. However, the important distinction is that such action necessitates a decision by the majority of members of council to mobilize municipal resources accordingly. This would not entail an individual member unilaterally taking action.

Similarly, the City of Ottawa's Integrity Commissioner has also advised against a member of council's direct participation in matters before the committee of adjustment, citing the risk that the perception of improper use of influence on a quasi-judicial body could undermine public trust in that process.¹³

(d) Councillor's Actions at the Hearing

Based on our review of the record, it is our opinion that the Councillor's attendance at and participation in the Hearing contravened Section 10.1 of the Code.

The evidence in our investigation supports the conclusion that the Councillor attended the Hearing in her capacity as a member of Council. She was identified on the virtual hearing platform as

¹¹ Ontario, Office of the Integrity Commissioner, *2012-2013 Annual Report* (June 2013), p. 9; online: <https://oico.on.ca/web/default/files/public/Annual%20Reports/Annual%20Reports%20Archive/annual-report-2012---2013.pdf>

¹² See City of Toronto Integrity Commissioner, *Report for Action – Councillor Conduct in Relation to the Toronto Local Appeal Body* (September 28, 2016); online: <https://www.toronto.ca/legdocs/mmis/2016/cc/bgrd/backgroundfile-96910.pdf>

¹³ See City of Ottawa Integrity Commissioner, *2020 Annual Report of the Integrity Commissioner*, pp. 14-15; online: <https://documents.ottawa.ca/sites/documents/files/2020%20Annual%20Report%20of%20the%20Integrity%20Commissioner.pdf>

“Councillor Dawn Dodge,” and stated that she was asked to attend by her constituents to represent their views in opposition to the Application. It is clear that the Councillor did not attend the Hearing solely as an interested observer.

By contrast, and for example, the Councillor was not in attendance in support of her own minor variance application, filed in her personal capacity, where she was a development proponent.

Furthermore, the Councillor made oral submissions to the Committee in opposition to the Applications. In so doing, she took on the role of “advocate” for specific individuals. These actions go far beyond the “representative” role of a municipal councillor.

We acknowledge that much of the Councillor’s comments and submissions to the Committee reiterate the reasons of other members of the public. However, they became her own statements when she made the deliberate choice to attend the Hearing and make those representations, ultimately taking a position on the matter.

We do not accept the argument that the Councillor was merely repeating what others had already said. It is acceptable and common place for residents to take a position of matters of concern in their neighbourhoods. When those concerns are repeated by a member of Council, they undoubtedly carry more significance and clout.

Any reasonable person attending the Hearing would perceive that a member of Council’s attendance at and opposition to an application would have greater weight or influence with the members of the Committee whose appointments are, in part, due to the Councillor’s position on Council. The Councillor is not precluded from wielding some authority with respect to matters at the Committee but she must do so in the proper context. The Councillor could have her say on the matter before Council and seek to influence Council’s decision with respect to the role of the City and its staff (if any) in any appeal hearing at the Ontario Land Tribunal arising from a decision of the Committee.

Lastly, we conclude that the content of the Councillor’s statements constituted an attempt to influence the decision of the Committee. The Councillor’s statements were far from neutral. The Councillor was not providing an objective planning opinion or advice on the matter (nor is that within her role). Her statements can only be understood in this context as an attempt to persuade the Committee to refuse the Application. Regardless of what the Committee’s ultimate decision was in this case, such actions by a member of Council are inappropriate.

In summary, we conclude that the Councillor contravened the Code by attending and making submissions to the Committee at its Hearing.

2. Discriminatory Comments Regarding “Students”

It is our finding that the Councillor’s statements at the Hearing did not contravene Sections 4.1(e) and 9.2 of the Code.

Sections 4.1(e) and 9.2 of the Code work in conjunction to combat discrimination based on enumerated protected grounds, much like other human rights enactments such as the *Ontario Human Rights Code*.¹⁴

“Age” is a particular enumerated ground in the Code and other human rights enactments. “Student status” is not a protected ground under the Code. In human rights law jurisprudence, in order to find discrimination on a non-enumerated ground, the ground of alleged discrimination must be “analogous” to a prohibited ground.¹⁵

Our review of the human rights law jurisprudence indicates that student status is not a specific protected ground, nor is it analogous to a protected ground.¹⁶ While we understand that students tend to be young persons, the courts have rejected student status as a fiat for the protected ground of “age”. Furthermore, the prohibited grounds in human rights legislation (and indeed the Code) all share the feature of being immutable, or changeable only at unacceptable cost to personal identity.¹⁷ Student status, on the other hand, does not share this characteristic. The status of being a student is a temporary and “transient, non-physical state.”¹⁸ As such, there can be no discrimination on the basis of student status.

Notwithstanding this, the comments made by the Councillor were not associated with or intended to perpetuate a stereotype or prejudice about “students”. We recognize that the Councillor made certain comments about student rental housing.¹⁹ However, understood in the context of the Application and the Hearing, the crux of these comments was a concern about the perceived adverse impacts associated with student rental housing. Whether these concerns are supported by any evidence or constitute a valid land use planning objection to the Application is beyond our mandate as Integrity Commissioner.

In summary, we find that the Councillor’s statements did not contravene the Code. That being said, we would encourage the Councillor to consider and reflect on whether her messaging in relation to residents of the City who are students would foster an environment of mutual respect.

¹⁴ *Human Rights Code*, R.S.O. 1990, c. H.19.

¹⁵ See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687, at para 13 (S.C.C.).

¹⁶ See e.g. *Fodor v. North Bay (City)* (2018), 76 M.P.L.R. (5th) 37 (Ont. Div. Ct.), wherein the Divisional Court refused to quash a municipal by-law regulating multi-unit rental on the basis that it violated the *Ontario Human Rights Code* and the *Canadian Charter of Rights and Freedoms* as “students” were not a protected or analogous group.

¹⁷ See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, *supra* note 15, at para 13.

¹⁸ *Allen v. Canada (Canada Human Rights Commission)*, [1992] F.C.J. No. 934 (Fed. Ct. T.D.)

¹⁹ We note that many post-secondary students reside in the City while attending local post-secondary institutions, including Brock University and Niagara College.

CONCLUSIONS

For all of the reasons set out in detail above, we find that the Councillor contravened the Code by attending and making representations at the Committee's Hearing. We also find that the Councillor did not contravene the Code provisions on discrimination on account of her statements about "students."

We understand that at the time of the Hearing, the Councillor was uncertain as to whether she could attend and participating in a Committee hearing. After the Hearing, the Councillor spoke with City Staff on her own initiative to better understand why speaking at such hearings is not recommended. We do note however that she did not consult our office for advice on her ethical obligations.

The Councillor has advised our office that she was prepared to make a public apology at the meeting of Council following the Hearing, but after consulting with City Staff decided to wait to issue that apology. In our view, now is an appropriate time to make such an apology.

RECOMMENDATIONS

In view of our finding that the Councillor has contravened Section 10.1 of the Code, we recommend that Council impose the penalty of a reprimand on the Councillor for her conduct pursuant to subsection 223.4(5) of the *Municipal Act, 2001*.

In addition, pursuant to Section 15.2 of the Code, we recommend that Council take the remedial measure of requesting that the Councillor issue a verbal apology, such apology expressing contrition for her actions and understanding of the importance of independence in the quasi-judicial processes of the City's administrative decision-making bodies. The apology should be provided at a meeting of Council (or a similar public setting), should be prepared by the Councillor herself, and should be delivered within 30 days from Council's decision on the matter.

Pursuant to the *Municipal Conflict of Interest Act*, the Councillor is entitled to make submissions on the Recommendations to Council and can participate in any discussion but she is not to vote on any questions in respect of the matter.

Respectfully submitted,

AIRD & BERLIS LLP



John Mascarin

Integrity Commissioner for the City of St. Catharines

Dated this 14th day of April, 2022