

RE: CITY OF BARRIE CODE OF CONDUCT COMPLAINT

Summary:

This report presents the findings of my investigation under the City of Barrie Code of Conduct (the “Code”) relating to the conduct of Councillor Keenan Aylwin (the “Respondent”) in connection to a complaint which alleged that:

1. the Respondent participated at a meeting of General Committee and Council regarding matter 19-G-076 without declaring a pecuniary interest as required by the *Municipal Conflict of Interest Act* (“*MCIA*”), in contravention of section 13 of the Code;

In so doing, the Complaint alleges that the Respondent contravened section 5.1 of the *MCIA* by participating in a matter under consideration at a meeting of Council, for which the Member had a deemed pecuniary interest as defined by section 3 of the *MCIA*, without declaring the interest.

Upon receipt and following an initial classification, I found that the issue subject of the complaint involved an allegation which was on its face a matter enforced under the *MCIA*. Section 13 of the Code provides that Members shall conduct themselves in accordance with the Municipal Conflict of Interest Act. By virtue of this Code rule, Members are must avoid conflicts of interest, both pecuniary and non-pecuniary and shall comply with the requirements of the *MCIA*, with respect to obligations relating to pecuniary interests.

Under section 27.5 of the Code which sets out the Complaint Procedure (the “Code Protocol”) , the Integrity Commissioner may state that there was no contravention of section 5, 5.1 or 5.2 of the *MCIA*, or may apply to a judge under section 8 of the *MCIA* for a determination as to whether the Member has contravened section 5, 5.1 or 5.2 of the statute. I concluded that the pecuniary interest was likely an interest in common with other electors generally and therefore I concluded that the Respondent did not violate the *MCIA*. I provide my reasons in this report.

In this report, I discuss my findings on the allegations in the complaint, my analysis and reasons for my findings. I have carefully reviewed the context of this complaint, the information provided by the Complainant in its entirety. Section 27.4 of the Code Protocol sets out that “[i]f upon completion of the investigation, the Integrity Commissioner finds that there has been no contravention of the Code, or that a contravention occurred, however, the member took all reasonable measures to prevent it, or the contravention committed was trivial or committed through inadvertence or an error of judgment made in good faith, the Integrity Commissioner shall set this out in its report to Council.

Code investigation reports are submitted to Council in open session to ensure transparency in decision making. It is important to the integrity of the investigation process that even when there is a finding of compliance with the rules, that the Integrity Commissioner set out the reasons for her findings.

The Complaint:

On May 24, 2019, I received a complaint under the City's Code. The Complainant submitted the complaint using the Complaint Form, appended 5 pages of supporting documentation.

The Complaint package contains copies of matters 19-G-077 and 19-G-078, two motions that were adopted both relating to repealing smoking in public places. Section 19-G-076 was in respect of "The Dunlop Street East Corridor Improvements" discussed at the meeting of 2019-04-08 (Attachment 1 – General Committee adopted recommendation Section "D" 19-G-076).

Matters covered by section 19-G-077 and 19-G-078 related respectively to:

19-G-077

New municipal smoking regulations and to repeal smoking in public places and workplaces by-law 2010-034 and smoking outdoors on City owned property by-law 2009-086- Referral to Finance and Corporate Services Committee

19-G-078

New municipal smoking regulations and to repeal smoking in public places and workplaces by-law 2010-034 and smoking outdoors on City owned property.

BIA Board of Management, 04-2019 Streetscape Project Motion:

The Downtown Barrie (BIA) Board of Management (the board) moves a motion To contribute \$300,000, over a period of ten years, to the Dunlop Streetscape Project For the Enhanced Streetscape portion, and that the BIA Office continue to liaise with The staff in the Engineering Department in regards to the project schedule, specifically Shortening the 2019 Patio Season to allow a construction start date of September 10, 2019.

Factual Background

The Respondent, Councillor Keenan Aylwin, is a municipal councillor for the City of Barrie. This is his first term of elected office. As the Councillor for Ward 2, the Respondent had also been appointed to the Downtown Barrie Business Association ("BIA").

The Respondent's father, is the owner and operator of the Grilled Cheese Social Eatery located on Dunlop Street East in Downtown Barrie. Section 3 of the *MCIA* sets out that a Member will have pecuniary interest if their relative has a pecuniary interest in a matter under consideration by Council.

Interest of certain persons deemed that of member

3. For the purposes of this Act, the pecuniary interest, direct or indirect, of a parent or the spouse or any child of the member shall, if known to the member, be deemed to be also the pecuniary interest of the member.

Issues raised by the Complainant

The Complainant raised the allegation that the Respondent had a deemed pecuniary interest under section 3 of the *MCIA*, on the basis of the Respondent's father being the owner of a business in the affected area of Downtown Barrie. The Complainant alleged that the Respondent failed to declare an interest in 3 matters discussed at meetings of General Committee and Council, involving Dunlop Street Corridor improvements. The Complainant alleges that the Respondent violated the *MCIA* obligations relating to a pecuniary interest and thus violated section 13 of the Code which requires that Members of Council comply with the *MCIA*. The Complainant states in the complaint that since the Respondent's father owns a business in the Downtown Barrie area affected by the Dunlop Street Corridor improvements, the Respondent had a deemed pecuniary interest under section 3 of the *MCIA* and did not declare this interest as required by section 5 of the *MCIA*.

According to the complaint, the Respondent was barred by his obligations under the *MCIA*, from participating in any Council discussions on the matter. The complaint notes that this would be considered a violation of the Code and also a violation of the *MCIA*. In respect of the issue subject of the complaint, that contains the allegations that the Respondent breached section 5 and 5.1 of the *MCIA*, the Complainant noted that the Respondent should be well aware of the *MCIA* rules as all Members of Council received Code of Conduct and *Municipal Conflict of Interest Act* training, shortly after taking office after the 2018 municipal election.

The duties of a Member, as set out in section 5 of the *MCIA* and as evidenced by a Member's declaration of office, leaves no doubt that the obligation to comply with the requirements of the statute is a personal one. A Member may seek out advice from the Integrity Commissioner to assist in making their decision regarding whether they should disclose a personal pecuniary interest. A Member may also consider obtaining independent legal advice to assist them in making their personal decision.

Preliminary Issues:

Integrity Commissioner MCIA Jurisdiction

Section 25.2 of the Complaint Protocol states that any individual "who identifies or witnesses who has identified or witnessed behaviour or activity by a member that appears to be in contravention of the Code or sections 5, 5.1 and 5.2 of the *Municipal Conflict of Interest Act* ("MCIA") in the case of Council members, may address their concerns through the formal complaint process.

Section 26 of the Complaint Protocol provides that if the Integrity Commissioner determines that a formal investigation is required, the Integrity Commissioner has discretion to carry out an investigation or decline to do so. If the Integrity Commissioner is satisfied, after considering the information contained in the complaint, that there are no grounds or insufficient grounds for an

investigation, the Integrity Commissioner shall not conduct an investigation and may summarily dismiss the complaint and where this becomes apparent in the course of an investigation, shall terminate the inquiry.

As Integrity Commissioner, I have jurisdiction to receive complaints that allege contraventions of *MCIA* rules, as well as general contraventions of Code rules. It is also important for me to consider whether there may be a separate violation of the Code, in the event that I receive a Code complaint in respect of a matter that triggers *MCIA* rules. I have set out this distinction later in this report.

In my view, the complaint is neither frivolous nor vexatious, nor was it made in bad faith. The issues raised in the complaint are important and significant and from the Complainant's perspective, there was a real question of whether a violation had occurred. The Complaint Protocol includes an opportunity for the Member whose behaviour is being impugned, to provide a response to the allegations of the complaint. The complaint has factual and legal basis.

Relevant sections of the Governing Legislation

A. The *Municipal Act*, 2001

Section 223.3 (1) of the *Municipal Act* states that:

Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an Integrity Commissioner who reports to council and who is responsible for performing in an independent manner the functions assigned by the municipality with respect to any or all of the following:

1. The application of the code of conduct for members of council and the code of conduct for members of local boards.
2. The application of any procedures, rules and policies of the municipality and local boards governing the ethical behaviour of members of council and of local boards.
3. The application of sections 5, 5.1 and 5.2 of the *Municipal Conflict of Interest Act* to members of council and of local boards

[...]

Within her statutory discretion, upon completing her investigation, pursuant to section 223.4.1 (15), the Integrity Commissioner may, if he or she considers it appropriate, apply to a judge under section 8 of the *MCIA* for a determination as to whether the member has contravened section 5, 5.1 or 5.2 of that Act.

223.4.1 (1) This section applies if the Commissioner conducts an inquiry under this Part in respect of an application under subsection (2). 2017, c. 10, Sched. 1, s. 21.

Application

(2) An elector, as defined in section 1 of the Municipal Conflict of Interest Act, or a person demonstrably acting in the public interest may apply in writing to the Commissioner for an inquiry to be carried out concerning an alleged contravention of section 5, 5.1 or 5.2 of that Act by a member of council or a member of a local board.

B. City of Barrie Code of Conduct

13. Municipal Conflict of Interest Act

13. Members shall conduct themselves in accordance with the Municipal Conflict of Interest Act as amended from time to time.

Of importance in accountability regimes at the municipal level in Ontario, a Members shall take proactive steps to mitigate any non-pecuniary conflicts of interest in order to maintain public confidence in the City and its elected officials. As part of taking proactive steps, 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.

C. Municipal Conflict of Interest Act, 1990

DUTY OF MEMBER

When present at meeting at which matter considered

5 (1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,

- (a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
- (b) shall not take part in the discussion of, or vote on any question in respect of the matter; and
- (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question

Written statement re disclosure

5.1 At a meeting at which a member discloses an interest under section 5, or as soon as possible afterwards, the member shall file a written statement of the interest and its general nature with the clerk of the municipality or the secretary of the committee or local board, as the case may be.

Interest of certain persons deemed that of member

3. For the purposes of this Act, the pecuniary interest, direct or indirect, of a parent or the spouse or any child of the member shall, if known to the member, be deemed to be also the pecuniary interest of the member.

Under section 9 of the *MCIA*, if a judge determines that the member or former member has contravened section 5, 5.1 or 5.2, the judge may suspend the remuneration paid to the member for a period of up to 90 days or declare the member's seat vacant, among other penalties.

Respondent's Position:

In his written response, the Respondent stated that it was his understanding at the time of the decision on the Dunlop Street Streetscape, that it was a general project affecting all of the downtown of the City of Barrie. The Respondent went on to state that:

“...the support for road and sidewalk reconstruction would not be considered a pecuniary interest. Therefore, I did not believe I had to declare an interest in this matter.

Further it was my understanding that even if someone did perceive a potential pecuniary interest, the exceptions would apply and that I did “not need to declare an interest and refrain from participating and voting on the matter before Council.”

The Respondent further stated that he believed that having sought my advice as the City of Barrie Integrity Commissioner on potential conflicts of interest generally that may involve discussions of matters at Council where his father's business may be affect and having completed a *due diligence letter*, he had met his obligations under both the *MCIA* and the Code.

Process:

On June 26, 2019, I received a Code of Conduct complaint naming the Respondent. In my correspondence to the Respondent, I invited him to provide me with preliminary comments or contact me to discuss and/or for any clarify what was being requested. Upon receipt of the comments, I advised that I would decide whether to commence an investigation or not.

On July 3, 2019, the Respondent provided a preliminary response to the Complaint and stated that:

Thank you for the opportunity to provide my preliminary comments on this matter.

As you may recall, you addressed the issue of my father's downtown business in email correspondence to me in response to my inquiry to you on October 24, 2018. In that email you described “general rules” that “can assist Members in making a decision on whether a) they have a pecuniary interest and b) if the exceptions apply such that they do not need to declare an interest and refrain from participating and voting on the matter before Council.”

It was my understanding at the time of the decision in question, that the issue of the Downtown Streetscape was a general project for the entire downtown of the City of Barrie and that the support for road and sidewalk reconstruction would not be considered a pecuniary interest. Therefore, I did not believe I had to declare an interest in this matter.

Further it was my understanding that even if someone did perceive a potential pecuniary interest, the exceptions would apply and that I did “not need to declare an interest and refrain from participating and voting on the matter before Council.”

On July 7, 2019, I replied to the Respondent and clarified that:

the Complaint package, set out in minutes of the Downtown BIA "Section E - Adoption of this Section Under 19-G-077 and 19-G-078, there were two motions adopted, both relating to repealing smoking in public places...

I posited that the question to be asked and answered was whether these matters were intended to affect outdoor smoking in all of Barrie, all of downtown Barrie or a restricted number of streets?

While the Respondent was correct in stating that the advice from my Office explained that if a matter affects a broad category, it may be viewed by my Office or a court as a pecuniary interest in common with other electors generally and therefore an exception to the rule of having to declare an interest and not vote under section 5 of the MCIA. However, the application of the MCIA is not such that one can correctly take the position of the Respondent that "even if someone did perceive a potential pecuniary interest, the exceptions apply" by virtue of the Member believing the matter before him is of a general nature affect a broad category. Even if the exceptions may apply, a Complainant can still bring forward a complaint and it will be up to the Integrity Commissioner to determine if there are grounds to commence an investigation or whether the Member carried out his/her/their due diligence and considered their obligations and made a correct assessment that one of the section 4 exceptions applied.

The Respondent referred to having executed a “due diligence” letter and believe that this fulfilled any duties he may have in respect of the circumstance of a matter coming before Council that may be perceived as placing him in a conflict in respect to his father’s business. However, “due diligence” letters do not absolve a Member from review the circumstance at hand but rather, these letters allow the Member to demonstrate that they have sought the advice of and consulted with the Integrity Commissioner on matters that may trigger a disqualifying circumstance for the Member. The due diligence letter does not waive consideration of whether one has a pecuniary interest that requires a declaration and abstaining from a vote, but rather, it allows the Member to participate on the Committee or Board while enhancing the public's trust that the Member understands there may be a perceived or real pecuniary interest in matters that come before them and that in the event that there is a real conflict, he/she/they will consult with the IC or their own lawyer and make their informed decision.

The due diligence letter does not absolve a Member from considering whether the matter before them creates a pecuniary interest in each circumstance. It acts as evidence that the Member has

consulted with the IC and understands their obligations under the Code and the MCIA such that they are not "disabled" from serving on the Committee/Board.

On July 7th, I requested that the Respondent advise if the repeal of the by-laws under consideration in the motions subject of the Code complaint, were intended to affect outdoor smoking in all of Barrie, all of downtown Barrie or a restricted number of streets. I advised the Respondent that based on the response I received, I would be in a position to determine if the Complaint could be dismissed or whether an investigation was required. I did not receive further correspondence from the Respondent.

On September 3, 2019, the Respondent contacted my Office by email requesting an update on the Complaint. The email stated:

I'm looking for an update on this matter considering it has been two months. We're heading back to Council and I would like to get this resolved as I'm sure you can understand.

Will you be investigating the matter? When can I expect an update?

On September 3rd, I replied by saying:

I can appreciate you are looking for an update. Please be advised that it is forthcoming. I received several Code Complaints over the summer and I have endeavoured to give each my attention and thoughtful consideration.

I will not be investigating the matter further. I should have a conclusion for you shortly.

On October 23, 2019, I advised the Respondent that I would be submitting the Report to the Clerk to be put on the next Council agenda. The Respondent contacted me by telephone and explained that he believed that I had not decided to investigate and I had not given him the required notice to respond to the Complaint.

On October 28th, I advised the Respondent that there appeared to have been a misunderstanding about whether I had commenced an investigation. I confirmed that I had investigated and in my September 30th response to the Respondent that I stated that I would not investigate any *further*.

I advised the Respondent that, in accordance with s.26 of the Barrie Code, I was providing notice of a formal investigation and I invited the Respondent to respond to the complaint within 14 days.

On November 20, 2019, I receive the Respondent's reply to the complaint.

Dear Ms. Craig,

Thank you for the opportunity to provide comments on this matter.

As you may recall, you addressed the issue of my father's business which is located in a leased downtown commercial space in email correspondence to me in response to my inquiry to you on October 24, 2018. In that email you described "general rules" that "can assist Members in making a decision on whether a) they have a pecuniary interest and b)

if the exceptions apply such that they do not need to declare an interest and refrain from participating and voting on the matter before Council.”

It was my understanding that the matter before Council was one in which the potential for a pecuniary interest was so remote as to be insignificant. It was also my understanding that any potential pecuniary interest would be one held in common with electors in general. As a result, I did not believe that I had to recuse myself from the matter in accordance with the Municipal Conflict of Interest Act.

I hope you will consider the fact that I have done my due diligence on this matter and will continue to consult on any issues that may arise in the future.

If you require further response from me on this matter please advise.

Analysis:

The questions that I had to answer in this review were:

1. Did the Respondent have a pecuniary interest as defined by the *MCIA* that disqualified him from participating in the 2019-04-08 session of Council, 2019-04-01 sessions of General Committee and the Downtown Barrie Business Association (BIA) Board of Management Special Meeting, 2019-04-04?
2. If the Respondent had a pecuniary interest, did the section 4 exception apply that ss. 5 and 5.2 of the *MCIA* do not apply by reason of the member having a pecuniary interest which is an interest in common with electors generally?

1. No Disqualification based on Pecuniary Interest

The Respondent Has A Pecuniary Interest

The term “pecuniary interest” is not defined under section 1 of the *MCIA*. However, the courts have recognized that a pecuniary interest for the purposes of the *MCIA* means a financial or economic interest.¹ Further, for the *MCIA* to apply, the matter for Council to consider and for the councillor to vote on to be in breach of the *MCIA* must have the potential to affect the pecuniary interest of the municipal councillor, that is to say, to involve a financial or economic interest.

The *MCIA* requires that not only must a City councillor declare a pecuniary interest he or she may have in any matter coming before Council, the pecuniary interest of a parent of the member of Council shall, if known to the member, be deemed to be the pecuniary interest of the member under section 3 for the purposes of the *MCIA*. The Complainant argues that this means any pecuniary interest in a matter involving a real or perceived financial interest to the Respondent’s parent coming before City General Committee and Council, would be deemed to be the Respondent’s pecuniary interest for the purpose of section 5 under the *Act*.

¹ *Magder v. Ford*, 2013 ONSC 263 (Ont. Div. Ct.)

The *Municipal Conflict of Interest Act* is legislation enacted by the Province of Ontario to maintain integrity, independent, and accountability in municipal decision making. The purpose and objective behind the *MCIA* is to ensure that the decisions of elected municipal officials are not influenced by their financial interests (i.e. they do not profit or seek an unfair benefit because of the office they hold when called upon to vote on matters in which they may have a direct or indirect interest).

The Complainant relies upon section 3 of the *MCIA*, the Interest of certain persons deemed that of member, as the statutory duty he alleges the Respondent breached or failed to meet.

3 For the purposes of this Act, the pecuniary interest, direct or indirect, of a parent or the spouse or any child of the member shall, if known to the member, be deemed to be also the pecuniary interest of the member

The Complainant alleges that the Respondent's father had a financial interest by virtue of a possible financial benefit to be gained from the Dunlop Street Corridor revitalization.

There is no doubt that the Respondent's father is the owner of a business located within the affected area of the Dunlop Street Corridor revitalization and thus there is a possibility of being financially impacted by the City's decision to move forward with the project.

The *MCIA* prohibits an elected official from discussing or voting on a matter because the matter before Council for decision is one in which the Member has a private interest distinct from the other Council Member. In fact, where a Member's spouse, child or parent's interest is at play in the decision before Council, the Member has two distinct interests and this conflict position creates a deemed pecuniary interest under the *MCIA*. It is settled law that elected officials are prohibited from discussing or voting on a matter when they have a pecuniary interest. A Councillor is deemed to have a pecuniary interest where her or his parent has such an interest. The position taken in this report is that, if a Councillor's pecuniary interest arises by reason of her or his parent's pecuniary (deemed) interest and one of the section 4 exception does not apply, the Councillor is bound to declare a conflict of interest pursuant to s. 5 of the *MCIA*.

The provincial legislation is paramount to the Code.² Such paramountcy is recognized in s. 2 of the Code which states that "[t]his Code of Conduct operates along with and as a supplement to the existing statutes governing the conduct of members". As a result, the Code augments other laws which Members are governed by and which require Members to follow other sources of applicable law, including but not limited to the:

- a) *Municipal Act, 2001*, S.O. 2001, c. 25;
- b) *Municipal Conflict of Interest Act*, R.S.O 1990, c.M. 50;

² City policies are *ultra vires* if they are inconsistent or conflict with the provisions of a provincial enactment

- c) *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.M. 56;
- d) *Municipal Elections Act*, 1996, S.O. 1996, c. 32;
- e) *The Occupational Health and Safety Amendment Act* (Violence and Harassment in the Workplace) 2009; and
- f) *Human Rights Code*.

The Relevant Exception in the MCIA: Interest in common with other electors

Section 4(j) of the *MCIA*, which provides that s. 5 and 5.2 do not apply to a pecuniary interest shared with electors generally. Section 4(j) of the *MCIA* clearly establishes, if the council member has a pecuniary interest in an issue which is an interest that is common to electors generally, the council member may participate and vote on the issue, even if the member's degree of pecuniary interest differs from that of electors generally.

Pursuant to s. 1 of the *MCIA*, "interest in common with electors generally" means a pecuniary interest in common with the electors within the area of jurisdiction and, where the matter under consideration affects only part of the jurisdiction, means a pecuniary interest in common with the electors within that part. "[E]lectors generally" may refer to something other than all electors³.

Each conflict of interest case must largely stand on its own facts.⁴ What constitutes a pecuniary interest in common with other electors generally under section 4(j) of the *MCIA* is not always clear cut. In the matter subject of this complaint, the Respondent had previously sought out my advice to guide him in making thoughtful decisions that align with both his statutory obligations under the *MCIA* and ethical obligations under the Code. While the ultimate decision must be a personal one, as an elected official, the Respondent took the responsible step of seeking out information from the Integrity Commissioner, an experienced subject-matter expert, so that his decision was informed and not speculative.

To that end, it is useful to touch on the reasons of the decision of a 2013 court decision. In *Gammie*⁵ the court pointed out the value of an elected official's participation in council debates and the intersection of this vital role with the prohibitions intended to bar private interest considerations at the expense of public duty. The court reasoned that:

It is often the potential benefit of a measure to members of council and those, such as other property owners or owners of businesses in the area, that informs their debate of it. Protecting the right of such members to participate is necessary in order to preserve the

³ *Biffis v Sainsbury* 2018 ONSC 3531 at para 13 citing *Ennismore (Township), Re*, [1996] O.J. No. 167 (Ont. Gen. Div.) at para 16

⁴ *Greene v Borins*, (1985) 18 D.L.R. (4th) 260 at p.269

⁵ *Gammie v Turner* 2013 ONSC 4563

vitality of informed debate that is to take place in Council. Restricting debate to those who are entirely disinterested, who own no property, and operate no businesses, would deprive public debate of its vitality and make it less likely that measures of value to all would be proposed, or that those who are most likely to benefit by them will have an opportunity to advocate to those who may benefit less, but benefit still, as to their value to the community as a whole.

In the case of *Stewart v. City of Yorkton*⁶ it was held that an interest in common of the same kind, but different in degree, with a segment of the residents of a municipality, as opposed to all the residents of the municipality, does not disqualify the member from voting.

As stated by the court in a recent decision,⁷ “...as the authorities and Section 4(j) of the current Municipal Conflict of Interest Act clearly establish, if the council member has a pecuniary interest in an issue which is an interest that is common to electors generally, the council member may participate and vote on the issue even if the member’s degree of pecuniary interest differs from that of electors generally.”

I find that the Respondent has a pecuniary interest in the matter subject of the Dunlop Street Corridor revitalization project. However, the Respondent fell within the exception under s. 4(j) because his interest was in common generally with other electors. Therefore, the exception of s.4(j) would likely be found to shield the Respondent from disqualification under section 5 of the *MCIA*.

The Jurisdiction of the Integrity Commissioner to seek a decision of the court

The *MCIA*, provides that:

8 (1) An elector, an Integrity Commissioner of a municipality or a person demonstrably acting in the public interest ***may apply to a judge*** for a determination of the question of whether,

(a) a member has contravened section 5, 5.1 or 5.2; or[...]

Section 27.5 of the Code states that:

With respect to alleged violations of sections 5, 5.1, or 5.2 of the *MCIA*, if the Integrity Commissioner determines that, on a balance of probabilities, there has been a violation of the *MCIA*, or is otherwise of the opinion that it is in the City’s interest for a judge to determine if there has been a violation of the *MCIA*, the Commissioner may apply to a judge for such a determination. For greater certainty, nothing in this Protocol shall prevent a complainant from bringing their own application to a judge for a determination of whether there has been a violation of sections 5, 5.1, or 5.2 of the *MCIA*.

⁶ Ibid 7, paragraph 17

⁷ *Biffis v. Sainsbury*, 2018 ONSC 3531, 2018 CarswellOnt 10650, paragraph 13.

Subsection 223.4.1(16) of the *Municipal Act* sets out the requirement that if the Integrity Commissioner does not proceed with an application to the judge, he or she shall so advise the complainant.

For the above noted reasons, I will not proceed with an application to the judge under section 8 of the *MCIA* as I have determined that a court would likely find that sections 5 does not apply to the pecuniary interest of the Respondent insofar as it is a pecuniary interest in common with other electors generally.

The Respondent's Due Diligence

It is also relevant that Respondent took considerable care not to put himself in contravention of 5(1)(c) of the *Municipal Conflict of Interest Act* by seeking my advice in respect of the application of the *MCIA* generally to the issue of his father's ownership of a restaurant on Dunlop Street. Early in his tenure as an elected City of Barrie Councillor, the Respondent disclosed to me all material facts in respect of his father owning a business on Dunlop Street. The Respondent did not seek advice on this particular vote or issue but he was attuned to the potential conflict issues.

In the face of his recognition of the possibility of conflict, the Respondent's replied to the complaint by stating that he did not believe that support for road and sidewalk reconstruction would be considered a pecuniary interest and therefore, he did not believe he had to declare an interest in this matter. The Respondent was incorrect in his assumption that he did not have a pecuniary interest in the decisions subject of this complaint. However, the Respondent was correct in the belief that the exception would likely apply because it is a matter which affects a broad category or a "pecuniary interest in common with other electors generally" and therefore an exception to the rule of having to declare and not participate in discussions or vote.

The decision to declare a pecuniary interest and refrain from participating or voting on a matter for which a Member has a pecuniary interest, is one to be made by the councillor. However, where the Member has sought advice from the Integrity Commissioner and/or independent legal counsel, these actions demonstrate the Member's due diligence and may trigger the application of s. 9(a), (b), or (c) of the *MCIA*. Section 9 of the *MCIA* sets out the enforcement power of the court, if a judge determines that a Member has breached the rules requiring the Member to declare a conflict, refrain from voting or influencing the vote. In exercising his or her discretion, the judge may consider, among other matters, whether the member or former member:

- (a) took reasonable measures to prevent the contravention;
- (b) disclosed the pecuniary interest and all relevant facts known to him or her to an Integrity Commissioner in a request for advice from the Commissioner under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* and acted in accordance with the advice, if any, provided to the member by the Commissioner; or
- (c) committed the contravention through inadvertence or by reason of an error in judgment made in good faith.

It is clear from the information that I have received throughout this investigation that the Respondent acted with diligence in seeking the advice of the Integrity Commissioner in circumstances in which a real or perceived conflict may arise. The Respondent should be commended in acting with care and diligence with a view to avoiding running afoul of the rules of the *MCIA*. However, this Complaint has underscored the need for Members to demonstrate that they have sought advice from the Integrity Commissioner in particular circumstances that come before Committee or Council. While not required by statute, it would be useful in future circumstances for Members of Council to identify that they have sought advice from the Integrity Commissioner on a matter that may trigger the application of the *MCIA*. In addition, it is imperative that a Member understand that general advice received from the Integrity Commissioner in respect of Member obligations under section 5 of the *MCIA*, cannot be relied upon to guide all of their future decisions.

2. Code Contravention -Improper Use of Influence

Several Ontario municipalities, including the City of Barrie have enacted Codes of Conduct that include Improper Use of Influence rules that prohibit a member of council from using the influence of his or her office for any purpose other than for the exercise of his or her official duties.⁸ Examples of prohibited conduct under Improper Use of Influence rules include the use of one's status as a member of Council to improperly influence the decision of another person to the private advantage of oneself, or *family members* or business associates or holding out of the prospect of promise of future advantage through a member's supposed influence within Council in return for present actions or inaction.⁹ These private interests go beyond pecuniary interests as defined in the *MCIA*.

Whether a Member of Council is interacting with other Members of Council, City staff, Committee Members or the public, the intent of the Code provision is to prohibit behavior or actions that would unduly influence a government decision to the advantage of the Member or third parties, including a parent. This includes "bias", "pre-judgement" and "closed mindedness". When considering whether or not a Code conflict exists, it is important to consider whether there

⁸ **Section 14: Improper Use Of Influence**

- 14.1 No Member shall use the influence of her or his office for any purpose other than for the exercise of her or his official duties.
- 14.2 Examples of prohibited conduct are the use of one's status as a Member to improperly influence the decision of another person to the private advantage of oneself, or one's parents, children or spouse, staff members, friends, or associates (business or otherwise). This would include attempts to secure preferential treatment beyond activities in which members normally engage on behalf of their constituents as part of their official duties. Also prohibited is the holding out of the prospect or promise of future advantage through a member's supposed influence within Council in return for present actions or inaction.
- 14.3 For the purposes of this provision "private advantage" does not include a matter:
 - a) That is of general application;
 - b) That affects a member of Council, his or her parents, children or spouse, staff members, friends, or associates, business or otherwise as one of a broad class of persons; or

⁹ Lorne Sossin, Formerly Dean of Osgoode Hall Law School, 2011.

are any grounds for a reasonable person to think that one exists.” This prohibition should be read together with the general principles of the Code.

It is a basic premise of decision-making at the municipal level that Council decisions be fair and that they appear to be fair to the informed and reasonable observer. If actual or apprehended bias arises from a Councillor’s words or actions, then the elected official has exceeded her or his jurisdiction and should disqualify themselves voluntarily. Impartiality is a statement of mind in which the Councillor is disinterested in the outcome and is open to persuasion by the staff reports and public submissions and all information that comes before Committees and Council. Bias denotes a state of mind that is in some way predisposed to a particular result or that is closed in regard to a particular issue.¹⁰

In *Old St. Boniface Residents Assn Inc v Winnipeg (City)*, Sopinka J, writing for the majority, commented on the meaning of “conflict of interest”, as understood under common law:

I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent ... that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.

Members are required to be free from bias and prejudgment in respect of the decisions that are part of a Member’s political and legislative duties. I find that the test for determining whether there is a reasonable apprehension of bias in respect of a Member is the same as the test established by courts with respect to an administrative tribunal. The test often used to explain the existence of a reasonable apprehension of bias is that set out by the Grandpré in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), at 394-395:

...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is ‘what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?’

¹⁰ *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at paras 91, 99, 104-105

Rule 14 of the Code requires Members to avoid the improper use of influence and prohibits them from extending preferential treatment to individuals or organizations in which they have a private interest.

The Code states that it is important to consider whether there are any grounds for a reasonable person to think that a conflict exists. Generally, it is a given that the Code of Conduct has been duly debated and passed into by-law in accordance with the City's procedural by-law. This legal process which brought into force an ethics regime for elected officials, demonstrates that Members of Council have a common understanding that they will avoid participating in activities that grant, or appear to grant, any special consideration, treatment, or advantage to an individual (including themselves) which is not available to every other individual. The key is to be mindful that the Code does not state whether there are any grounds for "any person" to think that a conflict exists, but rather for a reasonable person to think that a conflict exists.

Pecuniary or non-pecuniary conflicts of interest may arise out of close personal relationships. The common law applies two tests to situations where an official's public duties may be in conflict with non-pecuniary private interests:

- 1) The first test is the "closed mind test" or "amenable to persuasion test", which "applies when the official has expressed opinions in advance of a decision to such a degree that he or she might have bias."¹¹ This protects the audi alteram partem doctrine (i.e., listen to the other side).
- 2) The second test is akin to the pecuniary interest test and it "applies when the official has associations or connections within the community such that the public official's own interest might override the public interest when making a decision."¹² This test asks (1) whether the official has a personal interest in the matter beyond the interest he or she shares with all citizens of the municipality and (2) whether that interest is such that a reasonably well-informed person would conclude that the interest might influence the exercise of the official's public duty. This protects the principle that one should not be a judge in one's own cause.

The "reasonable person" standard, against which the actions of a Member of Council are measured to determine his or her adherence to the ethical principles of the Code in contrast to a "bias" or "personal interest", will be determined by how the Member exercises care, diligence and educates themselves in relation to advancing the common good for the area in which they are making decisions. Under the Code, a member should not participate in a discussion of Council if he or she has a non-pecuniary type of interest that places the person in a conflict position (e.g. bias). This could include any benefit obtained by relations, close friends, or associates of a member. One example may include a discussion about the rezoning application submitted by a relative or close personal friend.

¹¹ *Schlenker v Torgrimson*, 2012 BCSC 41 at para 55 (reversed on appeal, but not on this point)

¹² *Ibid* at para 56.

Section 14 of the Code expands this principle by requiring Members to avoid the improper use of the influence of their office, and conflicts of interest, both apparent and real. Members of Council shall not extend, in their discharge of their official duties, preferential treatment to family members, organizations or groups in which they or their family member have a pecuniary interest. Further, Members of Council shall not use his or her position to seek to influence a decision of another person or Council so as to further his or her private interest or the interest of his or her relatives or friends.

Taken together, the above-noted section of the Code (interpreted using the common law principle of bias and non-pecuniary conflicts) sets out the relevant rules for Members in relation to the City decision-making. Members should avoid, in the exercise of an official power, duty, or function, giving any form of preferential treatment to any person or entity based solely on the identity of the person or entity and or grant any special consideration or advantage in matters related to his/her position to any person or entity beyond that which is available to any other person.

The Code provisions contained in section 14 are in place with a view to ensuring that municipal elected officials do not act in a manner that would cause a reasonable person to think that she/he would show favour toward someone or that she/he can be improperly influenced. A Member of the City of Barrie Council is required to consider whether her or his relationships and affiliations could prevent her or him from acting fairly and objectively when performing their duties for the City. From a Code perspective, if she or he cannot be fair and objective because of a relationship or affiliation with a group or relative, the Member should refrain from participating in the discussion and decision-making, not insofar as any potential financial gain, but rather in relation to a real or perceived granting of favour towards the group or relative.

I find that there was no violation of section 14 of the Code as throughout this investigation I found no evidence that the Respondent was improperly influenced to vote in a manner to favour his father exclusively nor that a reasonable person would conclude that he was influenced by his father's business location in reaching the decision about sidewalks and streetscapes. The Respondent has demonstrated maturity as an elected official, in seeking out the advice of the Integrity Commissioner in all matters that have come before Committee and Council where there may be a potential *MCIA* or Code conflict in respect to his father's business. The Respondent has sought guidance on the rules of the Code in application of his circumstances and has demonstrated a true desire to balance his due diligence as an elected official with effectively representing the constituents of his Ward.

Conclusion

The Code is a document that was unanimously adopted by the City of Barrie as an agreement to a common understanding of rules regarding behaviour of individual Members of Council. Based on the information that I have received during this investigation, I have found that while section 3 of the *MCIA* was triggered in the circumstances subject of this complaint and the Respondent did have a deemed pecuniary interest by virtue of his father owning a business within the area

affected by the Dunlop Street Corridor revitalization being discussed by General Committee and Council, the actions of the Respondent in seeking advice on his obligations and the likelihood that the section 4(j) *MCIA* exception applied, as I set out above, leads to a conclusion that it is likely that a court would find that the s.4(j) exception applied in the circumstances of this complaint.

Findings

I find that the Respondent acted in accordance with the rules of the *MCIA* and the Code in respect to avoiding *MCIA* conflicts of interest and improper use of influence as set out in section 14 of the Code.

As a first time Councillor, the Respondent was quick to seek the advice of my Office to make every effort to avoid being a position of a *MCIA* of Code conflict. This Office is tasked with identifying and reporting on circumstances where a Member has run afoul of their ethical obligations and contravened rules of the Code of Conduct. It is the position of this Office that an equal effort should be taken by the Integrity Commissioner to highlight adherence to the ethical rules when an individual Member subject of a Complaint has displayed conduct required by the Code. The Respondent has fully adhered to the rules of the *MCIA* and the Code and has acted in an ethical manner in the circumstances of this complaint.

Recommendation

As there has been no finding of contravention of the Code of Conduct, the Office of the Integrity Commissioner makes no recommendations on penalty or remedial action

Respectfully submitted by,



Suzanne Craig
Integrity Commissioner