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Integrity Commissioner's Report

DATE: March 6, 2014

TO: Chair and members of the Governance Committee
Meeting Date: March 17, 2014

FROM: Robert J. Swayze
Integrity Commissioner

SUBJECT: **Review of Rule 7, *Council Code of Conduct* re: members attending tribunals such as the Ontario Municipal Board**

RECOMMENDATION: That the *Council Code of Conduct* be amended by deleting the two sections of Rule 7 highlighted in Appendix 1 and replacing them with the following:

If Council has taken a position in an Ontario Municipal Board (“OMB”) matter and instructed the City Solicitor to appear at a hearing in support of such position, no member of Council who disagrees with such position, shall give evidence at such hearing or otherwise work against the will of Council in such matter. With the consent of the lawyer assigned to represent the City at an OMB hearing, a member of Council who is in support of the Council instructions to such lawyer, may give evidence at an OMB hearing. Notwithstanding the above, if the OMB has decided to mediate a dispute between parties in a matter, any member of Council may offer his or her services to assist with such mediation regardless of his or her position in the matter and participate, if approved by the OMB mediator.

Generally, members of Council should not take part in the proceedings of any other tribunal where the City is a party unless such participation is approved by the Integrity Commissioner

BACKGROUND:

Council has referred the following wording from Rule 7 of the *Council Code of Conduct* (the “Code”) to the Governance Committee for its consideration:

“Members shall not make representations of any kind to other tribunals such as the OMB but may request Council to instruct the City Solicitor to appear in a case before such tribunal.”

Council at its meeting of March 5, 2014 revised the wording of Rule 7 relating to Councillors appearing before the Committee of Adjustment which is reproduced in Appendix 1 to this report. The wording relating to appearances before other tribunals such as the OMB which is highlighted on Appendix 1 was recommended by me in a report to the Governance Committee dated November 2, 2012 and accepted at its meeting of November 12, 2012. My intent in proposing such wording was to prohibit a member of Council who disagreed with a decision of Council resulting in the City becoming a party in an OMB hearing, from taking an opposite position at the OMB. Rule 10 of the Code requires members to “accurately communicate the decisions of . . . Council, even if they disagree with the majority decision . . . and by so doing affirm the respect for and integrity in the decision making processes of Council.” The Councillor may identify that he or she voted against it but, it is my opinion that, as a member of Council, he or she should accept the decision and not work at cross purposes to undermine it.

COMMENTS:

For the purpose of writing this report, I have consulted with the City Legal Department and the Ontario Municipal Board. The Legal Department seeks instructions from Council in every case before the Board. If instructed to appear, each case is assigned to a lawyer, usually in house but occasionally to an external counsel. That lawyer is in charge of presenting the case including the choice of witnesses to be called. Accordingly, I have recommended that the wording be

amended so that any member of Council may give evidence in support of a Council position at the OMB provided that he or she has the consent of the assigned lawyer.

My discussion with the OMB identified that there is no rule or policy at the Board prohibiting a member of Council appearing in any case. I have been present at hearings where a member of Council was criticized by the sitting member for giving evidence contrary to the position of the municipality and the evidence was disregarded. However, I am advised that in one procedure by the Board, particularly in the City of Toronto, elected members of Council have been invited by a member of the Board to take part. The Board offers mediation of cases upon request and with the consent of all parties. The hearing is adjourned and dispute resolution techniques are applied to help the parties enter into a voluntary resolution of the issues in dispute. The Board has found that ward councillors can be helpful by participating in the mediation with members of the community and this may apply regardless of the side of the case taken by the Councillor. For that reason, I have recommended that a change be made permitting Councillors to participate in OMB mediations if approved by the OMB mediator.

There is at least one exception to the rule prohibiting Councillors from taking an opposite position in the OMB to a Council decision and there may be others. The exception is a ward boundary distribution appeal where a ward councillor has a vital interest which requires representation whether Council agrees or not. Also, in my opinion, there are appearances before the Committee of Adjustment, the OMB or the Assessment Review Board which are appropriate for members of Council in relation to property owned by such Councillor. In Council's consideration of taking a position in such a hearing, the member is required to declare a conflict, but a member should not be denied the opportunity to bring an application. Even in an assessment appeal of property owned by a Councillor, he or she should not be disqualified from bringing the appeal because the interest of the City is adverse. In my opinion, the reduction in taxes applied for would be trivial for the City. As is apparent, the issues affecting a member of Council appearing before tribunals is complex and I am concerned that an absolute prohibition may not be appropriate in every case. For this reason, I have recommended the wording which authorizes the

Integrity Commissioner to rule on any requests for exceptions.

CONCLUSION:

This report confirms the opinion of the Integrity Commissioner that members of Council, as part of the municipal corporation, should accept final decisions of Council which they disagree with and not work at cross purposes against them in other proceedings. However, it is acknowledged that the role of a Councillor and the requirement to advocate on behalf of constituents is a complex one and exceptions may exist which the Integrity Commissioner is recommended to have authority to approve.

ATTACHMENTS:

Appendix 1: Rule 7, *Council Code of Conduct* as amended by Council on March 5, 2014.



Robert J. Swayze
Integrity Commissioner

Prepared By: Robert J. Swayze

Rule No. 7

Improper Use of Influence:

1. No member shall use the influence of his or her office for any purpose other than for the exercise of his/her official duties.
2. Members shall not contact members of any tribunal regarding any matter before it, such as the Committee of Adjustment, which is charged with making independent decisions and whose members have been appointed by Council. Members may with prior written notice to the Committee of Adjustment Secretary/Treasurer, infrequently attend meetings to provide the Committee of Adjustment with history and context of an application before the committee. Members may send a letter or E-mail addressed to the Secretary of such tribunal expressing the views of the member on behalf of the community.
Members shall not make representations of any kind to other tribunals such as the OMB but may request Council to instruct the City Solicitor to appear in a case before such tribunal.

Commentary

Examples of prohibited conduct are 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 one's Family Member, or friends. 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 a future advantage through a Member's supposed influence within Council in return for present actions or inaction.

Contact with members of tribunals appointed by Council on any case might be viewed as attempts to intimidate the tribunal member. Council is usually a party to OMB hearings and individual members must accept the position of Council. Exceptions would be where the Councillor is directly impacted respecting his or her office such as a ward boundary OMB appeal or in a matter before the Election Campaign Finance Committee. If in doubt whether a member should contact members or participate in any such hearings or meetings, the Integrity Commissioner may be consulted.

2. Pursuant to corporate policy, the City Manager and Chief Administrative Officer directs City Commissioners, who in turn direct City staff. City Council and not individual Members of Council appropriately give direction to the City administration.