

**INTEGRITY COMMISSIONER REPORT ON
CODE OF CONDUCT COMPLAINTS – 2019-01 & 2019-02
HERITAGE PORT HOPE ADVISORY COMMITTEE****SUMMARY**

Two formal complaints (collectively the “Complaints”) were filed with the Office of the Clerk of The Corporation of Municipality of Port Hope (the “Municipality”) on September 3, 2019. The Complaints allege that Phil Carter, a member (the “Member”) of Heritage Port Hope Advisory Committee (the “Committee”) contravened the Code of Conduct for Members of Council and Local Boards of The Municipality of Port Hope, enacted by By-Law 12/2019 (the “Code”) by his actions in a meeting of the Committee held on August 19, 2019 (the “Meeting”).

The first complaint (“Complaint 2019-01”) alleges that the Member failed to treat the Complainant, as a member of the public with respect and without bullying and intimidation in contravention of Section 9.0 of the Code. The second complaint (“Complaint 2019-02”) alleges that the Member had a conflict of interest at the Meeting and failed to recuse himself from hearing the Complainant’s application before the Committee. The Complainant alleges that the Member breached Section 11.0 of the Code.

The Complaints were filed pursuant to two separate complaint applications but will be dealt with together in this Report, given that they relate to the same set of facts that arose from the same Meeting and actions of the Member. This Report is being provided to Committee in accordance with subsection 223.6(2) of the *Municipal Act, 2001*

APPOINTMENT & AUTHORITY

Aird & Berlis LLP was appointed as Integrity Commissioner for the Municipality and its local boards (including the Committee) pursuant to subsection 223.3(1) of the *Municipal Act, 2001* by By-law 43/2019.

As such, we have reviewed both Complaint 2019-01 and Complaint 2019-02 in accordance with our authority as Integrity Commissioner pursuant to the Code.

As noted, the Member is an appointed member of the Committee which is a local board of the Municipality. As such, the Code applies to the Member with such necessary modifications as may be applicable given that he is a member of a local board and not a member of Council.

Complaint 2019-01 was validly filed in accordance with the Code and its Complaint Protocol. Complaint 2019-02 appears to have been filed as a request for an investigation pursuant to the *Municipal Conflict of Interest Act*, including the Statutory Declaration required for such requests. However, Complaint 2019-02 does not allege a breach of either section 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act* but rather a contravention of Section 11.0 of the Code. Notwithstanding this technical non-compliance with the filing requirements, we have accepted Complaint 2019-02 as being in substantial compliance with the requirements of the Code for the filing of a complaint and, as noted above, we have considered its allegations and will address them in this Report.

CODE OF CONDUCT PROVISIONS AT ISSUE

Complaint 2019-01 alleges that the Member has contravened Section 9.0 of the Code:

9.0 Discrimination and Harassment

- 9.1 A Member shall treat all members of the public, one another and staff with respect and without abuse, bullying or intimidation and ensure that their work environment is free from discrimination and harassment.
- 9.2 A Member shall 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.
- 9.3 A Member shall comply with the Municipality's workplace harassment and violence policy.

Complaint 2019-02 alleges that the Member has contravened Section 11.0 of the Code:

11.0 Conflicts of Interest

- 11.1 A Member shall seek to avoid conflicts of interest, both pecuniary and non-pecuniary. A Member shall comply with the requirements of the *Municipal Conflict of Interest Act* with respect to obligations relating to pecuniary interests. A Member shall take proactive steps to mitigate any non-pecuniary conflicts of interest in order to maintain public confidence in the Municipality and its elected officials.
- 11.2 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.

NOTICE OF COMPLAINTS

Notice of the Complaints was provided to the Member on October 4, 2019. We disclosed the nature of the Complaints therein and provided the Member with our preliminary findings with respect to the Complaints.

In accordance with Section 7.1 of Complaint Protocol, we provided the Member with an opportunity to respond in writing to the allegations in the Complaints by a specified date. The Member responded in writing by a letter dated October 9, 2019. The Member's response was forwarded to the Complainant on October 11, 2019 in accordance with Section 7(1)(c) of the Complaint Protocol. No reply was received.

REVIEW OF MATERIALS & INVESTIGATION

In order to prepare this Report, we have undertaken the following steps:

- Review of the Complaints and all attachments and materials referred to therein;
- Review of the Agenda and Minutes of the Meeting;
- Telephone interviews with seven (7) witnesses who were present at the Meeting; and
- Review of the Member's response, dated October 9, 2019.

BACKGROUND

As noted, the Complaints allege that the Member contravened Sections 9.0 and 11.0 of the Code by virtue of his presence and participation, as well as his conduct at the Meeting.

The Committee is a "municipal heritage committee" established under the *Ontario Heritage Act* to advise and assist the Municipality's Council on matters related to the statute. The Committee functions similarly to an adjudicative body by hearing and considering applications for relief or approval under the *Ontario Heritage Act*.

The Committee's mandate is to advise and assist Council in determining all matters related to the conservation of historic buildings in the Municipality, including applications to alter or repair existing heritage-designated buildings. The Committee is composed of seven members with various professional and educational backgrounds. Although advisory in nature, the Committee is a serious and highly reputable body in the field of heritage conservation.

The Committee's proceedings have operated more formally in recent years. The Committee's proceedings equate to a "council-in-committee" style meeting, following *Robert's Rules of Order*, having a formal agenda and minutes. Its decisions are made through express resolutions which are submitted to Council as recommendations. The Committee's formal proceedings permit interaction between Members of the Committee and the general public. Deputations are a frequent feature of the Committee's meetings. Applicants or their agents often make representations directly to the Committee. Committee members are permitted to engage in direct conversation with the applicant or agents regarding the details of their proposal.

The matters alleged in the Complaints arose at the Meeting during the Committee's consideration of Agenda Item 5.9 "Heritage Application No. 2019-25 - 31 Walton Street." The owner of a property designated under Part IV and Part V of the *Ontario Heritage Act* sought approval from the Committee to replace 35 wooden windows with vinyl replacements.

The Committee was not in favour of the application. The Committee appeared to consider the vinyl windows as not adequate to properly conserve the heritage features of the building. The Committee eventually voted to recommend to Council that the application be refused.

During the Committee's consideration of the application, there was a considerable exchange between the Member and the owner. The Member and the owner disagreed over several topics related to the building. The Member and the owner were not *ad idem* on whether or not the original wooden windows had been replaced several decades earlier. The owner had provided the Committee with several photographs of the building to demonstrate the conditions of the

existing windows. However, the Member voiced his opinion that the photographs were misleading as they did not show the correct windows. The Member also referenced his relationship with the previous owner of the building, suggesting that he knew more about its history than the owner of the property.

The Member and the owner also disagreed about whether a municipal heritage easement was registered on title to the property. The Member referenced a past heritage architecture report that identified such an easement. However, as the report was not before the Committee, the question was referred to staff for resolution.

The most significant point of contention between the Member and the owner concerned the proposed window replacement product. The owner proposed to replace the wooden windows with vinyl replicas for cost and energy efficiency reasons. However, the Member outwardly opposed the use of this product as, in his opinion, it did not maintain the heritage integrity of the building. The Member favoured a full restoration of the existing windows.

Several witnesses described this exchange as “heated” and unnecessarily confrontational. Witnesses observed that the Member and the owner both raised their voices to talk over one another although they were “not just yelling at each other.” In general, the witnesses indicated that the Member was not supportive of the application and did not hesitate to state his opinions.

The witnesses were also of the view that the interaction between the Member and the owner was not a constructive discussion, but rather a confrontation of opinions on the merits of the application. In one witness’s words, “it was not the community-minded approach I would have thought” the Committee would have taken.

Although the exchange between the Member and the owner may have become heated, none of the witnesses indicated that the Member made any vulgar, inappropriate, or disrespectful comments to the owner.

After the Committee’s consideration of the application, the Committee passed a resolution to recommend that Council deny the application.

The witnesses noted that the owner appeared frustrated after the interaction when the Committee did not accede to recommending approval of his application. Although supportive of the Committee’s decision, staff referred the owner to the next Council meeting where Council would be the authorized decision-maker under the *Ontario Heritage Act*.

ALLEGED CONTRAVENTIONS

(a) Complaint 2019-01

Complaint 2019-01 takes issue with the Member’s actions at the Meeting. The Complaint alleges that at the Meeting and, in particular, during the Committee’s consideration of the application respecting 31 Walton Street, the Member’s conduct contravened the Code’s requirement to “treat all members of the public...with respect and without abuse, bullying or intimidation” (Section 9.1).

The Complaint alleges that in dealings with the deputation regarding the heritage application for 31 Walton Street, the Member's actions, expressions and words were disrespectful and intimidating.

The Complaint specifically alleges that the Member's facial expressions and actions with respect to the examination of certain window samples presented to the Committee demonstrated disdain and disapproval, that the Member's questioning of the owner regarding certain photographs presented to the Committee was intimidating, and that the Member's interactions with and comments made to the owner regarding previous restorations of the property contradicting the owner's statements constituted a form of intimidation.

The Complaint attached a letter from a person in attendance at the Meeting who admitted to being a client and friend of the owner of the property. The letter supports the allegation in the Complaint and notes that the Member had a "non-professional attitude", was "condescending and unreasonable", and displayed "open hostility and disdain."

However, the descriptions in the Complaint and the supporting letter were not generally in keeping with the statements that were provided to us by the seven (7) other persons we interviewed who were in attendance at the same Meeting.

(b) Complaint 2019-02

Complaint 2019-02 takes issue with the Member's mere presence and participation in the Meeting. The Complaint alleges that the Member has a conflict of interest under the Code and ought to have recused himself from participating and voting on his matter at the Meeting.

The Complaint does not articulate the precise conflict of interest the Member is accused of having. The Complaint appears to assert that the Member has a conflict of interest by virtue of the fact that he had submitted an estimate to perform certain architectural services for the owner but was passed over in favour of another architect.

Since the Member did not obtain the contract for the work and the services were completed by another professional, there is no issue of a pecuniary interest under the *Municipal Conflict of Interest Act*.

However, Section 9.1 of the Code requires a "Member shall seek to avoid conflicts of interest, both pecuniary and non-pecuniary." The term "non-pecuniary interest" is defined in Section 3.1(m) of the Code as follows:

"non-pecuniary interest" means a private or personal interest that a Member may have that is non-financial in nature and that would be considered by a reasonable person, apprised of all the circumstances, as being likely to influence the Member's decision in any matter in which the non-pecuniary interest arises, and may include, but is not limited to, an interest that arises from a relationship with a person or entity

In this case, the Member had submitted an estimate to do work on an application that was to be considered by the Committee but was not selected.

FINDINGS

(a) Complaint 2019-01

The Member has not contravened Section 9.0 of the Code. The evidence demonstrates that the Member's interaction with the owner may have become unproductively animated and heated, but that the Member's treatment of the owner did not amount to abuse, bullying, or intimidation. Furthermore, there was no evidence that the Member used indecent, abusive, insulting or discriminatory words or phrases.

There was some level of confrontation between the Member and the owner at the Meeting. Their interaction left some observers uncomfortable and disappointed in the conduct of the Meeting. Although some witnesses viewed the exchange as inappropriate, when viewed in context, the Member's behavior simply did not fall within the specific area of prohibited conduct under Section 9.0 of the Code. There was no "abuse, bullying or intimidation" as contemplated by the Code. Furthermore, there was no evidence of any indecent comments made to or about the owner either before, during, or after the Meeting, which is the only other possible applicable behavior that would fall within Section 9.0.

(b) Complaint 2019-02

The Complaint seeks to draw a link between the Member's unsuccessful bid for architectural work with the owner and his opposition to the owner's application at the Meeting. Implicit in the Complaint is that the Member was prejudiced against the owner and that his conduct at the hearing demonstrated his animus toward the owner and his application to the Committee. Such an assertion is more in the nature of an allegation of bias than it is a form of non-pecuniary conflict of interest under the Code. We find that the Member had neither a pecuniary interest under the *Municipal Conflict of Interest Act* nor a non-pecuniary interest under the Code. The Member thus did not breach Section 11.0 of the Code.

CONCLUSIONS

In summary, on the basis of the foregoing, we have determined that the Member did not contravene either Section 9.0 or Section 11.0 of the Code.

The Complaints are hereby dismissed.

AIRD & BERLIS LLP



John Mascarin
Integrity Commissioner for the Municipality of Port Hope

Dated this 6th day of November, 2019