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LAWYERS

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June 18, 2019

By E-MAIL: mdwyer@twprideaulakes.on.ca

Council Members – Township of Rideau Lakes
c/o Mike Dwyer, Chief Administrative Officer
1439 County Road 8
Delta, ON, K0E 1G0

Dear Members of Council:

**RE: Municipal Conflict of Interest Act Complaint – Received March 18, 2019
Mayor Arie Hoogenboom; Councillor Marcia Maxwell
Our File No. 14093-102**

Please be advised that our inquiry under the *Municipal Conflict of Interest Act* is now complete. We attach a copy of our report for Council's consideration. Please note that Council is required to make this report public in accordance with section 223.6(3) of the *Municipal Act*, which may be done by posting it on the Township's website.

We find that neither member breached the *Municipal Conflict of Interest Act*, 1990 as amended. The reasons for this finding are set out in the report. As such, we will not be submitting an application to a judge under section 8 of the *Municipal Conflict of Interest Act*.

This complaint is hereby closed, and no further steps will be taken by the Integrity Commissioner in this regard.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP

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June 18, 2019

Council Members – Township of Rideau Lakes
Township of Rideau Lakes
1439 County Road 8
Delta, ON, K0E 1G0

Attention: Council Members

**RE: Integrity Commissioner Report
Municipal Conflict of Interest Act Complaint
Councillor Marcia Maxwell and Mayor Arie Hoogenboom
Our File No: 14093-102**

Summary of the Investigation

A complaint was submitted on March 18, 2019 and amended on April 2, 2019 to add Mayor Hoogenboom. In the normal course, any additional information or members to be named in the complaint must be done within a reasonable time period following the submission of the complaint and must involve the same or similar facts to the complaint as submitted. The decision on whether to allow such an addition is at the discretion of the Integrity Commissioner. In this case, the timing and substance of the complaint were considered, and the addition was accepted by the Integrity Commissioner.

The nature of the complaint was that Mayor Arie Hoogenboom and Councillor Marcia Maxwell participated in the discussion and vote before the February 11, 2019 Municipal Services Committee (the "Committee") meeting regarding the Committee's following recommendation to Council:

RECOMMENDATION #27-2019

Moved By: Councillor Maxwell
Seconded By: Councillor Livingston

To pass a Resolution that;

The Municipal Services Committee Recommends that the Council of the Corporation of the Township of Rideau Lakes acknowledge the verbal and written Report regarding Otter Lake and Bass Lake Outlet Studies – RFP for Services as provided by Mike Dwyer, CAO;

AND FURTHER Recommends that Council undertake the Bass Lake Outlet study, with financial support from the BLPOA;

AND FURTHER Recommends that once the preferred design is identified, engage with the BLPOA and the RVCA to determine the project lead and funders of any resulting works;

AND FURTHER Recommends that Council authorize Staff to negotiate and execute the necessary contract with JP2G for the Otter and Bass Lake Outlet studies.

Carried.

Recommendation #27-2019 (the “Recommendation”) of the Committee was adopted by Council at its March 4, 2019 meeting. Mayor Hoogenboom and Councillor Maxwell did not declare a conflict at either meeting.

After a preliminary review of the complaint and the supporting information submitted by the complainant, our office determined that there was a reasonable basis to conduct an investigation.

As part of our investigation, we corresponded with Township staff to obtain relevant documents, and requested written replies from both the complainant and the members. Finally, we reviewed documents relating to the Recommendation, supporting materials from the complainant, and the relevant case law pertaining to the facts of this complaint.

In our opinion, neither member’s conduct as disclosed in the investigation constituted a breach of the MCIA. Any pecuniary interest on the part of the members (for which we make no finding) is contingent on the report from the consultant regarding the Otter and Bass Lake Outlet studies (the “Studies). As such, no pecuniary interest had crystalized at the time the Recommendation was voted on by the Committee.

As no breach of the MCIA has been found, no application will be made to a judge in accordance with section 8 of the *Municipal Conflict of Interest Act*.

Relevant Provisions of the *Municipal Conflict of Interest Act, 1990*

The MCIA requires:

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.

Findings of Fact

The following facts are not in dispute:

1. Neither Mayor Hoogenboom nor Councillor Maxwell declared a conflict of interest under the MCIA at the February 11, 2019 Committee meeting.
2. Mayor Hoogenboom owns residential property on Bass Lake.
3. Councillor Maxwell owns residential property on Otter Lake.
4. At its February 11, 2019 meeting, the Committee passed a resolution to recommend to Council that Council move forward with studies that were the subject of a request for proposals ("RFP") with the preferred bidder, and Council, at its March 4, 2019 meeting adopted that recommendation.
5. The outcome of the Studies cannot be determined until after their completion, at which time a report containing findings and recommendations from the consultant will be considered by Council.
6. At the time of writing this Report, the Studies are not yet complete, and a report has not yet been submitted for Council's consideration.

Decision

Background

The complainant alleges that Mayor Hoogenboom, by virtue of his ownership of residential property on Bass Lake, and Councillor Maxwell, by virtue of her ownership of residential property on Otter Lake, breached section 5 of the MCIA when they considered and voted on the Recommendation at the February 11, 2019 Committee meeting.

Further, the complainant alleges that Councillor Maxwell experiences flooding on the private access road to her property on Otter Lake, and as such, will gain a personal benefit as a result of the Studies being conducted as she has an interest in lowering lake levels. The complainant alleges that the members used their positions on Council to further their private financial interests in controlling lake levels abutting their properties. At the February 11, 2019 meeting, the Committee voted to make the Recommendation to Council that Council move ahead with the Studies in accordance with the preferred bidder in the related request for proposals. Council adopted the Committee's Recommendation at its March 4, 2019 meeting and the Studies are now underway.

Purpose of the MCIA

The case law is clear regarding the purpose of the MCIA. It is there to hold members to a high standard of ethical conduct:

"The MCIA is important legislation. It seeks to uphold a fundamental premise of our governmental regime. Those who are elected and, as a result, take part in the decision-making processes of government, should act, and be seen to act, in the public interest. This is not about acting dishonestly or for personal gain; it concerns transparency and the certainty that decisions are made by people who will not be influenced by any personal pecuniary interest in the matter at hand. It invokes the issue of whether we can be confident in the actions and decisions of those we elect to govern. The suggestion of a conflict runs to the core of the process of governmental decision-making."¹

Cases involving allegations of a breach of a member's obligations under the MCIA are considered and decided on their individual facts. A decision maker must consider the following in assessing each case:

"Does the matter to be voted upon have a potential to affect the pecuniary interest of the municipal councillor?"²

Although the MCIA does not define "pecuniary interest", the case law provides guidance:

"Pecuniary interest" is not defined by the MCIA. Generally, it is a financial interest, an interest related to or involving money."³

¹ Mondoux v. Tuchenhagen, 2011 ONSC 5398, 2011 at para. 25

² Greene v. Borins, 1985 CarswellOnt 666 at para. 522.

³ Mondoux v. Tuchenhagen, *ibid*, at para. 31.

Motive and MCIA

The submissions from the complainant allege that the members had improper motives in both discussing of and voting on the Recommendation. It is important to state that it is not necessary for the Integrity Commissioner to determine whether a member's decision to take part in discussions and/or voting pertaining to a matter for which they had a pecuniary interest was made through malice or improper motive. The Court in *Mondoux v. Tuchenhagen*, involving a Councillor's interest in purchasing land, was clear on this point:

“The issue is whether Robert Tuchenhagen breached the requirements of the MCIA, not whether he acted out of any improper motive or lack of good faith.”⁴

This report will focus only on whether or not the members had a pecuniary interest when the Studies were discussed and voted on by the Committee as a recommendation to Council.

The Committee at its February 11, 2019 meeting decided whether to approve the Recommendation to Council to move ahead with the Studies using the preferred bidder. The question before us is whether the members had a pecuniary interest in the Studies based on their ownership of residences on the subject lakes.

The Studies

Background leading to the Studies

In June of 2017, the Rideau Valley Conservation Authority (“RVCA”) made a presentation to the Committee in response to ongoing discussions about water levels on Otter Lake. The RVCA noted that the following factors may influence water levels depending on conditions: a) the culvert under Otter Lake Road; b) an elevated rock ledge in Otter Creek; and c) beaver activity. As part of its concluding statement, the RVCA noted that any reconfiguration of related private roads or culvert systems to manage the water levels would need the approval of the RVCA and other regulatory bodies. Further, it noted that any trapping, etc. to do with beaver management would also need the same approvals.

In October of 2017, Council sent correspondence to the RVCA outlining its concerns regarding Otter Lake, including the RVCA's mandate to study and investigate the management and conservation of the natural resources of the watershed.

In January of 2018, Council considered a response from the RVCA, reports from Staff and from legal counsel and the Otter Lake Land Owners Association, and directed staff to obtain pricing on an engineering study on the issues.

⁴ *Mondoux v. Tuchenhagen*, *ibid*, at para. 28.

The Studies

A request for proposals (“RFP”) was issued by the Township in late 2018, with a closing date of January 15, 2019. The general description of that RFP was as follows:

“The Township of Rideau Lakes, hereinafter referred to as the “Township”, is seeking proposals from consulting firms with the necessary expertise, hereinafter referred to as the “Bidder”, to provide competent and comprehensive professional engineering and community planning services as described in Section 3 – Project context, Principles, and Goals.”⁵

Section 3, Project #1 – Otter Lake Outlet – “Project Context” section states as follows:

“The Township owns the road and culvert which forms the outlet of Otter Lake. The Township has received concerns from property owners on Otter Lake related to water levels. More specifically, concerns have related to spring flooding, private road/access inundation, shoreline erosion, and beaver dam management. Property owners have identified the outlet as being either a primary and/or contributing factor.

An Otter Lake Landowners Association (OLLA) member survey indicates a concern about spring flood risk and the contribution that the existing culvert makes according to existing hydrology reports. Water levels outside of the spring freshet period is not generally a concern for OLLA members.

Rideau Lake Conservation Authority assessments have indicated that the outlet does generate head loss during flood return periods.

Project Goals

The Township wishes to engage a consultant to assess the existing outlet and associated water level conditions and lead a project to determine the full scope of resident and other stakeholder concerns (both upstream and downstream). Through community consultation and understanding stakeholder positions, the consultant will be tasked with developing a consensus and recommending a preferred solution(s) to address identified concerns. The firm will be engaged to complete necessary plans, permit/approvals packages and inspection/certification work to facilitate implementation.”⁶

⁵ The Township of Rideau Lakes, Request for Proposals ADMIN2018-02, Otter Lake Outlet (Project #1) and Bass Lake Outlet (Project #2) – Assessment and Solution Development, at page. 4.

⁶ The Township of Rideau Lakes, Request for Proposals ADMIN2018-02, Otter Lake Outlet (Project #1) and Bass Lake Outlet (Project #2) – Assessment and Solution Development, at pages 12-13.

Section 3, Project #2 – Bass Lake Outlet – “Project Context” section states as follows:

“Bass Lake outlets into a creek through a berm and culvert structure. The Township does not own or maintain this outlet structure. It is believed the berm was developed by a private individual(s) in the mid-1990s on an ad hoc basis without regulatory approval. It is believed the berm is made of an earthen material and lies on private land, with a small portion potentially laying on an unopened original road allowance. The outlet creek flows to Lower Rideau Lake (part of the Rideau Canal system), entering just south of Rideau Ferry.

The Township has received concerns from property owners on Bass Lake related to water levels and the existing outlet. More specifically, concerns related to a significant drop in water levels in the spring of 2018, apparent tampering with the berm in the spring of 2018, the long-term structural stability of the berm, ownership and access issues related to the berm, and the potential environmental and social impacts should the berm unexpectedly fail. Additionally, isolated concerns have been received in the past related to spring flooding/land inundation.

Project Goals

Lake residents have sought to begin the process of building lake-wide communication channels via the establishment of the BLPOA. The codification of the berm and water levels and long-term stability of the berm have been identified as the key priorities of the association. The association would like to play an active role in addressing the concerns identified.

The Township wishes to support the association and lake property owners through identifying qualified firms, gaining professional proposals and costings for the work necessary to address the concerns raised. Once in hand, a determination will then be able to be made by all the stakeholders as to how to proceed and in what capacity.

It is envisioned the project would take place in two phases. The first phase would assess the existing structure, including a confirmation of the berm’s location in relation to underlying land ownership. Based on the assessment and a professional recommendation to abandon, renew or renew and augment, the project would, through community and stakeholder consultation and developing consensus, recommend a preferred solution(s). The second phase, subject to proponent approval, may see the engagement of the firm to complete necessary plans, permit/approvals packages and inspection/certification work to assist implementation.”⁷

⁷ The Township of Rideau Lakes, Request for Proposals ADMIN2018-02, Otter Lake Outlet (Project #1) and Bass Lake Outlet (Project #2) – Assessment and Solution Development, at pages 15-16.

The successful bidder on the RFP was Jp2g Consultants Inc. Jp2g's "proposed scope of work" can be summarized as follows:

1. To conduct site review, document existing conditions of the lake, outfalls, and existing vegetation, requesting materials and consultation necessary to understand expected total runoff and conveyance flows, engage in public consultation including with local residents and community associations, and make recommendations to the municipality based on their findings;
2. Otter Lake: to evaluate the Culvert system to ensure tailwater conditions are represented accurately, and property owners throughout the area are consulted. They will provide options based on an evaluation of the culvert that may include: 1) doing nothing; 2) cured-in-place pipe liner within existing culvert; 3) replace culvert in kind; or 4) new culvert crossing. This evaluation will include consideration of residents through consultation. Additional options were also noted, and would all depend on study results and the consultation process; and
3. Bass Lake: to evaluate the existing outlet control structure (the berm) and evaluate alternatives to rehabilitating the existing outfall. Options they may recommend following the evaluation which will include public consultation includes: 1) maintaining and improving existing structure; 2) constructing new earthen berm & spillway (50m span) at existing location adjacent to old structure; 3) construct new earthen berm & spillway (100m span) along the length of Township allowance which traverses the wetland; or 4) provide a rocky ramp along the outfall channel.⁸

Upon a review of both the RFP and the successful bidder's proposal, it is clear that the main intent and goal of the Studies is to gain stakeholder input through a variety of methods to complete an assessment of hydraulic/hydrologic conditions and outfall and outlet control conditions, and to provide recommendations/options to the municipality based on these findings. Until these steps are complete, the remedial options (if any) to be pursued by the municipality are not known.

Crystallization of Pecuniary Interest

The analysis of the Court in *Lorello v. Meffe* can be applied to the facts of this complaint.⁹ In *Lorello*, the Councillor was a shareholder, officer and director of a corporation that was alleged to have had an indirect pecuniary interest as a subcontractor that submitted a bid to a developer only after municipal approvals via a tender process had been obtained by the developer. The Court found that the mere potential for new business, without a special relationship between the developer and the subcontractor, was too hypothetical and too contingent to qualify as a pecuniary interest at the time of the vote. Similarly, the Court in

⁸ Proposal, "Otter Lake (Project #1) & Bass Lake Outlet (Project #2) Assessment and Solution Development, Jp2g Consultants Inc., January 15, 2019 at pages 1-2.

⁹ *Lorello v. Meffe*, 2010 ONSC 1976.

Bowers v. Delegarde refused to find that "possible future plans" qualified as a pecuniary interest under the MCIA.¹⁰

In *Lorello*, the Court referenced a decision in *Edmonton (City) v. Purves*, [1982] A.J. No. 695, 136 D.L.R. (3d) 340 (Alta. W.B.), wherein the Court noted that until there was a plan to explain what was going to happen, then the benefit is merely contingent on the decision.¹¹ Further, the Court in *Lorello* set out the Court's analysis regarding a contingent interest as stated in *Edmonton (City)* [our emphasis added]:

...

The evidence here is clear that whether there would be any monetary affect on the respondent's interest in the 39.84 acres at all, or whether the impact was advantageous or adverse, would not be known until the Area Structure plan is cast. [40] In the case of *Rands v. Oldroyd*, [1959] 1 Q.B. 204, Chief Justice Parker in discussing the expression "has any pecuniary interest", which appeared in s. 76 of the Local Government Act, stated at p. 213 All of these cases, of course, must be determined ultimately on their particular facts ...

At p. 214 Lord Parker C.J., while considering the judgment in *Brown v. Director of Public Prosecution*, [1956] All E.R. 189, which held that councillors who were tenants of a municipally owned house had a pecuniary interest in a vote dealing with a lodger's allowance to be paid by tenants of such houses, approved Donovan J.'s statement that "their case is different from a councillor who merely had a hope of obtaining such a house in the future." Lord Parker distinguished between a present and a future or contingent interest. He said at p. 214, that the members of:

...the court were making the very point I am trying to make. Namely, that one has to consider whether the pecuniary interest was direct or remote, and they were really saying that the interest of councillors who had not a council house was too remote, whereas those that did have a council house come within the words of the section.

Clement, J.A., in the case of *Lukas v. Peden*, [1975] 3 W.W.R. 673, stated at p. 678:

The question is whether the pecuniary interest can be reasonably said to exist, not whether or not it had an effect on the vote.

In the earlier case of *Wanamaker v. Patterson*, [1973] 5 W.W.R. 193, Clement, J.A., made it clear that the impugned pecuniary interest must be an interest existing at the time of the vote. He said at p. 201:

¹⁰ *Bowers v. Delegarde*, 2005 CanLII 4439 at para. 76.

¹¹ *Lorello*, *ibid*, at para. 52.

The sole issue is whether Patterson had the proscribed interest in the question at the time of the vote.

...

The Court in *Lorello* was clear that a pecuniary interest must be definable and real rather than hypothetical. It does not mean that a member may never be in a conflict of interest by the mere fact that the pecuniary interest is based on a contingency. The Court set out the following test when determining whether a contingent interest constitutes a pecuniary interest:

“Having regard to these considerations, in my view, the appropriate test to determine whether a contingent interest constitutes a pecuniary interest for the purposes of the MCIA is whether it is probable that the matter before council will affect the financial or monetary interests of the member.”¹²

We find that any pecuniary interest of the members is contingent on the report containing the results and recommendations following the Studies to be submitted by Jp2g to Council for consideration. Applying the test in *Lorello* we base this finding on the very broad scope of the Studies as laid out in the RFP and the proposal submitted by Jp2g. The recommendations which will form part of the report from Jp2g are uncertain: they range from Council taking no steps to resolve the issues, to absolute reconstruction of the Otter Lake Culvert and/or Bass Lake berm. There is no way to predict what the results of the Studies will be, or what the recommendations of the consultant will consist of. In addition, those recommendations still have to be considered by Council and until then, are options for discussion and a potential vote. We find that it is not probable that the matter before the Committee (the decision on whether to make the Recommendation) affected the financial or monetary interests of the members. The members’ pecuniary interests, if any, are contingent on the report from Jp2g, any adoption of recommendations by Council, and any subsequent necessary approvals from regulatory bodies necessary to move those options forward. As such, the nature of the Recommendation did not trigger the members’ obligations under the MCIA.

We encourage each member to seek our advice when the report is submitted to Council should they have questions regarding their obligations under the MCIA or the Code of Conduct.

¹² Lorello, *ibid* at para. 65.

Recommendations

We find no breach of the MCIA; as such, we will not be proceeding to make an application to a judge in accordance with section 8 of the MCIA and subsequently, we make no recommendations to Council.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP

A handwritten signature in black ink, appearing to read 'Tony E. Fleming', written over a horizontal line.

Tony E. Fleming, C.S.

LSO Certified Specialist in Municipal Law
(Local Government / Land Use Planning)

Anthony Fleming Professional Corporation

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