

February 25, 2019

Mayor and Members of Council,
Regional Municipality of York
C/O Christopher Raynor, Regional Clerk
17250 Yonge Street,
Newmarket ON L3Y 6Z1

Re: Draft Code of Conduct Review - Questions & Answers

At the conclusion of debate on the draft code of conduct at Regional Council's meeting of January 31, 2019 the Chairman invited Members to submit questions, concerns and comments to the integrity commissioner by February 21 so that an 'FAQ' style document could be prepared, along with any suggested code (and commentary) amendments/alternatives.

Members were invited to make their submissions by email, and also to schedule meetings or telephone conversations with the integrity commissioner if they thought that would be helpful.

A similar invitation was extended to Members of Town of Aurora Council, though on a different timetable. The Town subsequently adopted a similar form of Code of Conduct, albeit with the proviso that they may later consider amendments to the document made in due course by the Region of York.

Submissions have been limited. However, we believe that this letter, informed by comments and questions made at the January 31st York Region Council meeting, at the February 12th Town of Aurora Council meeting when it debated a similarly worded version of the draft code of conduct, and by the submissions that were directly received from a few councillors, will help inform your deliberations when York Region Council again considers the issue on February 28, 2019. We will be in attendance should any additional questions or concerns be raised.

The questions have been organized into categories to assist in your review:

Code Format/Length/Complexity

Q1. What is the draft code of conduct based on?

A. The draft code initially took shape in 2008 when consideration was being given to establishing an ethical framework in the City of Vaughan. Portions of that code were inspired by the mandatory code of conduct in place in the City of Toronto. The design of the code was inspired by the Rules of Professional Conduct under which lawyers licensed to practice in Ontario are governed – hence the appearance of commentary to illustrate the interpretation and application of the rules set out in the draft code.

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The content of the draft code of conduct evolved through the adoption of code text and commentary in other municipalities, including the City of Mississauga. The current version of the commentary is distilled from such codes as well as integrity commissioner decisions made throughout Ontario. The Gifts, Benefits and Hospitality chart is meant to be a clarification of rules typically found in codes of conduct (though the dollar limits are frequently adjusted to meet local circumstances).

The Avoidance of Conflict of Interest provision in Rule 1 is structured to recognize (and guide) Members' responsibilities to avoid breaches of the *Municipal Conflict of Interest Act* as well as the common law conflict of interest provisions that apply to them. Rather than, as is common, oblige Members to unwritten standards such as following the letter and 'spirit' of legislation such as the *Municipal Conflict of Interest Act*, or to unspecified 'highest standards', the draft code and its commentary is designed to provide helpful guidance to Members. To balance against Members being forced to recuse themselves when the circumstances do not warrant it, a mechanism to disclose and discharge any perceptions of conflict of interest is provided through the filing of Transparency Disclosures.

The provision against undermining or acting against council's interests (Rule 15) arises out of observations of the deleterious (and expensive) impact that can be caused by one member of Council, who despite efforts to persuade Council through the democratic process, is out-voted on an issue, yet chooses to initiate or participate in litigation or direct efforts to undermine the democratically determined position of the Council. The Rule is not meant to discourage Members from voicing their disagreement with the decision as long as they do so respectfully. Neither does the Rule deny Members from attaching their names to petitions, pledges and like public statements. The purpose of the Rule is only to prevent activity that purports to challenge the duly determined decision of Council by 'taking the municipality to court'.

Where the draft code contemplates the treatment of inquiries (complaints), it does so explicitly in the context of serving the public interest. Section 3(2) of the Formal Complaint Protocol provides:

- (2) If the Integrity Commissioner is of the opinion that a complaint is frivolous, vexatious or not made in good faith, or that there are no grounds or insufficient grounds for an investigation, **or that the pursuit of the investigation would not, in the opinion of the Integrity Commissioner be in the public interest**, the Integrity Commissioner shall not conduct an investigation, or, where that becomes apparent in the course of an investigation, terminate the investigation.

From a logistical perspective, the design of the Council Code enables the companion Local Board Code of Conduct to be a briefer, less intimidating document, less likely to discourage volunteer members of the community from serving on advisory committees and other local boards.

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Taken together, the Code is designed to be easy to read, accessible and informative. It contains 18 distinct Rules that are easily located through the code's table of contents. Its length is due largely to the extensive commentary which has been incorporated to clarify interpretation and application.

Exposure vs Guidance

Q2. Doesn't the longer code format expose Members to political enemies and vexatious complaints?

A. On the contrary, a more robust code (especially one with embedded commentary) provides guidance and certainty for Members and helps them avoid ethical missteps. Vague provisions, references to such things as 'highest standards' or following the 'spirit' of legislation or to undertakings of respectful or ethical behaviour (without further description of what that might mean) provide greater exposure, and less guidance.

It is important to recognize that the draft code emphasizes keeping the public interest in perspective. Trifling, vexatious or matters not serving the public interest will not be pursued as formal complaints.

Q3. You have to be a hermit to avoid getting caught by the code, right?

A. Not so. The draft code of conduct incorporates learnings mined from the experiences of Councils and councillors for over a decade. There are no hidden traps. Each of the 18 provisions give focused guidance, with commentary. [See also Avoidance of Conflict of Interest, below]

Q4. Why don't we have a very short set of principles and leave it to the electors to hold us to account every four years?

A. For one thing, a short set of principles would unlikely provide a helpful guide for Members. Further, leaving the remedy to electoral decisions taken every four years would be frustrating to persons (and perhaps fellow council members) with legitimate concerns, and would not serve the goal of raising the perception that Members of Council always exhibit high standards of ethical behaviour. One of the chief benefits for Members in having an integrity commissioner in place to address complaints of ethical transgressions is that those complaints can be resolved relatively quickly, bringing the matter to an end.

Q5. My experience is that people complain to the integrity commissioner, which makes headlines, but months later a report comes out clearing me and that hardly gets any coverage.

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A. The filing of complaints is a confidential process. Though it is possible for a complainant or respondent to attempt to influence media coverage, experience shows that issues are less likely to find their way into the media when another remedy exists. A robust Code and a fair complaint process results in fewer ‘headlines’. Complaints are investigated as expeditiously as reasonably possible but always in accordance with the tenets of procedural fairness, and the confidentiality provisions of the *Municipal Act*. Recommendation reports, produced after an investigation sustains one or more of the allegations, will clearly and accurately recite the relevant facts and circumstances and set out findings and recommendations with precision and without hyperbole. Where it is in the public interest to do so, for example to ‘clear the air’ in the face of inaccurate media coverage, or to provide the necessary closure when the circumstances demand, a report can be issued even where there have been no findings of ethical transgression.

Applicability of Local and Regional Codes

Q6. I also sit on Regional Council. Why do I have to memorize two codes?

Q7. Which code/integrity commissioner has jurisdiction when I sit on both a local council and Regional Council?

There is no need to memorize the code of conduct. It is organized in such a way that guidance can be quickly achieved by referencing the appropriate rule from the table of contents.

In most cases, the applicable code of conduct will be clearly identifiable from the circumstances (a particular report, an incident, a particular staff member, a clearly lower/upper tier issue...). In some cases though, such as the general relationship between a Member of Council and their constituents or persons involved in the community, it may be more difficult. This would most likely be the case when in applying the Gift rule a particular gift/benefit/hospitality is offered to the Councillor *without* there being a clearly identified project or concern. In this case the draft code suggests the more stringent rule apply to provide certainty, and to respect the provisions of both councils on which the Member serves. The burden on the Member will be to determine which Code is more stringent, but that is aided by the presence of a handy reference chart in Rule 2: Gifts, Benefits & Hospitality.

Broader Concept of Conflict of Interest

Q8. What is the relationship between *Municipal Conflict of Interest Act (MCIA)* interests and Common Law interests?

The MCIA pertains only to pecuniary (money or financial) interests of the Member or which are deemed to be the responsibility of the Member, such as through familial relationship or by being a member of a body with a pecuniary interest. The common law interest can best be explained through reference to the leading cases considering the topic:

Moll v. Fisher (1979):

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All conflict of interest rules are based on the moral principle...that no man can serve two masters. ...even the most well-meaning men and women may be impaired where their personal financial interests are affected.

Stevens v. Canada (Attorney General) (2004):

an apparent conflict of interest...” exists when there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists.

and the test to determine whether such a conflict exists is the ‘reasonable person test’:

Re Mel Lastman and The Queen in Right of Ontario (2000):

Would a reasonable elector, being apprised of all the circumstances, be more likely than not to regard the interest of the councillor as likely to influence that councillor’s action and decision on the question. In answering the question set out in such test, such elector might consider whether there was any present or prospective financial benefit or detriment, financial or otherwise that could result depending on the manner in which the member disposed of the subject-matter before him or her.

In short, a common law interest is an interest that is not necessarily financial in nature, but nevertheless calls into question the ability of a Member to separate their private interests from their public duty.

Definition of Family

Q9. Why is the definition of family so broad? Is this a new provision?

The broad definition of family member, which includes ‘first cousins’, has been in place at least since the adoption of the City of Vaughan code of conduct in 2009. The MCI A definition is restricted to spouses, children and parents – the broader class is intended to recognize that class of persons which a reasonable person would conclude would, if known to the Member, raise questions about the Member’s impartiality.

Q10. I come from a large family. How can I possibly know whether defined ‘Family’ members, who can be as remote as my first cousins, are involved in a matter coming before Council.

A. There is no obligation to declare an interest and/or step away from a Council decision unless you are aware of the interest. Though a Member should not intentionally ignore the existence of an interest (directly, indirectly, or deemed), there is no obligation on a Member to seek out the information. The reasonable person test, properly applied in the course of providing procedural fairness, affords adequate protection to Members in the event of a complaint being registered. Further, even if the complaint were in regard to a pecuniary interest under the MCI A, the Member cannot be found culpable when they have contravened the Act through inadvertence, or an error in judgement.

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Additional clarity might be provided by adding the words ‘their awareness of’ to paragraph 3b. of Rule 1, Avoidance of Conflict of Interest, as follows:

For greater certainty:

b. *Members of Council shall not participate in the decision-making processes associated with their office when they have an interest that though in compliance with the Municipal Conflict of Interest Act, is nevertheless a disqualifying interest by virtue of **their awareness** of the nature of the relationship between the Member and other persons or bodies to be affected by the decision.*

As well as by inserting the words ‘of which they are aware’ in the first paragraph of the commentary under Rule 1, Avoidance of Conflict of Interests, as follows:

*Members of Council should be committed to performing their functions with integrity and to avoiding the improper use of the influence of their office, and private conflicts of interest, both apparent and real. Members of Council shall also not extend in the discharge of their official duties, preferential treatment to Family Members, organizations or groups in which they or their Family Members have a direct or indirect pecuniary interest **of which they are aware**.*

Q11. Do I have research my family’s holdings, and disclose their or my personal finances when I take office?

A. There is no obligation to disclose your holdings or your family’s holdings. The assessment of whether an interest exists that could give rise to a conflict of interest if improperly managed, only occurs in the context of a specific decision to be made by Council (or by a person with delegated authority from Council).

Q12. If I sit on a board or charity (or a member of my Family sits on such a body) with a financial interest in a decision by Council do I have to declare an interest? What if a Family member is employed by a body that receives a grant?

A. These determinations for the most part require an interpretation of the MCIA, not the code of conduct. The MCIA is very specific that the pecuniary interest of your spouse, child or parent, or such bodies that you or they might sit on, or hold leadership or significant ownership in, becomes your pecuniary interest when you are aware of these facts in the context of a report coming before Council. This means that even if what might be perceived as a benign case, such as being a member of a service club when that club seeks a small contribution from the municipality, the MCIA specifically requires a Member to recuse themselves and not take part in the discussions. This is not the case in every province.

The code provision however expands beyond the narrow MCIA definition the interpretation of Family members to persons typically considered to be part of a person’s family. Though it is not our recommendation to do so, Members have the option to narrow the class by deleting ‘first

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cousins' or perhaps 'aunts and uncles' if they view the Family definition as being too broad when such persons are included.

Other Code Provisions:

Rule 3: Member Expenses

Q13. The title does not accurately reference the content of the rule.

A. Since the rule applies to expenditures and the receipt of sponsorships or donations in regard to charitable or community activities, a better title would be "Rule 3: Member's Role in Funding Charitable or Community Activities"

Q14. I understand why it is important not to handle cash, but I think it is necessary for fundraising cheques to come through me, so I know if donors are coming through with their promises.

A. By being a gatekeeper for the making of donations the Member can create the perception that favourable treatment is possibly available when donations are made to a charity the Member favours. While it is proper for a Member to encourage donations to worthy causes, the better practice is that the Member not be in place to track those contributions.

Q15. Paragraph 1 b. of Rule 3 could be read as imposing a responsibility on a Member even if they were unaware that someone was acting on their behalf.

A. The phrase 'on behalf of a Member' in the first line of the paragraph is intended to capture persons who act under the instructions or direction of the Member. It would therefore be appropriate to substitute "under the direction of the Member" in place of "on behalf of a Member".

Q16. With respect to the same paragraph (Rule 3, paragraph 1 b.), cannot that rule be construed as preventing a Member of Council from encouraging a person with a planning application before Council to make a section 37 contribution, or to offer other community supports or changes to the application?

A. The change in the title will assist in clarifying that Rule 3 applies only to expenditures/receipts in respect of charitable and community activities. The application of section 37 is done within the context of a Council's established planning processes and is not impacted by this rule.

It may also be prudent to add the following commentary:

- Members should avoid creating the perception of a link between a solicitation for a worthy cause and the possibility of favourable treatment for a donor's matter before Council. Conversations and solicitations about the making of a contribution should therefore be kept separate from those pertaining to other Regional business.
- For recurring events, members should consider approaching different potential 'prime',

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'lead', 'gold' or other high-level contributors each year, to minimize the perception that a donor can be advantaged by making regular significant contributions.

Q17. In paragraph 1 d. of Rule 3, cheques cannot be made payable to the Region of York. Why is that?

A. It is recommended that the words 'or to The Regional Municipality of York' be deleted from the paragraph. Payment to the Region is certainly appropriate (and affords transparency) if the Region and its staff are participating in the event's financial administration.

Rule 15: Undermining /Acting Against Council Interests

Q18. Can I sign the Greenbelt Pledge even though Council has voted in favour of development that might encroach on it?

A. The Greenbelt Pledge reads:

I pledge to support the protection of Ontario's Greenbelt and I will celebrate all it has to offer. I will visit farmers' markets, eat local produce, drink local wines and juices, and get out and enjoy some of the many towns, hamlets, and outdoor recreation opportunities available within it. Every chance I get, I will stand up for the continued protection of Ontario's Greenbelt!

Nothing in the code of conduct limits the ability of a Member to make this kind of personal public declaration. It is acknowledged that Members of Councils are political actors and so the taking of political stances is expected. There is nothing in the Greenbelt Pledge that is disparaging, disrespectful, or confidential, which could draw into play other code provisions.

The code does, however, seek to avoid Members from actually undermining Council decisions by participating, for example, in litigation against a Council decision.

The purpose of the proposed Rule is to prevent the unfortunate experiences of other municipalities where significant effort and expense was caused by a single Member litigating against the decision of Council. The rule is not meant to discourage Members from voicing their disagreement with the decision, as long as they do so respectfully, nor does it deny Members from attaching their names to petitions, pledges and like public statements. The purpose of the Rule is only to prevent activity that purports to challenge the duly determined decision of Council by 'taking the municipality to court'.

On the other hand, the purpose of the proposed Rule is not to deny Members from pursuing their own advocacy in appropriate circumstances. That is why the rule contemplates the possibility of seeking reconsideration under the Procedure By-law, and filing requests under oversight, transparency and accountability mechanisms.

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Q19. How do I protect my own interests as a citizen if I can't litigate against the municipality?

A. The draft code seeks to prevent Members who have had the opportunity through the democratic process to debate and decide on a question from then 'changing hats' and seeking to challenge a decision as if they were an outsider. Members who cannot participate in such debate because they declared an interest, as would be the case if the Member were, say, the applicant on a project involving their own home, would not be similarly restricted from appealing or taking other litigation steps in their own advocacy.

Q20. In denying me the ability to comment after a decision is made, the draft code of conduct denies me basic rights, doesn't it?

A. Members have the absolute right to comment, and to inform constituents that they disagree with a Council decision. The draft code of conduct only restricts Members from making disparaging comments and/or advocating non-compliance with the outcome. Ideally the comment would convey that: 'I disagree with Council's decision. Though I participated fully and passionately in Council's debate at the end of the day there were not enough votes on my side to carry the day. While I disagree with the outcome, I respect the process that led to it and acknowledge that the decision reflects the democratic will of Council'.

Q21. With all that said, what are the options for dealing with Rule 15 if I do not support it?

A. Several courses of action are possible:

1. Delete paragraph 1 on the basis that 'undermining the implementation of Council's decisions' casts too broad a net. Deletion of paragraph 1 will not impact paragraph 2, which contains a clear prohibition against engaging in litigation and other legal challenges to Council's decision (subject to the exceptions already recited, and any new ones Council might add).

If paragraph 1 is to be deleted, it is recommended that the two existing paragraphs of commentary be added to paragraph 2 of the Rule.

Further, if paragraph 1 is to be deleted, it is recommended that the title of the rule be changed to "Rule No. 15: Legal Challenges to Council Decisions"

2. Maintain paragraph 2, but narrow its application so that it minimally impacts the rights of Members to challenge Council's decisions. For example, one or more paragraphs could be added to the exception already provided, so as to read:

"Despite this provision:

- a. Members may pursue a complaint or request for investigation under any of the oversight, transparency and accountability mechanisms provided under Part V. 1 and under section 239 of the *Municipal Act*; [existing]
- b. Members may pursue a complaint or request for investigation under a statutory scheme dealing with access to information, the protection of privacy, or the

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- protection of human rights;
- c. Members are not restricted from participating in litigation or other legal challenges if they are uniquely impacted by the decision, such as when Council has imposed a penalty or reprimand following a report of the integrity commissioner;
 - d. Members are not restricted from participating in litigation or other legal challenges if they did not participate, and were not entitled to participate, in the respective deliberations and decision of Council. [In this case, the following commentary would also be appropriate:
 - Members who were not entitled to participate in Council’s original decision, as would be the case if they had recused themselves because of a disqualifying interest in the matter, are not subsequently restricted from advocating on their own behalf in the proper forum.]
 - e. Members may seek to have a Council decision reconsidered in accordance with Council’s Procedure By-law.” [In this case, paragraph 3 can be deleted as redundant].
3. Delete the entire Rule. Though outright deletion is not recommended, the deletion of Rule 15 will not require consequential amendments to other provisions in the draft code of conduct.

We trust the foregoing has been helpful. Should additional questions arise in the course of Council’s debate on February 28th, we will be in attendance to provide further assistance.

Sincerely,

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Integrity Commissioner for
The Regional Municipality of York