

# THE CORPORATION OF THE TOWN OF WASAGA BEACH

## BY-LAW #2020-25

A By-Law to Provide for the Indemnification of Current and Former Council Members, Board Members, Employees and Volunteers

**WHEREAS** section 279 of the Municipal Act, 2001, SO 2001, c 25, as amended, provides that a municipality may, subject to certain limitations, act as an insurer and protect present and former members of council, board members, employees and officers from risks that may involve pecuniary loss or liability on the part of those individuals;

**AND WHEREAS** Council wishes to put in place and maintain appropriate protections against personal liability to ensure that competent staff, volunteers and Council members continue to be attracted to serve the Town of Wasaga Beach;

**AND WHEREAS** in 2006 the Council enacted By-Law #2006-11 titled "A By-Law to Provide for the Indemnification of Current and Former Council Members, Board Members, Employees" (the "**Existing By-Law**") for the purposes of addressing the indemnification needs of Council Members, board members and employees in a comprehensive manner;

**AND WHEREAS** Council, having reviewed the Existing By-Law, deems it appropriate in the circumstances to enact this By-Law to address the indemnification needs of Council Members, board members, employees and volunteers of the Town of Wasaga Beach. It is the intention of Council that this By-Law serve to supplement (and not to substitute or replace) the protection provided by the policies of insurance of the Town of Wasaga Beach.

**NOW THEREFORE the Council of the Corporation of the Town of Wasaga Beach hereby enacts as follows:**

### ARTICLE I INTERPRETATION

#### 1.1 Definitions

In this By-Law, the following terms shall have the following corresponding meanings:

"**Act**" means the Municipal Act, 2001, SO 2001, c 25, as amended.

"**Assessment Committee**" means a committee comprised of the CAO and an independent solicitor selected by the CAO, provided that if the matter referred to the Assessment Committee involves the CAO, the CAO shall be recused and the decision of the Assessment Committee shall be made by an independent solicitor as selected by Clerk on the recommendation of the Town's outside legal counsel.

"**By-Law**" means this By-Law to Provide for the Indemnification of Current and Former Council Members, Local Board Members and Employees.

“**CAO**” means the Town’s Chief Administrative Officer.

“**Clerk**” means the Town’s Clerk.

“**Council**” means the Council of The Corporation of the Town of Wasaga Beach.

“**Covered Action or Proceeding**” means an action or proceeding commenced after the passing of this By-Law and arising out of acts or omissions done or made by an individual and includes all civil actions, processes under any administrative tribunals or other administrative, investigative or quasi-judicial bodies, other regulatory offences, a complaint to a professional organization and administrative proceedings, but excluding those actions or proceedings excluded by section 4.1 of this By-Law;

“**Covered Individual**” means a person who is or was a Member of Council, Local Board Member or Employee, as the case may be, at the time the cause of action or proceeding arose or at the time that the act or omission occurred that gave rise to the Covered Action or Proceeding, notwithstanding that prior to judgment or other settlement of the proceeding the person ceased to be a Member of Council, Local Board Member or Employee.

“**Defamation**” consists of any written, printed, or spoken words or publication, or communication of any audible or visible matters or acts, in each case which tends to lower a person’s reputation in the eyes of a reasonable person or cause a person to be shunned or avoided or exposed to hatred, contempt or ridicule. For greater certainty, Defamation shall include both libel, consisting of the publication of defamatory materials in a permanent form, and slander, which consists of defamatory statements in a transitory form such as spoken communications.

“**Defamation Action**” has the meaning given to it in section 3.1 of this By-Law.

“**Employee**” means any current or former salaried officer or any other person employed by the Town or by a Local Board, and includes current and former employees, appointees and volunteers acting under the direction of a person employed by the Town or a Local Board.

“**Integrity Commissioner**” means the Town’s Integrity Commissioner.

“**Local Board**” means a municipal service board, public library board, the board of a wholly-owned municipal corporation or any other board, commission, committee, body or local authority established or exercising power under any municipal authority with respect to the affairs or the purposes of the Town, excluding a school board and the Nottawasaga Valley Conservation Authority.

“**Local Board Member**” means a current or former member of a Local Board.

“**Member of Council**” means a current or former member of Council, and includes alternate members.

“**Town**” means The Corporation of the Town of Wasaga Beach.

**“Town Duties”** means the official duties of a Covered Individual in their capacity as a Member of Council, Local Board Member or an Employee, as the case may be.

## **ARTICLE II INDEMNIFICATION OF COVERED INDIVIDUALS**

### **2.1 Deemed Acceptance of the Terms of this By-Law**

Notwithstanding any other provision of this By-Law, any Covered Individual that benefits from indemnification by the Town pursuant to the terms of this By-Law shall be deemed to be bound by the terms of this By-Law in its entirety and shall have delivered to the Town an acknowledgement in writing that it has reviewed the terms of this By-Law and agrees to be bound by such terms (and/or such additional terms as may be specifically imposed by the Assessment Committee) prior to the Town having any obligation to indemnify such Covered Individual.

### **2.2 Eligibility for Indemnification in respect of a Covered Action or Proceeding**

The Town shall indemnify a Covered Individual in the manner and to the extent provided herein in respect of any Covered Action or Proceeding brought by a third party against a Covered Individual for acts or omissions arising out of the scope of the Covered Individual's authority or within the course of their Town Duties if:

- (a) the Covered Individual acted honestly and in good faith with a view to the best interests of the Town, having regard to the Town's Code of Conduct;
- (b) in the case of an administrative action or proceeding that is enforced by a monetary penalty, the Covered Individual had reasonable grounds for believing that his or her conduct was lawful;
- (c) the Covered Individual enters into an agreement that provides that any award of costs paid to such Covered Individual as a result of a Covered Action or Proceeding shall be paid by such Covered Individual to the Town in repayment of amounts advanced to such Covered Individual for legal costs and expenses under this By-Law; and
- (d) the Covered Individual complies with the other provisions of this By-Law.

### **2.3 Determination of Eligibility**

In the event that any determination is required as to whether a Covered Individual meets the requirements of section 2.2, the Assessment Committee shall determine if such

Covered Individual meets the requirements of section 2.2 in order to benefit from indemnification hereunder.

## **2.4 Manner of Indemnification**

The Town shall indemnify a Covered Individual that it determines satisfies the requirements of section 2.2, by

- (a) assuming the cost of defending such Covered Individual in a Covered Action or Proceeding;
- (b) paying any damages or costs, including a monetary penalty, awarded against such Covered Individual as a result of a Covered Action or Proceeding;
- (c) paying, either by direct payment or by reimbursement, any expenses reasonably incurred by such Covered Individual as a result of a Covered Action or Proceeding; and
- (d) paying any sum required in connection with the settlement of an action or proceeding, provided that such settlement is approved in accordance with section 5.5 of this By-Law.

Notwithstanding the foregoing, the Assessment Committee may impose a limit on the quantum of indemnification provided to any Covered Individual or may impose such other terms as the Assessment Committee determines.

## **ARTICLE III INDEMNIFICATION OF DEFAMATION ACTIONS**

### **3.1 Request for Coverage to Initiate Defamation Actions**

A Covered Individual may, by written request made to the CAO (or where such Covered Individual is the CAO, to the Clerk) request indemnification under this By-Law in respect of the legal costs and expenses associated with commencing a legal action or process against a third-party that is not the Town, a Member of Council, Local Board Member or an Employee, seeking relief in respect of an act of Defamation committed by said third party (such proceeding, a "**Defamation Action**"). Upon receipt of such a request, such request shall be referred to the Assessment Committee to determine, in its sole discretion, whether indemnification shall be provided having regard to the following criteria:

- (a) the merits of the Defamation Action (including the prospect of success and recovery of legal costs);
- (b) whether the matter at issue arises out of the exercise of the Covered Individual's Town Duties; and

- (c) whether the alleged defamatory statements, if left unchallenged, will undermine public confidence in the Town's municipal government and government officials and/or disrupt the efficient functioning of Council and/or staff.

### **3.2 Request for Coverage Defamation Actions**

If the Assessment Committee determines, having regard to the criteria set forth in section 3.1, that the Covered Individual should be entitled to indemnification in respect of a Defamation Action, the Assessment Committee shall also consider the reasonableness of the legal expenses being sought for reimbursement and determine whether to reimburse all or a portion of said expenses and any other terms, conditions or limitations to impose upon such indemnification. Such Defamation Action shall thereafter be treated for all purposes under this By-Law as a Covered Action or Proceeding, subject to the limitations set forth in this Article III.

### **3.3 Limitation on Indemnification in respect of a Defamation Action**

The indemnification for a Defamation Action shall be limited to the reimbursement of legal expenses as approved in accordance with section 3.2 hereof to a maximum amount of \$50,000.00, and shall not include indemnification for any adverse award (including an adverse costs award) rendered against such Covered Individual in respect of the Defamation Action.

## **ARTICLE IV EXCLUSIONS FROM INDEMNIFICATION COVERAGE**

### **4.1 General Exclusions from Indemnification Coverage**

Except as expressly provided for in section 4.3 of this By-Law, this By-Law excludes indemnification for:

- (a) a charge or proceeding pursuant to the *Highway Traffic Act*, RSO 1990, c H 8, as amended, the *Criminal Code*, RSC 1985, c C 46, as amended, or the *Municipal Conflict of Interest Act*;
- (b) a proceeding to enforce a municipally administered statute, regulation or municipal by-law;
- (c) the expenses incurred by a Covered Individual in obtaining legal advice to determine whether such Covered Individual has a pecuniary interest in a matter which is the subject of a determination or consideration by Council or a Local Board;

### **4.2 Responsibility for Costs**

Where the Town has determined that a Covered Individual is not entitled to indemnification coverage under this By-Law, either by reason of not satisfying the

eligibility requirements under sections 2.2 or 3.1 of this By-Law, as applicable, or by reason of exclusion set forth in section 4.1 of this By-Law, that person shall be responsible for all costs in connection with representation in the action or proceeding and shall reimburse the Town for all costs paid by the Town, and shall be responsible for payment of any penalty or damages or costs awarded or imposed against the Covered Individual in the action or proceeding.

### **4.3 Limited Indemnification Coverage**

Despite section 4.1 of this By-Law:

- (a) the Assessment Committee may elect to approve reimbursement to a member of Council charged with breaching Section 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act* ("**MCIA**") for costs and/or expenses incurred by the member of Council to defend those charges, but only where the member of Council is found not to have contravened the *MCIA*;
- (b) where a Covered Individual is charged with an offence under the *Criminal Code*, RSC 1985, c C 46, as amended, the *Highway Traffic Act*, RSO 1990, c H 8 as amended, or a municipal parking or traffic by-law, as a result of any act or omission or an allegation of the same in the attempted performance or performance in good faith of his or her Town Duties, the Covered Individual may be entitled to receive payment from the Town for a retainer and/or interim payment of legal costs incurred in the defence of such charge or allegation, in an amount not to exceed \$15,000.00, in the sole discretion of the Assessment Committee, provided that as a condition precedent to the Town making any payment pursuant to this section 4.3(b) of this By-Law, the Covered Individual must agree in writing to repay the Town on demand in the event that the Covered Individual is convicted or not acquitted of an offence, all sums paid by the Town in respect of the costs of defence or representation as to such charges, and must execute an indemnity or other documentation required by the Town to secure such repayment to the Town.

## **ARTICLE V ADMINISTRATION OF INDEMNIFIED CLAIMS**

### **5.1 Requirement to Provide Notice**

Where a Covered Individual receives a threat of or a notice of action, claim or proceeding or otherwise becomes aware of a Covered Action or Proceeding, the Covered Individual shall immediately notify the Town of the threat or claim by delivering a copy of such notice, action or other document to the CAO or, if such Covered Individual is the CAO, the Clerk.

### **5.2 Reliance on Insurance**

Notwithstanding any other provision of this By-Law to the contrary, in the event that the Covered Action or Proceeding is covered by the Town's insurance policy, any lawyer

retained by the Town's insurers from time to time shall represent a Covered Individual with respect to that Covered Action or Proceeding and the Town shall have no obligation to indemnify such Covered Individual for the retention of any other lawyer, unless the Town agrees otherwise.

### **5.3 Selection of Legal Counsel**

Where the Town has agreed to indemnify a Covered Individual for a Covered Action or Proceeding, the Town shall have the right to select and retain a lawyer to represent such Covered Individual or, if such Covered Individual makes a request to the CAO in writing to be represented by a lawyer of the Covered Individual's choice, the Town shall cover the costs of such legal counsel by way of direct payment or by reimbursement provided that the Assessment Committee has determined that such legal counsel is appropriate in the circumstances and has been retained pursuant to appropriate financial terms. The Town shall advise the Covered Individual within 10 days from receiving the request as to whether it has approved or denied such Covered Individuals request to be represented by a lawyer of such Covered Individual's choosing. The Town shall not reimburse a Covered Individual for its legal counsel under this By-Law unless such Covered Individual's legal counsel has been approved in accordance with this section.

### **5.4 Duty to Cooperate**

A Covered Individual seeking indemnification under this By-Law has a duty to cooperate with the Town and its solicitor(s) in connection with the Covered Action or Proceeding. This includes providing timely and fulsome responses to requests for information and attending the proceeding and meetings in respect thereof. Failure to cooperate with the Town or legal counsel may result in the termination of the Town's indemnification of legal costs, as determined by the Assessment Committee in its sole discretion.

### **5.5 Settlements**

All settlement terms in a Covered Action or Proceeding indemnified pursuant to this By-Law are subject to approval of the Assessment Committee. Failure to obtain the Assessment Committee's approval of a settlement may result in the termination of the Town's indemnification of the Covered Individual.

### **5.6 Appeals**

Where a Covered Individual seeks to appeal a judgment in a Covered Action or Proceeding, the Assessment Committee shall have the sole discretion to determine whether an appeal should be pursued, and whether the costs associated with such appeal shall be indemnified under this By-Law. Where the Assessment Committee determines that it is not in the Town's interest to commence an appeal, and a Covered Individual

elects to proceed with such an appeal, all costs will be at his or her own expense, including any award of costs.

## **ARTICLE VI TERMINATION OF INDEMNIFICATION**

### **6.1 Rescission of Indemnification**

- (a) The Town may at any time during the Covered Action or Proceeding, or after the completion of the Covered Action or Proceeding, review its decision to provide an indemnity and may terminate or rescind the indemnity if it is determined by the Assessment Committee in its sole discretion that the Covered Individual was not or is no longer entitled to an indemnity pursuant to this By-Law.
- (b) Prior to terminating or rescinding the indemnity in accordance with section 6.1, the Covered Individual shall be afforded the opportunity to present arguments relevant to the decision to terminate or rescind the indemnity, but the decision is not otherwise subject to further review or appeal.

### **6.2 Obligation to Reimburse**

Where the Town has paid for the legal costs, or any portion thereof, as indemnification of a Covered Individual in an action or proceeding and the indemnification is subsequently terminated or rescinded in accordance with section 6.1 of this By-Law, the Covered Individual shall be responsible for all costs in connection with the applicable legal proceeding and the Covered Individual shall be responsible for the payment of any damages or costs awarded against him or her in the action or proceeding. The Covered Individual shall be liable to repay to the Town, upon written demand, all costs incurred by the Town in connection with the applicable legal proceeding.

## **ARTICLE VII GENERAL**

### **7.1 Determination by the Assessment Committee**

All determinations made by the Assessment Committee shall require the unanimous consent of the members of such Assessment Committee. In the event that the Assessment Committee makes a unanimous determination of an issue, such determination shall not be subject to review or redetermination by Council. However, in the event that the Assessment Committee is unable to reach a unanimous determination of an issue, nothing herein shall prejudice the Town's ability to provide for indemnification of a Covered Individual pursuant to a separate By-Law approved by Council.



## 7.2 No Prejudice to Town's Rights

Nothing in this By-Law, including the decision to provide or withhold indemnification to a Covered Individual, shall prejudice:

- (a) any right the Town may have as against any Covered Individual, including in connection with any action or proceeding;
- (b) the Town's rights respecting discipline, removal and dismissal of a Covered Individual; or

## 7.3 Repeal and Effective Date

- (a) By-Law number 2006-11 is hereby repealed.
- (b) Despite the repeal of By-Law number 2006-11, such By-Law shall continue to apply to coverage for any action or proceeding commenced prior to the enactment of this By-Law.
- (c) This By-Law shall be effective as of the date it is passed by Council and shall apply to any action or proceeding commenced on or after the effective date, regardless of the date of the alleged act or omission.

**BY-LAW READ A FIRST, SECOND AND THIRD TIME AND FINALLY PASSED THIS 26<sup>TH</sup> DAY OF MARCH, 2020.**

**THE CORPORATION OF THE TOWN OF WASAGA BEACH**

  
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Nina Bifulchi, Mayor

  
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Dina Lundy, Director, Legislative Services & Clerk