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INTEGRITY COMMISSIONER REPORT

TO: Council, Town of Wasaga Beach

FROM: Robert Swayze, Integrity Commissioner

SUBJECT: Report of the Integrity Commissioner on complaints filed by Andrew McNeil, Director of Economic Development and Tourism against Nina Bifolchi, Deputy Mayor.

DATE: January 24, 2017

RECOMMENDATION

That the report of the Integrity Commissioner dated January 24, 2017 be received.

REPORT

A formal complaint was filed with me in the prescribed form, sworn by Andrew McNeill, Director of Economic Development and Tourism on October 6, 2016 alleging that the Deputy Mayor contravened the Council Code of Conduct (the "Code") by targeting the complainant with harassment and impugning his professional reputation in public meetings on numerous occasions. The complaint details several incidents which are summarized in this report.

Leases of Beachfront Properties

The first item in the complaint against the Deputy Mayor is that she interfered with lease negotiations carried out by the complainant in accordance with his authority, by speaking directly with the parties involved. She then criticized him in an open meeting of Council for giving one of the parties the incorrect impression that a lease was only available for a term of 5 months because it was to be leased to another party after that term.

Council approved the issuance of an RFP for the lease of a commercial property owned by the Town, described as 31 Beach Drive, Unit B and Council accepted a proposal from RLS Wasaga Group Inc. ("RLS") to lease the property for a term of 5 years with a right of renewal for an additional 5 years. Attached to that building is 31 Beach Drive, Unit A, also owned by the Town, which was not included in the RFP but RLS indicated to Mr. McNeill that it was interested in

acquiring a first right of refusal for Unit A to be exercised in six months. They were not interested in immediate occupancy of Unit A. Mr. McNeill did not recommend to Council the issuance of another RFP for Unit A, but made Council aware of the intention of RLS. Mr. McNeill then proceeded to negotiate with a third party, the owners of Sweet Tooth Candy Emporium ("Sweet Tooth") who had approached the Town, for a lease of Unit A and appeared willing to accept a lease for a 5 month period. When the complainant's recommendation to lease the property for 5 months reached Council, Sweet Tooth indicated it would prefer a longer term and a complicated debate ensued, led by the Deputy Mayor, resulting in the approval of a 5 year lease to Sweet Tooth for Unit A.

Analysis

It is generally accepted that municipalities must deal with the disposal of property to commercial interests by tender or RFP unless there are clear benefits arising from dealing with a single source, which would be lost if a competitive process was followed. It might be argued that recommending a short term lease acceptable to a single source was appropriate because there would be lack of general interest if an RFP were issued. The flaw in this argument is that there was no guarantee that RSL would enter into a lease of the property in six months' time. The recommendation to Council should have been to issue another RFP for Unit A.

Regardless of my above opinion, I am satisfied that the complainant had authority from Council to negotiate with Sweet Tooth for a 5 month lease and it was wrong of the Deputy Mayor to insert herself in the negotiations by speaking to its owners. She argues that they are her constituents and she has the obligation to deal with them. In this case she should have explained that she cannot involve herself as a single member of Council, in negotiations which were commenced by staff.

The complainant cites the following section of the Code:

- 9.2 "Members shall not attempt directly or indirectly, to influence the decision making process, as it relates to the award of contracts or settlement of claims. This includes but is not limited to direct or indirect personal contact or interaction with the parties administering or directly involved in such processes."

I cannot find that the Deputy Mayor contravened section 9.2 of the Code because, in my opinion, the negotiation "process" (not a competitive process) conducted by the complainant was not a decision making process as contemplated by that section of the Code.

I will provide my findings later on whether the behaviour of the Deputy Mayor towards the complainant, as set out in this report, collectively constitutes harassment within the meaning of the Code, as alleged by the complainant.

Expenses Questioned by the Deputy Mayor

The Deputy Mayor questioned, in two open meetings of Council, an expense of \$2599.00 approved by Mr. McNeill for sponsoring an event held in the Toronto Hard Rock Café in May of 2016 promoting Wasaga Beach and in a later meeting, for using Town funds in the amount of \$3300.00 to purchase a song. Both of these expenditures were within his authority to approve without prior Council approval.

The Deputy Mayor expressed her opinion that supporting an event in Toronto, including the hiring of “bikini clad models” and which primarily benefitted Wasaga Beach Brewery, was not an appropriate use of public funds. She also told the meeting that the support of the event was turned down earlier by Council but she was not able to provide any evidence or minutes of such refusal. The Mayor attended the event and gave his opinion that it was a successful promotion of Wasaga Beach.

The song was originally written for Wasaga Brewery and used in its advertising. An agreement of sale for an altered version of the song was entered into by the Town.

Analysis

It is the right of any member of Council to question expenses approved by any department head. However, I am concerned with the fact that she raised the expenditures in public after they had been approved and paid within the authority of the Complainant. Her anxieties should have been raised with the CAO and if a staff performance issue was established, it should have been discussed with Council in camera. Discrediting publicly a member of staff is contrary to the Code. However, I feel it is necessary here to note that in my experience, a staff member working in a political environment, who seeks to acquire such an unusual property as a song, should seek prior approval from Council to avoid the fallout that is inevitable.

Conflict in Evaluating RFP for Legal Services

On October 28, 2016 the Complainant filed with me a second formal complaint and requested me to consider it together with the above complaints. It provides as follows:

On October 18, 2016 a report from the CAO evaluating proposals from law firms responding to an RFP for legal services issued by the Town earlier, was being considered by Committee of the Whole and the Deputy Mayor asked the CAO

why he was the author of the report when the direction had been given to the complainant. He explained that the complainant had a conflict arising from his sister being a partner in one of the firms submitting a bid. He advised the meeting that the complainant had accordingly removed himself from the entire evaluation process. I was provided with a video of the committee meeting debating the staff recommendation as to the choice of law firms. During the debate, the complainant approached the table and stated that the law firm with which he had a conflict, was the “top municipal law firm in Canada”. When the report of the Committee was considered by Council in an open meeting, with the subject firm listed on the recommended panel, the Deputy Mayor criticized the complainant for “talking up” the law firm at the Committee.

Analysis

The Deputy Mayor was critical of the complainant for making a laudatory comment in the meeting about the law firm which was understandable in view of the complainant’s commitment that he had removed himself from the process. The acceptance of the report by the Committee was part of the process and he should not have spoken up. However, I repeat that criticism of staff should not be made in public. She should have taken it up with the CAO after the meeting and if she still felt that his statement in the meeting was a performance issue, she could have requested that it be placed before a Council meeting in camera.

WORKPLACE HARASSMENT POLICY VS. COUNCIL CODE OF CONDUCT

I have reviewed the Workplace Harassment Policy adopted by the Town in 2015 and it does not apply to members of Council. It applies by definition to all employees, but Councillors are not legally considered to be employees. In Section 23.2 of the Code, it incorrectly states that the Workplace Harassment Policy applies to members of Council. Also in Section 23.7 the complaint procedure to be applied is in accordance with the Workplace Harassment Policy which provides for “management” to investigate. These sections should be amended because they are unworkable when members of Council are respondents. These sections may also be unlawful in light of Bill 132 which requires employers to deal with incidents of harassment by maintaining harassment free work places, even if the harasser is a third party.

Accordingly, I must look to the Code for my consideration of this complaint. The Code contains the following two sections:

- 22.1 “Members shall be respectful of the role of staff to advise based on political neutrality and objectivity and without undue influence from any individual member or faction of the Council. Accordingly, no member shall maliciously or falsely injure the professional or ethical reputation, or the prospects or practice of staff, and all members shall show respect for the professional capacities of the staff of the Town”

and

- 23.1 “All members of Council have a duty to treat members of the public, one another and staff appropriately, without abuse, bullying or intimidation. . . .”

In my opinion the Deputy Mayor had a reason in each case for her to disagree with the actions by the complainant referred to in this report. It should not have been done in public but I cannot find that she had the intent to maliciously or falsely injure his ethical reputation or that she abused or bullied him. However, I am concerned that every complaint by her has purposely been expressed in a public meeting. She refuses to meet with the complainant to allow him to brief her on his economic development strategies and explain his activities in advance. I understand the complainant’s concern with the impact of her repeated public criticism on his professional reputation. This must stop.

DECISION

My investigation has benefitted from extensive documentation filed with me by both parties as well as watching video of public meetings which the Town has recently started streaming. None of the facts are in dispute and I have not found it necessary to interview either party to the complaint.

I have decided that I will not find a breach of the Code or recommend any sanctions against the Deputy Mayor at this time. I suggest to her that she meet with the complainant in the presence of the CAO, if requested by him at any time, to allow him to brief her on his future activities. I further ask her to consider this report as a strong warning that if I receive a future complaint confirming that she has in any way publicly criticized the Director of Economic Development and Tourism, I will recommend to Council that a substantial part of her salary be suspended. I will find any future public criticism as an injury to the complainant’s professional reputation and a breach of section 22.1 of the Code.

Respectfully Submitted,



Robert Swayze
Integrity Commissioner