



EWART

O'DWYER

Barristers and Solicitors

February 10, 2021

Municipality of Hastings Highlands
33011 Hwy. 62
P.O. Box 130
Maynooth ON K0L 2S0

*VIA EMAIL: SHuschilt@hastingshighlands.ca
and by ORDINARY MAIL*

Attention: Suzanne Huschilt, Municipal Clerk

**Re: Formal Complaint – Alternate Integrity Commissioner
Our File Number: 2040-003**


In accordance with Section 25 of By-law 2019-007 for the Corporation of the Municipality of Hastings Highlands, please find enclosed the report of the Integrity Commissioner.

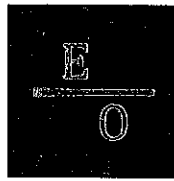
This report is in response to complaint dated August 12, 2020 with respect to allegations of breach of Municipal Code of Conduct, Section 6.1, 6.3(a) and 6.3(d) involving two members of Council.

As a result of the report now having been filed with your office, the inquiry with respect to this matter is now concluded.

Very truly yours,

EWART O'DWYER


M. John Ewart
MJE/jlh
Encl.



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THE CORPORATION OF THE MUNICIPALITY OF HASTINGS HIGHLANDS

TO: Suzanne Huschilt, Municipal Clerk

AND TO: Municipal Council

DATE: January 29, 2021

SUBJECT: Breach of Municipal Code of Conduct / Sections 6.1, 6.3(a) and 6.3(d)

PURPOSE:

This is a report to the Municipal Council for the Corporation of the Municipality of Hastings Highlands on the Municipal Integrity Commissioner's finding with respect to the behaviour of two (2) Members of Council with respect to the procurement/production of winter sand. The complaint received with respect to this matter was dated August 12, 2020.

PROCESS:

In preparation of this report, I have interviewed the Complainant and members of Council. I have also interviewed members of the Municipal Senior Staff.

In addition, I have reviewed the chronology of events as provided by the Complainant, and the Members of Council. I have also reviewed correspondence which has been exchanged between the Complainant and the Municipality, the Members of Council and Municipal staff.

I have received full cooperation from the Complainant, the members of Council, and Municipal staff.

BACKGROUND:

I was appointed by the Municipal Council for the Municipality of Hastings Highlands to serve as alternate Integrity Commissioner related to contraventions of the Municipality's Code of Conduct. The complaints focused primarily on the allegations as against two (2) members of Council with respect to the procurement of winter sand commencing in 2016. Of specific concern to the Complainant is the behaviour of the two (2) members of Council with respect to statements made to the Complainant and the belief that the members of Council had made false statements involving quality and quantity of winter sand used by the Municipality.

As a result of the alleged actions and statements of the two (2) members of Council, a formal complaint was received by the Municipality with respect to an alleged contravention of the Municipality's Code of Conduct by the members of Council, namely Section 6.1, 6.3(a) and 6.3(d).

LEGISLATIVE PROVISIONS:

A Municipal Integrity Commissioner is appointed by Council under Section 223.3(1) of the *Municipal Act, 2001*, as amended with the following responsibilities:

Without limiting Sections 9, 10, or 11, those Sections authorize the municipality to appoint an Integrity Commissioner who reports to Council and who is responsible for performing in an independent manner the functions assigned by the municipality with respect to: a) the application of the code of conduct for members of council and the code of conduct for members of local boards, or either of them; b) the application of any procedures, rules and policies of the municipality and local boards governing the ethical behavior of members of council and of local boards or either of them, or; c) both of clauses a) and b).

MUNICIPAL INTEGRITY COMMISSIONER INVESTIGATION PROTOCOL:

The Municipality of Hastings Highlands does not have a defined Integrity Commissioner investigation protocol. The Municipal Integrity Commissioner protocol would serve to outline the protocol to be adopted by the Integrity Commissioner for the Municipality dealing with complaints within the jurisdiction of the Municipality. This could be adopted by way of a policy in the Code of Conduct, which could read as follows:

Pursuant to Section 223.3(1) of the *Municipal Act, 2001*, the Corporation of the Municipality of Hastings Highlands shall appoint an Integrity Commissioner who reports to Council and who is responsible for performing the following duties in an independent and consistent manner, which includes complaint investigation, complaint adjudication, and annual reporting. Individuals who identify or witness behaviour and activity by members of Council who appear to be in contravention of the Code of Conduct may address their concerns through a formal complaint process.

In the case at hand, it is noted that a Request for Inquiry form is currently being used by the Municipality to deal with issues including that of alleged contraventions of the Code of Conduct for members of Council. However, as set out above, a specific complaint form with respect to matters involving Code of Conduct may have served to focus the issues put forward by the Complainant.

Notwithstanding the absence of an investigation protocol, I received my jurisdiction to investigate the issues in this report by virtue of Section 223.3(1) of the *Municipal Act, 2001*.

THE ROLE OF THE INTEGRITY COMMISSIONER IN ASSESSING A COMPLAINT:

The role of the integrity commissioner is to determine whether or not there is sufficient information or evidence to support and substantiate the allegations made in the complaint. That determination is made on an evidentiary standard of the “balance of probabilities”, that is whether it is more likely than not that the complaint in each scenario is contrary to the provisions of the code of conduct, the *Municipal Act, 2001*, and/or other applicable legislation. In order to ensure fair and credible process, the municipal integrity commissioner must also:

1. Act as an impartial, unbiased third party;
2. Maintain the integrity and confidentiality of the process, to the extent possible;
3. Interview the Complainant, the respondents, and the primary witnesses;
4. Collect and review the evidence;
5. Assess the issue of credibility;
6. Determine whether further witnesses should be interviewed;
7. Determine whether additional evidence or interviews are required;
8. Transmit the final report to the Complainant and to the municipality setting out the findings and conclusions with respect to the allegations.

NATURE OF THE COMPLAINT:

It is alleged by the Complainant that members of Council, assisted by senior Municipal staff, failed to adhere to the principles of accountability and transparency regarding the procurement and/or production of winter sand to be used by the Municipality.

The Complainant further alleges that members of Council, together with senior Municipal staff, made false representations as to the stock piles of winter sand in the possession of the Municipality.

It is the belief of the Complainant that the Municipality did not have sufficient stock of winter sand, and that such representations were false in nature thereby potentially putting the public at risk as it relates to winter maintenance of highways under the jurisdiction of the Municipality.

It is noted that the Complainant is a principle in a company which supplies sand and other aggregate materials to Municipal corporations, and therefore I accept that the Complainant is knowledgeable as to the Municipal Standards for sand.

It is further noted however, that no formal reports were put forward by the Complainant in support of the allegations of the quality of winter sand being produced by the Municipality, or the quantity of sand required to be kept on hand by the Municipality during winter months.

These two (2) points are identified as it is beyond the jurisdiction of an Integrity Commission to make recommendations as to the quality or quantity of sand which a Municipality must have on hand to carry out maintenance of public highways under its jurisdiction.

Furthermore, it is beyond the jurisdiction of the Integrity Commission to make recommendations as to the sufficiency or nature of a municipal procurement policy which would include the procurement of materials such as winter sand for maintenance purposes.

MUNICIPAL CODE OF CONDUCT:

The Corporation of the Municipality of Hastings Highlands adopted a code of conduct pursuant to the *Municipal Act, 2001*.

The code of conduct applies to all members of Municipal Council. The code of conduct does not apply to Municipal employees.

The preamble of the Code of Conduct further identifies the standard by which Council members are to be held and the expectation of conduct which is to be of "a higher standard of behaviour".

Pursuant to Section 6, General Conduct, Council members are to:

- 6.1: Every member has the duty and responsibility to treat members of the public, staff and each other in a respectful manner without abuse, bullying, harassment or intimidation.
- 6.3 Every member shall abide by the following principles:
 - (a) Members shall at all times act ethically;
 - (b) Members shall perform their functions with integrity, accountability and transparency;
 - ...
 - (d) Members acknowledge that the public has the right to open government and transparency;

It is important to note that the authority bestowed upon the writer pursuant to Section 223.3(1) does not extend to a review of procurement by-laws or policies passed pursuant to the provisions of the *Municipal Act, 2001* by municipal councils. It is important to identify the limitations of jurisdiction and the fact that the contravention of the procurement by-law, if it had occurred, has no application to the inquiry carried out by myself.

CONFIDENTIALITY:

It is important to state the requirement of confidentiality in order to provide the necessary context to the complaints which form the subject of this inquiry.

The Municipality of Hastings Highlands is not a large municipality and therefore providing excerpts from witness interviews runs the risk of identifying individuals who cooperated with the Code complaint investigation. As a statutory safeguard to ensure protection from disclosure of the names of those who speak with the Integrity Commissioner during the course of the investigation, Section 223.5(1) of the *Municipal Act, 2001*, sets out the Integrity Commissioner's duty of confidentiality. This section requires that:

“The Commissioner and every person acting under the instructions of the Integrity Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this part”.

INVESTIGATION:

CONCERN 1: Section 6.1 / Municipal Code of Conduct / Harassment:

It is alleged by the Complainant that a Member of Council was engaged in a campaign of intimidation to avoid accountability and transparency regarding the procurement of winter sand. In support of this allegation, the Complainant has put forward various pieces of correspondence including correspondence from the Municipal Solicitor to the Complainant, and a copy of the correspondence forwarded by the Member of Council to the Premier of Ontario.

Upon a review of the correspondence provided, I cannot find that the Member of Council engaged in a campaign of intimidation to avoid accountability and transparency regarding the procurement of winter sand.

In discussing this matter with several witnesses, it would appear that the decision to produce winter sand was arrived at in or about 2016. As a result of the Municipality owning or having access to several aggregate sites the decision of the Municipality to produce its own winter sand was means of having a sufficient quantity of winter sand on hand without being subject to the variables of the open market.

Furthermore, it is the writer's understanding that the Municipality employs various individuals who have experience in the production of winter sand which served to re-enforce the goal of the Municipality being self sufficient with respect to the supply of winter sand.

It was on this basis that the Complainant was advised that no contracts for winter sand would be needed.

In any event, the actions or correspondence forwarded by Municipal senior staff or the Municipal Solicitor does not fall within the jurisdiction of an Integrity Commission to consider or investigate when dealing with alleged contraventions of a Municipal Code of Conduct. The allegations that Municipal staff had engaged in activities such as trespass to property, or threatening the arrest of the Complainant are not those of Municipal Council or its members.

The Municipal Code of Conduct pertains only to elected members of Municipal Council, not Municipal staff.

CONCERN 2: Section 6.3(a) / Municipal Code of Conduct / Unethical Conduct:

It is the allegation of the Complainant that the Members of Council, if not the entire Municipal Council, acted in an unethical manner by allowing untested winter sand to be used on public highways within the jurisdiction of the Municipality of Hastings Highlands.

In speaking with the Operation Manager for the Municipality, the information provided was that all winter sand used and applied to public highways by the Municipality is of sufficient quality to meet both Provincial and Municipal standards.

It is the writer's further understanding, that since the production of winter sand by the Municipality, in or about 2016, no other individual, other than the Complainant, has raised concerns about the quality of winter sand being applied to public highways by the Municipality.

With respect to the allegation that a misrepresentation or false statement with respect to stock piles of winter sand had been provided by a Member of Council, this too was addressed by several of the witnesses interviewed in this matter.

It was the evidence provided that at all times sufficient stock piles of winter sand remained on hand with the Municipality commencing as of February, 2016, to current date.

With respect to this particular issue, it is unknown how the complainant would be aware of various stock piles on hand by the Municipality, or the ability of the Municipality to obtain winter sand if it was necessary. The Complainant references a FOI request, 2019-001, as the basis for the claim of misrepresentation. However, it was not the Member of Council who responded to the FOI request, but rather the 'head' of the Municipality as provided for by the provisions of the *Municipal Freedom of Information and Privacy Act*, R.S.O 1990, Chapter M.56.

As indicated earlier, it is not the jurisdiction of the Integrity Commissioner to inquire into the procurement policies of a Municipal Corporation when dealing with issues such as procurement of material, such as winter sand. In any event, the alleged statements of February 2, 2020 during a public budget meeting are attributed to the CAO, not a Member of Council.

As previously stated, the statements of a Municipal staff member is not subject to the Municipal code of conduct.

Furthermore, the issue as to whether a Municipality self produces a required material or seeks to obtain same through a tender process is a decision which rests solely with the Municipal Council of a Municipality.

In the absence of any evidence to the contrary, the decision by Municipal Council when securing necessary material, such as winter sand, must be seen as being the sole responsibility of Municipal Council.

With respect to the allegation that false statements were provided to the Complainant with respect to the amount of winter sand stock piled by the Municipality, I find that there is no evidence to refute the information provided by members of Municipal staff with regard to this particular issue.

Given the fact that the Municipality was self producing winter sand as of February, 2016, there would be no apparent reason to mislead any member of the public with respect to the available supply of winter sand, particularly when such statement could pertain to public safety.

A further allegation of the Complainant is that a member of Council, if not the entire Municipal Council continued to act unethically by allowing for the use of untested winter sand that contained dangerously oversized stones to be used instead of provincially compliant winter sand.

The Complainant raises the concern that the use of such material is a hazard to all members of the travelling public when making use of public highways under the jurisdiction of the Municipality of Hasting Highlands.

As noted above, I am advised by Municipal staff that the winter sand produced by the Municipality was safe and that there has been no complaint by any member of the public with respect to the winter maintenance of public highways, other than that raised by the Complainant.

Finally, if there was a concern with respect to the quality or safety of winter sand being produced and applied to public highways by the Municipality, I would have thought that this would have been an issue for the Municipality and its insurers given the liability which exists for improper maintenance of highways pursuant to the provisions of the *Municipal Act, 2001*.

CONCERN 3: Section 6.3(b) / Municipal Code of Conduct / Perform Duties with Integrity, Accountability and Transparency:

It is the allegation of the Complainant that Members of Council refused to provide the Complainant with the opportunity to address Council as a whole with respect to the issue of winter sand, or to respond to correspondence sent by the Complainant.

It is alleged by the Complainant that having been denied delegation before Council to discuss the issue of winter sand and procurement, Council failed to act in a manner consistent with Section 6.3(b) of the Municipal Code of Conduct.

Furthermore, the Complainant takes issue with respect to a statement by the Member of Council that the production of sand was "economically advantageous".

With respect to the first part of this particular allegation, the decision to allow a member of the public to make delegation to a Municipal Council is that of the Council. If it is the decision of the Council that the delegation is not necessary, and therefore will not be received, that is the purgative of Municipal Council. Such decision is then conveyed through senior staff either through the Chief Administrative Officer or the Clerk.

Simply put, a Municipal Council has the ability to set its own agenda, and to receive information and/or delegations from members of the public which it deems necessary and in the public interest.

In the case at hand, it is the writer's understanding that both Municipal Council and Municipal Staff were aware of the information which was to be provided by the Complainant and deemed it not necessary to be the subject of a delegation.

The second part of this particular allegation pertains to statements attributed to either the Chief Administrative Officer or the Operations Manager.

The Municipal Code of Conduct pertains only to Members of Municipal Council, and not to senior staff. Accordingly, I have no jurisdiction to make any ruling as it relates to this particular part of the allegation that a contravention of Section 6.3(b) has been breached.

It is further alleged that correspondence received by the Complainant from the Municipal solicitors was an attempt to avoid accountability with respect to the quality and/or quantity of winter sand being produced by the Municipality.

As to providing a response to the Complainant, correspondence was provided to the Complainant by the Municipal Solicitors on behalf of the Municipality and therefore on behalf of the Members of Council.

CONCERN 4: Section 6.3(d) / Municipal Code of Conduct / Open Mindedness and Transparency:

With this particular issue, it is the allegation of the Complainant that the Member of Council failed to reply to a “generous offer to supply winter sand in 2020”.

As previously stated, the decision of a Member Council to obtain materials necessary for its operations is the decision of Council. As such, Council has the right to decline the offer put forward by the Complainant.

In the case at hand, it is the uncontroverted evidence that Municipality of Hastings Highlands has been producing its own winter sand since 2016. However, should the Municipality deem it necessary to obtain winter sand from any other source, it is expected that the Municipality would adhere to its procurement policies and by-laws, thereby providing for an open and transparent process to any buyer who wished to participate in this tender process for the supply of winter sand.

It is the further position of the Complainant that the Member of Council has not offered a reason for the self production of sand, or expressed any real advantage to the tax payers. With respect to this particular allegation, it would appear that the advantages are obvious given the resources available to this particular Municipality to create and apply winter sand rather than purchasing such a commodity on the open market.

With respect to the suggestion that the Member of Council has in turn attempted to intimidate the Complainant by threatening arrest, denying access to Municipal services, or banning the Complainant from participating in any future contract, this allegation is not borne out by evidence provided in this matter. As a self-producer of winter sand, the Municipality would not need to secure winter sand from a third party source.

However, if the Municipality ever encountered the need to purchase winter sand from an outside source, it is expected that the Municipality would adhere to its Procurement By-laws or Policies.

Failure to do so would be contrary to the provisions of the *Municipal Act, 2001*, and not necessarily the Municipal Code of Conduct.

ANALYSIS:

When making decisions on acceptable conduct, it is necessary to keep in mind that Members of Council are required to comply with the Code of Conduct adopted by the Municipality. These rules provide Council with a reference guide and a supplement to the legislative parameters within which they must operate. When evaluating the integrity and ethical conduct of a Member of Council, my role is to apply the rules of the Code to the facts gathered throughout the investigation and make a determination as to whether there has been a breach of the Code of Conduct.

The Code of Conduct passed by the Municipality of Hastings Highlands sets out in its preamble that elected officials of the Municipality have recognized their obligation to not only obey the law but to go beyond the minimum standards of behaviour and act in a manner that is of the highest ideals so that their conduct will bear the closest public scrutiny.

Furthermore, to be a member of Municipal Council is a position of honour and privilege. Accordingly, all members are obliged to comport themselves in such a way that brings respect and honour to both the office and the Municipality. In doing so, Members of Council must discharge their duties in a manner that recognizes a fundamental commitment to the wellbeing of the community as a whole and have high regard for the integrity and presence of a corporation. Any behaviour which falls short of that obligation would need to be the subject of sanction.

FINDING:

Upon a careful review of the evidence provided in this matter by all parties interviewed, and based on the documentation provided, I cannot find that there has been any breach of the Municipal Code of Conduct as alleged by the Complainant.

In reviewing this matter, it would appear that the decision of the Municipality to produce its own winter sand based on resources available to the Municipality.

In doing so, the Municipality has become self sufficient with respect to this particular issue thereby having no need to go to the open market for the purchase of winter sand.

The decision by this particular Municipality to "self produce" winter sand resulted in allegations by the Complainant that the winter sand being produced by the Municipality was unsafe in nature, and therefore hazardous to members of the travelling public. This in turn has led to correspondence being exchanged between members of Council, senior staff and the Complainant.

As stated, any statements or correspondence delivered, or actions carried out by Municipal staff are not the subject of a Municipal code of conduct as provided for by the provisions of the *Municipal Act, 2001*.

As set out above, there has been no evidence that there has been any complaint received by any other individual, other than the Complainant with respect to the quality of winter sand being used by the Municipality.

With respect to the decision of the Municipality to produce its own winter sand, which formed the subject of a complaint is without merit. As indicated, how a Municipality chooses to obtain the necessary materials for its operation is the decision of the Municipality and its Municipal Council. So long as materials are obtained in accordance with the Municipality's own procurement by-laws and policies, it cannot be said that the Municipality is acting in an improper manner.

Based on the writer's investigation, allegations of unsafe material or misrepresentation as to stock pile of winter sand are unfounded and therefore must be dismissed.

Finally, with respect to the acrimony which seems to have developed between the Complainant and Members of Council and Municipal senior staff, this would appear to be the result of the insistence of the Complainant in pursuing unfounded allegations of public safety and concerns involving stock piles of winter sand.

In summary, the allegations raised by the Complainant in this matter fail to meet the threshold of demonstrating the type of behaviour which is in contravention of the Municipal Code of Conduct for Hasting Highlands, and therefore the subject of censure or sanction.

Accordingly, it is the decision of the Office of the Integrity Commissioner to dismiss the complaint put forward in this matter as against the Members of Council for those reasons as set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY M. JOHN EWART ON JANUARY 29, 2021.



M. JOHN EWART, B.A., M.A. L.L.B., C.S.