



**City of Kingston
Report to Council
Report Number 19-121**

To: Mayor and Members of Council
From: John Bolognone, City Clerk
Resource: Same
Date of Meeting: April 16, 2019
Subject: Transmittal of Report from Principles Integrity – Complaint Filed
Against a Member of Council

Executive Summary:

On September 19, 2017 Council appointed Principles Integrity as the City's Integrity Commissioner for a period of four years commencing November 1, 2017. The contract with Principles Integrity requires the Integrity Commissioner to be impartial and neutral and perform all duties skillfully, competently, independently, and in accordance with all applicable law. One of the many roles of the Integrity Commissioner is to conduct enquiries in response to a complaint regarding whether a Member has contravened the Code of Conduct, City policies, procedures, protocols and rules relating to ethical conduct of Members or the Municipal Conflict of Interest Act. The Integrity Commissioner is accountable to and reports directly to Council.

Attached hereto as Exhibit A is the "Councillor Oosterhof Conflict of Interest and Code of Conduct Recommendation Report dated April 6, 2019.

Recommendation:

That Council receive the "Councillor Oosterhof Conflict of Interest and Code of Conduct Recommendation Report, submitted by Principles Integrity, dated April 6, 2019 attached as Exhibit "A" to Council Report Number 19-121.

Authorizing Signatures:

ORIGINAL SIGNED BY CITY CLERK

John Bolognone, City Clerk

ORIGINAL SIGNED BY CHIEF ADMINISTRATIVE OFFICER

**Lanie Hurdle, Acting Chief Administrative
Officer**

Consultation with the following Members of the Corporate Management Team:

Gary Dyke, Commissioner, Corporate & Emergency Services	Not Required
Peter Huigenbos, Acting Commissioner, Community Services	Not required
Jim Keech, President & CEO, Utilities Kingston	Not required
Desirée Kennedy, Chief Financial Officer & City Treasurer	Not required

Options/Discussion:**Purpose**

The purpose of this report is to transmit to Council the “Integrity Commissioner’s “Councillor Oosterhof Conflict of Interest and Code of Conduct Recommendation Report, submitted by Principles Integrity, dated April 6, 2019.

Background / Discussion

On December 5, 2018, a complaint was filed in the City Clerk’s Department against Councillor Gary Oosterhof regarding his actions and activities with respect to the proposed development at the corner of Unity Road and Battersea Road. The complaint was subsequently forwarded to Principles Integrity for initial classification to determine if the matter was, on its face, a complaint with respect to non-compliance with the Code of Conduct.

The Integrity Commissioner is entitled to establish such procedures, practices, protocols and policies to support the performance of the Integrity Commissioner’s duties in a manner which best serve the public interest.

On April 6, 2019, the Recommendation Report was forwarded by Principles Integrity to the City Clerk with direction that it placed on the next regular Council agenda for consideration. Council must consider the report and may accept or refuse the recommendations set out in the report and accept or vary sanctions contained in the report.

A copy of the Recommendation Report submitted by Principles Integrity is attached as Exhibit A to Report Number 19-121.

Existing Policy/By-Law:

Municipal Act, 2001, as amended – Section 233.3 (appointment of Integrity Commissioner)

Notice Provisions:

Not Applicable

Accessibility Considerations:

Not Applicable

Financial Considerations:

There are no Financial Considerations with this report. Principles Integrity is under contract with the City until October 31, 2021.

Contacts:

John Bolognone, City Clerk, 613-546-4291, extension 1247

Other City of Kingston Staff Consulted:

None

Exhibits Attached:

Exhibit A - "Councillor Oosterhof Conflict of Interest and Code of Conduct Recommendation Report, submitted by Principles Integrity, dated April 6, 2019"

Principles
Integrity

City of Kingston

Councillor Oosterhof Conflict of Interest and Code of Conduct

Recommendation Report¹

April 6, 2019

Introductory Comments

- [1] Principles *Integrity* was appointed the Integrity Commissioner for the City of Kingston effective November 1, 2017 by the adoption of Report Number 17-266 on September 19, 2017. We are also privileged to serve as Integrity Commissioner for a number of other Ontario municipalities. The operating philosophy which guides us in our work with all of our client municipalities is this:

The perception that a community's elected representatives are operating with integrity is the glue which sustains local democracy. We live in a time when citizens are skeptical of their elected representatives at all levels. The overarching objective in appointing an integrity commissioner is to ensure the existence of robust and effective policies, procedures, and mechanisms that enhance the citizen's perception that their Council (and local boards) meet established ethical standards and where they do not, there exists a review mechanism that serves the public interest.

- [2] The City of Kingston has as part of its ethical framework a Code of Conduct which is the policy touchstone underlying the assessments conducted in this report. It represents the standard of conduct against which all members of Council are to be measured when there is an allegation of breach of the ethical responsibilities established under the Code of Conduct. The review mechanism contemplated by the Code, one which is required in all Ontario municipalities, is an inquiry/complaints process administered by an integrity commissioner.
- [3] Members of City Council are also governed by the provisions of the *Municipal Conflict of Interest Act*. Both the *Municipal Conflict of Interest Act* and the Code of Conduct are relevant to and form the framework for the matters reviewed in this report.

¹ Revised and re-issued April 6, 2019.

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- [4] Integrity commissioners carry out a range of functions for municipalities (and their local boards). They assist in the development of the ethical framework, for example by suggesting content or commentary for codes of conduct. They conduct education and training for members of council and outreach for members of the community. One of the most important functions is the provision of advice and guidance to members to help sort out ethical grey areas or to confirm activities that support compliance. And finally, but not principally, they investigate allegations that a person has fallen short of compliance with the municipality's ethical framework and where appropriate they submit public reports on their findings, and make recommendations, including recommending sanctions, that council for the municipality may consider imposing in giving consideration to that report.
- [5] It is important that this broad range of functions be mentioned at the outset of this investigation report. Our goal, as stated in our operating philosophy, is to help members of the City of Kingston community, indeed the broader municipal sector and the public, to appreciate that elected and appointed representatives generally carry out their functions with integrity. In cases where they do not, there is a proper process in place to fairly assess the facts and, if necessary, recommend appropriate sanctions. In every case, including this one, the highest objective is to make recommendations that serve the public interest, if there are recommendations to be made.
- [6] Our role differs from other 'adjudicators' whose responsibilities generally focus, to state it colloquially, on making findings of fact and fault. While that is a necessary component when allegations are made, it is not the only component.
- [7] Our operating philosophy dictates the format of this report. The tenets of procedural fairness require us to provide reasons for our conclusions and recommendations, and we have done that. Procedural fairness also requires us to conduct a process where parties can participate in the review and resolution of a complaint.
- [8] In this regard, we have assessed the information fairly, in an independent and neutral manner, and have provided an opportunity to both respondents named in this Report to respond the allegations, and to review and provide comment on the preliminary findings.

The Complaint

- [9] On December 5, 2018, a complaint was filed regarding the actions and activities of Councillor Gary Oosterhof in regards to the proposed development at the corner of

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Unity Road and Battersea Road in the City of Kingston, The Unity Inn and Spa (referred to herein as “The Project”).

[10] The Complaint alleges that the Councillor violated several provisions of the Code of Conduct including breaching the rules pertaining to conflict of interest. The specifics of the allegations are set out below.

1. The Councillor is in a conflict of interest, given that the owner of 2359 Battersea Road, abutting the Project, and through which The Project is seeking to obtain a Right-of-Way, is a long-term employee and potentially a partner in the Councillor’s company, Oosterhof Electric.
2. The Councillor organized a private meeting with the Chair of the Glenburnie Residents Association which was recently formed to oppose The Project. No other residents in the area, who may be in support of The Project, were invited. BPE, the owner and proponent of The Project, has had 3 public meetings and each time has paid to rent the local church hall for the space. The Councillor booked the City of Kingston Firehall and no money was paid for the space although this was not a public meeting.
3. The Councillor has repeatedly made false statements in public meetings and in e-mails and has fueled animosity and hatred. He has stated in the meetings or by e-mail, before having any results of the studies, such as:
 - a. " There is no way you can get water here, no way"
 - b. "they won't bring water out here for another 50 years, not a chance, they (the city) don' t care about us out here"
 - c. "I don' t see how you can get a project like this approved"
 - d. "I will never support this project "
 - e. "If this site does not have municipal water I cannot support this project"
 - f. "I would be surprised if this ever gets rezoned"
 - g. "Your 'dream' should not be our nightmare."
4. The Councillor attended closed door meetings with members of the Glenburnie Association to have The Project shut down, evidence of which appears in the meeting minutes.
5. The Councillor has attempted to order staff to shut The Project down. He wanted all legal activity on site shut down. He tried pressuring City staff to take Illegal action by shutting down a legal site.

Summary of Findings

[11] We find that the Councillor has not contravened the Code of Conduct, nor does dealing with this matter cause him to be in a conflict of interest.

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[12] We find that although the Councillor was at times intemperate in his comments regarding The Project, it must be recognized that such impassioned speeches made in the political realm may occasionally give rise to statements that overstep the bounds of diplomacy and good statesmanship, without crossing the threshold of bad conduct. We find that the Councillor's words, taken in context, do not support a finding of either discrimination or of bias against The Project.

[13] We find that the Councillor did not attempt to improperly or unduly pressure City staff in regard to shutting down legal activities at The Project.

Process Followed for the Investigation

[14] In conducting this investigation, Principles Integrity applied the principles of procedural fairness and was guided by the complaint process set out under the Kingston Code of Conduct.

[15] This fair and balanced process includes the following elements:

- Reviewing the Complaint to determine whether it is within scope and jurisdiction and in the public interest to pursue, including giving consideration to whether the Complaint should be restated or narrowed, where this better reflects the public interest
- Notifying the Respondent Councillor of the Complaint and seeking his response
- Reviewing the Kingston Code of Conduct
- Reviewing meeting minutes, websites and other documentation
- Interviewing relevant witnesses including relevant City staff²
- The Respondent being given an opportunity to review and provide responses to the draft findings of the Integrity Commissioner.

Background

[16] The Complainant is proposing the development of an Inn and Spa, "The Project", on 34 acres of land located at the corner of Unity Road and Battersea Road in the City of Kingston.

[17] The Project will result in an inn with 27 rooms, a restaurant, a year-round indoor/outdoor spa, and 40 single cabins surrounding the main building, and is proposed to rely on a full waste water treatment and recycling facility.

² This Report has been revised to correct an inadvertent statement in the original version indicating that the complainant had been interviewed as part of the investigation, which was not the case. Given that the originating complaint documentation consisted of a detailed 24-page submission which described the ambit and factual basis of the issues complained of, it was not necessary to conduct further inquiry to clarify the scope or evidentiary background to the complaint.

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- [18] The Project is being processed by the City of Kingston, including submission of tests and studies, and will ultimately require planning approvals by the City.
- [19] The Project abuts 2359 Battersea Road, over which the land on which The Project will be located has a Right-of-Way and which the proponent of The Project intends to open and utilize.
- [20] Councillor Oosterhof owns and operates an electrical company, Oosterhof Electric.
- [21] The owner of 2359 Battersea Road is a long-term employee of Oosterhof Electric.
- [22] The Councillor has been involved with the community over the past several months in seeking an understanding of the potential impacts of the proposal, and has attended meetings both public and private with various members of the community.
- [23] The Councillor has also been in communication with the Complainant over the past several months, encouraging him as proponent of The Project to address the various concerns raised by the community such as water issues, noise and traffic.
- [24] Through the summer and fall of 2018, a number of public meetings were held and input was sought by the Complainant, who is the developer of the Project.
- [25] In the course of this consultation, the Councillor continued to engage with the developer and to advocate for his constituents for solutions to issues raised by the community.
- [26] As the Complainant acknowledges in his Complaint, Councillor Oosterhof attended all three public meetings (held in the summer) and through neighbourhood feedback, the proposal changed greatly.
- [27] The Councillor also met with constituents, individually and in groups, concerned with the development. We note that it is part of his role as an elected official to meet with various constituents.
- [28] With respect to whether the Councillor may have meeting facilities made available to him for the purposes of meetings with constituents, this is a matter within the purview of the City administration.
- [29] While it is evident that the Councillor engaged in some strong, impassioned comments, which were quoted in this Complaint, it is also apparent that he was open to engaging with and actively participating with the developer and the public, in an effort to respond to constituents' concerns, so that these could be addressed and resolved.

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[30] Following a meeting held in early July 2018 to provide the community with a preliminary sense of the proposed project, the following exchange of emails between the developer and the Councillor reflected an appreciation of concerns needing to be addressed, and a general positive relationship between the developer and the Councillor:

July 3, 2018

8:57 pm:

Hey Gary, any thoughts or advice? I appreciate the help!

9:07 pm:

Hello XX. Well...that was actually a good meeting. I have to give it some thought yet but these points come to mind...

- *Preserve the peace and quiet of the area.*
- *Water issues are paramount...educating those concerned with the water engineering. The existing wells should be limited in use perhaps..main house only??*
- *Storm water management...*
- *Traffic study to determine if lights may be require at intersection...*
- *The closest 3 neighbours concerns are the most apparent...*
- *What else???*
- *Overall I think you scored very well.*

10:16 pm:

I agree with you. I know it's a lot for people to take in for the first time.

I'm hoping some of the answers helped. ...

...

I know XX and his wife are nervous. I'm hoping they stay engaged so I can show them where things will be located and they see that the cabins will be 150 to 200' from them through wood and brush.

...

I really appreciate the time. I know this is a long process. I hope I can provide the info that's needed to move this ahead and that it makes sense for the community.

...

Overall, Very positive first meeting. Please let me know if there's anything you think I should do to help.

Again, thanks.

[31] Behind the scenes, by August 2018, the Councillor – responding to complaints from residents - began urging the developer not to proceed with rock drilling near Glenburnie Public School to coincide with the return of classes on early September, and with driveway excavation work for entrance on to Unity Road in advance of

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approvals – in a sense, asking the developer not to get ahead of the process. The Councillor by email to the developer of August 31, 2019, urged proper review before moving ahead:

[In My Opinion] it is time to slow things down if not stop all together until you have followed all the policies and procedures that are required to actually accomplish an 'Inn and Spa' and related activities. Doing so would show that our community matters.

Glenburnie is a special community and should not be underestimated. You say you are building a place of tranquility but it should not come at the price of our peace. Your 'dream' should not be our nightmare.

The right way to go here is to work with the City of Kingston Planning Department and Site Plan Control. They have yet to see the plan and lead the public process and without it this whole development feels like a runaway train.

I have been asked to take the lead here which I cannot do but I will do my best to represent my community at this time and place.

[32] By email of September 20, 2018, the Councillor urged staff in the Planning Department to issue a short stop work order. Under the heading "Formal request to temporary stop work order", he outlined what he perceived as potential risks to the City if driveway excavation work was allowed to continue in advance of planning approvals for the proposed development.

A short 'stop work order' is requested in order that the above reasons can be researched anew and assure that all angles and legalities have been considered.

[33] A response from staff the evening of September 20, 2018 from the Chief Planner and Director of Planning, Building, Licensing Services provided a detailed explanation as to why no stop work order could not be issued at the time, and outlining the Planning process. No further attempts to pursue the issue have been made by the Councillor.

[34] The residents of the area formed an association, the Glenburnie Residents Association. On October 10, 2018 the first meeting of that Association was held at the Glenburnie Fire Hall. Among attendees was the owner of the abutting property, which is subject to a Right-of-Way. The minutes of the meeting reflect that the issue of the Right-of-Way is among the items discussed at that meeting, and reflect as follows:

Stop the Right of Way. [after explaining the status and significance of the right of way] Our first expenditure will be to assist the owners of the property

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that the proposed right of way would go through. This family has been encouraged to engage a lawyer to assist them in protecting their property. The Association agreed to assist with payment of legal costs. A recommendation of a lawyer with experience in real estate law was provided to the family.”

[35] The minutes of the October 10, 2018 meeting also indicate “A request to make a presentation at the next Rural Advisory Committee has been made through Counselor Oosterhof”.

[36] The Glenburnie Residents Association, shortly thereafter, created a website, to post information and updates for the community. On that website, in relation to the Right-of-Way issue, the following information is provided:

The owners of the property have now consulted with two lawyers with respect to the right of way that crosses through their property. The unfortunate answer is that there is no legal recourse to deny its use. Where there may be an opportunity to influence the use of the right of way is the entrance to it off of Battersea Rd. Entrances are the responsibility of the Engineering Department, not the Planning Department. The property owners have been in contact with the Engineering Department to express their concerns.

[37] The website update reflects the following with respect to the Rural Advisory Committee:

Our Councilor, Gary Oosterhof, indicated to me that the RAC wasn't interested in hearing from the Association about the development at 2285 Battersea Rd until the zoning/official amendment had been submitted. In my view, that is too late. I wrote a letter to the RAC on your behalf expressing our concerns with the work done to date.

[38] The letter dated November 2, 2018 to the Rural Advisory Committee expressing concerns from the Glenburnie Residents' Association states, in part:

[the developer] has held three information sessions about its proposed Unity Inn and Spa project, so we have a fair understanding of what the development is about. We recognize that specific concerns regarding the details of this development are best addressed through the City's Development Review Process once that process has been initiated. Rest assured that we will do so vigorously.

Our immediate concern is that we feel that the City's Development Review Process is being deliberately circumvented....When we have raised our

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concerns with the City Planning Department, the answer that we received is that the ongoing work represents “permitted” activities on the owner’s property without City approvals....

Our councilor, Gary Oosterhof has been very supportive; however, he is but one voice. You, the members of the Rural Advisory Committee, are also collectively one of our voices to City Staff and Council. The message that we would like for you to consider, then convey on our behalf, is that commercial development on agricultural land should not be permitted without following the established procedures to seek rezoning, Official Plan amendment if required, and then following Development Review Process.

[39] On November 30, 2018 at 2:31 pm, the developer broadly distributed to his staff and others on his ‘Team’, the brochure which would be going out to the community the following week, in advance of the December 11, 2018 Public Meeting.

[40] Immediately thereafter, on November 30, 2018, at 2:48 pm, the developer sent an email to the Mayor and to another Councillor, copying Councillor Oosterhof, raising for the first time a concern about Councillor Oosterhof having conflict of interest:

I had a meeting with C. Oosterhof (copied) this week. .

I have also recently learnt from a neighbour that C. Oosterhof may be in a conflict as his lead employee owns and lives in one of the abutting homes of our project...a property that we also have a right-of-way over and will be using. They told me, they believe C. Oosterhof would not be allowed to discuss this project or vote on it. It was my understand that the person who advised me of this was looking to notify the City of Kingston Ethics Commissioner of this potential conflict. I’m not sure if they have or if they will be submitting the request or if there is any validity to it but I wanted both of you and C. Oosterhof to be aware.

Gary, do you know if there is a conflict? I’m not familiar with any of the rules and regulations and rather deal with this now than later.

[41] By reply email sent November 30, 2018 at 5:38 pm, Councillor Oosterhof responded:

“I am confident that is not a conflict at all. We can look into this.”

[42] On November 30, 2018 at 5:54 pm, the developer responded:

“Yeah, I know nothing about this stuff. This is what I was told and said it was up to him to look into.”

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[43] On December 2, 2018 the developer sent an email marked ***Confidential*** to Councillor Oosterhof. He copied it to the Mayor and another Councillor, the CAO, and the Chief Planner. In it, he states: "I have spent some time talking to my legal counsel and we have reviewed [the Municipal Act, the Code of Conduct] ... and ... concluded that Councillor Oosterhof has a conflict of interest, is biased, and must cease from any further participation regarding The Project.

[44] On December 3, 2018 at 9:01 am Councillor Oosterhof forwarded the developer's email to Principles *Integrity* asking for advice.

[45] On December 3, 2018 at 2:50 pm Councillor Oosterhof wrote to the developer:

"I am seeking advice on this issue from the Integrity Commissioner assigned to City Councillors. I know we all want to do what is best. If it is better that I remove myself form this file and am advised to do so before it gets to Planning so be it."

[46] On December 3, 2018 at 4:54 pm the developer replied to Councillor Oosterhof as follows:

I do think it is in everyone's best interest that the integrity Commissioner get involved. It is also critical that this is a fully transparent process.

This is not personal. These are my views of the situation. I don't hold grudges, I am always fair, there has to be a win win and I genuinely want people to grow and become stronger, in this situation. I have had enough bullying.

Please take the following as constructive criticism:

I think you have been a weak councillor so far. You need to be stronger. You heard one side and chose a side based on emotion and no rational facts....

I have public meetings to get the community involved, I make massive change to our business plan based on comments received, I seek out the best technologies that will help everyone in the community.

You have continually stoked the fires of hate on the project. You have been so vocal that you could not support our project based on water, without even understanding the project, the water need, the recycling treatment plant, the ponds, the cisterns...my door has been open since the start by every email chain is me chasing you, me trying to educate you hoping you will learn. No more.

Attached you will find my complaints. I will be signing a sworn affidavit tomorrow.

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Be a better councillor. Be a stronger leader. Educate yourself of the facts.

[47] On December 5, 2018, the affidavit of Complaint was sworn by the developer, the allegation being that Councillor Oosterhof had violated the Code of Conduct, not only with respect to conflict of interest, but with respect to several other provision. The Complaint includes a 24-page chronology of facts in support of the allegations, dated December 3, 2018.

Application of Code of Conduct and *Municipal Conflict of Interest Act* to the Facts:

Conflict of Interest

[48] The Municipal Conflict of Interest Act ('MCIA') applies with respect to the pecuniary interests (direct, indirect and deemed) held by Members of Council.

[49] The MCIA recognizes an indirect pecuniary interest in section 2 as follows:

2. Indirect pecuniary interest

For the purposes of this Act, a member has an indirect pecuniary interest in any matter in which the council ... is concerned, if,

(b) the member is...in the employment of a person or body that has a pecuniary interest in the matter.

[50] The rationale for this provision, put simply, is that a member who is considering and deciding on his employer's matter may feel conflicted, given that he would not want to make any decision unfavourable to his employer and potentially negatively impact his employment situation.

[51] This provision of the MCIA does not contemplate any conflict of interest where the member, as a member of council, may be considering or deciding on a matter that impacts one of his employees.

[52] The relevant provision of the City of Kingston's Code of Conduct, is as follows:

12.1 Members shall take appropriate steps to avoid conflicts of interest, both apparent and real. Proactive steps to mitigate conflict of interest is important to maintaining public confidence in elected officials. Members are encouraged to seek guidance form the Integrity Commissioner on becoming aware that they may have a conflict between their responsibilities to the public as a Member of Council and any other interest, pecuniary or non-pecuniary.

[53] The practical difference between the MCIA and the Code of Conduct is, in a sense, two-fold:

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- 1) The MICA deals only with financial interests, whether direct, indirect or deemed.
- 2) The Code deals with the appearance of conflict, arising from close or special relationships, which might lend the appearance of bias.

[54] The test for determining an appearance of a conflict of interest is an objective test:

[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.**” [emphasis added]

(Stevens v. Canada (Attorney General) 2004 FC 1746)

[55] In the circumstances of this Complaint, it is alleged that the Councillor is in a conflict of interest because the owner of 2359 Battersea Road, which abuts The Project and through which The Project is seeking to obtain a Right-of-Way, is a long-term employee and potentially a partner in the Councillor’s company, Oosterhof Electric.

[56] The proper interpretation of the relevant provision in section 2 of the MICA is that the member of council has an indirect interest where a matter before council involves the member of council’s employer, not the member’s employee.

[57] Any matters for consideration before Council having to do with the property owned an employee of Oosterhof Electric, the member’s company, would not be recognized as interests of the member under s.2 of the MICA.

[58] Although the owner of 2359 Battersea Road is an employee of Oosterhof Electric, he is one of fifteen employees of that company, and is not a partner, as suggested by the Complainant.

[59] While that employee may be a long-term employee, the relationship is one of employment. There is no partnership, nor any other particularly close friendship or other special relationship between the employee and the Councillor.

[60] We see no reasonable basis on which the well-informed person would form the belief that a conflict of interest exists for the Councillor, in dealing with The Project, merely because an employee of the Councillor’s company owns the abutting property.

[61] The fact that the Councillor’s employee may or may not oppose The Project, or whether that employee disagrees with a Right-of-Way across his land, does not cause the Councillor to be ‘in a conflict of interest’ if a conflict of interest does not reasonably exist on the facts of the situation.

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Meetings Held At City Facilities (Firehall) or Held Without Inviting the Public

[62] The Councillor met with constituents, individually and in groups, concerned with the development. We note that it is part of his role as an elected official to meet with various constituents.

[63] With respect to whether the Councillor may have had meeting facilities made available to him for the purposes of meetings with constituents, this is a matter within the purview of the City administration.

[64] The relevant provision of the City of Kingston's Code of Conduct, is as follows:

- 7.2 By virtue of their office or appointment, members must not use or permit the use of City land, facilities, equipment...for activities other than the business of the City.

[65] Whether the Councillor attended meetings with members of the Glenburnie Association which may not have been 'public' meetings – whether they were opposed to or supportive of The Project – is not a violation of the Code of Conduct. As noted above, elected officials are called upon to meet with constituents and other persons for a variety of reasons, and the fact that such meetings may be 'closed door' meetings does not, in and of itself, represent any violation of the Code of Conduct.

Animosity, Hatred and Bias

[66] As noted above, over the course of the summer and fall, the Councillor engaged in at least three public meetings as well as meeting separately with individual residents regarding The Project. He also engaged in extensive communications with the developer and staff. In some of these communications the Councillor made strong, impassioned comments, which were quoted in this Complaint:

- a. " There is no way you can get water here, no way"
- b. "they won't bring water out here for another 50 years, not a chance, they (the city) don' t care about us out here"
- c. "I don' t see how you can get a project like this approved"
- d. "I will never support this project "
- e. "If this site does not have municipal water I cannot support this project"
- f. "I would be surprised if this ever gets rezoned"
- g. "Your 'dream' should not be our nightmare."

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- [67] Viewed in the context of the email exchanges, public meetings and concerns of area residents, the Councillor's comments reflect passion, colourful expression and hyperbole.
- [68] We do not find that the comments fueled animosity and hatred; rather, they reflected some general passions felt by those residents raising concerns regarding water, traffic and noise and opposing the development of the Project.
- [69] The comments generally express, although somewhat stridently, concerns raised by residents around issues relating to water and the lack of municipal water in the vicinity.
- [70] The comment in (d) "I will never support this project" was, indeed, intemperate and if taken at face value, articulates an intransigent position. However, comments such this must also be taken in context.
- [71] We find that although the Councillor was somewhat intemperate in his comments regarding The Project, it must be recognized that such impassioned speeches made in the political realm may occasionally give rise to statements that overstep the bounds of diplomacy and good statesmanship, without crossing the threshold of bad conduct.

The Concept of Bias:

- [72] The test for bias is whether as a member of Council, the member is completely incapable of being persuaded of a different point of view. The courts recognize that members of bodies popularly elected, such as municipal councils, are not expected to approach all matters with disinterest and strict impartiality. Members of public office often bring with them a predisposition towards the various issues upon which council must decide. In fact, these might well be the positions for which electors supported them.
- [73] The test for bias for members of municipal council requires establishing that there has been prejudgment to the extent that any representations to the contrary, or in support of an alternative view, are futile. The onus on establishing bias rests with the person alleging it. However, publicly articulating a definitive position on a matter before it has been fully debated may raise questions as to whether the member is capable of being persuaded.
- [74] In the circumstances of this situation, the allegation is that the comments expressed publicly by the member are of such a definitive nature that they reflect the views of a 'closed' mind, and that the member is so-biased against the development – as demonstrated in his statements – that he cannot fairly be allowed

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to participate in the decision-making process when the application comes before Council.

[75] As noted in communications throughout the summer and fall of 2018, the Councillor continually encouraged dialogue between the developer and the community; the Councillor attended numerous meetings; and ultimately the Councillor encouraged the developer to proceed through the City's Planning process.

[76] Rather than articulating a definitive position on the matter, we find that Councillor Oosterhof has strongly articulated – albeit somewhat intemperately – concerns as to obstacles facing The Project, which would need to be overcome in order to garner support.

[77] While we find the comments to be somewhat hyperbolic and intemperate, this is not entirely unusual in an animated community meeting about a contentious development. The comment: "I will never support this project", if made in isolation might raise questions around bias. However, we think it is reasonable to understand that comment in the context of the issues raised regarding the availability of municipal water. Taken in that context, the Councillor's comments are not evidence of bias, but rather the expression of intemperate and overly emphatic opposition to such a project in the face of the apparently insurmountable constraint posed by lack of municipal water.

[78] Taken in the context of an evolving and extremely contentious development application, we do not find the Councillor's words support a finding of either discrimination or of bias disqualifying the Councillor from participating in consideration of The Project.

[79] Clearly a municipal Councillor, expressing the views of his community residents in an over emphatic manner, cannot be said to be biased. Put another way, if in the future the community residents were to embrace development of the Project, there is little doubt that the Councillor would not be biased against it nor his mind so closed that he would be unable to be persuaded to support it. It is therefore, in our view, not a case of bias.

Pressuring Staff to Take Illegal Action

[80] The Complaint alleges that the Councillor overextended his power by pressuring City staff to take illegal action by shutting down a legal site.

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[81] On September 9, 2018, responding to a neighbour's concerns about the proposed development, and the excavation that was already underway³, the Councillor responded, copying staff:

At this time I respectfully request that no additional driveway permits be accepted until a traffic study has been completed.

...

We all understand that [the developer] is 'allowed' to complete the work that has been done. But that doesn't make it right and there is still a duty to protect the community from the negative impacts they have already incurred and will continue to compound.

[82] By email September 20, 2018, the Councillor urged staff in the Planning Dept to issue a short stop work order. Under the heading "Formal request to 'temporary stop work order'", he outlined what he perceived as potential risks to the City if driveway excavation work was allowed to continue in advance of planning approvals for the proposed development. The relevant portions of that correspondence are as follows:

[...] I have decided to formally request a stop work order on [The Project] for the work that is being done at Unity and Battersea Rd.

This request is made with the following rationale. I believe that a failure to do so could expose our City to possible risks. [the risks are then outlined in five paragraphs]

A short 'stop work order' is requested in order that the above reasons can be researched anew and assure that all angles and legalities have been considered.

The Glenburnie residents and all of Countryside deserve much better from his City. I will say again. Do not underestimate the ability of this community to effectively oppose this development and be successful.

...there is much to gain from slowing things down and having a sober second thought for all of us.

³ From the resident neighbour, September 7, 2018: ...Noise is currently an issue with the ongoing drilling of wells and the excavation of the site...There is a tremendous amount of excavation that has already taken place and is continuing. Apparently, with the rural designation, this is acceptable and [the developer] appears to be exploiting the current rural designation to lay the groundwork for this commercial development. ...In the interim, [the developer] continues to excavate, having turned the property into a major construction site. It is our view that [the developer] should be compelled to immediately engage in the Development Review Process before continuing further work. Much of the excavation work currently being done cannot easily be undone should the project not be approved.

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Thank you for considering this at this time.

[83] The relevant provision of the Code of Conduct provides as follows:

6.3 Members shall respect the role of staff in the administration of the business affairs of the City and in doing so comply with the City's Respect in the Workplace Policy. Members shall respect that:

...

(b) staff work within the administration of justice and Members must not make requests ...which may be construed as an attempt to influence the independent administration of justice and, therefore, Members shall not attempt to intimidate, threaten, or influence any staff member from carrying out that person's duties, including any duty to disclose improper activity;

[84] In a review of the exchange of correspondence between the Councillor and staff, it is evident that the Councillor was seeking that staff issue a stop work order to prevent the continued earthworks and excavation occurring at the property. The Councillor's request for staff to issue a stop work order does not amount to pressure. The staff response to the Councillor that same day reflects that staff did not see the request as 'pressure to take illegal action'. In fact, the staff response sets out a clear explanation as to why no stop order may issue at this time.

[85] The response back to the Councillor, the evening of September 20, 2018, provides a clear explanation as to staff's inability to issue a stop work order in the present circumstances. It goes on to outline the planning approval process required to be followed by the developer. We see no evidence of threats or intimidation brought to bear on staff by the Councillor.

[86] In our view, such a request to the Planning Dept. is not an attempt to intimidate, threaten or influence staff improperly in carrying out their responsibilities. It does certainly urge staff to consider whether all 'legalities have been considered'. This, in our view, is not be unusual or inappropriate in the context of the concerns raised regarding physical work occurring at the property in advance of approval of the development. This is the type of site work which can be expected to raise alarm bells in a community, and the Councillor was, in our view, bringing these concerns to the attention of staff.

[87] The fact that an elected official may specifically request a stop work order does not constitute pressure or improper influence. There is no evidence that the Councillor threatened staff or otherwise intimidated staff. We find that the Councillor's actions in this regard do not contravene the Code of Conduct.

Findings:

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[88] We find that there is no conflict of interest for the Councillor. The fact that the Councillor's company employs someone who may own the property abutting The Project, whether that employee opposes it or not, or disagrees with a Right-of-Way across his land, does not cause the Councillor to be 'in a conflict of interest' if a conflict of interest does not reasonably exist on the facts of the situation. We find that no conflict of interest arises for the Councillor on these facts.

[89] With respect to whether the Councillor may have had meeting facilities made available to him for the purposes of meetings with constituents, this is a matter within the purview of the City administration, and we do not find the Councillor has done anything inappropriate in this regard.

[90] We do not find that the Councillor's comments 'fueled animosity and hatred'. They may have reflected some of the passion – anger, fear or frustration - felt by some residents' concerns regarding water, traffic and noise. Taken in the context of a controversial development application, we do not find the Councillor's words support a finding of either discrimination or of bias amounting to disqualification of the Councillor from participating in consideration of The Project.

[91] Whether the Councillor attended meetings with members of the Glenburnie Association to which the public may not have been is not a violation of the Code of Conduct. As noted above, elected officials are called upon to meet with constituents and other persons for a variety of reasons, and the fact that such private meetings may be 'closed door' meetings does not, in and of itself, represent any violation of the Code of Conduct.

[92] The fact that an elected official may specifically request a stop work order does not constitute pressure or improper influence. There is no evidence that the Councillor threatened staff or otherwise intimidated staff. We find that the Councillor's actions in this regard do not contravene the Code of Conduct.

[93] In conclusion, we find that the Councillor has not violated any of the provisions of the Code of Conduct, nor of the Municipal Conflict of Interest Act.

Recommendations:

[1] We therefore recommend:

1. That Council receive this report for information, and that it be posted on the City of Kingston's web site for public access.

We wish to conclude by publicly thanking the parties and everyone else who was asked to participate in our investigation. We express genuine appreciation for the sharing of

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time, knowledge and opinions by everyone concerned. Our task would have been much more difficult had there been a reluctance to contribute.

We will be pleased to be in attendance when this report is considered to answer any questions you may have relating to its contents.