



**City of Kingston  
Report to Council  
Report Number 19-229**

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<b>To:</b>	<b>Mayor and Members of Council</b>
<b>From:</b>	<b>John Bolognone, City Clerk</b>
<b>Resource Staff:</b>	<b>Same</b>
<b>Date of Meeting:</b>	<b>August 13, 2019</b>
<b>Subject:</b>	<b>Transmittal of Report from Principles Integrity – Complaint Filed Against a Member of Council</b>

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**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 laws. 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 Neill Conflict of Interest and Code of Conduct Recommendation Report", dated August 2, 2019.

**Recommendation:**

**That** Council receive the "Councillor Neill Conflict of Interest and Code of Conduct Recommendation Report", submitted by Principles Integrity, dated August 2, 2019 attached as Exhibit "A" to Report Number 19-229.

August 13, 2019

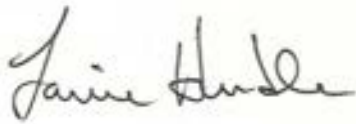
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**Authorizing Signatures:**



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**John Bolognone, City Clerk**



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**Lanie Hurdle, Interim Chief  
Administrative Officer**

**Consultation with the following Members of the Corporate Management Team:**

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
Sheila Kidd, Commissioner, Transportation & Public Works	Not required
Deanne Roberge, Acting Commissioner, Corporate Services	Not required

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**Options/Discussion:****Purpose**

The purpose of this report is to transmit to Council the Integrity Commissioner's "Councillor Neill Conflict of Interest and Code of Conduct Recommendation Report", submitted by Principles Integrity, dated August 2, 2019.

**Background / Discussion**

On May 14, 2019, a complaint was filed in the City Clerk's Department against Councillor Jim Neill concerning his actions and activities regarding the proposed development at 495-513 Frontenac Street. It was alleged that the Councillor violated the Code of Conduct and the Municipal Conflict of Interest Act. 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 August 2, 2019, the Recommendation Report was forwarded by Principles Integrity to the City Clerk with direction that Council receive the report for information, and that it be posted on the City of Kingston's website for public access. 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 19-229.

**Existing Policy/By-Law:**

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

**Notice Provisions:**

Not Applicable

**Accessibility Considerations:**

Not Applicable

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**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 Neill Conflict of Interest and Code of Conduct Recommendation Report, submitted by Principles Integrity, dated August 2, 2019

Principles  
*Integrity*

City of Kingston

Councillor Neill Conflict of Interest and Code of Conduct

Recommendation Report

August 2, 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.
- [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

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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 the respondent named in this Report to respond to the allegations, and to review and provide comment on the preliminary findings.

### The Complaint

- [9] On May 14, 2019, a complaint was filed by Patry Enterprises Inc. regarding the actions and activities of Councillor Jim Neill in regard to the proposed development at 495-513 Frontenac Street (the "Frontenac Development") in the City of Kingston.

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[10] The Complainant alleges that the Councillor violated the Code of Conduct and the *Municipal Conflict of Interest Act* (“MCIA”).

[11] The Complainant alleges:

1. That the Councillor has a conflict of interest with respect to the Frontenac Development, because he resides at 515 Frontenac Street, which is adjacent to the Frontenac Development.
2. That the Councillor is biased and harbours animosity against the Complainant.
3. That the Councillor has used his position to improperly influence staff to negatively impact the Complainant.

### Summary of Findings

[12] We find that the Councillor does not have a pecuniary interest contrary to the MCIA, nor does he have an apparent conflict of interest under the Code of Conduct.

[13] We find that the Councillor did not contravene the Code of Conduct, and his actions do not demonstrate bias or animosity against the Complainant, nor did he use his position to improperly influence staff to the disadvantage of the Complainant.

### 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 Code of Conduct and the *Municipal Conflict of Interest Act*
- Reviewing minutes of meetings, reports, viewing archived meeting proceedings, and reviewing other relevant documents and relevant case law
- Interviewing witnesses, as necessary, including relevant City staff
- Providing the Respondent with an opportunity to review and respond to the draft findings of the Integrity Commissioner.

### Background

[16] Councillor Neill is a five term Councillor representing District 9: Williamsville in the City of Kingston, serving two terms in the ‘90s and now, since 2010, is in his third consecutive term.

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- [17] Williamsville lies just north of the Queen's University campus and comprises an area which provides much of its housing to the student body, and as such experiences the pressures this brings. Undergoing significant redevelopment, as older century homes and properties make way for medium and high-rise multi-unit purpose-built student housing.
- [18] The Complainant is a developer in the City of Kingston. Their website states that they are "one of Kingston's premiere multi-unit residential developers".
- [19] The Complainant is the proponent of the development at 495-513 Frontenac Street (the "Frontenac Development") in Williamsville. The Frontenac Development consists of a proposed 4-1/2 storey building comprising 71 units.
- [20] An earlier 2008 development proposal for the property, which consisted of 58 units, culminated in an appeal to the Ontario Municipal Board and a decision dated February 11, 2010 whereby the application was denied, although the OMB was supportive of the concept on the property.
- [21] On a subsequent application, the OMB granted site specific zoning and site plan approval to permit the development.
- [22] In March 2019 Patry Enterprises Inc. applied for a zoning by-law amendment to change the total number of units while maintaining the building footprint, and reduce parking and other on-site amenities.
- [23] The Councillor resides at 515 Frontenac Street, a property directly adjacent to Frontenac Development. He has been a tenant of 515 Frontenac Street for the past four years. Prior to that, he was a tenant at 635 Princess Street.
- [24] On a number of occasions over the past several years, the Councillor has not supported other planning applications made by the Complainant relating not only to the Frontenac Development but to other developments.
- [25] The Councillor participated at the Ontario Municipal Board Hearing, during May of 2015, in opposition to the Frontenac Development.
- [26] The Complainant alleges that the Councillor's participation in the 2015 OMB Hearing in opposition to the Frontenac Development demonstrates the Councillor's personal interest, and therefore his conflict of interest in the matter.
- [27] The Complainant additionally alleges that on September 18, 2018, the Councillor participated in a closed meeting discussion relating to litigation involving Frontenac Development.



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- [28] The Complainant further alleges that on April 2, 2019, the Councillor participated in a closed meeting discussion relating to litigation involving 55 Ontario Street, another property owned by the Complainant.
- [29] It is alleged that these examples of opposition to the Complainant's developments demonstrate a bias and animosity against the Complainant.
- [30] The Complainant further alleges that the Councillor has attempted to improperly influence staff, to disadvantage the Complainant, and for purposes beyond the proper exercise of his office duties. The Complainant alleges that the Councillor is improperly singling his properties out for more rigorous scrutiny.
- [31] Examples provided by the Complainant include comments contained in emails to staff in 2013, in which the Councillor makes sarcastic or ironic comments and remarks about the Complainant, referencing the Complainant's alleged disregard for and violation of various City by-laws and requirements.
- [32] In 2014, reacting to the Complainant's application for a demolition permit on Frontenac Street (at the Frontenac Development site), the Councillor asked staff to impose more rigorous criteria for demolition permits.
- [33] In 2015, the Councillor requested that staff cease work on a site plan application for the Frontenac Development because Council had denied the zoning by-law amendment.
- [34] In the fall of 2017, the Councillor emailed City staff and volunteered to "walk around" the development at 663 Princess Street – another development of the Complainant – to determine whether elements of the Site Plan had been completed.

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

#### Conflict of Interest

- [35] The Municipal Conflict of Interest Act ('MCIA') applies with respect to the pecuniary interests (direct, indirect and deemed) held by Members of Council.
- [36] The MCIA requires that a Member of Council who has a pecuniary interest in a matter before Council must declare the interest and step away from participating in the discussion or the vote on the matter.
- [37] While the MCIA does not specifically define pecuniary, there is a large body of case law as well as integrity commissioner reports which provide significant guidance as to when a pecuniary interest arises.

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[38] The 1985 Division Court decision in *Re Greene and Borins*<sup>i</sup> captured the concept as follows:

“...Does the matter to be voted upon have the potential to affect the pecuniary interest of the municipal councillor? It is an objective test not reliant on subjective feelings. It relates to **the potential for enrichment or for economic loss**, directly or indirectly through an official position in a club or association, not merely to whether the council member has another moral or political responsibility to a group other than the municipal council.”  
[emphasis added]

[39] In the circumstances of this complaint, it is alleged that the fact the Councillor is a tenant at 515 Frontenac Street raises a pecuniary interest for the Councillor under the MCIA, and an apparent conflict of interest under the Code of Conduct.

[40] If the Councillor were the owner of the property at 515 Frontenac, this would certainly constitute a pecuniary interest under the MCIA because the redevelopment of such a near-by property would likely impact the property value at that address in some way.

[41] The issue at hand, however, is whether a residential tenancy constitutes a pecuniary interest under the MCIA.

[42] We are of the opinion that it does not.

[43] A residential tenancy is established through a short-term rental agreement – annual lease or month-to-month tenancy – and does not give rise to a vested interest in the property.

[44] In the Councillor’s case, his tenancy is month-to-month.

[45] It is noteworthy that the Planning Act, which requires Notice of planning applications be given to affected property owners – determined by proximity to the proposal – requires Notice be provided to **owners** of properties (ie. within 120 m. of a proposal), not to tenants of properties.

[46] It is recognized that tenants, unlike owners, do not have a vested interest in the financial impacts of nearby developments on their residence.

[47] In 2014, the Councillor sought and obtained legal advice as to whether he might have a conflict of interest in voting on a planning matter as a tenant of a nearby property. That legal advice, which he relied on, was that as a residential tenant, he did not have a conflict of interest.

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[48] Although the matter involved a different property, and he was a tenant residing at 635 Princess Street at the time, the advice with respect to the issue of conflict of interest of a residential tenant remains valid: a residential tenant without any ownership interest, financial interest or option to purchase the property, does not have a pecuniary interest in a planning matter relating to an adjacent or nearby property.

[49] We find that the Councillor does not have a pecuniary interest in the matter of the Frontenac Development.

[50] It remains to be considered whether the Councillor has a conflict of interest within the meaning of the Code of Conduct.

[51] 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 from 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.

[52] The practical difference between the MICA and the Code of Conduct is as follows:

- 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.

[53] 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)

[54] The Code of Conduct recognizes that non-pecuniary interests may also give rise to an apparent conflict of interest.

[55] A non-pecuniary interest can arise where there is a relationship which may be seen to influence the member's impartiality and impede the member's ability to deal with

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the matter from the perspective of the public interest; such relationships such as a close or long-standing personal or business relationship or friendship.

[56] It so happens that the Councillor does know and is friends with his landlord of 515 Frontenac Street. However, it is noteworthy that the Councillor opposed the Frontenac Development planning application when it first came before Council even while he was a tenant residing at 635 Princess Street, before he became a tenant at 515 Frontenac Street.

[57] In other words, his opposition to the proposal did not arise when he became a tenant of 515 Frontenac Street.

[58] The Councillor represents an area of the City which is undergoing rapid change these past few years, experiencing the development of a significant number of purpose-built student buildings in an area which was primarily comprised of individual dwellings originally constructed for single families. The opposition by residents in the area has been significant, and not surprisingly, the Councillor as their elected representative, has articulated many of those concerns.

[59] As noted above, the Councillor had already sought legal advice regarding whether as a tenant, he would have a pecuniary interest in a planning matter pertaining to a nearby property and had been advised he did not. In reliance on that advice, the Councillor continued to represent his constituents' concerns with the Complainant's application.

[60] We do not think that a reasonably well-informed person, apprised of these facts, would believe that the Councillor had a conflict of interest in regard to Frontenac Development.

[61] We note that the Complainant made the assertion that the Councillor benefits from a reduced rent. There was no evidence or other information provided by the Complainant to support this bald assertion. The Councillor's evidence to us is that he does not benefit from any reduced rent or other special or beneficial arrangement as a tenant of 515 Frontenac Street. He pays market rent and his rent has increased annually, lockstep with the allowable rent increases.

### Alleged Bias, Animosity and Improper Influence

[62] The Complainant alleges that the Councillor has attempted to injure, inconvenience and disadvantage the Complainant's developments, demonstrating a history of animosity, bias and vendetta against the Complainant.

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[63] The Complainant further alleges that the Councillor has attempted to improperly influence staff, to disadvantage the Complainant, and for purposes beyond the proper exercise of his office duties.

[64] The relevant provisions of the Kingston Code of Conduct are as follows:

### 11.0 Improper Use of Influence

11.1 Members shall not use the influence of their office or appointment for any purpose **other than the exercise of his or her official duties**.

11.2 Members should not use the status of their position to influence the decision of another person to the private advantage or non-pecuniary interest of themselves, their parents, children or grandchildren, spouse, or friends or associates, or **for the purpose of creating a disadvantage to another person**. [emphasis added]

[65] The Complainant provided examples of remarks and comments in emails obtained by the Complainant through a Freedom of Information Request under the *Municipal Freedom of Information and Protection of Personal Privacy Act*.

[66] These emails to staff, which date from the summer of 2013, are in relation to the Complainant disregarding City By-laws and requirements and reflect a degree of sarcasm and irony in regard to the Complainant.

[67] The following comments were provided as evidence of bias, animosity, and attempts to improperly influence staff against the Complainant:

- the Complainant “seems to be a Construction Cowboy and Kingston is the Wild West”,
- “he ignores City Bylaws as a matter of course...not once “oops I didn’t know”; and
- he “is allowed to apparently run roughshod over City Bylaws as a matter of course”.

[68] Although these comments may reflect a level of frustration, in our view they do not raise concerns of bias or animosity against the Complainant. Nor do they appear to be attempting to improperly influencing staff against the Complainant.

[69] The fact that an elected official may specifically request staff to investigate in order to determine whether there is compliance with zoning by-laws, Building Code or other requirements does not constitute pressure or improper influence. It is not an improper exercise of office to do so.

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- [70] While the Councillor forwards and refers constituent concerns about the Complainant's projects to staff for review, Staff advise that they receive a significant number of complaints and concerns about these projects directly from members of the community. Some of these are sent by residents to staff, with the Councillor merely copied on the emails.
- [71] The Complainant was a front-runner, being one of the first to enter into the development of purpose-built multi-unit student projects in Williamsville. This change is disruptive to the community, and the Complainant's projects have become a lightning rod for those opposing change.
- [72] As such, the Complainant's applications have attracted significant opposition, and his projects, as construction proceeds, are the subject of close neighbourhood scrutiny.
- [73] Councillor Neill, as the elected representative for the area, is properly referring these concerns to appropriate staff.
- [74] Staff in turn respond by investigating the concerns forwarded to their attention. Because enforcement is complaint-based, it may appear to the Complainant that he is being singled out. The concerns brought to staff's attention for investigation have been borne out, and have not been frivolous or vexatious or completely unwarranted.
- [75] The evidence does not support a finding that the Councillor is singling out the Complainant, or that he harbours animosity or is biased against the Complainant.
- [76] We do not find that the Councillor acted out of bias or animosity against the Complainant.
- [77] We do not find that the Councillor has attempted to improperly influence staff, to disadvantage the Complainant, and for purposes beyond the proper exercise of his office duties.
- [78] We find that none of the Councillor's actions in this regard contravene the Code of Conduct.
- [79] A report is not often warranted where allegations of conflict of interest or code violations are found not to be substantiated. We are of the view that a public report in this matter is beneficial in that it provides guidance and clarification on a question that has received very little consideration, that no pecuniary [conflict of] interest arises for a member of council who resides near a property which is the subject of a planning application before council, if the member is a tenant not an owner of the neighbouring property.

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### Findings:

[80] We find that there is no conflict of interest for the Councillor under the MCIA nor any apparent conflict of interest under the Code of Conduct.

[81] We find that nothing in the Councillor's comments or actions constitute a contravention of the Code of Conduct.

[82] 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.

### Recommendation:

[83] We therefore recommend:

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

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<sup>i</sup> Re Green and Borins (1985), 50 O.R. (2d) 513 (Div.Ct.)