

Municipality of West Grey
Recommendation Report
of the Integrity Commissioner
Respecting a Complaint against Councillor Hergert
September 10, 2020

Introductory Comments

- [1] Principles *Integrity* was appointed the Integrity Commissioner for the Municipality of West Grey on April 1, 2018. 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 Municipality of West Grey 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] 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.

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- [4] 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 West Grey 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.
- [5] 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.
- [6] 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.
- [7] In this regard, we have assessed the information fairly, in an independent and neutral manner, and have provided an opportunity to the respondent to respond to the allegations and provide comment on the preliminary findings.

The Complaint

- [8] On July 9, 2020 we received a complaint from the Chair of the Saugeen Municipal Airport Commission (SMA), on behalf of the Commission, alleging that the Respondent, Councillor Hergert, contravened the Council Code of Conduct.
- [9] The complaint alleges that the Respondent has continued to communicate with an individual or his lawyer, who is in a dispute which may result in litigation with the SMA, despite the decision and explicit direction by the SMA Commission that all communication with that party should be directed through the Chair to the SMA's lawyer.
- [10] The complaint alleges that the action of the Respondent directly undermines the collective efforts and experience of the Commission, disregards and ignores the SMA Commission's decision, and casts doubt on the contributions of the Respondent in her role on the SMA Commission.

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Process Followed for this Investigation

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

[12] 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 and providing her with an opportunity to respond in full to the allegations
- Reviewing the relevant provisions of the Council Code of Conduct and other documentation and emails
- Conducting interviews of persons with information relevant to the complaint
- Providing the Respondent with the opportunity to review and provide comments prior to finalizing our Recommendation Report, although the Respondent chose not to provide any

Background and Context:

[13] The Respondent is a Councillor for the Municipality of West Grey.

[14] The Municipality of West Grey is one of three municipal partners who together have entered into a joint municipal services agreement to oversee operations of the Saugeen Municipal Airport (the SMA).

[15] Pursuant to the joint municipal services agreement, each member municipality appoints one member of its Council to serve as a Commissioner on the SMA.

[16] Councillor Hergert is the Council appointee for the Municipality of West Grey.

[17] The SMA Commission is composed of three elected officials, one appointed from the Council of each of the partner municipalities of Brockton, Hanover and West Grey, plus four members at large, representing pilots who use the airport.

[18] Dan Gieruszak, the Deputy Mayor of Brockton, is the Chair of the SMA Commission.

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- [19] The Respondent, the Councillor from West Grey, is the Vice-Chair.
- [20] The SMA Commission, which was newly constituted in January 2019 reflecting a change in membership following the municipal elections, experienced challenges with one of its pilots who was not complying with the terms of his Airport Access Agreement.
- [21] Throughout 2019, the SMA was pursuing steps seeking to remedy safety violations and to pursue an up-to-date Access Agreement with the pilot in question.
- [22] These steps included investigating legal recourse against the pilot.
- [23] On September 4, 2019 the pilot advised the SMA Commission that all future correspondence concerning these or other matters should be directed to his lawyer, A. Ferrier of Fallis Falls & McMillan, a Durham law firm.
- [24] The email, with the subject line Future Communications, marked High Importance, was copied to all members of the SMA Commission.
- [25] Shortly following receipt of this correspondence, the Commission reviewed it and all members confirmed their understanding that all direct communication between the pilot and/or his lawyer should cease, and all communication with that party and his lawyer should be directed through the Chair, who would direct it to the SMA lawyer.
- [26] Following this decision of the Commission, it became apparent that the Respondent was continuing to communicate directly with the pilot or with his lawyer.
- [27] On June 19, 2020 the Chair sent correspondence by email to the lawyer for the Commission, copied to all members of the Commission, as follows:

Please be advised that the Saugeen Municipal Airport Commission wishes to ensure that all communication between the Commission and Fallis Law is effective, efficient and represents the position and understanding of the Commission. Establishing a single point of contact will ensure that we can move forward in good faith. Please ensure that future communication is directed through me.

I have cc'd the Commissioners as I trust you understand our desire to establish effective communication going forward. To that end, and since there may have been a misuse of email address / contact points I may BCC Commissioners in the future.

Best regards,

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Dan Gieruszak

- [28] At its June 17, 2020 meeting, the Commission decided that if the pilot did not comply with the request to enter into an up-dated Access Agreement by July 16, 2020, the Commission would pursue legal recourse.
- [29] On June 26, 2020 A. Ferrier sent a letter to the three Mayors of the partner municipalities indicating that, on the advice of the Respondent, they were requesting a virtual/video-conference meeting to discuss the matter. This letter made it obvious to the Commission that the Respondent continued to communicate behind the scenes with the pilot and/or his lawyer, contrary to the decision taken by the Commission.

Applicable Provisions of the Code of Conduct:

[30] The Saugeen Airport Commission has adopted a Code of Conduct for the SMA which applies to employees, contractors, users and members of the Saugeen Airport Commission.

[31] The SMA Code of Conduct provides as follows:

Article 2 General Principles

2.1 SMA employees, contractors, airport users and members of the SAC shall:

- (a) act with integrity, honesty, and professionalism and in the best interests of the SMA.

[32] The SMA is a joint municipal service board established under s.202 of the Municipal Act.

[33] A joint municipal service board is a local board under the Municipal Act, and as such would be subject to the code of conduct for local boards adopted by the municipal partners, even if there were no code of conduct adopted by the SMA Commission.

[34] Finally, all members of council, even those who serve on local boards such as the SMA Commission, are subject to their own Council Code of Conduct. The Respondent is subject to the West Grey Council Code of Conduct.

[35] The provisions of the West Grey Code of Conduct relevant to this investigation are as follows:

5.2 General Principles and Values

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c) Members will respect the decision-making process of Council by accurately communicating the decision reached by majority of Council, even if they disagree with the outcome.

d) Members will maintain professionalism, integrity, respect, and trust.

5.3.5. Confidentiality, Privacy and Use of Information

b) Members will not disclose or release by any means to any Member of the public either in verbal or written form any confidential information acquired by virtue of their office, except when required by law to do so.

4.0 Definitions

f). “Confidential Information” means:

iii. Information concerning litigation, negotiation, or personnel matters;

iv. Reports of consultants, draft documents and internal communications, which, if disclosed may prejudice the reputation of the Municipality, its officers and employees, or its effective operation.

Findings and Analysis:

[36] The Respondent freely admits that she has communicated with the lawyer for the pilot, despite the direction of the Commission to direct all communication through the Chair following the letter of September 4, 2019.

[37] The Respondent has expressed concern about the Commission’s decision to require communications with the pilot and his lawyer to be directed through legal counsel.

[38] It is evident that the Respondent has been in communication and working behind the scenes with the pilot and his lawyer, attempting to ‘do an end run’ around the SMA Commission’s position.

[39] The Commission, on the other hand, is satisfied that the Access Agreement it is requiring is fair and reasonable, and all other users of the facility are required to sign it.

[40] Significantly, the Commission was put on notice by the letter of September 4, 2019 from the pilot that all future communications should be directed to his lawyer.

[41] As noted, the SMA Commission is comprised of three elected officials and four non-elected officials.

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- [42] There is sometimes a lack of procedural knowledge and experience among non-elected citizen appointees on a local board as to the conduct of meetings and other matters of governance. The presence and support of municipal staff is often helpful in this regard.
- [43] The SMA Commission is a joint municipal service board and so is one step removed from a municipality. It therefore does not benefit from having the built-in support of municipal staff.
- [44] The SMA has also experienced some turnover on its management staff.
- [45] As a result, the Commission has not kept pace with its partner municipalities in providing public notice of its meeting agendas and minutes. For obvious reasons, the focus has been on airport operations.
- [46] The Respondent has expressed concerns around the Commission's procedural steps, and raises this as a rationale for continuing her direct communications with the pilot and his lawyer.
- [47] While the Commission may need to improve its administrative processes in terms of providing public notice of its meetings, and making its agendas and minutes publicly available, this does not justify the Respondent's refusal to respect and abide by the Commission's decision to direct all communication from the pilot or his lawyer to the attention of the Chair.
- [48] The Respondent advises that she is the 'representative' of the lawyer. While it may be the case that the lawyer or the pilot reside in the Respondent's municipality, she is not an agent for her constituents. While some members of Council interpret the Municipal Act describing the role of Council (s. 224(a)) "to represent the public and to consider the well-being and interests of the municipality", to establish an obligation to faithfully carry out the objectives of individual constituents, that is simply not the case. The Respondent must abide by the Commission's decisions in matters such as these.
- [49] The Respondent represents but a single vote on the Commission of seven.
- [50] The Council Code of Conduct includes a provision which requires that members of Council respect the decision-making process of Council, even if they disagree with the outcome. This includes not only accurately communicating that decision, but not conducting oneself in a manner that disregards that decision.
- [51] This provision reflects the proper conduct of members of elected and appointed municipal bodies where all votes are equal and decisions are democratically arrived at following due process.

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- [52] The conduct of the Respondent in refusing to abide by the Commission's decision and continuing to communicate directly with the lawyer, raises doubt in the mind of some commissioners as to whether the Respondent can be trusted to maintain confidentiality around discussions of the Commission regarding its legal actions involving the pilot.
- [53] The Council Code of Conduct includes a provision that members maintain professionalism, integrity, respect and trust.
- [54] We find that the Respondent, by continuing to communicate with the pilot and/or his lawyer and by demonstrably disregarding the direction of the Commission, undermined the trust of the SMA in her, and thereby failed to maintain integrity and trust.
- [55] The SMA Code of Conduct similarly includes a provision that members act with integrity, honesty, and professionalism and in the best interests of the SMA.
- [56] The decision as to what constitutes the 'best interests of the SMA' is for the SMA to determine. It is clearly not open to a member of the SMA to operate in a manner contrary to the best interests of the SMA when participating in SMA business.
- [57] In directing all communications to be forwarded to the Chair, the SMA Commission determined this course of action to be in its best interests.
- [58] We find that the Respondent's continued communication was not, according to the SMA Commission, in the best interest of the SMA.
- [59] We find that the Respondent's conduct contravened the Council Code of Conduct by failing to maintain integrity and trust, and contravened the SMA Code of Conduct by not reflecting the best interest of the SMA.

Conclusions and Recommendations:

- [60] An Integrity Commissioner's investigation report is not simply the conclusion of a technical exercise to determine whether there has been a breach of codified standards of behaviour. This report is not simply the sum total of analysis of fact and policy. We are not simply assigned the duty of bringing adjudication to grievances between individuals.
- [61] As observed above, the conduct of the Respondent in refusing to abide by the Commission's decision and continuing to communicate directly with the lawyer, has raised doubt in the mind of some commissioners as to whether the Respondent can be trusted to maintain confidentiality.

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[62] Unfortunately, her conduct has resulted in an erosion of that trust to the degree that some members of the SMA question whether Councillor Hergert can continue to properly fulfill the role of serving the Municipality of West Grey's interests on that Commission.

[63] An integrity commissioner may recommend that sanctions be imposed, including a reprimand, or a suspension of pay for up to 90-days. Sometimes, appropriate recommendations do not involve financial sanctions at all.

[64] Having made the findings we did in this investigation, in our view, a reprimand is warranted.

[65] We are also of the view that Councillor Hergert should consider resigning from the SMA given her reluctance to follow the Board's explicit direction.

[66] In the event that Councillor Hergert does not step down, it is within Council's jurisdiction to revoke her appointment and proceed with an alternate appointee as the representative of West Grey to the SMA Commission.

Recommendations:

[67] It is recommended:

1. That Council pass the following resolution:

That having been found to have breached the Codes of Conduct for the Municipality of West Grey and the Saugeen Municipal Airport Commission, that Councillor Rebecca Hergert be and is hereby formally reprimanded.

2. That Councillor Hergert consider resigning from her position on the SMA; and
3. Alternatively, that Council consider revoking the appointment of Councillor Hergert as the West Grey appointee to the Saugeen Municipal Airport Commission, and that another member of Council be appointed in her stead.

[68] We wish to conclude by publicly thanking everyone who was asked to participate in our investigation.

[69] We will be pleased to be available at the Council meeting when this report is considered.