



ADR
C H A M B E R S

Integrity Commissioner Office
for the City of Richmond Hill

Final Report

Marvin Huberman, LL.B., LL.M, FCI Arb

E-mail: mhuberman@adr.ca

July 17, 2019

Sent by email and courier to:

Stephen M.A. Huycke

Director of Legislative Services, City Clerk

City of Richmond Hill, ON, L4B 3P4

stephen.huycke@richmondhill.ca

Re: Complaint Reference Number IC-56-0519

Dear Mr. Huycke:

Delegation of Investigative Powers

Pursuant to a delegation of powers, Deborah Anshell, in her capacity as Integrity Commissioner for the City of Richmond Hill, delegated to the undersigned pursuant to section 223.3(3) of the *Municipal Act, 2001*, certain of her powers and duties as Integrity Commissioner to inquire into, investigate, and prepare a report (subject to her review and approval) with respect to the Complaint (the "Complaint") described herein.

The Complaint

Carmine Perrelli, Deputy Mayor of the City of Richmond Hill/Regional and Local Councillor (the Complainant), complains that Karen Cilevitz, a Member of the City of Richmond Hill Council (the Member), contravened section 9.2 of the Council Code of Conduct, which requires Members to adhere to all other by-laws, policies, procedures and rules (collectively the "policies") that govern the behaviour of Members.

Specifically, the Complainant alleges that the Member failed to adhere to the Richmond

Hill Policy for Councillor-Held Residents Meetings on High Density Development Applications (the “Policy”) by holding a residents meeting on March 7, 2019, on a development application re: 9675, 9697 and 9699 Yonge Street, File #D01-18003 and D02-18013, which is adjacent to a regional road or is a high density development application which is in close proximity to a regional road, but failed to inform all Members of Council of the date, time and location of the meeting, as well as the name of the development application being represented, at the same time that the residents and businesses were informed of the residents meeting.

The Response

In her Response Statement, the Member takes the position that the Complaint should be dismissed because:

- a. The Policy does not govern the specific **behaviour** of Council Members as envisioned by section 9.2 of the Council Code of Conduct and therefore the Member did not breach the Code of Conduct;
- b. The Complainant’s history of negative actions towards the Member lends credence to the fact that this Complaint is vexatious and was filed to cause the Member unnecessary personal and economic hardship, which it did;
- c. The Complainant’s own position on the Policy in the past confirms that he truly does not believe in or wants to enforce the Policy and this Complaint is frivolous; and
- d. It is apparent that the Complaint was brought in retaliation to the Member’s Defamation Action against the Complainant.

Investigative Process

Having been delegated the powers and duties of the Richmond Hill Integrity Commissioner pursuant to section 223.3(3) of the *Municipal Act, 2001*, S.O. 2001, c.25, as amended, as part of my investigation of this formal complaint, I reviewed:

- a. The approved Code Complaint Form and Affidavit, with Schedule “A” attached thereto, sworn/affirmed on April 30, 2019, of the Complainant;
- b. The Consent and Confidentiality Agreement signed by the Complainant on April 30, 2019; and

c. The Karen Cilevitz Response Statement, with documents attached as tabs, dated May 10, 2019.

I interviewed the Complainant and the Member on July 10, 2019, the latter's interview having been conducted in the presence of her legal counsel, Mr. Jason R. Allingham of MacDonald Associates pc, Lawyers.

I received full cooperation with my investigation from both the Complainant and the Member, and from their representatives who provided me with the information and documentation I requested.

The Issue

There is one issue for determination:

Did the Member contravene section 9.2 of the Council Code of Conduct?

Standard of Proof

The standard of proof is on the balance of probabilities in respect of this civil matter. As the Supreme Court of Canada clearly stated: "...there is one civil standard of proof at common law and that is proof on a balance of probabilities...": *F.H. v. McDougal*, [2008] S.C.J. No. 54 (S.C.C.) at para. 40.

Credibility Assessments

Regarding the statements of the Complainant and the Member, both of whom I interviewed, I have considered the generally accepted factors in assessing their credibility in this complaint including their demeanour, ability and opportunity to observe, power of recollection, interest, bias, prejudice, sincerity, inconsistency, and the reasonableness of their statements when considered in the light of all the evidence: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at pp. 356-8, per O'Halloran J.A.

John Sopinka, in his text, *The Trial of an Action* (1981, Toronto, Ontario: Butterworths) at p. 77, wrote of the role of the assessment of credibility through probabilities as follows:

Probability is the great touch-stone of all evidence. A witness whose credibility strays from the truth will often have built into it some inherent improbability.

As the British Columbia Court of Appeal stated in *Faryna v. Chorny*, *supra*:

...the real test of the truth of a story of a witness... must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The Facts – Background

By letter dated February 22, 2019 sent to Residents re: 9675, 9697 and 9699 Yonge Street, File #D01-18003 and D02-18013, the Member advised as follows:

A residents' information meeting will be held on:

*Thursday, March 7, 2019
7:00 pm - 9:00 pm
Richmond Hill Central Library
Room B, 2nd Floor
1 Atkinson Street
Richmond Hill, ON L4C 0H5*

Please be advised this meeting is hosted by Ward 5 Councillor Cilevitz regarding lands municipally known as 9675, 9697 and 9699 Yonge Street.

The purpose of the proposed Official Plan and Zoning By-law Amendment is to permit a high density, mixed use residential/commercial development consisting of two residential buildings on the subject lands. I, along with staff from the Town's Planning and Regulatory Services Department, will be in attendance when the applicant presents their proposal to the residents.

*A Council Public Meeting (CPM) in this regard, in statutory compliance with the Planning Act, is scheduled for Wednesday, March 20, 2019 in Council Chambers. Please be advised **NO** decisions are made at the CPM - This public meeting will be held to enable comments to be referred back to staff for further considerations with regard to the proposal.*

Should you have any further questions please do not hesitate to contact me directly, or you may contact Leigh Ann Penney, Planner and Regulatory Services Department, at 905- 771- 2562.

Sincerely,

Karen Cilevitz

Councillor - Ward 5, Richmond Hill, Ontario

On March 7, 2019, the residents information meeting referred to above was held and hosted by the Member regarding the lands municipally known as 9675, 9697 and 9699 Yonge Street.

On March 20, 2019, a Council Public Meeting was held in Council Chambers at which comments made at this meeting and at the March 7, 2019 residents meeting, as well as a Staff Report, correspondence, and a Petition on behalf of residents, regarding official plan and zoning by-law amendment applications submitted by NYX 9675 Yonge Street Ltd. for 9675, 9697 and 9699 Yonge Street, were received for future consideration of the proposal.

On April 26, 2019, the Complainant was informed by Yashar Fatehi, CEO of Nyx Capital Corp., that the Member held a residents meeting on March 7, 2019, prior to the Council Public Meeting on March 20, 2019, regarding official plan and zoning by-law amendment applications submitted by NYX 9675 Yonge Street Ltd. for 9675, 9697 and 9699 Yonge Street. The Complainant had no prior knowledge of the March 7, 2019, residents meeting and was not invited to attend that meeting.

In the words of the Complainant: "We have a by-law that compels any Councillor who is having a residents meeting to invite all Members of Council...I would have loved to have been at that residents meeting, would have loved to engage with all the people that were there, some of which I am certain weren't present on the evening of March 20, 2019. I did not have the benefit, of which it was my legal right to hear those comments. After meeting with Yashar Fatehi, I took it upon myself to confirm if in fact this meeting did take place."

The Member, in her interview with me, acknowledged that she held a residents meeting on March 7, 2019, prior to the Council Public Meeting on March 20, 2019, regarding official plan and zoning by-law amendment applications submitted by NYX 9675 Yonge Street Ltd. for 9675, 9697 and 9699 Yonge Street, and that she mistakenly failed to inform all members of Council, including the Complainant, of the date, time and location of the March 7, 2019, residents meeting, as well as the name of the development application being presented, at the same time that the residents were informed of the residents meeting. Her failure to give the requisite notice of the residents meeting to all members of Council was, in the Member's words, the result of an oversight or accident, and not achieved through deliberate planning.

The Historical Context

According to the Member, since 2011, the Complainant and the Member have not had a good relationship, professional or otherwise. In support of this position, the Member relies on several events summarized below.

2011

A conversation between the Member and the Complainant, then Ward 2 Councillor, in the Summer of 2011 at a community picnic event held at the Phyllis Rawlinson Park in Richmond Hill, in which the Complainant cautioned the Member about the direction her David Dunlop Observatory (DDO) work and activism was going, and which later resulted in the Complainant being the only Councillor to vote against the Town of Richmond Hill taking the Corsica/Metrus development application to the Ontario Municipal Board.

Fall 2013

A conversation between the Member and the Complainant in the Fall of 2013 at Alice Fazoolis on Yorkland. following a Council meeting, in which the Complainant suggested that the Member not run for the Ward 5 seat in 2014, but rather let **Ward 5 Councillor Papa** stay in Ward 5, and that the Member should run for the Ward 6 seat given her great support there from her DDO work and not worry about campaign finances. The Member was taken aback by the Complainant's suggestions, questioned his integrity and stated that she would not agree to what was proposed.

December 2013

In December 2013, the Complainant attempted to lay a charge of criminal assault against the Member with York Regional Police (YRP) at District 2 Headquarters with respect to an alleged incident that took place on December 4, 2013, following the appointment of David West to the vacant Ward 4 seat, whom the Complainant voted against in Council, in an elevator where the Member made intentional physical contact with the Complainant's left arm to which the Complainant took great objection and considered a malicious assault. Following a YRP investigation, no criminal charge was laid against the Member.

2018/2019

On April 17, 2019, following the Complainant's election as Regional Councillor on October 22, 2018, the Member was chastised by the Complainant during a public council meeting for the Member's alleged breach of the Policy for Councillor-Held Residents Meetings on High Density Development Applications (the Policy), for which a

complaint that the Member had contravened the Council Code of Conduct may be (and ultimately was) filed with the Integrity Commissioner.

In 2012, specifically at Council Meeting C#14-12 held on April 10, 2012, the Complainant was opposed to the Policy, which was adopted following a recorded vote on a Motion that Carried 5-4 in favour of the Policy, and that the Complainant launched a civil lawsuit against the Town of Richmond Hill to try to overturn/quash the Policy.

The Complainant's position with respect to the Policy and his lawsuit against the Town of Richmond Hill is that the Policy went outside the jurisdiction of the municipality, and that the Motion that passed was illegal, because the terms of the Policy are vague and uncertain and they impair the Complainant's function as an elected official. The Complainant was quoted by local media as stating, "I felt strongly that the by-law passed by Richmond Hill Council infringed on residents' rights, was without merit and unenforceable. I felt council overstepped their authority and was once again imposing their will on residents without consultation": <https://www.yorkregion.com/news-story/4148966-Councillor-s-lawsuit-against-town-of-Richmond-hill-dropped/>.

The Complainant chose to withdraw his lawsuit against the Town of Richmond Hill in respect of the Policy and the Ontario Superior Court of Justice dismissed it on August 26, 2013, without costs. The Complainant stated, "My viewpoint was vindicated on many occasions when my fellow councillors flagrantly disregarded the by-law without penalty. A by-law without penalty or consequence that is unenforceable is in reality not a by-law at all... With my goal for challenging the by-law achieved, I felt that there was no need for further action on this item": www.yorkregion.com/news, *supra*.

On March 15, 2019, the Member commenced a defamation action against the Complainant and others with respect to events that allegedly transpired in December 2018 (the "Defamation Action").

Given the timing of the instant Complaint, the Member believes that it was brought against her by the Complainant in retaliation to the Defamation Action against the Complainant, and as part of the Complainant's obsession to serve as one more attempt to discredit, humiliate and/or intimidate the Member for his own self-serving reasoning.

The Complainant emphatically denies the Member's allegations as set out above.

Relevant Provisions of the Council Code of Conduct and the Policy

Council Code of Conduct (the "Code")

Section 4.2 (b) of the Code provides that “A Member shall observe and comply with every provision of the Code, as well as all other policies and procedures affecting the Member, acting in his or her capacity as a Member.”

Section 4.3 (b) of the Code provides that “No Member shall fail to observe and comply with every provision of the Code, as well as all other policies and procedures affecting the Member, in his or her capacity as a Member.”

Section 9.2 of the Code provides that “Members are required to adhere to all other by-laws, policies, procedures and rules (collectively “policies”) that govern the behaviour of Members, including, but not limited to, those policies set out in Appendix B.”

Policy for Councillor-Held Residents Meetings on High Density Development Applications (the “Policy”)

The relevant provisions of the Policy are set out below.

Purpose:

The purpose of this policy is to set out the steps to be followed by Councillors when they plan for and hold residents meetings on development applications that are adjacent to a regional road or are a high density application which is in close proximity to a regional road.

Policy Principles:

This policy is guided by the following principles:

Community engagement - Council and staff are committed to high levels of community engagement to allow opportunities for a range of views to be heard on issues of importance to the community.

Openness and transparency - The sharing of information in an open and transparent manner is key to ensuring that all information is available during the decision making process.

Scope:

This policy applies to all members of Council. This policy sets out the process to be

followed by Councillors when they plan for and hold residents meetings on development applications that are adjacent to a regional road or are a high density application which is in close proximity to a regional road.

Policy:

Council and Town staff are committed to community engagement and the sharing of information to foster effective communication. One way this is accomplished is through residents meetings on development applications. Typically, a member of Council will hold a residents meeting to provide an opportunity for the community to learn more about a proposed development application and to hear comments from the residents regarding the application. It is not a requirement for a Councillor to hold a residents meeting on a development application.

If a Councillor opts to hold a residents meeting on a development application and it is either adjacent to a regional road or it is a high density development application which is in close proximity to a regional road, the Councillor shall:

...

Inform all members of Council of the date, time and location of the meeting, as well as the name of the development application being presented, at the same time that the residents and businesses are being informed of the residents meeting...

Roles and Responsibilities:

Member of Council Holding the Residents Meeting

...

Inform all members of Council of the date, time and location of the meeting, as well as the name of the development application being presented, at the same time that the residents and businesses are being informed of the residents meeting ...

Findings, Conclusions and Recommendations

Having thoroughly reviewed and carefully considered the information and documentation obtained in the course of my investigation (collectively, “the evidence”), I conclude that the Member contravened section 9.2 of the Council Code of Conduct, which requires Members to adhere to all other by-laws, policies, procedures and rules (collectively “policies”) that govern the behaviour of Members.

Specifically, I find on the preponderance of the evidence that the Member failed to adhere to Richmond Hill Policy for Councillor-Held Residents Meetings on High Density

Development Applications (the “Policy”) by holding a residents meeting on March 7, 2019, on a development application re: 9675, 9697 and 9699 Yonge Street, File #D01-18003 and D02-18013 which is adjacent to a regional road or is a high density development application which is in close proximity to a regional road, but failed to inform all members of council of the date, time and location of the meeting, as well as the name of the development application being represented, at the same time that the residents and businesses were informed of the residents meeting.

I accept the Member’s acknowledgement, and find that she held a residents meeting on March 7, 2019 prior to the Council Public Meeting on March 20, 2019, regarding official plan and zoning by-law amendment applications submitted by NYX 9675 Yonge Street Ltd. for 9675, 9697 and 9699 Yonge Street, and that she mistakenly failed to inform all members of Council, including the Complainant, of the date, time and location of the March 7, 2019, residents meeting, as well as the name of the development application being presented, at the same time that the residents were informed of the residents meeting. Her failure to give the requisite notice of the residents meeting to all Members of Council was, in my view, the result of an oversight or accident, and not achieved through deliberate planning.

I reject the Member’s argument that the Policy does not govern the specific behaviour of Council Members as envisioned by section 9.2 of the Council Code of Conduct and therefore the Member did not breach the Code of Conduct. In my view, the words of the Policy, properly construed using a broad, liberal and purposive interpretation as will best ensure the attainment of the purpose/objective/subject-matter of the Policy according to its true intent, meaning and spirit, clearly govern the behaviour, that is the way in which one acts or conducts oneself, especially towards others, of Council Members as envisioned by section 9.2 of the Council Code of Conduct.

I am supported in this conclusion by the explicitly stated purpose of the Policy “to set out the **steps to be followed by Councillors** when they plan for and hold residents meetings on development applications” [Emphasis added]. I am also supported in this conclusion by the specific role and responsibility/obligation of a Councillor who opts to hold a residents meeting on a development application to “**inform all members of Council** of the date, time and location of the meeting, as well as the name of the development application being presented” [Emphasis added]. Through this mechanism, which clearly governs the behaviour of Councillors, the Policy Principles of community engagement and openness and transparency can be achieved.

I accept the Complainant’s evidence, and find, that he would have wanted to have been at the March 7, 2019, residents meeting, and to engage with all the people there, some

of whom he was certain were not present at the meeting of March 20, 2019. He did not have the benefit, of which it was his legal right, to hear the comments made at the residents meeting of March 7, 2019.

I reject the Member's argument that the Complainant's history of negative actions towards the Member lends credence to the submission that this Complaint is vexatious and was filed to cause the Member unnecessary personal and economic hardship, which it did, because this argument is not supported by the applicable law or the preponderance of the evidence which deserves weight.

Under the Richmond Hill Integrity Commissioner Procedures, which applies to the instant Complaint, a "vexatious" complaint is defined to mean an alleged contravention of the Council Code of Conduct through the filing of a formal written complaint "without reasonable or probable cause or excuse".

The evidence does not support a finding that the instant Complaint was made without reasonable or probable cause or excuse, as contended by the Member. To the contrary, the weight of the evidence supports the conclusion, and I find, that the instant Complaint was made with reasonable or probable cause or excuse, and it is therefore not vexatious.

I also reject the Member's argument that the Complainant's own position on the Policy in the past confirms that he truly does not believe in or want to enforce the Policy and therefore the Complaint is frivolous. This argument is based on evidence that is insufficiently clear and convincing. Rather, the argument is founded on the Member's speculation and conjecture based on her own beliefs and incomplete, potentially inaccurate and unconvincing evidence, to which I accord little weight.

The Richmond Hill Integrity Commissioner Procedures defines a "frivolous" complaint to mean "something that is not worthy of serious consideration, or that is of little or no importance, due to its lack of seriousness or sense".

In my view, the instant Complaint is worthy of serious consideration, and is of considerable importance. I therefore find that it is not frivolous. I am not persuaded, and therefore I am unable to find, as contended by the Member, that the instant Complaint was made by the Complainant with frivolous and malicious intent, in bad faith and for ulterior purposes to cause the Member personal stress, embarrassment and anxiety, because in 2012, specifically at Council Meeting C#14-12 held on April 10, 2012, the Complainant was opposed to the Policy, which was adopted following a recorded vote on a Motion that Carried 5-4 in favour of the Policy, and because the Complainant

launched a civil lawsuit against the Town of Richmond Hill to try to overturn/quash the Policy.

I accept the Complainant's evidence, and find, that the Complainant's position with respect to the Policy and his lawsuit against the Town of Richmond Hill is that the Policy went outside the jurisdiction of the municipality, and the Motion passed is illegal, because the terms of the Policy are vague and uncertain and they impair the Complainant's function as an elected official. I accept the Complainant's statement, quoted by local media as follows: "I felt strongly that the by-law passed by Richmond Hill Council infringed on residents' rights, was without merit and unenforceable. I felt council overstepped their authority and was once again imposing their will on residents without consultation.

Furthermore, I find that the Complainant unilaterally chose to withdraw his lawsuit against the City of Richmond Hill in respect of the Policy, that the Ontario Superior Court of Justice dismissed it on August 26, 2013, without costs, and that the Complainant stated, "My viewpoint was vindicated on many occasions when my fellow councillors flagrantly disregarded the by-law without penalty. A by-law without penalty or consequence that is unenforceable is in reality not a by-law at all... With my goal for challenging the by-law achieved, I felt that there was no need for further action on this item."

I also reject the Member's argument that the Complaint was brought in retaliation to the Member's Defamation Action against the Complainant, for three reasons. First, this argument is based on the Member's own belief, speculation and conjecture, which is based on unfounded and unconvincing evidence, specifically, "the timing of the Complaint", to which I give no weight. Second, the mere existence of a correlation in time between two events does not establish a causal relation. When the Member infers causation simply because one event, the instant Complaint, followed chronologically after another, the Defamation Action, she has committed what is known as the false cause or *post hoc* fallacy, which comes from the Latin phrase, "*post hoc ergo propter hoc*", which means "after this, therefore, because of this". To establish a causal relation, more evidence is needed to indicate a cause-and-effect relationship than merely a suggestive time sequence. Third, this argument is inconsistent with the evidence of the Complainant, which I accept, that the instant Complaint was not brought in retaliation to the Defamation Action or to serve as an attempt to discredit, humiliate and/or intimidate the Member for the Complainant's own self-serving reasoning.

I am mindful of the historical background, the context, the relationship between the Member and the Complainant, and the challenges that each faced from 2011 to date, as

described above. Having regard to the evidence, and my findings and conclusions above, I further find that the instant Complaint was made by the Complainant against the Member in “good faith”, that is “in accordance with standards of honesty, trust and sincerity”, as defined in the Richmond Hill Integrity Commissioner Procedures

The Recommendations

To address the matters that I have identified in my investigation, specifically that the Member has contravened through inadvertence, that is mistakenly, by accident or oversight, section 9.2 of the Council Code of Conduct, I make the following recommendations to assist the Council of the City of Richmond Hill to achieve “the highest standards of conduct by its Members which is essential to maintaining and ensuring public trust and confidence in Council and Richmond Hill’s decision and operations” as set out in the Preamble of the Council Code of Conduct:

- a. The Member, and, as a matter of best practice, all members of Council, should be vigilant in adhering to their individual and collective obligations to ensure that members of Council comply with their responsibilities under the *Municipal Act, 2001*, the Council Code of Conduct, and the Policy for Councillor-Held Residents Meetings on High Density Development Applications, and
- b. Council impose a **reprimand** on the Member for having contravened section 9.2 of the Council Code of Conduct in the circumstances of the instant Complaint.

Comments on Draft Report

In his comments (received on July 23, 2019) to my Draft Investigation Report, dated July 16, 2019, the Complainant submits that:

- a. From the statement – “this is the by-law [Policy] that he [Deputy Mayor Perrelli] tried to quash” – (allegedly) made by the Member and heard by some Council Members at the Council Public Meeting of April 17, 2019, it can be inferred, and is very strong evidence, that the Member was **very well** aware of the by-law and its consequences. In my view, the only pertinent conclusion that can reasonably be drawn from this statement is that the Member was aware of the by-law (the “Policy”) on April 17, 2019. It does not, however, follow therefrom that the Member “was very well aware of the by-law and the consequences” when she failed to inform all Members of Council, including the Complainant, of the date, time and location of the March 7, 2019, residents meet, as well as the name of the development application being presented, at the same time that the residents were informed of the residents meeting, which was **before** April 17, 2019.

b. As of this date, there has been no demonstration of remorse by the Member. I agree. I surmise that is because until now, the Member had taken the position that she did not violate section 9.2 of the Council Code of Conduct and that the instant Complaint should be dismissed. I have rejected these arguments for the reasons stated above.

c. The Council Code of Conduct does not allow for the defence that the Member failed to follow the requirements of the by-law (the "Policy) as a result of "oversight, accident or not deliberate planning". I agree and note that this defence was neither asserted by the Member nor accepted by me as a basis to excuse the Member's contravention of the Policy, which I explicitly found as a fact to have occurred. However, in my view, the Member's failure to give the requisite notice of the residents meeting to all Members of Council, as the result of an oversight or accident, and not achieved through deliberate planning, is a pertinent factor relevant to the penalties – a reprimand or the suspension of the remuneration paid to the Member for a period of up to 90 days – that the Integrity Commissioner may recommend and Council may impose, under section 12.8 of the Council Code of Conduct.

I reiterate my recommendation that a reprimand be imposed on the Member in the circumstances of the instant Complaint for the reasons stated above.

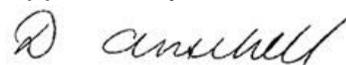
Dated at Toronto, this 26 day of July, 2019.

Respectfully submitted by,



Marvin J. Huberman, LL.B., LL.M., FCI Arb
Investigator
c/o ADR Chambers Inc.
Office of the Integrity Commissioner

Approved by



Deborah Anschell,
Integrity Commissioner of the City of Richmondhill
c/o ADR Chambers Inc.
Office of the Integrity Commissioner