

**Cunningham Swan**  
LAWYERS

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March 10, 2020

**By E-MAIL: [clerk@tayvalleytwp.ca](mailto:clerk@tayvalleytwp.ca)**

Members of Council – Tay Valley Township  
c/o Amanda Mabo, Clerk  
Tay Valley Township  
217 Harper Road  
Perth, ON K7H 3C6

Dear Members of Council:

**RE: Request for Inquiry – Municipal Conflict of Interest Act – Councillor Darling  
Our file No. 29235-13**

Please be advised that our inquiry under the *Municipal Conflict of Interest Act* is now complete.

We attach the final report which should be placed on the agenda for the next open session meeting of Council. The process for receiving the report should be as follows:

1. Council should receive the report for information;
2. Council should not debate the findings or attempt to 'go behind' the findings of the Integrity Commissioner;
3. Council should debate the recommendations of the Integrity Commissioner and decide whether to implement all or some of the recommendations.

We have advised the Member that as per section 5(2.1) of the *Municipal Conflict of Interest Act*, she ought to declare a conflict of interest at the outset of the portion of the meeting that deals with the report, but may participate in the debate. This specific exemption is contained in the Act to allow a member to participate in the debate on the recommended financial penalty (but may not vote). She ought to abstain from participating in any portion of the meeting that does not deal with the consideration of the recommended financial penalty (which the provision refers to as the 'matter');

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CUNNINGHAM, SWAN, CARTY, LITTLE & BONHAM LLP

### Exception, consideration of penalty

(2.1) The following rules apply if the **matter** under consideration at a meeting or a part of a meeting is to consider whether to suspend the remuneration paid to the member under subsection 223.4 (5) or (6) of the *Municipal Act, 2001* or under subsection 160 (5) or (6) of the *City of Toronto Act, 2006*:


1. Despite clauses (1) (b) and (c), the member may take part in the discussion of the **matter**, including making submissions to council or the local board, as the case may be, and may attempt to influence the voting on any question in respect of the **matter**, whether before, during or after the meeting. However, the member is not permitted to vote on any question in respect of the **matter**.
2. Despite subsection (2), in the case of a meeting that is not open to the public, the member may attend the meeting or part of the meeting during which the **matter** is under consideration.

We have provided a copy of the report to the complainant and to the Member.

This inquiry is hereby closed, and no further steps will be taken by the Integrity Commissioner in this regard.

Sincerely,

**Cunningham, Swan, Carty, Little & Bonham LLP**



Tony E. Fleming, C.S.  
LSO Certified Specialist in Municipal Law  
(Local Government / Land Use Planning)  
Anthony Fleming Professional Corporation

TEF:als  
Enclosure



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Council Members – Tay Valley Township  
c/o Amanda Mabo, Clerk  
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Dear Members of Council:

**RE: Request for Inquiry – Municipal Conflict of Interest Act – Councillor Darling  
Our file No. 29235-13**

This public report of our inquiry is being provided to Council in accordance with section 223.6(1) of the *Municipal Act*. We note that section 223.6(3) of the *Municipal Act* requires that Council make the report public. The Clerk should place the report on the agenda for the next open session Council meeting.

Should Council desire, the Integrity Commissioner is prepared to attend at the open session meeting to present the report and answer any questions from Council.

At the meeting, Council must first receive the report for information. The only decision Council is afforded under the *Municipal Act* is to decide how the report will be made public, and whether to adopt any recommendations made by the Integrity Commissioner. Council does not have the authority to debate the findings of the report, only the recommendations.

The Integrity Commissioner has included only the information in this report that is necessary to understand the findings. In making decisions about what information to include, the Integrity Commissioner is guided by the duties set out in the *Municipal Act*. Members of Council are also reminded that Council has assigned to the Integrity Commissioner the duty to conduct inquiries in response to applications for inquiry, and that the Integrity Commissioner is bound by the statutory framework to undertake a thorough process in an independent manner. The findings of this report represent the Integrity Commissioner's final decision in this inquiry.

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CUNNINGHAM, SWAN, CARTY, LITTLE & BONHAM LLP

## BACKGROUND

[001] An application was submitted to the Integrity Commissioner on November 12, 2019 for an inquiry to be carried out concerning an alleged contravention of the *Municipal Conflict of Interest Act* (the "Act" or the "MCIA"). The application was brought by an elector and within the prescribed time as set out in section 223.4.1 of the *Municipal Act*. The following summarizes the allegation contained within the application:

1. At the November 5, 2019 meeting of the Committee of the Whole ("COW"), Councillor RoxAnne Darling addressed agenda item #6 ii) "Report #CAO-2019-05 – Road Access Agreements for Un-assumed Subdivision Roads" by way of introduction, followed by bringing a motion (the "Motion") which was seconded by Deputy Reeve Crampton. The Motion was as follows:

**"THAT**, the Township absolve any requirement of a road access agreement on Township owned roads;

**THAT**, any applicant proposing development whether new or redevelopment that occurs on an unassumed Township road enter into a site plan control agreement registered on their deed recognizing they are developing on an unmaintained Township road and that the applicant indemnifies the Township, its elected officials, employees and agents against all liabilities, etc. as currently written and included in all site plan control agreement;

**AND THAT**, section 3.4 of the Township zoning by-law be reviewed and appropriately revised."

The allegation is that Councillor Darling's employer had a pecuniary interest in the Motion as their client (the "Client") would be directly affected by the disposition of the Motion, and that Councillor Darling therefore had an indirect pecuniary interest under section 2(b) of the MCIA. Further, it is alleged that although the Member declared a conflict and did not participate in part of the debate on the Motion, she did not abstain from participating in the entirety of the debate and voted on the Motion following the debate, thereby contravening section 5, 5(1) or 5(2) of the MCIA.

[002] During the course of the inquiry, the Integrity Commissioner reformulated the request to add one additional potential breach of the Act to the inquiry. This potential breach arises from the same set of facts that led to the Motion. It deals with whether Councillor Darling, in her e-mail correspondence and meetings with the Township's Clerk and/or Planner on behalf of the Client, attempted to influence the decision or recommendation of the Clerk and/or Planner (who have the delegated authority to approve site plan applications) in relation to the Client's site plan application approval, thereby breaching section 5.2 of the Act.

[003] Councillor Darling was informed of this reformulation and provided with an opportunity to respond. The decision to reformulate the application in order to interpret and apply the Act falls within the Integrity Commissioner's discretion, and the decision to do so is based on a standard of reasonableness.<sup>1</sup>

## **STANDARD OF PROOF**

[004] All findings made within this report are based on a standard of a balance of probabilities. This standard is applied in civil cases and requires the Integrity Commissioner to "scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."<sup>2</sup>

## **PROCESS**

### **Preliminary Review**

[005] The Township's Code of Conduct and the *Municipal Act* provide the Integrity Commissioner with powers which include the ability to interview witnesses and review documents deemed relevant to the investigation process. In conducting the preliminary review, our process included:

- Reviewing the Township's complaint protocol;
- Reviewing the relevant provisions of the *Municipal Conflict of Interest Act* and the *Municipal Act*;
- Providing a copy of the request for inquiry and supporting materials to Councillor Darling, with a request for any written response to be provided within 10 business days;
- Providing a copy of Councillor Darling's response to the applicant, with a request for any written response to be provided within 10 business days;
- Providing a copy of the applicant's response to Councillor Darling with a request for any written response to be provided within 10 business days; and
- Reviewing all submissions and analyzing the merit of the request for inquiry.

[006] After completing the preliminary review, our office determined that there was a reasonable basis to conduct an inquiry.

### **Inquiry**

[007] In conducting the inquiry, our process included:

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<sup>1</sup> *Di Biase v. City of Vaughn*, 2016 ONSC 5620.

<sup>2</sup> *F.H. v. McDougall*, [2008] 3 SCR 41; 61; 2008 SCC 53 (SCC) at para. 61.

- Reviewing various minutes of Council, reports and materials provided by both the applicant, Councillor Darling, and witnesses;
- Interviewing Councillor Darling;
- Interviewing witnesses that we identified as relevant to the inquiry;
- Conducting legal research relevant to the subject matter of the inquiry; and
- Providing Councillor Darling with an opportunity to respond to the reformulation of the application to add an additional potential breach of the MCIA.

## **BRIEF STATEMENT OF FINDINGS OF THE INTEGRITY COMMISSIONER**

[008] The following is a summary of the findings of the Integrity Commissioner:

1. The *Municipal Conflict of Interest Act* prohibits members from considering and voting on matters, and influencing the vote on matters, for which they have an indirect or direct pecuniary interest that does not fall within a section 4 enumerated exception.
2. More recently, an amendment to the Act (in force on March 1, 2019) prohibits members from using their office to influence any decision or recommendation where that decision is made by an officer or employee of the municipality or local board who are delegated that authority by Council.
3. Councillor Darling had an indirect pecuniary interest in the Motion:
  - Councillor Darling's employer had a direct pecuniary interest in the Motion, as the disposition of the Motion directly affected the Client;
  - Councillor Darling had a subsequent indirect pecuniary interest, that cannot be excepted under the enumerated section 4 exceptions;
  - Councillor Darling declared a conflict for only part of the debate on the Motion and participated in the remaining portion of the debate and voted on the Motion, thereby breaching section 5(1)(a) and (b) of the Act; and
  - Part of the debate took place in closed session, and Councillor Darling did not declare a conflict and took part in the closed session discussions, thereby breaching section 5(2) of the Act.
4. Councillor Darling, through her e-mail correspondence and meetings with the Clerk and/or Planner (who have delegated authority to approve site plan agreements) regarding the Client's site plan agreement application, attempted to influence the Clerk and/or Planner, thereby breaching section 5.2(1) of the Act.
5. The Integrity Commissioner will not be exercising his discretion to apply to the Court for a determination of this matter under section 8 of the Act.
6. Notwithstanding that the Integrity Commissioner will not be referring the matter to the Court, we find that the Member is required by section 3.0(b) of the Code of Conduct to comply with the *Municipal Conflict of Interest Act*. The breaches of the MCIA also amount to breaches of the Code of Conduct.
7. The Integrity Commissioner recommends that Council impose a financial penalty and issue a reprimand for the breach of the Code of Conduct.

## MUNICIPAL CONFLICT OF INTEREST ACT

[009] The following provisions of the MClA were applicable to our analysis:

### **When present at meeting at which matter considered**

5 (1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,

(a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;

(b) shall not take part in the discussion of, or vote on any question in respect of the matter;

### **Where member to leave closed meeting**

(2) Where the meeting referred to in subsection (1) is not open to the public, in addition to complying with the requirements of that subsection, the member shall forthwith leave the meeting or the part of the meeting during which the matter is under consideration.

### **Indirect pecuniary interest**

2 For the purposes of this Act, a member has an indirect pecuniary interest in any matter in which the council or local board, as the case may be, is concerned, if,

...

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

### **Influence**

5.2 (1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter that is being considered by an officer or employee of the municipality or local board, or by a person or body to which the municipality or local board has delegated a power or duty, the member shall not use his or her office in any way to attempt to influence any decision or recommendation that results from consideration of the matter.

## **INQUIRY**

### **Application for Inquiry**

[0010] It is alleged that at the November 5, 2019 meeting of the COW, Councillor RoxAnne Darling introduced the Motion, and although she declared a conflict and did not participate in part of the debate on the Motion, she did not abstain from participating in the entirety of the debate and voted on the Motion following Committee debate.

[0011] The applicant alleges that Councillor Darling's employer had a pecuniary interest in the Motion and Councillor Darling therefore had an indirect pecuniary interest under section 2(b) of the Act, and by participating in part of the debate and voting on the Motion, breached sections 5(1) of the Act.

[0012] Our addition to this allegation is:

- Whether Councillor Darling, through her e-mail correspondence to the Clerk and/or the Planner, as well as meetings with the Clerk and/or the Planner (who have delegated authority to approve site plan agreements), attempted to influence their decision on the approval of the Client's site plan application, thereby breaching section 5.2 of the Act.

### **Councillor Darling's Employment with a Local Business**

[0013] Councillor Darling has been employed in a non-unionized position as the office manager for a business in the Township for approximately seven years. That business provides services to persons wishing to build in the Township using a custom home design. She has held the role of office manager for approximately four years. Prior to that, she worked in an administrative capacity with the company for three years.

[0014] The business provides services to clients that may include facilitating project management throughout a build, explaining processes to clients, assisting with sourcing trades through competitive bidding, and assisting with planning and permit applications to regulatory authorities, including the Township. In her role as office manager, she often assists clients with these applications.

[0015] The business was retained to assist the Client who wished to build a summer residence within the Township. The Client's property was located in a subdivision that fronted onto an unassumed road within the Township.



## Email Correspondence Relating to Allegations

### (a) RoxAnne Darling e-mails to the Township

[0016] **Note:** In this section, we refer to the Member as “Ms. Darling”, as the correspondence is sent from her work e-mail account as an employee of a local business.

November 18, 2018: Ms. Darling e-mailed the Township Planner in late 2018 to determine if there were any development issues with the property prior to her company assisting the Client in moving forward with the appropriate applications.

November 19, 2018: The Township Planner informed Ms. Darling of the requirement for a road access agreement (“RAA”) prior to the appropriate permits being issued.

November 27, 2018: Ms. Darling forwarded the Township Clerk the previous e-mail correspondence between herself and the Planner, asking whether the Client may already have a RAA.

December 20, 2018: The Township Clerk responded to Ms. Darling, indicating that the Client’s property was located on a private unassumed road, and the owners would require a RAA.

January 7, 2019: Ms. Darling e-mailed the Township Clerk to ask what costs the Client would incur as a result of the RAA, and other procedural questions about the planning process for the property. Further, Ms. Darling asked why the RAA was required, and under what by-law so that she may refer the Client to this information.

January 7, 2019: The Township Clerk indicated to Ms. Darling that section 3.4 of the Zoning by-law requires a RAA for the property as it fronts onto an unassumed private road.

July 9, 2019: Ms. Darling sent an e-mail to the Planner, Clerk and CAO, but directed specifically to the Planner. Ms. Darling stated as follows:

“My hope is that we can reach a logical solution within the site plan control agreement.....It does not seem right/logical that only new development require a road agreement. This is penalizing new development and adding extra cost and possible time delays to the applicant. I do need to address this item long before I

apply for the building permit and have it come up then.  
It could kill the project for this year. It is a Fall build."

July 15, 2019: The Township CAO e-mailed Ms. Darling, indicating that he had asked the Planner and Clerk to fill him in on the issue, and whether they needed "to have a larger discussion regarding road access agreements."

July 15, 2019: Ms. Darling replied to the CAO, indicating that her interpretation of section 3.4 of the Township's Zoning By-law 02-121 (the "Zoning By-law"), was that if the Client's property was rezoned, the Client would no longer require a RAA and recommended to the Client that they proceed with rezoning. She also agreed with the CAO that it should be discussed "on a wider scale for the whole of the Township"

July 22, 2019: Ms. Darling wrote to the Clerk, copying the CAO, CBO and Planner asking for an update on the Client's application, indicating she did not "want it to come up at building permit application time and delay the build."

July 24, 2019: The Planner responded to Ms. Darling, indicating that Council could change the requirement for the RAA – but that discussion should be about the policy itself and not on a "case by case basis". The Planner also shared legal advice they had received on the issue.

July 24, 2019: Ms. Darling responded to the Planner, and copied the Clerk, the CAO, the Chief Building Official, and the Public Works Manager. She indicated that the requirement for a RAA:

"definitely needs to be a council discussion. When can it be included on an agenda? And yes I think it needs to be discussed as a Township wide issue not just case by case."

...

"But for the [Client], I need a solid direction from the Township. If it is to come before council and a decision is [sic] make in favor of addressing Township liability in another way other than [sic] a individual road agreement, would it happen in time so the [Client] do not require one."

....

"Biggest question [sic] fairness, why only new builds. why now.."

July 25, 2019: In responding to the Planner's e-mail indicating that the Client's rezoning application would be heard on August 6, 2019, Ms. Darling indicated that:

"When will the requirement of a RAA [sic] into play? how do we explain it to the applicant when it is not in the zoning? If required, how and who do they contact to obtain such insurance information? Are we able to fit this discussion on the Agenda for the 6<sup>th</sup>? And if not on what agenda?"

July 30, 2019: The CAO responded to Ms. Darling indicating that the RAA would still be required regardless of the rezoning.

July 30, 2019: Ms. Darling responded to the CAO indicating that she still did not understand why there was a requirement for a RAA, and that

"it can be a discussion for Council as a whole, as long as it does not delay the [Client] build.."

July 30, 2019: In a further e-mail to the CAO, copying the Planner, Clerk and CBO, Ms. Darling indicated that she does not agree with staff and the Township's legal counsel's interpretation of section 3.4 of the Zoning By-law, stating:

"I would like this to come before council for discussion please. :) Not just for this application but all."

August 12, 2019: Ms. Darling emailed the Clerk and included quotes that she bolded and underlined where she had requested that the issue of the RAA be placed on a Council agenda for discussion. She then asked if it could be added to an upcoming meeting agenda.

August 12, 2019: The Clerk e-mailed Ms. Darling to indicate that she had added the issue to the September 3, 2019 Committee of the Whole agenda.

August 21, 2019: Ms. Darling e-mailed the Clerk, Planner and CAO, and indicated:

"I have yet to explain this requirement to my client, AND to be honest I do not know how I'm going to explain it to them because I do not actually understand the [sic] rationale behind it. I know we have a legal opinion, but that opinion is in conflict with our zoning requirements. I have contacted 3 other area [sic] planner they all agree that one bullet point in a zoning section does not precede or is more important than any other.

...

So I need to explain why to them clearly and concisely, with supporting documents. Policy and logic. I need an example of what has been done and why. Please.

I know we have this subject on the Sept agenda for a general Township wide discussion, but I need something prior to that for my client. Please."

- August 28, 2019: The CAO e-mailed Ms. Darling, indicating that the RAA is required under section 3.4 of the Zoning By-law.
- August 28, 2019: Ms. Darling responded to the CAO, "Thanks Larry, not one I'm going to give up on :) BUT for the time being are we OK to move forward with a letter indicating that IF a road access agreement is required after council discussions, then we will do so..".
- September 5, 2019: Ms. Darling wrote to the Clerk, CAO and Planner, indicating that the Client was upset they were still required (after rezoning) to obtain a RAA. She indicated that she still does not see what authority dictates this requirement.
- September 6, 2019: The CAO responded to Ms. Darling indicating that staff have answered all of the questions, but if she wished to come in and meet with himself, the Planner and Clerk, she could.
- September 9, 2019: Ms. Darling wrote to the Clerk, Planner and CAO asking for a copy of the "policy and corresponding by-law that was enacted to deal with the requirement of the road access agreement on some properties."
- September 9, 2019: Ms. Darling wrote to the Client indicating that they should reach out to specific council members on the issue as those members

allegedly did not agree with the requirement for the RAA. She provided the Client with the members' contact information. Further, she indicated that she would "strongly suggest" that they ask the Clerk to be added as a delegation at the October 8<sup>th</sup> Committee of the Whole meeting. Following that e-mail, the Client replied and included the suggested members of Council, the Clerk, and Ms. Darling's employer, and asked that they be added as a delegation at the "next meeting."

September 10, 2019: The Clerk responded to the Client, indicating that this was an operational/policy matter and as per the Township's procedural by-law, it would not be placed on a Council agenda at that time. Further, she stated:

"Please note though that a general discussion on the requirement for Road Access Agreements will occur at the October 8<sup>th</sup> Committee of the Whole meeting, which starts at 6p.m. Should you wish to address Council in general terms about the requirement for a road access agreement then please let me know and I can schedule you as a delegation."

September 17, 2019: Ms. Darling e-mailed the CAO:

"I want to let you know that I have submitted both the [Client] site plan control agreement and their Building Permit. They very much wish to build this Fall. I'm trusting that the issue of the road access agreement and the interpretation of the zoning by-law has been dealt with in house and all is good to move forward without a road access agreement. :)

September 17, 2019: The CAO responded to Ms. Darling, indicating that he was seeking further legal advice.

September 20, 2019: Ms. Darling e-mailed the CAO "Please tell me I have some good news to share with my client after your conversation with [Legal Counsel] and staff."

September 20, 2019: Ms. Darling (after getting an out-of-office notification for the CAO) e-mailed the Planner and Clerk to ask if there was an update on the CAO's conversations with the Township's legal counsel.

September 30, 2019: Ms. Darling e-mailed the Planner, CAO and Clerk indicating the Client wishes to have an update, as well as indicating that others have allegedly built on the same road without the requirement of a RAA.

October 1, 2019: The CAO sent an e-mail to Ms. Darling and copied the Planner and Clerk on the response, providing an update on his continued correspondence with legal counsel and other individuals about the requirement for the RAA. He indicated as follows:

“In looking at the COW meeting agenda for next Tuesday, I know you had asked to add this issue to be discussed by Council from a policy standpoint. Given the above noted [the client’s request], I’m wondering if it might be better to hold off on that discussion until we sort out the property at hand, as I think one leads to the other. Should you still wish to move forward with the policy discussion I would suggest we ask [Legal Counsel] to attend the meeting. Alternatively, you could proceed with the discussion next Tuesday but I believe Council needs to hear [Legal Counsel] comments before making any changes to the current situation and so my recommendation would be for Council to defer the matter to staff to follow-up and bring a report back outlining the issue. That way we can articulate the legal issues to ensure Council understands them clearly prior to [sic] consider changes. However, at this point, the building permit and site plan control applications are more pressing than future policy direction. If you can let Amanda know how you wish to proceed with this that would be great as she will be preparing the agenda.”

October 2, 2019: Ms. Darling wrote to the Planner and Clerk (the CAO was away) and indicated she wished for the item to remain on the agenda:

“As for the general discussion of the road agreement requirements, on the agenda, I think I would like for it to remain at this time. Staff can certainly give a basic overview for council to digest,

and Staff can recommend deferral of any decision until [Legal Counsel] can give a report if that is the wishes of Council.”

October 2, 2019: Ms. Darling wrote to the Planner, CAO and Clerk indicating that after giving it more thought,

“it would be best to move the road agreement discussion at the Nov, COW. If Staff feels it necessary [Legal Counsel] could attend that meeting. Again I wish to stress that the general policy discussion about the requirement of a road agreement is irrelevant to my permit application for the [Client] build. I need a clear decision from Staff addressing the [Client] application [sic] that have been submitted.”

October 11, 2019: The CAO sent an e-mail to Ms. Darling, copying the Clerk and the Planner, providing an extensive overview of why the RAA is required from a legal, land use planning, and insurance perspective, and explaining why section 3.4 of the Zoning By-law requires the agreement.

October 15, 2019: Ms. Darling e-mailed the CAO attaching a copy of a letter from the Client which Ms. Darling indicates the Client had prepared to provide to Council at the last meeting but the item was removed from the agenda. The letter sets out why the Client disagrees with the requirement for a RAA, and that if they lose their build because of it, they would take whatever action was necessary to reverse the decisions and recoup their direct and indirect costs.

October 15, 2019: Ms. Darling e-mailed the Clerk and the CAO asking if there was any update from the Township’s insurance company.

October 15, 2019: The CAO responded to Ms. Darling indicating that they were talking to the insurance company, and would get back to her.

October 25, 2019: Ms. Darling e-mailed the Clerk asking that the Clerk add her employer as a delegation at the November 5, 2019 COW meeting.

- October 30, 2019: Ms. Darling e-mailed the Clerk, CAO and Deputy Clerk to ensure that her employer had been added as a delegation so that he may “speak in general terms as an area Builder, about the possible building obstacle the road access agreement plays in past and future development in Tay Valley.”
- October 30, 2019: Ms. Darling e-mailed the Clerk and the CAO asking when the November 5, 2019 COW meeting agenda would be available to the public, as the Client was inquiring.
- October 30, 2019: Ms. Darling e-mailed the CAO asking if her employer had been added as a delegation at the November 5, 2019 COW meeting as it was “important that [Employer] has a chance to speak to this issue if he wants to.”
- October 31, 2019: The CAO responded that the report for the RAA and the agenda for the November 5, 2019 COW meeting would be available soon, and that her employer was listed as a delegation. He also warned that the Township’s legal counsel had indicated that depending on the nature of the discussions, Council may need to go in-camera during part of the discussions.
- October 31, 2019: Ms. Darling e-mailed the Clerk and the CAO indicating that the Client wished to be added as a delegation “OR because [Client] is an applicant will [Client] have an opportunity to speak if [Client] wishes?”
- October 31, 2019: The Clerk responded to Ms. Darling indicating that the Client  
  
“would need to be added on as a delegation as we are not speaking about the [Client] application specifically on Tuesday, rather their situation is being used as an example.”
- October 31, 2019: Ms. Darling responded to the Clerk asking that the Client be added as a delegation.
- November 5, 2019: Ms. Darling e-mailed the CAO, Clerk and Chair of the Committee of the Whole to ask if the delegates (her employer and the Client) could speak after the report was made to the Committee of the Whole as the delegation “may choose to change the information they wish to present or to not speak at all.” Further, Ms. Darling asked if one of the individuals could call her:



“Could one of you please give me a call to discuss my participation in the discussion tonight.”

November 5, 2019: The CAO responded to Ms. Darling that she would need to seek Council approval to waive the procedural rules to allow the delegates to speak first and again cautioned that part of the discussions may need to take place in-camera.

November 5, 2019: The Chair of the COW replied to Ms. Darling that she would seek approval to have the agenda amended to allow the delegates to speak after the report.

November 22, 2019: Ms. Darling wrote to the Planner to ask when she could expect a revised site plan agreement for the Client.

**(b) Councillor e-mails to the Township**

[0017] **Note:** The following is a summary of correspondence sent to and from Councillor Darling dealing with the issues in her capacity as a Councillor

September 17, 2019: The Clerk e-mailed Councillor Darling indicating that she may wish to seek advice from the Township’s Integrity Commissioner regarding her obligations under the MClA and the Code of Conduct, and may also “talk to him about the general discussion coming up.”

September 17, 2019: Councillor Darling responded “Good idea...thanks,, I forgot all about Tony. :)”

November 5, 2019: The CAO e-mailed Councillor Darling to ask “Will you be declaring a conflict?”

November 5, 2019: Councillor Darling responded to the CAO’s November 5<sup>th</sup> e-mail:

“I will not be declaring a conflict on the general discussion of the requirement of a road access agreement. I will make a brief statement and recommendation that I will hopefully read prior to any other councillors comments. I will then declare a possible conflict and remove myself from the council table. That way if the conversation segues

into a conversation about the [Client] application I will not be in a conflict.”

November 6, 2019: Councillor Darling e-mailed the CAO, Planner and Clerk to request that:

“Part 2 and 3 of my suggested motion come back for council discussion as soon as possible. BUT the more I think about it, both refer to the zoning by-law and I believe there are other sections in the zoning by-law that need to be reviewed. So can you please add to our next COW meeting agenda a brief discussion about the current zoning by-law and possible changes, so it can get on a future meeting agenda for a bigger discussion.”

November 12, 2019: Councillor Darling e-mailed the Clerk and CAO to ask when the RAA motion was being brought before Council.

### **Inquiry into Allegations**

#### **(1) November 5, 2019 meeting of the Committee of the Whole:**

**Councillor Darling is alleged to have declared a conflict but participated in some of the debate on agenda item #6 ii) “Report #CAO-2019-05 – Road Access Agreements for Un-assumed Subdivision Roads” and voted on the motion, contrary to section 5(1) and/or (2) of the Act.**

#### Facts

[0018] Councillor Darling introduced the Motion to the Committee of the Whole, and provided a statement that was attached to the agenda, which we attach to our report as Appendix “A”. Councillor Darling, through her introductory statement and Motion, attempted to broaden the issue into a Township-wide issue, rather than identifying the direct interest of the Client.

[0019] Councillor Darling did not declare a conflict after her opening statement, as she indicated she would in her email of November 5, 2019.

[0020] The Committee debated the Motion at length and heard from the Township’s legal counsel and insurer.

[0021] The minutes of the COW meeting indicate that Councillor Darling declared a conflict after her employer spoke as a delegate but before the Client spoke as a delegate. The

employer spoke to the broad nature of the issue and also referred to the Client specifically in their submissions. The Committee then heard from the Client.

[0022] The minutes further indicate that the Committee then heard from the Township's legal counsel on the larger of the Zoning By-law requirement to enter into a RAA, and to the specific issue concerning the Client.

[0023] Finally, the minutes indicate that following the submissions of the Client and the Township's legal, Councillor Darling returned to her chair and resumed further debate with the Committee on the Motion.

[0024] The Clerk indicated that the Client's matter was not on the agenda and would need to be added if it was to be discussed specifically. That did not occur. The Committee went in-camera to discuss the agenda item with legal counsel. Councillor Darling did not declare a conflict in-camera, indicating that she wished for the debate to remain 'general' so that she may stay in the room.

[0025] Following the Committee's return to open session, the following amended motion (the "Amended Motion") was presented as a Committee recommendation to Council:

**"THAT**, the Township eliminate the requirement for property owners to enter into a road access agreement on unassumed subdivision roads in the Township;

**AND THAT**, section 3.4 of the Township zoning by-law be reviewed and appropriately revised."

[0026] Councillor Darling voted in favour of the Amended Motion and it was passed on a majority vote.

#### Councillor Darling's Position

[0027] Councillor Darling indicated that she felt that section 3.4 of the Zoning By-law did not mandate that a RAA was required if the property was rezoned as seasonal and limited service residential. Councillor Darling reiterated that she voiced her concerns to staff that the mandatory RAA for individuals who wished to develop their properties was cost prohibitive and that the Township was losing development from property owners who could not afford to enter into such agreements given the insurance premiums. Further, she indicated that staff confirmed to her that development had been lost in the past due to this requirement, but they could not confirm how many times this had occurred. Councillor Darling also indicated that staff confirmed that the Township had not been consistent in its application of this requirement.

[0028] Councillor Darling's position is that she asked that the matter be brought to Council in September as a general item for discussion, given that it affected many property owners on unassumed roads within the Township who could not develop because of the requirement for an onerous RAA.

[0029] Councillor Darling felt that private citizens should not be required to insure something owned by the Township. Further, she opined that one ratepayer should not be responsible for insuring other ratepayers that have already developed on the road and who are not required to enter into such an agreement.

[0030] Councillor Darling felt that she met her obligations under the Act by declaring a conflict when the Client spoke as a delegation at the November 5, 2019 meeting of the COW. She indicated that she considered this portion of the discussion on the Motion to be "specific discussion" impacting the Client, whereas the beginning and remaining portions of the debate on the Motion were "general discussion". The "general discussion" was thought by the member to be about the larger issue and how it impacts electors in general. Further, she indicated that in the past, she had always declared a conflict of interest when clients of her employer (including the Client) came before Council or Committee on matters for which her employer had a pecuniary interest. She indicated that this was a matter that affected a larger category of those who own property and have not yet developed it, and that the general discussion pertained to all of those individuals.

### Analysis

[0031] Similar to the facts before us, the Court in *Baillargeon v. Carroll* addressed issues relating to whether a line can be drawn between "general" and "specific" decisions by a Board. The respondent member of a School Board was found to have breached section 5 of the Act after voting on a matter for which he had a deemed pecuniary interest:

"Trustee Carroll acknowledges that he participated in discussion of a matter before the Board on May 14, 2008 in which he had a deemed pecuniary interest contrary to the Act. That pecuniary interest arose because of his daughter's employment as a teacher and because the Board was discussing a budget proposal for the upcoming fiscal year which contemplated reductions in teaching staff.

Trustee Carroll's position is that he understood that he could participate in general budget discussions but not discussions of specific items that could affect his daughter's pecuniary interests. As such, Trustee Carroll submits that his breach of the Act was the result of an error in judgment and that it should not result in his seat being declared vacant..."<sup>3</sup>

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<sup>3</sup> *Baillargeon v. Carroll*, 2009 CanLII 4510 (ON SC) at paras. 4-5.

[0032] In *Baillargeion*, the respondent member had requested legal advice asking how far his conflict of interest extended when it came to discussions regarding budget and teachers, given that his daughter was employed by the Board. He had declared a conflict of interest on several occasions previously. The question to their legal counsel was:

“If a trustee declares an interest in a specific budget line, can the trustee then vote on the budget minus that specific line?” The answer given to that question is as follows:

“...it depends on how the budget comes before the Board. If the budget approval is a stepped process so that the specific budget line, such as the teacher’s salary component, is separated from the others, and the votes are held on each individual item or groups of items, then the trustee can vote on the budget except the excluded items.

On the other hand if the whole budget comes forward for approval in one motion without any division or separate categories then the trustee cannot vote on it.”

.....

“It was confirmed at the meeting of May 7, 2008 that if the budget, as a whole, comes to the Board and the trustee is conflicted with respect to an element of the budget, he or she cannot discuss or vote on the budget as a whole.”<sup>4</sup>

[0033] The respondent trustee in *Baillargeion*, after receiving legal advice, indicated that his understanding was that he could not participate in discussions regarding teacher layoffs or vote on specific budget items dealing with teacher layoffs because of his daughter’s employment as a teacher, but that he *could* participate in general budget discussions. He argued that his error was the result of an error in judgment. The Court found that the Board voted on a general budget decision that could indirectly lead to teacher layoffs (including his daughter’s position), and that the respondent Trustee was aware of this impact but participated in and voted on that decision anyway. The argument that the vote was not ‘specific’ was not successful. As such, he was found to have breached section 5 of the Act.

[0034] Similarly, Councillor Darling took part in the debate on the Motion and the Amended Motion, and voted on the Amended Motion to recommend eliminating the requirement of the RAA from the Zoning By-law. She noted that this resolution was a general policy decision by the COW. However, the Amended Motion directly affected the Client who wished to enter into their site plan agreement with the Township without the requirement of entering into a RAA.

[0035] When discussing the matter with the Planner, Councillor Darling noted that she was concerned whether Council’s decision on the matter would be made in time so that the

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<sup>4</sup> Ibid, at paras. 28 and 31.

Client would not require a RAA, which contradicts the idea of a general policy discussion that is not related to the Client specifically.

[0036] It is relevant that staff recommended to Councillor Darling that she seek the advice of the Integrity Commissioner or independent legal counsel prior to the COW or Council meetings for which the requirement of the RAA was discussed and voted on. Notwithstanding this recommendation, the Councillor did not seek advice. The Member's position is that she declared when she ought to have declared, and was not in a conflict during the 'general discussion' of the Motion and thus did not require advice.

[0037] As in *Baillargeon*, the facts of this matter do not support Councillor Darling's position. The decision by the COW and subsequently Council were not 'general' in nature such that the impact on the Client was unpredictable. In fact, the impact was entirely predictable given the previous statements by the Member that the Client would not move ahead with their project if they were required to enter into a RAA with the Township and any decision in that regard would affect their plan for a Fall build. The decision of the COW and Council to eliminate this requirement directly affected the Client.

[0038] Councillor Darling's correspondence with staff was that the matter needed to be placed on the COW agenda, expediently. But for the Client and the issues of importance to the Client, there is no evidence that the issue would have been brought before Council – and certainly not in the timeframe under which it was advanced.

### Finding

[0039] The purpose of the MCIA is to ensure that members do not vote or attempt to influence the vote on matters for which they stand (directly or indirectly) to gain or lose financially. Section 4 of the Act creates a list of enumerated exemptions to the section 5 requirement, such that when the member has a pecuniary interest (either direct or indirect) but an exception applies, they need not declare that interest and may take part in the debate and vote on the matter. This exception deems a pecuniary interest not to exist and therefore the requirements of section 5 of the Act do not apply.

[0040] The intent of the member is not part of the consideration of whether or not there was a breach of the MCIA. The inquiry is objective – and deals only with the member's actions, objectively viewed.<sup>5</sup>

[0041] We find that although the Motion was presented as 'general' in nature to address road access agreements, the disposition of the Amended Motion directly affected the active site plan application of the Client and the employer's potential to profit from that contract. If the Motion (or subsequent Amended Motion) failed, it was more likely than not (as stated

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<sup>5</sup> *Baillargeon v. Carroll* 2009 CanLII 4510 (ON SC) at para. 77

in the e-mail correspondence from Councillor Darling to staff), that the Client would not have proceeded with their development and Councillor Darling's employer would have lost the Client's contract.

[0042] The timing of the Motion cannot be ignored. If in fact the Motion was to apply only to electors in general, then the timing was not urgent. The Client's application was the only active site plan application that required a RAA at the time that the Motion was considered. In his October 1, 2019 e-mail to Councillor Darling, the CAO indicated that the motion to the Committee should wait until after the Client's matter had been dealt with as one issue most certainly follows the other. We agree.

[0043] We find that the rationale for Councillor Darling's pursuit of a fair result for the Client is irrelevant. Whether section 3.4 of the Zoning By-law is clear, or whether there is a need for the RAA, is immaterial to our inquiry. Unfairness to the Client does not thereby remove the pecuniary interest of the Member. It also does not alter the impact of the Motion or Amended Motion on the Client.

[0044] The e-mails referenced above clearly demonstrate that but for the Client's interest in this issue, the matter would not have been advanced in such an expeditious manner by Councillor Darling. Councillor Darling's assertion that she was attempting to address the "general" issue only, separate from the Client's obvious interest, is not credible. The issue of the RAA was brought to Council by Councillor Darling only after it was an issue for the Client and was pursued diligently while simultaneously attempting to maintain the Client's timetable for their build. The build was clearly contingent on having the policy for RAA's reversed by Council. The attempt to characterize the issue as "general" was Councillor Darling's attempt to avoid the MCIA and continue to advocate for the Client.

[0045] We find that Councillor Darling's employer had a direct pecuniary interest in the Motion (and resulting Amended Motion). As a result, Councillor Darling had an indirect pecuniary interest in accordance with section 2(b) of the MCIA.

[0046] Of the section 4 exemptions, we find that the only one that might apply to the facts being considered in our inquiry, is section 4(k).

4. "Section 5 does not apply to a pecuniary interest in any matter that a member may have,

.....

(k) by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member."

[0047] Section 4(k) was applied in the case of *Whitely v. Schnurr*<sup>6</sup> in which a Councillor voted in favour of a university's application to amend an official plan without first disclosing that he was a university employee. An application was brought under the Act for a declaration that the Councillor had failed to disclose a pecuniary interest. The court held that no pecuniary interest existed since "the interest of the [councillor] in the subject matter of the official plan amendment approval was of such remoteness and insignificance in its nature that it could not reasonably be regarded as having been likely to influence the [councillor] in his vote on the subject matter."

[0048] In reaching its decision, the Court advocated the following test in determining whether a particular set of circumstances would meet the "remoteness" or "insignificance" threshold of section 4(k):

Would a reasonable elector, being apprised of all the circumstances, be more likely than not to regard the interest of the councillor as likely to influence that councillor's action and decision on the question? In answering the question set out in such test, such elector might consider whether there was any present or prospective financial benefit or detriment, financial or otherwise, that could result depending on the manner in which the member disposed of the subject matter before him or her."<sup>7</sup>

[0049] The exact position held at the University by the councillor was not mentioned in the decision; however, the Court identified several factors concerning the nature of the councillor's employment that may be considered in determining the applicability of section 4(k). While cautioning against taking a 'comprehensive checklist approach', the Court identified the following factors:

- 1) The nature of the employee's work;
- 2) The employee's pay;
- 3) The employee's benefits;
- 4) Employee's advancement prospects; and
- 5) Whether the terms of employment are governed by a collective agreement.

[0050] In finding that the councillor's interest fell within the exception in section 4(k) and therefore, did not have a conflict of interest, the Court found in *Whitely* that the employee was one of a large number of employees whose employment was governed by a collective agreement. Therefore, there was no reasonable likelihood that his pay, benefits or employment advancement could be affected one way or the other by how he chose to vote as a member of council.

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<sup>6</sup> (1999) 4 M.P.L.R. (3d) 309 (Ont. Sup. Ct. of Justice)

<sup>7</sup> This test was also applied in the case of *Mel Lastman v. Ontario* (2000) 47 O.R. (3d) 177 (Ont. Sup. Ct. of Jus.)



[0051] The Ontario Superior Court applied this test in the case of *Bowers v. Delegarde*<sup>8</sup>. In that case, the Court considered whether a municipal councillor had a conflict of interest as a Bell Canada employee and (minimal) shareholder in relation to council's consideration of what to do about the municipality's plans for high-speed internet development. While the court concluded that Bell did not have a pecuniary interest (and thus the councillor did not have an indirect interest) it went on to address the application of the exception in subsection 4(k) had the court found that Bell did have pecuniary interest. The court concluded that neither the interest held by the councillor as an employee nor as a shareholder of Bell was significant and that "a reasonable elector, being apprised of all the circumstances, would not be more likely than not to regard the interest of the councillor as likely to influence that councillor's action and decision on the question".

[0052] When considering whether the respondent councillor/employee's conflict through his employment as a maintenance technician for Bell (which was a potential competitor to the municipal system) was too remote, the Court considered:

- 1) The chance for promotion;
- 2) The chance of a raise; and
- 3) The possibility of favourable treatment.

[0053] Similar to the analysis in *Whiteley*, the Court in *Bowers* focused on the nature and terms of the councillor's employment. Significant to the Court were the facts that:<sup>9</sup>

- 1) there was no marketing, sales, or consulting component to the employment;
- 2) the councillor was a member of a trade union and the terms of employment were governed by a collective bargaining regime;
- 3) there was no realistic possibility of the councillor being directly financially rewarded by his employer beyond the terms of the collective agreement; and
- 4) the councillor did not interface with customers; and
- 5) the councillor had no managerial role and did not have any managerial input.

[0054] The test for whether the pecuniary interest is remote or insignificant is an objective one. The Act does not mandate that a member refrain from having an opinion; it is concerned only with interests that are pecuniary. In such circumstances where a conflict may exist, the question to ask is whether an objective observer would consider any pecuniary interest, if in fact one exists, to be remote or insignificant.

[0055] In applying the above-referenced test, we find that Councillor Darling's indirect pecuniary interest cannot be excepted under section 4(k). We took the following factors into account in making this finding:

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<sup>8</sup> 5 M.P.L.R. (4th) 157.

<sup>9</sup> *Ibid.*

- (a) Councillor Darling holds a managerial role within her employer's business;
- (b) She interfaces with clients in a sale and oversight capacity, including submitting applications to the Township on their behalf;
- (c) It is a small business and therefore not unionized, and Councillor Darling therefore enjoys no protection in that capacity;
- (d) The nature of Councillor Darling's work is related to the item that was before the Committee; and
- (e) There was a chance for favourable (or less favourable) treatment by her employer resulting from the decision on the Motion.

[0056] Further, Councillor Darling knew that if the Motion passed, the requirement for the RAA would be disposed of and the Client could move ahead with their development and contract with her employer.

[0057] We find that a reasonable person apprised of the circumstances would be more likely than not to regard the pecuniary interest of Councillor Darling as likely to influence her action and decision on the question. The exception does not apply in this instance.

[0058] As the interest of Councillor Darling cannot be excepted under section 4(k), we find that in participating in some of the debate (both in open and closed session) on the Motion and Amended Motion, and voting on the Amended Motion, she breached section 5(1) and (2) of the Act.

**(2) Allegation 2: Did Councillor Darling, through her e-mail correspondence to the Planner, Clerk and CAO from March 1, 2019 onward attempt to influence the decision of the Planner and/or Clerk to approve the Client's site plan application?**

Facts

[0059] On March 1, 2019, the Act was amended to add a new section 5.2:

**Influence**

**5.2 (1)** Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter that is being considered by an officer or employee of the municipality or local board, or by a person or body to which the municipality or local board has delegated a power or duty, the member shall not use his or her office in any way to attempt to influence any decision or recommendation that results from consideration of the matter.

[0060] Council for the Township previously delegated authority to the Clerk and Planner to make site plan decisions.

[0061] Correspondence between Councillor Darling and the Clerk, Planner, and CAO regarding the Client's build began in November 2018 and continued through to the end of 2019. Initially, Councillor Darling was inquiring only as to whether there were any development issues on the Client's property in her capacity as an employee of a local business. The answer provided to Councillor Darling by staff is at the core of the request for inquiry before us. The Member was informed that the Client, being on an unassumed road, required a RAA in order to develop on the property in accordance with section 3.4 of the Township's Zoning By-law.

[0062] What followed was extensive correspondence between Councillor Darling and the Clerk, Planner and CAO regarding this requirement. Councillor Darling, after reviewing section 3.4 of the Zoning By-law, disagreed with staff's interpretation of the requirement specifically dealing with the Client.

[0063] On July 9, 2019, Councillor Darling indicated to the Planner, Clerk and CAO by e-mail that she hoped a logical solution could be found within the site plan control agreement, and that the requirement could "kill the project for this year. It is a Fall build".

[0064] Councillor Darling then indicated that her interpretation of section 3.4 of the Zoning By-law was that if the Client rezoned the property there would no longer be a need for the RAA. Staff did not provide Councillor Darling with an answer prior to her recommending to the Client that they rezone the property to avoid the necessity of the RAA.

[0065] Councillor Darling e-mailed the Clerk, CAO and Planner on numerous occasions indicating that she and the Client did not understand the need for the RAA. Further, she informed these staff members that the Client was very upset after obtaining a rezoning and still being informed by staff that they require a RAA. Councillor Darling provided her own interpretation of section 3.4 of the Zoning By-law to the Clerk, Planner and CAO on several occasions, reiterating that she did not see any Township authority for this requirement. She was continually informed that the requirement remained.

[0066] Councillor Darling, notwithstanding that the Planner, Clerk, and the CAO had informed her on several occasions (including legal advice from the Township's legal counsel that the requirement for the RAA remained), continued to send e-mails regarding what she considered to be their improper interpretation of section 3.4 of the Zoning By-law. At one point, Councillor Darling attached a letter from the Client indicating that if they were required to enter into the RAA, they would be seeking to reverse that decision and seek costs from the Township incurred to date.

#### Councillor Darling's Position

[0067] Councillor Darling's response to this allegation is that she was not acting in her capacity as a Councillor in her communications with the Planner and Clerk, as all e-mails were sent

from her work e-mail address. Further, she reiterated that when required, she declared a conflict of interest.

### Analysis

[0068] While writing as agent for the Client from her work e-mail address, the requests to staff can be characterized as using her position as a Councillor. To illustrate this point, the Member often used terms such as “our insurance” (i.e. the Township) or “our zoning” when writing to staff from her work e-mail account. Councillor Darling asked questions pertaining to information provided to the CAO, Planner and Clerk by the Township’s insurance company and legal counsel as it pertained to RAAs. This is information that would only be provided to her in her capacity as a Councillor, given that a member of the public would not be privy to such information. This type of correspondence blurs the line between acting as agent for the Client and as a Councillor for the Township.

[0069] In *Baillargeon*<sup>10</sup>, the Trustee, following the Board’s budget meeting, sent an email to the Director of Education for the Board and copying all trustees, raising the question of whether ‘regular’ teachers who might be laid off could be assigned to long term supply positions if they were laid off again. Further, he urged that long-term supply contracts ought to be provided to younger teachers, not retired teachers. He sent a further e-mail to a trustee and copying the remaining trustees, indicating that there were options to balance the budget that did not include ‘gutting classroom staff.’ The Court found that in sending those e-mails, the Trustee attempted to influence the consideration of the other trustees on changes to policy that would benefit his daughter. As such, he was found to have breached section 5(1)(c) of the Act.

[0070] Similar to the facts in *Baillargeon*, Councillor Darling sent continuous e-mails to the two staff persons with the delegated authority to make the decision on the Client’s site plan application. Even after being informed of their decision, Councillor Darling continued to disagree with their analysis of section 3.4 of the Zoning By-law, and encouraged them to meet with the Township’s insurer and legal counsel to see if the Client’s application could be approved without this requirement. She was not willing to ‘give up on’ her position in this regard.

### Finding

[0071] We find that Councillor Darling’s e-mails that we examined (dated March 1, 2019 and onward) were sent in an attempt to influence the Planner and/or Clerk who had the delegated authority to make site plan decisions. Although this section of the Act is relatively new, we are informed by previous case law interpreting section 5(1)(c). The case law relating to section 5(1)(c) sets out the test for whether a member has attempted to influence:

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<sup>10</sup> Ibid, at para. 78(g).

“Section 5(1)(c) of the Act requires an attempt to influence. This involves a deliberate act made with the intention of influence another or which a reasonable person would objectively see as meant to influence another.”<sup>11</sup>

[0072] Councillor Darling’s role as an employee of a local business and her role as a Councillor was often conflated as it pertained to the Client’s matter and her correspondence with the Clerk and Planner on the requirement of the Client to obtain a RAA prior to site plan approval. Even after receiving the decision of the Planner and Clerk, Councillor Darling sent ongoing e-mails attempting to sway their decision in the opposite direction. A reasonable person, apprised of the facts, would be more likely than not to objectively see the e-mails as an attempt to influence the Clerk and Planner’s decision on the Client’s site plan application. What account the e-mails were sent from is not material to the analysis. What is important is the word choice and requests made by the Member, the refusal by the Member to accept the decision of the staff delegated to make that decision and the continued effort by the Member to change the mind of staff by repeatedly stating her disagreement with their interpretation of the Zoning By-law on a matter for which she had an indirect pecuniary interest.

[0073] This was a breach of section 5.2(1) of the Act. The ongoing email correspondence summarized above illustrates the extensive efforts made by Councillor Darling to advance the interests of the Client and influence the decision of staff who had the delegated authority from Council to make site plan application decisions.

### **COUNCIL MEETING TO ELIMINATE REQUIREMENT OF ROAD ACCESS AGREEMENTS**

[0074] Council, on November 19, 2019, passed a resolution to adopt the Amended Motion, and as a result, persons on unassumed private roads (such as the Client) were no longer required to enter into a RAA with the Township in order to develop on their property under section 3.4 of the Zoning By-law. As a result, Councillor Darling wrote to the Planner and Clerk on November 22, 2019, asking when the revised site plan would be approved for the Client. At the time of this vote, only Councillor Darling’s Client was advantaged by the decision.

[0075] Although not part of our inquiry, we find that this meeting item stems from the same facts and conflict of interest that Councillor Darling had at the November 5, 2019 meeting of the COW. The fact that Councillor Darling did not declare a conflict of interest and voted on the resolution to accept the recommendation of the COW regarding road access agreements is an aggravating factor. However, we did not feel it necessary to add this to the inquiry as our resulting decision and recommendations on penalty would remain the same given that all of the conflicts arise out of the same set of facts.

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<sup>11</sup> *Amaral v. Kennedy*, 2010 ONSC 5776, at para. 54.

## **MEMBER'S HISTORY**

[0076] Councillor Darling has been a Councillor with Tay Valley Township since 2006. She is a seasoned Councillor, who has contributed much to her community over the years. We found her demeanour during our interviews to be courteous and at times emotional given the stress she has endured during the course of our inquiry. This is to be expected given the nature of the MCIA and the ramifications that a finding of a breach may entail.

[0077] We reviewed Councillor Darling's history regarding declarations of conflict of interest under the MCIA at Council and Committee meetings. We find that Councillor Darling has a consistent history of declaring conflicts as they arise. Some of the history is summarized as follows:

- In 2016, Councillor Darling declared a conflict of interest on at least four occasions;
- In 2018, Councillor Darling declared a conflict of interest on at least four occasions;
- In 2019, Councillor Darling declared a conflict of interest on at least seven occasions.

[0078] Several of Councillor Darling's declarations of a conflict have dealt with matters relating to the Client's business with her employer in the past.

## **DECISION**

### **Allegation 1**

[0079] The Integrity Commissioner finds that Councillor Darling ought to have declared a conflict of interest at the outset of the November 5, 2019 meeting of the COW as it pertained to the Motion, and the closed session portion of that meeting dealing with the Motion, and abstained from participating in the entirety of the Committee's debate and vote on the Motion and Amended Motion. A member cannot declare a conflict on part of an agenda item – if there is a conflict of interest in part of the agenda item, then the member must declare a conflict and abstain from participating in the entirety of the debate and vote on that matter.

[0080] Councillor Darling attempted to notionally declare a conflict while still debating and voting on a matter that directly benefited the Client. This is precisely what the Act is designed to prevent.

[0081] Councillor Darling participated in the debate on the Motion and Amended Motion, and voted on the Amended Motion, violating section 5(1) and (2) of the Act.

[0082] Councillor Darling's e-mails dating after March 1, 2019 to the Planner, Clerk and CAO attempted to influence the consideration of the Planner and Clerk on a matter for which she had an indirect pecuniary interest, thereby breaching section 5.2(1) of the Act.

[0083] We note that section 5.2(1) came into force in March of 2019. Members had not yet received training on this section, yet ought to have been aware of their new obligations under the Act. Still, we consider the newness of this provision to be a mitigating factor in the recommendations for penalty.

[0084] This is not to say that a Member who holds an employment position such as Councillor Darling may not communicate with staff holding delegated decision-making authority on files. That would be overly broad and not the intention of the Province. This section is meant to capture influencing or attempts to influence. Councillor Darling, in her role as an employee, may certainly correspond with staff delegated to make decisions on building applications, etc. The line was crossed in this instance when the Member made consistent attempts to sway the decision that had been made, and attempted to have staff reverse their position on the requirement of the RAA for the Client.

[0085] We note that members ought to seek the advice of the Integrity Commissioner or independent legal counsel when they are unsure of their obligations under the MCI and/or the Code of Conduct. The provisions of the Act are intended to be harsh in order to ensure that members are held to the highest levels of trust.<sup>12</sup> Wilful blindness is not an excuse to a failure to live up to obligations under those governing authorities.

## **RECOMMENDATIONS**

[0086] In communicating with staff on the matter of the requirement of the RAA, staff and the Member often referred to 'general policy' or 'general discussion' versus the specific matter relating to the Client. This confused the issue of what exactly the COW and subsequently Council was being asked to do.

[0087] However, the revocation of the requirement for the RAA under section 3.4 of the Zoning By-law directly impacted and benefited the Client. Councillor Darling said herself, without the change in policy, the Client's Fall build would not happen.

[0088] Even so, we find that the consistent reference by staff and the Member (without correction) to 'general' versus 'specific' discussion on the policy without the acknowledgement by the COW or Council that one most definitely follows the other, was not particularly helpful in how these events played out. We find this to be a mitigating factor in our recommendations on penalty.

[0089] The Member ought to have known that she could not declare on part of the agenda item and subsequently reinsert herself and participate in the remaining portion of the debate (including debate in closed session) and vote on the Motion.

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<sup>12</sup> Ibid at para. 77.

[0090] Further, the Member ought to have known that her continued e-mails sent in attempt to sway the decision of the Planner and Clerk were a breach of section 5.2(1) of the Act.

[0091] It is the Integrity Commissioner's position that although the Member breached the Act in these instances, there are mitigating factors that have led to our decision not to apply to the Court under section 8 of the Act to determine whether the Member's seat ought to be vacated. Those mitigating factors include:

1. The Member's attempt to avoid a conflict of interest at the meeting by declaring a conflict of interest on part of the debate on the Motion;
2. The recent amendment to the Act regarding the influence of staff delegated to make decisions and Members of Council for Tay Valley Township having not yet received training on this amendment; and
3. The confusion between staff and the Member when the policy issue was characterized as a "general" discussion.

[0092] It is the Integrity Commissioner's decision that an application to the Court is not in the public interest on the facts (including the mitigating factors listed above) of this case.

[0093] Notwithstanding that the Integrity Commissioner will not be referring the matter to the Court, we find that the breaches of the MCI Act are also breaches of section 3.0(b) of the Code of Conduct.

[0094] Under the Code of Conduct, the Integrity Commissioner may recommend a reprimand, a monetary sanction of up to 90-days' remuneration, or other appropriate remedial or corrective actions.

[0095] The recommendations on penalties and/or sanctions must serve to reinforce the requirement that members adhere to the very high standard of their role as an elected official.

[0096] Based on our findings that the Member breached section 3.0(b) of the Code of Conduct, we recommend that Council pass the following resolution:

That, having breached section 3.0(b) of the Code of Conduct,

1. Councillor Darling's pay be suspended for period of 50 days; and
2. A public reprimand of the actions of Councillor Darling be issued by Council.

[0097] Further, we recommend that Council as a whole receive training regarding their obligations under the new section 5.2 of the MCI Act.



[0098] This concludes our inquiry of this matter. The Integrity Commissioner will take no further steps.

[0099] We would like to thank the applicant, the Member and all those involved for their cooperation and patience during this inquiry.

Sincerely,

**Cunningham, Swan, Carty, Little & Bonham LLP**

A handwritten signature in black ink, appearing to read 'Tony E. Fleming', with a long, sweeping horizontal line extending to the right.

Tony E. Fleming, C.S.  
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