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| TO: | CHAIR AND MEMBERS FINANCE AND ADMINISTRATIVE SERVICES COMMITTEE MEETING ON MAY 28, 2012 |
| FROM: | JAMES P. BARBER CITY SOLICITOR |
| SUBJECT | COUNCIL MEMBER INDEMNIFICATION BY-LAW |

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| RECOMMENDATION |
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That, on the recommendation of the City Solicitor, the attached proposed by-law (Appendix "A") **BE INTRODUCED** at the Municipal Council meeting on June 12, 2012 for the purpose of amending By-law No. A-5 entitled "A by-law to provide for the Indemnification and Defence of Members of Council against liability incurred while acting on behalf of the Municipality" to delete references to the Board of Control and substitute the Finance and Administrative Services Committee and to delete references to City Administrator and substitute City Manager.

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| PREVIOUS REPORTS PERTINENT TO THIS MATTER |
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None.

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| BACKGROUND |
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At its meeting of March 20, 2012, City Council adopted the following resolution:

- a) the City Solicitor BE REQUESTED to review the indemnification provisions of other municipalities and report back at a future meeting of the Finance and Administrative Services Committee (FASC) with proposed changes to the City of London's Indemnification By-law for Council Members with a view to developing a by-law which speaks to adverse versus non-adverse behavior; and
- b) the communication dated January 19, 2012 from O. Hobson, 45 Evergreen Avenue, London BE REFERRED to the City Solicitor for consideration as part of his review of indemnification provisions.

What is the legislative authority for an Indemnification By-law?

Section 279 of the *Municipal Act, 2001* provides as follows:

Insurance

279. (1) Despite the *Insurance Act*, a municipality may be or act as an insurer and may exchange with other municipalities in Ontario reciprocal contracts of indemnity or inter-insurance in accordance with Part XIII of the *Insurance Act* with respect to the following matters:

1. Protection against risks that may involve pecuniary loss or liability on the part of the municipality or any local board of the municipality.
2. The protection of its employees or former employees or those of any local board of the municipality against risks that may involve pecuniary loss or liability on the part of those employees.
3. Subject to section 14 of the *Municipal Conflict of Interest Act*, the protection of the members or former members of the council or of any local board of the municipality or any class of those members against risks that may involve pecuniary loss or liability on the part of the members.

4. Subject to section 14 of the *Municipal Conflict of Interest Act*, the payment of any damages or costs awarded against any of its employees, members, former employees or former members or expenses incurred by them as a result of any action or other proceeding arising out of acts or omissions done or made by them in their capacity as employees or members, including while acting in the performance of any statutory duty.
5. Subject to section 14 of the *Municipal Conflict of Interest Act*, the payment of any sum required in connection with the settlement of an action or other proceeding referred to in paragraph 4 and for assuming the cost of defending the employees or members in the action or proceeding. 2001, c. 25, s. 279 (1).

As demonstrated by the distinction in the statute between members of council and employees, the relationship of elected councillors to the municipal corporation is quite different to the relationship of employees to the municipal corporation. In one case, the Ontario Superior Court of Justice has described the legal position of municipal councillors vis-à-vis the municipal corporation as follows:

“[21]councillors in my view are free to hire their own counsel and to be represented independently in these matters. The City Solicitor does not represent or speak for these individuals unless with their consent. These members of Council are not officers, agents or representatives of the City in their own capacity. Mr. Caskey [the city’s solicitor] does not represent these individuals personally. They are independent, and free to talk to whom they choose subject to their Code of Conflict”

As the Court indicates above, the City Solicitor does not act for councillors except with their consent and the courts have ruled that where the interests of the City and a councillor are adverse or potentially different, the city’s lawyer cannot act for a councillor. Part 4 of the by-law provides that councillors may either retain their own lawyers or request the Corporation to select and retain a lawyer on their behalf.

Section 279 permits the municipality to be an insurer itself or to contract for insurance for the payment of any damages or costs awarded against any of its members of council or former members or expenses incurred by them as a result of any action or other proceeding arising out of acts or omissions done or made by them in their capacity as members, including while acting in the performance of any statutory duty and for the payment of any sum required in connection with the settlement of an action or other such proceeding and for assuming the cost of defending the members in the action or proceeding. While the statute is not explicit on how this is to be done, the *Municipal Act, 2001* provides that a municipal power shall be exercised by by-law and it appears that municipalities have enacted by-laws or adopted policies by by-law providing for indemnification either generally or on a case by case basis.

While section 279 provides for indemnification for actions or proceedings against council members in their capacity as members of council, the indemnification is limited to acts or omissions done or made by them in their capacity of members. The Courts have interpreted this or similar wording to provide that “reimbursement can only be made where a member of council was performing the duties of his or her office. Thus, reimbursement for activity that predates a term of office, or is outside the ambit of the office, is not permitted.” The most recent judicial statement is that this limitation was “meant to limit the circumstances in which councillors can seek reimbursement from a municipality’s funds. They cannot seek reimbursement for expenses unrelated to their activities and duties as councillors.”

There is generally no personal liability for municipal councillors at common law for an act or omission of the municipal corporation in its corporate capacity except where the act is *ultra vires* the municipal corporation, contrary to law, carried out with malice or bad faith, unauthorized by the municipal council or where the council member had a conflict of interest. Councillors may be subject to legal action where they are alleged to have acted outside the powers of council, alleged to have acted deliberately in bad faith or with malice, alleged to have committed a criminal offence or alleged to have defamed someone. A councillor may seek indemnification in such circumstances on the basis that the allegations are untrue. In such circumstances, they are entitled to seek indemnification under an

indemnification by-law in advance by making a request to the City Manager or at the conclusion of the proceedings. If indemnification is not granted, they may have to institute legal proceedings to recover the indemnification or, to the extent that indemnification is granted, the granting of indemnification may be challenged in court. The by-law does not contain a provision for repayment (as do some municipalities) in the event indemnification is granted with respect to legal fees and the councillor is unsuccessful in the litigation.

City Council members are also entitled to statutory protection and statutory immunity. Under the *Legislation Act, 2006*, a provision of an Act that creates a corporation, exempts the members of the corporation from personal liability for its debts, acts and obligations, if they do not contravene the Act that incorporates them. Section 448 of the *Municipal Act, 2001* provides considerable statutory immunity for individual members of a municipal council as follows:

Immunity

448. (1) No proceeding for damages or otherwise shall be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority. 2001, c. 25, s. 448 (1).

Liability for torts

(2) Subsection (1) does not relieve a municipality of liability to which it would otherwise be subject in respect of a tort committed by a member of council or an officer, employee or agent of the municipality or a person acting under the instructions of the officer, employee or agent. 2001, c. 25, s. 448 (2).

Pursuant to s. 279, the city has contracted for insurance which provides for coverage for municipal councillors with respect to certain types of liability as follows:

General Liability for Third Party Damages

- Bodily injury, sickness, diseases and resulting death
- Malicious prosecution, libel, slander, etc.
- Damage to, loss or destruction of property
- Wrongful Dismissal

Contractual Liability

- Legal Liability assumed by the City under an agreement related to statute warranties, written leases and easement agreements and any other contract.

Non-Owned Automobile Liability

- Legal Liability for automobile accidents arising out of use by representatives of automobiles not owned by the City (except for vehicles under contract for snow ploughing).

Errors and Omissions Liability Insurance

- The policy insures "compensatory damages which the Insured shall become obligated to pay by reason of the liability imposed upon the insured by a court of civil law because of a Wrongful Act" for *claims made during the policy period*. A Wrongful Act is defined as: 'Any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by the Insured in the discharge of their duties individually or collectively...'.

While all of these insurance policies contain limitations and exclusions, in circumstances where there is insurance coverage, the municipal councillor would be represented by legal counsel appointed or approved by the insurer.

Finally, s. 131 of the *Courts of Justice Act* provides that costs of a legal proceedings are in the discretion of the court to determine by whom and to what extent that costs shall be paid and costs may be awarded by the Courts against persons who bring proceedings unsuccessfully against municipal councillors personally including circumstances where the councillor was improperly added to the legal proceeding.

What are the current provisions of the Councillor Indemnification By-law?

By-law A-5 (attached as Appendix "B"), as amended, was enacted November 15, 1993 and is not found on the City's website.

The relevant section in relation to the Council resolution of March 20, 2012 reads as follows:

3.1 The Corporation shall indemnify a member of the Council and his heirs and legal representatives in the manner and to the extent provided by section 3.2 of this By-law in respect of any civil, criminal or administrative action or proceeding by a third party arising out of acts or omissions done or made by such person in his capacity as or by reason of being or having been a member of the Council or an officer of the Corporation, including acting in the performance of any statutory duty imposed by any general or special act, if:

(a) He acted honestly and in good faith with a view to the best interest of the Council or the Corporation; and

(b) In the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

3.2 The Corporation shall indemnify a person referred to in section 3.1 of this by-law by:

(a) assuming the cost of defending such person in an action or proceeding;

(b) paying any damages or costs, including a monetary penalty, awarded against such person as result of an action or proceeding;

(c) paying, either by direct payment or by reimbursement, any expenses reasonably incurred by such person as a result of an action or proceeding;

(d) paying any sum required in connection with the proceeding;

to the extent that such costs, damages, expenses or sums are not assumed paid or reimbursed under any provision of the Corporation's insurance for the benefit and protection of such person against any liability incurred by that person.

The wording in London's Councillor Indemnification By-law reflects the wording in the indemnification by-laws and policies in other municipalities in Ontario, some of which have recently been enacted. Indemnification is provided "in respect of any civil, criminal or administrative action or proceeding by a third party arising out of acts or omissions done or made by such person in his capacity as or by reason of being or having been a member of the Council or an officer of the Corporation, including acting in the performance of any statutory duty imposed by any general or special act".

Similar wording has been held not to provide indemnification with respect to defamation, compliance audit costs, and criminal charges upon which the councillor was acquitted but which were found to be unrelated to the councillor's official duties. By-law A-5 does not provide indemnification for contraventions of the *Municipal Conflict of Interest Act* (s.2.2), the *Municipal Elections Act* (s. 2.3), *Criminal Code* offences (s.2.4) or actions for defamation (s. 2.5). It should be noted that a few large municipalities (unlike the vast majority of municipalities in Ontario) have made provision for indemnification for defamation explicitly and it has been reported that councillors have sought and received indemnification where

they have been held liable for defamation. It should be noted as well that at least one municipality has amended its indemnification policies to address explicitly the activities of councillors on outside agencies, boards and commissions.

The Indemnification By-law provides for indemnification as described in the by-law as long as the councillor can demonstrate that the councillor “acted honestly and in good faith with a view to the best interest of the Council or the Corporation” “in his capacity as or by reason of being or having been a member of the Council or an officer of the Corporation” and “[i]n the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful”.

The question as to whether an individual councillor meets the criteria established under the by-law for entitlement potentially places the municipal council in a position of being adverse in interest to the councillor claiming entitlement. If the City Council refuses to authorize payment in accordance with the by-law or the City Manager refuses to appoint a lawyer or approve the Councillor’s selection of a lawyer, it would be open to a councillor seeking indemnification to sue the municipal corporation based upon the provisions of the by-law and a judge would make the final determination as to the entitlement of the councillor to indemnification under the by-law. Similarly, a person with standing could initiate legal proceedings to challenge a council action authorizing indemnification in purported compliance with the by-law and a judge would determine whether council’s action was valid and whether the councillor was entitled to indemnification.

Can an indemnification by-law require that the councillor act in good faith with a view to the best interest of the Council and the Corporation as a condition of receiving indemnification?

Given the very limited grounds upon which a municipal councillor can be held to be personally liable for acts done in the capacity of or by reason of being a municipal councillor, the requirement that a councillor act “in good faith with a view to the best interest of the Council or the Corporation” in the City’s by-law appears to be consistent with the enabling legislation and the related jurisprudence concerning the role and functions of a municipal councillor.

The jurisprudence of the Supreme Court of Canada appears to support the view that a councillor is elected to give effect to public views as to important policies to be effected by the community and could meet the “best interest” test by demonstrating that he or she had acted in fact in the best interest of the Council or the Corporation in so doing in respect of legislative activity and in a manner not contrary to law. The Supreme Court of Canada has adopted the following description of the role of councillors:

A municipal council is an elected body having a legislative function within a limited and delegated jurisdiction. Under the democratic process the elected representatives are expected to form views as to matters of public policy affecting the municipality. Indeed, they will have been elected in order to give effect to public views as to important policies to be effected in the community.... They are not Judges, but legislators from whom the ultimate recourse is to the electorate. Once having given notice and fairly heard the objections, the Council is of course free to decide as it sees fit in the public interest.

The “good faith” and “best interest” standards would also appear to be applicable to a legal proceeding with respect to the exercise of the Corporation’s business powers and to any circumstance where the councillors are subject to fiduciary duties with the proviso that where there is an administrative or criminal penalty, the councillor must demonstrate that he or she “had reasonable grounds for believing that his (or her) conduct was lawful”.

What committee should address these matters?

No committee is identified for these matters at the present time and the final decision with respect to indemnification is made by City Council which is the successor to the Board of Control (under the by-law abolishing it). It is recommended that the By-law provide that requests for indemnification be referred to the Finance and Administrative Services Committee and that the statutory references in the by-law be updated as a housekeeping matter.

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| RECOMMENDED BY: |
| JAMES P. BARBER CITY SOLICITOR |

Att.

APPENDIX "A"

Bill No.

By-law No. A-

A by-law to amend By-law A-5 entitled, "A by-law to provide for the Indemnification and Defence of Members of Council against liability incurred while acting on behalf of the Municipality" to remove references to "Board of Control" and replace them with "Finance and Administrative Services Committee" and to remove references to "City Administrator" and replace them with "City Manager".

WHEREAS the Council of The Corporation of the City of London wishes to amend By-law A-5 entitled "A By-law to provide for the Indemnification and Defence of Members of Council against liability incurred while acting on behalf of the Municipality";

AND WHEREAS section 279 of the *Municipal Act, 2001* provides that a municipality may be or act as an insurer and may exchange with other municipalities in Ontario reciprocal contracts of indemnity or inter-insurance with respect to the protection of the members or former members of the council against risks that may involve pecuniary loss or liability on the part of the members; the payment of any damages or costs awarded against any of its members or former members or expenses incurred by them as a result of any action or other proceeding arising out of acts or omissions done or made by them in their capacity as members, including while acting in the performance of any statutory duty; and the payment of any sum required in connection with the settlement of an action or other proceeding referred to in paragraph 4 and for assuming the cost of defending the members in the action or proceeding;

AND WHEREAS section 5(3) of the *Municipal Act, 2001* provides that a municipal power shall be exercised by by-law;

NOW THEREFORE the Municipal Council of The Corporation of the City of London enacts as follows:

1. The Councillor Indemnification By-law, being By-law No. A-5, is hereby amended as follows:
 - (a) by removing all references to the term "Board of Control" and replacing them with the term "Finance and Administrative Services Committee"; and
 - (b) by removing all references to the term "City Administrator" and replacing them with the term "City Manager".
2. This by-law comes into force and effect on the day it is passed.

PASSED in Open Council on June 12, 2012.

Joe Fontana

Mayor

Catharine Saunders
City Clerk

First Reading – June 12, 2012
Second Reading – June 12, 2012
Third Reading – June 12, 2012