

**REPORT ON REVIEW OF CONDUCT OF COUNCILLOR, MICHAEL VAN HOLST
AT MEETING OF CITY COUNCIL MAY 3, 2022**

INTRODUCTION

I do not generally comment on Integrity Commissioner Reports once they have been completed and submitted. In this case, I have received a complaint regarding the conduct of Councillor Michael van Holst, the subject of my recent Report of April 19, 2022, and asked to further investigate his conduct. Accordingly, I have done so.

FACTS

On April 19, 2022, I released the report on my Code of Conduct investigation concerning Michael van Holst's activities related to the City of London Members of Council Proof of COVID-19 Vaccination Policy. That report was put before Council on May 3, 2022, for consideration. After a brief discussion, the report and its findings were accepted by Council by a vote of 13 to 1. The recommendation that Council issue a reprimand of Councillor van Holst which was dealt with by a separate vote of Council was defeated on the basis of a 7 to 7 tie vote.

Late in the afternoon of May 3, 2022, I received an email communication concerning the vote. The concerns raised in the email were that Councillor van Holst did not declare a conflict of interest prior to the vote – a vote that would inherently impact him alone and proceeded to vote on the matter. As a result, the vote on the reprimand wound up being a tie vote and the motion was defeated.

The communication made reference to adherence to the City's Code of Ethics suggested that the Councillor had a conflict of interest and requested an investigation as to whether Councillor van Holst failed to identify and disclose a conflict of interest. Councillor van Holst was copied on that email communication.

Shortly after I received that email, I received an email reply from Councillor van Holst copied to the complainant stating that he did not have a conflict of interest in this matter. He raised a concern that in declaring a conflict of interest it would mean that he could not participate in the debate which would allow him to object to portions of the ruling. He further stated that if it was found that he was out of order, he would move for reconsideration of the vote at the earliest opportunity.

In reply to this, the complainant stated that in the event the Councillor chose to seek re-election, a reprimand is an official record of performance and therefore there would be a pecuniary interest in the matter.

Councillor van Holst's further response was to note that the Integrity Commissioner's findings of his violation of sections of the Code and their adoption by Council are also official. He stated that the question is whether he had the right to have a say in the matter. He stated that if the

answer to that question is no, he would do the best that he could to rectify the matter. He further commented that the issue didn't strike him until he had to select the yes or no button in voting. He firmly stated that he saw no pecuniary interest.

ANALYSIS

The City's Code of Ethics to which the Complainant refers is a document that applies to City employees. It does not apply to City Councillors as they are not employees of the City. The relevant governing documents with respect to a City Councillor would be the Code of Conduct for Members of Council and the Municipal Conflict of Interest Act.

The relevant provisions of the Code of Conduct generally refer to the Municipal Conflict of Interest Act on these issues. Section 5(1) of the Municipal Conflict of Interest Act refers to Councillors' obligations in cases of direct or indirect pecuniary interest. It states as follows:

"5(1) Where a member either on his or her own behalf or while acting for, by with or through another, has a pecuniary interest, direct or indirect 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 general nature thereof; (b) shall not take part in the discussion of, or vote on any question in respect of the matter; and (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question."

As a result of amendments to the act, Section 5(2.1) was included dealing with the status of a member when council is considering imposition of a penalty:

"5(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."

Therefore, where council is considering imposition of a penalty a member may participate in the discussion but is not to vote on the issue. In the case of Councillor van Holst, at the May 3, 2022, meeting at which the Integrity Commissioner's report was to be considered, he distributed a memo to other Members of Council commenting on the report and he did not participate in the discussion. He voted both on the question of accepting the report and the recommended sanction. He did not declare a conflict.

The recommendation in the report was to issue a reprimand. Suspension of remuneration was not recommended although it was open to Council to impose such suspension. There was a

suggestion in the Complaint that a reprimand, if Councillor van Holst chose to run for council again could result in a defeat at the polls which could lead to a corresponding loss of income. This was suggested as a pecuniary interest.

I would suggest that this would be quite remote and speculative so as not to qualify as a pecuniary interest.

In a 2013 Decision, the Ontario Divisional Court commented on the position of a Member of Council in such a situation:

“In our view, it is not correct as the Respondent argues and the Application Judge appears to have accepted, that a member is precluded from speaking whenever a Code violation is before the council just because council has the power to impose a financial penalty. The pecuniary interest of the member must be a real one. Unless the report of the Integrity Commissioner recommends an economic sanction, or if there is some real likelihood that a financial penalty is contemplated, the member is not precluded from speaking to a report on his conduct. There is no reason to preclude a member from speaking to a report recommending a reprimand or requesting an apology. Given the importance of procedural fairness and especially the right to be heard, the individual should not be precluded from speaking, absent a real financial interest that has crystalized.” (Magder Ford 2013 Carswell Ont. 3 DIV CT)

It would appear that in this case, there is no “real likelihood of a financial penalty” against Councillor van Holst. Accordingly, it would appear that it is appropriate for him to participate in the discussion and the vote on the Integrity Commissioner’s report.

This leaves the one unspoken concern, that it was Councillor van Holst’s vote that created the tie and defeated approval of the recommendation for a reprimand. The Ontario Courts have ruled that neither the outcome of the vote or the effect of the result is relevant to the issue of contravention of Conflict of Interest legislation (Graham v. McCallion (1982) 137 DLR (3d) 433(ONT. CO. CT., affirmed (1982) 39 OR (2d) 740 (ONT. DIV. CT)).

The courts have further ruled that how a vote was cast, its outcome or the motive of the member are of no consequence with respect to conflict of interest. (Greene v. Borins (1985), 50 O.R. (2d) 513 (ONT. DIV. CT.).

Therefore, it would appear that from the point of view of conflict of interest, the fact that Councillor van Holst’s vote produced the tie vote is of no consequence in this case.

CONCLUSION

Considering all of this, it was not inappropriate for Councillor van Holst to participate in the proceedings concerning the Integrity Commissioner’s report at the May 3, 2022, meeting of Council.

APPLICATION TO A JUDGE

Pursuant to section 223.4.1(16) and (17) of the Municipal Act, after completing an inquiry concerning conflict of interest, the Commissioner is to advise the applicant if he or she will not be making an application to a Justice of the Superior Court of Justice and the reasons for that decision.

I do not intend to make such application to the Superior Court of Justice. The complaint has come to me mere hours after the events which were the subject of the complaint. It is an issue that in the interest of the parties, the other Members of Council and the public generally should be responded to promptly. The issues here are not complicated, and the facts appear not to be disputed. The evidence is largely available in the comments of the complainant and the Councillor who do not contradict one another. The conduct during the council meeting is available on the video which I have viewed. There does not appear to be any factual dispute or credibility issue. In my opinion, the review and determination of this matter does not warrant burdening the parties and the taxpayers with the costs that would be entailed in an application to the Superior Court of Justice. Accordingly, I have not done so.

Dated at Goderich, Ontario this 10th day of May, 2022.



Gregory F. Stewart
Integrity Commissioner for the City of London