



**INTEGRITY
COMMISSIONER REPORT
ACTION REQUIRED**

**Councillor Involvement in Advocacy Activities at
Adjudicated Tribunals**

Date:	May 31, 2010
To:	Executive Committee
From:	Janet Leiper
Wards:	All
Reference Number:	

SUMMARY

On August 5 and 6, 2009, City Council requested that the Integrity Commissioner review councillor advocacy activities at adjudicated tribunals and report back to Council on a protocol to guide Councillors relating to such involvement. The Integrity Commissioner was also requested to consult with interested Members of Council, the Auditor General and the City Solicitor.

This report summarizes the outcome of those consultations and reports to Council on the question of a protocol to guide Councillors on this question.

On the basis of these consultations and taking into account the existing policy and regulatory framework to promote ethical standards of behaviour and the principle of independent decision making by City adjudicators, I recommend that City Council defer the creation of a protocol to address the advocacy activities of Councillors before City adjudicative tribunals.

RECOMMENDATION

The Integrity Commissioner recommends that:

Council receive this report.

FINANCIAL IMPACT

There is no financial impact.

DECISION HISTORY

At its meeting of August 5 and 6, 2009, Council, considered the Integrity Commissioner Annual Report (the “Annual Report”) and adopted the following motion:

1. The report (July 29, 2009) from the Integrity Commissioner be received for information.
2. The new Integrity Commissioner be requested to review Councillor involvement in advocacy activities and at adjudicated tribunals and report back to Council through the Executive Committee, on a protocol to guide Councillors relating to such involvement; and that the new Integrity Commissioner, in preparing the protocol, be requested to consult with interested Members of Council, the Auditor General and the City Solicitor.

COMMENTS

Background

The request for the review arose from the following item of advice in the Interim Integrity Commissioner’s 2009 Annual Report:

- Q. Can a Councillor appear before an adjudicative tribunal of the City to provide evidence on behalf of a member of her/his Ward?
- A. Councillors who intervene on behalf of a party before an adjudicative tribunal of the City may be perceived to be using her or his influence improperly under Article VIII of the *Code of Conduct*, especially where Council has a role in the appointment or reappointment of Tribunal Members. Generally, however, a Councillor may mitigate the risk of finding of improper use of influence in a number of ways. Written submissions may be crafted more carefully and are less likely to raise concerns than oral submissions. Whether oral or written, submissions should include a caveat regarding the Councillor’s respect for the quasi-judicial, arm’s length role of the Tribunal and should state expressly that the Councillor is not seeking to use her or his office to influence the result, but believes it is consistent with her or his role to ensure that the Tribunal has the benefit of the Councillor’s perspective. It is also imperative that the Councillor does not stand to benefit personally from the outcome of the Tribunal’s decision (or any friend or family member of the Councillor). With these qualifications, the Councillor may provide information based on the Councillor’s direct knowledge of the party involved in the tribunal. This information should be descriptive. The Councillor may not engage in

advocacy on behalf of a party. Whether or not a Councillor is engaging in an “Improper Use of Influence” is a contextual judgment to be made in the circumstances of each matter.

Nature of the Consultation

The consultation was a combination of in person meetings, requests for input, telephone consultations and electronic submissions. Relevant background information, reports and applicable rules of procedure, policies and *Codes of Conduct* were reviewed. Two visits to adjudicative proceedings were conducted to get a sense of the forum. In all, the following sources were consulted:

- Consultation with all Members of Council;
- Consultation with the Auditor General and the City Solicitor;
- Consultation with the Office of the City Manager;
- Consultation with the Office of the City Clerk;
- Requests for input from Members of Adjudicative Boards (current and some former);
- Requests for input from Ratepayer Groups (454 mailings);
- Requests for input from Managers to City adjudicative tribunals;
- Review of the City of Toronto Public Appointments Policy;
- Review of the Rules of Procedure for the Committee of Adjustments;
- Review of the *Code of Conduct* for Members of Council;
- Review of the *Code of Conduct* for Members of Adjudicative Boards;
- Review of the 2009 Annual Report of the Integrity Commissioner;
- Review of Auditor General’s recommendations, 2006 concerning Members of Council attending Committee of Adjustment Meetings
- Site visits to Committee of Adjustment proceedings;
- Consultation with the City Planner;
- Consultation with lawyers and architects with experience in planning and municipal matters;
- Review of jurisprudence on the role of municipal Councillors.

I wish to acknowledge the information and insights received from everyone who participated in this consultation.

Introduction: City of Toronto Adjudicative Tribunals

The City of Toronto has established a number of adjudicative bodies. These include the Committee of Adjustment which is empowered to make decisions on minor variances and land severances with appeals possible to the Ontario Municipal Board. Other adjudicative bodies include the Property Standards Committee, the Rooming House Licensing Commissioner and the Toronto Licensing Tribunal. The adjudicative tribunal discussed most frequently during this consultation was the Committee of Adjustments. Reportedly, appearances and written submissions by Councillors are most often seen at the Committee of Adjustment (although not exclusively).

Appointments to City tribunals are made in accordance with the Public Appointments Policy adopted by City Council in 2006. The stated aims of this policy are to create a framework to ensure “that the most suitable candidates are selected and appointed as Board Members” and to guide Members of Council and City staff who are involved in the appointment process to “ensure consistency, integrity and fairness in administering the process.”

Citizen applications for membership on adjudicative tribunals begin at the City Clerk level, where staff members screen applications for eligibility and completeness. From there, a staff team examines and reviews the applications and summarizes them in accordance with the areas set out in the policy. For the Committee of Adjustment, the initial short listing of candidates is done by the relevant Community Council(s). The applications and the staff review summaries are sent to the Community Council(s) to identify nominees for the short-list of candidates to be interviewed by the Civic Appointments Committee. The applications and staff review summaries are then placed before the Civic Appointments Committee, which may add to the shortlist from the larger pool of candidates for the Committee of Adjustment.

The entire short listing process for the other adjudicative bodies is done by the Civic Appointments Committee.

Once the various shortlists have been developed, the Civic Appointments Committee conducts the interviews, but it may also organize itself into smaller panels to conduct interviews. The Civic Appointments Committee then makes recommendations to City Council for qualified candidates to be appointed. Members of City Council make the final decision and once that takes place, the names and biographical information supplied by the candidates are released to the public.

The Public Appointments Policy (the “Policy”) has a number of features which address its aim to ensure a fair process. There are limits on the ability of members of Council to provide references (s. 5.6), a description for applicants of the provisions of the *Municipal Conflict of Interest Act* and a summary of expectations around declaring potential or actual conflicts of interest as defined by the Act (s. 6.1). In addition, Part VIII of the Policy sets out requirements for ensuring standards of conduct are clear at the outset for City Appointees. Orientation for new Board Members is mandatory for quasi-judicial

appointments (s. 8.1), and s. 8.2 sets out important standards for conduct of Board Members as follows:

- Members of the public who are appointed to a City board shall serve and be seen to serve in a conscientious and diligent manner, and in a manner that accommodates access to services by the City's diverse communities.
- No member of a City board shall use the influence of the office to which he or she is appointed for any purpose other than for the exercise of official duties.
- Members are expected to perform their duties in a transparent manner that promotes public confidence and will bear close public scrutiny.
- Members shall strive to serve the public interest by upholding both the letter and the spirit of the laws and policies established by the Federal Parliament, Ontario Legislature and the City of Toronto Council as well as any policies established by the Board.

Consultations with Members of Council

Councillors were responsive and thoughtful about their practices in relation to appearances or submissions to City Adjudicative Boards. Some commented on the necessity for a protocol, others did not. Many noted that their constituents had expectations for them to become involved in ward matters before adjudicative tribunals. Their practices fell into three categories:

1. Selective Appearance or Advocacy by Letter

The great majority of Councillors adopted this approach. A theme that emerged over and over was the need to exercise judgment and to have some articulated philosophy as to when to become involved in adjudicative matters. These Councillors tended to play a number of different roles depending on the needs of the situation and not all of them "advocacy" roles. At times they act as providers of information to constituents who are bringing or responding to applications. Frequently, they became mediators who are involved with the parties and assist in brokering compromise. On occasion, the Councillors in this group also write letters in support or opposition, or make appearances to speak at the tribunal. Their reasons for doing so varied, but were considered in advance, were considered the "exception rather than the rule" and included the following rationales:

- Broader community impact;
- The ability to bring information or history of the area forward that might otherwise not be available for consideration
- Symbolic or heritage issues
- Where a danger exists that not all perspectives will be placed before the tribunal; to protect minority rights

- Identifiable interest in preserving the planning process
- Identifiable issue that could have city-wide implications
- Legitimate reasons to attend based on community work

2. High Degree of Interest, Monitoring and Frequent Attendance or Letter Writing

A few Councillors adopted a more frequent practice of being present either through staff or personally at many or most meetings of the Committee of Adjustments. These Councillors described their role as being an “integral” part of the planning process and relied upon the quasi-judicial “arms-length” nature of the Committee of Adjustments. These Councillors feel they are being responsive to the expectations of their constituents and saw no issues of "conflict" (in roles) in taking part more frequently.

3. A Deliberate Practice of Not Making Appearances Before City Adjudicative Boards

A few Councillors adopted this approach. Those who did were concerned about maintaining a neutral stance, and ensuring that they did not appear to be attempting to use influence with panels appointed by Council. One member who does not make personal appearances, but at times writes letters described the value of doing so as ensuring that the Councillor’s position is clear and avoids any issue of “grandstanding.” Another Councillor described being “dead-set” against the practice, seeing it as unfair for Councillors to take sides in the case of the Committee of Adjustments.

Consultations with Tribunal Members

Requests for the view of the various tribunals were forwarded via the Office of the City Clerk and the Office of the City Solicitor. Responses were received from Members of adjudicative tribunals and managers who support the work of these tribunals. The respondents expressed their commitment to their independent role and to treating all people who appear in front of them impartially. In particular, Tribunal Members discussed the importance of not according “special privileges” to any particular party, including Councillors.

One respondent stated a preference for Councillors taking written positions rather than make personal appearances, which were described as “awkward” for the decision maker. Another panel of four discussed the matter and concluded that Councillors ought not to participate directly in the adjudicative process, by speaking at hearings in person, or making submissions in writing.

Others wrote that councillor appearances do not presently pose a problem for the independent decision making of the tribunals. A sense of these views can be understood from the following example responses (unattributed, as promised to all respondents):

“I am grateful and very proud to sit on the (adjudicative tribunal) I do not oppose City Councillors appearing before me at our meetings on behalf of our constituents. Their presence does not sway my vote in any way.”

“Councillors do not appear often, [when they do], they are treated like any other witness.”

“What I have observed over the years [is that] the Councillors are well behaved and professional.”

“Councillors respect the boundaries, [in addition] they can assist the Committee in bringing forward concerns that the Committee may not have considered.”

“The one time a councillor appeared before our board, it was very helpful in sorting out [a] tangled bureaucratic mess”

Consultations with Ratepayers Associations

A mailing was delivered to all ratepayers associations inviting input into the issues raised by this consultation. Those who did respond encouraged the ability of Councillors to provide information, either in writing or in person, on matters before City adjudicative tribunals. One response referred to the existing Codes of Conduct and concluded that these are a sufficient regulatory mechanism for any inappropriate attempts to use influence. Another response tied Councillor advocacy to providing some transparency to the positions taken by Councillors, presumably because citizens are able to know from their direct involvement from time to time, what their views are on issues affecting constituents. All of the responses from this group were positive with the exception of one respondent who flagged the practice of Councillors being “heavily involved” in committee of adjustments and the negative perception of such involvement.

Consultations with Relevant Professionals

In addition to the public, the panels and Councillors, a number of professionals (lawyers and architects) with experience with municipal tribunals were sought out to provide their views. There was recognition of the “difficult and contradictory” roles often played by municipal Councillors, particularly because they must often take positions on ward matters. In the view of a number of those consulted, Councillors can play a critical role in certain matters. At the same time, these respondents acknowledged the potential perception by members of the public of a conflict in role between their legislative function of appointing citizens to tribunals and their political function of constituency work, particularly for those who maintain an ongoing presence and intervene frequently. These conversations also covered the question of whether a further protocol is practical or necessary. Alternatives to further regulation in the area included creating opportunities for debate and discussion of core principles, the modeling of best practices, mentoring, participation in education sessions and resort to existing *Codes of Conduct* for informal or formal resolution of complaints. As a practice, Councillors who have assistants with

planning experience and delegate appearances at the Committee of Adjustments to them, do not run as high a risk of either appearing to be using the influence of their office. At least one of these respondents echoed the comments of Councillors who felt that any contribution (in person or in writing) must be backed up by an awareness of the nature of the application and the applicable planning principles, in order to maintain a reputation for integrity and to enhance such a reputation for the established processes.

Relevant Legislation: *Codes of Conduct* and Rules of Procedure

Councillors and Members of the Adjudicative Boards are subject to *Codes of Conduct* in the exercise of their roles. Councillors and Members of Adjudicative Boards are expected to follow a principle of “performing their functions with integrity and to avoiding the improper use of influence of their office, and conflicts of interest, both apparent and real” (*Code of Conduct for Members of Council; Code of Conduct for Members of Adjudicative Boards*).

In addition, Members of Council are proscribed by Article VII of the *Code of Conduct for Members of Council* from the improper use of influence of their office for any purpose other than the exercise of his or her official duties.

The provisions of the *Code of Conduct for Adjudicative Boards* provide further safeguards for the process. Article VI sets out boundaries around how communications with Adjudicative Boards are to take place:

VI. COMMUNICATIONS WITH ADJUDICATIVE BOARDS

Written communication to an Adjudicative Board shall take place only through the board administrator, and shall be copied to all parties or their representatives as appropriate. Oral communications with the Adjudicative Board about a current proceeding shall take place only in the presence of or with the consent of all parties.

Where a party is represented by a representative, all communication between the Adjudicative Board and the party shall be through the representative, with the exception of notices of hearing, which shall be served upon all parties known to the Adjudicative Board as appropriate. The Adjudicative Board shall not be copied on correspondence and documents exchanged by parties, unless the board administrator has given prior approval to such copying.

Existing mechanisms are found in the complaint protocols (*Complaint Protocol for Members of Council; Complaint Protocol for Members of Local Boards (Restricted Definition) including Adjudicative Boards*) for formal and informal complaint resolution. Any member of the public, staff member, Councillor, tribunal member or applicant who believes that the *Codes of Conduct* are not being followed can raise their concerns directly or via the Office of the Integrity Commissioner, in accordance with the complaint protocols.

In addition to the *Codes of Conduct*, each adjudicative tribunal has adopted procedural rules which act as a further safeguard to the process. For example, in the case of the Committee of Adjustment, the rules of procedure provide for on the record declarations of conflict of interest (s. 5), a process for decision making (s. 6) and a minute-taking requirement (s. 7). Further, Appendix B to the rules describes the role of the panel chair and includes the following provision:

The Panel Chair shall:

- iii) ensure that the actions of any individual, including Council Members and staff attending hearings, are consistent with the arm's length, quasi-judicial nature of the Committee of Adjustments.

The Role of City Councillors

Municipal Councillors fulfill a hybrid role as elected officials with legislative responsibilities. This point was emphasized by many of those consulted on this issue. This duality has also been recognized by the judiciary in cases involving the application of natural justice to the carrying out of these dual roles. In the decision of *Old St. Boniface Residents Association Inc. v. City of Winnipeg*, [1990] 3 S.C.D. 1170, the Supreme Court of Canada recognized that Councillors have both political and legislative duties. Absent improper relationships or financial interests, Councillors may speak in support of particular development or preservation of neighbourhoods in their community and indeed, may have been elected on the basis of those expressed views.

Is a Protocol Necessary?

There were a number of opinions expressed on the question of creating a protocol to guide Councillors. Some respondents were in favour of creating a protocol or adopting a set of principles to guide Councillors in making a deliberate choice as to whether and how they should appear before City adjudicative tribunals. Those who favoured a protocol described an interest in having some "high level principles," "best practices," "guidelines" or "commentary." Others saw a protocol as being a valuable tool "mechanism for consistency." Approximately 35% of those who expressed a view favoured a creation of such a protocol, with 65% believing that a protocol is not necessary.

The majority of Members who do not think a protocol is necessary provided a number of reasons for their views. Many pointed to the existing *Codes of Conduct* as sufficient to address any potential for abuse of a Councillor's position in relation to appearances before Adjudicative Boards. Others were concerned about unnecessary over-regulation. This view tended to be shared by other participants in the process, for similar reasons.

In the years since the Auditor-General's Report, 2006 was released there have been no findings of undue use of influence by Councillors, or of breaches by Members of Adjudicative Boards in relation to their decision making in cases where Councillors have

become involved. This consultation was designed to provide anonymity of response to those who might like to express a view, and the range of points of view reflect some degree of confidence in the results. This is not to say that there are not lingering concerns, particularly for those Councillors who choose to have a greater presence due to longstanding practice. What this study has revealed is that the presence is noted and for some involved in the process, it is not always seen in a positive light. According to some respondents, such practices may be counterproductive to the effectiveness of the role. Some Councillors believe this to be the case and for that reason, they described the necessity to “pick their battles.” Others felt it was better to encourage their constituents to speak for themselves for reasons of citizen empowerment and effectiveness. In all quasi-judicial (and judicial) matters, any party develops a reputation with the decision maker. It may be that a shift to a more judicious and careful reason for intervening could lead to greater effectiveness, particularly once the potential for tribunal sensitivity is expressed as it was in some cases during these consultations.

It is fair to observe that there are already multiple accountability mechanisms which exist around the decision making of City of Toronto Adjudicative Boards. The Public Appointments Policy, mandatory training, *Codes of Conduct* and *Complaint Protocols* for both Councillors and Members of Adjudicative Boards, the Rules of Procedure, and the public nature of these hearings create a regulatory framework that reflect the expectations of the City and its citizens in having municipal adjudicative processes that operate with integrity.

I have taken into account the views of all those who have been consulted as well as the existing mechanisms. There is great deal of collective wisdom that has been shared by virtue of Council’s request for consideration of this question and it is wisdom that can be tapped into in future, both formally and informally.

On the core question of whether a formal protocol ought to be created, I suggest that this particular item ought to be deferred. There is no suggestion that the existing mechanisms do not “work.” The public is not crying out for more regulation. There is an understanding by those who are familiar with the processes that Councillors must often walk a delicate line between their various roles yet often play a critical role in planning issues. However, the desire to have a discussion about best practices ought to also be respected. How can this be achieved? There are a number of logical points of contact. The outcome of this report will be available for discussion and use by City staff who conduct the orientation of new Members of Adjudicative Boards. The debate at Executive Committee and in Council will allow Council Members to share their views with their colleagues. Any developing increases in complaints about member advocacy can be tracked through the annual report from the Integrity Commissioner. Finally, there is the matter of advice for Councillors on this issue.

The original piece of advice provided by the Interim Integrity Commissioner has turned out to be sound and careful advice. This advice flags for Council the potential for a perceived conflict between their role in appointing the Members of adjudicative tribunals and their role as community advocates. It points out that Councillors should not get

involved where they stand to personally gain from the outcome. At the heart of the question is the need for Councillors to be conscious of their motivations and for them to ensure that they are acting in the public interest rather than for private gain. Where they are not able to articulate that interest, they may be vulnerable to complaints or criticism. While I do not recommend a formal protocol at this time, the original advice provides a useful roadmap for ensuring that their position is clear, and that Councillors articulate their respect for the independence of the tribunals. The only modification I would make to the original piece of advice, having had the benefit of this consultation process, is to acknowledge that in addition to providing descriptive information, a Councillor's role may sometimes include expressing a view on the merits of an application, where there is some identifiable public interest in taking a position. Finally, for those Councillors who make frequent attendances and commonly express views on the merits of applications, it would be advisable for them to reflect on this report and consider whether they ought to alter some of their practices to ensure that the public interest continues to be served by their involvement with City adjudicated tribunals and reflects the spirit of the Codes of Conduct and the legislation.

Conclusion

This report has responded to Council's request of August 5 and 6, 2009. I propose to include the modified advice arising from this consultation in my 2010 annual report to Council.

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SIGNATURE

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