



OFFICE OF THE INTEGRITY COMMISSIONER

REPORT REGARDING THE CONDUCT OF
COUNCILLORS JON BURNSIDE AND
JOHN CAMPBELL AND A MEMBER OF
THE LEASIDE MEMORIAL COMMUNITY
GARDENS ARENA BOARD OF
MANAGEMENT

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Integrity Commissioner
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INTRODUCTION

On June 30, 2016, a member of the public (the "Complainant") filed complaints about the conduct of Councillor Jon Burnside, Councillor John Campbell, and Raymond J. White, the Chair of the Leaside Memorial Community Gardens Arena (the "Arena") Board of Management (the "Board") (collectively, the "Respondents").

The Complaints allege that when the Respondents participated in a decision to approve a sign bylaw amendment in relation to a sign at the Arena, they failed to adhere to the provisions of the City's policy about donations, and accordingly, contravened Article XV of the relevant code of conduct, which requires members to comply with Council policies.

For the reasons that follow, I have concluded that the Respondents did not contravene any provision of the relevant code of conduct.

THE COMPLAINTS AND RESPONSES

The complaints alleged that the Councillors contravened Article XV (Failure to Adhere to Council Policies and Procedures) of the *Code of Conduct for Members of Council* and that Mr. White contravened Article XV (Failure to Adhere to Council Policies and Procedures) of the *Code of Conduct for Members of Local Boards (Restricted Definition)* (collectively, the "Codes") because they failed to adhere to the "Donations to the City of Toronto for Community Benefits Policy" (the "Donations Policy" or the "Policy")¹ with respect to an application for a bylaw amendment that allows a third party sign (a billboard)² to be located at the City-owned Arena.

In support of the complaints, the Complainant referred to parts of the Policy applicable to the land use planning approval process. The Donations Policy does not specifically contemplate its application to the sign approval process, although it does contain the general principal that "applicants seeking an approval, permit or license shall not concurrently offer or make voluntary donations to the City or an agency, board or commission for community benefits."

In their responses, Councillors Burnside and Campbell and Mr. White each explained their roles, expressed support for the sign and disputed that the Donations Policy

¹ The current version of the policy, revised in 2016 after the events at issue took place, to add a definition of "Donations" is available on the website of the Toronto Office of Partnerships, at http://www1.toronto.ca/city_of_toronto/toronto_office_of_partnerships/files/pdf/donation_policy.pdf.

² The City's sign bylaw distinguishes between "third party" signs that display advertising, and "first party" signs which identify the owner's business, organization, or building.

applied. Mr. White and Councillor Burnside referred to statements made by City staff that the Donations Policy did not apply to the sign.

In reply to the responses, the Complainant stated that the focus of his complaint was whether the Donations Policy ought to have applied to the sign. He provided detailed submissions about policy considerations that he believes should be taken into account when interpreting and applying the principles in the Donations Policy. He maintained his point of view that the integrity of the approval process relating to the Arena sign was compromised.

INQUIRY STEPS

In consideration of the overlapping issues in the complaints, I decided to conduct a single investigation. I was aided in this investigation by the Integrity Officer, Investigations and Analysis. Together, we undertook the following investigation steps.

We reviewed the following documents:

- The complaints, responses, and the Complainant's replies.
- The Relationship Framework for the City and its Arena Boards of Management.³
- The deputations, agendas, staff reports, minutes, and video of the June 2016 Planning and Growth Management Committee meeting and the July 2016 City Council meeting as they pertained to the sign application.
- Electronic records from the City, including records from the councillors' offices, including Arena Board agendas, reports, and minutes; calendar entries; emails and notes of meetings and phone calls.
- The Donations Policy.
- The City's sign bylaw.
- The application for the sign bylaw amendment, staff notes and comments, and the staff report.
- Subject matter registrations from the City's lobbyist registry.

We interviewed the following individuals:

- Ted Van Vliet, the Manager of the City's Sign Unit, which is responsible for the implementation of the City's sign bylaw and staff review of sign applications.

³ Relationship Framework for The City of Toronto and The Boards of Management for George Bell Arena, Larry Grossman Forest Hill Memorial Arena, Leaside Memorial Community Gardens Arena, McCormick Playground Arena, Moss Park Arena, North Toronto Memorial Arena, Ted Reeve Community Arena, William H. Bolton Arena
<https://www1.toronto.ca/City%20Of%20Toronto/City%20Managers%20Office/Agencies%20and%20Corporations/Files/pdf/spc-arenas.pdf>.

- Robert Bader, the Supervisor of the Sign Unit, who had day-to-day carriage of the sign application.
- Phyllis Berck, the Director of the City's Partnerships Office, which oversees the Donations Policy.
- Councillor Burnside and his Executive Assistant.

SCOPE OF THE INVESTIGATION

In consideration of the Councillors' and Mr. White's responses to this complaint, the issue in dispute, and the documentary and other evidence gathered in this investigation, I determined that it was not necessary to examine further the actions of Mr. White and Councillor Campbell.

There were some discrepancies about when and how Councillor Burnside was informed about the Donations Policy so I focused my review on those facts.

I have not interpreted or attempted to apply the Donations Policy to the Arena sign because (as is described below) there was a determination made by appropriate City staff about whether the Policy applied.

FINDINGS

This section describes the evidence gathered in the investigation. Most of the facts in this investigation were not in dispute. When there were discrepancies, I applied the standard of proof for fact-finders in civil cases identified by the Supreme Court of Canada: a balance of the probabilities.⁴ The balance of probabilities standard requires a fact finder to "scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."⁵

The Roles of Councillor Burnside, Councillor Campbell, and Mr. White

Mr. White

Mr. White is the Chair of the Arena Board. Together with his colleagues on the Board, Mr. White is responsible for overseeing the day-to-day management of the Arena, consistent with the Relationship Framework between the City and its Arena Boards.⁶

⁴ *F.H. v. McDougall*, [2008] 3 SCR 41, 61; 2008 SCC 53 (SCC), available at <http://canlii.ca/t/20xm8> (internal citations omitted).

⁵ *Ibid.* at 61.

⁶ Note 3, *supra*.

The Board manages what happens at the Arena, can enter into leases on Arena property, determine how to generate revenue and what fees to charge, and if necessary, seek permissions and approvals from the City. Mr. White and the Board's only role in a sign bylaw amendment process is like that of any other landowner. The Board has to apply to the City (or authorize someone else to apply) to have Council consider an amendment to the sign bylaw allowing a sign on the Arena property.

Councillor Campbell

Councillor Campbell represents a ward in a different part of the City from the Arena and he does not have any role in managing the Arena. However, he is a member of the City's Planning and Growth Management (PGM) Committee, which considers applications and staff reports on sign bylaw amendments. As a member of the Committee, he can introduce motions for the Committee's consideration and vote on recommendations the Committee makes to Council.

Councillor Burnside

The Arena is located in Councillor Burnside's ward. As the ward councillor, he is a member of the Arena Board. Like Mr. White and the other members of the Arena Board, he is responsible for overseeing the day-to-day management of the Arena. Councillor Burnside is not a member of the PGM Committee. Nevertheless, each Council committee, including PGM, provides time for non-member councillors to speak to the committee at its meetings and ask questions of speakers and staff. Once a matter reaches Council, Councillor Burnside, like any other councillor, can ask questions of staff, take part in debate, and vote on the matter.

The Sign Bylaw Amendment Application

There is an existing third-party, outdoor sign with printed content (a billboard) at the Arena.⁷ It has been there since before the City's current sign bylaw, chapter 694 of the Municipal Code,⁸ was passed in 2010 and it is operated by a sign company, Outfront Media, which leases the land from the Arena Board.

In November 2015, the sign company approached the Arena Board with a proposal to install a new, digital sign. The sign company also advised Councillor Burnside, the local councillor, of its plans. The sign company proposed new designs that would complement the Arena's architecture and would provide space for Arena announcements on one side. In addition, since digital signs allow sign companies to

⁷ Staff Report, Page 5, <http://www.toronto.ca/legdocs/mmis/2016/pg/bgrd/backgroundfile-93875.pdf>.

⁸ Toronto Municipal Code, c. 694, Signs, General, available at http://www.toronto.ca/legdocs/municode/1184_694.pdf.

change the posted advertisements more easily and frequently than traditional, printed signs, the sign company offered to increase the rent it paid to the Arena Board. The Arena Board supported the sign company's idea and chose one of the new designs it presented.

Since the sign company wanted to build a new sign, it also needed a permit under the City's sign bylaw. However, the bylaw identifies the area where the sign is located as "open space" and would prohibit any new sign. Accordingly, the sign company was required to apply for a site specific amendment to the bylaw that would allow the City to issue a permit for the sign.

Sign bylaw amendments must be approved by Council, but the applications are first reviewed by the City's Sign Unit staff and then by the PGM Committee, which makes a recommendation to Council.

In contrast to the legislative and policy framework applicable to land use planning decisions – which contemplate the provision of community benefits under section 37 of the *Planning Act*⁹ – the sign bylaw does not contemplate the provision of any type of community benefits.

The Sign Unit staff brings all applications for sign bylaw amendments made during the year to the PGM Committee in the late spring of the following year. Accordingly, the sign company submitted its application in December 2015 and it was considered by the Committee in June 2016 and by Council in July 2016. From December 2015 through to June 2016, the City's Sign Unit staff reviewed the application and, following standard protocols, met with concerned residents and the Councillor, and held a community consultation meeting.

Staff in the Sign Unit testified that during the review process they provided Councillor Burnside and the Board with copies of the Donations Policy. With respect to Councillor Burnside, Sign Unit staff testified that they offered no opinion about whether the Policy applied but suggested that the Policy should be reviewed.

The Councillor did not recall being provided with the Donations Policy during the review process. However, he said that it was possible that staff provided him with the Policy. There are no records evidencing that the Policy or any advice was provided to Councillor Burnside during the review process. I will return to this evidence below.

⁹ R.S.O. 1990, c. P.13.

The Planning and Growth Management Committee Meeting

The Sign Unit staff filed a report with the PGM Committee recommending against a bylaw amendment for the sign.¹⁰ The report contains no reference to the Donations Policy. It focuses on the sign's physical characteristics, compatibility and impacts, including the fact that it would be in an open space area.

The Committee received deputations from members of the community, the sign company, and the Chair of the Arena Board.

The Board Chair also spoke to the Arena Board's support for the sign, including the benefits of increased revenue. Councillor Burnside also spoke in support of the sign and of letters and a petition he had received in support. He also asked questions of members of the public making deputations.

Councillor Campbell moved a motion to amend the staff recommendation, and have the Committee recommend that Council approve the sign. The Committee voted to recommend approval.

Councillor Campbell moved the motion at the request of Councillor Burnside because only a member of the Committee could introduce a motion. While he spoke with a representative of the sign company on the day of the Committee meeting, he had no other role in relation to the process leading to the sign's approval, including any interactions with staff in the Sign Unit.

The Donations Policy

The Donations Policy is a Council policy that applies to the City, Council and the City's local boards. The purpose of the Donations Policy is to separate donations to the City from City decision-making processes. Sections 1.1 and 1.2 of the Policy create a framework to ensure that a benefit to a City facility or service does not improperly influence a City decision. The Policy provides in part:

1.1 Conditions, contributions and community benefits may only be requested from an applicant seeking an approval, permit or license from the City or its agencies, boards or commissions if such requests are permitted or required by that decision making process.

1.2 In the case of an applicant seeking an approval, permit or license from the City or its agencies, boards or commissions, beyond matters permitted or required as part of the decision making process, voluntary donations

¹⁰ Note 7, supra.

from the applicant or their representative may only be requested or accepted at arm's length from the decision making process:

1.2.1 applicants seeking an approval, permit or licence shall not concurrently offer or make voluntary donations to the City or an agency, board or commission for community benefits;

1.2.2 voluntary donations for community benefits shall not be solicited or accepted, for any purpose or community beneficiary, from applicants with a concurrent application for an approval, permit or license.

(Emphasis Added).

Among its other requirements, the Policy states that if a City decision-making process does not permit a donation, then donations must be separate, or at arm's length, from the decision-making process, and donations must not be offered, solicited, or accepted while a City decision affecting the donor is pending. At the time of the Arena sign approval, the Policy did not include a definition of "donations."

I have previously stated that the Policy is "one of the City's more significant policies because it sets out clear rules of engagement for how City officials interact with stakeholders during times when the City is involved in making administrative decisions that affect a stakeholder's interest. It ensures that stakeholders cannot use voluntary donations to influence City decision-making."¹¹

The City has had a Donations Policy since 2006. It is overseen by the Toronto Office of Partnerships (TOP), a City office that works with other City divisions, agencies, boards and commissions and supports the City's efforts to partner with businesses, not-for-profits, community groups and individuals; and, facilitates corporate sponsorships at the City as well as naming opportunities and donations to the City.

Application of the Donations Policy to the Sign

Early in the application review process, Sign Unit staff were concerned that the increased rent and the new sign constituted a "community benefit" and might not be permitted under the Donations Policy. (The term "community benefit" is not defined in the Policy.)

¹¹ July 5, 2016 Investigation Report Regarding the Conduct of Councillor Mark Grimes, pp. 24-25, available at <http://www.toronto.ca/legdocs/mmis/2016/cc/bgrd/backgroundfile-94815.pdf>

On a balance of probabilities, I conclude that Sign Unit staff provided a copy of the Policy to Councillor Burnside and the Board and that staff suggested the Policy be reviewed, but I also find that staff did not provide advice about whether the Policy applied in this case. As noted, the staff report contained no reference to the possible application of the Donations Policy. I find that the Sign Unit staff did not consult with or inform TOP about the issue during the application review process. The first time that the Director of TOP became aware of the proposed sign was on July 13, 2016, the first day of the Council meeting.

Councillor Burnside testified – and I find – that he did not become aware of the possibility that the Policy could apply to the sign until the few days before the Council meeting. There is a clear documentary record that he was seeking specific advice about this issue on July 11, 2016. I find that when Councillor Burnside became aware of the possibility that the Policy could apply, he consulted with various City officials including the Sign Unit and TOP. He recalled that after making a number of inquiries, he received advice from the Director of TOP that the Policy did not apply to the rent or the sign.

The City Council Meeting

The complaints were filed following the Committee meeting, but before the July 2016 Council meeting, when Council would consider the Committee's recommendations on sign bylaw amendments.

At Council, the Director of TOP was asked whether the Policy defines a voluntary donation. The Director responded that it did not. She also stated that business transactions, such as the payment of rent, are not donations covered by the Policy.

In the interview for this investigation, the Director affirmed her determination that the sign and rent in this case were not donations prohibited by the Policy. The Director provided other examples where the Policy had operated to preclude a sign company from providing a donation.

The Director explained that following the July 2016 Council meeting, the Policy was amended to add a definition of "donations" and, importantly, that work is currently underway to complete a full review of the Policy.

ANALYSIS

Article XV and the Donations Policy

Article XV of the Codes of Conduct¹² requires members of Council and members of local boards to follow applicable Council and Board policies. Article XV of the *Code of Conduct for Members of Council* states, “members of Council are required to observe the terms of all policies and procedures established by City Council.” Accordingly, a member can only contravene Article XV if a policy applies and the member did not follow the policy.

Council has passed numerous policies governing diverse matters at the City. Article XV requires members to familiarize themselves with Council policies (by consulting City staff or undertaking their own research) when they become aware that a particular matter could implicate a Council policy and, certainly, to follow Council policies.

The investigation has confirmed that there was no policy breach and it therefore follows that Article XV was not contravened.

However, the evidence about when Councillor Burnside was informed of the Policy required me to consider whether he should have consulted with TOP earlier. As described above, I examined his actions in more detail. Councillor Burnside was cooperative and forthright in his testimony in this investigation. As noted, he did not dispute that he may have been provided a copy of the Policy prior to the PGM Committee meeting. I accept his evidence that it was not until the days before the Council meeting that he understood that the Policy could possibly apply to the sign. As soon as he became aware that the Policy might apply, he investigated its application further by making inquiries of relevant City staff.

I find that Councillor Burnside fulfilled his obligations to comply with Article XV by familiarizing himself with the Donations Policy and making inquiries of staff.

In sum, there was no policy breach and therefore no Code of Conduct contravention. I considered whether Councillor Burnside, in furtherance of his obligation in Article XV of the Code of Conduct, ought to have consulted with TOP earlier and I have concluded that he consulted with TOP as soon as he became aware that the Policy might apply.

The evidence is that there was a lack of clarity about the application of the Donations Policy, including which department or division was responsible for overseeing its

¹² Copies of both provisions are attached to this Report at Appendix A.

application across the City. The Policy has since been amended to include a definition of donations and a full review is underway.

As I have previously commented, the principles advanced by the Donations Policy are important. Whether and how these principles ought to apply to the sign approval process requires review so that administrative decisions about signs are made based on merit. In the context of the sign bylaw, the circumstances that appear to require review include third party signs on land owned by the City or a City Board. I therefore welcome the news that the Donations Policy is being reviewed.

As noted, the majority of the Complainant's submissions focused on whether the Policy ought to apply to circumstances such as the Arena sign. I trust that the Complainant, and other interested residents, will participate in the policy review process as it progresses.

CONCLUSION

For the reasons stated above, I find that the Respondents' conduct did not contravene Article XV of the Codes.

Although I make no finding of misconduct, I have discretion to file reports with City Council in exceptional circumstances. In consideration of the public awareness of this complaint and because the circumstances and analysis could be relevant to the ongoing policy review, I decided to file this report with City Council with a recommendation that it be received for information.

Respectfully,



Valerie Jepson
Integrity Commissioner
April 20, 2017

APPENDIX A

Code of Conduct for Members of Council – Article XV (Failure to Adhere to Council Policies and Procedures)

A number of the provisions of this Code of Conduct incorporate policies and procedures adopted by Council. More generally, members of Council are required to observe the terms of all policies and procedures established by City Council.

This provision does not prevent a member of Council from requesting that Council grant an exemption from a policy.

Code of Conduct for Members of Local Boards (Restricted Definition) – Article XV (Failure to Adhere to Council Policies and Procedures)

A number of the provisions of this Code of Conduct incorporate policies and procedures adopted by Council. More generally, members are required to observe the terms of all policies and procedures established by the local board and any Council policies and procedures that apply to the local board or its members.

This provision does not prevent a member from requesting that Council or the local board grant an exemption from a policy.