

INVESTIGATION REPORT

FOR THE CITY OF ELLIOT LAKE

CODE OF CONDUCT COMPLAINT RE:

COUNCILLOR MANN



*Office of the Integrity
Commissioner*

Prepared By:

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PREAMBLE

Expertise for Municipalities (“E4m”) was appointed as the Integrity Commissioner for the Corporation of the City of Elliot Lake (the “City”) by resolution at the February 11, 2019 meeting of Council.

As the Integrity Commissioner, E4m is a statutory officer of the City. The Integrity Commissioner reports to Council and is responsible for independently performing functions assigned to them by the City. Pursuant to section 223.3(6), the City must indemnify and save harmless the Integrity Commissioner or any person under their instructions for costs reasonably incurred by either in connection with the defence of certain proceedings.

E4m has been appointed by the City as the Integrity Commissioner for all functions set out in section 223.3(1) of the *Municipal Act 2001*, and E4m is responsible for conducting inquiries into whether a member has contravened the Code of Conduct pursuant to section 223.4(1) or contravened sections 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act* pursuant to section 223.4.1 (1).

The *Municipal Act, 2001*, awards the Integrity Commissioner a number of powers that the Integrity Commissioner can exercise while conducting Code of Conduct and *Municipal Conflict of Interest Act* inquiries. Specifically, subsections 223.4 (3) and 223.4.1(10) provide that “the municipality and its local boards shall give the [Integrity] Commissioner such information as the [Integrity] Commissioner believes to be necessary for an inquiry.” Moreover, subsection 223.4(4) and 223.4.1(11) provide that the Integrity Commissioner is “entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers things or property belonging to or use by the municipality or a local board that the Commissioner believes to be necessary for an inquiry.”

In addition to the statutory requirements for an inquiry under the *Municipal Act, 2001*, Integrity Commissioner inquiries are governed by the Integrity Commissioner Inquiry Protocol, which was adopted by Council. Pursuant to section 3.4 of the Integrity Commissioner Inquiry Protocol, in performing his or her duties, the Integrity Commissioner may engage outside assistance or consult with the City’s legal counsel.

The City’s legal counsel is employed by the City. The *Rules of Professional Conduct* provide that notwithstanding the fact that instructions may be received from an agent for an organization, when the lawyer is employed by an organization, including a corporation, in exercising the lawyer’s duties and providing professional services, the lawyer shall act for the organization. An incorporated organization has a legal personality distinct from its members, agents, councillors or employees. As such, when the Integrity Commissioner consults with the City’s legal counsel pursuant to section 3.4 of the Integrity Commissioner’s protocol, the Integrity Commissioner providing instructions as a statutory officer of the City and the City’s legal counsel is acting to ensure that the City’s interests are served and protected.

I. EXECUTIVE SUMMARY

- [1] On March 11, 2019, a member of the public who requested that their identity not be released, and on March 12, 2019, Mayor Dan Marchisella (“Mayor Marchisella”) (collectively the “Requestors”) requested an inquiry into allegations that Councillor Norman Mann (“Councillor Mann”) did breach sixteen (16) sections of the City of Elliot Lake’s (the “City”) Code of Conduct by his actions at a meeting of Council held on March 6, 2019.
- [2] After the preliminary review, some of the allegations were determined not to give rise to contraventions of the City’s Code of Conduct and the scope of the investigation was narrowed to fully review twelve (12) allegations.

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- [3] A special meeting of City Council was held on March 6, 2019. There was a public [open] portion of the meeting and an in-camera [closed] portion of the meeting. There were only two (2) items on the agenda.
- [4] The matters to be discussed were covered in a memo to Council from the Chief Administrative Officer, Mr. Dan Gagnon (“CAO” Gagnon”) attached to the agenda for the open session and a second memo dated March 5, 2019, outlining the nature of the in-camera [closed] portion of the special meeting. The in-camera memo was disseminated to Council in advance of the special meeting as required by the City’s Procedure Bylaw.
- [5] It is our practice not to violate the confidential nature of the in-camera meeting where possible however, the matter discussed by Council on March 6, 2019, has become public knowledge through the actions of members of Council. We will not disclose the content of the confidential memo sent to Council regarding the in-camera [closed] session. Our review of the memo is sufficient for this inquiry.
- [6] At the March 6, 2019, meeting during the closed session, Council discussed the potential purchase of 151 Ontario Avenue from/with Mr. Guidoccio. The open portion of this special meeting was televised/recorded. Councillor Mann made a statement, refused to participate in the in-camera session and left the meeting. The following is the transcription of what he said:

“Thank you, Worship. I think over my term, my terms on council, I’ve always prided myself in being able to go into closed session with an ability to make sound decisions. Unfortunately, I don’t have that feeling today. Um, I don’t feel that I have had full disclosure on this item, um, therefore I will not be staying for the balance of the meeting, and I will not be participating in the vote. So, at this point, I’m going to excuse myself from the table today and...thank you very much.”

- [7] CAO Gagnon's memo contained sufficient information to advise Council what the nature of the in-camera discussion would be.
- [8] Councillor Mann denied that his actions contravened the City's Code of Conduct and further denied that he colluded with others regarding his actions [prepared statement and leaving the meeting] at the special meeting of March 6, 2019.
- [9] Unlike many municipalities, the City's Procedure By-law does not prohibit a member of Council from leaving a meeting nor does it require a Councillor to seek leave from the Head of Council before leaving.
- [10] The City's Procedural By-law does provide the authority for the Head of Council to have a Councillor leave a meeting as a method of handling misconduct in a meeting. That is obviously not helpful to the Mayor in this instance. Arguably this restricts the Mayor's ability to control a meeting and attempt to prevent Councillors from working to remove quorum by abandoning their chair during the course of a meeting. Control of this kind of conduct should in large part be the responsibility of the Head of Council.
- [11] We find that Councillor Mann's behaviour at the March 6th, 2019, Council Meeting did not contravene the sections of the City's Code of Conduct alleged in the complaints and more specifically section 7.2. It is our finding that the allegations of breach of the Code of Conduct by Councillor Mann are UNSUBSTANTIATED. That is not to say that Councillor Mann's conduct was professional, responsible or proper.

II. LEGISLATIVE FRAMEWORK

- [12] Under section 223.4 (1) (a) of the *Municipal Act, Council*, a member of Council or a member of the public may make a request for an inquiry to the Integrity Commissioner about whether the Member has contravened the code of conduct applicable to that Member.
- [13] When a matter is referred to us, we may then conduct an inquiry in accordance with the City's Integrity Commissioner Inquiry Protocol and, upon completion of the inquiry, we may make recommendations to Council on the imposition of penalties.

III. THE REQUEST

- [14] The request before us was properly filed and in accordance with the *Municipal Act* and the relevant policies and procedures for the City. We received complaints from Mayor Marchisella and one (1) member of the public alleging Councillor Mann contravened sixteen (16) provisions of the City of Elliot Lake Code of Conduct.
- [15] These complaints were filed on March 11th and March 12th, 2019.

IV. THE INQUIRY PROCESS

- [16] The responsibilities of the Integrity Commissioner are set out in section 223.3(1) of the *Municipal Act*. On March 1, 2019, section 223.2 of the *Municipal Act* was amended, and municipalities were required to adopt a code of conduct. Further, municipalities were to appoint an Integrity Commissioner who is responsible for the application of the code of conduct. Complaints may be made by Council, a member of Council or a member of the public to the Integrity Commissioner for an inquiry about whether a Member has contravened the code of conduct that is applicable to that Member.
- [17] After receiving the complaints, we followed the inquiry process as set out in the Integrity Commissioner Inquiry Protocol. We did a preliminary review of each complaint which included reviewing the available evidence and interviewing the Complainants. Subsequent to the preliminary review, the number of allegations to be investigated was reduced to twelve (12) [from sixteen (16)]. Four (4) of the allegations specifically related to the City's Procedure Bylaw which does not contemplate a member of Council refusing to participate in an in-camera session and/or leaving a meeting without the permission of the Member presiding over the meeting and therefore did not give rise to contraventions of the City's Code of Conduct..
- [18] The investigation of these matters involved a voice recorded interview of each complainant. The recordings were transcribed, and the complaints were "crystallized" to clearly indicate the substance of the complaint. Thereafter, each respondent was provided with a written document laying out the complaint and was provided an opportunity to respond to the complaint in writing. The investigation of these matters involved a voice recorded interview of each complainant. The recordings were transcribed, and the complaints were "crystallized" to clearly indicate the substance of the complaint. We typically provide a respondent with a document laying out the nature of the complaint however, in this instance [since the March 6, 2019, meeting was recorded and there was no dispute as to what occurred] Councillor Mann was interviewed without being provided a written document outlining the allegations against him. The investigator advised Councillor Mann that this matter would not result in findings but would be detailed in a report.
- [19] The conclusions we arrived at with respect to these matters are based upon the standard of a balance of probabilities. As required, assessments of credibility have been made. These assessments are based on:
- whether or not the individual had first-hand knowledge of the situation,
 - whether or not the individual had an opportunity to observe the events
 - whether or not the individual may have bias or other motive,
 - the individual's ability to clearly describe events
 - consistency within the story
 - the attitude of the individual as they were participating

- any admission of dishonesty¹

- [20] Of importance to this inquiry, is that the allegations made by the Requestors are supported by the video recording of the March 6, 2019, special meeting of City Council and there can be no dispute as to what transpired.
- [21] Both Mayor Marchisella and the member of the public requesting this inquiry were found to be mostly credible.
- [22] Councillor Mann was found by the investigator not to be credible with respect to his statement at the March 6, 2019 special meeting of City Council. Therefore, evidence provided by him with respect to this inquiry was only accepted when it could be corroborated by another credible party involved in this inquiry. When it was not corroborated, it was not accepted.

V. THE FACTS

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- [23] A special meeting of City Council was held on March 6, 2019. This meeting was called by Mayor Marchisella.
- [24] The agenda contained two topics for discussion. One (1) to be discussed in open session [procurement of loader mounted snow blower unit] and another to be discussed in closed [in-camera] session. The in-camera matter regarding the “*potential acquisition of property for municipal purposes*” was properly held in a closed session [in-camera] pursuant to section 239(2)(c) of the *Municipal Act*.”
- [25] The agenda and related materials [for both open and closed sessions] were circulated to all Members of Council.
- [26] A staff report and related material for the open session discussion was attached to the public agenda. The matter to be dealt with in closed [in-camera] session was detailed in a memo to Council from the Chief Administrative Officer, Mr. Dan Gagnon (“CAO” Gagnon”) dated March 5, 2019.
- [27] It is our practice not to violate the confidential nature of the in-camera meeting where possible however, the matter discussed by Council on March 6, 2019, has become public knowledge through the actions of members of Council. We will not release the specific details of the memo provided by CAO Gagnon to Council. We find that this

¹ *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.), at Para 10, 11. *Alberta (Department of Children and Youth Services) v. A.U.P.A.* (2009), 185 LAC (4th) 176 (Alta.Arb.)

memo contained sufficient information to advise Members of Council as to the nature of the matter to be discussed during the in-camera portion of the meeting to be held on March 6, 2019.

[28] At the March 6, 2019, meeting during the in-camera session, Council discussed the potential purchase of 151 Ontario Avenue from/with Mr. Guidoccio.

[29] The open portion of this special meeting was televised/recorded. This was reviewed by the investigator and transcribed for the purposes of this inquiry.

[30] During the open portion of the meeting, Councillor Mann made a statement, refused to participate in the in-camera session and left the meeting. The following is the transcription of what he said:

“Thank you, Worship. I think over my term, my terms on council, I’ve always prided myself in being able to go into closed session with an ability to make sound decisions. Unfortunately, I don’t have that feeling today. Um, I don’t feel that I have had full disclosure on this item, um, therefore I will not be staying for the balance of the meeting, and I will not be participating in the vote. So, at this point, I’m going to excuse myself from the table today and...thank you very much.”

[31] Councillor Mann was first elected to City Council in 2010. He was re-elected in 2014 and then again in 2018. Councillor Mann self-reported that in all of the closed sessions in which he has participated, he could do so with a good conscience and make “*sound decisions*”. However, in this circumstance, he alleged he had insufficient information [*full disclosure*] on the subject matter of the closed session and chose to vote with his feet [left the meeting and did not participate in the in-camera session].

[32] Section 239 of the *Municipal Act* clearly describes reasons that a Council may discuss a matter in an in-camera or closed session. The express purpose of the closed session is to have an open dialogue about a matter that needs to be kept confidential for a variety of reasons. There is no provision in the City’s Procedure Bylaw directing that staff must provide a certain amount of information to Council prior to a closed session meeting. In fact, there is no requirement for a staff report to be provided to Council on ANY matter to be discussed in open or closed [in-camera] session. The material provided by CAO Gagnon was more than sufficient for the purpose of the closed session deliberations.

[33] Of significance is that Councillor Mann does not typically leave a meeting. His behaviour at the March 6, 2019 meeting is extraordinary and uncalled for. It is also an abdication of his responsibility as a Councillor.

[34] Councillors Sandy Finamore and Chris Patrie also made statements during the open portion of the March 6, 2019, special meeting of City Council.

[35] Councillor Finamore Stated:

“Um. As we are a few days away from the next council meeting, I don’t see anything on any information I’ve been given, which isn’t very much, as to the uh time sensitivity of this um, acquisition. And uh, so I don’t believe that it meets the special meeting criteria and I don’t believe we should be even meeting about this, so I will be opposed to going into closed session at this meeting to discuss anything and... I won’t participate...information was not forwarded. I am not aware of anything other than a brief memo and so, um, I would require more information to go inside.”

[36] Councillor Patrie Stated:

“...I have a few misgivings about coming into the closed session. First off, the purchase of this property has been dealt with by this council and turned down therefore in my opinion shouldn’t even be on the agenda especially of a special meeting... Second, if we’re to deal with this item today, it should not be in closed session as we discussed it in open at the December 19th meeting and Councillor Pearce stated that he had a proponent at that time. And third, and most importantly, is if any portion of this matter is the proponent that his Worship told me about in Thessalon a week ago last Thursday where he and Councillor Pearce are negotiating for him to purchase the property and we guarantee to purchase a portion of that from him at a more expensive rate than he is paying, that in my humble opinion is completely illegal, and I believe not only is it against the Municipal Act to negotiate this bonusing deal, but it also contravenes the REBBA laws, Section 4 uh 2 (a) and (b) at a minimum. So, with that being said, I believe we legally should not be dealing with this in open or closed session. I think it should be stricken from the agenda.

[37] What is notable about these three similar statements is that Council was going into closed session so they could obtain information about the issue and vote on the issue. As such it is unusual for a Councillor to be saying they can not make a decision before the issue is even discussed. The vote to go in-camera was only to start the closed session of the meeting, not to make a decision on the issues to be determined in closed session.

[38] It would have been open to Councillors Mann and/or Finamore to ask to defer the issue, to ask for a further and better staff report or to vote no if they opposed the matter. These are the options for responsible Councillors on any issue. Abandoning their seats gives the distinct appearance that the involved Councillors were attempting to avoid quorum.

[39] Councillor Patrie attended the meeting electronically. The *Municipal Act* prohibits electronic participation in an in-camera session. For clarity, Councillor Patrie could not have “left the meeting” in the same manner as those present. However, his words clearly show that he was not in support of the meeting proceeding to an in-camera session.

[40] Similar to the statements by the three (3) noted Councillors were posted on social media by former Councillor [now appointed Commissioner/Committee Member for the City's Elliot Lake Residential Development Commission/Committee] Tammy Van Roon ("Ms. Van Roon") and former Mayor Rick Hamilton ("Mr. Hamilton").

[41] During the inquiry it was pointed out by one of the witnesses interviewed that likely there was collusion between the parties to sabotage the special meeting and Council's subsequent decision to purchase 151 Ontario Avenue:

'So, when Rick Hamilton said to these people [Councillors Finamore, Mann and Patrie as well as former Councillor Tammy Van Roon]: 'I don't agree with this'. They were on his Council when he was the Mayor. Everybody that is on here except for one, was part of his Council. So, when he met with them all and said, 'This is what I want you to do.' He [Rick Hamilton] posted on Facebook one day. Tammy [Ms. Van Roon] posted on Facebook the next day. And then at the meeting, Chris [Councillor Chris Patrie] call in on the phone and says his piece. Norm [Councillor Norman Mann] gets up and walks out after a brief statement, Sandy [Councillor Finamore] gets up and walks out before going into closed session. It was in concert. It was uniform. It was similar. And it was orchestrated.'

[42] One of the Requestors alluded to the fact that Mr. Hamilton advised that if Councillors Finamore, Mann and Patrie did not participate in the closed session quorum would be lost [because Councillor Luc Cyr would need to declare a conflict of interest] and it would circumvent a decision being made.

[43] Ms. Van Roon submitted her first complaint to our office on March 5, 2019, regarding the purchase of 151 Ontario Avenue and Councillor Ed Pearce's ("Councillor Pearce") alleged breach of the *Real Estate Business and Brokers Act (REBBA)*.

[44] Mr. Hamilton submitted a complaint to our office on March 6, 2019, alleging that Councillor Pearce contravened the *Municipal Conflict of Interest Act ("MCOIA")* but when requested did not provide the necessary statutory declaration.

[45] Facebook posts of both Ms. Van Roon and Mr. Hamilton confirm their concerns with the purchase of 151 Ontario Avenue and generally the actions of some members of Council.

VI. THE ISSUE

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[46] We considered:

- a. Whether Councillor Mann contravened the City's Procedure Bylaw and/or the *Municipal Act* when he left the meeting; and
- b. Whether Councillor Mann colluded with other Members of Council and/or the public to sabotage the meeting and subsequent decision of Council.

VII. THE OPINION

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[47] There is no provision in the City's Procedure Bylaw giving staff direction as to the breadth of information required to be provided prior to a closed session. However, CAO Gagnon did provide Council with a confidential memo outlining the closed session matter.

[48] Councillor Mann's statement that he was not given "*full disclosure*" is a misnomer. Councillor Mann had sufficient knowledge of the item Council would be deliberating during the in-camera session of the March 6, 2019, special meeting. Furthermore, the City has previously considered the acquisition of 151 Ontario Avenue and the memo from CAO Gagnon clearly demonstrated this property was to be the topic of discussion.

[49] Councillor Mann chose to not participate in the in-camera session and by voting with his feet [refusing to go into closed session and abandoning his seat at the meeting] he did not provide his voice/comments to the rest of Council. As indicated above, Councillor Mann had the ability to put forward various motions to defer or obtain further information or to vote against the decision. Instead he chose to abandon his seat.

[50] The evidence before us supports one of two issues: either Councillor Mann's ignorance of the workings of Council and failure to review material provided to him in advance of the meeting, or a collaboration with other Councillors to frustrate the meeting by abandoning their seats. We highly suspect that his efforts were contrived, however we were not able to obtain evidence to prove this on a balance of probabilities. We note that we were unable to rely on Councillor Mann's own evidence [he has been found to be not credible] or the evidence of other parties who attempted to obstruct Council's consideration of the matter [with the exception of Mr. Hamilton who was not interviewed]. None of Councillors Finnamore, Patrie, or Mann admitted that they acted in concert. Some of the evidence of the Requestors and witnesses in this matter was conjecture.

We did not attempt to determine the validity of some specific evidence [outside what was easily dismissed or substantiated] due to the cost to the ratepayers and the fact that the result would not result in a different finding.

- [51] We find that Councillor Mann's behaviour at the March 6th, 2019, Council Meeting did not contravene the reported sections of the City's Code of Conduct and more specifically section 7.2. It is our finding that the allegations of breach of the Code of Conduct by Councillor Mann are UNSUBSTANTIATED. That is not to say that Councillor Mann's conduct was professional, responsible or proper.

VIII. CONCLUSION

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- [52] Although the allegations made against Councillor Mann are unsubstantiated, this is in no way an exoneration of his conduct. Councillor Mann certainly engaged in grandstanding and was disingenuous when he protested that he was not provided sufficient information to proceed into closed session of a special meeting of Council. Our evidence supports the following:
- Information for the special meeting was provided to all of Council from the office of the Chief Administrative Officer [CAO Gagnon];
 - Materials for the meeting were circulated as required to ALL members of Council.
 - The CAO did not receive inquiries or requests for further information from Councillor Mann prior to the meeting, nor did Councillor Mann provide staff nor Mayor Marchisella with any advance warning that he was going to abandon his seat. That action was a pure ambush of Council.
- [53] Members of Council are expected to be unbiased and make decisions in the best interest of the taxpayers they have been elected to represent, in this case the City. This does not mean that all members of Council need to agree with every decision. It is appropriate for individual members of Council to voice their opinion and vote in accordance with such opinion with respect to a matter as may be presented to Council. It is not within an individual Councillor's role to sabotage the efforts of Council [even if they do not agree with a Member of Council's efforts]. Councillor Mann clearly demonstrated his refusal to consider a matter properly put before Council. And while the evidence before us did not substantiate that he had a malicious motive, we are highly suspicious in these circumstances.

DATED October 25, 2019