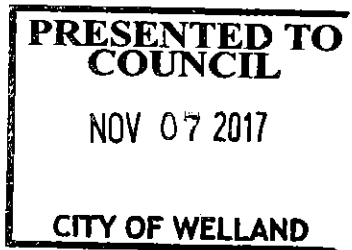


THE CORPORATION OF THE CITY OF WELLAND

IN THE MATTER OF A COMPLAINT against Councillor Tony Di Marco, dated April 8, 2017, under section 223.4 of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, and Policy Number HUM-001-0031 of the Corporation of the City of Welland, being a Policy to establish a Code of Conduct for Members of Council.

REPORT OF THE INTEGRITY COMMISSIONER

November 7, 2017



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INTRODUCTION

1. On February 5, 2013, the City of Welland approved Policy Number HUM-001-0031, establishing a Code of Conduct for Members of Council (the “Code”). The purpose of the Code is to ensure that the Members of Council share a common basis for acceptable conduct. The Code is not intended to replace personal ethics.

2. On or about October 4, 2016, I was appointed as the City’s Integrity Commissioner.

3. Among other things, the Code is designed to provide a reference guide and a supplement to the legislative parameters within which the Members must operate; serves to enhance public confidence that the Members of Council operate from a base of integrity, transparency, accountability and common courtesy; and serves to enhance the quality of public administration and governance through high standards of conduct.

4. In accordance with section 223.4 (5) of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended (the “Act”), section 19 of the Code authorizes Council to impose either of two penalties on a Member of Council following a report by the Integrity Commissioner that, in her or his opinion, there has been a violation of the Code:

- i. A reprimand; or
- ii. Suspension of the remuneration paid to the Member of Council in respect of his or her services as a Member of Council or local board, as the case may be, for a period of up to 90 days.

5. Under the Code, the Integrity Commissioner may also recommend that Council or a local board take the following actions:

- i. Removal from membership on a Committee or local board;
- ii. Removal as Chair of a Committee or local board;
- iii. Repayment or reimbursement of moneys received;

- iv. Return of property or reimbursement of its value; and
- v. A request for an apology to Council, the complainant or both.

BACKGROUND

6. The use of the Welland Recreational Canal (the “**WRC**” or the “**Canal**”) for recreation, including motorized and non-motorized watercraft, is an historic and important part of the recreational culture of the City of Welland. Indeed, in recognition of the importance of the Canal to the residents of Welland, on March 31, 1991, Her Majesty the Queen in Right of Canada, transferred ownership of the WRC to the City of Welland.
7. The City established the Welland Recreational Canal Corporation (“**WRCC**”) to manage and operate the Canal, and on July 20, 2005, passed By-law Number 2005-92 (the “**Go-Quiet By-law**”), adopting the “Go-Quiet” policy of the WRCC.
8. The stated purpose of the WRCC’s Go-Quiet policy is:
- To reduce the negative impacts on public safety, noise pollution, bank erosion, bank stability, insurance costs and risk management of motorized watercraft use on the Recreational Waterway and increase the potential for multi-use quiet enjoyment and flatwater sport event attraction by restricting the use of motorized watercraft to those persons granted permission to use said watercraft as part of an association, club, or corporation, making application to the WRCC.*
9. Section 3 of the Go-Quiet By-law reflects that purpose by prohibiting the operation or use of any motorized watercraft upon the Canal, except with the express written permission of the WRCC.
10. Suffice to say that proposed changes to both the WRCC and the Go-Quiet By-law have been the source of much discussion and debate in the community.

11. The debate was moved to the front burner on May 3, 2016, when Councillor Tony Di Marco introduced a motion to initiate discussion on the Go-Quiet By-law. According to the Councillor, the impetus for the motion was a request by local fishers to be able to use motorized watercraft on part of the Canal, for a few hours in the mornings. The motion passed, and staff was requested to prepare a report for Council on the Go-Quiet policy, and potential alternatives to expand the use of the waterway by the general public.

12. The narrow and precise intent of the motion has, however, been broadened in its interpretation by some, leading to a fear that its passing would see motorized watercrafts having free reign of the Canal. In response to this, Councillor Di Marco was quoted in *Niagara This Week* as saying: *I'm not sure where residents are getting the idea of that, but that's not what I asked for ... They would be out there early in the morning, and would be somewhere north of Woodlawn, between there and the 406 ... Last May, I just asked for a staff report on the policy, that was it".*

13. As part of the review, four public meetings were held. A report was prepared and was received by Council on July 25, 2017. After some debate, the report was referred back to General Committee, for further discussion.

THE COMPLAINT

14. The Complaint is based on an incident involving the Complainant and Councillor Di Marco, which occurred after the second public meeting to consider changes to the Go Quiet By-law, on March 16, 2017, at Welland's Wellness Centre.

15. The Complainant filed a written complaint on April 8, 2017 (the "**Complaint**"). At the request of Councillor Di Marco, I have reformulated the Complaint. The Complainant and her husband have been actively engaged in the meetings about the canal. The Complainant alleges that at the March 16, 2017, meeting the Respondent approached her in an aggressive manner, pointing at her and waving his arms.

16. The complainant's husband also submitted a written account of the event, confirming the Complainant's version.

THE FACTS

17. I met with the Complainant in her office on April 18, 2017. She has been a resident of Welland for almost 20 years. The Complainant and her family are frequent and enthusiastic users of the WRC. She has been actively opposed to the proposal to re-open the Welland Canal to motorized watercraft, and attended all four public meetings.

18. At the second public meeting, the Complainant spoke against the motion to restore motor boats to the Canal, encouraging Council not to delay its decision. By the Complainant's account, the majority of the 50 or so people in the room were opposed to Councillor Di Marco's motion. She told me that she was the most outspoken female voice in the crowd.

19. As soon as the meeting was over, Councillor Di Marco made his way directly to the Complainant. The Complainant did not know him, and he did not introduce himself. She asked Councillor Di Marco who he was, and he identified himself as the person making the motion.

20. According to the Complainant, Councillor Di Marco was waving his hands and pointing his finger at her. According to the Complainant, Councillor Di Marco's voice was raised and he was very agitated, but he was not yelling.

21. I spoke with Councillor Di Marco on May 1, 2017. He confirmed that he had brought the motion to re-introduce boats into the canal. As reported in *Niagara This Week*, Councillor Di Marco has become frustrated, as it seems to him that the public does not fully understand the nature of his motion. The proposal to have boats in the Canal does not apply to the entire length of the Canal. The span where motor boats would be allowed was the small stretch between the Woodlawn Bridge and Highway 406. Moreover, his request was only to allow motorized watercraft between sunrise and about 10:00 a.m., when the heat of the day made it uncomfortable to remain out on the water.

22. Councillor Di Marco had never met the Complainant before, but remembers her as being against motor boats along the full length of the canal, which, he reminded me, is not what he was asking for. He was upset that people seemed to be misinformed. He recalls the Complainant pressing Council to move forward with the issue.

23. The Councillor remembers approaching the Complainant. He tried to explain that his concern is for the fishermen; to allow them to use the north end of the Canal. He acknowledged that he was using his hands to gesture, but explained that: "some people use their hands to speak, I was just pointing north". Councillor Di Marco claims that the Complainant "guided" his hand away from her. He says that this happened, twice. Councillor Di Marco told me that at this point he walked away.

24. Councillor Di Marco adamantly denies that he said or did anything improper, or that he threatened, intimidated or harassed the Complainant.

25. I spoke again with the Complainant on May 12, 2017, telling her what Councillor Di Marco had said to me. The Complainant denies that Councillor Di Marco said anything about fishing, or that she could have misinterpreted the meaning of his gestures. She denies touching his hand.

26. On June 2, 2017, I spoke by telephone with the Complainant's husband. He confirmed that Councillor Di Marco approached the Complainant, soon after the meeting ended. The husband was talking to a friend in another aisle, with his back to his wife, and he could not hear the discussion between the Complainant and the Councillor. The husband's friend was looking at the Complainant, which caused him to turn around. He saw that Councillor Di Marco was pointing a finger in the Complainant's face, and describes the Councillor as being red in the face and talking loudly. The husband immediately made his way to his wife. From where the husband was standing, it appeared to him that his wife had touched Councillor Di Marco with her hand, and that he seemed to be waving to the north.

THE CODE

27. The Complainant references Policy XI of the Code – “Discreditable Conduct”:

As a representative of the City, every Member has the duty and responsibility to treat members of the public, one another and staff, appropriately and without abuse, bullying, or intimidation, and to ensure that the municipal work environment is free from discrimination and harassment.

A Member shall not use indecent, abusive or insulting words or expressions toward any other Member, any member of staff, or any member of the public. A Member shall not speak in a manner that is discriminatory to any individual based on that person’s race, ancestry, place of origin, creed, gender, sexual orientation, age, colour, marital status, or disability.

During Council and Standing Committee meetings, Members shall conduct themselves with decorum and in accordance with the City’s Procedural By-law.

28. As an aid to interpreting the Discreditable Conduct provisions of the Code, I would also like to refer to the Preamble.

The Code of Conduct for Council serves as a guide to Members of Council in the individual conduct of their official duties, helping to ensure that the Members share a common basis for acceptable conduct. It also serves to protect the public interest and encourage high ethical standards among the Members. The Code represents general standards; it supplements, but does not replace Members’ roles, responsibilities, actions, and behaviors required by various statutes, by-laws and policies. The Code does not replace personal values or ethics held by individual members.

The Code of Conduct identifies the public’s expectations of the Members and establishes guidelines for appropriate behavior. The key principles that underlie the Code of Conduct are as follows:

- i. Members shall serve and be seen to serve their constituents in a conscientious and diligent manner;*
- ii. Members shall perform their functions with integrity, accountability, and transparency, avoiding the improper use of the influence of their office, and conflicts of interest, both real and apparent;*
- iii. Members shall perform their duties of office in a manner that promotes public confidence and will bear close public scrutiny; and*
- iv. Members shall seek 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 Town Council.*

ANALYSIS

29. I will begin with a few comments on the circumstances of the encounter.

30. Although the fact that the topic at hand was contentious and divisive does not condone discreditable conduct, neither can the context be ignored. The public meeting was emotionally charged, and the Complainant and the Councillor were clearly on opposite sides of the debate. I have weighed their testimony and made my findings against this backdrop.

31. The Complainant feared the loss of enjoyment of the canal by her and her family, as well as the paddling and rowing communities of Welland. These were deep and heartfelt concerns. Councillor Di Marco wished to see his position, if not prevail, at least be understood. He believed that his original request was being misrepresented, causing him great frustration. He too, believed there was an important interest that needed to be advocated.

32. Without too close a parsing of the words of the Code, it seems that I am left with determining whether, objectively speaking and on the basis of what I have been told by both the Complainant and the Respondent, Councillor Di Marco's acted in an abusive, bullying, or intimidating way.

33. I have found this a very difficult determination to make. In the end, for reasons that follow, I do not think that Councillor Di Marco's words or deeds were sufficiently extreme to constitute abusive behaviour, and I do not believe that he intended to bully, threaten or harass the Complainant.

34. The Complainant acknowledges that Councillor Di Marco was not shouting, and he does not appear to have said anything insulting, that is words of a scornful and personal nature. Nor is there any evidence that Councillor Di Marco made any threats against the Complainant; by all accounts his message, however poorly delivered, was entirely about the substance of his motion, and the process that the City was following. It was not his words, but the way they were delivered that I believe was most upsetting to the Complainant.

35. As for the allegation that the Complainant was being harassed, I do not believe that an isolated incident between these two persons, until that moment complete strangers, constitutes harassment. This was the first time the two had met, and the discussion was not personal. There is no pattern of repeated, unwanted abusive behaviour, the usual hallmarks of harassment.

36. In the circumstances, I find that Councillor Di Marco approached the Complainant, not with any intent to threaten or harass her, but to correct her. I find on a balance of probabilities that Councillor Di Marco's words and actions on the evening of March 16, 2017, while clearly impolite, if not rude or puerile, fall short of the kind of discreditable conduct that warrants sanction under the Code.

37. I will, however, use this public opportunity to remind Councillor Di Marco that he serves all members of the community, regardless of their views on any particular issue, and that he owes all members of the community, at all times, a duty of respectful and restrained comment.

38. It is my hope that he will regard this outcome as a caution against allowing his passion for a cause to manifest itself in behaviour that undermines respect for him and his office, and, ultimately, succeeds only in putting that very cause in jeopardy.

CONCLUSION AND RECOMMENDATIONS

39. For the reasons outlined above, I find that Councillor Di Marco did not breach the Code, and I dismiss the Complaint. However, I do believe that an apology from Councillor Di Marco to the Complainant is in order, and recommend that Council request that he make that apology.

40. On a final note, I would like to comment on the gap in time between the making of the Complaint, and the delivery of this report. While Code of Conduct complaints and their investigation are becoming, perhaps begrudgingly, an accepted element of municipal governance, yet they ought not to become a distraction from, or a means to influence, the decisions of Council or the electorate. It is often preferable to separate in both time and procedure the matter-at-hand from a complaint and, whether by design or accident, this is one of those occasions.

41. I note that over the past five months the debate on the Go-Quiet By-law has thrived, and that Council has received a well-researched and comprehensive report on the matter. I trust that Council will apply its usual diligent consideration to the Go-Quiet By-law, and that its ultimate decision will be accepted with equanimity by all members of the community.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of November 2017.

A handwritten signature in black ink, appearing to read 'Harold G. Elston', with a long horizontal line extending to the right from the end of the signature.

Harold G. Elston