



Cunningham Swan
LAWYERS

Tony E. Fleming
Direct Line: 613.546.8096
E-mail: tfleming@cswan.com

June 28, 2019

BY E-MAIL: KCostello@smithsfalls.ca

Council Members – Town of Smiths Falls
c/o Kerry Costello, Director of Corporate Services/Clerk
77 Beckwith Street North
Smiths Falls, ON K7A 2B8

Attention: Council Members

**RE: Integrity Commissioner Report
Code of Conduct Complaint - Mayor Shawn Pankow
Our File No: 24529-13**

Please be advised that our preliminary review of this complaint under the Code of Conduct is now complete. We attach a copy of our report for Council's consideration. Please note that Council is required to make this report public in accordance with section 223.6(3) of the *Municipal Act*, which may be done by posting it on the Town's website.

We found the allegations contained within the complaint to be without merit. The reasons for this finding are set out in the report.

This complaint is hereby closed, and no further steps will be taken by the Integrity Commissioner in this regard.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP

Tony E. Fleming
Tony E. Fleming, C.S.
LSO Certified Specialist in Municipal Law
(Local Government / Land Use Planning)
Anthony Fleming Professional Corporation
TEF:als

CUNNINGHAM, SWAN, CARTY, LITTLE & BONHAM LLP



Tony E. Fleming
Direct Line: 613.546.8096
E-mail: tfleming@cswan.com

June 28, 2019

Council Members – Town of Smiths Falls
c/o Kerry Costello, Director of Corporate Services/Clerk
77 Beckwith Street North
Smiths Falls, ON K7A 2B8

Attention: Council Members

**RE: Integrity Commissioner Report
Code of Conduct Complaint - Mayor Shawn Pankow
Our File No: 24529-13**

Summary of the Investigation

A complaint was submitted on April 15, 2019 under the Code of Conduct. The complaint contained five separate complaints against Mayor Shawn Pankow. At the beginning of our preliminary review process, the Integrity Commissioner determined that complaints numbered 4 and 5 were without merit and indicated to the complainant that there would be no investigation of those complaints.

We then continued our preliminary review of complaints numbered 1 through 3. The allegations contained within those complaints were that Mayor Shawn Pankow breached the Code as follows:

1. That in a January 16, 2019 Facebook post, Mayor Pankow made “many false/untrue statements”, contrary to subsections 11(a), 11(b), 11(c), and 11(d) of the Code of Conduct;
2. That in a March 14, 2019 Facebook post, Mayor Pankow “made false/untrue statements”, contrary to subsections 11(a), 11(b), 11(c), and 11(d) of the Code of Conduct; and
3. That during a March 21, 2019 radio interview, Mayor Pankow “made false/untrue statements and for the first time, openly admitted that friends and family knew their views on complete streets” contrary to subsections 11(a), 11(b), 11(c), 11(d) and 11(f).

As part of our preliminary review, we requested written replies from both the complainant and the member. Further, we reviewed supporting materials from the complainant, and conducted telephone interviews with both the complainant and the member.

The complainant notes and we confirmed that Council for the Town of Smiths Falls voted to rescind Resolution 2018-02-62 of the previous term of Council passed on February 26, 2018, which was a resolution to redevelop the Beckwith Street area while maintaining the existing angled parking. The complainant states at the opening of the complaint that this decision:

“caused an uproar in the town of Smiths Falls. Much of the frustration centers around the fact that Beckwith Street Redevelopment was not discussed during the election campaign prior to October 22, 2018. Most citizens believed that because the design options had been voted on in February 2018, Beckwith Street Redevelopment was no longer an issue.”

We find this paragraph of the complaint to be implicitly at the heart of the complaint. While we have observed that this decision has resulted in considerable public discourse on the issue, it is not within the Integrity Commissioner’s jurisdiction to question decisions made by Council.

We find that Mayor Pankow’s conduct did not constitute a breach of the Code of Conduct. We find no basis to support the allegation that he intended to mislead the public by making inaccurate statements. While a member should correct him or herself if the facts of a public statement turn out to be inaccurate and substantive, the inaccuracy itself will not always constitute a breach of the Code of Conduct. Further, we find no evidence to substantiate the allegation that the member and his family and friends “knew their views on the complete streets” prior to the election. Even if we were to have found this to be true, it would not constitute a breach of the Code of Conduct. It is not within the Integrity Commissioner’s jurisdiction to state what should or should not have been an election issue. We accept the Mayor’s evidence that:

- one of the statements quoted within the complaint was inaccurate (and the result of an oversight); and
- the remaining statements were based on the facts known to him at the time they were made, and the balance of the comments were based on his subjective opinion.

In the normal course, our office does not provide a report where allegations of breaches of the Code of Conduct are found to be unsubstantiated and/or without merit after the completion of a preliminary review only. However, given the public nature of the Beckwith Street issue that implicitly underlies the complaint, it is our view that it is appropriate to make the findings of the preliminary review public. We do so in the belief that it is important to clarify both the role of the Integrity Commissioner and the limitations of the Code of Conduct.

Relevant Provisions of the Code of Conduct

The sections contained with the complaint include the following sections of the Code of Conduct:

11. Every Member shall abide by the following principles:
 - (a) Members shall at all times act ethically;
 - (b) Members shall perform their functions with integrity, accountability and transparency;
 - (c) Members shall comply with all applicable legislation, by-laws and Municipal policies, including this Code of Conduct;
 - (d) Members acknowledge that the public has a right to open government and transparent decision-making;
 - (e) ...
 - (f) Members shall not extend preferential treatment to any individual or organization.

Background

In November of 2017, the Town of Smiths Falls submitted an application for funding to the Ministry of Transportation via the "Connecting Links Program". The application noted that the Town had engaged Parsons (Ottawa) to complete the "Beckwith Street Redevelopment Plan" which would include an assessment of lane requirements, parking configurations, cycling, sidewalks and accessibility provisions.

Attached as "Attachment C" to the application was a copy of the "Notice of Commencement" issued to stakeholders (including the Ministry of Transportation (MTO)), which referenced the following as the project description:

Project Description

The Town of Smiths Falls has initiated the Beckwith Street Redevelopment Plan that includes the preparation of a streetscape functional design for the renewal of Beckwith Street in the downtown core. The study area includes Beckwith Street between Elmsley Street and Chambers Street, as well as the first 50 metres of each connecting street. The renewal of Beckwith Street is a project that implements the vision established in the 2013 Council-approved *Downtown Revitalization and Waterfront Integration Plan*: that plan provides guidance for the redevelopment of the downtown core.

The Beckwith Street Redevelopment Plan will address the various demands of the street:

- Determine the street's lane arrangement, including turn lanes;
- Determine the on-street parking arrangement;

- Determine sidewalk and crosswalk widths and accessibility provisions;
- Determine cycling provisions including bicycle parking;
- Understand, at a basic level, the below-grade services and utilities that might inform street designs;
- Determine locations for potential public places and enhanced streetscape areas; and
- Develop potential streetscape themes and directions. ¹

The application was submitted at the very early stages of the Town’s planning process for the redevelopment of Beckwith Street. Following the submission of this application, several meetings of Council addressed the issue of street design for Beckwith Street. The following resolutions illustrate the evolution of what is now planned for as the “complete streets” design for the redevelopment:

Resolution – February 26, 2018 Meeting of Council

“That Council of the Corporation of the Town of Smiths Falls approve the Angle Parking Option as the preferred Beckwith Street Redevelopment concept as outlined in Parsons final presentation to Committee dated February 20, 2018.”

Carried 4-2 (Mayor Pankow voted “nay”)

Resolution – January 21, 2019 Meeting of Council

“WHEREAS Council of the Corporation of the Town of Smiths Falls passed resolution 2018-02-62 on February 26, 2018 approving the Angle Parking Option as the preferred Beckwith Street Redevelopment concept as outlined in Parsons final presentation to Committee dated February 20th, 2018. AND WHEREAS Council of the Corporation of the Town of Smiths Falls passed 2019-01-06 on January 7, 2019 to review and discuss all of the options that were presented by Parsons with the possibility of repealing the 2018 Resolution by January 21, 2019; NOW THEREFORE BE IT RESOLVED THAT Council of the Corporation of the Town of Smiths Falls hereby rescinds resolution 2018-02-62.”

Carried 4-3 (Mayor Pankow voted “Yes”)

Resolution – January 21, 2019 Meeting of Council

“THAT Council of the Corporation of the Town of Smiths Falls approves the Complete Streets Design for Beckwith Street Redevelopment AND THAT Council directs staff to conduct an analysis of the detailed design choice of the arrangement of the cycle lane, sidewalk, and streetscape zone; AND FURTHER THAT staff will provide Council with the findings of the analysis.

Carried 6-1 (Mayor Pankow voted “Yes”)

¹ “Notice of Project Commencement – Beckwith Street Redevelopment Plan (Elmsely to Chambers Street), Attachment C to November 2017 Connecting Links Funding Application.

On January 16, 2019, March 14, 2019, and March 21, 2019, Mayor Pankow made various statements which the complainant alleges contained false/untrue statements with an intent to mislead the public. Those comments centred on the Beckwith redevelopment project. The complainant stated to us that these inaccurate statements were made in an attempt to mislead the public into believing that the Town did not receive funding because it did not submit a complete streets design. Further, the complainant states that no design was submitted at all as part of the funding application.

Finally, the complainant submits the Mayor, in a live radio interview on March 21, 2019 “openly admitted that friends and family knew their views on complete streets.”

Findings of Fact

The following facts are not in dispute:

1. The Mayor made the following statement of January 16, 2019 on Facebook:

As I prepared to address the minister and staff with our proposal, Minister McGarry spoke, telling us ‘I hope you are going to use a complete streets model.’ I advised that Council had yet to arrive at its decision but that a complete streets model was one of the options being considered. The Town later submitted its formal application after council made its decision to proceed with Option 1 – which does not follow a complete streets design. The application was denied. There is no way to confirm if street design was a factor and it is not uncommon to have an application denied as the requests for funding exceed the money available.”

There is no dispute between the complainant and the Mayor that a portion of this statement was incorrect. The Mayor confirms that the Town had submitted the application for funding prior to Council moving forward with Option 1.

The following facts are in dispute:

1. The complainant alleges that a January 16, 2019 Facebook post by the Mayor and statements made by the Mayor to other outlets were meant to mislead the public into believing that the Town was denied funding because it did not submit a complete streets design as part of its application. The complainant states that a complete streets design was not a criteria for funding;
2. The complainant states that there was in fact a way to determine if street design was a factor in the MTO’s decision to deny funding, and that the MTO website and correspondence to the Town states that municipalities may contact them to ascertain why funding was denied;

2. The complainant alleges that a March 14, 2019 Facebook post by the Mayor contains false/untrue statements:

"I completely disagree with suggestions that this should have been a campaign issue. How could anyone have predicted during the campaign that the province would delay any announcement on Connecting Link Funding?"

The complainant states that Mayor Pankow "certainly would have been made aware" of the delay in funding during an August 20, 2018 meeting with Parliamentary Assistant Kinga Surma.

Preliminary Review

We have reviewed the submissions from both the complainant and the Mayor, along with all submissions from each which includes the November 2017 application for funding to the MTO via the Connecting Links Program.

Our review indicates that the entirety of this complaint is based on questions of fact or speculation. The complainant alleges that the Mayor made several false/untrue statements with an intent to mislead the public. We find no evidence to support the contention that any statements were made for the purpose of misleading the public. Although it is ideal for members to refresh their memories prior to making public statements about issues, it is not always what occurs in real time. The Code of Conduct does not require perfection, or for statements to be 100% accurate. It requires that members represent the public in an honest and ethical manner.

Mayor Pankow candidly admitted that part of a statement made by him was inaccurate. Apart from any inaccurate statements, the Mayor contends that the remainder of his statements were either based on the facts as known to him at the time the statements were made or based on his subjective opinions. Through our review of the Mayor's submissions and our interview with him, we find his evidence to be credible.

Inaccurate statements alone do not amount to a breach; the complainant has submitted no evidence that any statements were made unethically, or with the intent to mislead the public. We cannot make findings of a breach based on guesswork or mere speculation; such allegations must be supported through the evidence.

Finally, the complainant alleges the Mayor, in a live radio interview on March 21, 2019, "openly admitted that friends and family knew their views on complete streets." We find this allegation to be based on speculation, not fact. During our review of past meeting minutes of Council, it is clear from at least as early as February of 2018, that Mayor Pankow supported the complete streets design model. Even so, the Integrity Commissioner has no jurisdiction to

question what should or should not have been an election issue, nor what was in the mind of a candidate prior to that individual taking office.

Recommendations

As we have found these allegations to be without merit following our preliminary review, we therefore submit no recommendations for Council's consideration.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



Tony E. Fleming, C.S.
LSO Certified Specialist in Municipal Law
(Local Government / Land Use Planning)
Anthony Fleming Professional Corporation
TEF:als