

## **ADVISORY BULLETIN**

### **PARTICIPATION ON COMMISSIONS, BOARDS OR AGENCIES**

#### **I. Purpose of the bulletin**

Members of Council are regularly appointed by Council to various commissions, boards or agencies, ranging from museums and galleries to business improvement zones. A full listing of these organizations can be found here: <http://winnipeg.ca/clerks/boards/boards.stm>. Occasionally, members will also sit voluntarily on commissions, boards or agencies.

In certain cases, such participation can lead to an apparent or real conflict of interest with respect to the Member's role on Council. The purpose of this bulletin is to provide guidance with respect to determining whether participating on a particular board or tribunal gives rise to a conflict of interest in connection with the performance of a Member's duties of office.

#### **II. Executive Summary**

- 1) Members of Council are presumed not to have a conflict of interest in any appointment made by Council, to serve in their official capacity on any commission, board or agency or in matters arising in relation to that commission, board or agency.
- 2) Members may still have a conflict of duty (as opposed to interest) by virtue of being appointed by Council to sit on a commission, board or agency. That is, the duty that a Member owes to a given commission, board or agency may clash with his/her role as a Member of Council. This is an ethical issue but not one which is covered directly by the Code of Conduct for Members of Council for the City of Winnipeg ("the Code"). Members of Council must consider whether they have a clash of duties on a case-by-case basis.
- 3) When Members of Council voluntarily sit on a commission, board or agency, as opposed to being appointed to the position by Council, they must take care to avoid real or apparent conflicts of interest. Each situation will need to be considered on a case-by-case basis as it arises.

#### **III. Rationale for Appointing Members to Boards, Commissions and Agencies**

Generally, the rationale for appointing Members of Council to sit on boards, commissions and agencies is to help ensure that a civic voice is heard on such entities.

Under the Code and *The Municipal Council Conflict of Interest Act*, a Member of Council is presumed **not** to have an interest when serving on a board to which they been appointed by Council in their official capacity.

A similar presumption or exception to the conflict rule was commented on by the Ontario courts in *Blyth v. Northumberland (County)*, 1990 CanLII 6752 (ONSC). In that case, three municipal councillors who cast a vote on a by-law were also members of the Board of Health which administered the local health unit and was a potential lessee of the new administration building.

The applicants in the case had submitted that the three councillors had a conflict of interest in voting on the by-law relating to the new building.

The court, however, in addition to finding that the three councillors had no pecuniary interest in the matter, went on to note that the municipal conflict of interest legislation contained an exception to the conflict rules in the case of interests arising solely by virtue of being appointed by council to sit as a member of a board, commission or other body. The court cited S.M. Mackuch, *Canadian Municipal and Planning Law* (Toronto: Carswell 1983), at p.312 where the author described this exception as "common sense" and stated:

"such interests embody public duties similar to those of the member as a councillor or board member and any conflict must be accepted since private or personal interests are not involved."

*Blythe, supra*, p.12

#### **IV. Interests and Duties**

Members of Council must still keep in mind, however, that they could have a conflict of duties (as opposed to a conflict of interest) by virtue of being appointed to a board or commission. That is, the duty that a Member owes to a given board may clash with his or her role as a Member of Council. This is an ethical problem but not one which is covered directly by the Code.

Further, where Members of Council voluntarily choose to sit on boards such as, for example, the board of a community-based agency, the presumption provided in rule 2.c of the Code that they do not have an interest in sitting on the board, does not apply.

For example, if a Member of Council sits on the board of a ratepayer's association there could be a potential for promoting private interests which would affect the member's own land value. Other interests may be more selfless, relating, for example, to a charitable or religious organization where one gets personal gratification but no remuneration.

Members of Council are advised to be alert at all times to whether they have a private interest in a given matter, ensure that they declare the interest and avoid voting on or influencing a decision on the matter should it come before Council.

The determination of what amounts to a private interest is fact specific and must be determined on a case-by-case basis. Members are, as always, strongly encouraged to seek the advice of the Integrity Commissioner.

#### **V. Analysis**

As noted by Gregory J. Levine:

"Conflict of interest in the public sector is the clash of a private interest with a public duty. It involves the potential to further private, personal interest at the expense of fulfilling public duty and acting in the public interest. Conflict of interest is often mistakenly confused with conflict of duties, where two public duties of one official clash, or where competing public interests appear to

clash. These are not conflicts of interest in the public sector, as it is clear from law and practice that such conflict of interest must entail personal and private interest."

*The Law of Government Ethics (2<sup>nd</sup> ed) 2015, Gregory J. Levine, Thomson Reuters Canada, page 9*

Mr. Levine goes on to note that there are several different types of interest that could give rise to a conflict and that while the law has traditionally focused on pecuniary or financial interests, the term "private interest" is broader than pecuniary or financial interest and is the growing norm in government ethics law in Canada. A private interest can include familial relationships or friendships and may include beliefs, predilections and psychological gratification. He points out:

"The potential breadth of private interests is as large as the field of activity and relationships open to individuals as human beings. Moreover, it has long been understood in law that interests are determined on the facts and in the circumstances of each case."

*The Law of Government Ethics, supra, page 10*

The rule in the Code defines a "private interest" to include any personal benefit, whether or not of a pecuniary nature. A personal benefit may include a benefit to anyone with whom the Member of Council has a special relationship.

In the public sector, a conflict of interest occurs:

"When an elected or appointed public official attempts to promote a private interest for him – or herself, or for some other person(s), that results, or appears to result, in interference in the impartial discharge of one's duties or a gain or advantage by virtue of his or her position ... where there is a conflict between public and private interest, the public should always prevail."

*Honest Politics Now, Ed. Ian Greene and David P Shugarman, 2017, James Lorimer & Company Ltd., pages 70-71*

Note that the Code articulates that interests held in common with others are not private interests.

As Mr. Levine points out, legislatures and decision makers are a part of the community and so long as they are not focused on their own interests they may deal with matters which affect their interests in a general way.

*The Law of Government Ethics, supra, page 19*

## **VI. Authorities**

### **a) The Code of Conduct – Conflict of Interest**

In the Code, the conflict of interest rule provides:

#### **2. Conflict of Interest**

- a. Members must not act in situations in which they have a real or apparent conflict of interest, whether during a meeting of council or committee of council or at any other time while performing their duties of office.

**A conflict of interest** exists when a member exercises his or her duties of office and at the same time knows that the performance of those duties there is the opportunity to fulfil his or her private interest.

**A private interest** includes any personal benefit, whether pecuniary or not.

**A real conflict of interest** exists when a member has knowledge of a private interest that is sufficient to influence the exercise of his or her duties of office.

**An apparent conflict of interest** exists when there is a reasonable perception, which a reasonably well-informed person could properly have, that the member's ability to perform any official duty or function must be influenced by his or her private interest.

b. Interests which do not give rise to a conflict of interest include:

- interests in matters of general application;
- interests in matters that affect a Member as one of a broad class of the public;
- interests that concern the remuneration and benefits of the Member as a Member of Council; and
- interests that are trivial.

c. **A Member is presumed not to have an interest in any appointment to serve in his or her official capacity on any commission, board or agency, or in matters arising in relation to that commission, board or agency**

(emphasis added)

d. A Member who has a conflict of interest with respect to any matter must refrain from influencing the matter and from discussing or voting on any decision with respect to the matter.

e. Should a conflict of interest, real or apparent, arise with respect to a matter that will be discussed or determined at a meeting of Council or a Committee of Council, the Member must:

- i. disclose the general nature of the Member's interest, and
- ii. withdraw from the meeting without voting or participating in the discussion.

f. Where a Member does not disclose an interest under Rule 2.e. because they are not in attendance at the meeting at which the matter arose, the Member must disclose the general nature of his or her interest at the next meeting of the same body before which the matter arose.

g. Where, by reason of withdrawal from a meeting because of non-pecuniary interests, there would be fewer Members remaining than are needed to meet quorum, those Members who have withdrawn by reason of a non-pecuniary interest must disclose their interest but may still vote in respect of the matter.

**b) The Municipal Council Conflict of Interest Act, CCSM c M255**

The Municipal Council Conflict of Interest Act also allows for members of council to serve on a board or agency in his or her official capacity without it giving rise to a pecuniary interest:

**Appointments**

4(6) For purposes of this Act, where a councillor is appointed to serve in his official capacity as a councillor on any commission, board or agency, the councillor shall be presumed not to have a direct pecuniary interest in the appointment and the councillor shall not be presumed, solely by virtue of that appointment, to have

- (a) an indirect pecuniary interest in a matter in which the commission, board or agency has a direct pecuniary interest; or
- (b) an indirect pecuniary liability to another person or to a corporation, partnership, or organization to whom or which the commission, board or agency has a direct pecuniary liability.

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