



**COMMUNICATION : C 13
COMMITTEE OF THE WHOLE (2)
MAY 20, 2020
ITEM # 17**

DATE: May 15, 2020

TO: Hon. Mayor and Members of Council

FROM: Wendy Law, Deputy City Manager, Administrative Services & City Solicitor

RE: Draft Indemnification By-law

At the April 21, 2020 Committee of the Whole (2) meeting, Council asked staff to further review the Draft Indemnification By-law based on comments received at the meeting. Following this review, staff are proposing a few changes to the draft By-law, as attached and noted below:

- Clarification has been added to section 1(h)(vii) to confirm that the section does not prevent indemnification of Members of Council and Local Boards in the context of a proceeding brought under the *Municipal Conflict of Interest Act* (MCIA).
- A “set-off” section has been added to the By-law (section 3(7)). This new section confirms that where an Eligible Person is in default of the requirement to reimburse funds to the City under the By-law, the City may withhold an amount equal to the default from funds it owes to the Eligible Person. This set-off section is subject to the general requirement that set-off must be done in accordance with any applicable law. It is proposed that the City Manager, in consultation with the City Solicitor, may apply set off as applicable if the Eligible Person is a current or former employee. For all other Eligible Persons, it is recommended that Council confirmation is obtained prior to set off being applied. This new clause provides added measure for the City to obtain reimbursement of fees paid if necessary.
- In the context of Code Complaints and proceedings brought under section 8 of the MCIA, a limit on the quantum of indemnification for such proceedings may only be imposed if approved by Council. These proceedings are not covered by the City’s insurance and are not within the City’s litigation portfolio - those proceedings are separately reported to Council. As such, staff believe that it is appropriate to first seek Council’s confirmation prior to imposing a quantum on the indemnification.



- Various cosmetic changes have been made, as well as minor edits to wording for consistency. For example, additional wording in section 2(1) to further clarify the intent that indemnification applies to proceedings that have been commenced against an Eligible Person.

It is staff's recommendation that Recommendation #1 in the Report from the Deputy City Manager, Administrative Services and City Solicitor on the Indemnification Bylaw Amendments dated March 9, 2020 be deleted and replaced with the following:

1. That the Indemnification By-law, substantially in the form as attached to this Communication from the Deputy City Manager, Administrative Services and City Solicitor dated May 15, 2020, be enacted.

THE CITY OF VAUGHAN

BY-LAW

BY-LAW NUMBER XX-2020

A By-law to provide for the indemnity and defence of members of council, members of local boards, and employees of the Corporation against loss or liability incurred while acting on behalf of the Corporation, and to repeal By-law 91-2011, as amended.

WHEREAS Section 8 of the *Municipal Act, 2001*, S.O. 2001, c. 25 as amended, provides that the powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to govern;

AND WHEREAS Section 279(1) of the *Municipal Act, 2001*, as amended, provides that a municipality may, subject to certain limitations, act as an insurer and protect present and former members of council, local boards, employees, and officers from risk that may involve pecuniary loss or liability on the part of those individuals;

AND WHEREAS Section 283(1) of the *Municipal Act, 2001*, as amended, provides that municipalities may pay any part of the remuneration and expenses of the members of any local board of the municipality and the officers and employees of the local board;

AND WHEREAS Section 283(2) of the *Municipal Act, 2001* as amended, provides that a municipality may only pay the expenses of members of council, local boards, employees, and officers if the expenses are of those persons in their capacity as members, officers or employees, among other considerations;

AND WHEREAS Section 223.3(6) of the *Municipal Act, 2001*, as amended, provides that a municipality shall indemnify and save harmless the Integrity Commissioner or any person acting under the instructions of that officer for costs reasonably incurred by either of them in connection with the defence of a proceeding if the proceeding relates to an act done in good faith in the performance or intended performance of a duty or authority under Part V.1 of the *Municipal Act, 2001*, as amended, or a by-law passed under it or an alleged neglect or default in the performance in good faith of the duty or authority;

AND WHEREAS the Integrity Commissioner is authorized under sections 223.4 and 223.4.1 of the *Municipal Act, 2001* to conduct inquiries as it relates to the Code of Ethical Conduct for Members of Council and local boards and the *Municipal Conflict of Interest Act*;

AND WHEREAS Section 8 of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.

50, as amended, allows an elector, an Integrity Commissioner of a municipality or a person demonstrably acting in the public interest to apply to a judge for a determination of the question of whether a member, or former member, has contravened section 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act*.

AND WHEREAS Section 14 of the *Municipal Conflict of Interest Act*, provides that a municipality may pass a by-law to protect a member of council or of any local board thereof against any costs or expenses incurred by the member as a result of a proceeding brought under *Municipal Conflict of Interest Act*, and for paying on behalf of or reimbursing the member for such costs or expenses, so long as the member has been found not to have contravened that Act.

NOW THEREFORE the Council of The Corporation of the City of Vaughan enacts as follows:

Section 1 - Definitions and Interpretation

- (1) In this By-law, unless a contrary intention appears,
 - (a) “Advance Payment” means payment by the Corporation of actual and reasonable legal fees incurred by an Eligible Person in the course of defending the Legal Proceeding, in advance of a final disposition of the Legal Proceeding;
 - (b) “Code” means the Code of Ethical Conduct for Members of Council and Local Boards, as amended;
 - (c) “Code Complaint” means a formal or informal complaint made to the Integrity Commissioner, and includes an inquiry under section 223.4 or 223.4.1 of the *Municipal Act, 2001*.
 - (d) “City” or “Corporation” means The Corporation of the City of Vaughan;
 - (e) “City Solicitor” means the City Solicitor of the Corporation, or designate;
 - (f) “City Manager” means the City Manager of the Corporation, or designate;
 - (g) “Eligible Person” means any of the following persons of the Corporation:
 - (i) a current or former member of Council;
 - (ii) a current or former member of a local board;
 - (iii) the current or former Integrity Commissioner, including any person acting under the instructions of the Integrity Commissioner;
 - (iv) the current or former Lobbyist Registrar;
 - (v) current or former officers and employees.

(h) "Legal Proceeding" means:

- (i) a civil proceeding or administrative action, including but not limited to an action, application, motion, hearing, trial; or
- (ii) a proceeding wherein a person is charged with an offence under the *Criminal Code*, R.S.C. 1985, c. C. 46 or the *Highway Traffic Act*, R.S.O. 1990, s. H.8; or
- (iii) a proceeding brought under section 8 of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M. 50, as amended (the "MCIA"); or
- (iv) a Code Complaint; or,
- (v) a complaint to a professional association;

But excludes:

- (vi) any proceeding commenced by the Corporation;
- (vii) any proceeding in which the Corporation is a party adverse in interest. For greater certainty, this section 1(h)(vii) does not prevent indemnification of Members of Council and Local Boards in the context of a proceeding brought under the MCIA.; or
- (viii) any proceeding under the *Municipal Elections Act*, 1996, S.O. 1996, c. 32, Sched., as amended.

Section 2 - Indemnification of Eligible Persons

- (1) Subject to the provisions of this By-law, the Corporation shall indemnify an Eligible Person, and his or her heirs and legal representatives, in respect of any Legal Proceeding that has been commenced against, and arises out of acts or omissions done or made by, the Eligible Person:
 - (a) in his or her capacity as an Eligible Person, including those acts or omissions arising from the performance of any statutory duty imposed by any general or special Act; and
 - (b) acting in good faith and based on the reasonable belief that such acts or omissions were lawful and in the best interests of the Corporation or local board as applicable.
- (2) The Corporation shall reimburse members of Council and local boards for expenses incurred in obtaining legal advice to determine whether the member has a pecuniary interest in a matter which is the subject of consideration by council or a board.
- (3) If an Eligible Person qualifies for indemnification in a Legal Proceeding under this By-law, the City will assume carriage of the Legal Proceeding on behalf of the

Eligible Person, unless the City Solicitor determines that the City cannot represent the Eligible Person. For greater certainty, the City shall not assume carriage of a Legal Proceeding referred to in 1(h)(iii) or 1(h)(iv) above.

- (4) Where the City Solicitor determines that the City cannot represent the Eligible Person, the City Solicitor may request that the Eligible Person retain independent legal counsel and be indemnified for legal fees in accordance with this By-law.
- (5) The City Solicitor shall have the right to request that an Eligible Person obtain their own legal counsel at any time during the course of the Legal Proceeding if the City Solicitor is of the opinion that it is no longer appropriate for the City to defend and represent, or to continue to defend and represent the Eligible Person.
- (6) Where the City assumes the defence of a Legal Proceeding on behalf of an Eligible Person, the Eligible Person shall co-operate with the City and assist the City in the defence of the Legal Proceeding, as required by the City. This includes providing timely and fulsome responses to requests for information and attending the proceedings and meetings, as required.
- (7) Where an Eligible Person fails to co-operate and assist the City in accordance with section 2(6), the City Solicitor may determine that it would be inappropriate for the City to defend and represent, or continue to defend and represent, the Eligible Person, and the Eligible Person will no longer qualify for indemnification in respect of the Legal Proceeding.
- (8) If the City defends and represents the Eligible Person in a Legal Proceeding, the City shall not be responsible for any legal or other costs incurred by the Eligible Person unless such expenses have been pre-approved by the City Solicitor.

Section 3 - Process to Request Indemnification

- (1) If an Eligible Person is required to obtain their own legal representation pursuant to section 2, or if the Eligible Person is seeking to be reimbursed for legal expenses pursuant to section 2(2), he or she may make a written request for indemnification,
 - (a) to the City Solicitor; or,
 - (b) where the City Solicitor is the person seeking indemnification, to the City Manager; or
 - (c) where both the City Manager and the City Solicitor are named as parties in the legal proceeding giving rise to the request, to Council.
- (2) Upon receipt of a request for indemnification, the City Solicitor, or City Manager as applicable, shall provide a written response within 10 business days of delivery of the request.

Advance Payment

- (3) A written request referred to in section 3(1) may include a request for Advance

Payment of actual and reasonable legal fees. In the absence of such a request for Advance Payment, payment of legal fees shall be made after a final disposition of the Legal Proceeding or the completion of the matter referred to in section 2(2) as appropriate (where a final disposition includes termination or settlement of a Legal Proceeding).

- (4) Any Advance Payment made by the Corporation is subject to:
 - (a) A cap of \$25,000 if the Advance Payment is not assumed or paid for by the Corporation's insurer;
 - (b) the requirement to reimburse the City, as set out in sections 5(2), 5(3), and 5(4); and
 - (c) the condition that, if repayment of legal fees is required under this Bylaw, that repayment shall be made within 90 days of the final disposition of the Legal Proceeding.
- (5) If an Eligible Person wishes to seek Advance Payment for an amount exceeding \$25,000 as provided in section 3(4)(a), the City Solicitor shall bring a report to Council for direction.
- (6) If at any point the Eligible Person wishes to deviate from the repayment obligations to repay the City within 90 days, the Eligible Person shall make a request to the City Solicitor who shall bring the matter to Council to seek direction and approval.
- (7) If the Eligible Person is in default of the requirement to reimburse the City under this By-law, the City may retain an amount equal to the Eligible Person's default from amounts the City owes to the Eligible Person, to the extent allowed by law ("set-off"). In the case of a current or former employee who defaults in reimbursement, the City Manager, in consultation with the City Solicitor, shall have the authority to direct such set-off be applied. In the case of other Eligible Persons, the City Solicitor shall bring the matter to Council to confirm approval before set-off is applied.

Approval of Lawyer

- (8) A written request for indemnification referred to in section 3(1) may include a request for approval of a lawyer chosen by the Eligible Person, or may request that the City Solicitor suggest three lawyers.
- (9) Notwithstanding section 3(8), in the case of proceedings referred to in section 1(h)(iii) or 1(h)(iv), the Eligible Person shall not require approval of their lawyer by the City.
- (10) Where a request for indemnification seeks approval of a lawyer chosen by the Eligible Person in accordance with section 3(8), the response by the City Solicitor, acting reasonably, shall also:

- (a) approve the request to retain the lawyer chosen by the Eligible Person; or
 - (b) deny the request and suggest three lawyers of the Corporation's choice who could represent the Eligible Person in the Legal Proceeding at issue.
- (11) Where the City Solicitor has suggested three lawyers, the Eligible Person shall select from the list and shall notify the City Solicitor of the selection, within 5 calendar days of receipt.

Section 4 - Eligible Persons Served with Process

- (1) Subject to section 4(2), where an Eligible Person is served with any document which initiates a Legal Proceeding, he or she shall forthwith deliver the document to the City Solicitor.
- (2) Where a Member of Council or local board receives a Code Complaint the Member of Council or local board may request permission from the Integrity Commissioner to disclose the existence and general nature of the complaint to the City Solicitor in support of their request for indemnification under this By-law.

Section 5 - Manner and Extent of Indemnification

- (1) The Corporation shall provide indemnification to an Eligible Person as follows under this By-law:
 - (a) Assume carriage of the defence on behalf of the Eligible Person or pay the actual and reasonable expenses of defending such Eligible Person in the Legal Proceeding; and/or,
 - (b) pay any damages or costs, including any monetary penalty, or award against such Eligible Person as a result of a Legal Proceeding; and/or,
 - (c) pay, either by direct payment or by reimbursement, any expenses reasonably incurred by the Eligible Person as a result of a Legal Proceeding or a request for payment of fees under section 3; and/or,
 - (d) pay any sum required in connection with the settlement of a Legal Proceeding, provided that the City Solicitor approves the terms of the settlement;

to the extent that such costs, damages, expenses, monetary penalty, other award or other sums related to the Legal Proceeding are not assumed, paid or reimbursed under any provision of the Corporation's insurance for the benefit and protection of such person against any liability incurred by him or her.

- (2) If it is determined in a Legal Proceeding that an Eligible Person's acts or omissions giving rise to the Legal Proceeding:

- (a) did not arise out of acts or omissions done or made by the Eligible Person in his or her capacity as an Eligible Person; or
- (b) were not done or not made in good faith; or
- (c) were not based on the reasonable belief that such acts or omissions were lawful and in the best interests of the Corporation,

the Eligible Person shall not be eligible for indemnification under this By-law, and shall be required to reimburse the Corporation for all funds paid on the Eligible Person's behalf pursuant to this By-law within 90 days of such a determination.

- (3) An Eligible Person is not entitled to indemnification under this By-law and must reimburse the Corporation for any legal fees paid by the Corporation in respect of a Legal Proceeding if:
 - (a) the Eligible Person is convicted of an offence in the case of a Legal Proceeding under section 1(h)(ii); or
 - (b) In the case of a proceeding brought under section 8 of the *MCIA*, the member of Council or local board has been found to have contravened section 5, 5.1 or 5.2 of the *MCIA*; or
 - (c) In the case of a Code Complaint, where a contravention has been found, unless:
 - (i) the contravention has occurred by reason of inadvertence; or
 - (ii) the contravention has occurred by reason of a bona fide error in judgment.
- (4) If an Eligible Person receives a payment through a costs award or settlement in respect of a Legal Proceeding for which the City has indemnified the Eligible Person, such amounts must be paid to the City upon receipt by the Eligible Person.
- (5) The City Solicitor, acting reasonably, may request or impose one or all of the following:
 - (a) Budgets for anticipated legal expenses; and/or
 - (b) Status Updates in respect of the progress of the proceedings; and/or
 - (c) A limit on quantum of indemnification for legal fees. For Legal Proceedings under section 1(h)(iii) and 1(h)(iv), a limit on the quantum of indemnification for legal fees shall only be imposed after such has been approved by Council.
- (6) If there is a dispute between the City Solicitor, acting reasonably, and the Eligible Person with respect to the account for legal expense payments, the City Solicitor may require that such account for reimbursement be assessed by a Court Assessment Officer prior to payment by the Corporation. The Corporation shall have the right to limit the amount which it will reimburse, or provide Advance

Payment, to the amount arrived at by the Court Assessment Officer.

- (7) The City Solicitor shall be provided with copies of the statements of account on a monthly basis, which shall outline all fees and disbursements, and shall be provided with information relating to these accounts, as may be requested from time to time, in order to determine reasonableness of the account before any payment would be made.

Section 6 - Failure to Comply with By-law / Exclusions

- (1) If an Eligible Person who has been approved to receive indemnification fails or refuses to comply with any of the provisions of this By-law, or in the event of one or more of the following:
 - (a) the Eligible Person or his or her lawyer takes a step which is unnecessary, or is otherwise prejudicial to the conduct of the Legal Proceeding, as determined by the City Solicitor; or
 - (b) the quantum of indemnification exceeds the Budget referred to in section 5(5); or
 - (c) the maximum amount of indemnification approved has been paid, or
 - (d) the Eligible Person commences a counterclaim, crossclaim, third party claim, application for judicial review, or other proceeding related to the Legal Proceeding for which reimbursement is sought, without first obtaining prior approval from the City Solicitor,

then the Corporation shall not be liable to assume or pay any of the costs, damages, expenses, monetary penalty or other sums as set out in this By-law.

Section 7 - Appeal

- (1) Notwithstanding other provisions of this Bylaw, where a person seeks to appeal or bring an application for judicial review with respect to a judgment or decision in a Legal Proceeding covered by this By-law, the Corporation shall have the sole discretion to determine whether the expenses of the appeal or judicial review will be covered by this By-law. If an individual pursues an appeal or application for judicial review without representation by the Corporation and is successful in that appeal, the Corporation shall have sole discretion to determine whether the Eligible Person shall be indemnified for his or her legal expenses.

Section 8 - Executive Acts Authorized

- (1) The City Solicitor is authorized to execute any necessary documents on behalf of the Corporation in order to give effect to this By-law according to its true intent and meaning.
- (2) Nothing in this By-law shall prevent the City Solicitor from bringing a report to Council to seek direction on any matter related to indemnification.

Section 9 – Repeal

- (1) By-law 91-2011, as amended, is hereby repealed.

Section 10 - Force and Effect

- (1) This By-law comes into force on the day it is passed. For greater certainty:
- (a) For ongoing Legal Proceedings where the Corporation has assumed the defence of the matter on behalf of an Eligible Person, the City will continue to defend the Legal Proceeding on the Eligible Person's behalf, subject to the terms of this By-law.
 - (b) For all Legal Proceedings where indemnification was authorized under Bylaw 91-2011, as amended, those existing indemnification approvals will continue under this By-law, and be subject to the terms of this By-law.
 - (c) For ongoing Legal Proceedings in which an Eligible Person was required to retain their own counsel, including Code Complaints filed with the Integrity Commissioner prior to the enactment of this By-law where a final disposition has not been rendered, the provision of this By-law will apply.

Enacted by City of Vaughan Council this 27th day of May, 2020.

Hon. Maurizio Bevilacqua, Mayor

Todd Coles, City Clerk

Authorized by Item No. __ of
Report No. __ of the Committee
of the Whole
Adopted by Vaughan City
Council on May __, 2020