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CHAMBERS

Integrity Commissioner Office
for the City of Kawartha Lakes

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April 25, 2022

SENT BY EMAIL

Ms. Jodi Harper
Councillor Kathleen Seymour-Fagan
cc: Cathie Ritchie, City Clerk

Re: Investigation Report for Complaint IC-16215-0422

This is the report of the Integrity Commissioner Office concerning a complaint brought by Jodi Harper against Councillor Kathleen Seymour-Fagan under the Kawartha Lakes Code of Conduct and Ethics for Members of Council and Local Boards (the "Code of Conduct") and the *Municipal Conflict of Interest Act* R.S.O 1990, c. M.50 (the "*Municipal Conflict of Interest Act*").

Pursuant to Section 223.3(1) of the *Municipal Act*, S.O. 2001, c. 25 (the "*Municipal Act*") the Integrity Commissioner is responsible for the application of the Code of Conduct and for determining, when requested, whether a Member of Council has contravened the Code of Conduct.

Pursuant to Section 223.4.1 of the *Municipal Act*, an elector may apply in writing to the Integrity Commissioner for an inquiry concerning an alleged contravention of section 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act*.

Pursuant to a delegation dated January 13, 2022, made under section 223.3(s) of the *Municipal Act*, Charles A. Harnick delegated his powers and duties as Integrity Commissioner to Ellen Fry to inquire into, investigate and, if warranted, prepare a report thereon subject to his review and approval with respect to the above-noted complaint.

A. The Complaint

Ms. Harper filed a written complaint under the Code of Conduct dated January 10, 2022. Ms. Harper believes that Councillor Seymour-Fagan had a conflict of interest concerning Ms. Harper's zoning application for a bruncheonette. She believes that Councillor Seymour-Fagan did not behave appropriately concerning this alleged conflict of interest in the meetings of the Kawartha Lakes Planning

Advisory Committee on July 14, 2021 and October 6, 2021 and the Kawartha Lakes Council meeting of October 19, 2021.

B. The Investigation

We reviewed the submissions of the parties and other relevant information, including

- The complaint filed by Ms. Harper on January 10, 2022
- The response to the complaint filed by Councillor Seymour-Fagan on January 30, 2022
- The reply filed by Ms. Harper on February 1, 2022
- Additional information filed by Ms. Harper on February 2, 2022
- Additional information filed by Ms. Harper on March 20, 2022
- Additional information and videos filed by Ms. Harper on March 21, 2022
- Additional information filed by Councillor Seymour-Fagan on March 21, 2022
- Additional information filed by Ms. Harper and Councillor Seymour-Fagan on March 22, 2022
- Agenda, video and minutes of the July 14, 2021 Planning Advisory Committee meeting and Report Plan 2021-041 filed by Kawartha staff for the meeting
- Agenda and minutes of the October 6, 2021 Planning Advisory Committee meeting and Report Plan 2021-056 filed by Kawartha staff for the meeting. There is no video of this meeting.
- Agenda, video and minutes of the October 19, 2021 Council meeting
- Final report of the Downtown Parking Strategy dated May 17, 2021
- Public comments concerning Ms. Harper's application
- The Code of Conduct
- The *Municipal Conflict of Interest Act*.

We conducted telephone interviews with

- Ms. Harper
- Councillor Seymour-Fagan
- Emma Drake, Planner for Ms. Harper
- Andy Letham, Mayor of Kawartha Lakes
- Ron Taylor, Chief Administrative Officer, Kawartha Lakes
- Ian Walker, Kawartha Lakes Planning Officer

C. Relevant Provisions of the Code of Conduct

Ms. Harper alleges that Councillor Seymour-Fagan failed to fulfill the following responsibilities of Councillors under the Code of Conduct:

4.1 In all respects, Members shall:

...

c) Seek to advance the public interest with honesty;

5.3 No Member shall:

...

c) Use the influence of their office for any purpose other than for the lawful exercise of their official duties for municipal purposes.

6.1 Members shall:

...

c) Ensure compliance with the Municipal Act, 2001; Municipal Conflict of Interest Act; Municipal Freedom of Information and Protection of Privacy Act, and other applicable legislation regarding open meetings, accountability and transparency.

7.2 Actions of a Member of Council shall be above suspicion and shall not give rise to any conflict of interest. Dealings with business(es) and other interests must be able to bear the closest possible scrutiny and avoid risk of damage of public confidence in local government [and] a Council Member's impartial and objective role in the decision-making process.

7.4 It is recognized that Members may have work or business activities outside of their normal Council duties. Members shall ensure these responsibilities remain distinct and separate from City business.

D. Relevant Provisions of the *Municipal Conflict of Interest Act*

Ms. Harper also alleges that Councillor Seymour-Fagan failed to fulfill the following responsibilities of Councillors under the *Municipal Conflict of Interest Act*:

5(1) Where a member...has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,

- (a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
- (b) shall not take part in the discussion of, or vote on any question in respect of the matter; and
- (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question.

5.2(1) Where a member...has any pecuniary interest, direct or indirect, in any matter that is being considered by an officer or employee of the municipality...the member shall not use his or her office in any way to attempt to influence any decision or recommendation that results from consideration of the matter.

E. Relevant Events

Councillor Seymour-Fagan is the Councillor for Bobcaygeon and a member of the Kawartha Lakes Planning Advisory Committee.

Ms. Harper applied to Kawartha Lakes Council for a zoning amendment to expand permissible uses of her property to open a business in Bobcaygeon. The proposed uses to be added to the zoning of the property as stated in the application included "a bruncheonette; bed and breakfast; bakery, bistro, coffee house; diner; snack bar; and tea room".

The amendment to the zoning by-law that was passed by Council as a result of Ms. Harper's application defines "bruncheonette" as "a building or structure or part thereof in which primarily light breakfast and lunch fare is prepared and associated dining facilities provided".

Ms. Harper indicates that a key element in the zoning amendment application was to change the total number of parking spaces required for the business to 5, a decrease from the 8 parking spaces required

by the zoning by-law. She indicates that to require 8 parking spaces would mean that the project was not feasible and would necessitate the removal of several trees.

Ms. Harper's application was initially considered by the Planning Advisory Committee on July 14, 2021. Prior to this meeting the City circulated a notice of the application to persons within a 120 metre radius of the property and posted a sign on the property. The notice invited participation by members of the public in the July 14 meeting.

The staff report Plan 2021-041 prepared for the July 14 meeting stated that 3 public comments were received concerning the application, one in support, one opposed and one asking a number of questions on various subjects including traffic, pedestrian movements, refuse etc. At the meeting the City Planner stated that additional public comments had been received since the report was written. When asked if there was any theme to the objections, the City Planner named traffic issues, scale, parking and drainage.

Councillor Seymour-Fagan indicates that prior to the July 14 meeting she received comments from residents expressing concern about the number of parking spaces required for Ms. Harper's business. She indicates that she received these comments by phone and in 2 or 3 emails. Councillor Seymour-Fagan indicates that she did not keep any record of these calls. In response to our request for the relevant emails, Councillor Seymour-Fagan provided one email that appeared to indicate opposition to the application overall and did not focus on the number of parking spaces.

Although she indicated that she received concerns about parking prior to the July 14 meeting, Councillor Seymour-Fagan did not raise any issue concerning parking at the meeting. The only issues she raised were a desire to clarify the scale of the project and a question about whether a site plan would be needed.

At the beginning of the July 14 Committee meeting, when the Chair asked for any declarations of pecuniary interest, Councillor Seymour-Fagan stated that she owns a restaurant in Bobcaygeon. When asked by the Chair whether she was declaring a pecuniary interest, Councillor Seymour-Fagan initially said that she didn't know if she had a pecuniary interest. The Chair indicated that issue was up to her to determine.

Councillor Seymour-Fagan then indicated that she wanted Committee members to know about her business but was not declaring a pecuniary interest because the proposed bruncheonette would not affect her business and she didn't care whether or not Ms. Harper's application was approved.

The result of the July 14 meeting was a recommendation by the Committee that the application "be referred back to staff to address any issues raised through the public consultation process and for further review and processing until such time that all comments have been received from all circulated agencies and City departments, and that any comments and concerns have been addressed".

Councillor Seymour-Fagan participated in the discussion of Ms. Harper's application, seconded the motion to refer the application back to staff and voted on the motion. The vote was a vote by show of hands rather than a recorded vote and Councillor Seymour-Fagan voted in favour of the motion.

The application was again considered by the Planning Advisory Committee on October 6, 2021.

The materials for the October 6 Committee meeting included a report by the Kawartha Lakes Planning Officer recommending that the application be approved with 5 rather than 8 parking spaces. The report indicated that 7 comments had been received from the public and that some of these comments involved questions concerning traffic related issues such as traffic, parking and pedestrian movements. The report indicated that 2 of the 7 commenters objected to the application. Neither of these objections focussed on parking. One of the comments concerned property values and the other did not provide a specific reason for the objection.

Councillor Seymour-Fagan was present at the October 6 Committee meeting. She did not declare a pecuniary interest. She raised an issue concerning the number of parking spaces and participated in the ensuing discussion. The discussion culminated in a motion by the Mayor to recommend approval of the application with 8 parking spaces rather than 5. There was a vote by show of hands, rather than a recorded vote. Councillor Seymour-Fagan voted in favour of the motion.

Councillor Seymour-Fagan was present at the October 19 Council meeting. She did not declare any pecuniary interest. The Committee recommendation to approve the application with 8 parking spaces rather than 5 was approved by Council. The vote was by a show of hands rather than a recorded vote. Councillor Seymour-Fagan voted in favour of the recommendation.

At the October 19 Council meeting Ms. Harper indicated that it would be possible to go ahead with the project on the basis of 8 parking spaces. After the meeting she realized that the applicable regulations meant that this was not feasible. Council's decision on Ms. Harper's application is presently being appealed by Ms. Harper to the Ontario Land Tribunal.

F. Did Councillor Seymour-Fagan have a pecuniary interest in the application?

Councillor Seymour-Fagan owns a restaurant in Bobcaygeon called ElPatio/Kawartha Coffee. It is located a short walk from the site of Ms. Harper's proposed bruncherie. According to an Internet search, the distance between the two locations is approximately .3 kilometres.

Councillor Seymour-Fagan describes her restaurant in a February 15, 2022 email to the Integrity Commissioner as follows:

It was originally a fair trade organic coffee shop.

Over the past few years and specifically when we moved to a new location 4 years ago it has morphed into a fully licensed 140 seat patio bar.

The interior in which the coffee shop [is located] is only open 3-5 days a week during the summer from 9 o'clock to 11 o'clock and then the focus moves to the patio restaurant.

This is very busy and runs from 12 pm -2am. We do not serve breakfast or anything remotely similar.

We are a Mexican restaurant focusing on farm to table. We sell tacos and margaritas.

The coffee shop part of her restaurant is similar in size to Ms. Harper's proposed bruncherie, as it has 20 seats while Ms. Harper's proposal is for 16 seats (8 tables with 2 seats each).

Councillor Seymour-Fagan indicates that currently, due to COVID, the coffee shop portion of her restaurant serves only coffee, for takeout, and no food or other beverages. However, in the pre-COVID period the coffee shop served scones, muffins, brownies, cookies, smoothies and lattes.

As indicated above, Ms. Harper's application encompasses a broad range of food service uses: "a brunchonette; bed and breakfast; bakery, bistro, coffee house; diner; snack bar; and tea room". Ms. Harper indicates that her intent would be to start by serving breakfast and brunch, and later expand the food service offerings. The "bistro" use included in Ms. Harper's application could also entail lunch and/or dinner service.

The above factors indicate that Councillor Seymour-Fagan's restaurant would likely be in competition with Ms. Harper's brunchonette, given the fact that the two restaurants would be near each other, have coffee/breakfast areas of similar size, both serve during the breakfast timeframe and potentially both serve during the lunch/dinner timeframe. Accordingly, it is clear that Councillor Seymour-Fagan had a pecuniary interest in the application.

Councillor Seymour-Fagan could have sought advice from the Integrity Commissioner on her obligations concerning any pecuniary interest under the Code of Conduct and *Municipal Conflict of Interest Act*, as provided for by paragraphs 17.2(e) and (f) of the Code of Conduct. She did not do so.

Councillor Seymour-Fagan had ample time to seek such advice prior to the July 14, 2021 meeting, since she indicated that she was aware for about a year and a half that Ms. Harper would be making a zoning application. She also had ample time to seek such advice between the July 14, 2021 meeting, when the possibility of a pecuniary interest was raised, and the October 6, 2021 meeting.

Councillor Seymour-Fagan indicated that she sought informal advice at a dinner party regarding the situation from the husband of an acquaintance, who worked in the Clerk's department of a different municipality and whose name she could not recall. The fact that she sought this informal advice indicated that she was aware of a potential issue.

G. Did Councillor Seymour-Fagan behave appropriately given her pecuniary interest?

Councillor Seymour-Fagan volunteered that she was not fully familiar with the *Municipal Conflict of Interest Act*, and that if she were more familiar with it, she might have behaved differently. She also expressed the view that it might have been better if she simply stayed silent.

Because Councillor Seymour-Fagan had a pecuniary interest in the application, paragraph 5(1)(a) of the *Municipal Conflict of Interest Act* requires her to disclose "the interest and the general nature thereof".

Councillor Seymour-Fagan did not declare her pecuniary interest at the July 14, 2021 meeting of the Planning Advisory Committee, the October 6 meeting of the Planning Advisory Committee or the October 19, 2021 Council meeting. To the contrary, at the July 14 Committee meeting she expressed the view that she had no pecuniary interest in the outcome of the application.

Accordingly, Councillor Seymour-Fagan contravened section 5(1)(a) of the *Municipal Conflict of Interest Act* and hence contravened section 6.1 c) of the Code of Conduct, which requires Councillors to comply with the *Municipal Conflict of Interest Act*.

However, although Councillor Seymour-Fagan did not comply with the requirement to declare her pecuniary interest, it is likely that the attendees at the three meetings were aware that she had a restaurant in Bobcaygeon. As indicated above, she alerted Committee members to this at the July 14, 2021 Committee meeting, and the Mayor of Kawartha Lakes indicates it was general knowledge in the

community that she had a restaurant in Bobcaygeon. Although Councillor Seymour-Fagan did not consider that this constituted a pecuniary interest, the other meeting attendees likely had sufficient information to draw their own conclusions about whether this was correct.

Given the fact that she had a pecuniary interest, paragraphs 5(1)(b) and (c) of the *Municipal Conflict of Interest Act* requires that Councillor Seymour-Fagan not take part in discussion or voting on the application, and not attempt to influence the voting on the application.

However, Councillor Seymour-Fagan participated in the discussion of Ms. Harper's application at the July 14, October 6 and October 19, 2021 meetings, seconded the July 14 motion to refer the application back to staff, and voted on the application at all three meetings. In addition, at the October 6, 2021 meeting she was the person who raised the concern about parking that ultimately led to the application being approved with 8 parking spaces rather than 5.

Accordingly, Councillor Seymour-Fagan contravened section 5(1)(b) and (c) of the *Municipal Conflict of Interest Act* and hence contravened section 6.1c) of the Code of Conduct.

Councillor Seymour-Fagan's pecuniary interest also gave rise to a conflict of interest on her part, in that her interest in the wellbeing of her restaurant potentially conflicted with her responsibility as a Councillor to consider the application of a competitor objectively.

Accordingly, her actions at the July 14, October 6 and October 19 meetings contravened section 7.2 of the Code of Conduct.

H. Other Complaint Allegations

The information available does not indicate that Councillor Seymour-Fagan contravened section 4.1(c) or 5.3(c) or section 7.4 of the Code of Conduct or section 5.2(1) of the *Municipal Conflict of Interest Act* as alleged by Ms. Harper. We therefore dismiss those complaint allegations.

I. Recommendation

It is clear that Councillor Seymour-Fagan had a pecuniary interest in Ms. Harper's application, and that she did not deal with this pecuniary interest as required by the Code of Conduct and *Municipal Conflict of Interest Act*.

If Councillor Seymour-Fagan had dealt with her pecuniary interest as she was required to do, it is probable that Ms. Harper's application would have been approved by Council, since the staff report recommended approval and Councillor Seymour-Fagan was the person who raised the issue concerning the number of parking spaces. Accordingly, if Councillor Seymour-Fagan had disclosed her pecuniary interest as she is required to do, it is probable that Ms. Harper would have avoided the expense and uncertainty she has incurred in appealing Council's decision to the Ontario Land Tribunal.

Councillor Seymour-Fagan did not provide information to support her belief that permitting 5 rather than 8 parking spaces would be a significant problem.

Councillor Seymour-Fagan indicates that in her view there is a parking problem in the area of Ms. Harper's proposed restaurant, which causes safety issues, and that as a result of this parking problem the City has conducted parking studies.

However, the City's May 17, 2021 study of parking in the Bobcaygeon core was taken into account in the staff report for Ms. Harper's application, which recommended approval with 5 rather than 8 parking spaces. When this was brought to her attention, Councillor Seymour-Fagan expressed the view that City parking studies are not relevant because they do not deal with peak season (July to mid-September). However, this understanding was incorrect, as the May 17, 2021 parking study surveyed the parking situation on two separate days in July. The parking study included significant public consultation and did not raise any safety issue related to parking in Bobcaygeon.

It is difficult to understand why having 5 parking spaces rather than 8 (i.e., a difference of 3 spaces) would cause a significant problem. According to the May 17, 2021 parking study, the total number of on-street and off-street parking spots in the Bobcaygeon core when surveyed was 655. It is difficult to understand how 3 parking spots more or less would be significant in relation to this number. The parking study did not give any indication that would be the case and did not flag any parking issue in relation to the location of Ms. Harper's bruncheonette.

We have reviewed the public comments received by the City concerning Ms. Harper's application. The few comments concerning parking related to the location and environmental impact of parking, but did not address the number of parking spaces.

In addition, Councillor Seymour-Fagan did not provide any substantiation of the telephone and email communications that she received which she indicates were the basis of her concern about the number of parking spaces.

Councillor Seymour-Fagan also did not behave in a manner consistent with the belief that permitting 5 parking spaces would be a significant problem.

She indicates that her objection to the number of parking spaces was motivated by significant concerns she received from residents prior to the July 14, 2021 Planning Advisory Committee meeting. That being the case, she would reasonably have been expected to raise these concerns at the July 14 meeting. However, although she mentioned two other issues at the meeting, she did not mention any concern about the number of parking spaces.

Subsection 8(b) of Appendix "A" of the Code of Conduct notes that under Section 223.4(5) of the *Municipal Act*, the City can impose a reprimand or suspend remuneration paid to a Councillor in respect of their service as a Councillor, for a period of up to 90 days, if the Integrity Commissioner reports to the City that the Councillor has contravened the Code of Conduct.

As indicated above, Councillor Seymour-Fagan has contravened sections 6.1(c) and 7.2 of the Code of Conduct.

Penalties should provide both a level of rehabilitation for the person who has contravened the required standard of behaviour and deterrence to encourage others to meet the required standard in future.

It is clear that there is a significant limitation in Councillor Seymour-Fagan's apparent understanding of issues concerning pecuniary interest and conflict of interest. This is clear from her behaviour concerning Ms. Harper's application, as discussed above. This is also clear from her statements that she might have

behaved differently if she was more familiar with the *Municipal Conflict of Interest Act* and that it might have been better if she simply stayed silent. Given the fact that her contravention has probably had a significant negative financial impact on Ms. Harper, it is appropriate to recommend that Council impose a significant financial penalty on Councillor Seymour-Fagan. We therefore recommend that Council suspend remuneration for her service as a Councillor for a period of 90 days.

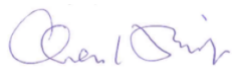
A draft of this investigation report was provided to Councillor Seymour-Fagan for comment. It is clear from her comments that she believes, incorrectly, that the key issue in this complaint relates to parking rather than her conflict of interest and pecuniary interest. She states that "This is not a conflict of interest it's a parking issue...". The fact that Councillor Seymour-Fagan continues to express a very limited understanding of her obligations to address her conflict of interest and pecuniary interest confirms the need for the penalty we have recommended.

As indicated in section 4(g) of "Appendix B" - Conflict of Interest Investigation Protocol to the Code of Conduct, (the "Protocol") the Integrity Commissioner may, if they deem it appropriate, apply to a judge under Section 8 of the *Municipal Conflict of Interest Act* for a determination as to whether Councillor Seymour-Fagan has contravened Section 5, 5.1 or 5.2 of the Act.

We have decided not to apply to a judge under section 8 of the Protocol because in our view in this instance the Code of Conduct provides an appropriate and sufficient penalty. Accordingly, in our view, it would not be appropriate to incur court time and legal expenses to seek one of the sanctions that only a judge can impose.

We note that in response to a question from us, Councillor Seymour-Fagan has committed that if any matter concerning Ms. Harper's restaurant comes before Council (or a Committee of Council) in future, she will recuse herself from consideration of the matter.

Dated this 25th day of April, 2022



Charles Harnick, Integrity Commissioner for the City of Kawartha Lakes



Ellen Fry, Co-Investigator, Office of the Integrity Commissioner