

A Warning To Members Of Councils and a Plea To The Province – Update

December 1, 2008

The recent court decision in *Jaffary v. Greaves* highlights key ambiguities in Ontario's Municipal Conflict of Interest Act, providing a clear warning to councillors of how careful they must be in adhering strictly to its mandate.

The *Jaffary v. Greaves* decision

Michael Greaves, a member of the Council of the Town of Huntsville, and the secretary and director of a development corporation, (the "corporation") sought approval from the Council of the Town of Huntsville for a pre-construction waiver of development fees for the building of affordable housing.

On the suggestion of the Mayor, he wrote a letter to the Finance and Administration Committee, and appeared twice before that committee to present the letter. He also attended two Council meetings. At all four meetings, he declared his pecuniary interest and absented himself during the vote.

There was no evidence that the letter was ever placed before the Council, or that the member made any submissions to the Council or participated in any way in its deliberations when the matter was before it.

In the conflict of interest proceedings brought against him, the Court held that the letter constituted a request for a financial advantage for the corporation and an attempt to persuade the reader that the waiver of fees should be granted. Consequently, it represented an attempt to influence the vote of any council member reading it. The Court held that the member's participation at the committee level constituted an attempt to influence the voting within the meaning of Section 5(1)(c) of the *Municipal Conflict of Interest Act*:

"It is at the committee level where the matter is scrutinized and the form in which it will go to council is formalized. The members of council most familiar with the issue will therefore be the members of the committee before which it first appeared. Therefore once a matter is referred to council with a committee's recommendation, the members of that committee will have made up their minds on the matter for or against."

It follows therefore that participation at the committee level is 'engaging in the decision-making process' by seeking to influence the committee members who are members of council."

Despite the breach of the Act, the Court declined to impose any sanction upon the member, taking into account that he appeared to consider his presence at the committee meetings primarily to have been to educate the committee members concerning the progress of the development, and that he was "punctilious in declaring a conflict of interest on each occasion that he appeared before a committee and at each Council meeting where the matter was subject to consideration."

The Court also clearly accepted that the actions of the member were done in good faith, a case where he “honestly fails to see that his conduct was a violation of the Act”, in circumstances in which “the advantage he sought from Council was not large, was readily given, and has since been afforded to other developers of affordable housing”.

Analysis

The problematical part of the Court’s reasoning is its finding that Section 5 of the Act, which imposes duties upon a member who “is present at a meeting of the council at which the matter is the subject of consideration”, applied to the member, despite the fact that the only steps that he took to influence the vote occurred at the committee level.

The Court reached this conclusion on the basis of the definition of “meeting” in Section 1(h) of the Act, which includes “any regular, special, committee or other meeting of the Council”, interpreted in the context of the intention of the Legislature, which is “to prohibit members of councils and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic interest.”

Although the judgment is not entirely clear on this point, it appears to hold that the member’s contravention of the Act occurred at the committee meetings, and did not depend on the fact that the member also attended two meetings of Council at which the matter was on the agenda.

In a way, the decision should not come as a surprise, in view of the Court’s conclusions that the member had a pecuniary interest in obtaining a council decision in his company’s favour, and that he made a written and oral presentation to a committee of council for the purpose of bringing about that result.

At the same time, the Court had to strive for an interpretation of ambiguous language mainly involving the definitions of “meeting” and “local board” that would give effect to the intention of the Legislature in the circumstances of the particular case.

If the Legislature intends to make Section 5 apply to a member present at a meeting of a committee of a council, an amendment to the Act would be helpful in reconciling the definitions of “meeting” and “local board” in section 1 with the provisions of section 5(1). It might be sufficient to amend the definition of “meeting” to include “any regular, special, or other meeting of a council, a committee of a council or a local board, as the case may be, respectively”;

Conclusion

The Court found that the actions of the respondent were done in good faith and with no improper motive. Even so, the Court concluded that the respondent had breached the Act, thereby demonstrating and applying the strict principles and rules to which members of municipal councils will be held.

This decision underlines the warning to Ontario councillors contained in Ontario’s Municipal Conflict of Interest Act A Handbook, in which it is stated as follows:

“Prior to this point in law being clarified by either an appellate court or the provincial legislation, it remains a prudent move for members who believe they have a pecuniary interest in a particular item to disclose it and abstain from the entire decision-making process, including all committee meetings that precede a council meeting, especially taking into account the fact that if the member attends at council to deal with their advice, he or she may be found to have breached clause 5(1)(c) of the Act at the committee level.”

Ultimately what the case says is: if you have a financial interest in something that is the subject of municipal decision-making, do not communicate advocacy on its behalf to fellow members of council, participate or engage in any way in the decision-making process or use your position as a councillor for the purpose of bringing about a result.

It's not always easy, but it's what you have to do.

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