
TOWNSHIP OF NORTH DUMFRIES INTEGRITY COMMISSIONER,
GUY GIORNO

Citation: Deutschmann v. Ostner, 2023 ONMIC 5

Date: December 31, 2023

REASONS FOR DECISION

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CONTEXT

1. Among their responsibilities, municipal Integrity Commissioners in Ontario conduct inquiries into applications alleging that council members or members of local boards have contravened the *Municipal Council of Interest Act*. At the end of such an inquiry, the Integrity Commissioner shall decide whether to apply to a judge under section 8 of the *Municipal Conflict of Interest Act* for a determination as to whether the member has contravened section 5, 5.1 or 5.2 of that Act, and shall publish reasons for the decision. Such decision is not subject to approval of the municipal council and does not take the form of a recommendation to council. There is, therefore, no municipal council resolution necessary to give effect to the decision.

THE APPLICATION

2. Section 223.4.1 of the *Municipal Act* allows an elector or a person demonstrably acting in the public interest to 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* (MCIA) by a member of council or a member of a local board.

3. Mr. Rob Deutschmann (the Applicant) alleges that Councillor Derrick Ostner (the Respondent) contravened section 5 of the MCIA by failing to declare a pecuniary interest in relation to a matter, and failing to withdraw from discussing and from voting on the matter, at the August 16, 2023, meeting of Council.

4. The Application was received September 7. I assigned it File No. 2023-05-MCIA.

DECISION

5. Subsection 223.4.1 (15) of the *Municipal Act* states that, upon completion of an inquiry, the Integrity Commissioner may, if the Integrity Commissioner considers it appropriate, apply to a judge under section 8 of the MCIA for a determination whether the member has contravened section 5, 5.1, or 5.2 of that Act.

6. After considering all the evidence and the submissions of the parties, I have decided that I will not apply to a judge for a determination whether Councillor Ostner has contravened the MCIA.

7. Subsection 223.4.1 (17) of the *Municipal Act* requires me to publish written reasons for my decision. These are my reasons.

BACKGROUND

8. This inquiry arises from consideration of the 10-Year Capital Forecast at the August 16 Special Council Meeting. The Ayr Community Centre (ACC) was a topic of discussion and the subject of a Council resolution. Councillor Ostner owns property near the ACC. In addition, his wife has an ownership interest in a commercial property across the road from the ACC.

9. Mr. Deutschmann, the Applicant, alleges that Councillor Ostner had a pecuniary interest in the discussion and vote pertaining to the ACC.

10. Councillor Ostner, the Respondent, did not declare a pecuniary interest on August 16. Councillor Ostner participated in decision-making and voting on the 10-Year Capital Forecast, including on the resolution affecting the ACC.

11. The August 16 Special Council Meeting was the first Council meeting of the 2024 Budget process. As is typical of such a meeting, Council was expected to provide only preliminary direction to the staff, and no decision would be final. Budget-making is a long process and this was only a first step; nonetheless, the MCI A applies to decision-making on a first step if the decision has a potential to affect a pecuniary interest.¹

12. Two staff reports were before the meeting. Report No. FIN-17-2023 (2024 Budget Drivers and Schedule) sought Council's direction on an estimated 2024 budget increase, to provide guidance to the staff in its preparation of the draft 2024 Operating and Capital Budget. It also sought Council's approval of a proposed schedule of Council and committee meetings related to development of the 2024 Budget. Council approved the report's recommendations, including the guideline of a maximum 3.5 per cent increase in the municipal tax rate after accounting for assessment growth.

13. More than 90 per cent of the meeting² was devoted to Report FIN-18-2023 (10-Year Capital Forecast 2024-2033 - First Draft). As its title indicates, the report included the first draft of a ten-year capital forecast for the years 2024 to 2033 inclusive. Its purpose was to give Council an overview and to invite a "roundtable discussion" that would assist the staff in its on-going work on and refinement of the ten-year capital forecast as part of development of the draft 2024 Budget.

14. The capital report was long and detailed, consisting of 13 pages of text and an additional 15 pages of spreadsheets. It forecasted more than \$127 million of capital expenditure over the ten-year period. The forecast represented an increase of more than \$16 million (almost 13 per cent) since Council's last review of the capital plan in January

¹ *Re Greene and Borins*, 50 O.R. (2d) 513 (Div. Ct.).

² The entire meeting lasted 176 minutes. Consideration of the second report, including presentation, discussion and voting, took 160 minutes.

2023. According to the report, three projects were the most significant contributors to the increase in the forecast: the partial demolition and rebuild of the Public Works Operation Centre at 1168 Greenfield Road, and two linked projects, “twinning” of the arena in the North Dumfries Community Complex (NDCC), and “adaptive re-use” of the ACC.

15. The two linked projects were the subject of most of the August 16 discussion and of the resolution subsequently adopted. That discussion and resolution are what give rise to the allegation that the MCIA was breached.

16. The Township currently operates two single-pad arenas: the Ayr Farmer’s Mutual Insurance Company Arena, located in the NDCC, and the Queen Elizabeth Arena, located in the ACC. Both arenas are in Ayr, and they are less than 3 km (about a five-minute drive) apart.

17. According to a study presented to Council, in 2020 the demand for ice time was equivalent to 1.5 ice pads, estimated to grow to a need for 2.3 ice pads by 2031. The study found that the ACC could not accommodate the entirety of the increased demand, in part because its ice pad is not regulation size, it has small change rooms and a small lobby, and its ice quality is inconsistent.

18. Until the August 16 meeting, the Township had been moving in the direction of a plan to place two ice pads at the NDCC (the “twinning” project) and to re-purpose the ACC’s arena space (the “adaptive re-use” project). The projects were to be sequenced so that two ice pads would be available to the community at all times. In other words, the ACC would not be re-purposed until both pads at the NDCC were operational.

19. In 2022, the Township set aside funding to start the design phase of the NDCC twinning, a consultant was retained, and work on this phase began. The original target was for construction to be complete in 2025.

20. By the time of the August 16 Special Council Meeting, the estimated costs of both the NDCC twinning and the ACC adaptive re-use had significantly increased, by \$4.8 million and \$3.3 million, respectively.³ In addition, the 2023 federal and provincial budgets provided for no grant programs under which the twinning project might be eligible; the Township had been counting on grant revenue of roughly \$6.8 million to offset the cost. Combined, the cost increases and likely absence of grant funding would mean a negative financial impact of roughly \$15 million.

³ All figures in 2023 dollars. FIN Report No. 02-2023 (January 26, 2023) had pegged the twinning construction cost at \$13.6 million. The new total estimate was \$18.4 million, including professional services and a building addition for the Ayr Centennials (Junior B). The same report listed \$2.6 million in anticipated capital expenditures related to the ACC. The new total estimate was \$5.9 million.

21. The alternative, to abandon the twinning project, would carry its own costs. The ACC's ice chiller is old and cannot be used past September 2025.⁴ Under the NDCC twin-pad plan, this would have been manageable, but if the ACC will continue to house an ice rink, then its entire ice plant and refrigeration distribution system must be removed and replaced, and other repair and rehabilitation will be necessary. The staff report estimated that an estimated capital expenditure of more than \$5.9 million would be needed to keep the ACC ice pad operating beyond 2025. This amount does not include the costs of any capital upgrade at the NDCC (such as a gymnasium) that might be undertaken in lieu of twin ice pads.

22. The staff report identified an additional challenge. For the NDCC twin pads to open before the ACC's old ice chiller is decommissioned in September 2025, the Township would need to issue a call for tenders in Fall 2023, and start construction on the NDCC twinning in early 2024. Yet, the availability of grant funding (currently, none) would not be known until the announcement of future years' federal and provincial budgets.

23. For more than two hours on August 16, Council Members discussed how to manage the new financial reality and to grapple with goals that seemed incompatible. Most agreed that two, regulation-size, ice pads at the NDCC would be the ideal outcome for the Township. At the same time, all favoured a fiscally-responsible plan, and the updated cost projection (including the lack of grant revenue) seemed to make twinning untenable. Most also felt that to operate just one Township ice pad was a result to be avoided.

24. Only near the very end of the lengthy discussion did a consensus emerge; it was incorporated into the following motion (C-320-23), which was moved by Councillor Wilms, seconded by Councillor Rolleman, and carried unanimously:

THAT Council undertake the building rehabilitation and design of the new ice surface at the ACC in 2024;

AND THAT Council direct staff to establish a reserve for a future gymnasium at the NDCC in 2028.

25. The effect of the resolution is to abandon the NDCC twinning project and to make the capital investments necessary to continue to operate the ACC ice pad for the foreseeable future. The NDCC's one ice pad will continue to operate, and construction of a gymnasium there is targeted for 2028.

26. Under the *Municipal Act*, subsection 223.1 (1), paragraph 6, one of an Integrity Commissioner's functions is to handle, "Requests from members of council and of local boards for advice respecting their obligations under the *Municipal Conflict of Interest Act*."

⁴ The Technical Standards and Safety Authority had informed the Township that the chiller will not be recertified (and, consequently, cannot be safely or lawfully operated) beyond September 2025.

27. Subsection 223.1 (2.1) requires that any request for advice from the Integrity Commissioner be made in writing. Subsection 223.1 (2.2) requires that the Integrity Commissioner's responsive advice be in writing.

28. On August 30, two weeks following the Special Council Meeting, Councillor Ostner made a written request for advice. On August 31, I responded in writing. My advice was as follows:

Thank you for your email. As the *Municipal Act* requires, I am providing my advice in writing.

I have assigned this correspondence File No. 2023-03-RFA. RFA means Request for Advice.

Municipal Conflict of Interest Act

The *Municipal Conflict of Interest Act* concerns only interests that are pecuniary – that is, economic or financial interests. It applies not just to your pecuniary interests, but also those of your wife, and other categories of people and entities with whom you are associated including a parent, child, employer, business partner, body of which you are a member, corporation of which you are an officer or director, private corporation of which you are a shareholder, and public corporation of which you are a controlling shareholder.

If you or one of these people or entities has a pecuniary interest in a matter before Council or committee, then you must disclose the interest, withdraw from decision-making and voting, refrain from attempting to influence the decision, and file a written statement of the interest.

I understand that you own or co-own residential property beside the arena and your wife has an interest in a commercial property across the road from the arena. If the Council decision could reasonably be expected to affect the value of either property – regardless of whether the impact on value is positive or negative – then you would be required to disclose a pecuniary interest and take the other steps described above.

Whether you or your wife has a pecuniary interest in Council decision-making related to the arena is a question of fact. You in a better position than me to assess the impact, if any, on property values. My advice is that you should be alert to any possible impact on value and, with this in mind, you should carefully consider the details of each notice of motion, motion, staff report, or agenda item, related to the arena.

If the decision is not reasonably expected to affect the value of one or both of these properties then, absent any other type of pecuniary interest (I am aware of none), you do not have a pecuniary interest in decisions related to the arena.

Please allow me to make four additional observations about pecuniary interest and property values:

- First, factors such as noise, traffic, and parking, and, conversely, the desirability of arena facilities and services, do not indicate a pecuniary interest unless these factors affect property value. The aesthetic advantages or disadvantages of

living next to the arena are only relevant under the MCIA if they have a financial impact: that is, an impact on property value.

- Second, and in any event, since the arena is already in existence, the issue is not the existing impact of the arena on property value, but the impact on property value of Council decision making about the arena.
- Third, the MCIA only applies to a pecuniary interest arising from a matter before Council or committee that involves something to be decided. If all the Council does is to hear a delegation and receive for information, there is no pecuniary interest, because there cannot be a pecuniary interest in receiving for information: *Lediard v. Clarke* (1997), 44 M.P.L.R. (2d) 82 (Ont. Gen. Div.), at para. 18. Similarly, if all Council does is to ask the staff to look into a matter and report back, there is no pecuniary interest because the direction to staff to come back with a report does not, of itself, have a pecuniary impact on anybody: *Rivett v. Braid*, 2018 ONSC 352 (CanLII), at paras. 64, 67, 69.
- Fourth, the Courts have stated on multiple occasions that a pecuniary interest under the MCIA is one that is real and present, not speculative, hypothetical, or remote. If the effects of Council's decision are presently hypothetical and speculative, then it is premature to conclude the existence of a pecuniary interest. Mere speculation about what a proposal might, in future, mean for your property is insufficient to require you to disclose a pecuniary interest and to withdraw.

You have informed me that you have no reasonable basis to believe that Council decision making on the arena will affect the value of your residential property or of the commercial property across the road. At any point in future, should this change – that is, should you come to the reasonable belief that Council or committee decision making could affect the value of either property – then disclosure of a pecuniary interest and withdrawal from decision-making would be required.

[a sub-heading and two paragraphs unrelated to the MCIA have been deleted]

About this Advice

This advice is provided under the provisions of the *Municipal Act*. The advice is yours to handle as you wish. You may share it or make it public. The decision to make it public is yours. You are, however, under no obligation to make this advice public if you wish to keep it confidential.

While you can do with the advice as you wish, I am required by the *Municipal Act* to keep this advice confidential, and I may not share it with anyone except in certain specific circumstances outlined in the *Municipal Act*. For example, I may release this advice in the following circumstances:

- I may release this advice with your written consent.
- If you release only part of this advice, then I am free to release part or all of it.
- If an application alleging a *Municipal Conflict of Interest Act* contravention is made to me, then I may disclose this advice in the reasons for my determination.
- If an application is made to a judge alleging that you contravened the *Municipal Conflict of Interest Act*, then I may disclose this advice in that application.

My advice is based on the facts set out above and in your email below. If this information is inaccurate or incomplete, then please do not rely on this advice. Instead, please let me know about the inaccuracy or incompleteness so that I may modify the advice accordingly.

Thank you.

PROCESS FOLLOWED

29. The *Municipal Act* does not direct the procedure that an Integrity Commissioner must follow in handling MCIA applications. I have chosen to follow a process that ensures fairness to both the individual making the application (Applicant) and the Council Member alleged to have contravened the MCIA (Respondent).

30. This fair and balanced process usually begins with me issuing to both parties a Notice of Inquiry that sets out the issues. The Notice of Inquiry includes a copy of the Application for an MCIA Inquiry. The Respondent is made aware of the Applicant's name. I do, however, redact personal information such as phone numbers and email addresses.

31. The Respondent has an opportunity to respond. The Applicant receives the Respondent's Response and is given an opportunity to reply. I may accept supplementary communications and submissions from the parties, generally on the condition that parties get to see each other's communications with me. I do this in the interest of transparency and fairness.

32. I typically set deadlines for the submission of a Response and a Reply, but give reasonable extensions when requested.

33. I received the Application on September 7, but did not immediately issue a Notice of Inquiry. Instead, on September 15, I issued a Notice of Pending Inquiry. In it, I informed the parties that whether to conduct an inquiry is in the discretion of the Integrity Commissioner, and I had not yet determined whether to conduct an inquiry into whether section 5 of the *Municipal Conduct of Interest Act* was contravened.

34. With Councillor Ostner's consent, in the Notice of Pending Inquiry I shared my August 31 advice to him. I told the parties that I would not conduct an inquiry into matters already covered by my prior advice. However, I invited the Applicant to inform me should he seek an inquiry on the basis of one or more facts that my prior advice did not consider or should he seek an inquiry on the basis of one or more issues that my prior advice did not address. If the Applicant sought an inquiry on either basis, or both, then I would review the Applicant's clarification and any supporting information and then proceed to determine whether it would be appropriate to conduct an inquiry

35. Mr. Deutschmann submitted his position on the preliminary issue on September 24. Councillor Ostner responded on September 27. Mr. Deutschmann replied on September 28 and Councillor Ostner sur-replied on September 29. The parties' submissions addressed the substantive issue of whether there was an MCIA breach as well as the preliminary issue of whether I ought to conduct an inquiry. In addition to reviewing their written submissions, I interviewed each party by telephone or videoconference.

36. On November 8, I issued a Notice of Inquiry.

37. In the Notice of Inquiry, I informed the parties that, based on their submissions, I was exercising my discretion not to conduct an inquiry that revisited the issues set out in my August 31 written guidance or that revisited my August 31 explanation of the legal meaning, under the MCIA, of a pecuniary interest in a matter. I informed them that the only question the inquiry would consider would be a factual question related to property value: Was Council's August 16 decision reasonably expected to affect the value of either of the following properties? 1) The residential property in which the Respondent has an interest. 2) The commercial property in which the Respondent's wife has an interest.

38. The Notice of Inquiry also stated that, for purposes of the inquiry, the matter that was the subject of consideration by Council on August 16 would be delineated by: 1) the August 16 Special Meeting minutes, Item 6.2, including resolution C-320-23, and 2) FIN Report 18-2023, in particular, the section under the heading, "The Twinning of the North Dumfries Community Complex (NDCC) Arena and the Adaptive Re-use of the Ayr Community Centre (ACC)," starting on page 6.

39. I informed the parties that all submissions they had made in relation to the Notice of Pending Inquiry would be treated as submissions in the inquiry. I invited the Respondent to provide any additional submissions in response to the Application and stated that the Applicant would then have an opportunity to reply.

40. Councillor Ostner provided additional submissions on November 10. Mr. Deutschmann replied on November 16.

41. I conducted interviews of the Applicant and the Respondent in late November. I interviewed witnesses, including Mr. Andrew McNeeley, the Township's Chief Administrative Officer, and Mr. Tyson Hirschberger, a real estate broker with Planet Realty Inc., in Guelph. (The evidence from each witness interview was used in this inquiry and in the parallel inquiry involving a different Respondent: 2023 ONMIC 4.) I also considered a letter from Mr. Hirschberger and continued his interview by email. I reviewed documentary evidence, including maps, diagrams, minutes and reports. I also watched and listened to the entire recording of the August 16 Special Council Meeting. Finally, I read and considered relevant jurisprudence.

42. In making my decision, I have taken into account all the submissions of the parties and all of the evidence obtained during the inquiry.

POSITIONS OF THE PARTIES

Applicant's Position

43. Mr. Deutschmann states that on August 30 he asked Councillor Ostner whether the latter had consulted the Integrity Commissioner. He surmises that this is why Councillor Oster sought my guidance.

44. He disagrees with the information that Councillor Ostner provided to me, namely that the proposals for work on the ACC will have no impact, positive or negative, on the value of Councillor Ostner's residential property or the value of the commercial property, in the vicinity of the ACC, in which his spouse has an interest.

45. Mr. Deutschmann submitted a letter from Mr. Hirschberger, real estate broker. I discuss Mr. Hirschberger's evidence under the "Findings of Fact" heading.

46. According to Mr. Deutschmann, the issue is not solely the choice between an arena and other community amenities. Given past discussions of the Township regarding the ACC property, it would be possible for the Township to decide to sell the property (providing an opportunity for a housing development) or potentially to do nothing with the property. Any change to the use of the site, not only from arena to gymnasium, but from community amenity space to residential space, would have an impact on the values of properties in the immediate vicinity of the ACC. All options are still up for consideration by the Township as there is no final decision or resolution of Council.

47. He states that the issue of renovating or re-purposing the ACC involves more than just presentations and reports to Council. Council has conducted votes and made decisions about action and no action. The Respondent has a direct or indirect pecuniary interest in property whose value will be impacted by whatever decision Council takes regarding the ACC. There is a very strong probability that the pecuniary interest of the Respondent will be impacted by any action of Council.

48. The Applicant states that there is a real and present impact on the Respondent's pecuniary interest. It is not speculative, hypothetical, or remote. He refers to the reasons of Justice Holland in *Re Greene and Borins*:⁵

The question which must be asked and answered is: "Does the matter to be voted upon have a potential to affect the pecuniary interest of the municipal councillor?"

⁵ 1985 CanLII 2137 (ON SC).

It is of no consequence, in my opinion, what the nature of the effect might be – for his betterment or otherwise – as long as it may be seen by the public to affect that pecuniary interest.

Nor is it of any consequence how the vote was cast, the outcome of the vote, or the motive of the municipal official. The very purpose of the statute is to prohibit any vote by one who has a pecuniary interest in the matter to be considered and voted upon. It is only by strict observance of this prohibition that public confidence will be maintained.

49. He also refers to *Re Jackson and Wall*, where a municipal council was dealing with a proposal to construct a new arterial road to relieve traffic, and the respondent, who resided on the existing street, was found to have an interest in the matter.⁶ In this matter, Councillor Ostner directly and indirectly, personally and through his spouse, has interests in properties that are beside or in the immediate vicinity of the ACC. The staff report (Report FIN-18-2023) presented options for renovations to the ACC ranging in estimated cost from \$5.9 million to \$8.1 million.

50. In *Jafine v. Mortson*,⁷ the more mature the Highway 404 planning process became, and the more solidified its route and terminal points became, the greater the likelihood that the adjacent lands to the roadway and access ramps would increase in value. If the highway extension was built on the technically preferred route, it would have the potential to affect and would probably affect the pecuniary interest of the member.

51. The Applicant notes that the test for a pecuniary interest is a balance of probabilities.⁸

52. He submits that the matter does not fall under any MCI exception. The interest of Councillor Ostner cannot properly be described as an interest in common with other ratepayers. This is not a community interest but is a particular interest of the Councillor. While he may have an interest in common with electors regarding recreational space and amenities in the community, his ownership of property immediately adjacent to, or in the immediate vicinity of, the ACC, provides him with an interest that is not in common with electors. His pecuniary interest, and the impact to his property, are not shared by others in the community whose properties are farther from the ACC. Councillor Ostner's interest is particular to him. The decisions and actions with respect to the ACC will have a more significant impact on his pecuniary interest than others in the community.

⁶ 1978 CanLII 1714 (ON SC).

⁷ 1999 CanLII 14755 (ON SC).

⁸ *Lorello v. Meffe*, 2010 ONSC 4532 (CanLII), at paras. 63, 65; also, Robert M. Forbes, Armand G.R. Conant, Roger G. Conant, *Protecting the Local Official: Municipal Conflict of Interest, Plus: What it Means, What it Says: A Handbook*, 1997.

Respondent's Position

53. Councillor Ostner's position is that he did not have any pecuniary interest in the matter before Council.

54. He explains that the capital forecast is a fluid document that changes as needed, often several times a year. The forecast exists because the staff needs some guidance on how to handle yearly budgets based on the "in and out placements of projects." However, a staff reports always comes to Council before any project is approved or disapproved. Placing items into the capital forecast is not a final decision.

55. He observes that the ACC is currently operating as an arena, and if the ice pad were refurbished, it would continue to do so.

56. He notes that the discussion of ice pads covered the options of twinning the NDCC, and fixing the ACC. He did not think it viable to turn the ACC ice surface into a gymnasium, because an independent report done on ice needs, which concluded the Township needed two ice surfaces.

57. He is on record supporting the NDCC twin pad, but when staff strongly suggested that NDCC twinning would be unaffordable without government funding (that is, the twin pad was "a pipe dream") he supported fixing the ACC ice surface as a "plan B."

58. At the time of his submissions, Councillor Ostner did not know whether the ACC would move forward to be repaired, whether the NDCC would be twinned, or whether the ACC pressure vessel could be exchanged (perhaps buying more time to secure federal or provincial government funding for the twin pad.) He says there are just too many variables. When the staff receives this information, the Council will receive a staff report on "where we are with the ice plant currently at the ACC. Then decisions will be made."

59. He states that it never entered his thoughts that he would benefit from fixing the ACC, as that is not why he makes decisions as a Councillor.

60. He explains that, since the 1970s, his wife's family business (*The Ayr News*) has worked with the Township to provide, at no cost, parking for the users of the ACC, as the ACC itself has limited parking. Not until 2016 did *The Ayr News* and the Township enter into an official memorandum of understanding. The MOU recognizes the Township's use of the newspaper's parking lot and that *The Ayr News* also allows overflow parking for downtown employees and for people who launch canoes and kayaks into the Nith River. In return, the Township plows the parking lot in winter. There is no financial compensation; it is an example of how the community works together.

61. Councillor Ostner adds that his father-in-law was one of the driving forces behind building the original ACC. In recognition of his life long dedication to the community,

Schmidt Park is named after him. The family values instilled in the Councillor's wife and in him do not consider personal gain.

62. In response to the letter of Mr. Tyson Hirschberger, on which the Applicant relies, Councillor Ostner states, "I wish I had his crystal ball." He says it is speculative to suggest, "that if an arena that is operating on its last breath, gets repaired to the point that the ice surface can continue to operate, property values on my street will reap rewards."

63. Councillor Ostner rejects Mr. Deutschmann's suggestion of alternate plans for the ACC. The staff presented three ACC options for the ten-year capital forecast, none of which included selling the property or building homes. He says these suggestions are speculative and highly hypothetical. He adds that, had such an option been discussed, then he most certainly would have had to remove himself from the process.

64. He also feels that the legal precedents cited by the Applicant are inapplicable. In his words: "I am not on the 404 corridor, in an area that is booming with massive development. I'm [address redacted] in Ayr, a mature neighborhood which is value growing at the same rate as everywhere else in Ayr."

65. He notes that Ayr is a small settlement. This means that any new subdivision, infill, new retail, new industry, new park, new facility or growth area, anywhere in Ayr, is within five minutes of his residence.

66. He concludes that he always does what is in the best interest of his community, and that he is not planning on moving, so he does not care what is the market value of his house.

Applicant's Reply

67. Mr. Deutschmann responds that the fact the capital forecast changes is not the issue of a conflict. It is the subject matter of the discussion that gives rise to the conflict. Any discussion in connection with the use of the ACC is the very essence of the conflict issue. A councillor with a pecuniary interest should not engage in any discussion about the potential uses of the ACC. Its not the final decision that is determinative, but the process that gets one to the final decision is as relevant to the conflict issue.

68. He quotes O'Connor and Rust-D'Eye on what constitutes a pecuniary interest:⁹

It does not matter whether the pecuniary interest is large or small (subject to the exceptions contained in section 4); positive, negative or maintaining the status quo; direct or indirect; or easily quantifiable; nor is it relevant whether the member votes for or against his or her interest; whether that member's vote carries the question; or whether the outcome of the vote itself serves or defeats the member's interest. It

⁹ M. Rick O'Connor and George H. Rust-D'Eye, *Ontario's Municipal Conflict of Interest Act: A Handbook* (2007), at 15.

is the fact that the member has a pecuniary interest in the matter that imposes the duty, not the direction or result of the vote. It is the act of participating in the debate or voting on the matter in contravention of the duties prescribed by the statute that constitutes the offence.

69. In *Re Greene and Borins*,¹⁰ a councillor participated in the debate and voted on four development proposals for lands that were between 220 and 1000 feet away from two acres that had been assembled by family members. It was held that the matter to be voted upon had the potential to affect the pecuniary interest of the councillor. In *Re Jackson and Wall*,¹¹ a member voted against a resolution approving a new arterial road to relieve traffic on an existing street upon which he resided. Even though the member voted against the resolution, the fact that he did not declare a conflict of interest led the court to conclude that he had contravened the MCIA. In *Costello v. Barr*, the councillor's pecuniary interest involved his ownership of lands adjacent to one of a number of possible waste disposal sites under consideration by council, the location of which would significantly affect the value of adjacent lands. It was also alleged that there was little that the councillor could have done to influence the site selection, which involved reports by external consultants. The Court held that, in view of the fact that all of the sites were before the Council, and any one of them could have been selected, the councillor's land value was potentially at risk or not at risk, and could be affected by the vote, making his interest neither remote nor insignificant withing the context of clause 4(k) of the MCIA.

70. The Applicant refers again to O'Connor and Rust-D'Eye:¹²

... the question is whether there is the basis for a real connection between the member's direct or indirect pecuniary interest, and the benefit or detriment that the vote will cause to him or her, enabling a judgment to be made as to whether or not there is a real likelihood that the potential for financial gain or loss will influence the councillor's vote in any way. This is an objective test, not a subjective one, although courts frequently refer to evidence as to the intention of the councillor as demonstrated by his or her actions, objectively viewed.

In some cases, it appears that the court has proceeded on an assumption that any potential financial benefit alone is sufficient to assume that factor as grounds likely to influence the member.

FINDINGS OF FACT

71. In making my determination, I rely on the facts in the Background section of this report, and in this Findings of Fact section.

¹⁰ Note 5.

¹¹ Note 6.

¹² Note 9, at 48.

72. Findings of fact are made based on the standard of the balance of probabilities. The findings are based on interviews of the parties and witnesses, and consideration of the other evidence.

73. The NDCC's arena was opened in 2011. The current ACC arena was completed in 1977.

74. The ACC was significantly renovated in 2013. Alterations and enhancements included a lift, barrier-free access, washroom renovations, a new HVAC system and upgraded lighting.

75. Councillor Ostner's residence is located on a flood plain, within the "Regulation Limit" of the Grand River Conservation Authority. Under Ontario Regulation 150/06, no development may be undertaken on the property without the written approval of the GRCA.

76. On August 16, Councillor Ostner did not declare a pecuniary interest. He participated actively in the discussion and voted.

77. The ACC has multiple current uses beyond hockey and skating. It is home to Ayr Community Theatre, the Ayr Pipe Band, and the Ayr-Paris Band. It is used for fitness classes. It hosts community events, such as tonight's Ayr 200 New Year's Eve Celebration. Its hall is used for weddings, banquets, charity events, and rentals.

78. The Township has not proposed or considered closing the ACC or changing its status from that of a municipal facility in active use.

79. In the staff report on the ten-year plan, and during Council's entire discussion on August 16, closing the ACC was never suggested or mentioned. The discussion was on how, not whether, the ACC would be used.

80. Multiple interviewees confirmed that, because of the need to transport gear, driving is almost always the preferred method of travel to hockey practices and games. I find as a fact that, for hockey players and their families, walking distance to an arena is a virtually irrelevant consideration.

81. Ayr's settlement area is very small. Driving access to the ACC (and to the NDCC, for that matter) is roughly equivalent no matter where in the settlement one lives.

82. To the extent that motive is relevant, I accept and I find that on August 16 it never entered Councillor Ostner's thoughts that he would benefit from fixing the ACC, as that is not why he makes decisions as a Councillor; he believes he always does what is in the best interest of his community. I accept and find that he is not planning on moving and does not care about the market value of his house.

83. Mr. Tyson Hirschberger has expertise in real estate. He has at least ten years experience as a broker in southwestern Ontario and is the Immediate Past President of the Guelph & District Association of Realtors. The Applicant invited him to provide evidence on the assumption that Mr. Hirschberger is geographically close enough to provide a relevant perspective while, at the same time, possessing no ties to North Dumfries municipal politics or business.

84. The relevant portion of Mr. Hirschberger's letter reads as follows:

I'm aware that Council is currently contemplating large-scale renovations to both the North Dumfries Community Complex and the Ayr Community Centre. In the short-term, large scale renovations can create additional traffic, noise pollution, inconvenience and uncertainty – each of which can have an impact on surrounding neighbourhoods, prospective future residents and, most of all, existing residents and businesses. These would be exacerbated should someone have an inclination to sell or purchase a nearby property while the construction is underway as prospective buyers would be subject to the above. Impacts are felt to a greater magnitude in the immediate vicinity of the amenity, and would lessen in an non-linear fashion the further from the amenity a property resides.

In the long-term, one would reasonably expect these decisions to have a material impact on the values of nearby properties. Depending on the course chosen, the value of properties in the immediate vicinity of the Ayr Community Centre could be positively impacted by a wholesale remediation. At the same time, a decision to decommission the building, downgrade its current function, or remove it altogether is likely to have an adverse effect on the surrounding real estate – as the utility of the space for the benefit of the public stands to be diminished. Adjacent businesses would also expect to be see impacts to value from factors such as vehicular and pedestrian traffic in various scenarios.

Exploring alternative uses for the property, ie. housing, could be part of Council's discussions, and would also have positive or negative impacts on surrounding values, depending on the type of housing established. It's also important to consider that taking no action and allowing the ACC to languish and deteriorate, or seeing the facilities continue to provide sub-optimal recreational facilities would also negatively impact surrounding homes at either or both facilities.

85. In addition to reviewing Mr. Hirschberger's letter, I interviewed him on November 13, and followed up a few weeks later with additional questions, to which he replied on December 11. I found Mr. Hirschberger to be a knowledgeable and credible witness, and I have taken his comments into account.

86. During the interview, Mr. Hirschberger explained that allowing a facility to "languish" will have a likely impact on the value of nearby properties, particularly those within hearing distance or "line of sight" – that is, neighbours who can see an eyesore or hear noise. On the other hand, the perceived difference between alternate public uses of a facility – I asked specifically about an ice rink versus a community centre not including an arena – is more subjective. It is "hard to put a dollar value" on the impact.

87. In response to an email follow-up question, Mr. Hirschberger stated that the impact on value of each of proximity to an ice rink and being located on a flood plain would “be minor relative to, for example, the condition of the house, level of finish, size, etc.”

ISSUES AND ANALYSIS

88. I have considered the following issues:

- A. Was the matter before Council reasonably expected to affect the value of the Respondent’s residential property?
- B. Was the matter before Council reasonably expected to affect the value of the commercial property in which his wife has an interest?
- C. In either case, did an exception apply?
- D. Should I make an application to a judge under section 8 of the MCIA?

A. Was the matter before Council reasonably expected to affect the value of the Respondent’s residential property?

89. I agree with Mr. Deutschmann that the question is the one formulated by the Court in *Re Greene and Borins*: “Does the matter to be voted upon have a potential to affect the pecuniary interest of the municipal councillor?”¹³

90. I agree with Mr. Deutschmann that this question must be answered on the basis of the balance of probabilities.¹⁴

91. I also agree that the direction of the impact on a Council Member is irrelevant to whether a pecuniary interest exists. The impact may be positive or negative;¹⁵ what counts is that the Council Member possesses a pecuniary interest in the matter.

92. I agree with O’Connor and Rust-D-Eye, quoted by the Applicant, that, “it does not matter whether the pecuniary interest is large or small (subject to the exceptions contained in section 4)” [emphasis added]. The size of the interest is irrelevant to whether a pecuniary interest exists. However, once a pecuniary interest is found to exist, its size is relevant under clause 4(k), which exempts, “an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.”

¹³ 50 O.R. (2d) 513, at 522.

¹⁴ *City of Elliot Lake (Integrity Commissioner) v. Patrie*, 2023 ONSC 223 (CanLII), at para. 21.

¹⁵ *Cooper et al. v. Wiancko et al.*, 2018 ONSC 342 (CanLII), at para. 63.

93. Finally, I only partly agree with the words of the Holland J. in *Re Greene and Borins*, “Nor is it of any consequence ... the motive of the municipal official.” As I explain below, there are two schools of thought on whether motive is relevant. *Re Greene and Borins* is associated with one school of thought, but in *Ferri v. Ontario* the Court of Appeal embraced the other.

94. I approach the question of whether Councillor Ostner had a pecuniary interest in the matter before Council on August 16 based on the standard of a pecuniary interest that is real and present, and not speculative and remote. In the words used by Ontario Courts, that standard is an interest that is actual,¹⁶ definable,¹⁷ and real.¹⁸ A pecuniary interest does not arise from speculation based on hypothetical circumstances.¹⁹

95. A pecuniary interest must have crystalized by the time the matter is considered by Council or committee.²⁰ The matter before Council must be such that, “the member could experience an immediate, in the sense of close, non-deviated or traceable[,] financial or economic impact, positive or negative.”²¹ Possible and potential future happenings do not amount to a pecuniary interest.²²

96. Under the MCIA, a “pecuniary interest” means a financial, monetary or economic interest.”²³ In a case such as this, the pecuniary interest is property value. The assumption underlying both parties’ submissions is that the issue is whether the matter before Council had the potential to affect the value of Councillor Ostner’s property.

97. The ACC is an actively-used municipal facility. I have found there was never any consideration or suggestion that it would cease to be actively used. Council’s determination related to the nature of the use, and the municipal investments that might be required to support alternative uses.

98. I agree that, if the ACC were to languish, or to be sold, demolished, or converted to housing, then such an occurrence – which, I stress, is completely hypothetical – might well affect nearby properties’ values. The evidence of Mr. Hirschberger confirms this. Yet, the present case involves none of these hypotheticals. Further, a hypothetical situation does not give rise to an MCIA pecuniary interest.²⁴

¹⁶ *Bowers v. Delegarde*, 2005 CanLII 4439 (Ont. S.C.), at para. 78; *Darnley v. Thompson*, 2016 ONSC 7466 (CanLII), at para 59; *Rivett v. Braid*, 2018 ONSC 352 (CanLII), at para. 51.

¹⁷ *Lorello v. Meffe*, 2010 ONSC 1976, at para. 59; *Darnley v. Thompson*, at para. 59.

¹⁸ *Methuku v. Barrow*, 2014 ONSC 5277 (CanLII), at paras. 43, 48; *Lorello v. Meffe*, at para. 59; *Darnley v. Thompson*, at para. 59.

¹⁹ *Gammie v. Turner*, 2013 ONSC 4563 (CanLII), at para. 57; *Darnley v. Thompson*, at para. 63.

²⁰ *Darnley v. Thompson*, at para. 59.

²¹ *Cooper v. Wiancko*, at para. 63.

²² *Bowers v. Delegarde*, at paras. 76, 78; *Rivett v. Braid*, at para. 51.

²³ *Ferri v. Ontario (Attorney General)*, at para. 9.

²⁴ *Gammie v. Turner*, 2013 ONSC 4563 (CanLII), at para. 57; *Darnley v. Thompson*, at para. 63.

99. This case involves a community facility that will remain in active use with – potentially – different activities taking place inside. On a balance of probabilities, I am not satisfied that such different uses will affect property value, even of a property located as close to the ACC as Councillor Ostner's. The interviews I conducted and the Council deliberations that I observed both confirm that the choice between an ice rink and a gymnasium is a matter of subjective preference. I accept that it is "hard to put a dollar value" on subjective preference. Consequently, it is not possible for me to find the existence of a pecuniary interest – certainly not an interest that meets the standard set by the jurisprudence: actual, definable, real, and "an immediate, in the sense of close, non-deviated or traceable[,] financial or economic impact, positive or negative."

100. I understand that Council was considering multi-million-dollar projects at the ACC and NDCC. The relevant pecuniary interest, however, is that of the Council Member, not the Township. No matter how much the Township spends, or is thinking of spending, MCI A obligations kick in only when a Council Member has a pecuniary interest. The argument that investing millions in the ACC will inevitably affect nearby property values is, I note respectfully, speculative. An MCI A pecuniary interest cannot be grounded in speculation.

B. Was the matter before Council reasonably expected to affect the value of the commercial property in which his wife has an interest?

101. With one exception, everything I have said about the impact of the matter on the value of the residential property applies to the Respondent's wife's commercial property.

102. The exception relates to the MOU under which, in exchange for use of the commercial parking lot, the Township agrees to plow it.

103. In my view, *The Ayr News*, the Respondent's wife, and consequently, Councillor Ostner, have a pecuniary interest in the MOU. Any matter before Council that affects the MOU is one in which the Councillor should disclose a pecuniary interest.

104. In this case, on the balance of probabilities, I find that nothing in the matter considered by Council on August 16 had the potential to affect the MOU. Nonetheless, Councillor Ostner should be alert to this issue when future matters come before Council or a committee.

C. In either case, did an exception apply?

105. Yes. If I am wrong in concluding that Councillor Ostner did not have a pecuniary interest, then I believe that, by virtue of clause 4(k) of the MCI A, the interest was exempt from disclosure and recusal.

106. I do not believe that the clause 4(j) exception – an interest in common with electors generally – would apply. If I were wrong on Issues A and B (existence of pecuniary interest), then this would mean that property value impacts did exist. In that case, nearby property owners would not be in the same position as electors generally.

107. On the other hand, assuming I am wrong on Issue A or Issue B, the Court of Appeal decision in *Ferri* compels a conclusion that clause 4(k) applies.

108. Section 4 of the MCIA sets out eleven exceptions to the requirement to declare a pecuniary interest and withdraw from decision-making and voting. One exception is clause (k).

Sections 5 and 5.2 do not apply to a pecuniary interest in any matter that a member may have ... (k) by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

109. It should be noted that section 4 does not negate the existence of a pecuniary interest. Section 4 merely provides that the pecuniary interest does not need to be declared and that the Member does not need to withdraw from decision-making, voting and attempting to influence others.

110. The test, under clause 4(k), of what can be reasonably regarded as likely to influence, is based on the standard of a reasonable elector fully apprised of all the circumstances.²⁵

111. Under clause 4(k), the amount or extent of a pecuniary interest does matter. If the interest is so insignificant – for example, so small – that it cannot reasonably be regarded as likely to influence the Council Member, then sections 5 and 5.2 of the MCIA do not apply.

112. Any impact on nearby properties' values would, as Mr. Hirschberger stated, "be minor relative to, for example, the condition of the house, level of finish, size, etc." It also might be "hard to put a dollar value" on such impact.

113. In my view, such an impact would be an interest which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the Council Member.

114. In Councillor Ostner's particular case, I note that he owns property located on a flood plain and in the GRCA "Regulation Limit" and that any development is subject to GRCA approval. This restriction affects his property value (though not to the same extent

²⁵ *Ferri v. Ontario*, at para. 16.

as other factors), and further diminishes the relative significance of any impact on property value of what happens inside the ACC.

115. In the above paragraphs, I have considered only the nature of the pecuniary interest to determine whether it is remote and insignificant. In my view, that is the extent of clause 4(k).

116. In *Ferri v. Ontario*, the Court of Appeal went farther, and embraced a line of cases in which judges have considered not just the nature of a pecuniary interest but also surrounding factors such as a Council Member's length of service and whether a Council Member was motivated by good faith or private gain.

117. The orthodox view of conflict of interest, exemplified by *Moll v. Fisher*²⁶ and *Tuchenhagen v. Mondoux*,²⁷ is that propriety of motive and the presence of good faith are not relevant to the existence of conflict. According to this view, a conflict of interest exists regardless of whether personal gain is preferred over private interest.²⁸ Conflict of interest "is not about acting dishonestly or for personal gain."²⁹ The suggestion that a conflict of interest only arises when a private interest actually interferes with decision-making in the public interest is, as the Federal Court of Appeal has observed, to confuse conflict of interest with corruption.³⁰

118. In *Ferri v. Ontario*, the Ontario Court of Appeal appears to have embraced a different school of thought and line of cases. It held that several subjective factors must also be considered in determining whether the pecuniary interest of a Member is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the Member.³¹ These subjective considerations include, among other factors: a Council Member's length of faithful service, whether the Member is acting in bad faith or good faith, whether the Member is motivated by a potential pecuniary benefit, and whether the matter before Council is of major public interest to constituents.³²

119. Regardless of my own views, it is not my place, as a municipal integrity commissioner, to ignore the interpretation of the Ontario Court of Appeal that public-mindedness and unselfish motives may be sufficient to obviate a conflict of interest. I have already found that it never entered Councillor Ostner's thoughts that he would benefit from fixing the ACC, that is not why he makes decisions as a Councillor, that he believes he always does what is in the best interest of his community, and that he is not planning

²⁶ (1979), 23 O.R. (2d) 609 (Div. Ct.) at 612.

²⁷ (2011), 107 O.R. (3d) 675 (Div. Ct.) at 686, para. 28.

²⁸ *Cox v. College of Optometrists of Ontario* (1988), 65 O.R. (2d) 461 (Div. Ct.) at 469.

²⁹ *Tuchenhagen v. Mondoux*, at 686, para. 25.

³⁰ *Democracy Watch v. Campbell*, 2009 FCA 79, at para. 51.

³¹ In this respect, the Court of Appeal was applying the reasoning of the Divisional Court in *Amaral v. Kennedy*, [2012] O.J. No. 3766, and of Justice D.A. Broad in *Craig v. Ontario*, 2013 ONSC 5349.

³² *Ferri v. Ontario*, at para. 21.

on moving, so he does not care about the market value of his house. Further, he has a long record of faithful service on Council. Consequently, on the basis of *Ferri v. Ontario*, I must find that his pecuniary interests, if they existed, are of a remote and insignificant nature as described in clause 4(k). The interests did not need to be declared, and Councillor Ostner did not need to withdraw from debate, voting, or influencing others.

D. Should I make an application to a judge?

120. No. The *Municipal Act* leaves this decision to the Integrity Commissioner, based on what the Integrity Commissioner feels is appropriate. Having found that no pecuniary interest exists, I should not commence a Court application.

121. Even if I am wrong about the existence of a pecuniary interest, I feel that the Court of Appeal decision in *Ferri v. Ontario* governs the application of clause 4(k). It would be irresponsible to commence a Court application that advances an argument contrary to *Ferri*.

122. Consequently, I do not consider it appropriate for me to apply to a judge for a determination as to whether Councillor Ostner contravened section 5 of the MCIA.

DECISION

123. I will not apply to a judge under section 8 of the MCIA for a determination as to whether Councillor Derrick Ostner contravened the MCIA on August 16, 2023.

124. This decision is limited to the August 16, Special Council Meeting. The assessment of a conflict of interest must be made on a case-by-case basis. Just because the August 16 staff report, discussion and vote did not engage a pecuniary interest does not mean that a subsequent matter before Council or a committee – perhaps different in some material respect – will be similarly treated. An Integrity Commissioner is always available to give confidential advice to a Council Member prior to a meeting.

PUBLICATION

125. The *Municipal Act* requires that, after deciding whether or not to apply to a judge, the Integrity Commissioner shall publish written reasons for the decision. This decision will be published by providing it to the Township to make public and by posting on the free, online CanLII database as decision 2023 ONMIC 5.

126. Subsection 223.5 (2.3) of the *Municipal Act* states that I may disclose in these written reasons such information as in my opinion is necessary. All the content of these reasons is, in my opinion, necessary.



Guy Giorno
Integrity Commissioner
Township of North Dumfries

December 31, 2023