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Our File No.: 305966

Shawn Everitt
Chief Administrative Officer
The Corporation of the Town of The Blue Mountains
32 Mill Street, Box 310
Thornbury, Ontario
N0H 2P0

Dear Mr. Everitt:

Re: Blue Mountains Attainable Housing Corporation

Introduction

The Corporation of the Town of the Blue Mountains (the “Town”) established a non-profit corporation, The Blue Mountain Attainable Housing Corporation (“BMAHC”) in 2013 for the purpose of facilitating the supply of suitable, adequate, attainable, and sustainable ownership and rental units in the Town that are accessible to a larger portion of the population, in a financially prudent manner that supports economic development and workforce development.¹

The BMAHC is governed by a board of directors comprising nine (9) members (“BMAHC Board”). Two (2) council members are appointed to the BMAHC Board by Council.

Questions

The appointment and membership of two members of Council to the board of BMAHC has raised a number of questions as to these members’ obligations and responsibilities to the Council and to the BMAHC board by virtue of their dual role.²

We have been asked to respond to the following questions:

1. Do the Members have a conflict of interest between their roles as Councillors for the Town and Directors of the BMAHC?

¹ The Town enacted By-law 2013-16 to create the BMAHC pursuant to the authority under s. 203 of the *Municipal Act, 2001*, S.O. 2001, c. 25 and O. Reg. 599/06. BMAHC was incorporated by letters patent under the *Corporations Act*, R.S.O. 1990, c. C.38. See also [About | The Blue Mountains Attainable Housing Corporation \(thebluemountainshousing.ca\)](http://www.thebluemountainshousing.ca)

² For ease of reference and to distinguish the officials, we will refer to the members of Council as “Councillors”, to them as directors of the BMAHC Board as “Directors” and to the Councillors and Directors collectively as “Members”.

2. While attending a meeting of the BMAHC Board, are the Members representing the Town or BMAHC?
3. If the Members vote one way at the meeting of Council on a question or matter are they required to vote the same way at the meeting of the BMAHC Board on the same question or matter, and *vice versa*.
4. If the Members voted in the negative at either a meeting of Council or a meeting of the BMAHC Board, do the Members have an obligation to support the by-law, resolution or decision that was passed if the question or matter is then before either the Council or the BMAHC?

We will provide a brief response to each of the questions in our Answers section on page 7. We will first provide an analysis of the law as it relates to the discharge of the Members' obligations and responsibilities when they have dual roles.

Analysis

(a) Duties of a Member of Council

Associate Chief Justice Frank N. Marrocco commented on the roles, responsibilities and obligations of members of Council in *Transparency and the Public Trust – Report of the Collingwood Judicial Inquiry*:

Like the head of Council, members of Council are trustees of the public interest. Council members must ensure that this trust governs all their actions and decisions..³

In *The Law of Canadian Municipal Corporations*, I.M.F. Rogers wrote as follows:

While serving on the council, members are under a duty to act in the best interests of the corporation and the citizens they represent..⁴

Justice Poupore wrote in *Sims v. Fratesi*, as follows:

It is argued, and this Court does agree, an elected official stands in a fiduciary relationship with the electorate. The Mayor was under a duty to act in the electorate's best interest and not to permit any conflict between his duty to so act and his own interest..⁵

A fiduciary is a trustee, a person that is entrusted to take the property of another and who must act honestly, in good faith and strictly in the best interests of the other party.

³ Frank N. Marrocco, *Transparency and the Public Trust – Report of the Collingwood Judicial Inquiry* (Volume 1 – Executive Summary and Recommendations) at p. 22.

⁴ I.M.F. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed., Vol. 2, (Toronto: Carswell, 2001) at p. 147.

⁵ *Sims v. Fratesi* (1996), 36 M.P.L.R. (2d) 294 (Gen. Div.) at para. 78.

(b) Duties of a Corporate Director

As a not-for-profit corporation, the BMAHC is now governed by Ontario's *Not-for-Profit Corporations Act, 2010*.⁶ The responsibility of a director for a not-for-profit corporation is set out in clause 43(1)(a) of the statute as follows:

Duties of directors and officers

Standard of care

43 (1) Every director and officer in exercising his or her powers and discharging his or her duties to the corporation shall,

- (a) act honestly and in good faith with a view to the best interests of the corporation...

This statutory fiduciary duty of a corporate director is described in *People's Department Stores Inc. v. Wise*:

The statutory fiduciary duty requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally.⁷

Regardless of the fact that a director may have been appointed by a particular shareholder (i.e., the Town), “[d]irectors owe a fiduciary duty both to the company and to all of the shareholders equally.”⁸

Justice Frank N. Marrocco also commented on the roles, responsibilities and obligations of directors of municipally-established and owned corporations in his Report on the Collingwood Judicial Inquiry. Within his recommendations, Justice Marrocco affirms that officers and directors have an obligation to the corporation and that a “municipally-owned corporation is at arm’s length from the municipality.”⁹

⁶ *Non-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15. See also s. 134(1) of the *Business Corporations Act*, R.S.O. 1990, c. B.16.

⁷ *People's Department Stores Inc. v. Wise*, 2004 SCC 68 at para. 35.

⁸ Ron Clark, *Regulation and Governance of Municipally-Owned Corporations in Ontario* (Toronto: LexisNexis Canada, 2019) at page 70. The Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37 at paras. 37-39, held that directors may consider the interests of parties other than the corporation, but where a conflict occurs between those interests, the best interest of the corporation must be placed before that of other stakeholders.

⁹ *Supra* 3 at p. 79.

(c) Analogous Situations – Members having Dual Roles with other Bodies

We have considered two analogous circumstances where members of a council wear dual or multiple hats: where a council member may be appointed as a member of one or more of a municipality's local boards¹⁰ and where a member of a lower-tier council also sits as a member of the upper-tier council.

In considering the issue of when the interests of the local board may be contrary to the interests of the municipality, the jurisprudence provides that the appointed member is obligated to act in the best interest of the local board when they sit as a member of the local board, regardless of what other positions they may hold elsewhere or the interests, wishes or desires of the council that appointed them to the local board.

The above principle was noted in *Walker v. Toronto (City)*¹¹ where the issue of termination of service of city-appointed members to the Toronto Harbour Commission was considered in the context of the city's displeasure with the actions of the members that had been appointed as city representatives on the commission:

[T]he applicants believe that they are acting in the best interests of the T.H.C. It would appear that Mayor Rowlands believes that the city-appointed commissioners should act in a way representing the interests of the city. If she believes that the three city-appointed commissioners are agents of the city, she is in error. The T.H.C. commissioners' responsibility is not only to the city but to the Federal Government and the public generally. The members thereof must act in the best interests of the T.H.C. regardless of who appointed them, even if that interest is contrary to the wishes of those who appointed them. This principle applies whether the city appointees are members of the city council, members of the city staff or outsiders.¹²

Furthermore, the Court of Appeal in *Orangeville (Town) v. Dufferin (County)* noted that, with respect to members of council who sit as representatives of both upper- and lower-tier municipal councils, it "should not be taken to suggest that in discharging their function as *ex officio* members of Dufferin Council, the Orangeville representatives do not owe a duty to act in the interests of Dufferin County. They do."¹³

(d) Members' Competing Best Interests

Based on the foregoing, it is undisputed that a member of Council owes a fiduciary responsibility to the municipal corporation and to the inhabitants of the municipality to always act in their best interests.

¹⁰ BMAHC is not a local board. See s. 21(1) of O. Reg. 599/06 – *Municipal Services Corporations*:

Status of corporation

21 (1) A corporation is not a local board for the purposes of any Act.

¹¹ *Walker v. Toronto (City)* (1993), 15 M.P.L.R. (2d) 213 (Ont. Gen. Div.).

¹² *Ibid*, at para. 7.

¹³ *Orangeville (Town) v. Dufferin (County)* (2010), 68 M.P.L.R. (4th) 25 (Ont. C.A.) at para. 27.

It is equally clear that when a Member is appointed by council as a member or director on a board of another body, whether it is a corporation, such as the BMAHC, or a local board or any other board, commission, committee or body, the member owes the same duty to the other body when it is tasked with the obligation to make a decision on behalf of that body.

Thus a member who has a dual or multiple roles, clearly has competing interests that essentially require the member to temporally suspend their responsibility to the council or to the other body in order to validity discharge their obligations on behalf of the entity for which they are making a decision.

The general rule can be stated thusly: the primary obligation of a member is to act in the best interests of the body in which they are sitting on when they are making a decision. This means that a member is obligated to put aside the wishes, desires, interests and decisions of the other body. A dual member is not to act only in accordance with the wants or direction of the other entity of which they are also a member.

In the context of local government decision-making, the law recognizes that a member of a council may having competing interests if that member sits on another council or has been appointed by their council to be a member of another body.

With respect to dual representative members of council, the aforementioned Court of Appeal decision in *Orangeville (Town) v. Dufferin (County)* expressly addressed such members' competing interests. The County of Dufferin argued that the representatives from the Town of Orangeville on County Council had imputed indirect pecuniary interests in a matter before Dufferin County and should be precluded from voting on the question.

The Court of Appeal reasoned that such an argument would run counter to the very structure of two-tier municipal governments in Ontario:

The appellant submits that the interpretation proposed by the respondent is inconsistent with the structure and purpose of upper- and lower-tier municipalities created by the legislature. This structure creates a significant overlap in the areas of jurisdiction. There will be many instances where a lower-tier municipality's interest in a matter before the upper-tier municipality will be pecuniary in nature. The legislature could not have intended that members of the component lower-tier municipalities would have imputed to them the pecuniary interest of the municipality they represent. If that were so, elected representatives would be prevented from participating in discussions of or voting on issues important to their electors whenever the lower-tier municipality on whose council they sit had a pecuniary interest in the matter being considered by the upper-tier municipality. The issue in the present case, like many issues in which the Town of Orangeville has a pecuniary interest, is important to the electors of Orangeville. They should not be effectively disenfranchised simply because their representatives on Dufferin Council are, by virtue of the *Dufferin County Act*, *ex officio* members selected from among members of the Council of Orangeville rather than representatives elected directly by them.¹⁴

¹⁴ *Ibid*, at para. 21.

With respect to a financial conflict of interest that arises when a member has been appointed by their council to be a director or a member of another board, commission or other body, the *Municipal Conflict of Interest Act* recognizes an exception to the requirements that the council member disclose their pecuniary interest and then recuse themselves from participating, voting or attempting to influence the vote at a meeting.

There is a specific exemption set out in clause 4(g) of the *Municipal Conflict of Interest Act*:

Exceptions

Where ss. 5, 5.2 and 5.3 do not apply

4 Sections 5, 5.2 and 5.3 do not apply to a pecuniary interest in any matter that a member may have,

...

- (h) by reason only of the member being a director or senior officer of a corporation incorporated for the purpose of carrying on business for and on behalf of the municipality or local board or by reason only of the member being a member of a board, commission, or other body as an appointee of a council or local board;

Accordingly, even though the council member is a member of another body that has a financial interest in a matter at a meeting, the council member is entitled to vote on the matter. The council member must at this point, however, vote in the best interests of the municipality.

The Superior Court of Justice considered the application of the *Municipal Conflict of Interest Act* involving a council-appointed director of a non-share capital corporation in *Aurora (Town) v. Ontario (Attorney General)*.¹⁵ Justice O'Connell determined that a non-share capital corporation did not fall within the scope of the indirect interest provisions in section 2 of the statute.¹⁶

The Court also determined that if an indirect pecuniary interest did exist, clause 4(h) exempted the application of section 5 of the *Municipal Conflict of Interest Act*:

I find the ratio in *Blyth v. Northumberland (County)*, [1990 CanLII 6752 \(ON SC\)](#), 75 O.R. (2d) 576, (Ont. Ct. Gen. Div.) to be instructive. There the court noted that the appointment of a council member to fulfil a public duty was contemplated by section 4(h) even though an indirect conflict might arise when there was otherwise no actual or personal interest at issue.

As was stated in *Blyth*, common sense dictates that any indirect conflict created for the appointee should be accepted to allow council members to fulfil their public duty.¹⁷

¹⁵ *Aurora (Town) v. Ontario (Attorney General)* (2013), 17 M.P.L.R. (5th) 188 (Ont. S.C.J.).

¹⁶ *Ibid*, at paras. 22-29. The determination that a “body” under s. 2(a)(iii) of the *Municipal Conflict of Interest Act* did not include a corporation was criticized and was expressly not applied in *Cooper v. Wiancko* (2018), 73 M.P.L.R. (5th) 212 at paras. 66-70 (Ont. S.C.J.).

¹⁷ *Ibid*, at paras. 35-36.

Answers

Based on the foregoing analysis, our responses to the questions are as follows:

1. Do the Members have a conflict of interest between their roles as Councillors for the Town and Directors of the BMAHC?

The Members may have a conflict of interest but it is one that is recognized at law. They are entitled to still consider, debate, discuss and vote on matters and questions at both the Council and at the BMAHC Board.

2. While attending a meeting of the BMAHC Board, are the Members representing the Town or BMAHC?

The Councillors who have been appointed to the BMAHC Board are representatives of the Town but they are directors of the BMAHC Board and they must act and decide matters as Directors at the BMAHC Board with a view to the best interests of the BMAHC, even if those interests are contrary to Council who appointed them.¹⁸

3. If the Members vote one way at the meeting of Council on a question or matter are they required to vote the same way at the meeting of the BMAHC Board on the same question or matter, and *vice versa*.

The Members are not required to vote in accordance with how they voted at the Council or at the BMAHC Board when they are asked to vote on the same question or matter at the other body. The Members have an obligation at law to the Council and to the BMAHC Board to act honestly and to make decisions in the best interests of either the municipality (when the matter is before Council) or of the BMAHC (when the matter is before the BMAHC Board).

4. If the Members voted in the negative at a meeting of Council or at a meeting of the BMAHC Board, do the Members have an obligation to support the by-law, resolution or decision that was passed if the question or matter is then before either the Council or the BMAHC?

The Members do not have to support the majority decision made at either the Council or at the BMAHC Board when they may be considering and voting on the question or matter before the other body. The Members have an obligation at law to the Council and to the BMAHC to vote in accordance with what is in the best interests of either the Town (when at Council) or the corporation (when at the BMAHC Board).

¹⁸ Council has no authority to “direct” its Councillors to make decisions or to vote in any particular any way at the BMAHC Board. If Council is not content with the how the Councillors are exercising their responsibilities as Directors of the BMAHC, Council retains the authority to replace them – see s. 77(a) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F:

Implied powers

- 77** Power to appoint a person to a public office includes power to,
- (a) reappoint or remove the person...

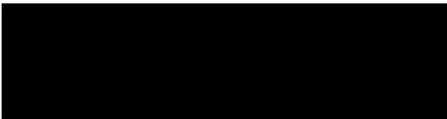
Conclusions

The Members must be cognizant of their dual roles and responsibilities as Councillors of the Town and as Directors of BMAHC. They wear different hats at different times. The Members must remain alive to their fiduciary and ethical responsibilities to the body in which they are members when they must make decisions on behalf of that body. They must act honestly, loyally, and in good faith and always with a view to the best interests of the body.

Should the Councillors have any concerns with respect to their ethical obligations vis-à-vis their responsibilities to the Town, they are expressly permitted to seek the written advice of the Town's Integrity Commissioner pursuant to subsection 223.3(2.1) of the *Municipal Act, 2001*. They can also seek the written advice of the Integrity Commissioner with respect to their obligations to the BMAHC pursuant to the *Municipal Conflict of Interest Act*.¹⁹

Yours truly,

AIRD & BERLIS LLP



John Mascarin

JM/km

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¹⁹ As set out in note 10, a municipal services corporation (such as the BMAHC) is not a local board in general under s. 21(1) of O. Reg. 599/06. However, s. 21(2) provides that it is deemed to be a local board for the purposes of the *Municipal Conflict of Interest Act*.