

Special Meeting of the Executive Committee was held via videoconference, on Friday, April 30, 2021, pursuant to section C.12, of the TRCA's Board of Directors Administrative By-Law. The Chair Jennifer Innis, called the meeting to order at 12:28 p.m.

PRESENT

Jennifer Innis	Chair
Jack Heath	Vice-Chair
Ronald Chopowick	Member
Dipika Damerla	Member
Joanne Dies	Member
Jennifer Drake	Member
Xiao Han	Member
Gordon Highet	Member
Linda Jackson	Member
Maria Kelleher	Member
Anthony Perruzza	Member

ABSENT

Paula Fletcher	Member
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The Chair recited the Acknowledgement of Indigenous Territory.

CLOSED SESSION

RES.#B36/21 - CLOSED SESSION

Moved by:	Linda Jackson
Seconded by:	Jennifer Drake

THAT pursuant to subsection C.4.(2)(b) of TRCA's Board of Directors Administrative By-Law, the Executive Committee move into the closed session to discuss item 10.1 – Results of the Investigation of the Complaint under the Board of Directors Code of Conduct as the subject matter consists of personal matters about an identifiable individual, including staff of TRCA.

CARRIED

RES.#B37/21 - RISE AND REPORT

Moved by:	Linda Jackson
Seconded by:	Dipika Damerla

THAT the Executive Committee reconvene and report from closed session.

CARRIED

Section II – Items for Executive Action

RES.#B38/21 - RESULTS OF THE INVESTIGATION OF THE COMPLAINT UNDER THE BOARD OF DIRECTORS CODE OF CONDUCT

A report on the results of an investigation of the formal complaint under the Board of Directors Code of Conduct against Toronto and Region Conservation Authority's (TRCA) Board of Directors Member, Regional Councillor Kevin Ashe.

Moved by: Linda Jackson
Seconded by: Dipika Damerla

THAT confidential item 10.1 – Results of the Investigation of the Complaint under the Board of Directors Code of Conduct be approved.

RES.#B39/21 - AMENDMENT TO THE MAIN MOTION

Moved by: Linda Jackson
Seconded by: Jack Heath

THAT the amendment to item 10.1 be approved.

THE AMENDMENT WAS:

CARRIED

THE RESULTANT MOTION READS AS FOLLOWS:

THAT this report be received;

THAT TRCA staff notify the Regional Municipality of Durham of the results of the investigation;

AND FURTHER THAT the main motion, as amended and the closed session report together with the report on investigation be voluntarily made public after approval at the April 30, 2021 Special Executive Committee meeting.

CARRIED

BACKGROUND

Under subsection B16.2 of the [*Board of Directors Administrative By-Law*](#), a member of the public may submit a formal complaint against a Board Member, who has allegedly contravened applicable by-laws, policies and legislation in the course of their duties. The Executive Committee is responsible for responding to complaints, investigation of the complaint, and determining the appropriate action(s) to be taken.

On February 25, 2021 TRCA's Chief Executive Officer received a formal Code of Conduct complaint against TRCA's Board Member, Durham's Regional Councillor Kevin Ashe, alleging contravention of section 2(d) of the Code of Conduct for Board Members.

The Complainant alleged that due to Councillor's pre-existing support of the Durham Live lands (also known as 1802 Bayly Street in the City of Pickering) development, he was not able to approach TRCA discussions related to the matter "with an open mind, with consideration for the organization as a whole" (clause 2(d) of the Code of Conduct for Board members).

The Executive Committee members reviewed the complaint at the March 5, 2021 meeting and directed TRCA staff to contract an external impartial investigator to investigate the complaint.

Furthermore, Executive Committee members raised concerns with the current Board of Directors Administrative By-Law for investigations that involves Board Members investigating each other on Code of Conduct complaints. Executive Committee Members voiced their preference for a third party impartial investigator.

RATIONALE

Pursuant to the March 5 decision of the Executive Committee, TRCA reached out to several lawyers who provide integrity commissioner services in accordance with limited tendering rules under TRCA's Procurement policy. As TRCA has a preexisting vendor of record arrangement for provision of legal services with Fasken, TRCA staff contracted services of Mr. Guy Giorno, a lawyer with the law firm, to act as a third-party investigator in investigating the complaint.

During the investigation Mr. Giorno reviewed the complaint which mentioned 2(d) of the Code of Conduct and determined that the gist of the Complainant's concerns also involved section 2(e) and section 9 of the Code. The investigator then conducted separate interviews with the Complainant and the Respondent (Regional Councillor Ashe). During the interviews, both parties provided additional information and further argued their positions. Following the interviews and upon a detailed analysis of the allegations against the Board of Directors Code of Conduct, the investigator concluded that Regional Councillor Ashe did not contravene the Code of Conduct for Board Members.

The complete report of investigation is available as **Attachment 1** to this report.

Relationship to Building the Living City, the TRCA 2013-2022 Strategic Plan

This report supports the following strategy set forth in the TRCA 2013-2022 Strategic Plan:
Strategy 7 – Build partnerships and new business models

FINANCIAL DETAILS

Funds to cover the cost of the investigation will be allocated from the Corporate Legal account (account code 012-30).

DETAILS OF WORK TO BE DONE

The Complainant and Regional Councillor Ashe will be notified of the outcome of the investigation. TRCA staff will further evaluate a need to conduct a refresher training related to Board Members' compliance with the Code.

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Date: April 22, 2021

Attachments: 1

Attachment 1: Report on Investigation

GUY GIORNO, INVESTIGATOR FOR EXECUTIVE COMMITTEE,
TORONTO AND REGION CONSERVATION AUTHORITY

REPORT ON INVESTIGATION

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INVESTIGATION

1. This report concludes an investigation into a February 25 complaint against TRCA Board Member Kevin Ashe.
2. Emma Cunningham (Complainant) alleges that Kevin Ashe (Respondent) contravened the Code of Conduct of Board Members¹ by failing to maintain an open mind with respect to TRCA Board consideration of the Durham Live proposal.
3. I was appointed as a third-party investigator pursuant to a March 5 decision of the Executive Committee.²

SUMMARY

4. I find that the Respondent did not contravene the Code of Conduct.
5. While it is understandable that the Respondent's public comments, including social media activity, raised questions about his open mindedness, his conduct at the hearing confirms that in fact he approached the matter with an open mind and was capable of persuasion. The legal standard set by the Supreme Court of Canada was satisfied.
6. Especially when a hearing is conducted, a Board Member should consider that external discussion of the subject of the hearing, including social media commentary, might compromise the apparent fairness of a hearing and create a risk of contravention of section 9 of the Code of Conduct.

BACKGROUND

7. The Board of Directors Administrative By-Law requires that all Board Members be "guided by and adhere to the Code of Conduct ..."³

¹ Board of Directors Administrative By-Law (Policy No. CG-1.01-P), Appendix 1, Code of Conduct for Board Members.

² I note that I am also the Integrity Commissioner for the Regional Municipality of Durham, and the Integrity Commissioner for the City of Pickering. Mr. Ashe sits on both the Regional Council and the City Council. However, a municipal integrity commissioner exercises functions independently, and does not take municipal direction in discharging investigative functions.

³ Board of Directors Administrative By-Law, note 1, section B-1(4). See also section B-16, which reiterates that Board members must respect and adhere to all applicable by-laws and policies, including the Code of Conduct, and permits the TRCA to take reasonable measures to enforce them.

8. The complaint specifically alleges that the Respondent contravened section 2(d) of the Code of Conduct. After reviewing the complaint, I determined that the gist of the Complainant's concerns also involves sections 2(e) and 9 of the Code.

9. The following are the relevant portions of section 2 of the Code of Conduct:⁴

It is expected that Board Members^[5] adhere to a code of conduct that:

...

(d) approaches all TRCA^[6] issues with an open mind, with consideration for the organization as a whole;

(e) while Board Members may have interests contrary to TRCA interests, when acting as Board Members they shall adhere to their fiduciary duty to consider TRCA interests and issues at hand above other interests and issues ...

10. The reference to fiduciary duty in section 2(e) of the Code of Conduct relates to section B-1(4) of the Administrative By-Law, which states that, "Board Members owe a fiduciary duty to TRCA and not their Member Municipalities, when acting as a Board Member of the organization (Appendix 11)." Appendix 11 is *20 Questions Directors of Not-For-Profit Organizations Should Ask About Fiduciary Duty*, a 26-page publication of the Chartered Professional Accountants of Canada, authored by Jane Burke-Robertson.

11. Section 9 of the Code, titled "Apprehension of Bias," provides as follows:

As decisions makers [*sic*], no Board Member shall enter into discussions with any party outside of TRCA that may result in either a real or perceived bias of their position on matters that may come before staff and/or the Board of Directors.^[7]

Executive Committee Members may act as a decision-making tribunal in the form of Hearing Board on matters related to Regulations issued under the *Conservation Authorities Act*, and in particular Section 28 (1) (or section 28.1 when in force). Executive Committee Members shall not enter into discussions outside the Hearing on such matters that may result in either a real or perceived bias of their position on the matters under the Hearing, with the exception of the TRCA solicitor. The Chair^[8] of the Executive Committee may receive a briefing from TRCA staff on procedural matters prior to the Hearing Board convening.

⁴ The Board of Directors Administrative By-Law, note 1, italicizes its defined terms everywhere they appear. Because several of those terms appear both in the body of this report and in quotations from the By-Law, for consistency and to avoid confusion, the italics have been dropped from the quotations. However, the first time a defined term appears in a quotation, its definition will appear in an accompanying footnote.

⁵ "Board Members" are defined in the Administrative By-Law as, "the individuals appointed to the Authority's Board of Directors by the participating municipalities in TRCA's area of jurisdiction."

⁶ "TRCA" is defined as, "The corporation of this conservation authority established under Section 5 of the [*Conservation Authorities Act*]."

⁷ "Board of Directors" is defined to mean, "the general membership, and as such is all of the Board Members collectively appointed by participating municipalities as per the requirements of the *Conservation Authorities Act*."

⁸ "Chair" is defined as, "the Chairperson as referenced in the [*Conservation Authorities Act*] as elected by the Board of Directors."

Executive Committee and Board of Directors Members shall not enter into discussions on the merits of a *Planning Act* application and/or an appeal to the Local Planning Appeal Tribunal (formerly Ontario Municipal Board) that may be associated with a current or likely permit application under the Act, that may result in either a real or perceived bias of their position on the permit application.

Durham Live and the Minister's Zoning Order

12. The Respondent sits on Pickering City Council as Regional Councillor–Ward 1.⁹ From December 1, 2018, to January 28, 2021, the Respondent was Deputy Mayor.¹⁰

13. Durham Live, initiated in 2014, is a proposed development in the City of Pickering, in the area south of Highway 401/GO line, north of Bayly Street, west of Church Street, and east of the CN rail tracks.¹¹ Squires Beach Road runs through the lands. On the their east side and part of their north side, the lands are adjacent to the Town of Ajax.

14. The area is environmentally sensitive. It contains three minor tributaries of Duffins Creek, and forest and wetland that form part of a Provincially Significant Wetland, the Lower Duffins Creek Wetland Complex.¹²

15. The City of Pickering describes the proposal as follows:

Durham Live will become the premier entertainment and tourism district east of Yonge Street, and one of Ontario's top destinations for fun and excitement.

Anchored by a resort casino and 5-star hotel, this unique destination will also include a boutique hotel, convention centre, amphitheatre, restaurants, cinemas, an indoor water park, performance venues, an office tower, and film studios.

This landmark project, located at the northwest corner of Church and Bayly Streets, will boast a dynamic mix of excitement, culture, nightlife, cuisine, and adventure that will cater to every whim and indulgence.¹³

16. On May 13, 2020, Pickering City Council adopted a resolution¹⁴ directing the Respondent, as Deputy Mayor, to ask the Minister of Municipal Affairs and Housing to make an order under section 47 of the *Planning Act* (Minister's Zoning Order or

⁹ Mr. Ashe was elected as City Councillor–Ward 1 in 2003, 2010, and 2014. He was appointed Regional Councillor–Ward 1 on November 2, 2015, to fill the vacancy caused by the resignation of Jennifer O'Connell upon her election as Member of Parliament for Pickering–Uxbridge. He was elected Regional Councillor–Ward 1 in 2018.

¹⁰ City of Pickering Policy ADM 045 provides for the Regional Councillor–Ward 1 to be appointed Deputy Mayor for the first 16 months of the term. Resolution# 259/20, adopted March 18, 2020, effectively extended the Respondent's appointment for the remainder of the term. The Respondent resigned as Deputy Mayor on January 28, 2021.

¹¹ These are the tracks to the west of Squires Beach Road.

¹² City of Pickering, Information Report to Planning & Development Committee, Report 04-14 (April 7, 2014), p. 1.

¹³ City of Pickering, "Durham Live," <https://www.pickering.ca/en/city-hall/durham-live.aspx>

¹⁴ Resolution #293/20, as amended by Resolution #294/20 and Resolution #295/20.

MZO).¹⁵ The resolution asked, “given the economic stimulus of this project that Minister Clark be requested to expedite this Order.”¹⁶ The vote included the Respondent, and was unanimous.¹⁷

17. On May 25, the Respondent sent a letter to the Minister, requesting an MZO pursuant to Council’s unanimous direction. The letter included a description of the subject lands. It also attached a proposed, draft text of the MZO.

18. The letter read, in part, as follows:

The subject property is approximately 226.4 acres in size, and is located south of Highway 401, north of Bayly Street, west of Church Street and extends west of Squires Beach Road. The subject property is the site of Durham Live, a critically important development in the City which represents the City’s (and Region’s) present single most important economic development driver. It is because of the utmost importance of Durham Live to the City that we make this request of you.

The first phase of construction of Durham Live is currently underway, with its anchor tenant, Pickering Casino Resort, substantially complete and ready to open its doors once COVID-19 conditions permit. Durham Live is poised to be one of the region’s largest employers (10,000 or more jobs) and certainly its primary tourist destination. At a time when the Pickering Nuclear Generating Station is winding down its operations, and General Motors has ceased vehicle production in Oshawa, Durham Region desperately needs something of this size and scale to drive its economic recovery. Durham Live can be that driver. Durham Live seeks to raise the City’s profile as the pre-eminent municipality in Durham. A key part of the overall Durham Live development is the introduction of a range of hospitality and entertainment uses to complement the casino, including film studios. An application for the film studios (phase 1), is currently under review with City staff. This film studio will have some of the largest single sound stages in North America and is slated to open in the latter half of 2021.

Durham Live is, however, much more than just the casino and film studio and the owners are anxious to maintain momentum. In fact, Durham Live is ideally positioned to be shovel ready for the economic recovery kick-start which the City, Region and Province must now plan for. The success of Durham Live depends on the inclusion of synergistic and complementary uses to the Casino Resort. The ability of Durham Live to fulfill its planned function as a major tourism hub depends on its ability to provide certainty to prospective tenants that they can build and open with as little delay as possible.

With its large available vacant parcels so close to Highway 401, Durham Live is ideally positioned to attract a specific very large employment user interested in the portion of the site west of Squires Beach Road. This is an approximately 70 to 85-acre site that the user would develop for an approximately 850,000 to 4 million square foot distribution centre and production facility (“Project Lonestar”).

¹⁵ The term “Minister’s Zoning Order” does not actually appear in the *Planning Act*, but is found in several regulations, including O. Reg. 543/06 through O. Reg. 547/06. It is commonly used by the Ministry, municipalities, and stakeholders.

¹⁶ The Respondent provided considerable background outlining the rationale behind Pickering’s request for the MZO for the Durham Live site. I have considered the background information, but not included it in this report. It is not necessary for this investigation to assess the merits of the City’s request. It is sufficient for me to find that requesting an MZO was a valid, lawfully-available planning tool that Pickering City Council had the right to pursue.

¹⁷ Mayor David Ryan was absent, so the unanimous vote was 6-0 in favour.

Project Lonestar alone will bring significant economic benefits to the City of Pickering and Durham Region. The investment in the land, buildings, infrastructure, equipment and training alone is estimated to exceed C\$100 million. Development charges in the range of \$20 to 80 million are anticipated, along with new property tax assessment in the range of \$5 to 20 million annually.

Durham Live is precisely the type of project which supports both the Provincial Policy Statement (2020) and a Place to Grow: The Growth Plan for the Greater Golden Horseshoe (2019). In order to bring the remainder of Durham Live online much faster and be shovel ready very soon, the City of Pickering is requesting that you exercise your authority and enact a MZO in accordance with the draft attached. The City is very pleased that the Honourable Peter Bethlenfalvy, MPP and President of the Treasury Board supports this request.

Yours truly

Kevin Ashe

Deputy Mayor & Regional Councillor, Ward 1

19. On September 30, Durham Regional Council adopted a resolution that effectively supported the request for an MZO, on the condition that the owner of the lands make certain commitments, including a commitment to build affordable housing.¹⁸ The Respondent was present and voted in favour.

20. On October 23, 2020, the TRCA Board of Directors adopted a resolution opposing commercial development on a portion of the lands covered by the request for an MZO. The resolution read, in part:

THAT in recognition of our role as a watershed management and regulatory agency, and stewards of lands within our jurisdiction, the Board of Directors indicate that they do not support development within wetlands, particularly, Provincially Significant Wetlands;

THAT the Toronto and Region Conservation Authority (TRCA) acknowledge the subject lands west of Squires Beach Road contain natural and hydrological features, including a currently designated provincially significant wetland and significant wildlife habitat and that those lands warrant protection ...¹⁹

21. The operative portion of the resolution authorized the CEO of TRCA to execute a Memorandum of Agreement (with the landowner) to review a proposal for ecosystem compensation to facilitate development of the Durham Live lands containing the Provincially Significant Wetland, in the event the wetland is reclassified by the Ministry of Natural Resources and Forestry. *The Living Cities Policies* of TRCA provide that:

It is the policy of TRCA ... c) To recommend that when development or infrastructure cannot fully protect a natural feature or any other component of the Natural System, compensation for lost ecosystem services be provided.²⁰

¹⁸ Regional Council, Minutes (September 30, 2020), Motion 277 as amended by Motion 279, pp. 26-28.

¹⁹ RES.#A164/20, as amended by RES.#A165/20.

²⁰ TRCA, *The Living Cities Policies*, pp. 88-89, policy 7.4.2.1.

22. Compensation would include making up the loss by replicating the same ecosystem structure and associated level of ecosystem functions, and the land base, of the natural areas proposed to be lost.²¹

23. It was the Ministry of Municipal Affairs and Housing that asked TRCA to enter into an agreement with the landowner to consider an ecosystem compensation proposal should the development be approved.

24. The Respondent moved the original October 23 motion, voted for the amendment, and voted for the motion as amended. The vote was unanimous.

25. One week later, on October 30, the Minister made the MZO.²²

26. The MZO confirmed the zoning of the subject lands, consisting of a Mixed Use Major Tourist and Entertainment Zone, a Warehousing and Logistics Zone, a Mixed Employment Zone, and a Natural Heritage and Open Space Zone.

27. The MZO did not recognize the Provincially Significant Wetlands west of Squires Beach Road, and none of the Natural Heritage and Open Space Zone is west of Squires Beach Road. The subject lands west of Squires Beach Road fall entirely in the Warehousing and Logistics Zone.

28. Recently, the Minister of Municipal Affairs and Housing invited Pickering to request an amendment that would remove from the MZO the lands west of Squires Beach Road,²⁴ and the City of Pickering has formally made this request.²⁵ Nonetheless, the lands west of Squires Beach Road were covered by the MZO at all times relevant to this report. (Further, the MZO has not yet been amended.)

29. The only uses permitted in the Natural Heritage and Open Space Zone are the protection, maintenance, enhancement and restoration of ecosystem forms and functions, and drainage, flood control and erosion control.²⁶ As noted, however, all of the Natural Heritage and Open Space Zone is to the east of Squires Beach Road.

²¹ TRCA, *Guideline for Determining Ecosystem Compensation (After the decision to compensate has been made)* (June 2018), pp. 10-15.

²² O. Reg. 607/20, *Zoning Order - City of Pickering, Regional Municipality of Durham*.

²⁴ Hon. Steve Clark, letter to Mayor Dave Ryan (March 12, 2021): "Given this new development, I am writing to ask if the City of Pickering would like me to consider amending the MZO to exclude the portion of lands that would allow for the construction of the distribution centre ... As you know, every MZO made on non-provincial land has been at the request of the local municipality, and if the City of Pickering no longer wishes to have the MZO in place for the distribution centre, I will issue the mandatory public notice to consult on amending the MZO which is a pre-condition to an amendment."

²⁵ Resolution # 540/21 (March 22, 2021).

²⁶ O. Reg. 607/20, subs. 6(2).

30. In the Warehousing and Logistics Zone, the permitted uses are: accessory uses, buildings and structures; business support services; film studios; laboratories; manufacturing plants; medical offices; offices; software development and processing establishments; vehicle service facilities; and warehouses and distribution facilities.²⁷

31. Permitted uses in the Mixed Use Major Tourist and Entertainment Zone are the following: accessory uses, buildings and structures; apartment dwellings; art galleries; banquet facilities; bake shops; botanical gardens; business support services; cafés; cinemas; convenience stores; commercial fitness or recreation centres; commercial schools; community centres; community gardens; curling rinks, tennis courts, bowling alleys, or similar recreational facilities; day care centres; dry-cleaner's distribution centres; financial institutions; home-based businesses; museums; nightclubs; parking lots; parking garages; personal service establishments; places of amusement; private clubs; restaurants; retail stores and accessory retail sales; service and repair shops; spas; supermarkets; travel agencies; travel information centres; vehicle rental establishments; and the uses described in subsection 5(1) of City of Pickering Zoning By-law 7404/15.²⁸

32. Finally, permitted uses in the Mixed Employment Zone include any use permitted in the Mixed Use Major Tourist and Entertainment Zone or the Warehousing and Logistics Zone.³⁰

33. Each zone except the Natural Heritage and Open Space Zone is subject to zoning requirements.³¹

Permit Applications

34. Six days after the MZO was made, the Minister of Finance introduced Bill 229, the *Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020*. Schedule 6 of that Act amended the *Conservation Authorities Act*. On December 4, Schedule 6 itself was amended by the Standing Committee on Finance and Economic Affairs.³² One committee amendment, discussed in more detail below, made it mandatory for conservation authorities to grant permissions to developments authorized by MZOs. The Bill, as amended, received Third Reading and Royal Assent, December 8.³³

²⁷ *Ibid.*, subs. 4(2).

²⁸ *Ibid.*, subs. 3(3).

³⁰ *Ibid.*, subs. 5(2).

³¹ *Ibid.*, subss. 3(4), 4(3), 5(3).

³² The amendments were introduced, debated, and adopted all on the same day, December 4. By this point, the committee had already conducted public hearings. There was no opportunity for public comment on the amendments. They were adopted on a Friday, the amended Bill was reported to the House the following Monday, and Third Reading and Royal Assent occurred Tuesday.

³³ S.O. 2020, c. 36.

35. Most of the amendments were to come into force on proclamation,³⁴ but one of the changes contained in the December 4 committee amendments, the enactment of new section 28.0.1 of the *Conservation Authorities Act*, came into effect on December 8.³⁵

36. Section 28.0.1 requires a conservation authority to grant permission for a development project that has been authorized by an MZO and is not located in the Greenbelt Area.³⁶

37. A conservation authority may attach conditions to the permission, including conditions to mitigate effects on control of flooding, erosion, dynamic beaches or pollution or the conservation of land, and any conditions or circumstances created by the development project that, in the event of a natural hazard, might jeopardize health or safety, or result in property damage or destruction.³⁷ However, the authority shall not refuse to grant permission.³⁸

38. Because of the timing of its introduction, adoption as a committee amendment, and passage as part of the amended Bill, section 28.0.1 was not the subject of comment by conservation authorities, other stakeholders, and members of the public before it was enacted. TRCA had opposed Schedule 6 of Bill 229, but its position was taken before *Conservation Authorities Act* section 28.0.1 was added to the Bill. On November 13, the Board of Directors had adopted a resolution that read, in part, as follows:

... the proposed amendments will diminish TRCA's ability to serve its municipal partners and other watershed stakeholders in the protection from natural hazards and conserving natural resources, primarily in the areas of planning, permitting and enforcement;

THEREFORE, LET IT BE RESOLVED THAT TRCA's Board of Directors request that the Government of Ontario remove proposed amendments to the *Conservation Authorities Act* and *Planning Act* in Bill 229 relating to planning, permitting and enforcement ...³⁹

39. The Respondent was present for most of the November 13 Special Meeting, but he left at 12:01 p.m. and was absent during debate and voting on the motion.⁴⁰

40. In late December 2020, Pickering Developments (Squires) Inc. applied to the TRCA for permission to interfere with a wetland to conduct borehole investigations on the Provincially Significant Wetland located at 1802 Bayly Street, on part of the lands covered by the MZO. The application was considered by the Executive Committee, February 5,

³⁴ Several of these provisions were proclaimed in force February 2, 2021.

³⁵ *Ibid.*, Sched. 6, c. 36, subs. 29(2). Two additional provisions of Schedule 6 came into force on Royal Assent, but these affected Acts other than the *Conservation Authorities Act*.

³⁶ *Conservation Authorities Act*, subss. 28.0.1(1), (3).

³⁷ *Ibid.*, subs. 28.0.1(5).

³⁸ *Ibid.*, subs. 28.0.1(4).

³⁹ RES.#A176/20 as amended by RES.#A177/20.

⁴⁰ The only items on the agenda were an information presentation on Bill 229, and adoption of a resolution setting out TRCA's position. The meeting lasted until 12:43 p.m.

pursuant to O. Reg. 166/06, which provides that the Executive Committee may exercise TRCA's authority to grant permission to change or to interfere with a wetland.⁴¹

41. Section 28.0.1 of the *Conservation Authorities Act* obliged TRCA to grant permission, but the Executive Committee restated TRCA's "opposition to development within wetlands, particularly, Provincially Significant Wetlands," and, with the consent of the applicant, attached seven conditions.⁴²

42. The Respondent is not a member of the Executive Committee and did not take part in its February 5 decision. On February 26, the Executive Committee decision was not reported to the Board of Directors for action, but for information, and was "received."⁴³ The Respondent was present and voted for the motion to receive.⁴⁴

43. Meanwhile, on or about February 16, Pickering Developments (Squires) Inc. had applied for permission to site grade, temporarily or permanently to place, dump or remove any material, originating on the site or elsewhere, and to interfere with a wetland to remove a Provincially Significant Wetland located at 1802 Bayly Street.

44. On March 4, the Minister of Natural Resources and Forestry made a regulation, O. Reg. 159/21, requiring TRCA to grant the permission by March 12 – eight days away.

45. As noted, under the new provision of the *Conservation Authorities Act*, TRCA was required to grant permission, but it could attach conditions. TRCA staff proposed, in addition to TRCA's standard 13 conditions, another 20 special conditions.⁴⁵ The applicant agreed to all 13 standard conditions, but wanted nine of the proposed special conditions deleted, three modified, and three clarified.⁴⁶

46. Subsection 28.0.1(7) of that Act provides that, before attaching conditions, an authority shall give the applicant an opportunity to be heard by the authority. On March 12, the TRCA Board of Directors held a hearing under subsection 28.0.1(7).

⁴¹ O. Reg. 166/06, *Toronto and Region Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses*, subs. 6(3).

⁴² Executive Committee Meeting #9/20 (February 5, 2021) RES.#B111/20 as amended by RES.#112/20.

⁴³ Board of Directors Meeting (February 26, 2021), RES.#A36/21.

⁴⁴ The Respondent was under the impression that he and the Board of Directors had voted on a substantive motion to adopt an Executive Committee recommendation to grant permission on conditions. However, the February 26 minutes indicate that the Executive Committee had already exercised authority under O. Reg. 166/06, and the Board of Directors was merely receiving the Executive Committee decision: "Moved by: Linda Jackson, Seconded by: Gino Rosati THAT item 13.4.1 – Application for Permits Pursuant to s.28.0.1 of the *Conservation Authorities Act* (Minister's Zoning Orders) – Pickering Developments (Squires) Inc. be received. CARRIED."

⁴⁵ *TRCA Staff Report – Hearing under section 28.0.1(7) of the Conservation Authorities Act* (March 12, 2021 hearing), pp. 1050-1054.

⁴⁶ Ira T. Kagan, letter to TRCA (March 10, 2021).

47. At the end of the hearing, the Board of Directors voted “under duress” to grant the permission, with conditions, Following the Board’s in camera decision, TRCA issued a public statement that read, in part, as follows:

Unequivocally, TRCA's Board of Directors and staff, using a science-based approach to decision making and TRCA's Living City Policies, would have declined permission of this permit had the Province not intervened. TRCA's Board of Directors continues to raise substantial concerns with the Provincial directive, which appears to directly conflict with TRCA's mandate to further the conservation, development, and management of natural resources in watersheds within our jurisdiction, and its regulatory role regarding flooding and interference with wetlands.⁴⁷

48. The Respondent was present at the March 12 hearing, participated and voted.

Respondent’s Position on Durham Live

49. As Complainant notes, the Respondent has made several previous, positive, public comments about Durham Live.

50. At least since 2018, the Respondent has been active on social media, explaining the merits of the Durham Live proposal (and often distinguishing it from alternatives in Ajax). Examples of Tweets include:

Kevin Ashe @kevinashe1 • May 22, 2018

Exciting day at Pickering city hall as Great Canadian Gaming and Durham Live review building plans at Site Plan Committee. Let’s start digging

Kevin Ashe @kevinashe1 • Sep 14, 2018

while site work has started ... the actual building permit application for Durham Live Casino was submitted today ... thousands of new jobs and millions in revenue @JohnMutton18 @CityofPickering @NurseNicoletta @TownOfAjax @PBethlenfalvy @progright @nancyhenry_ @SteveApost

51. Several of the Respondent’s posts have directly or indirectly addressed Town of Ajax opposition to Durham Live. For example:

Kevin Ashe @kevinashe1 • Jun 12, 2018

Breaking news.... Town of Ajax appeal of OMB decision on Durham Live. Dismissed. Durham Live full steam ahead ... let’s start building

Kevin Ashe @kevinashe1 • Jul 9, 2018

City of Pickering and Durham Live awarded \$60,000 plus in cost from Town of Ajax for Division Court loss #wastingtaxpayersmoney

⁴⁷ TRCA, “Results of Today’s Hearing to Grant Permission for Development at 1802 Bayly Street” (March 12, 2021).

52. Sometimes he engaged directly with the Mayor of Ajax:

Shaun Collier #StayHomeAjax @mayor_collier • Nov 30, 2020

Just in: Judicial review application filed to stop massive warehouse on Provincial Significant Wetland in Pickering. #SaveTheDuffinsCreekWetland

Kevin Ashe @kevinashe1

Replying to @mayor_collier

How did the last judicial review go about Durham Live?

4:05 PM • Nov 30, 2020 • Twitter for iPad

53. The letter requesting the MZO, signed by the Respondent, described the benefits of the project as follows:

Durham Live is poised to be one of the region's largest employers (10,000 or more jobs) and certainly its primary tourist destination. At a time when the Pickering Nuclear Generating Station is winding down its operations, and General Motors has ceased vehicle production in Oshawa, Durham Region desperately needs something of this size and scale to drive its economic recovery. Durham Live can be that driver. Durham Live seeks to raise the City's profile as the pre-eminent municipality in Durham. ...

Durham Live is, however, much more than just the casino and film studio and the owners are anxious to maintain momentum. In fact, Durham Live is ideally positioned to be shovel ready for the economic recovery kick-start which the City, Region and Province must now plan for. ...

54. The day the MZO was made, the Respondent issued a supportive Tweet:

Kevin Ashe @kevinashe1 • Oct 30, 2020

Fantastic news. Durham Live MZO issued to realize full potential of Durham Live. Thousands of jobs. Thank you @PBethlenfalvy @RodPhillips01 @fordnation

55. Shortly afterward, the Respondent spoke about the MZO to Global News:

The City of Pickering stands by its decision to order the MZO. Ashe says with the pandemic delaying the opening of the casino, jobs are top of mind. And these projects will provide 3,000 of them.

"From our perspective, it's not really a choice between protecting the environment and securing much-needed investment. I think both can happen," says Ashe.

"We'll be working hard with our partners to achieve that."⁴⁸

56. The Complainant also drew attention to the Respondent's public support for Bill 229, the omnibus budget bill that amended the *Conservation Authorities Act*. Examples are the following exchanges with the Mayor of Ajax:

⁴⁸ Frazer Snowdon, Global News, "Minister's zoning order could impact large swath of provincially significant wetlands" (November 3, 2020).

Shaun Collier #StayHomeAjax @mayor_collier • Nov 14, 2020

Please reach out to the following Ministers @JYakabuskiMPP @SteveClarkPC @RodPhillips01 @JeffYurekMPP and ask them to remove Schedule 6 from Budget Bill 229. This section of the Bill gives the power to the province to declassify this significant wetland.

Kevin Ashe @kevinashe1

Replying to @mayor_collier @DrStevenMurphy and 4 others

The Province SHOULD have the power

5:04 PM • Nov 14, 2020 • Twitter for iPhone

Shaun Collier #StayHomeAjax @mayor_collier • Dec 6, 2020

Letter from Conservative Chair of TRCA's Board of Directors Jennifer Innis. "If you are not worried, you are not paying attention. I appeal to everyone reading this letter to contact the Premier and your local MPP immediately to ask them to remove Schedule 6 from Bill 229."

Kevin Ashe @kevinashe1

Replying to @mayor_collier

I have reached out to my MPP tonight and indicted my support of the Budget Bill

7:46 PM • Dec 6, 2020 • Twitter for iPad

57. The November 14 Tweet was made before, and the December 6 Tweet was made after, the committee amended the Bill to include the new section 28.0.1 of the *Conservation Authorities Act*.

58. The Respondent's public position on Bill 229 was consistent with his voting at City Council and Reginal Council meetings. On November 25, Durham Regional Council voted 24-5 to recommend to the Province that Schedule 6 be "removed" from Bill 229. The Respondent voted against the motion.⁴⁹ On December 14 (after the Bill had received Royal Assent), Pickering City Council voted 4-2 to table a motion calling for the repeal of Schedule 6 (which by now included section 28.0.1 of the *Conservation Authorities Act*). The Respondent moved and voted in favour of the tabling motion.⁵⁰

PROCESS FOLLOWED

59. Section 16 (Enforcement of By-law and Policies) of the Administrative By-Law establishes a Formal Complaint Procedure covering complaints about adherence to applicable bylaws and policies including the Code of Conduct. The Formal Complaint Procedure provides for investigations but does not prescribe how they are to be conducted. I opted to follow roughly the same fair and balanced process that I employ during municipal integrity commissioner investigations, namely:

⁴⁹ Regional Council, Minutes (November 25, 2020), Motion 341 as amended by Motion 342, pp. 6-9. The Respondent voted against the amendment (which carried) and then voted against the motion as amended.

⁵⁰ City of Pickering, Council Meeting Minutes (December 14, 2020), Item 12.1, Resolution # 489/20.

- The Respondent is given an opportunity to respond, and then the Complainant is given the opportunity to reply.
- Each party sees the other's submission.
- The investigation involves interviews of parties and any witnesses with potentially relevant information, and reviews of documents.
- The parties are interviewed separately. A party may be represented by legal counsel but is not entitled to participate in the interview of anyone else.
- The process is conducted in confidence and I ask both parties to maintain its confidentiality.
- I was assisted by a lawyer who works with me.

60. Upon review of the complaint, which mentioned 2(d) of the Code of Conduct, I determined that the gist of the Complainant's concerns also involved section 2(e) and section 9 of the Code.

61. I gave the Respondent notice of the complaint. In inviting him to respond, I asked him to address section 2(d), section 2(e), and section 9 of the Code. I also wrote to the Complainant, informing her that sections 2(d), 2(e) and 9 would be considered.

62. I shared the Response with the Complainant. She decided to hold her Reply, pending our interview.

63. I conducted separate interviews of the Complainant and the Respondent. During the interviews the parties provided information and further argued their positions.

64. The day following her interview, the Complainant sent me a brief Reply that included additional material for me to consider.

65. I did invite each party to provide me with a list of individuals who might possess relevant information. Unsurprisingly, given the clear-cut nature of the issues, neither found it necessary to suggest witnesses to me. I spoke to other individuals only to confirm background information about decision making.

66. After reviewing the submissions of the parties, conducting interviews, reviewing documents, meeting recordings, and decision records, and then considering the relevant legal authorities, I determined that I had enough information before me to conclude the investigation and report to the Executive Committee.

67. The complaint was made February 25. This was prior to the Board of Directors vote on February 26 to receive the Executive Committee's February 5 decision on borehole permitting and conditions. This also was prior to the Board's March 12 hearing and decision on the owner's second application. While the complaint pre-dated the Board

of Directors votes, both parties made submissions on, and wanted this investigation to resolve, whether the Respondent was entitled to participate on those subsequent occasions.

68. In summary, the process was procedurally fair. Each party had full opportunity to make submissions on the issues in this report and to comment on the other party's submissions.

POSTIONS OF THE PARTIES

69. The Complainant argues that the Respondent failed to approach matters before the TRCA Board with an open mind.

70. In her initial complaint, she notes that the Respondent was one of the members of Pickering Council that "advocated the hardest for the MZO" related to the subject property. She concludes that he therefore "could not possibly have approached the TRCA debate an open mind" since his "mind was made up in favour of the development, in opposition to the TRCA's declared support for the wetlands."

71. As evidence of this, she pointed to the fact that the Respondent: voted with Pickering Council in favour of requesting the MZO; actually wrote the letter to the Minister of Municipal Affairs and Housing formally requesting the MZO; indicated that he personally spoke to the local MPP in favour of the MZO; and was otherwise on record making public statements in support of the development.

72. The Complainant also appeared as a delegation before Pickering City Council at its March 22 meeting. In her presentation to Council, she stated that while she understands that "MZOs have their place in planning," they should be used with "extreme caution" because they serve to bypass proper planning processes.

73. The Respondent argues that the complaint is frivolous and vexatious. The Complainant disagrees.

74. The Respondent is familiar with recusals, such as those, for example, made following disclosures of pecuniary interest under the *Municipal Conflict of Interest Act*. He never felt that his participation in TRCA Board of Directors consideration of these matters warranted his recusal.

75. He acknowledges having always been an advocate for the development of the subject lands and, in particular, for the Durham Live proposal, but submits that he nevertheless maintained an open mind in respect of all matters before the TRCA Board.

76. The Respondent notes that section 28.0.1 of the *Conservation Authorities Act* left TRCA with a narrow role. It was required to grant permission, but it could attach

conditions. Consequently, he argues that his prior statements were not relevant to his participation in a TRCA decision on which it had no choice.

77. The Respondent also submits there is a distinction between the MZO (which he characterizes as a zoning and planning tool) and the TRCA decisions that that would follow. Expressed simply: zoning only controls what may be built on land; permitting and conditions determine what will be built. He submitted that he could simultaneously support Pickering's request for the MZO and the actual MZO, as it affected planning, but nevertheless remain open to persuasion with respect to his responsibilities on the TRCA Board of Directors.

78. The Respondent maintains that his advocacy for the MZO had no impact on his conduct as a TRCA Board Member.

79. According to the Respondent, proof that he kept an open mind and did not prejudge the matter is that, on March 12, he voted with the rest of the Board to attach conditions – including staff-recommended special conditions that the applicant opposed – to the granting of permission.

80. The Complainant disagrees with the Respondent on these points. She submits that, regardless of the outcome of TRCA decision-making, the Respondent should not have participated in considering the application. She submits that the distinction between zoning and permitting (and conditions attached to permitting) is artificial, since at all stages the fundamental issue has been whether there should be development on a Provincially Significant Wetland.

FINDINGS OF FACT

81. Findings of fact appear in the Background section of this report, and below.

82. The Respondent is on the public record, supporting the making of the MZO for the subject lands. He acknowledged as much in his submissions to me.

83. The Respondent also publicly supported the passage into law of Schedule 6 of Bill 229, the *Protect, Support and Recover from COVID-19 Act (Budget Measures), 2020*, including, by implication, once it was added to the Bill, section 28.0.1 of the *Conservation Authorities Act*.

84. As noted above, Respondent takes the position that zoning is substantively different than permitting, and that his support for an MZO did not prejudge a decision by a conservation authority about the conditions attached to granting permission. The Complainant disagrees. I consider this question in the next section.

ISSUES AND ANALYSIS

85. Before applying sections 2(d), 2(e), and 9 of the Code of Conduct to the Respondent's participation, I will briefly summarize the law on conflict of interest, bias, fiduciary duty, and hearings. In my view, sections 2(d), 2(e), and 9 of the Code are meant to reiterate the legal obligations of Board Members, and they should be interpreted in a manner consistent with the law.

86. The common law treats differently a Member who has a personal interest in a matter before the Board, and one who has previously expressed views on a matter before the Board. The issue in the former case is conflict of interest; the issue in the latter is prejudgment: they are not the same.⁵¹ The law governs both situations, but the legal tests are different.

Personal Interest (Conflict of Interest)

87. When a Member has a personal interest in a matter, for example, because of a relationship with the applicant, the appropriate test is **reasonable perception** (or reasonable apprehension). "Would a reasonably well-informed person consider that the interest might have an influence on the exercise of the official's public duty?"⁵²

88. If a reasonable observer would conclude that the Member's interest might influence the Member's participation in TRCA decision-making on a matter, then the Member should withdraw.

89. The common law obligation is not inconsistent with, but is broader than, the *Municipal Conflict of Interest Act* obligation to disclose certain types of pecuniary interest (e.g., self, spouse, parent, child, employer, etc.) and to withdraw from decision making, attempting to influence others, and voting.⁵³

90. For example, if a Member is the personal friend of an applicant, then the *Municipal Conflict of Interest Act* might not apply, but the common law rule could still be relevant; it requires withdrawal if a reasonably well-informed person would consider that the personal friendship might influence the Member's participation.

⁵¹ *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 SCR 1170, at 1196: "I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. ... [The latter] is commonly referred to as a conflict of interest." See also: *Fortin v. Sudbury*, 2020 ONSC 5300 (CanLII), at para. 139.

⁵² *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, note 51, at 1198.

⁵³ *Municipal Conflict of Interest Act*, ss. 2, 3, 5, 5.2.

Prejudgment and Previously Expressed Opinion

91. In the case of a previously expressed opinion, as opposed to a personal interest, the Supreme Court of Canada has made clear that the reasonable perception standard does not apply.⁵⁴

92. Instead, the standard is that of an open mind. Despite any previous statements made about a matter, a Member who remains capable of persuasion may participate in the decision making:

The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.⁵⁵

93. The party that alleges a Member should be disqualified bears the onus of proving that the Member has prejudged the matter to the extent of having a closed mind.⁵⁶

94. As I have noted, when the question is prejudgment bias, the perception test (what a reasonable observer would perceive) is not applicable.⁵⁷ The test is whether a Member has a closed mind, in fact.⁵⁸ On this point, the Member's actual conduct at the meeting, including the Member's voting, is relevant:

The councillors in question may have had an opinion, even a strong opinion on the matter, but their conduct at the meeting where the resolution was actually passed shows that they were willing to listen to contrary points of view and to amend their positions as a result of those contrary opinions. This is the opposite of what is meant by a closed mind.⁵⁹ [emphasis added]

⁵⁴ *Old St. Boniface Residents Assn.*, note 51, at 1198.

⁵⁵ *Old St. Boniface Residents Assn.*, note 51, at 1197.

⁵⁶ *Belleville Sign Rentals Inc. et al. v. The Corporation of the City of Belleville*, 2019 ONSC 6579 (CanLII), at para. 49.

⁵⁷ While the decision in *Citizens for Accountable and Responsible Education Niagara Inc. v. District School Board of Niagara*, 2015 ONSC 2058 (CanLII), at para. 114, suggests that the closed-mind test is assessed on a reasonable-person standard, this is assertion is expressly contrary to the reasons of the Supreme Court of Canada majority in *Save Richmond Farmland Society v. Richmond (Township)*, note 58, below, and *Old St Boniface Residents Assn.*, note 51, at 1198: "It was error, therefore, for the learned judge to apply the reasonable apprehension of bias test."

⁵⁸ *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 SCR 1213, at 1124: "Southin and Toy J.J.A. opined that a reasonable person would conclude that he had a closed mind. As explained in *Old St. Boniface*, the relevant test is whether the Councillor had a closed mind, in fact."

⁵⁹ *Know Your City Inc. v. The Corporation of the City of Brantford*, 2021 ONSC 154 (CanLII), at para. 43.

Fiduciary Duty / Best Interests of The Authority

95. Each board member of a public body has a fiduciary duty to make decisions in the best interest of the public body. This is true of a municipal councillor in relation to the municipal corporation, and true of a conservation authority member (commonly referred to as a board member, or director) in relation to the conservation authority.

96. In a pre-Confederation case involving the Mayor of Toronto, the Court explained that the interests of the corporation must be the sole basis of decision-making:

But the City of Toronto had entrusted the management of this, as of all other matters, to the common council; and every member of the common council, in discharge of that trust, was bound to determine those questions with a single eye to the interests of the corporation.⁶⁰
[emphasis added]

97. This principle has been reaffirmed and applied in modern times.⁶¹

98. A member who participates in the decision making of a public body must act in the interests of the public body, even if the member belongs to another public body. The clearest expression of the principle is found in a 2010 Ontario Court of Appeal decision involving councillors who belonged to both an upper-tier municipality and a lower-tier municipality (a common occurrence):

In reaching this conclusion I 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. However, they cannot be said to violate their duty to Dufferin County simply because they also represent the interests of Orangeville.⁶²

99. The same principle applies to board members of a conservation authority. They owe a duty to act in the interests of the conservation authority. (However, they cannot be said to violate their duty to the conservation authority simply because they also represent the interests of a municipality.) See section B-1(4) of the Administrative By-Law: “Board Members owe a fiduciary duty to TRCA and not their Member Municipalities, when acting as a Board Member of the organization.”

Interests of Two Public Bodies: Not a Disqualifying Conflict

100. The 2010 Ontario Court of Appeal decision deals with another important principle: The municipal councillor who is nominated by, appointed by, or represents the municipality, on another body, is not disqualified, merely because decision making by one could affect the interests of the other. In that case, Town of Orangeville representatives

⁶⁰ *Toronto v. Bowes* (1854), 4 Gr. 489, at 508, *per* Blake C., *aff'd* (1856), 6 Gr. 1, *aff'd* C.R. [3] A.C. 10, 11 Moo. P.C. 463, 14 E.R. 770.

⁶¹ *Alberta v. Hawrelak* (1965), 53 DLR (2d) 353 (Alta. C.A.), at 357, *aff'd* (1966), 53 DLR (2d) 673 (S.C.C.); see also *R. v. Gentile* (1993), 81 CCC (3d) 541, 1993 CanLII 14685 (Ont. Ct. Prov. Div.), at CCC 550.

⁶² *Orangeville (Town) v. Dufferin (County)*, 2010 ONCA 83 (CanLII), at para. 27.

on County Council were permitted to vote on a County decision of significant pecuniary interest to Orangeville.⁶³

101. Similar decisions were made in the cases of two councillors appointed to represent their municipality on the board of a non-profit corporation substantially funded by the municipality,⁶⁴ and three councillors appointed by the municipality to the board of health, who then voted on a matter affecting the board of health.⁶⁵

102. A key factor in all these decisions was that the councillors were all representing public interests, not private interests.

103. A municipal councillor appointed as a board member of a conservation authority is not disqualified by conflict of interest, and may participate in decision making, when the conservation authority considers a matter in which the councillor's municipality has an interest.

Hearing Procedure and Fairness

104. Section 28 and section 28.0.1 of the *Conservation Authorities Act* provide, in particular circumstances, for hearings, such as the one held on March 12. The hearing and subsequent decision must meet the common law requirement of **procedural fairness**. Aspects of procedural fairness include, for example, hearing from a party (or allowing an opportunity to be heard) before making the decision, and ensuring that the people who make the decision are the ones who heard the case. In addition, a provincial statute called the *Statutory Powers Procedure Act* sets out particular procedural requirements.

105. TRCA has adopted Hearing Guidelines, which are intended to ensure that hearings are procedurally fair and comply with the *Statutory Powers Procedure Act*.⁶⁶

106. In my view, Code of Conduct section 9 ("Apprehension of Bias") is intended to apply more broadly than the name suggests. The content of section 9 clearly contemplates the Hearing Guidelines, procedural fairness, and the *Statutory Powers Procedure Act*. For example, the prohibition of discussion of a matter outside the hearing promotes many aspects of fairness, including: basing the decision on what occurs in the hearing; not deciding until the hearing is held; ensuring parties receive notice of the issues and a chance to address them; not conducting the hearing in the absence of a party.

⁶³ *Orangeville v. Dufferin*, note 62, *passim*.

⁶⁴ *Aurora (Town) v. Her Majesty the Queen in Right of Ontario*, 2013 ONSC 6020 (CanLII).

⁶⁵ *Blyth v. Northumberland (County) (Gen. Div.)*, 1990 CanLII 6752 (ON SC).

⁶⁶ Hearing Guidelines (October 2005, Amended 2018), Board of Directors Administrative By-Law, Appendix 5, Attachment 1.

107. Section 9 codifies the responsibility of each individual Member to act in a manner that allows TRCA to conduct procedurally fair hearings. It should be interpreted in that manner.

Issue A: Is the Complaint Frivolous and Vexatious?

108. No. The manner in which the Respondent expressed his support for Durham Live, such as “Let’s start building” and “Let’s start digging,” gave rise to a concern that cannot be described as frivolous. I should add that the length and detail of this investigation report indicate that the complaint raised issues that were not frivolous.

109. Vexatiousness, meanwhile, is a concept that can only be assessed in the full context, including prior dealings involving the parties. There is no evidence before me that would allow me to find the complaint is vexatious.

Issue B: Did the Respondent Fail to Approach Matters with an Open Mind, Contrary to Section 2(d)?

110. At the end of the day, the way he voted demonstrated that the Respondent did not have a closed mind. He voted for conditions that the applicant opposed.

111. On this point, according to the Supreme Court of Canada, *perception* is not the standard. The standard is met because, in fact, his mind was not closed.

112. That being said, I do find that the Complainant’s perception was understandable. The Respondent’s consistent championing of Durham Live caused the Complainant to doubt that he approached TRCA decision making with an open mind.

113. I also find that the distinction between zoning (the MZO) and granting permission (the TRCA decision) is not necessarily determinative of compliance with the Code when the subject is the same development on the same lands. The Respondent correctly observes that *Planning Act* zoning governs what type of development is permitted and where, while TRCA was deciding what conditions, if any, would be imposed on a permission it was compelled to grant. However, the Complainant accurately points out that the “what” and the “where” were the same in both instances: both the MZO and the applications to TRCA dealt with the same development on a Provincially Significant Wetland. (This is the case even though the Respondent voted with the rest of the TRCA Board, October 23, to oppose development within wetlands). Further, claiming the MZO merely determined what *may be a permissible use* of the lands, not what *actually gets built*, seems inconsistent with the Respondent’s response to the MZO: “Fantastic news. Durham Live MZO issued to realize full potential of Durham Live. Thousands of jobs.”

114. On the other hand, I find that the Respondent’s support of Bill 229 was not relevant to his participation in TRCA decision making and not evidence of a closed mind. Schedule 6 of the Bill affected the powers and responsibilities of conservation authorities,

but it did not pertain to any particular matter that would come before TRCA. (Also, until a few days before Royal Assent, it did not include the provision compelling a conservation authority to grant permission for a development authorized by an MZO.) To articulate an opinion on whether a proposed, provincial law of general application should be enacted, is not to prejudge what one might decide if the law is enacted.

115. As noted, on October 23, the Respondent voted in favour of a TRCA Board resolution stating, in part, “the Board of Directors indicate that they do not support development within wetlands, particularly, Provincially Significant Wetlands.”

116. On March 12, the Respondent further demonstrated his open mindedness by voting to attached special conditions that the owner opposed. Regardless of the perception created by his public statements, he was open minded in fact. This is what the common law and the Code of Conduct required of him.

Issue C: Did the Respondent Fail to Uphold His Fiduciary Duty to Act in the Best Interests of TRCA, Contrary to Section 2(e)?

117. There was no failure to act in the best interests of TRCA.

118. In voting with the majority of the Board to adopt staff’s recommendation of special conditions to attach to the permission, there is no evidence that the Respondent was acting other than in the best interests of TRCA.

119. It is true that the Respondent is also a member of Pickering City Council and Durham Regional Council, but there is no evidence that those roles caused him not to act in TRCA’s best interests.

120. On Schedule 6 of Bill 229, the Respondent espoused views opposite to TRCA’s official position. His expression of opinion on provincial legislation of general application, either before or after its passage, did not interfere with his fiduciary duty to TRCA. The fact that TRCA held its own opinion of what the provincial law should have been does not mean that expression of a contrary opinion was against TRCA’s interests.

Issue D: Did the Respondent Contravene Section 9, which Supports TRCA in Conducting Procedurally Fair Hearings?

121. No.

122. As previously explained, I believe section 9 of the Code of Conduct is meant to be interpreted as consistent with common law and statutory rules of procedural fairness, and with the Hearing Guidelines.

123. Nothing the Respondent did compromised procedural fairness or placed it at risk.

124. The Respondent did not have a personal interest in the hearing, either directly or indirectly as a result of belonging to City Council or Regional Council. The City of Pickering and Durham Region were not parties to the March 12 hearing, so their interests were not directly affected. Even if Pickering's and Durham's interests were affected by the hearing, *Orangeville v. Dufferin* and other cases make clear that the Respondent was not disqualified on that basis, whether at common law, under the *Municipal Conflict of Interest Act*, or under section 9 of the Code.

125. Further, there is no indication that the Respondent discussed the conditions of granting permission with the applicant, or anyone, prior to the hearing, or outside the hearing, before the making of the decision.

126. Section 9 of the Code of Conduct prohibits outside-of-the-hearing discussion for many good reasons, some of which are mentioned at paragraph 106, above. None of these reasons was engaged by this particular case. Despite any impression of prejudgement that may have been created by the Respondent's public comments, he was open-minded in fact. On the question of prejudgement, actual open-mindedness, not perception, is determinative.

127. Despite the fact that there was no contravention of section 9 in this instance, the fact remains that section 9 exists to ensure that individual Members do their part to uphold TRCA's compliance with the Hearing Guidelines, procedural fairness, and the *Statutory Powers Procedure Act*. Discussing the subject of a hearing outside of the hearing, including but not limited to making social media comments, certainly might compromise the apparent fairness of a hearing and expose a Member to the risk of contravention of section 9 of the Code of Conduct.

CONCLUSION

128. I find that Kevin Ashe did not contravene the Code of Conduct for Board Members.

129. TRCA might consider refresher training related to Board Members' compliance with the Code, particularly compliance with section 9 (and procedural fairness generally) if the Board of Directors is likely to conduct more hearings in future.

Respectfully submitted,



Guy Giorno
Investigator
April 21, 2021

ADJOURNMENT

ON MOTION by Anthony Perruzza, the meeting was adjourned at 12:41 p.m., on Friday, April 30, 2021.

Jennifer Innis
Chair

John MacKenzie
Secretary-Treasurer

/am