

COMMITTEE OF THE WHOLE MARCH 22, 2011

INDEMNIFICATION BY-LAW

Recommendation

The Commissioner of Legal and Administrative Services and City Solicitor, in consultation with the City Manager, the Senior Management Team, and the Integrity Commissioner, recommends that Council enact an Indemnification By-law as described herein.

Contribution to Sustainability

Not applicable.

Economic Impact

The economic impact of this Report is presently undetermined, as the number of instances and costs per instance that might occur pursuant to the By-law, during the course of a given year, cannot be estimated. However, any costs that are incurred during the course of legal proceedings can be recovered in certain instances where the proceeding is ultimately dismissed or otherwise concluded in a manner favourable to the City. As well, the By-law provides for indemnification only in those instances where insurance coverage is not available. The legal costs that are incurred will be paid from the Human Resources Professional Fees Budget, except where the proceeding does not relate to a labor or employment law matter, in which case costs will be paid from the Legal Services Professional Fees Budget.

Communications Plan

The enactment of the By-law will be communicated to City employees.

Purpose

The purpose of this report is to recommend enactment of an Indemnification By-law, to provide consistency and predictability in the ability to obtain financial assistance where legal proceedings are commenced against current or former members of Council and employees, in relation to actions taken in the course of official or employment duties.

Background

Section 279 of the *Municipal Act, 2001*, permits the City to act as an insurer for the protection of members of council and employees, or former members of Council and employees, to protect against risks that may involve pecuniary loss or liability, the payment of any damages or costs awarded or expenses incurred by them, as a result of any action or other proceeding arising out of acts or omissions done or made by them in their capacity as employees or members, including while acting in the performance of any statutory duty, as well as settlements paid and costs incurred to defend such proceedings.

On March 23, 2010, Committee of the Whole considered the report of the Commissioner of Legal and Administrative Services and City Solicitor in relation to the adoption of an Indemnification By-law and directed that the recommendation be referred to the Integrity Commissioner for her comments as it pertains to Members of Council prior to reporting back to Council.

In accordance with Council direction, the Integrity Commissioner has reviewed the draft Indemnification By-law to ensure that its procedural and other provisions are consistent with the principles outlined in the Code of Ethical Conduct for Members of Council.

Analysis and Options

The City's insurance policies provide coverage for a wide variety of potential claims, such as where a third party seeks compensatory damages because of an alleged wrongful act causing financial loss including negligence or misrepresentation. Coverage is also provided for payment of legal fees including disbursements incurred in the defence of civil legal proceedings. However, despite the extent of coverage, there are inevitably "gaps" in coverage, such as where losses are within the deductible amount. As well, the City's insurance policies provide no coverage for certain claims including payment of fines and penalties, and legal defence costs arising from charges laid for an alleged offence arising under federal legislation, even where the allegations are ultimately dismissed by a Court.

Presently there is no prescribed procedure in effect at the City respecting reimbursement by members of Council or employees, of legal expenses, costs, damages or other losses incurred for actions taken in the course of official or employment duties, which are not otherwise covered by the City's insurance policies. Where such costs or losses have been incurred or were anticipated, staff has sought Council direction to indemnify, on a case by case basis. Adoption of an Indemnification By-law would ensure consistency in the determination of when indemnification is appropriate, and would provide guidelines concerning timing and parameters for indemnification.

Issues dealt with in an Indemnification By-law for employees are predominantly the same as those that would be dealt with in an Indemnification By-law applicable to members of Council, and therefore it is appropriate to have one unified Indemnification By-law. This approach is consistent with the approach that has been taken in most municipalities within the GTA.

Indemnification By-laws similar to the City's draft have been in place for several years in surrounding municipalities including Toronto, York Region, Richmond Hill, Mississauga and Brampton.

Municipal Conflict of Interest Act:

The City's Insurance Policy provides for the reimbursement of legal fees and expenses incurred by elected or appointed members of Council where an application is brought under the *Municipal Conflict of Interest Act*, provided that a court finds there has been no contravention, or contravention has occurred by reason of inadvertence, remoteness, or insignificance, or contravention has occurred by reason of a *bona fide* error in judgment. Coverage is for 100% of legal fees and expenses incurred by the member of Council, up to \$250,000.

The underlying authority for indemnification (section 279 of the *Municipal Act* and section 14 of the *Municipal Conflict of Interest Act*), does not authorize the City to indemnify for legal costs relating to the defence of conflict of interest applications except where the judge determines that there is no contravention, or that the contravention was through inadvertence or by reason of an error in judgment. Thus, the City's draft Indemnification Bylaw applies to such proceedings only to the extent that such expenses or other sums related to the legal proceeding exceeds the coverage provided by the Corporation's insurance.

Relationship to Vaughan Vision 2020/Strategic Plan

This report is consistent with the priorities previously set by Council: supporting employees who may be named in lawsuits for actions taken in good faith in the course of regular duties is illustrative of the City's desire to value and encourage a highly motivated workforce, as well as its interest in attracting, retaining and promoting skilled staff.

Regional Implications

There are no regional implications associated with this Report.

Conclusion

Indemnification under an Indemnification By-law would take place only in respect of matters not covered by the City's insurance policies, for costs or losses arising from acts done or omissions made in good faith in the performance of official or employment duties. The proposed By-law would apply to present and former employees and members of Council, in respect of proceedings arising on or after the By-law is adopted.

Attachments

Attached as Attachment #1 is a copy of the draft Indemnification By-law, substantially in the form to be presented to Council for adoption on April 5, 2011.

Report prepared by:

Nancy Salerno
Solicitor

Respectfully submitted,

Janice Atwood-Petkovski
Commissioner of Legal & Administrative Services and
City Solicitor

THE CITY OF VAUGHAN

BY-LAW

BY-LAW NUMBER -2011

A By-law to provide for the indemnity and defence of members of council and employees of the Corporation against loss or liability incurred while acting on behalf of the Municipality.

WHEREAS pursuant to subsection 279(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, municipalities may pass by-laws for, among other things, the indemnification and protection of any members of Council or any of the employees or former members of Council or employees against risks, liability or losses, including the payment of any damages or costs awarded against them as a result of any action or other proceeding arising out of acts or omissions done or made by them in their capacity as members of Council or employees, including while acting in the performance of any statutory duty imposed by any general or special Act, the payment of any sum required in connection with the settlement of such action or other proceeding, and for assuming the costs of defending them in such an action or other proceeding.

NOW THEREFORE the Council of The Corporation of the City of Vaughan enacts as follows:

Definitions

1. In this By-law, unless a contrary intention appears,
 - (a) "Corporation" means The Corporation of the City of Vaughan;
 - (b) "City Solicitor" means the City Solicitor of the Corporation of the City of Vaughan, or the person that he or she designates to perform the functions of the City Solicitor under this By-law;
 - (c) "City Manager" means the City Manager of the Corporation of the City of Vaughan, or the person that he or she designates to perform the functions of the City Manager under this By-law;
 - (d) "employee" means any member of Council, including the Mayor, salaried officer or employee, in the employ of the Corporation or any former member of Council, salaried officer or employee;
 - (e) "legal proceeding" means
 - (i) a civil or administrative action;
 - (ii) a proceeding wherein a person is charged with an offence under the *Criminal Code*, R.S.C. 1985, c. C. 46 or the *Highway Traffic Act*, R.S.O. 1990, s. H.8, where the person is subsequently acquitted of the offence or the charges are withdrawn; or,
 - (iii) a complaint to a professional association.
- but excludes
- (i) any proceeding commenced by the Corporation; or,
 - (ii) any proceeding in which the Corporation is a party adverse in interest; or,
 - (iii) any proceeding where the City's and the employee's interests conflict.

Indemnification of Employees

2. Subject to the provisions of this By-law, the Corporation shall indemnify an employee of the Corporation and his or her heirs and legal representatives in the manner and to the extent provided for in this By-law, in respect of any legal proceeding arising out of acts or omissions done or made by the employee in his or her capacity as an employee of the Corporation, including acts or omissions done or made by such employee while acting in the performance of any statutory duty imposed by any general or special Act.
3. If an employee seeks indemnification pursuant to this By-law, he or she shall make a written request,
 - (a) to the City Manager, with a copy to the City Solicitor; or,
 - (b) where the employee requesting indemnification is the City Manager, to the City Solicitor, who shall perform the functions of the City Manager that are outlined in this By-law; or,
 - (c) where both the City Manager and the City Solicitor are named as parties in the legal proceeding giving rise to the request, to Council, which shall perform the functions of the City Manager that are provided for in this By-law.
4. An employee shall qualify for indemnification pursuant to this By-law if the City Manager, in consultation with the City Solicitor or his or designate, determines that the act or omission giving rise to the legal proceeding was done or made in good faith, and based on the reasonable belief that such act or omission was lawful and in the best interests of the Corporation.
5. The City Manager shall provide a written response to a request made under section 3, within 10 calendar days of delivery of the request.

Approval Of Lawyer

6. (1) A written request referred to in Section 3 may include a request for approval of a lawyer chosen by the employee, or may request that the City Solicitor suggest three lawyers as indicated in subsection (2).
 - (2) Where a request for indemnification also seeks approval of a lawyer chosen by the employee, the response referred to in section 5 shall also:
 - (a) approve the request to retain the lawyer chosen by the employee; or,
 - (b) deny the request and suggest three lawyers of the Corporation's choice who could represent the employee in the legal proceeding at issue.
 - (3) Where the City Solicitor has suggested three lawyers, the employee shall select from the list and shall notify the City Manager of the selection, within 5 calendar days of receipt.
 - (4) This section does not apply to legal proceedings as defined in section 1(e)(ii).

Persons Served With Process

7. Where an employee is served with any document which initiates any proceeding that arises out of acts or omissions done or made by an employee of the Corporation in his or her capacity as an employee, including a legal proceeding covered by this By-law, or any other proceeding for which indemnification may be sought under this By-law, then he or she shall,
 - (a) forthwith deliver the process or a copy thereof to the Commissioner of the department for which the employee works or to a person designated by the department head to receive such process, who in turn shall deliver a copy thereof to the City Manager and the City Solicitor; or
 - (b) if the employee is a Commissioner of a department, forthwith deliver the process or a copy thereof to the City Manager and the City Solicitor.

Manner and Extent of Indemnification

8. Where an employee qualifies for indemnification under this By-law, the Corporation shall:
 - (a) pay the costs of defending such employee in the legal proceeding; and/or,
 - (b) pay any damages or costs, including any monetary penalty, or award against such employee as a result of a legal proceeding; and/or,
 - (c) pay, either by direct payment or by reimbursement, any expenses reasonably incurred by the employee as a result of a legal proceeding; and/or,
 - (d) pay any sum required in connection with the settlement of a legal proceeding, provided that as a condition precedent the City approves the terms of the settlement;to the extent that such costs, damages, expenses, monetary penalty, other award or other sums related to the legal proceeding are not assumed, paid or reimbursed under any provision of the Corporation's insurance for the benefit and protection of such person against any liability incurred by him or her.

Limits of Indemnification

9. (1) The City Manager, acting reasonably and in consultation with the City Solicitor, may request or impose one or all of the following:
 - (a) Periodic Budgets for anticipated legal costs, which may be revised; and / or
 - (b) Status Updates in respect of the progress of the proceedings; and / or
 - (c) A limit on quantum of indemnification.
- (2) The City shall have the right to reasonably limit the amount which it shall pay an employee for legal costs, and may require that any account for legal costs for which reimbursement is sought be assessed by Court Assessment Officer prior to payment by the City. The City Manager shall be provided with copies of the statements of account on a monthly basis, which shall outline all fees and disbursements, and shall be provided with information relating to these accounts, as may be requested from time to time.

Failure To Comply With By-law / Exclusions

10. If an employee who has been approved to receive indemnification fails or refuses to comply with any of the provisions of this By-law, or in the event of one or more of the following:
- (a) the employee or his or her lawyer takes a step which is unnecessary, or otherwise prejudicial to the conduct of the proceeding, as determined by the City Solicitor; or
 - (b) the quantum of indemnification exceeds the Budget referred to in section 9; or
 - (c) the maximum amount of indemnification has been paid, or
 - (d) the employee commences a counterclaim, crossclaim, third party claim or other proceeding related to the legal proceeding for which reimbursement is sought, without first obtaining prior approval from the City Manager,
- then the Corporation shall not be liable to assume or pay any of the costs, damages, expenses, monetary penalty or other sums mentioned in Section 8 of this By-law.

Appeal

11. Where a person seeks to appeal a judgment or decision in a proceeding covered by this By-law, the City shall have the sole discretion to determine whether the costs of the appeal will be covered by this By-law. If an individual pursues an appeal without representation by the City and is successful in that appeal, the City shall have sole discretion to determine whether the employee shall be indemnified for his or her legal costs.

Executive Acts Authorized

12. The Mayor and the proper officers of the Corporation are hereby authorized and directed to do all the things necessary, including executing any necessary documents under the seal of the Corporation, to give effect to this By-law according to its true intent and meaning.

Commencement

13. This By-law comes into force on the day it is passed.

Enacted by City of Vaughan Council this day of , 2011.

Hon. Maurizio Bevilacqua, Mayor

Jeffrey A. Abrams, City Clerk