

**Memorandum
(Draft)**

To: Mayor Andy Letham, City Councillors
From: Joan Abernethy
Date:
Re: Council Policies CP2018-017 and CP2018-018 and
in comparison to Policy No. 028 CAO 002

1. CP 2018-017 and CP2018-018, passed by council on 11 December 2018, replace Council Policy 028 CAO 002. I have attached those three policies to this memo.

2. The sections of the above policies this communication will address are:

- a) Sections 7 of 028 CAO 002,
- b) Section 6 of CP2018-017, and
- c) the unnumbered section on page 7 of CP 2018-018 entitled “Compliance/Contravention”.

A. CP2018-018

3. CP2018-018 is a Council Policy entitled “Code of Conduct and Ethics - Members of Committees, Boards & Task Forces”.

4. In its first paragraph, CP2018-018 states it is binding on Committee, Board and Task Force Members: “This Code of Conduct and Ethics is established to provide a shared and common foundation and expectations for acceptable behavior, conduct and actions of appointees to City of Kawartha Lakes’ Committees, Boards and Task Forces.”

5. CP2018-018 details principles and policy directives that Committee, Board and Task Force Members must adhere to.

6. On page 7 of CP2018-018, under “Compliance/Contravention”, the policy gives the mayor sole power to hear and investigate complaints against Committee, Board and Task Force members: “The mayor shall determine the form an investigation will take” and “The mayor may consult with the CAO, Committee, Board or Task Force Chair and/or the liaison Department.”

7. CP2018-018 neither requires nor allows consultation with council, nor does it require or allow council to be informed of complaints the Mayor has received of alleged Committee/Board/Task Force Member policy contraventions or of initiated investigations, until after the Mayor has investigated the complaint of alleged contravention and determined a preferred recommendation.

8. Also under “Compliance/Contravention” on page 7, CP2018-018 further states: “The mayor may disclose the alleged contravention with the accused Member and outline the form of

investigation.” Whether the accused Member is notified of his/her/their alleged contravention and of whether s/he/they is/are under investigation is arbitrary and is entirely up to the Mayor.

9. Only after the Mayor hears and investigates a complaint, possibly in secret, does the policy require council be informed. On page 7 under “Compliance/Contravention”, CP2018-018 states: “At the completion of the investigation, the Mayor will provide recommendations to Council to verify any contraventions, and appropriate actions (including immediate termination of appointment).”

10. For Council to responsibly “verify any contraventions” the accused Member may have made of City policy would require

- a) adequate and timely notice and details of the complaint, *before any investigation is undertaken and final recommendations made by the Mayor*,
- b) a majority Council vote on a motion to challenge the Mayor’s investigation and recommendation, including immediate termination, and
- c) majority Council support to expend the resources required to complete an independent investigation.

11. CP2018-018 gives the power to hear, determine how to investigate and to investigate complaints against Committee/Board/Task Force members exclusively to the Mayor, allows the Mayor to hear and investigate complaints entirely in secret, and severely limits the power of constituent-elected Councillors to responsibly “verify” allegations made in complaints against Committee/Board/Task Force Members.

12. The Compliance/Contravention section of CP2018-018 contradicts the stated goal of the policy itself and of related policies to conduct business in an open and transparent manner. It encourages duplicity and disrespect between staff, members of the public, Council members and Committee/Board/Task Force members. There are very few more duplicitous or disrespectful acts than complaining to an authority to form a limited and secret conspiracy to effect the sudden termination of a Committee/Board/Task Force Member’s appointment that provides that Member no recourse to understand, to answer or to repair. The Romance-period poet, William Blake wrote a famous children’s fable about exactly such duplicity entitled “A Poison Tree”. The moral of that simple fable is that those who want to establish friendly relations openly discuss their differences whereas those whose interests are relationship enmity plot in secret to fell their opponents. CP2018-018 encourages the cultivation of poison trees, not the respect, openness and transparency the City of Kawartha Lakes claims as its relationship standard.

028 CAO 002

13. Policy 028 CAO 002 protected the natural justice principle known as “Audi Alteram Partem” - “listen to the other side” or “let the other side be heard as well”. It is fundamental to a free, fair and democratic society that no accused person be condemned without first being heard.

14. Section 7 of Policy 028 CAO 002 required the following:

- a) that a recommendation to Council to terminate a Member for reasons based on an accusation of alleged policy contraventions other than uncontested vacation of his/her/their seat not be considered unless the accused Member has been provided notice of the recommendation,
- b) that waiving of the required notice is prohibited,
- c) that the notice state both the recommendation to Council and the reasons advanced in support of the recommendation,
- d) that the notice of the recommendation and supporting documentation be sent by the Clerk directly to the accused Member by registered mail, at least seven (7) days prior to the meeting at which the complaint is to be presented,
- e) that the accused Member be apprised of his/her/their entitlement to forward a written response to the Clerk within seven (7) days of receipt of the notice and supporting documents,
- f) that, after the period for the accused Member to reply has expired, the Clerk provide Council with details of the notice to terminate, supporting documentation, and any written response received and place it on the closed session agenda of the next scheduled regular Council meeting or on the agenda of any Special Meeting called to consider the notice, and
- g) that the accused Member be given the opportunity to make a presentation to Council prior to a vote being taken on the recommendation.

CP2018-017

15. CP2018-017, at section 6, omits any right of an accused Member to receive notification of a recommendation to terminate his/her/their appointment, to receive and review details of the complaint(s) and alleged policy contraventions, to answer the allegations, to present evidence in support of a defense to council and to produce witnesses in support of a defense to council.

16. CP2018-017 grants to any member of a Committee, Board, or Task Force, any staff, any Council member, Council itself, and any member of the public the right to identify any alleged non-compliance with the Code of Conduct and Ethics - Members of Committees, Boards & Task Forces, Policy CP2018-018.

17. CP2018-017 requires the complainant make his/her/their complaint directly to the Mayor and, as detailed above, CP2018-018 gives the Mayor the power to hear and investigate the complaint entirely in secret before recommending to Council how to respond.

18. The only reference to the complaints process is at Section 6.3 of CP2018-017 where it refers to Policy CP2018-018. It is up to anyone who wants to understand the complaints process to find it on page 7 of CP2018-018 under "Compliance/Contravention".

19. I submit that the natural justice principle that no one should be condemned unheard (*Audi Alteram Partem*) or "listen to the other side"/"let the other side be heard as well" is fundamental

to a free, fair and democratic society. No person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

20. The repeal of 028 CAO 002 and its replacement by CP2018-017 and CP2018-18 gives the Mayor alone the power to hear and investigate complaints against Committee, Board or Task Force members, to determine the scope of any investigation deemed necessary, to do so entirely in secret, then to recommend to Council immediate termination based on the secret investigation.

21. The repeal of 028 CAO 002 and its replacement by CP2018-017 and CP2018-018 empowers council to condemn an accused Member based on hearing only the recommendations of the mayor that are based on the mayor's investigation of anyone's allegations - an estranged spouse, a political opponent, a business competitor - without the accused person being provided notice or details of the accusation, and without giving him/her/them an opportunity to speak to the allegations, to submit evidence to council and/or to produce witnesses to speak to council.

22. I think Policies CP2018-017 and CP2018-018, as written, are draconian and that they may set the City up for allegations of Charter violations and significant claims for civil damages.

23. Therefore, I recommend the following amendments to CP2018-017 and CP2018-018:

24. CP2018-017

6.1 Council may remove from a Committee/Board/Task Force any member who vacates his/her/their seat by missing three consecutive formal business meetings without being excused by the Committee/Board/Task Force, and who does not contest their vacation.

6.2 Council may remove from a Committee/Board/Task Force any member who it is determined by Council has violated the Code of Conduct and Ethics - Members of Committees, Boards & Task Forces, Policy CP2018-018.

6.3 Anyone (including members of the public, City staff, Committee/Board/Task Force members, Council members) may identify any alleged non-compliance with the Code of Conduct and Ethics - Members of Committees, Boards & Task Forces and may notify Council of their allegations, in writing, via a formal complaint to the City Clerk.

6.4 Within seven (7) days of receiving a formal written complaint about a Committee, Board, Task Force member, the City Clerk shall notify the accused member of the details of the complaint, shall provide the accused member with any supporting documentation, and shall provide the accused member details of the complaints process.

6.5 Waiving by anyone, including the Mayor and Council, of notice that the City Clerk has received a formal complaint and the provision of details, documentation and complaints process information to the accused member is strictly prohibited.

6.6 The complaints process shall consist of the following:

6.6.1 The complainant files a formal written complaint with the Clerk's office, along with any supporting documentation.

6.6.2 Within seven (7) days of receipt of a formal complaint, the Clerk shall provide the accused member, by secured mail, with notification that a formal complaint has been made, shall provide the accused member with details of the complaint and any supporting documentation, and shall provide the accused member with information about the complaints process.

6.6.3 Within seven (7) days of receipt of a formal complaint, the Clerk shall also apprise the accused member of his/her/their right to reply, in writing, to the allegations made in the formal complaint, including the provision of any supporting documentation and any list of witnesses or materials provided by witnesses or references, within seven (7) days of receipt of the Clerk's notice, including details and supporting documentation of a formal complaint.

6.6.4 Once the period for the accused member to reply has expired, the Clerk shall place the matter on the agenda of the next regularly scheduled Council Meeting agenda and shall provide all Members of Council with copies of the formal written complaint, the supporting documentation, and any materials provided by the accused member in response to the complaint.

6.6.5 Council shall review the materials and discuss them in closed session, as allowed under the *Municipal Act*, and may recommend an independent investigation of the complaint and the form such an investigation will take.

6.6.6 The Clerk shall issue an invitation to the complainant, to the accused member, and to any other person (including witnesses) the Clerk deems appropriate to appear before Council at a meeting, either closed or special, to present to Council their case and to respond to any questions Council has about the complaint, the accused member's reply, supporting documentation, and/or witness testimony.

6.6.7 In the event the complaint concerns allegations of threat or risk, the Clerk shall invite security resources to attend the meeting.

6.6.8 Council shall deliberate on the evidence, testimony and submissions in closed session, as allowed under the *Municipal Act*, and make a recommendation for remedial action.

6.6.9 At the next open meeting of Council, the recommendation shall be voted on by Council and shall be decided by a simple majority.

25. CP2018-018

Delete the section on page 7 entitled "Compliance/Contravention".