

# The Corporation of the City of Markham

## By-law 2019-XX

A By-law to provide for the indemnification and defence of employees and Members of Council against loss or liability in certain circumstances arising out of acts or omissions done while acting on behalf of the Corporation.

WHEREAS section 279 of the *Municipal Act, 2001*, SO 2001, c 25, as amended, provides that a municipality may, subject to certain limitations, act as an insurer and protect present and former members of council, board members, employees and officers from risks that may involve pecuniary loss or liability on the part of those individuals;

And whereas Council has deemed it advisable to enact an indemnification by-law for this purpose.

Therefore be it enacted by the Council of The Corporation of the City of Markham as follows:

### 1. Definitions:

In this By-law:

"Action or Proceeding" includes all civil actions, provincial offences, administrative proceedings including but not limited to tribunals such as the Human Rights Tribunal, complaints to a professional association and third party proceedings, except any proceeding brought under the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched., the *Highway Traffic Act*, R.S.O. 1990, c.H.8, as amended, the *Criminal Code*, R.S.C. 1985, c.C.46, as amended (**the "Criminal Code"**), or municipal parking and traffic by-laws;

"Chief Administrative Officer" means the Chief Administrative Officer of the City of Markham or his/her designate;

"City" means The Corporation of the City of Markham; and

"City Clerk" means the City Clerk of the City of Markham or his/her designate;

"City Solicitor" means the City Solicitor of the City of Markham or his/her designate;

"Corporation" means The Corporation of the City of Markham;

"Council" means the Council of the City;

"Covered Action or Proceeding" means an Action or Proceeding arising out of alleged acts or omissions done or made by the Employee or Member acting in their capacity as an Employee, Member or officer of the City, including acts or omissions done or made by the Employee or Member in the performance of a statutory duty imposed by any general or special act and duties arising out of an appointment to a Statutory Board or Committee and having been determined by the Integrity Commissioner as entitled to indemnification;

"Department Head" means the Manager, Director, Commissioner or Chief Administrative Officer directly responsible for overseeing the work of the

Employee. The City Clerk is the "Department Head" for Members of Council and the Chief Administrative Officer;

"Director of Human Resources" means the Director of Human Resources of the City of Markham or his/her designate;

"Employee" means any salaried officer or any other person employed by the Corporation and any former employee or salaried officer and includes appointees and volunteers acting under the direction of a person in the employ of the City;

"Indemnified Person" means an Employee or a Member approved for indemnification under this By-law; (CMC: or use Eligible Person?)

"Integrity Commissioner" means any person or corporation appointed by the City of Markham to perform the functions assigned by Section 223.3 of the *Municipal Act, 2001*, S.O. 2001, c. 25 as amended, or by the Code of Conduct for Council, Local Boards, and Adjudicative Boards, as amended from time to time, or any person acting under the instructions of the Integrity Commissioner.

"Member" means a Member of the Council of the City of Markham and any former Member of Council;

"Statutory Board or Statutory Committee" means any board or committee of Council established or required by any Act of the Province of Ontario or whose members are appointed by City By-law;

## **2. Former Employees, Officers and Members**

Subject to subsection 3.4(x), this By-law also applies to any person who was an Employee or Member at the time the cause of Action or other Proceeding arose but who, prior to judgment or other settlement of the Action or Proceeding, has ceased to be an Employee or Member.

## **3. Indemnification of Employees and Members:**

3.1 Subject to the provisions of this By-law, the City shall, in respect of any Covered Action or Proceeding against an Employee or Member or in which the Employee or Member is a party and in which their conduct is called into question, indemnify the Employee or Member and his or her heirs and legal representatives in the manner and to the extent provided for in this By-law.

3.2 Where an Employee or Member becomes aware that an Action or Proceeding has been threatened against them, for which they may seek indemnification, the Employee or Member shall provide immediate and confidential written notice of the Action or Proceeding to their Department Head.

3.3 Where an Employee or Member is served with any document which commences an Action or Proceeding for which they seek indemnification, the Employee or Member shall provide the document or a copy thereof and a written request for indemnification, immediately and confidentially to the Integrity Commissioner, through the City Clerk. A copy of the confidential documents submitted to the Integrity Commissioner shall also be provided to the Employee's or Member's Department Head.

3.4 At any time prior to the conclusion of **an Action or Proceeding or any other matter for which indemnification is requested**, the Integrity Commissioner shall, exercising its own discretion, determine whether an Employee or Member is entitled to indemnification pursuant to this By-law. The Integrity Commissioner may authorize indemnity where it is determined, in the Integrity Commissioner's sole discretion, acting reasonably, that:

- a) the Employee or Member acted honestly and in good faith with a view to the best interests of the City and with no improper,

immoral or objectionable purpose; and

- b) the act or omission was done while acting on behalf of the Corporation or done or made by them in good faith in their capacity as Employees or Members; and
- c) in the case of a criminal, quasi-criminal or administrative action or proceeding that is enforced by a monetary penalty, the Employee or Member had reasonable grounds for believing that his/her conduct was lawful; and
- d) the interests of the City and the Employee or Member are not adverse to each other; and
- e) the actions of the Employee were not of a nature as to provide grounds for immediate dismissal; and
- f) indemnification is not prohibited by statute or court order.

3.5 The Integrity Commissioner shall provide a written decision in respect of a request made under Subsection 3.3, within twenty (20) business days of receipt of the request. Notwithstanding Subsections 7.1 and 7.4, the decision of the Integrity Commissioner shall be final.

3.6 Where an Employee or Member is the subject of an investigation in a matter which may result in charges being laid against the Employee or Member under **the Criminal Code**, a provincial statute or regulation, or municipal by-law, **in relation to** any act done or any failure to act or allegations of same in the attempted performance or performance **in good faith** of his/her duties, the Employee or Member may be entitled to receive payment from the City for a retainer and/or interim payment of legal costs, up to \$15,000.00, to obtain legal representation during the investigation, at the discretion of the **Integrity Commissioner**.

3.7 **Notwithstanding any other provision of this By-law, where an Employee or Member is charged with an offence under the *Criminal Code*, as amended, a provincial statute or regulation, or municipal by-law, in relation to any act done or any failure to act or allegations of same in the attempted performance or performance in good faith of his/her duties, and where such charges have been withdrawn or where an Employee or Member is subsequently acquitted, the Employee or Member may be indemnified for the necessary and reasonable legal costs incurred in the defence of such charges or allegations.**

3.8 As a condition precedent to the City making any payment in respect of the costs of or representation of any Employee or Member pursuant to this By-law, the Employee or Member must agree in writing to comply with the provisions of this by-law and such other terms and conditions as are determined to be appropriate by the City Solicitor, and shall agree to repay the City on demand, in the event that the Employee or Member is convicted of an offence **under the Criminal Code, a provincial statute or regulation, or municipal by-law**, in respect of the Covered Action or Proceeding, all sums paid by the City in respect of the costs of defence or representation as to such charges, including the retainer referred to in Subsection 3.6 and must execute an indemnity agreement or other documentation required by the City to secure such repayment to the City. No retainer shall be **paid to or** on behalf of an Indemnified Person and/or no money shall be paid by the City with respect to any Action or Proceeding until an indemnity agreement has been executed. The Chief Administrative Officer and the Clerk are hereby authorized to execute such indemnity agreements on behalf of the City upon recommendation of the City Solicitor.

#### 4. Excluded Actions and Proceedings

4.1 This By-law does not apply to an Action or Proceeding:

- a) which relates to a grievance filed under the provisions of a collective agreement or any action taken by the City with respect to an Employee;
- b) under the Council Code of Conduct where the Member has been found by the Integrity Commissioner to have been in breach of any provision of the Council Code of Conduct;
- c) where the conduct or incident alleged in the Action or Proceeding also gives rise to a complaint or request for inquiry or investigation under the Council Code of Conduct and where the disposition of that complaint remains outstanding.
- d) where the Employee or Member acted in bad faith;
- e) where the Employee has been terminated as a result of the actions or omissions that gave rise to the Action or Proceeding;
- f) in any proceeding against a Member or Employee prosecuted by or on behalf of the City or in which the City was the complainant;
- g) where the Employee or Member was performing his or her duties otherwise than in good faith and honestly or with malice;
- h) where, in committing an alleged wrong, the Employee or Member was clearly acting on his or her own behalf and not that of the City.
- i) where adverse parties in civil proceedings would each be entitled to funding for defence costs under this by-law, it being the policy of the City that it shall not finance both sides of an Action or Proceeding and the neither party should receive indemnification in such circumstances;
- j) In third party claims or cross claims brought against Employees or Members where such third party claims or cross claims are for relief over against such Employees or Members in a proceeding commenced by the City;
- k) the subject actions or omissions were not within the Employee or Member's good faith performance of his or her duties.

4.2 Where the Integrity Commissioner has determined that an Employee or Member is not entitled to indemnification, the Employee or Member shall be responsible for all costs, damages, penalties and legal fees in connection with representation in the Action or Proceeding.

**5. Manner and Extent of Indemnification:**

Where an Employee or Member is entitled to indemnification under this By-law, in a Covered Action or Proceeding, the City shall:

- a) pay the costs of defending such Employee or Member; and
- b) pay any award of damages or costs, including any monetary penalty or award against such Employee or Member; and
- c) pay, either by direct payment or reimbursement, any expenses reasonably incurred by the Employee or Member; and
- d) pay any sum required in connection with the settlement of a Covered Action or Proceeding, provided that, as a condition

precedent, the City Solicitor and the Chief Administrative Officer have approved the terms of settlement.

to the extent that such costs, damages, expenses, monetary penalty, other award or other sums related to the Covered Action or Proceeding are not assumed, paid or reimbursed under any provision of the City's insurance program for the benefit and protection of such person against any liability incurred by him or her.

## **6. City's Right to Select Legal Counsel:**

- 6.1 Subject to Section 12, the City shall have the right to select and retain legal counsel to represent an Indemnified Person and the City Solicitor shall advise the Employee or Member of the legal counsel selected to represent him/her.
- 6.2 An Indemnified Person may retain their own legal counsel for their defence or representation in a Covered Action or Proceeding in lieu of the legal counsel provided by the City, provided that the City shall not be obliged to pay for the services of the Indemnified Person's legal counsel at a rate in excess of the rates the City pays for legal counsel on insurable claims. If the Indemnified Person's choice of legal counsel charges in excess of the rates the City pays for insurable claims, the Indemnified Person shall be responsible for the difference in the legal costs.
- 6.3 Where an Indemnified Person seeks approval of legal counsel under Subsection 6.2, the Indemnified Person shall advise the City Solicitor through the written request in Subsection 3.3, and shall provide sufficient information to support the City Solicitor's decision, acting reasonably, to approve the Indemnified Person's choice of legal counsel, which may include the hourly rate charged by the legal counsel, as well as the experience of such legal counsel in dealing with similar claims.

## **7. Limits to Indemnification:**

- 7.1 The Integrity Commissioner shall have the authority at any time during or after the commencement of the Action or Proceeding, upon the request of the Employee or Member, to review its decision to not provide indemnity and may provide indemnity where additional facts become available, that demonstrate that the Employee or Member is entitled to indemnification pursuant to this By-law.
- 7.2 The City Solicitor, acting reasonably, may require one or both of the following:
- a) Periodic Budgets for anticipated legal costs, which may be revised from time to time as circumstances require; and
  - b) Status Updates in respect of the progress of the proceedings;
  - c) Detailed invoices including details of docketed time; and
  - d) Work plans and any other documents deemed appropriate by the City Solicitor.
- 7.3 The City Solicitor 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.
- 7.4 Notwithstanding any other provision of this By-law, the Council may, by resolution of Council, choose not to indemnify an Indemnified Person, or may cease to indemnify an Indemnified Person if it has commenced to do so, if:
- a) the Indemnified Person breaches any provision of this By-law or any agreement for indemnification or reimbursement entered into by the Indemnified Person, at any time;

- b) the Indemnified Person or their legal counsel took a step which was unnecessary or otherwise prejudicial to the conduct of the Covered Action or Proceeding;
- c) the Indemnified Person initiated a counterclaim, cross claim, third party claim, appeal, or other proceeding related to the Covered Action or Proceeding for which the indemnity or reimbursement was sought, without first obtaining approval from the City Solicitor; or
- d) the Covered Action or Proceeding arises out of the Indemnified Person's bad faith acts or omissions, or their intentional or malicious wrongful conduct.

**8. Third Party Actions and Counterclaims:**

An Indemnified Person may not commence a third party action or Counterclaim unless such Action or Counterclaim is part of the proper defence of the Indemnified Person in a Covered Action or Proceeding under this By-law, and only if such Action or Counterclaim has been approved by the City Solicitor.

**9. Duty to Cooperate**

9.1 An Indemnified Person shall co-operate fully with the City in the management of any Covered Action or Proceeding including the requirements of section 7.2.

9.2 An Indemnified Person shall cooperate fully with any legal counsel retained by the City to defend any Covered Action or Proceeding and shall make available to such legal counsel all information and documentation relevant to matter as are within his or her knowledge, possession or control, and shall attend at all proceedings when requested to do so by such legal counsel.

**10. Failure to Comply With By-law**

If an Indemnified Person fails or refuses to comply with the provisions of this By-law, or any agreement entered into by the Indemnified Person for indemnification or reimbursement, the Council shall have authority to determine whether to assume or pay or continue to pay any of the costs, damages, expenses or sums mentioned in Sections 5 or 6 of this By-law. Prior to the Council making a decision to terminate or rescind indemnity, the Indemnified Person shall be provided with the opportunity to make submissions to the Council in support of the Indemnified Person's indemnification.

**11. Appeal**

11.1 Where a person seeks to appeal a judgment or decision in a Covered Action or Proceeding, the Indemnified Person shall first consult with the Integrity Commissioner, and the Integrity Commissioner shall have sole discretion to determine indemnification eligibility for the appeal. If an Indemnified Person pursues an appeal, or participates as a party in an appeal, without first seeking indemnification approval from the Integrity Commissioner and is successful in that appeal, the Integrity Commissioner shall have sole discretion to determine whether the Indemnified Person shall be indemnified for his or her legal costs in the appeal.

11.2 Where the Integrity Commissioner determines that it is not in the City's interest to commence an appeal and the Indemnified Person elects to proceed with an appeal, all costs of the appeal, including any awards of damages or costs, shall be at his or her own expense.

**12. Conflict**

12.1 The City maintains various policies of insurance for both the City and its Employees and Members. The provisions of this By-law are intended to supplement the protection provided by such policies of insurance. In the event of conflict between this By-law and the terms of any such policy of insurance in place from time to time, the terms of such policy or policies of insurance shall prevail.

**13. Reimbursement**

Where the Employee or Member is to be indemnified by the City, the amount of the indemnity shall be reduced by the amount of any costs recovered by the Employee or Member and where the indemnity has been paid, any costs recovered by the Employee or Member shall be paid or assigned to the City up to the amount of the indemnity.

**14. Severability**

If any sections, section or part of a section of this By-law are found by any Court to be illegal or beyond the power of Council to enact, such sections or section or part of a section shall be deemed to be severable and all other sections or parts of sections of this By-law shall be deemed to separate and independent and shall continue in full force and effect.

Enacted and passed this            day of            2019.

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Mayor Frank Scarpitti

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Clerk Kimberley Kitteringham

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