

To: City Council

From: Samuel Yoon, City Solicitor,
Corporate and Finance Services Department

Report Number: CNCL-24-42

Date of Report: April 24, 2024

Date of Meeting: April 29, 2024

Subject: Proposed New Indemnification By-law for Members of Council
and Employees of the City of Oshawa

Ward: All Wards

File: 03-05

1.0 Purpose

The purpose of this report is to recommend that Council repeal the City's current Indemnification By-law 127-2015, and replace with an updated, modernized by-law that will continue to provide for the indemnification and defence of both Members of Council ("Members") and City of Oshawa Employees ("Employees") against loss or liability arising out of acts or omissions that occur while acting on behalf of the City of Oshawa ("City").

Attachment 1 is a copy of the City's current Indemnification By-law 127-2015.

Attachment 2 is a copy of the proposed new Indemnification By-law.

2.0 Recommendation

It is recommended to City Council:

That in accordance with Report CNCL-24-42 dated April 24, 2024 concerning a proposed new indemnification by-law:

1. That Council pass the new Indemnification By-law as set out in Attachment 2 to this Report which will continue to provide for the indemnification and defence of Members of Council and City of Oshawa Employees against actions or proceedings that name them personally, and,
2. That the City Clerk be authorized, if necessary, to enter into an amending agreement with Principles Integrity for Integrity Commissioner Services in accordance with the new Indemnification By-law and in a form and content to the satisfaction of the City Clerk and City Solicitor; and,

3. That the Indemnification By-law be in a form and content acceptable to the Chief Administrative Officer and the City Solicitor; and,
4. That Indemnification By-law 127-2015 be repealed.

3.0 Executive Summary

Various legislative changes, as well as the City's corporate reorganization and the lack of references to both the Council Code of Conduct 51-2015, as amended ("Council Code of Conduct") and the Council-appointed Integrity Commissioner, have necessitated an update to the City's current Indemnification By-law 127-2015. While Members of Council and Employees can avail themselves of some degree of statutory immunity from legal claims and, in some circumstances, are protected by the City's insurance policies, they continue to remain at financial risk in some circumstances, even if completely successful in defending against such claims. There is a continued municipal interest in indemnifying both Members of Council and Employees in certain circumstances, subject to conditions.

4.0 Input From Other Sources

- Chief Administrative Officer
- Commissioner, Corporate and Finance Services
- Commissioner, Community and Operations Services
- Commissioner, Safety and Facilities Services
- Commissioner, Economic and Development Services
- Director, Legislative Services/City Clerk
- Durham Municipal Insurance Pool

5.0 Analysis

5.1 Legislation

The Municipal Act, 2001, S.O. 2001, c. 25 (the "Municipal Act, 2001") provides several immunity provisions that are designed to protect the municipality, members of Council, Officers and Employees from personal liability against legal actions and proceedings in the following circumstances:

- (1) Neglect from "any act done in good faith" (Section 448);
- (2) Nuisance from water or sewage works (Section 449);
- (3) Negligence for policy decisions in the performance of their public duty (Section 450);
- (4) Damages for highway and bridges (Section 45); and,
- (5) Sale of land for tax arrears (Section 386).

Section 31 of the Building Code Act, 1992, S.O. 1992, c. 23 ("Building Code Act") makes reference to immunity provisions that specifically protect municipally-appointed Chief

Building Officials and provides protection from legal liability for both members of Council and Employees within the scope of those provisions, so long as the acts are done in “good faith” and in “performance of their duty.”

Section 75 of the Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4 (“F.P.P.A.”) also makes reference to immunity provisions that provide indemnification and protection from legal liability for firefighters, fire coordinators, fire safety officers, so long as the acts are in “good faith”.

Section 448 of the Municipal Act, 2001 provides the following scope of immunity:

Immunity

448(1) No proceeding for damages or otherwise shall be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority.

Liability for Torts

(2) Subsection (1) does not relieve a municipality of liability to which it would otherwise be subject in respect of a tort committed by a member of council or an officer, employee or agent of the municipality or a person acting under the instructions of the officer, employee or agent.

Section 448(2) makes it clear that members of Council, Employees and volunteers/agents would not be protected from specific actions, such as those framed within a tort (i.e. a civil legal action involving a wrongful act that results in injury to another), or misfeasance (i.e. a knowingly/deliberate unlawful act). Former and retired Employees and Members of Council are also not specifically addressed in these statutory provisions.

The Municipal Act, 2001 does not require a municipality to undertake a defence or pay legal costs on behalf of a Member or Employee, even in circumstances where the municipality is also named as a defendant. In addition, the Municipal Act, 2001 does not require the municipality to pay any costs associated with any legal action. While legal costs may be awarded to a successful defendant and ordered to be paid by the plaintiff, those costs rarely, if ever, fully indemnify a successful defendant for all of their costs. Consequently, a Member or Employee undertakes the defence at their own expense.

5.2 Municipal Indemnification By-laws

Section 279 of the Municipal Act, 2001 permits a municipality to act as an insurer for current/former Employees and Members of Council against any risk that may involve pecuniary loss or liability, subject to certain limitations. One such limitation is Section 14 of the Municipal Conflict of Interest Act, R.S.O. 1990, c. M.50 (the “M.C.I.A.”), which provides that a municipal council may only reimburse a Member’s legal expenses if that Member has been found not to have contravened subsections 5, 5.1, and 5.2 of the M.C.I.A.

In addition, Sections 11(2) and 282(2) of the Municipal Act, 2001 authorize municipal councils to pass indemnification by-laws or adopt policies to defend or reimburse Members and Employees for legal expenses they may incur while acting “in their capacity as members of council” or in the course of their public duties, respectively.

5.3 Insurance

The City’s insurance policies provide coverage to Members, Employees, officers and volunteers for claims for “bodily injury”, “personal injury”, and property damage caused during the policy term, subject to limits of liability, exclusions, conditions and other terms of the policy. The City’s insurance policy defines “personal injury” to mean false arrest, malicious prosecution, wrongful detention, false imprisonment, libel, slander, defamation of character, humiliation, invasion of privacy, wrongful eviction, wrongful entry, invasion of copyright and discrimination (except where insurance is prohibited by law) and such other causes of injury to a person other than “bodily injury”. Where coverage is provided, it includes investigative costs, defence counsel and related costs and any damage award up to the coverage limit. If a deductible is applicable, the insured pays the balance that exceeds the deductible up to the policy limit.

Despite these protections, both Members and Employees may be exposed to the financial risk of legal proceedings even where it may ultimately be determined that they acted in good faith and within the scope of their duty or authority. Further, the City’s insurance policies may only provide protection for a Member or an Employee in certain circumstances, as noted above. The costs of defending a legal proceeding can be significant, even if one is completely successful.

Generally, as an employer, the City is vicariously liable for the actions of its Employees, and may be subject to allegations of liability for the actions of individual Members of Council. As such, there is a common municipal interest in indemnifying Members and Employees to the extent that the City may have some degree of control in legal proceedings that may negatively affect its interests while also providing a level of certainty and protection for individuals facing such legal proceedings arising out of the good faith performance of their duties to the City.

5.4 Indemnification By-law 127-2015

At its meeting of October 29, 2015, Council passed Indemnification By-law 127-2015 (“the By-law”). The By-law delegates authority to the then City Manager (currently, Chief Administrative Officer) to permit indemnification of both Members of Council and Employees subject to certain conditions and limitations, the scope of which includes, but not limited to:

- (1) The City Manager shall review all indemnification requests by an Employee or Member of Council against “Indemnified Claims”;
- (2) Both Members and Employees have a duty to provide to the City Solicitor any document(s) that commences an Action or Proceeding;

- (3) The City Manager has authority or duty to decide whether the City will indemnify the Employee or Member and the extent of such indemnification;
- (4) The City Manager has authority to review, affirm, alter or reverse a decision;
- (5) If approved for indemnification, Employees and Members are required to retain their own legal counsel and to submit all expenses to the City Manager, and where the City Treasurer has authority to pay for “Indemnified Claims”; and
- (6) The Mayor shall perform the City Manager’s duties to the extent of any claims against the City Manager.

The By-law does not, however, include any of the principles and processes arising out of the current Council Code of Conduct which applies to each member of Council in their conduct and execution of the duties of their office. The By-law also does not make reference to the Integrity Commissioner who exercises duties and responsibilities in accordance with Section 223.3 of the Municipal Act, 2001, with respect to the application of the Council Code of Conduct, applicable sections of the M.C.I.A. and any procedures, rules, or policies governing the ethical behaviour of Members of Council and local boards.

5.5 Proposed New Indemnification By-law

The principles of an indemnification by-law are premised on the following:

- (1) Establish a framework for indemnifying Members of Council and Employees for defence and other costs;
- (2) Extend protection into additional types of legal disputes or actions;
- (3) Extend protection for legal fees to Members of Council and Employees, including both former/retired Members of Council and Employees; and,
- (4) Establish a process to determine when such indemnification applies and how litigation is managed.

The purpose of this new indemnification by-law is to provide an updated, modernized by-law in response to various legislative changes, the City’s recent corporate reorganization and the lack of references to the Council Code of Conduct and the Integrity Commissioner, along with optimizing efficiencies and processes, particularly as related to the retainer of external legal counsel.

The proposed new by-law is organized as follows:

- (1) Indemnification for present and former:
 - (a) Members of Council;
 - (b) City Employees;
 - (c) Contract Employees; and,

- (d) Volunteers.
- (2) Indemnifiable Member of Council and Employee actions:
- (a) Acts done in performance of duty and statutory duties;
 - (b) Acts done honestly and in good faith with a view to the best interests of the City and with no improper, immoral or objectionable purpose;
 - (c) Acts or omissions done while acting on behalf of the City or done or made by them in good faith in their capacity as Employees or Members; and,
 - (d) In cases involving monetary penalties, conduct believed to be lawful.
- (3) Covered Proceedings:
- (a) Any civil or administrative proceeding before any court or tribunal, subject to certain exclusions.
- (4) Excluded Conduct or Proceedings:
- (a) Proceedings relating to a grievance filed under the provisions of a collective agreement;
 - (b) Complaints made pursuant to the Council Code of Conduct 52-1015, as amended, where the Integrity Commissioner has found that the Member of Council has breached the Code;
 - (c) Where an Employee has been found to be in breach of any provision of the Employee Code of Conduct;
 - (d) Proceedings in which the interests of the Member of Council or Employee are adverse in interest or in conflict with the City's interests;
 - (e) Municipal Elections Act, 1996, S.O. 1996, c. 32, Sched. (coverage available under insurance subject to limits);
 - (f) Highway Traffic Act, R.S.O. 1990, c. H.8;
 - (g) The Criminal Code, R.S.C. 1985, c. C-46; and,
 - (h) City parking and traffic by-laws.
- (5) Extent of Indemnification:
- (a) Legal fees;
 - (b) Fines;
 - (c) Damages;

- (d) Settlements; and,
 - (e) Reasonable expenses incurred.
- (6) Process:
- (a) Members of Council must submit a written request to the Integrity Commissioner, via the City Clerk;
 - (b) City Employees must submit their written request to the Chief Administrative Officer and/or their designate;
 - (c) If the Chief Administrative Officer is named as a party to an Action or Proceeding, the Chief Administrative Officer must submit their written request to either the Mayor or Council (depending on the source of authority for the Chief Administrative Officer's appointment);
 - (d) Determination of eligibility for indemnification for Members of Council is made by Integrity Commissioner, taking into consideration the criteria in the by-law, while the Chief Administrative Officer shall be authorized to determine eligibility for Employees;
 - (e) The Indemnified Person must execute an Indemnification Agreement with the City.
- (7) Limits to Indemnification:
- (a) Reasonable defence costs;
 - (b) City to be reimbursed by any award of costs (but not damages awards to the Member or Employee) paid to the Employee or Member of Council;
 - (c) Council may, where the Member of Council breaches any provision of the Indemnification By-law, or acts in bad faith or with intentional or malicious wrongful conduct, discontinue indemnification with notice to the Member of Council; similarly, for Employees, the Chief Administrative Officer may discontinue indemnification with notice to the Employee.
- (8) Process for Approval of External Legal Counsel:
- (a) The City shall select and retain a lawyer on behalf of the Member of Council or Employee; or,
 - (b) The Member of Council or Employee may retain their own lawyer, in lieu of the City's choice of lawyer, provided that the fees are billed at not more than the rate charged by the City's lawyer in insurable claims; and,
 - (c) Approval of lawyer must be by written request.
- (9) Investigation costs:

- (a) Up to \$15,000 may be provided to assist a Member of Council or Employee with the costs of representation during an investigation which may lead to charges (provincial legislation or municipal by-law).

Section 3 of the proposed new indemnification by-law sets out the approval process to determine when indemnification is applicable to either a Member of Council or Employee. The City's Integrity Commissioner, an independent and impartial arbiter, will evaluate requests received from a Member of Council for indemnification and respond within a reasonable time, with their decision based on the criteria for indemnification and the exclusions set out in the By-law. The Integrity Commissioner will ensure that persons assigned to this work will not also work on or have access to any other City files, so that the decision is made independently. Similarly, the Chief Administrative Officer will evaluate requests from an Employee for indemnification and respond within a reasonable timeframe, based on the criteria for indemnification and exclusions as set out in the new indemnification by-law. If the Chief Administrative Officer is named as a party to an Action or Proceeding, then either the Mayor or Council will evaluate requests from the Chief Administrative Officer for indemnification, based on the criteria in the new indemnification by-law.

6.0 Financial Implications

If the new Indemnification By-law is approved by Council, the City would continue to pay for those "Indemnified Claims" for any "Covered Action or Proceeding", subject to any repayments contemplated by the new Indemnification By-law. The financial implications associated with a particular Covered Action or Proceeding will be reported from time to time through the Corporate and Finance Committee pursuant to the new Indemnification By-law.

7.0 Relationship to the Oshawa Strategic Plan

The recommendation in this report is consistent with the Strategic Goal of Accountable Leadership.



Samuel Yoon, City Solicitor,
Corporate and Finance Services Department



By-law 127-2015
of The Corporation of the City of Oshawa

Being a by-law to establish a process for the indemnification of employees and members of Council against claims and related costs arising out of the course of their duties and not otherwise covered by The Corporation of the City of Oshawa's insurance policies.

Whereas

1. Section 448(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "Act") prohibits proceedings for damages being brought against a member of Council or "an officer, employee or agent" of a municipality for any act done in good faith in the performance or intended performance of his or her duty or authority under the Act or a by-law passed under the Act as well as for any alleged neglect or default in the good faith performance of said duty or authority.
2. Section 279 of the Act authorizes Council to pass by-laws to protect employees, former employees, members of Council and former members of Council against risks that may involve pecuniary loss or liability, including the payment of damages or costs awarded against them, incurred by them as a result of any action or other proceeding arising out of their actions or omissions done or made by them in their respective capacities, the payment of any sum required in connection with the settlement of such action or other proceeding, and for the cost of defending them in such action or proceeding, subject to limitations set out in that section.
3. Council considers it appropriate and advisable to pass such a by-law.

NOW THEREFORE the Council of The Corporation of the City of Oshawa ENACTS AS FOLLOWS:

Interpretation

1. In this By-law:
 - 1.1. "Action or Proceeding" includes all civil actions, provincial offences, administrative proceedings, complaints to a professional association, third party proceedings and related appeals to which an Employee or Member is or may be a party and for which the Employee or Member wishes to be indemnified pursuant to this By-law, but does not include a proceeding:
 - (a) under the *Municipal Conflict of Interest Act*, R.S.O. 1990, c.M.50, where the Member has been found to have contravened section 5 of that Act, other than through inadvertence or by reason of a *bona fide* error in judgment;
 - (b) under the *Highway Traffic Act*, R.S.O. 1990, c.H.8, as amended;
 - (c) under the *Criminal Code*, R.S.C. 1985, c.C.46, as amended;
 - (d) to enforce a municipally administered statute, regulation or municipal by-law;
 - (e) which relates to a grievance filed under the provisions of a collective agreement, a disciplinary action regarding the Employee or to a management decision affecting the Employee by the City as an employer, except to the extent that the proceeding relates to the Employee's exercise of management or management support functions; or
 - (f) under the *Municipal Elections Act, 1996*, S.O., 1996, c. 32, Schedule, as amended, if the Member has been found to have committed bribery or a corrupt practice or to have otherwise contravened any of the provisions of that Act.
 - 1.2. "By-law" means this by-law and any schedule to this by-law as they may from time to time be amended;
 - 1.3. "City" means The Corporation of the City of Oshawa;

- 1.4. "City Clerk" means the Employee from time to time performing the function of the City's City Clerk;
- 1.5. "City Manager" means the Employee from time to time performing the function of the City's chief administrative officer;
- 1.6. "City Solicitor" means the Employee from time to time performing the function of the City's City Solicitor;
- 1.7. "Council" means the City's Council;
- 1.8. "Covered Action or Proceeding" means an Action or Proceeding commenced after the passing of this By-law and arising out of alleged acts or omissions of an Employee or Member acting in that person's capacity as an Employee or Member, including while acting in the performance or intended performance of a statutory duty imposed by any general or special Act, for which indemnification is provided to the Employee or Member pursuant to this By-law;
- 1.9. "Employee" means a person in the City's employ or formerly in the City's employ;
- 1.10. "Indemnified Claims" mean, in respect of a Covered Action or Proceeding, the
 - (a) legal and other costs of defending the Employee or Member;
 - (b) payment of any damages or costs, including any fine, monetary penalty or award imposed or made against such Employee or Member;
 - (c) payment, directly or indirectly, of any expenses reasonably incurred by the Employee or Member; and the
 - (d) payment of any sum required in connection with the settlement of a Covered Action or Proceeding where Council or the City Manager has approved the terms of the settlement;
- 1.11. "Mayor" means the City's Mayor;
- 1.12. "Member" means a member or former member of Council;
- 1.13. "Treasurer" means the Employee from time to time performing the function of the City's Treasurer.

Indemnification of Employees and Members

2. Subject to this By-law, the City will indemnify an Employee or Member against Indemnified Claims.
3. Where an Employee or Member becomes aware that an Action or Proceeding has been threatened against the Employee or the Member, the Employee or Member shall immediately provide to the Treasurer written notice of the Action or Proceeding that includes all particulars of the Action or Proceeding in the Employee's or Member's knowledge, information and belief. The Treasurer shall immediately provide a copy of the notice to the City Manager and the City Solicitor.
4. Where an Employee or Member receives any document that commences an Action or Proceeding, the Employee or Member shall immediately provide the document to the City Solicitor. The City Solicitor shall immediately provide a copy of the document to the City Manager and the Treasurer.
5. The City Manager may, at any time after receipt of the notice referenced in section 3 and shall, within ten (10) days after receipt of the document referenced in section 4, decide whether the City will indemnify the Employee or Member in respect of the Action or Proceeding. Prior to making the decision, the City Manager:
 - 5.1. shall consult with the City Solicitor;
 - 5.2. may consult with such others as the City Manager and City Solicitor consider appropriate; and

- 5.3. shall consider any submissions made by the Employee or Member to the City Manager.
6. The City Manager may decide that the City will indemnify the Employee or the Member in respect of the Action or Proceeding to the extent that the City Manager is satisfied that:
 - 6.1. 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;
 - 6.2. in the case of a criminal or administrative Action or Proceeding that is enforced by a fine or monetary penalty, the Employee or Member had reasonable grounds for believing that her or his conduct was lawful;
 - 6.3. the interests of the City and of the Employee or Member are not adverse to each other;
 - 6.4. for an Employee, the Employee's actions or omissions did not justify immediate dismissal as a City employee;
 - 6.5. the Employee's or Member's actions or omissions were not grossly negligent;
 - 6.6. the claims which are the subject of the Action or Proceeding are not assumed, paid or reimbursed under a policy of insurance;
 - 6.7. in respect of the claims which are the subject of the Action or Proceeding, the Employee or Member has sought or is seeking to recover all damages, costs and other amounts to which the Employee or Member may be entitled from persons other than from the City or from an Employee or a Member to the extent that such other Employee or Member is indemnified pursuant to this By-law in respect of such claims;
 - 6.8. the Employee or Member is represented by appropriate legal counsel pursuant to appropriate financial terms of a retainer agreement between the Employee or Member and her or his legal counsel;
 - 6.9. the Employee or Member has cooperated and will continue to cooperate with the City including by providing to the City Solicitor and Treasurer information respecting the Action or Proceeding and by complying with requests by legal counsel for the Employee or Member;
 - 6.10. the claims which are the subject of the Action or Proceeding are, individually and in the aggregate, of an amount that is reasonable in all of the circumstances;
 - 6.11. indemnification is not otherwise prohibited by law; and
 - 6.12. the Employee or Member has agreed to pay or to repay to the City on terms and in the form of agreement acceptable to the City Manager in consultation with the Treasurer and the City Solicitor any amounts that the City may pay or have paid on account of or in relation to Indemnified Claims to the extent that the Employee or Member is no longer entitled to indemnification pursuant to this By-law.
7. The City Manager will forthwith provide to the Employee or Member written notice of the City Manager's decision made pursuant to sections 5 and 6.
8. The City Manager may, from time to time and in consultation with the City Solicitor and such others as they consider appropriate, review a decision made by the City Manager pursuant to this By-law. The City Manager may affirm, alter, or reverse the decision in whole or in part. Without limitation, the City Manager may reverse a decision to indemnify to the extent that the City Manager is satisfied that any condition for indemnification prescribed by section 6 has not been satisfied or is no longer satisfied or that the Employee or Member has not otherwise complied with this By-law. The City Manager will forthwith provide to the Employee or Member written notice of the City Manager's decision made pursuant to this section.
9. The City Manager's decisions pursuant to this By-law are subject only to review by the City Manager pursuant to section 8 and by Council. Otherwise, the City Manager's decisions and Council's decisions are final and are not subject to review including review by any court or tribunal.


Administration of Indemnified Claims

10. The Employee or Member shall forthwith provide to the Treasurer and the City Solicitor such information respecting Indemnified Claims as they may from time to time request.
11. The Employee or Member shall forthwith comply with all requests by legal counsel for the Employee or Member.
12. The Treasurer may, from time to time, cause Indemnified Claims to be paid.
13. The Employee or Member shall forthwith repay to the City any amounts that the City may pay or have paid on account of or in relation to Indemnified Claims if the Employee or Member is no longer entitled to indemnification pursuant to this By-law.
14. The City Manager is authorized to execute on the City's behalf any agreement that may be required by subsection 6.12 of this By-law and such other documents or agreements that, in the City Solicitor's opinion, are required to give effect to such agreement.
15. The City Solicitor shall periodically report to the Finance Committee respecting Actions and Proceedings.
16. Where the City Manager is a party to an Action or Proceeding, the Mayor shall perform the City Manager's duties and may exercise the City Manager's powers pursuant to this By-law to the extent of the claims against the City Manager.

General

17. In the event of any conflict between anything done pursuant to this By-law and the terms of any policy of insurance maintained by the City, the terms of any such policy or policies prevail to the extent of any such conflict.
18. The short title of this By-law is the "Indemnification By-law".

By-law passed this ninth day of November, 2015.



Mayor

City Clerk



of The Corporation of the City of Oshawa

Being a by-law to provide for the indemnification and defence of members of Council and City employees against claims for loss or liability in certain circumstances arising out of acts or omissions done while acting on behalf of, and not covered by the insurance policies of, the Corporation of the City of Oshawa.

Whereas Section 448(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "Municipal Act, 2001") prohibits proceedings for damages being brought against a member of Council or "an officer, employee or agent" of a municipality for any act done in good faith in the performance or intended performance of his or her duty or authority under the Act or a by-law passed under the Act as well as for any alleged neglect or default in the good faith performance of said duty or authority; and,

Whereas Section 279 of the *Municipal Act, 2001* authorizes Council to pass by-laws to protect employees, former employees, members of Council and former members of Council against risks that may involve pecuniary loss or liability, including the payment of damages or costs awarded against them, incurred by them as a result of any action or other proceeding arising out of their actions or omissions done or made by them in their respective capacities, the payment of any sum required in connection with the settlement of such action or other proceeding, and for the cost of defending them in such action or proceeding, subject to limitations set out in that section; and,

Whereas Section 14 of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 ("M.C.I.A.") provides that a municipality may indemnify members of a municipal council for costs or expenses incurred to defend a proceeding brought under the M.C.I.A. provided that a member of Council is found not guilty of the allegation brought under section 5 of the M.C.I.A.; and,

Whereas Council has deemed it advisable to enact an indemnification by-law for these purposes.

Therefore it is enacted by the Council of The Corporation of the City of Oshawa 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, or City parking and traffic by-laws;

"Chief Administrative Officer" means the Chief Administrative Officer of the Corporation of the City of Oshawa, or their designate;

“City” means The Corporation of the City of Oshawa; and

“City Clerk” means the City Clerk of the Corporation of the City of Oshawa, or their designate;

“City Solicitor” means the City Solicitor of the Corporation of the City of Oshawa, or their designate;

“Commissioner” means the Commissioner, Community and Operations Services Department, Commissioner, Corporate and Finance Services Department, Commissioner, Economic and Development Services Department, and Commissioner, Safety and Facilities Services Department, or their respective designates;

“Corporation” means The Corporation of the City of Oshawa;

“Council” means the Council of the Corporation of the City of Oshawa as a whole;

“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 a statutory appointment and having been determined by the Integrity Commissioner as entitled to indemnification;

“Employee” means all full-time, part-time, temporary and seasonal staff, including Statutory Officers of the City of Oshawa including staff hired on a contract basis for a defined period of time and students. For purposes of this By-law, an Employee shall also include former staff, appointees (which include statutory appointments under the Municipal Act, 2001, the Building Code Act, 1992, the Fire Protection and Prevention Act, 1997 and other provincial legislation) and volunteers acting under the direction of a person in the employ of the City;

“Indemnified Person” means a Member or Employee approved for indemnification under this By-law, and shall also include the Chief Administrative Officer if so named in an Action or Proceeding;

“Integrity Commissioner” means any person or corporation appointed by the City of Oshawa to perform the functions assigned by Section 223.3 of the Municipal Act, 2001, S.O. 2001, c. 25 as amended;

“Mayor” means the head of Council, and includes Members from time to time acting as the Mayor;

“Member” means a Member of the Council of the Corporation of the City of Oshawa, and including any former Member of Council.

2. Former Employees and Members:

Subject to Subsection 3.4, this By-law also applies to any person who was a Member or Employee 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 a Member or Employee.

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 a Member or Employee, or in which the Member or Employee is a party and in which their conduct is called into question, indemnify the Member or Employee and their heirs and legal representatives in the manner and to the extent provided for in this By-law.
- 3.2 Where a Member or Employee becomes aware that an Action or Proceeding has been threatened against them, for which they may seek indemnification:
 - (1) The Member shall provide an immediate and confidential written notice of the Action or Proceeding to the Integrity Commissioner;
 - (2) The Employee shall provide an immediate and confidential written notice of the Action or Proceeding to the Chief Administrative Officer.
- 3.3 Where a Member or Employee is served with any document which commences an Action or Proceeding for which they seek indemnification, the Member or Employee shall provide the document or a copy thereof and a written request for indemnification, immediately and confidentially as follows:
 - (1) For Members, documentation and written request shall be submitted to the Integrity Commissioner, through the City Clerk.
 - (2) For Employees, documentation, including the written request for indemnification, shall be submitted to the Chief Administrative Officer or their designate. A copy of the confidential documents shall also be provided to the Employee's direct supervisor.
 - (3) If the Chief Administrative Officer is served with any document which commences an Action or Proceeding for which they seek indemnification, a City Commissioner shall be designated as the acting Chief Administrative Officer for purposes of this By-law to that Action or Proceeding. The Chief Administrative Officer shall submit documentation, including the written request for indemnification to either the Mayor or Council (pursuant to whether the Mayor or Council was the source of authority for the appointment of the Chief Administrative Officer). All indemnification provisions of this By-law, including reporting and decision-making processes, shall apply to the Chief Administrative Officer and their reporting relationship to either the Mayor or Council.
- 3.4 At any time prior to the conclusion of the Action or Proceeding, the Integrity Commissioner (for Members), the Chief Administrative Officer (for Employees) or the Mayor/Council (for the Chief Administrative Officer) shall, in accordance with Section 3.3 and exercising their sole discretion, acting reasonably, determine whether a Member or Employee is entitled to indemnification pursuant to this By-law subject to the following:
 - (1) The Member or Employee acted honestly and in good faith with a view to the best interests of the City and with no improper, immoral or objective purpose; and,

- (2) 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 a Member or Employee; and,
- (3) In the case of a criminal, quasi-criminal or administrative action or proceeding that is enforced by a monetary penalty, the Member or Employee had reasonable grounds for believing that his/her conduct was lawful; and,
- (4) The interests of the City and the Member or Employee are not adverse to each other; and,
- (5) The actions of the Employee were not of a nature as to provide grounds for immediate dismissal; and,
- (6) Indemnification is not prohibited by statute or court order.

3.5 The Integrity Commissioner or Chief Administrative Officer shall provide a written decision to a Member or Employee, respectively, in response to 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 decisions of either the Integrity Commissioner or Chief Administrative Officer shall be final.

3.6 Where a Member or Employee is the subject of an investigation in a matter which may result in charges being laid against the Member or Employee under a provincial statute or regulation, or municipal by-law, because of any act done or any failure to act or allegations of same in the attempted performance or performance of his/her duties, the Member or Employee 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 or Chief Administrative Officer, respectively.

3.7 As a condition precedent to the City making any payment in respect of the costs for representation of any Member or Employee pursuant to this By-law, the Member or Employee 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 Chief Administrative Officer in consultation with the City Solicitor, and shall agree to repay the City on demand, in the event that the Member or Employee is convicted of an offence 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 Subsections 5.2 and must execute an indemnity agreement or other documentation required by the City to secure such repayment to the City. No retainer shall be made 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 City Clerk are hereby authorized to execute such indemnity agreements on behalf of the City.

4. Excluded Actions and Proceedings:

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

- (1) 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;

- (2) 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;
 - (3) Under the Employee Code of Conduct, where the Employee has been found by the Chief Administrative Officer to have been in breach of any provision of the Employee Code of Conduct;
 - (4) 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.
 - (5) Where the Member or Employee acted in bad faith;
 - (6) Where the Employee has been terminated as a result of the actions or omissions that gave rise to the Action or Proceeding;
 - (7) In any proceeding against a Member or Employee prosecuted by or on behalf of the City or in which the City was the complainant;
 - (8) Where the Member or Employee was performing their duties otherwise than in good faith and honestly or with malice;
 - (9) Where, in committing an alleged wrong, the Member or Employee was clearly acting on their own behalf and not that of the City.
 - (10) 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;
 - (11) In third party claims or cross-claims brought against a Member or Employee where such third party claims or cross-claims are for relief over against such Member or Employee in a proceeding commenced by the City;
 - (12) The subject actions or omissions were not within the Member's or Employee's good faith performance of their duties.
- 4.2 Where the Integrity Commissioner or Chief Administrative Officer have determined that a Member or Employee, respectively, are not entitled to indemnification, the Member or Employee shall be responsible for all costs, damages, penalties and legal fees in connection with representation in the Action or Proceeding (and which may include the reimbursement of said costs from the Member or Employee back to the City).
- 4.3 Where the Mayor or Council has determined that the Chief Administrative Officer is not entitled to indemnification, the Chief Administrative Officer shall be responsible for all costs, damages, penalties and legal fees in connection with representation in the Action or Proceeding (and which may include the reimbursement of said costs from the Chief Administrative Officer back to the City).

5. Manner and Extent of Indemnification:

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

- (1) Pay the costs of defending such Member, Employee or Chief Administrative Officer; and,
- (2) Pay any award of damages or costs, including any monetary penalty or award against such Member, Employee or Chief Administrative Officer; and,
- (3) Pay, either by direct payment or reimbursement, any expenses reasonably incurred by the Member, Employee or the Chief Administrative Officer; and,
- (4) Pay any sum required in connection with the settlement of a Covered Action or Proceeding, provided that, as a condition precedent, the Chief Administrative Officer (or designated Commissioner acting as the Chief Administrative Officer) in consultation with the City Solicitor has approved the terms of the settlement; and,
- (5) 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 Member, Employee or Chief Administrative Officer of the legal counsel selected to represent them.
- 6.2 An Indemnified Person may retain their own legal counsel for their defence or 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 Authority:
 - (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 Member, to review their decision to not provide indemnity and may provide indemnity where additional facts become available, that demonstrate that the Member is entitled to indemnification pursuant to this By-law.

- (2) The Chief Administrative Officer shall have the authority at any time during or after the commencement of the Action or Proceeding, upon the request of the Employee, to review their decision to not provide indemnity and may provide indemnity where additional facts become available, that demonstrate that the Employee is entitled to indemnification pursuant to this By-law.
- (3) The Mayor or Council shall have the authority at any time during or after the commencement of the Action or Proceeding, upon the request of the Chief Administrative Officer, to review their decision to not provide indemnity and may provide indemnity where additional facts become available, that demonstrate that the Chief Administrative Officer is entitled to indemnification pursuant to this By-law.

7.2 The City Solicitor, acting reasonably, may require one or both of the following:

- (1) Periodic budgets for anticipated legal costs, which may be revised from time to time as circumstances require; and,
- (2) Status updates in respect of the progress of the proceedings; and,
- (3) Detailed invoices including details of docketed time; and,
- (4) 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 a 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 regarding the Member, or as determined by the Chief Administrative Officer regarding the Employee, or by either the Mayor or Council regarding the Chief Administrative Officer, choose not to indemnify an Indemnified Person, or may cease to indemnify an Indemnified Person if it has commenced to do so, if:

- (1) 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; and,
- (2) 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; and,
- (3) 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 Council (for the Member), the Chief Administrative Officer (for the Employee) or the Mayor/Council (for the Chief Administrative Officer); or,
- (4) 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 third party 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 third party action or counterclaim has been approved by Council (for the Member), the Chief Administrative Officer (for the Employee), or the Mayor/Council (for the Chief Administrative Officer).

9. Duty to Co-operate:

- 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 co-operate 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 (for the Member), Chief Administrative Officer (for the Employee) or the Mayor/Council (for the Chief Administrative Officer) 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 Council or the Chief Administrative Officer making a decision for either a Member or Employee, respectively, to terminate or rescind indemnity, the Indemnified Person shall be provided with the opportunity to make submissions – for Members, to Council; for Employees, to the Chief Administrative Officer; for the Chief Administrative Officer, to the Mayor/Council – in support of the Indemnified Person's indemnification.

11. Appeal:

- 11.1 Where a Member who, as an Indemnified Person, seeks to appeal a judgment or decision in a Covered Action or Proceeding:
 - (1) The Member shall first consult with the Integrity Commissioner, and the Integrity Commissioner shall have sole discretion to determine indemnification eligibility for the appeal. If the Member 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 their legal costs in the appeal.

- (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 their own expense.

11.2 Where an Employee who, as an Indemnified Person, seeks to appeal a judgment or decision in a Covered Action or Proceeding:

- (1) The Employee shall first consult with the Chief Administrative Officer, and the Chief Administrative Officer shall have sole discretion to determine indemnification eligibility for the appeal. If the Employee pursues an appeal, or participates as a party in an appeal, without first seeking indemnification approval from the Chief Administrative Officer and is successful in that appeal, the Chief Administrative Officer shall have sole discretion to determine whether the Indemnified Person shall be indemnified for their legal costs in the appeal.
- (2) Where the Chief Administrative Officer 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 their own expense.

11.3 Where the Chief Administrative Officer who, as an Indemnified Person, seeks to appeal a judgment or decision in a Covered Action or Proceeding:

- (1) The Chief Administrative Officer shall first consult with the Mayor or Council, and the Mayor or Council shall have sole discretion to determine indemnification eligibility for the appeal. If the Chief Administrative Officer pursues an appeal, or participates as a party in an appeal, without first seeking indemnification approval from the Mayor or Council and is successful in that appeal, the Mayor or Council shall have sole discretion to determine whether the Indemnified Person shall be indemnified for their legal costs in the appeal.
- (2) Where the Mayor or Council determine 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 their own expense.

12. Conflict:

12.1 The City maintains various policies of insurance for both the City and its Members or Employees. 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.

12.2 Notwithstanding any provision of this By-law, those Employees who are statutorily appointed pursuant to the Municipal Act, 2001, the Building Code Act, 1992, S.O. 1992, c. 23, the Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4, or other Provincial legislation, may be afforded indemnification subject to the criteria articulated in the relevant statute that confers indemnification. All provisions of the By-law shall apply to those Employees within the meaning of this By-law.

13. Reimbursement:

Where a Member, Employee or Chief Administrative Officer are to be indemnified by the City, the amount of the indemnity shall be reduced by the amount of any costs recovered by the Member, Employee or Chief Administrative Officer, and where the indemnity has been paid, any costs recovered by the Member, Employee or the Chief Administrative Officer 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.

15. Title of the By-law

The short title of this By-law is the "Indemnification By-law".

16. Enactment and Transition

Indemnification By-law 127-2015, as amended, is hereby repealed.

By-law passed this day of , 2024.

Mayor

City Clerk