



REGIONAL
DISTRICT
OF NANAIMO

STAFF REPORT TO REGIONAL DISTRICT OF NANAIMO BOARD CODE OF CONDUCT OPTIONS June 27, 2023

Code of Conduct Options

RECOMMENDATION(S)

That the Board direct staff to draft amendments to Board Policy A1-37 “Code of Conduct” to:

1. Increase its length and detail to be generally consistent with the guidance and recommendations in Mr. Ralph Hildebrand’s memo regarding code of conduct approaches attached to, and emphasized within, the June 27, 2023 staff report from the Chief Human Resources Officer.
2. Include a definitions section, expand the application and scope to include Board Committee and Commission members, and to include an interpretation section.
3. Update the existing foundational statements and standards of conduct sections as recommended in the January 10, 2023 staff report to be consistent with the most recent Model Code of Conduct developed by the Union of British Columbia Municipalities Working Group on Responsible Conduct.
4. Expand the standards of conduct section to build upon the existing contents related to communication guidelines and social media use, authorize sharing of in-camera information with member municipalities and their senior staff, and to include additional language related to general conduct, interactions with staff, volunteers and committee members, interactions with the public and media, public meetings, collection and handling of information, conflict of interest, use of influence and gifts and personal benefits.
5. Include a complaint and resolution process consistent with guidance and recommendations in the memo and generally modelled after the City of Nanaimo complaint and resolution approach which: emphasizes informal resolution where possible; includes appointment of an independent, third party by the Board to receive, administer, adjudicate, resolve and/or investigate complaints and make recommendations to the Board regarding appropriate sanctions for any substantiated breach; states that any investigation report be made available to the public subject to the *Freedom of Information and Protection of Privacy Act*; and sets out that any hearing and/or decision for potential censure will be in an open meeting subject to the *Freedom of Information and Protection of Privacy Act* and unless there is a valid reason to close the meeting under section 90 of the *Community Charter*.

BACKGROUND

On January 10, 2023, the Board reviewed Policy A1-37 “Code of Conduct” and directed staff to “return to the Board with information on options for Code of Conduct approaches, such as those adopted in other jurisdictions, including the City of Nanaimo.” Board Policy A1-37 “Code of Conduct” is included for reference as Attachment 1.

The January 10, 2023 staff report recommended some language amendments to reflect revised wording in the Foundational Principles of Conduct and Standards of Conduct sections of Policy A1-37 “Code of Conduct” to bring the policy into alignment with updates introduced in October 2022 to the Model Code of Conduct developed by

the Union of British Columbia Municipalities Working Group on Responsible Conduct.¹ This staff report is included for reference as Attachment 2.

To support a fulsome review and analysis of the available information on options for Code of Conduct approaches in response to the January 10, 2023 resolution, staff requested a legal memorandum from Mr. Ralph Hildebrand,² Associate Counsel at Lidstone & Company which is enclosed as Attachment 3 (hereafter referred to as the “memo”).

MEMORANDUM EXECUTIVE SUMMARY

Mr. Hildebrand’s memo provides information on options for amendments to existing policy or development of a new code of conduct for the Board, and reinforces that the Board may exercise significant discretion in determining the format and contents of a code of conduct. The memo highlights that the purpose of a code of conduct is to proactively establish clear expectations for behavior and complaint resolution in advance of any specific issues, thus promoting good governance. Mr. Hildebrand stresses that there is no universal model code of conduct, as each board's expectations, requirements, and potential complaint resolution process(es), are unique. In the preparation of his memorandum, he reviewed numerous provincial examples, including but not limited to the City of Nanaimo (Attachment 4), City of Surrey (Attachment 5), and the Regional District of Okanagan-Similkameen Code of Ethics (Attachment 6).

Memorandum Information and Options

The memo unpacks the most significant decision points for the Board in contemplating a code of conduct, and elaborates on the benefits and drawbacks of the various options and associated sub-options. A synopsis of the options is provided below, with paginated reference to the analysis in the memo, when considering whether a code of conduct will:

1. be set out in **policy** or **bylaw** (page 2).
2. be a **lengthy and detailed** document or a **brief** statement of expectations (page 2).
3. contain **introductory provisions** (i.e., definitions, application/scope and interpretation), and which provisions to include and their contents (ex., applicable to Board and Committee only) (page 4).
4. include **foundational statements** to establish high level values and principles (page 4).
5. include clear **standards of conduct** (i.e., behaviour to be encouraged or discouraged) where it could be easily determined whether a standard of conduct has been met or breached (page 4), and what those specific standards of conduct might be (page 5-7), including but not limited to:
 - a. conduct based on foundational principles;
 - b. compliance with laws of the land;
 - c. contact with staff and others;
 - d. respect for procedural requirements;
 - e. conduct of public meetings and statutory or other public hearings;
 - f. improper use of influence;
 - g. conduct respecting lobbyists;
 - h. conflicts of interest;
 - i. election activities;
 - j. discrimination;
 - k. confidential information;
 - l. closed meeting materials;
 - m. use of public resources;
 - n. communications including social media, etc.;
 - o. intellectual property;
 - p. gifts and personal benefits (i.e., setting a lower threshold than contained in the *Community Charter*);

¹ https://www.ubcm.ca/sites/default/files/2022-10/Policy_Model_COC_Aug2022_UPDATED.pdf

² <https://lidstone.info/team/ralph-hildebrand/>

- q. remuneration, expenses and benefits; and,
 - r. Mandatory leave of absence if charged with a criminal offense until resolved.
6. contain **enforcement provisions** ranging from how the initial complaint is handled through to potential consequences of findings and which provisions to include, for example:
- a. Criteria for complainants and the complaint process (including limitation periods, election period restrictions, who receives and administers complaints) (page 7);
 - b. Steps toward resolution (including mutual resolution, mediation, formal review and the process by which formal complaints will be investigated) (page 8);
 - c. The investigation report and its elements (page 9);
 - d. Guidance on the appropriate measures to be taken in response to a finding of a contravention of the code (page 9 -10);
 - e. Sanction/censure parameters for decision-makers (page 10); and,
 - f. Prohibitions against reprisals, retaliation, and actions to be taken if a complaint is without merit (page 10).

Memorandum Guidance and Recommendations

While the intent of the memo was to provide the Board with general information on options of code of conduct approaches, Mr. Hildebrand provides the following specific guidance and recommendations in the memo:

1. **introductory provisions – definitions and application** – “These provisions are necessary to any code...the definition’s sections importance should not be overlooked...in regional districts it is normal for the Code to apply to appointed directors, their alternates, members of committees of the Board and members of commissions...” (page 4).
2. **foundational statements** – “it is desirable to have these statements to guide the drafting and justification for subsequent provisions.” (page 4).
3. **standards of conduct** – “the Board should be thinking about behaviours referenced in the code that they seek to encourage or discourage. The standards of conduct should be clear and easy to interpret and apply so that the Board members can readily determine whether or not they are meeting a standard.” (page 4)
4. **standards of conduct – conduct for public meetings and statutory or other public hearings** – “some codes require that board members have an open mind on the matter and not discuss their positions. Others simply require members not to have a closed mind. The latter more closely aligns with current law.” (page 5)
5. **standards of conduct – closed meeting materials** – “Regional districts are in unique positions regarding disclosure of closed meeting materials since most Directors are both Board members and councillors. The default provision is that closed meeting materials cannot be disclosed to any third parties. That would include the municipal Directors’ own municipal councils, municipal CAOs, and municipal senior staff persons. This is the approach that is now set out in the Regional District’s policy; disclosure is prohibited unless there is a specific resolution to release. The Board may take an alternative approach which permits disclosure to member municipality Councils in closed meetings and the municipal CAOs, (or additional senior staff persons), subject to confirmation of compliance with the Regional District’s requirements regarding such disclosure and possibly the execution of a non-disclosure agreement by municipal staff. If such an approach is taken, this limited disclosure would be permitted subject to a specific Board direction that disclosure is not to be made.” (page 5-6).
6. **enforcement** – “There are advantages to creating enforcement processes which trigger particular actions by particular responsible parties rather than relying on *ad hoc* responses. For example, appointing a permanent advisor, mediator, ethics commissioner, or an investigator to undertake the complaint

process, rather than appointing an investigator for each complaint, avoids allegations of bias and unfairness if appointments are made on an *ad hoc* basis in response to a particular complaint. In addition, it is preferable to have a process with resolution steps which proceed from informal to more formal processes. For example, the initial step could be person to person, with or without the assistance of an advisor, followed by an optional mediation and then a formal investigation and review.” (page 7).

7. **enforcement** – *who receives and administers complaints* – “The complaints could be submitted to the Chief Administrative Officer, the Board Chair or an ethics commissioner. However, the receipt of complaints by other than an independent investigator raises the issue of bias in processing as well as confidentiality.” (page 8)
8. **enforcement** – *steps to resolution* – “The Code should encourage the complainant and the person about who a complaint is made to attempt to resolve the matter directly or with the assistance of an advisor. However, it is not advisable to require the parties to undertake this step.” (page 8)
9. **enforcement** – *investigation process* – “Some Codes have included council/board conduct, control, or input in the investigation process. However, such involvement raises the spectre of bias and unfairness, and it is recommended that the investigator be delegated responsibility rather than subject to ongoing direction from the Board or staff.” (page 9)
10. **enforcement** – *investigation report* – “we generally recommend that the report from the investigator be presented to the Board in closed meeting. However...there is a trend to hold such hearings in open meetings in order to ensure transparency.” (page 9). “The code of conduct should set out whether the hearing will be in public or in a closed meeting. This will ensure that the investigator has clear instructions when drafting the report and will avoid allegations that a determination to hold a hearing in public is politically motivated.” (page 14)
11. **enforcement** – *sanctions/censure* – “It is not recommended that a Code of Conduct set out pre-set sanctions or censure requirements. Rather the Board may wish to set out parameters which decision makers must consider. For example; the measures must be proportionate to the findings of the Board with respect to the specific complaint. The Board must not consider other past behaviour or histories that were not the subject of the complaint process.” (page 10)

DISCUSSION AND ANALYSIS

Reviewing the difference of approach in Board Policy A1.37 “Code of Conduct” and the options identified in the memo and the City of Nanaimo approach, the following analysis identifies the staff recommendations with regard to significant decision points should the Board wish to make changes to the code of conduct approach at the Regional District of Nanaimo:

1. **policy or bylaw** – the memo identifies clear benefits and drawbacks to articulating a code of conduct in bylaw or policy, and confirms there is no “best way” (page 2). While the City of Nanaimo and City of Surrey have embedded the code in bylaw, the Regional District of Okanagan-Similkameen has utilized a board policy. A Board policy provides greater flexibility for the Board which may be beneficial as unique circumstances arise which may benefit from a greater exercise of discretion than permissible by bylaw.
 - ➔ Staff have not identified a compelling reason to recommend rescinding existing Board Policy A1.37 “Code of Conduct” and enacting a code of conduct bylaw in its place, and recommend retaining the code of conduct within a board policy.
2. **lengthy or detailed document** – while the existing policy is short, exercises brevity and does not cite other laws or policy requirements, the memo finds that the trend with more recent codes of conduct is that they tend to be lengthier and include greater detail (versus a brief statement of expectations), especially as enforcement provisions and procedures are now often included. The City of Nanaimo Bylaw includes a

significant definitions section, standards of conduct section and complaint and resolution procedures. Further, the memo highlights some benefits to citing the laws of land (even though it is not necessary) as a means to ensure Directors, Alternate Directors and Committee members are made *aware* of the requirements.

➔ Staff recommend that the Board authorize staff to bring forward additions to Board Policy A1.37 “Code of Conduct,” which will increase its length and detail to be consistent with the guidance and recommendations of the memo and bring the policy into closer alignment with the City of Nanaimo approach.

3. **introductory provisions** – the current policy does not have a definitions section and the scope (application) does not include Committee or Commission members which is inconsistent with the memo’s guidance and what it finds to be normal practice in other jurisdictions. Further, staff have recently identified a benefit of extending the Code of Conduct’s application, specifically around conflict of interest, to Committee and Commission members based on recent recommendations from the BC Ombudsperson. Without inclusion of these supporting bodies under the policy, there is limited proactive guidance to members on conduct expectations and any enforcement processes will be *ad hoc*. As noted in the memo, a definitions section is necessary in a code of conduct.

➔ Staff recommend that the Board provide direction to bring forward amendments to Board Policy A1.37 “Code of Conduct” to include a clear definitions section, expand the application and scope to include Committee and Commission members, and to include an interpretation section.

4. **foundational statements** – minor updates to this section and the standards of conduct section would ensure these are completely consistent with the most recent Model Code of Conduct developed by the Union of British Columbia Municipalities Working Group on Responsible Conduct.

➔ Staff recommend the Board provide direction to staff to amend the foundational statements and existing standards of conduct in Board Policy A1.37 “Code of Conduct” as recommended in the January 10, 2023 staff report (Attachment 3) to be consistent with the most recent Model Code of Conduct developed by the Union of British Columbia Municipalities Working Group on Responsible Conduct.

5. **standards of conduct** – the existing standards of conduct section is more limited than other approaches. Please see page 2 of this staff report, bullet no. 5 and sub points a to r for a list of possible items for inclusion. As noted in the memo, there are benefits to including greater detail and making Board members aware of expectations and requirements for them in the legislation, and in some cases, under other applicable organizational policies. The City of Nanaimo Bylaw in the section entitled “conduct of elected officials” addresses general conduct, interaction with staff, volunteers and the public, interactions with public and media, public meetings, collection and handling of information, use of social media, use of influence and gifts and personal benefits. Staff have identified that amendments to the “Confidentiality of Information Presented in Closed Meetings” section would be advantageous to streamline in-camera information sharing with member Municipality Councils and senior staff (see page 3, bullet 5 of this staff report).

➔ Staff recommend the Board provide direction to staff to amend the standards of conduct section in Board Policy A1.37 “Code of Conduct” to build upon the existing contents related to communication guidelines and social media use, authorize sharing of in-camera information with member municipalities and their senior staff, and to include additional language to bring this section of the

policy into closer alignment with the City of Nanaimo approach and the potential contents listed in the memo.

6. **enforcement** – as noted above, the existing Board Policy A1.37 “Code of Conduct” is silent on complaint and resolution procedures which would require the RDN to rely on an *ad hoc* approach in the event a complaint is raised. Navigating a complaint involving a Board member in an *ad hoc* manner is less transparent for participants and the public and more prone to conflict and rancor between staff and the Board and/or amongst Board members themselves. The UBCM Working Group on Responsible Conduct recently developed a guide (April 2021) to support local governments in dealing with conduct issues. The guide notes that “an enforcement process articulated within a code of conduct has several advantages over a case-by-case enforcement process...and is strongly recommended (“Forging the Path to Responsible Conduct in Your Local Government,” page 25).”³

➔ Staff recommend the Board provide direction to staff to amend Board Policy A1.37 “Code of Conduct” to include a complaint and resolution process consistent with guidance and recommendations in the memo and generally modelled after the City of Nanaimo complaint and resolution approach which emphasizes informal resolution where possible, and includes appointment of an independent, third party by the Board to receive, administer, adjudicate, resolve and/or investigate complaints and make recommendations to the Board regarding appropriate sanctions for any substantiated breach, make any investigation report available to the public subject to the *Freedom of Information and Protection of Privacy Act*, and set out that any hearing for potential censure will be in an open meeting subject to the *Freedom of Information and Protection of Privacy Act*.

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3. Update the existing foundational statements and standards of conduct sections as recommended in the January 10, 2023 staff report to be consistent with the most recent Model Code of Conduct developed by the Union of British Columbia Municipalities Working Group on Responsible Conduct.
4. Expand the standards of conduct section to build upon the existing contents related to communication guidelines and social media use, authorize sharing of in-camera information with member municipalities and their senior staff, and to include additional language related to general conduct, interactions with staff, volunteers and committee members, interactions with the public and media, public meetings, collection and handling of information, conflict of interest, use of influence and gifts and personal benefits.
5. Include a complaint and resolution process consistent with guidance and recommendations in the memo and generally modelled after the City of Nanaimo complaint and resolution approach which: emphasizes informal resolution where possible; includes appointment of an independent, third party by the Board to receive, administer, adjudicate, resolve and/or investigate complaints and make recommendations to the Board regarding appropriate sanctions for any substantiated breach; states that any investigation report be made available to the public subject to the *Freedom of Information and Protection of Privacy Act*; and sets out that any hearing and/or decision for potential censure will be in an open meeting subject to the *Freedom of Information and Protection of Privacy Act* and unless there is a valid reason to close the meeting under section 90 of the *Community Charter*.

³ <https://www.ubcm.ca/sites/default/files/2021-08/Forging%20the%20Path%20to%20Responsible%20Conduct.pdf>

IMPLICATIONS

Should the Board adopt an amended Board Policy A1-37 “Code of Conduct,” consistent with the staff recommendations and including the appointment of an independent, third party by the Board, staff would recommend a new \$35,000 line item specific to Board Code of Conduct Administration in the 2024-2028 Financial Plan to cover the third party consultation and/or investigation costs and/or legal costs for individual Board members should complaints arise under the newly amended policy. Unused funds would be transferred to a reserve dedicated to Code of Conduct Administration as these costs may vary annually, and by term. Staff would also return to the Board with options and a recommendation regarding the independent third party to oversee the complaint and complaint resolution process.

Should the Board proceed with adoption of an amended policy with increased application to Committee and Commission members, staff would facilitate Director and Alternate Director sign off, and coordinate an orientation and review of the policy for Committee and Commission members, as well as requiring sign off from those parties. Subsequent Board orientations would include a dedicated session to review the policy in detail.

STRATEGIC PLAN ALIGNMENT

People and Partnerships - Improve the governance and awareness of RDN activities for citizens throughout the Region.

REVIEWED BY:

- Douglas Holmes, Chief Administrative Officer

ATTACHMENT(S)

1. Attachment 1 – Policy A1-37 Code of Conduct
2. Attachment 2 – January 10, 2023 Staff Report, Code of Conduct Review, Jessica Bagnall
3. Attachment 3 – Code of Conduct Memorandum, Ralph Hildebrand, Lidstone & Company
4. Attachment 4 – City of Nanaimo Bylaw No. 7348 “A Bylaw to Regulate the Conduct for Council and Committee Members”
5. Attachment 5 – City of Surrey Bylaw No. 20020 “Council Code of Conduct Bylaw”
6. Attachment 6 – Regional District of Okanagan-Similkameen Board Policy “Code of Ethics”