

Report – Alleged Breach of Confidentiality

**Submitted to Mayor and Council
City of Corner Brook**

Submitted by James G. Kennedy

April 2, 2012

Background - Griffin Proposal

Mr. Danieal Griffin of Griffin Developments Inc. is proposing to construct a modular home manufacturing plant in Corner Brook. His initial proposal was to construct this facility at the Massey Drive access road. The proposal was a discretionary use and a Public Notice was advertised in the Western Star on Sept. 28, 2011 in accordance with the Urban and Rural Planning Act and the documents which included details of Mr. Griffin's proposal were available for public viewing. This development application was denied by Council at the Public Council Meeting of October 17, 2011.

Mr. Griffin with the assistance of the City then looked for an industrial property to accommodate his development. He identified an approximate 30 acre site on Lundrigan Drive and entered into negotiations with the City to acquire this site. It was during these property acquisition negotiations that the alleged breach of confidentiality occurred. Since the Land Management Division has direct reporting to the Director of Corporate Services, at this stage the Corporate Services Dept. would take the lead role to negotiate a purchase and sale agreement. From the documents I reviewed and the interviews I conducted, it is my view that these negotiations did not proceed as you would expect and as I am sure is the norm for property negotiations. Mr. Griffin would only talk to the Manager of Business Services so there was little or no face to face discussions with the Corporate Services Division. Mr. Griffin was aggressively lobbying individual councillors and he perceived he could negotiate directly with Council. On Dec. 8, 2011 the CAO e-mailed the Mayor and Council saying the Manager of Business Services advised him that Mr. Griffin saw no need to meet with senior staff because he was dealing directly with Council. The Mayor immediately e-mailed the CAO and all Councillors to advise them that Councillors did not have authority to conduct negotiations and directed Mr. Griffin be advised accordingly. At this point, if not before, it should be clear to Mr. Griffin that he was only to negotiate with staff.

Because of pressure from Mr. Griffin to have his proposal brought to a Public Meeting of Council and staff's inability to have effective negotiations, the request to purchase was placed on the Agenda of the December 19, 2011 Public Council Meeting. Council approved a counter proposal with conditions in accordance with Council Minute 11-364. Following the Council meeting there was extensive media coverage where all the details of both Mr. Griffin's proposal and Council's proposal were reported in the media including an interview with Mr. Griffin who was obviously upset by Council's decision.

On January 11, 2012 Mr. Griffin delivered another proposal to the office of the Manager of Business Services and on January 12, 2012 Danieal Griffin e-mailed the proposal to the Supervisor of Business Services, the Manager of Business Services, the Mayor and all Councillors with the exception of Councillor Boutcher.

Background - Alleged Confidentiality Breach

On February 16, 2012 there was a discussion on twitter where an allegation was made that Councillor Gary Kelly showed a confidential document to Mr. Ches Ruth. Mr. Ruth claimed "that Councillor Gary Kelly showed him a City-Confidential Proposal". Councillor Kelly stated "I showed Ches the Griffin proposal. He agreed to keep it confidential".

Councillor Kelly told me the proposal he showed Mr. Ruth was the proposal he received with his information package for the December 2011 Public Council Meeting and all of the information contained in the proposal had been in the public domain from the discussions at the public council meeting and the numerous media reports.

Mr. Ruth told me that the proposal he saw was not the proposal presented at the Public Council Meeting. The proposal Mr. Ruth claims he saw was a two page document, the first page was a text written on Griffin Developments Inc. letterhead and the second page was a site drawing. He remembered the text document having a specific dollar figure and the site plan showed a building outlined with a felt marker. I showed Mr. Ruth the proposal that was included with the documents for the Dec. 19, 2011 Public Council Meeting and he was certain it was not the same document. He said it was similar in format and the section of the text dealing with the benefits of the proposal looked similar. The difference was the monetary amount contained in the document did not specify \$ 1.00 and the site drawing did not show the building location.

Subsequent to my meeting with Mr. Ruth, I found another proposal which was presented to the City around Jan. 11, 2012. This is a proposal currently under review by the City and for that reason I have not identified the dollar amount identified by Mr. Ruth. I have reviewed this proposal and it appears to be the proposal Mr. Ruth claims he saw during his discussions with Councillor Kelly. Mr. Ruth said he was not given a copy of the document and confirmed that he has not made public any of the information in the proposal only the fact that Councillor Kelly showed him the proposal.

Councillor Kelly and Mr. Ruth were unable to confirm the exact date of their meeting but both agreed that it was either the second or third week of January 2012.

Since I have been given two conflicting statements, I will give separate opinions based on the two scenarios.

Scenario 1 The document shown by Councillor Kelly to Mr. Ruth was the same document presented at the Dec. 19, 2011 Public Meeting of Council.

Scenario 2 The document shown by Councillor Kelly to Mr. Ruth was the document submitted on January 11, 2012 that is currently under review.

Evaluation of Scenario 1

Councillor Kelly said he was having a discussion with Mr. Ruth about Council not being business friendly and the difficulty for developers to do business in Corner Brook. The discussion then centered around Mr. Griffin's efforts to get approval for a project to manufacture modular homes in the City. Councillor Kelly was expressing his frustration that the developer had provided very little information in his proposal. Councillor Kelly left the meeting, went to his computer and called up and printed two pages from the Council Agenda Package for the Dec. 19, 2011 Public General Meeting. He copied pages 48 and 49. The agenda for the meeting showed Agenda number 9 as **Land** and 9.1 **Request to Purchase Land in Lundrigan Drive** and next to the agenda number was a reference to pages 46-49. Pages 46 and 47 was the Request for Decision (RFD) and 48 and 49 was the two page proposal submitted by Mr. Griffin, the first page being a text document and the second page a site drawing. Councillor Kelly checked the information on the Griffin Proposal against the information published in the media and confirmed all of the information contained in the proposal was already public. Councillor Kelly said he then returned and resumed the meeting with Mr. Ruth. Councillor Kelly perceived Mr. Ruth as a person who had experience in capital projects and showed him the two page proposal asking something to the effect, what would you do if you received a proposal like this?

It should be noted that from the information I reviewed Councillor Kelly did not say in his tweet that he showed confidential information. He said "I showed Ches the Griffin proposal. He agreed to keep it confidential." Mr. Ruth said "I have announced that Councillor Gary Kelly showed me a City Confidential Proposal".

Opinion Scenario 1

Once the proposal went to the Public Meeting of Council the proposal could no longer be considered confidential. The reason for Councillor Kelly requesting confidentiality is irrelevant.

It is my opinion that Councillor Kelly did not release confidential documents and is not in violation of the City of Corner Brook Act.

Evaluation of Scenario 2

Mr. Ruth has made an allegation that Councillor Kelly showed him a City confidential document and from his description of the document I have concluded the document was the proposal submitted by Mr. Griffin and received by the City on or before January 11, 2012. I asked the City to check their records and they confirmed that the City did not give a copy of this document to Councillor Kelly. The records show the first discussion of this proposal with Councillors was on February 14, 2012 when this proposal was on the Agenda of the Corporate Services Policy Advisory Committee Meeting. Councillor Kelly is co-chair of this Committee and was in attendance. The Director of Corporate Services has confirmed that a copy of the proposal was not given to anyone attending this meeting. In any event this meeting was after the meeting between Councillor Kelly and Mr. Ruth which took place on the second or third week of January (Jan. 9-20), 2012. As I stated previously, this proposal was e-mailed to Councillor Kelly by Mr. Griffin on January 12, 2012. Councillor Kelly would have had a copy of this proposal in his possession if the meeting with Mr. Ruth took place after January 12, 2012.

Opinion Scenario #2

Taking into consideration:

- at the December 19, 2011 Public Council Meeting the details of Mr. Griffin's initial proposal and the details of Council's counter proposal were made public;
- the details of the negotiations were discussed in the media including discussions by Mr. Griffin;
- Mr. Griffin e-mailed copies of the proposal to individual Councillors.

It is my opinion the negotiations have ceased to be negotiated in confidence and therefore Councillor Kelly did not breach confidentiality nor is he in violation of the City of Corner Brook Act.

Legislation

The terms of reference state "The Consultant should also review the City of Corner Brook Act and the Access to Information and Protection of Privacy Legislation to determine if there were any violations of the pertinent legislation". I am not a solicitor and therefore cannot offer a legal opinion. The City Solicitor would be the best person to provide this opinion.

I am familiar with the City of Corner Brook Act and will offer the following comment.

The only provision in the City of Corner Brook Act dealing with confidentiality is Section 41 Public Meetings which gives Council the authority to hold privileged meetings with the provision any decision must be ratified at a public meeting of Council in order to be valid.

Since the discussions of Council did not take place at a duly constituted privileged meeting there is no violation of this section of the City of Corner Brook Act.

Recommendations

1. If both parties wish to continue negotiations they should clearly understand the process to be followed and agree to keep the negotiations confidential.
2. Council should review its procedures for discussing confidential matters. In this case the discussions with Council were done at a Council briefing session where no information was recorded. I would recommend Council have these discussions at a privileged meeting of Council. This would provide Council an opportunity to give direction to the city's negotiator and establish the principles Council want included in a Purchase/Sale Agreement. The only action Council is required to take is to approve the Purchase/Sale Agreement and this could be done at a Public Meeting of Council. I believe the information could be kept privileged under the Access to Information and Protection of Privacy Act (ATIPPA) at least while the negotiations are ongoing.
3. Council should develop guidelines for discussing Council business on any social network site.

Confidentially Breach Allegation –Investigation

Terms of Reference

Background

On 16 February 2012 it was reported on twitter that Councillor Gary Kelly released confidential documents to Mr. Ches Ruth pertaining to a proposal submitted to the City of Corner Brook. The proposal was from Mr. Daniel Griffin to start a modular home manufacturing plant in Corner Brook. City officials had been in discussions with Griffin Developments Inc. for several months and on 19 December 2011, Council passed a resolution approving the sale of 28.70 acres of land in the Lundrigan Business Park, subject to the applicant meeting conditions outlined by the Council. (Minute attached).

The articles on twitter and reported by several media outlets alleges that Councillor Kelly released confidential documents to Mr. Ruth.

As a result of this incident the Council of the City of Corner Brook passed a resolution appointing a third party (Jim Kennedy) to investigate any supposed breach of confidentially or other misconduct by Councillor Kelly in relation to the release of documents pertaining to the proposed development by Griffin Developments Inc.

Terms of Reference

The scope of the review shall include the following:

Inquire into all aspects of the transactions and matters described in the aforesaid matter, their history and their impact on the City of Corner Brook as they relate to the governance of the municipality, or the conduct of its business and to make recommendations to Council that the consultant deems appropriate and in the best interest of the public as a result of the review.

In conducting the inquiry into the transaction the consultant should conduct interviews with the parties that are the subject matter of the incident including Ches Ruth, Councillor Gary Kelly, representatives of Griffin Development Inc., City officials; and any other party the consultant deems is necessary in conducting this review.

The consultant should also review the City of Corner Brook Act and the Access to Information and Protection of Privacy Legislation to determine if there were any violations of the pertinent legislation.

Submit a final report to Council outlining the findings of the review.