

Principles *Integrity*

City of Hamilton

Code of Conduct Complaint Against Councillor Clark

Final Report

April 21, 2021

Introductory Comments

- [1] Principles *Integrity* was appointed the Integrity Commissioner for the City of Hamilton in July 2018. We are also privileged to serve as Integrity Commissioner for a number of Ontario municipalities. The operating philosophy which guides us in our work with all of our client municipalities is this:

The perception that a community's elected representatives are operating with integrity is the glue which sustains local democracy. We live in a time when citizens are skeptical of their elected representatives at all levels. The overarching objective in appointing an integrity commissioner is to ensure the existence of robust and effective policies, procedures, and mechanisms that enhance the citizen's perception that their Council and local boards meet established ethical standards and where they do not, there exists a review mechanism that serves the public interest.

- [2] The City of Hamilton has as part of its ethical framework a Code of Conduct which is the policy touchstone underlying the assessments conducted in this report. It represents the standard of conduct against which all members of Council are to be measured when there is an allegation of breach of the ethical responsibilities established under the Code of Conduct. The review mechanism contemplated by the Code, one which is required in all Ontario municipalities, is an inquiry/complaints process administered by an integrity commissioner.
- [3] Integrity commissioners carry out a range of functions for municipalities (and their local boards). They assist in the development of the ethical framework, for example by suggesting content or commentary for codes of conduct. They conduct education and training for members of council and outreach for members of the community. One of the most important functions is the provision of advice and guidance to members to help sort out ethical grey areas or to confirm activities that support compliance. And finally, but not principally, they investigate allegations that a person has fallen short of compliance with the municipality's ethical framework and where appropriate they submit public reports on their findings, and make recommendations, including recommending sanctions, that council for the municipality may consider imposing in giving consideration to that report. In the City of Hamilton, this extends to imposing sanctions as warranted.

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- [4] It is important that this broad range of functions be mentioned at the outset of this investigation report. Our goal, as stated in our operating philosophy, is to help members of the City of Hamilton community, indeed the broader municipal sector and the public, to appreciate that elected and appointed representatives generally carry out their functions with integrity. In cases where they do not, there is a proper process in place to fairly assess the facts and, if necessary, recommend appropriate sanctions. In every case, including this one, the highest objective is to make recommendations that serve the public interest, if there are recommendations to be made.
- [5] Our role differs from other ‘adjudicators’ whose responsibilities generally focus, to state it colloquially, on making findings of fact and fault. While that is a necessary component when allegations are made, it is not the only component.
- [6] Our operating philosophy dictates the format of this report. The tenets of procedural fairness require us to provide reasons for our conclusions and recommendations, and we have done that. Procedural fairness also requires us to conduct a process where parties can participate in the review and resolution of a complaint.
- [7] In this regard, we have assessed the information fairly, in an independent and neutral manner, and have provided an opportunity to the Councillor named in this Report to respond to the allegations, and where findings were made, to review and provide comment on the preliminary findings

The Complaint

- [8] On February 4, 2021 Councillor Brad Clark became aware that a recording of a conversation dating back more than six months in which he alleged wrongdoing/corruption by City staff had been posted to YouTube.
- [9] On February 7, the Councillor issued a media release apologizing to Council and his constituents for the statements, resigned his position as Chair and Vice-Chair of three committees of Council, and advised that he would be asking the integrity commissioner to investigate.
- [10] On February 8, we received a Complaint from Councillor Clark in which he requested we initiate an investigation of whether his own conduct contravened the Code of Conduct, initiating a complaint about himself.
- [11] Integrity commissioners do not have jurisdiction to initiate an investigation without a complaint.

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- [12] The scope of a complaint is generally defined by the facts as articulated by the complainant.
- [13] We are not aware of a precedent for a member to self-initiate their own complaint. One could conceive of circumstances where a member might self-initiate a complaint in order to truncate or circumscribe the ambit of the alleged facts or conduct to be investigated, and so we were took steps to verify that the complaint had the proper ambit and scope.
- [14] In conversation with Councillor Clark, he agreed that we would obtain validation from the Mayor with respect to the ambit of the complaint as it was understood by members of Council, which we have done.
- [15] In the result, the conduct alleged is as follows:
- That Councillor Clark engaged in a private conversation with a member of the public in which he disclosed confidential information
 - That the Councillor made statements alleging corruption by staff and others
- [16] The questions arising from this conduct are:
- Whether the Councillor's comments damage or injure the professional or ethical reputation of any City staff or member of the public
 - Whether they harm or damage public respect for the City and its by-laws; and
 - Whether, in the released recording of the conversation with the resident, the Councillor disclosed any confidential information.

Process Followed for this Investigation

- [17] In conducting this investigation, Principles *Integrity* applied the principles of procedural fairness and was guided by the complaint process set out under the Code of Conduct.
- [18] This fair and balanced process includes the following elements:
- Reviewing the complaint to determine whether it is within scope and jurisdiction and in the public interest to pursue, including obtaining validating the ambit of the complaint, given the unique circumstances of the complaint being self-initiated by the Councillor
 - Advising the Councillor of the full ambit of the complaint being considered, and providing him with an opportunity to respond, including interviewing the Councillor

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- Reviewing the Code of Conduct, recordings, reports, meeting minutes, emails, posts and other relevant documentation
- Conducting interviews of persons with information relevant to the issues under investigation
- Providing the Councillor with the opportunity to review and provide comments to the Integrity Commissioner's Preliminary Findings Report, and taking any such comments into consideration prior to finalizing our Report.

Background and Context:

- [19] In 2019, a building permit was issued erroneously permitting the construction of a dwelling where it did not, in fact, meet all of the applicable planning requirements.
- [20] The error occurred because staff inadvertently misinterpreted the interplay of the applicable policies of the Niagara Escarpment Plan Special Policy Area and the Dundas Official Plan. Staff, in processing a Site Plan Control application in January 2019, issued the building permit in error in February 2019. (As noted below, the complexity of the relevant documentation rendered the error by the staff involved to be an innocent mistake, honestly made despite their diligent review of the matter).
- [21] Construction almost immediately attracted the attention of neighbouring property owners, revealing the error to City officials who promptly issued a stop work order and revoked the building permit in July 2019.
- [22] A thorough review of the circumstances of the permit issuance revealed lack of clarity in the applicable planning documents, leading to ambiguity. In the wake of the incident, the City directed staff to amend the applicable planning documents to eliminate future missteps.
- [23] In its review of the circumstances, management was satisfied that the issuance was entirely the result of challenges in interpreting the planning documentation, and not a matter of staff competence or integrity.
- [24] In rectifying the inadvertent error, the City acquired the property for an undisclosed amount in a settlement with the owner.
- [25] Through the latter half of 2019 and the first half of 2020, the matter was the subject of several reports to Council, both public and confidential.
- [26] The entire episode was well-documented publicly at the time, with public reports and articles in the media.

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[27] On February 4, 2021 it was brought to Councillor Clark's attention that a recording of a telephone conversation had been posted on social media by a constituent in which the subject matter of the conversation was the erroneous issuance of the building permit.

[28] During the recorded conversation, Councillor Clark is heard making the following statements:

Clark:...So some guy bought 10 acres and built a house there. He got a building permit. The house is up. Now the roof is on. And Arlene [Councillor VandeerBeek] found out about it, and talked to Building Department. The Building Department went back and talked to Planning and Planning said: no, the zoning doesn't allow that. So they have issued an order to stop work on the house, and they're telling him to tear the house down.

It was the Planning Department that approved it. It was the Building Department issued a building permit. It is illegal because of that and now they're telling him to tear it down and Arlene is flipping out.

It's gonna cost the City a million dollars if they want to tear down, I mean the guy's gonna have to be bought off.

...

Clark: So what's going on in the Building Department and how come building permits are being issued, when they shouldn't be issued? And who is paying who to get those building permits issued?

[Brief Interjection by Constituent]

Clark: It's a [expletive deleted] nightmare.

Constituent: You think there's some kind of corruption then behind it?

Clark: It's just, it's just, beginning to scratch the surface...

[29] In the recording, Councillor Clark suggests corruption at the City, and states that 'it's gonna cost the City a million dollars'.

[30] Immediately upon learning of the social media post, on February 4, Councillor Clark sent an apology to all Council members, the City Manager, the General Manager of Planning, and the Chief Building Official recanting the suggestion of corruption: "I have no knowledge of any corruption with the Building Department or any department within the City".

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- [31] On February 7, 2021 Councillor Clark issued a media statement in which he reiterated his apology to the Mayor and Council, his constituents, and offered “sincere and unequivocal apologies to our dedicated, hardworking and honest city staff who have my utmost respect”.
- [32] In that media statement Councillor Clark indicated he had referred the matter to the Integrity Commissioner, and was resigning effective immediately as Chair of the Audit and Finance Committee, Vice-Chair of the Emergency and Community Services Committee and Chair of the Development Charge Stakeholders Sub-Committee.
- [33] On February 16, 2021 Councillor Clark posted another media statement in which he reiterated his apology, recanted the statements he made as unfounded and baseless, and extended an apology to the property owner.

The Applicable Code of Conduct Provisions, and their Interpretation:

- [34] The City of Hamilton Council Code of Conduct provides an ethical guide and framework for Members of Council for conduct and behavior which promotes confidence in the office which they hold as elected officials of municipal government.

- [35] That Code of Conduct sets out as the Purpose:

A legislated Code of Conduct helps to ensure that the Members of Council share a common basis for acceptable conduct. The Code of Conduct is not intended to replace personal ethics. The Code of Conduct:

serves to ensure public confidence that the City’s elected representatives operate from a base of integrity, transparency, justice and courtesy.

- [36] The provisions of the Code which are most relevant to our findings and analysis in this investigation are:

Section 5: Confidentiality

- 5. (1) No Member of Council shall disclose or release by any means to any member of the public, any confidential information acquired by virtue of his or her office, in either oral or written form, except when required by law or authorized by Council to do so.

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...

- (3) No Member of Council shall disclose the content of a matter that has been discussed at, or is or has been, the substance of deliberations of or at, an in camera meeting, except for content that has been authorized by Council, or a Committee of Council, or otherwise by law, to be released to the public.
- (4) Under this section, every Member shall, unless otherwise authorized or required by law, maintain confidentiality over, and not disclose, the following forms and types of information and documents:

- (a) items under litigation, negotiation, or personnel matters;

Section 11: Conduct Respecting City Employees

11. (1) ...

- (a) every Member of Council shall be respectful of the role of City officers and employees to provide service and advice based on political neutrality and objectivity, ...

- (b) no Member of Council shall maliciously, falsely, negligently, recklessly, or otherwise improperly, injure the professional or ethical reputation, or the prospects or practice, of any one or more City employees; and

- (c) every Member of Council shall show respect for the professional capacities and position of officers and employees of the City.

...

Section 12: Respect for the City and its By-Laws

- 12. Members of Council shall encourage public respect for the City and its By-laws.

Analysis and Findings:

[37] The Councillor has acknowledged and confirmed that he made baseless and unfounded allegations of staff corruption during the conversation with his constituent. He has since recanted these assertions, and has confirmed he had no basis for such statements.

[38] We are satisfied that management at the City of Hamilton undertook a thorough review of the circumstances leading up to and surrounding the erroneous issuance of the building permit, and that the error made in issuing the building permit was entirely inadvertent.

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- [39] We find that in making the statements, Councillor Clark contravened section 11(1)(b) of the Code by “maliciously, falsely, negligently, recklessly, or otherwise improperly, injur[ing] the professional or ethical reputation ... of ...one or more City employees”.
- [40] The stop work order was issued in July 2019. We understand that the recorded conversation took place after July 28, 2020.
- [41] The Councillor has advised that his statement: “It’s gonna cost the City a million dollars if they want to tear down” was merely his own estimate, and not reflective of any confidential information provided to him.
- [42] By the time of the conversation between the Councillor and the constituent, Council had been provided with confidential information relating to the potential costs for the City to rectify the situation.
- [43] However, the Councillor has advised that the quantum of a million dollars was not based on anything he had learned during closed meetings but rather was a ballpark figure based on his awareness that the property had been valued at \$800,000. He had learned this in conversation with the Ward 13 Councillor, whose ward comprises the community of Dundas, where the property in question is located.
- [44] We are satisfied that the Councillor’s statement did not, in fact, disclose confidential information.
- [45] Certainly one of the pitfalls in engaging in casual exchanges of this nature with a member of the public is that inadvertent disclosures of confidential information become more likely.
- [46] We understand that the Councillor was, during the recorded conversation, discussing other issues relating to another property, believing that the other party to the conversation, a former undercover officer, might be in a position to provide some pertinent information about persons potentially involved. In this regard, it appears the Councillor was attempting to undertake some sort of investigation of his own.
- [47] While it appears that nothing came of this behind the scenes investigation, the former undercover officer was secretly recording the conversation, unbeknownst to the Councillor.
- [48] In the winter of 2021, when this individual experienced some difficulty obtaining an unqualified clearance letter from the Building Dept. enabling him to sell his home despite the existence of unauthorized structures on the property, the recording was posted.

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- [49] We understand that the unauthorized structures have since been removed, the clearance letter has been issued, and the sale of his home completed. What remains is the cloud of an unfounded criticism tarnishing the reputation of the Building Department and the Councillor.
- [50] There is no doubt in our view that the Councillor has demonstrated genuine remorse for his conduct in making unfounded and baseless allegations of corruption in a casual conversation with a member of the public.
- [51] The Councillor is regarded as a credible and authoritative member of City Council and therefore such comments may tend to carry significant weight.
- [52] To his credit, prior to the filing of the complaint Councillor Clark had already taken remedial steps which an integrity commissioner might contemplate in the course of an investigation, in that he:
- issued repeated genuine and heartfelt apologies;
 - removed himself from leadership roles (Chair/Vice-Chair) on 3 committees
- [53] By his recent actions, Councillor Clark has assumed accountability for his conduct.
- [54] In addition to the Councillor voluntarily removing himself as Chair/Vice-Chair of 3 committees, the Councillor has personally reached out and apologized to the relevant management of the City's Building Department, who have accepted his apology.

Additional Observations:

- [55] While members of Council regularly engage with constituents regarding any number of matters, it is troubling to think that a member of Council would engage so casually with a constituent regarding issues unrelated to that constituent, and clearly related to matters of significant legal concern which are or will be before Council.
- [56] The conversation posted reflects an exchange which appears to be in the nature of friendly banter, while casting a significant aspersion on the City, its staff, and building permit applicants. Beyond unprofessional, it is distressing to staff that a member of Council may so readily offer up such an inappropriate and damaging explanation.
- [57] The fact that the constituent is a former undercover officer and the Councillor believed he was engaging in some behind the scenes investigative effort relating

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to other matters, may go some way to explain the conversation, but does not excuse the unfortunate statement.

- [58] We note that, while it is certainly considered unethical for one party to a conversation to record it without consent, it is not illegal.
- [59] This should be taken as a learning opportunity for members of Council – aside from the obvious need to avoid gratuitous criticisms of staff and others, it would be prudent for members of Council to consider with whom they discuss contentious matters, particularly if the substance of the discussions includes speculation and unsubstantiated opinions.
- [60] Members of Council should refrain from embarking on their own investigations, but rather refer these as appropriate either to staff within the organization or to other agencies.

Summary of Findings:

- [61] While we find that the Councillor's statements in the conversation posted did damage or injure the professional and ethical reputation of City employees by alleging corruption, we do not find that the Councillor released or disclosed any confidential information.
- [62] We also find that the Councillor's conduct breached s.11 of the Code of Conduct, by "maliciously, falsely, negligently, recklessly, or otherwise improperly, injur[ing] the professional or ethical reputation ... of ...one or more City employees".
- [63] We do not find, in the circumstances of this matter, that the Councillor's comments harmed or damaged public respect for the City and its By-laws.

Concluding Remarks:

- [64] While monetary sanctions are available to an integrity commissioner, in our view the more important outcomes of any investigation are to provide the community and staff with a mechanism to hold members accountable, daylight issues, and achieve improved behaviour among members of elected and appointed municipal bodies.
- [65] The Councillor has unequivocally taken steps to demonstrate his remorse and accept responsibility for his actions by:
 - Issuing a public apology
 - Self-reporting to the Integrity Commissioner
 - Resigning from leadership positions on three committees of Council, and
 - Personally, apologizing to relevant staff

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- [66] Significant consequences are now already in place, having been self-imposed by the Councillor.
- [67] In our view, the objectives of the enforcement mechanism under the Code have been met and no additional sanctions are necessary.
- [68] We wish to conclude by publicly thanking everyone who was asked to participate in this process.
- [69] We will be pleased to be available at the Council meeting when this report is considered.

All of which is respectfully submitted,

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Integrity Commissioner for the
City of Hamilton