

CITY OF HAMILTON INTEGRITY COMMISSIONER, DAVID G. BOGHOSIAN

Citation: Complaint re: Mayor Horwath Use of Strong Mayor Powers Concerning 5 and 13 Lake Ave. S. – DGB-HamiltonICI-2024-008

Date: November 22, 2024

REPORT ON COMPLAINT

Introduction

[1] On September 10, 2024, I received a Complaint regarding Mayor Horwath. The Complaint essentially alleges that at the behest of the principal of Indwell/Flourish, Graham Cubitt, she exerted undue influence in exercising Strong Mayor Powers to have a City-owned parking lot located at 5 and 13 Lake Avenue South declared as surplus land and transferred to an affordable housing developer, which the Complainant asserted would invariably be Indwell. The Complainant requested that their identity remain anonymous, which, given the circumstances, I have agreed to.

[2] Having requested and reviewed (with the assistance of my staff) copious documents and communications from the Mayor’s Office, the City’s Housing Secretariat and the City’s Municipal Land Development office, I find no reasonable grounds for this Complaint regarding the Code of Conduct and I have no jurisdiction to review whether the Mayor’s exercise of Strong Mayor Powers was undertaken in “good faith.” This report explains my reasons for dismissing the Compliant.¹

The Complaint

[3] The Complaint was as follows:

[The Lobbyist Registrar] identified correspondence between Mayor Horwath and Mr. Graham Cubitt (unregistered lobbyist representing Indwell Inc, and other arm's reach for-profit entities identified therein), dated February 26th, 2024, in which "Mr. Cubitt communicated with Mayor Horwath urging her to find a workaround in relation to the defeat of the staff proposal to make available parking lots on Lake Street South in Stoney

¹ Section 13.(5) of the Integrity Commissioner Bylaw #16-288 (“the Bylaw”) states that where I decide not to conduct an Inquiry, I am not to issue a report but rather only a letter to the Complainant and the Member complained about. Where I do decide to conduct an investigation, s. 19.(1) of the Bylaw states that my first step is to provide the Member (in this case, the Mayor) with a copy or synopsis of the Complaint. I did conduct an Inquiry in requesting voluminous records from the City but I did not provide the Mayor with the Complaint as I formed the opinion that reviewing the documents I requested and received was necessary to carry out a preliminary evaluation of the Complaint to determine if I needed the Mayor to respond, which I ultimately determined I did not. Because I did conduct a manner of Inquiry, although not strictly speaking in accordance with the Bylaw, and because of the publicity this matter garnered following the September 3, 2024 Council Meeting related to the Lobbyist Registrar Investigation into Graham Cubitt, I have determined that issuing a report in this matter is in the public interest.

Creek", referencing undisclosed "plans" to modify parking capacity for an as yet unproposed affordable/supportive housing facility on the site. Mayor Horwath went on to use Strong Mayor Powers (SMPs) on March 27th, 2024 to unilaterally advance this initiative (authorizing disposition of 5 & 13 Lake Ave S for sale at nominal value/lease to affordable [sic] housing providers), despite a Council Code of Conduct mandate to not exert undue influence on behalf of any business or associate (including any lobbyist, or entity required to register as a lobbyist), after which she cited "local housing [sic] providers" as influential in her decision to do so, in a Hamilton Spectator Op-Ed dated March 29th, 2024. Further, she issued a Mayor's Staff Directive dated April 25th, 2024, mandating "the successful nonprofit housing provider" at these sites would "make recommendations on how to maximize parking spaces", demonstrating the coordinated effort of the Mayor and Mr. Cubitt to covertly ensure the disposition of these city owned properties [sic] to Indwell, in the personal and business interest of Mr. Cubitt. This coordination undermines the notion that the Mayor employed her SMPs "in good faith", as mandated by the Municipal Act (section 284.14), and the inherent immunity for SMPs from review/reversal that this assumption provides.

Investigation

February 26th, 2024 Letter from Graham Cubitt to Mayor Horwath, copied to Members of Council

[4] This letter concerns the decision of the General Issues Committee to maintain two municipal-owned sites as parking lots rather than allocate them for affordable housing.² Mr. Cubitt, writing on behalf of Hamilton is Home, a coalition of not-for-profit affordable housing providers, states that this decision has generated mostly negative discussion and that he believes it is possible to maintain public parking while building affordable housing. He states that the prospect of building affordable apartments at these sites was flagged by "Real Estate" for Hamilton is Home in 2022. In 2023, a City study was undertaken and, during a virtual meeting, staff shared draft concepts with Hamilton is Home, which offered high-level comments. Mr. Cubitt advises that because, in his opinion, it is likely feasible to increase at-grade parking at the site by 50%, the potential project should be refined rather than rejected outright. Mr. Cubitt suggests that Council defer a vote regarding the use of the lots to allow Hamilton is Home to work with the Housing Secretariat to consider designs for the lots that would simultaneously maximize public parking and address the housing crisis.

Mayoral Decision MDE-2024-08 dated March 27th, 2024

[5] Mayoral Directive MDE-2024-08 was made pursuant to s. 284.11 of the *Municipal Act, 2001* and vetoes City of Hamilton Bylaw 24-044 to the extent to which it confirmed Council's vote not to adopt Item (g)(i)(1) of the General Issues Committee Report 24-004. That item called for 5 Lake Avenue South, Stoney Creek to be declared surplus in accordance with the City's

² Though not explicitly stated, Mr. Cubitt is presumably referencing 5 and 13 Lake Avenue South, Stoney Creek.

Procedural By-law to achieve the City's affordable housing objectives and that staff be directed to select a non-profit housing provider via an open process to dispose of 5 Lake Avenue South at nominal value for the purpose of affordable housing. It also called for staff to use an open process to select a non-profit housing provider and negotiate an agreement to dispose of 13 Lake Avenue South, Stoney Creek, also for the purposes of affordable housing. MDE-2024-08 states that, for greater certainty, all other aspects of By-law 24-044 confirming the proceedings of the March 27, 2024 City Council meeting are approved. In essence, MDE-2024-08 undoes Council's decision regarding not allocating 5 and 13 Lake Avenue South for the purposes of affordable housing.

Hamilton Spectator Op-Ed by Andrea Horwath dated March 29th, 2024

[6] In this op-ed, Mayor Horwath outlines why she is using strong may powers to build affordable housing in Stoney Creek. Her Worship states that affordable housing is the most pressing issue Hamilton faces and that she was disappointed with the recent committee decision to preserve parking spots rather than building affordable housing units.³ She goes on to state that Council refusing to build 67 affordable units is contrary to the principles that it has unanimously upheld and that as Mayor, it is her duty to lead, and that she is committed to ensuring affordable housing is a top priority. Her Worship states that she disagreed with community leaders in Stoney Creek, who thought that parking should be prioritized. She opines that that using surplus municipal lands for affordable housing is a crucial aspect of the City's Housing Sustainability and Investment Roadmap, which was unanimously supported by Council, and that her use of Strong Mayor Powers aligns with that Roadmap. Doing so, in her Worship's opinion, sends a strong message to other levels of government that Hamilton is doing everything in its power to address the housing crisis. Local housing providers advised her that their success in applying for Federal or Provincial funding is contingent upon the City's commitment to its objectives and her Worship states that Hamilton is committed to working with its partners to bolder its position when seeking support from other levels of government. Mayor Horwath noted that she had hoped to avoid using strong mayor powers, but that the urgency of the situation left her with no other option.

Mayoral Directive to Staff MDI-2024-01 dated April 25th, 2024

[7] Mayoral Directive to Staff MDI-2024-01 dated April 24, 2024 was issued in the context of a by-law to dispose of 5 and 13 Lake Avenue South, Stoney Creek to build affordable housing and that doing so will require removing an existing Veteran's Lane and eliminate 57 parking spaces. It directs City of Hamilton staff to undertake research and consultation with, among others, (1) the Royal Canadian Legion Branch 622 and the successful non-profit housing provider, on how the City can honour Veterans and (2) with the community, including the Stoney Creek Business Improvement Area, on how to maximize parking spaces while disposing of 5 and 13 Lake Avenue South, Stoney Creek to build affordable housing.

Review of Emails from Various City Offices re 5 and 13 Lake Ave. S.

³ Despite not stating the exact date of the impugned decision, this is presumably the decision regarding Item (g)(i)(1) take at the March 27, 2024 City Council meeting.

[8] We requested all communications generated by the City’s Housing Secretariat, Municipal Land Development Office and the Office of the Mayor relating to 5 and 13 Lake Ave. S.⁴ We received and reviewed approximately 850 discrete files from these offices, in total, with the communications spanning the time frame of 2019 up to the present. These files frequently consisted of email strings involving multiple email exchanges, many including attached letters, drawings, diagrams, charts, graphs, powerpoint presentations, etc. Where a file was requested containing an email that referenced an attachment but the attachment was not included, we subsequently requested and received the attachment. We were ultimately satisfied, after several back and forth communications to obtain additional emails and attachments, that we had been provided with full disclosure of all files related to the subject of 5 and 13 Lake Ave. S. from the three offices from which we requested disclosure. We are also satisfied that the three offices we requested documents from were the only City offices that would have documentation pertaining to our investigation.

Applicable Legislative Provisions

Strong Mayors, Building Homes Act, 2022, S.O. 2022, c. 18 - Bill 3

[9] The relevant provisions of this statute are as follows:

1. The *Municipal Act, 2001* is amended by adding the following Part:

PART VI.1

SPECIAL POWERS AND DUTIES OF THE HEAD OF COUNCIL

Veto powers

Application

284.11 (1) This section applies with respect to by-laws under,

- (a) this Act and the regulations, other than under any prescribed section;
- (b) the *Planning Act* and its regulations, other than any prescribed section; and
- (c) any other prescribed Act or regulation or prescribed section of an Act or regulation.

By-law for consideration

(2) Despite any procedure by-law passed by the municipality under subsection 238 (2) and subject to subsection (3) of this section, if the head of council is of the opinion that all or part of a by-law that is subject to this section could potentially

⁴ Because the emails often contained confidential information, we have not included a summary of the files we reviewed in this Report.

interfere with a prescribed provincial priority, the head of council may provide written notice to the council of the intent to consider vetoing the by-law.

Same, timing

(3) If the head of council intends to consider vetoing the by-law, the head of council shall provide the written notice described in subsection (2) on or before the earlier of two days after the day council voted in favour of the by-law or the prescribed deadline, if any.

By-law commencement

(4) Despite any other Act, a by-law that is subject to this section shall be deemed not to have been passed by council until,

- (a) if notice has not been given under subsection (3), the earlier of,
 - (i) the day written approval of the by-law is given by the head of council to the municipality, and
 - (ii) two days after the day council voted in favour of the by-law or the prescribed deadline, as the case may be; or
- (b) if notice has been given under subsection (3), the earlier of,
 - (i) the day written approval of the by-law is given by the head of council to the municipality, and
 - (ii) 14 days, or such other prescribed time period, after the day the council voted in favour of the by-law.

Veto powers

(5) Subject to subsection (6), if the head of council is of the opinion that all or part of the by-law could potentially interfere with a prescribed provincial priority, the head of council may veto the by-law by providing to the clerk, on the day of the veto, a written veto document that includes the veto and the reasons for the veto.

Same, timing

(6) The head of council shall not veto a by-law after giving approval under subclause (4) (b) (i) or after the expiry of the time period described in subclause (4) (b) (ii), as the case may be.

Duties of clerk

(7) If the head of council vetoes a by-law the clerk shall,

- (a) by the next business day after the clerk receives the written veto document under subsection (5), provide each member of council, other than the head of council, a copy of the written veto document; and
- (b) make the written veto document available to the public in accordance with the regulations, if any.

Effect of veto

(8) If the head of council vetoes a by-law, clause (4) (b) does not apply and the by-law shall be deemed not to have been passed by council.

...

Immunity

284.14 A decision made, or a veto power or other power exercised, legally and in good faith under this part shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the decision or exercise of the veto power or other power.

Hamilton Code of Conduct for Members of Council and Local Boards – Bylaw 16-290

[10] The following provisions of the Code of Conduct have been put in issue:

SECTION 8: CONDUCT IN OFFICE, INCLUDING AT COUNCIL AND COMMITTEES

8. (2) In this Section:

- (a) A “disqualifying interest” is an interest in a matter regarding which a reasonable person fully informed of the facts and circumstances would conclude that the Member could not participate impartially in the decision-making process related to the matter either because to do so would not be in compliance with the Municipal Conflict of Interest Act, or, because the Member’s relationship to persons or bodies involved in the matter or affected by the decision is so close, a reasonable person would conclude that the Member could not effectively carry out their public duty with impartiality.
- (b) A “non-disqualifying interest” is an interest in a matter that, by virtue of the relationship between the Member and other persons or bodies associated with the matter, is of such a nature that a reasonable person fully informed of the facts and circumstances would conclude that the Member could still participate impartially in the decision-making processes related to the matter only so long as:

- (i) the Member fully discloses the interest so as to provide transparency about the relationship; and
- (ii) the Member states why the interest does not prevent the Member from making an impartial decision on the matter.

(3) Members shall not participate in the decision-making processes associated with their role or position when they have a disqualifying interest in a matter. Participation includes attempting to influence an outcome, whether the decision to be made is to be made by Council or a member of staff with delegated authority or operational responsibility.

(4) Members may participate in the decision-making process related to a matter in which they have a non-disqualifying interest provided they file at their earliest opportunity a Transparency Disclosure in a form and manner established by the City Clerk acting in consultation with the Integrity Commissioner.

- (i) Transparency Disclosures are public documents and shall be available for public viewing on the City of Hamilton's website.
- (ii) On receipt of a proper request, the Integrity Commissioner shall determine whether an interest is a disqualifying interest or a nondisqualifying interest.

SECTION 10: IMPROPER USE OF INFLUENCE

10. (1) No Member of Council shall use the influence of his or her office for any purpose other than the performance of the Member's responsibilities as a Member, and other official duties.

(2) In addition to the general requirement contained in subsection 10(1): (a) No Member shall use her or his status as a Member of Council to influence, or try to influence, improperly, any action or decision of another person or entity to the private advantage of:

- (i) the Member;
- (ii) any member of the Member's family;
- (iii) any City employee;
- (iv) any friend, or business or other associate;

or attempt to secure preferential treatment beyond activities in which Members normally engage on behalf of constituents as part of their official duties.

(3) For the purposes of this section, “private advantage” does not include a matter that: (a) is of general application; (b) affects a Member of Council, a family member, City employee, friend or associate, as one of a broad class of persons; or (c) concerns the remuneration or benefits of one or more Members of Council, as authorized by law.

Findings

[11] My findings are as follows:

1. There is no evidence in the documents we reviewed of any relationship between the Mayor and Graham Cubitt, Indwell or Flourish⁵ beyond that of elected representative- constituent;
2. Although Mr. Cubitt, on behalf of “Hamilton is Home,” wrote to the Mayor *as well as all other members of Council* on February 26, 2024 urging a reconsideration of the decision not to declare of 5 and 13 Lake Ave. S. surplus lands so they could be developed as affordable housing sites, and although the Mayor cited entreaties of “affordable housing providers” as one of the reasons she exercised Strong Mayor Powers in relation to 5 and 13 Lake Ave. S., which *may* be a reference to the Cubitt letter, her exercise of Strong Mayor Powers did not direct that the subject properties be disposed of to any particular entity and merely paved the way for them to be developed following an “open process to select a non-profit housing provider;”⁶
3. There has been no disposition of 5 and 13 Lake Ave. S. and no discussions with any developer regarding the development of these lands;⁷
4. There is no evidence in the City files we reviewed of any attempt on the part of the Mayor’s Office to influence who would be selected to develop 5 and 13 Lake Ave. S.;
5. Although Invizij Architects Inc., the principal of which is Emma Cubitt, spouse of Indwell Director of Projects & Development/Flourish President, Graham Cubitt, was selected through a roster selection process rather than a competitive bidding process, Invizij was first selected to prepare concept design plans for 5 and 13 Lake Ave. S. in January 2022, prior to the election of Mayor Horwath. It appears that Invizij was selected by the Municipal Land Development Office to prepare updated design plans based on revised circumstances in 2024 because

⁵ Indwell and Flourish are not-for-profit corporations through which Mr. Cubitt operates as an affordable housing developer.

⁶ Bylaw 24-057, ss. 2 and 3.

⁷ As of October 12, 2024.

Invizij had previously prepared the concept design plans for the properties in 2022.

6. There is no evidence in the City files we reviewed of any attempt on the part of the Mayor's Office to influence the selection of the architectural firm chosen to do the updated concept plans for the development of 5 and 13 Lake Ave. S in 2024;
7. It follows from the foregoing that there is no basis for a finding that either s. 8 or s. 10 of the Code of Conduct has been breached by Mayor Horwath.

[12] Insofar as the complaint regarding the use of Strong Mayor Powers in relation to 5 and 13 Lake Ave. S. stems from the allegation of an intent to benefit a particular developer (Graham Cubitt and/or his companies, Indwell and Flourish), we have found no evidence of this. In relation to any other aspect of the use of Strong Mayor Powers alleged to constitute lack of "good faith," the Office of the Integrity Commissioner has no jurisdiction to review this matter and the appropriate forum for any such challenge is through a judicial review application to the Ontario Superior Court of Justice.

Concluding Remarks

[13] After a comprehensive investigation, we have found no evidence of wrongdoing on the part of Mayor Horwath in relation to 5 and 13 Lake Ave. S. from the standpoint of the Code of Conduct.

[14] This office has no jurisdiction over the policing of the use of Strong Mayor Powers beyond the scope of the Code of Conduct.

[15] This concludes my investigation.

Respectfully Submitted,



David G. Boghosian,
Integrity Commissioner,
City of Hamilton