

REPORT ON CODE OF CONDUCT COMPLAINT – 2018-02**SUMMARY**

A formal complaint (the “Complaint”) was filed with the Office of the Clerk of The Corporation of Haldimand County (the “County”) on April 27, 2018. The Complaint alleges that Mayor Ken Hewitt (the “Mayor”) contravened the County’s Code of Conduct and Complaint Protocol for Members of Council, being Policy No. 2008-02 (the “Code”) by engaging in activity that is incompatible or inconsistent with the ethical discharge of his duties in the public interest, specifically by acting as an agent for another and by using his office to advance the interests of another in contravention of Part 5 of the Code and by accepting an advantage or benefit from another in violation of Part 6.

APPOINTMENT & AUTHORITY

I was appointed as Integrity Commissioner for the County pursuant to subsection 223.3(1) of the *Municipal Act, 2001* by way of an approval of Recommendation 26 by Council in Committee at its meeting of March 27, 2018 which was ratified by Council at its meeting of April 3, 2018 as confirmed by By-law No. 1910/18. On April 30, 2018, Council approved an extension of the appointment to include any additional complaints filed pursuant to the Code for the remainder of the term of Council.

As such, I have reviewed this matter in accordance with my authority as Integrity Commissioner pursuant to the Code and the Complaint Protocol.

CODE OF CONDUCT PROVISIONS AT ISSUE

The Complaint alleges that the Mayor has contravened the following provisions of the Code:

Part 5 Incompatible Activity

Members of Council shall not engage in any activity, financial or otherwise, which is incompatible or inconsistent with the ethical discharge of duties in the public interest. Without limiting the above, members of Council shall not:

...

- (b) act as an agent before Council or any committee or local board;

...

- (f) use their office to advance their interests or the interests of any person or organization with whom or with which they are associated.

Part 6 Gifts and Benefits

Members of Council shall not accept, offer or agree to accept a commission, reward, gift, advantage or benefit of any kind, personally or through a family member or friend, which is connected directly or indirectly with the performance of the duties of office.

REVIEW OF MATERIALS

In order to prepare this Report to Council, I have reviewed the following materials:

- the Complaint and all attachments;
- the Mayor's response by way of sworn affidavit on May 10, 2018 and all attachments thereto (the "Response"); and
- the Complainant's written reply, which was delivered on May 30, 2018 (the "Reply").¹

I have also reviewed materials and data of the Canada Mortgage and Housing Corporation ("CMHC") as to average rental rates. In particular, I reviewed data from CMHC's 2016 Secondary Rental Market Survey with respect to the average cost of rent for single detached houses across Canada (the "2016 House Rental Data"), and data from CMHC's 2015 Rental Market Survey with respect to the average cost of rent for 3 bedroom apartments in the County (the "2015 Haldimand Apartment Rental Data") (collectively, the "CMHC Data").²

BACKGROUND

The Complaint alleges that the Mayor has contravened Parts 5(b) and (f) of the Code relating to Incompatible Activity and Part 6 of the Code relating to Gifts and Benefits. The allegations pertain to the Mayor's participation at various meetings of Council at the County, and his alleged attempts to influence certain decisions in favour of a particular developer in the County, (the "Developer"), and a builder that the Developer works with (the "Builder") (collectively, the "Developer/Builder"). The Complaint alleges that the Mayor acted as an agent of the Developer/Builder and used his office to advance the interests of the Developer/Builder.

The Complaint also alleges that the Mayor received a benefit or advantage from the Developer/Builder by way of the use of a single detached house for residential purposes (the "Property") that is owned by a senior executive of the Builder (the "Executive").

¹ The Reply was delivered beyond the specified timeline provided to the complainant. I have exercised my discretion to accept the Reply. The Reply has been reviewed and considered for the purposes of this Report.

² These materials are available through CMHC's "Housing Market Information Portal", online: <https://www03.cmhc-schl.gc.ca/catalog/home.cfm?lang=en&fr=1403031125279>. Please note that these materials are the most current in relation to the relevant issues as of the date of writing.

The Complaint was accompanied by a number of appendices seeking to establish the following:

- At a meeting of Council (the “First Meeting”), the Mayor supported an aggregate development project “despite negative impacts on residential development”;
- the Mayor supported the Developer’s request that the County develop a policy to facilitate front-end financing for residential development projects (the “Policy”) and approved of lending funds to the Developer pursuant to the Policy;
- The Mayor resided in or used the Property owned by the Executive, and;
- At another meeting of Council (the “Second Meeting”), the Mayor took a position that, from a policy perspective, was exactly opposite to that of the position that he took at the First Meeting.

Based on the foregoing, the proffered implication is that the Mayor: (1) was acting as an agent and in the interests of the Builder at the Second Meeting in contravention of Parts 5(b) and (f) of the Code; and (2) is “receiving the benefit of housing” from the Executive in contravention of Part 6 of the Code, presumably rent-free or at below-market rent.

The Response addresses the above allegations. The Mayor denies that he has contravened Parts 5(b) and (f) of the Code relating to Incompatible Activity. The Mayor also denies that he has contravened Part 6 of the Code relating to Gifts and Benefits.

With respect to the alleged contravention of Parts 5(b) and (f) of the Code, the Response contends that, although the Mayor *is* renting the Property from the Executive, such a rental arrangement does not constitute a benefit, gift or advantage within the meaning of Part 6 of the Code, as the Mayor is paying the Executive fair market value rent for the use of the Property.

The Response was accompanied by a number of attachments seeking to establish the following in support of the Mayor’s position:

- The Mayor entered into a lease agreement with the Executive, whereby the Mayor agreed to pay fair market value to rent the Property;
- The Mayor pays monthly rent to the Executive in accordance with the lease agreement as well as utilities expenses in relation to the Property, and;
- The rent under the lease agreement is consistent with many other similar rentals elsewhere in Caledonia.

In relation to the alleged contravention of Part 6 of the Code, the Response contends that the Mayor, in participating at the Second Meeting, was acting from a purely political and policy based standpoint, rather than in the interests of or as agent for the Builder.

The Reply dismisses the evidence proffered by the Response without offering any rebuttal evidence. With respect to the alleged contravention of Parts 5(b) and (f) of the Code, the Reply notes that no credence should be given to the Mayor’s statement in his Response that the “lease was negotiated for what I believe to be fair market value.” This point will be addressed below.

The Reply also claims that, despite evidence of the payment of rent and utility charges, the Mayor's use of the Property owned by the Executive creates a conflict of interest that is either real or perceived (which is not a matter governed by the Code). In any event, the Reply does not provide any evidence to support this claim.

With respect to the purported contravention of Part 6 of the Code, the Reply simply repeats the allegations contained in the Complaint without any evidence to counter the sworn Response from the Mayor.

The Reply also refers to alleged improper behaviour and practices on the part of the Mayor and other unnamed members of Council. Such allegations did not form part of the original Complaint, are unsupported by any evidence and do not constitute a proper reply. Therefore, such allegations will not be addressed in this Report.

The 2016 House Rental Data demonstrates that, in 2016, the average cost per month for renting a single detached house in municipalities across Ontario was as follows:

- Toronto: \$1,786.00
- Hamilton: \$1,286.00
- Barrie: \$1,425.00
- Ottawa: \$1,537.00
- St. Catharines-Niagara: \$1,020.00
- Windsor: \$957.00

The 2016 House Rental Data does not demonstrate the average cost per month for renting a single detached house in the County in particular.

The 2015 Haldimand Apartment Rental Data demonstrates that, in 2015, the average cost of rent per month for a three bedroom apartment was \$812.00.

Based on the foregoing, it is my determination that I have a full factual and evidentiary record in order to be able to assess the Complaint and the allegations made therein.

FINDINGS

I find that there is no evidence to support the allegation that the Mayor contravened Parts 5(b) and (f) of the Code in relation to Incompatible Activity, as there is no proof that the Mayor acted as agent or in the interests of the Builder.

The evidence demonstrates that, at both the First Meeting and the Second Meeting, the Mayor took a position that supported the economic development of the County. While there may have been some similarities in terms of the subject matter at issue, it does not follow that because the Mayor supported one kind of development project in the first instance, and another in the second, the Mayor was acting as an agent or in the interests of another. This is especially so in light of my second finding, outlined below. Any such allegation is purely and highly speculative. As such, I find that the Mayor did not contravene Parts 5(b) and (f) of the Code.

I find that the evidence in relation to the lease of the Property by the Mayor from the Executive demonstrates that the Mayor did not contravene Part 6 of the Code in relation to Gifts and Benefits through the provision of the use of the Property by the Executive. The evidence demonstrates that there is a lease agreement between the Mayor and the Executive. I do not find the lease agreement itself to be improper or invalid in any way.

I am satisfied that the lease agreement demonstrates that the Mayor has committed in a *bona fide* agreement to pay monthly rent to the Executive for the use and enjoyment of the Property. The rate of rent pursuant to the lease agreement is above, and, in some instances, well above, the average rate of rent for houses in other Ontario municipalities, as evidenced by the 2016 House Rental Data.

The Mayor has also provided evidence that demonstrates he has been paying rent by way of monthly e-transfer to the Executive in accordance with the lease agreement. As such, the evidence establishes that the Mayor is paying at least the average monthly rent for a housing rental in comparable municipalities. Even taking into account inflation, it is still very likely that the amount of the Mayor's rental rate would be at or above the average rate for similar house accommodation across Ontario.

Similarly, while it is likely that a house rental in the County would be more expensive than a three-bedroom apartment rental in the County, the 2015 Haldimand Apartment Rental Data is illustrative of the average rental rates in the County. By comparison, the evidence demonstrates that the Mayor pays significantly more per month to rent the Property than he would to rent a three-bedroom apartment in the County. Again, I make this finding based on the evidence, even after taking into account that there may have been changes to the average rental rates due to inflation since 2015.

While the CMHC is limited insofar as there is no information more current than 2016, and there is no information on the rental rate averages for houses in the County in particular, I am satisfied based on the data available and the evidence provided through the Response that the Mayor is paying at least fair market value for the use of the Property. Accordingly, I have taken into account independent evidence and not simply the statement of the Mayor that he entered into a lease for fair market value.

I was asked in the Reply filed by the complainant to make a determination that the mere agreement to lease the house by the Mayor from the Executive was improper and inappropriate. I will decline to do so.

It is my interpretation that in order to run afoul of Part 6 of the Code, a gift, advantage or benefit of any kind cannot be something for which a fair market value price is paid. The provision of housing for market rent cannot, in and of itself, constitute a gift, advantage or benefit unless such housing was so scarce a commodity in the County that it would not have been made generally available to others in the County. I find that the allegation of a breach of Part 6 to be without merit. As such, I find the Mayor did not contravene Part 6 of the Code.

A copy of this Report in a draft form was provided to the Complainant and to the Mayor on May 30, 2018 with an opportunity to review it and correct or note any omissions. No further comments were received from either party.

CONCLUSIONS

In summary, on the basis of the foregoing, the Mayor did not contravene Parts 5(b) and (f) or Part 6 of the Code as alleged in the Complaint. The Complaint is lacking in merit. The evidentiary record does not support a finding that the Mayor acted as agent or in the interests of the Developer/Builder when participating in the aforementioned meetings. Furthermore, the evidence does not demonstrate that the Mayor received a benefit or advantage within the context of Part 6 in the form of the provision of housing by the Executive.

RECOMMENDATION

In view of my determination that the Mayor did not contravene the Code, there is no sanction or penalty, or further action recommended.



John Mascarin
Integrity Commissioner for Haldimand County

Dated this 5th day of June, 2018