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February 10, 2025

File: 156417

Andrea Daisley
Chief Human Resources Officer
Corporate and Enterprise Services
The Corporation of the City of Welland
60 East Main Street
Welland, ON
L3B 3X4

Dear Ms. Daisley:

Re: Strong Mayor Powers Re Organizational Structure and Employment Matters

We have been asked to provide an opinion with respect to the delegated powers and authorities provided to the Chief Administrative Officer (“CAO”) of The Corporation of the City of Welland (the “City”) in relation to the City’s organizational structure and related employment powers under Part VI.1 of the *Municipal Act, 2001*.¹

Background

The City was designated as a “strong mayor” municipality pursuant to section 284.2 of the *Municipal Act, 2001* by section 1 of O. Reg. 331/23: *Part VI.1 of the Act* on October 31, 2023.²

As is well known, Part VI.1 was added to the *Municipal Act, 2001* to provide new executive powers to the heads of council in larger urban cities in order to advance the provincial government’s initiative to build 1.5 million new homes (and related infrastructure) in Ontario by December 31, 2031.

One of the powers assigned to strong mayors pertains to the determination of their municipality’s organizational structure.³

Related to the authorities respecting a municipality’s organizational structure are employment powers, which include the powers to hire, dismiss and such other prescribed employment powers with respect to the head of any division or the head of any other part of the organizational structure.⁴

¹ *Municipal Act, 2001*, S.O. 2001, c. 25.

² O. Reg. 331/23 revoked O. Reg. 530/22 and added the third tranche of strong mayor municipalities, which included the City of Welland in para. 41 of s. 1.

³ *Municipal Act, 2001*, s. 234.6(1).

⁴ *Municipal Act, 2001*, s. 234.6(2).

At its meeting on October 29, 2024, Council considered the following Notice of Motion, which was carried:

Notice of Motion:

WHEREAS the Mayoral decision 2023-04 delegated organizational structure and employment matters to the CAO (Municipal Act Part VI.1 284.6 (1,2); and further

WHEREAS there are limitations as outlined in 284.6(3) of the Municipal Act;

NOW THEREFORE BE IT RESOLVED that the Council of the City of Welland directs staff to seek legal advice and report to Council for employment matters within Policy HR 005 to align with the authority that Council maintains outside of the strong mayor powers under the Municipal Act 284.6, by December 10, 2024.

Mayor Campion delegated his powers with respect to the City's organizational structure and related employment matters powers to the CAO by way of Mayoral Decision No 2023-04 made on November 17, 2023.⁵ Mayoral Decision 2023-04 provided as follows:

I, Frank Campion, Mayor of the City of Welland, hereby delegate the overall structure of the organization, including the appointment of department heads and all employment matters, to the sole discretion of the Chief Administrative Officer.

We have been asked to provide a legal opinion as to what authority Council retains with respect to employment law matters that have not been assigned to the CAO outside of the delegated powers under section 284.6 of the *Municipal Act, 2001*.

In order to provide our opinion, we have reviewed the City's Hiring Policy⁶ and the statutory and regulatory strong mayor powers as they relate to employment matters.

Analysis

(a) Hiring Policy

Council adopted the Hiring Policy pursuant to its mandatory requirement to adopt and maintain a policy with respect to "its hiring of employees" in accordance with paragraph 270(1) 2 of the *Municipal Act, 2001*.

The purpose of the Hiring Policy is set out in Section 1.2 "to set a consistent and equitable standard for the recruitment and selection of employees at the City." The Hiring Policy outlines the responsibilities of various key persons, specific principles that apply to hiring practices, the procedures that are to be followed, and provisions relating to compliance. Typically, decisions on the hiring and firing of staff resides with the administrative arm of a municipality and not with Council, except for the senior most positions in local government (e.g., deputy chief administrative officers, commissioners, and mandatory statutory officers).

⁵ A strong mayor is empowered to delegate their powers under s. 284.6 (organizational structure) pursuant to s. 283.13(1) 2 of the *Municipal Act, 2001*. Such a delegation may only be made to council or the chief administrative officer pursuant to s. 6 of O. Reg. 530/22.

⁶ City of Welland Hiring Policy. No. HR-005, revised January, 2021.

For the purposes of this opinion, we have been directed to particularly focus and consider the application of Sections 4.1 and 4.5 of the Hiring Policy:

4.0 Procedures

4.1 Employment Hiring Authority

- The CAO shall have the authority to advise Council on performance and to recommend to Council the appointment, promotion, demotion, suspension, or dismissal of Directors.
- The CAO, in consultation with the appropriate Director and Human Resources, shall have the final authority to employ, promote, demote, suspend or dismiss an employee of the City below the rank of Director not covered by a collective agreement and in accordance with all applicable employment legislation.
- The CAO shall have the authority to, in consultation with the appropriate Director and Human Resources, appoint, employ, demote, suspend and dismiss all other employees of the Corporation within approved staff complement levels, in accordance with the requirements of any/all affected collective agreements and all applicable employment legislation.

4.5 Hiring of Directors

- The appointment of a Director, reporting directly to the CAO, is subject to the approval of Council and the selection procedure is as follows:
 - o The Human Resources Department verbally advises the selected candidate of the Selection Committee's recommendation to Council.
 - o Council, in closed session, decides on the Selection Committee's recommendation.
 - o A formal written offer of employment is extended to the successful candidate, and a written acceptance of the offer is received.
 - o A By-law is passed to either establish the position or appoint the successful candidate to the position, or both.

The aforementioned provisions from the Hiring Policy are comparable to those in other similar municipalities of the size and stature of the City. The general authority over day-to-day operations and management of a municipality does not reside with Council, which is the policy-setting and governance arm of the municipality. That responsibility belongs to the chief administrative officer of a municipality, which is made clear in section 229 of the *Municipal Act, 2001*:

Chief administrative officer

229 A municipality may appoint a chief administrative officer who shall be responsible for,

- (a) exercising general control and management of the affairs of the municipality for the purpose of ensuring the efficient and effective operation of the municipality; and
- (b) performing such other duties as are assigned by the municipality.

It stands to reason that if the CAO is the senior official who is statutorily in charge of the control and management of the affairs of the municipality in order to ensure it operates efficiently and effectively, the CAO would be the official primarily responsible for the hiring and termination of most senior staff. Council has sought to maintain some degree of control over Directors in the Hiring Policy with the input and recommendation of the CAO. This is not unusual, although many municipal councils have but a single employee: the chief administrative officer, who has full responsibility over *all* staff hiring and termination decisions.

(b) *Municipal Act, 2001* – Strong Mayor Employment Powers

The applicable provisions of the *Municipal Act, 2001* as they relate to a municipality's organizational structure and employment matters are set out in subsections 284.6(1)-(3):

Powers re organizational structure

284.6 (1) Subject to subsection (3), the powers of the municipality with respect to determining the organizational structure of the municipality are assigned to the head of council.

Employment matters

(2) Subject to subsection (3) and the regulations, subsection (1) includes the power to hire, dismiss or exercise any other prescribed employment powers with respect to the head of any division or the head of any other part of the organizational structure.

Limitation

(3) The powers assigned under subsection (1) do not include the power to hire, dismiss or exercise any other prescribed employment powers with respect to any of the following persons:

1. The clerk or deputy clerk.
2. A treasurer or deputy treasurer.
3. An Integrity Commissioner.
4. An Ombudsman.
5. An Auditor General.
6. A registrar, as described in section 223.11.
7. A chief building official, as defined in the *Building Code Act, 1992*.
8. A chief of police, as defined in the *Police Services Act*.
9. A fire chief, as defined in the *Fire Protection and Prevention Act, 1997*.
10. A medical officer of health, as defined in the *Health Protection and Promotion Act*.
11. Other officers or heads of divisions required to be appointed under this or any other Act.
12. Any other prescribed persons.

As noted above, the Mayor delegated his statutory powers respecting the City's organizational structure and employment matters to the CAO by Mayoral Decision pursuant to paragraph 284.13(1) 2 of the *Municipal Act, 2001*:

Delegation

284.13 (1) Subject to the prescribed limitations, if any, the head of council may delegate their powers and duties under the following sections:

...

2. Section 284.6 (organizational structure).

and in conjunction with subsection 6(2) of O. Reg. 530/22

Limitations on delegation, s. 284.13 of Act

6. (2) The head of council may not delegate their powers and duties under the section referred to in paragraph 2 of subsection 284.13 (1) of the Act except to council or to the chief administrative officer, if one is appointed.

Subsections 284.6(2) and (3) of the *Municipal Act, 2001* include reference to "other prescribed employment powers." In this context, "prescribed" means "by regulation." There is no regulation or regulatory provisions that have set out or listed any "employment powers" for the purposes of section 284.6.

Finally, we note that section 284.6 contains several transition provisions:

Transition

284.6 (4) Any organizational structure in place in a municipality immediately before being designated under this Part shall continue unless the organizational structure is changed by the head of council under subsection (1).

Same

(5) The head of any division or of any other part of the organizational structure who held that position immediately before the municipality was designated under this Part shall continue in that position unless they are dismissed by the head of council under subsection (2).

Same

(6) A head of council may exercise a power under subsection (2) with respect to a person regardless of when that person started their employment.

In our view, subsection 284.6(4) is clear that if there has been no changes to the organizational structure of the City (including the Hiring Policy), it continues to exist as applicable unless it is changed by the head of council or unless it conflicts⁷ with the strong mayor powers.

⁷ See the conflict resolution provision in s. 14 *Municipal Act, 2001*, discussed below.

Issue

The central question is to what extent have the strong mayor power in section 284.6 of the *Municipal Act, 2001* altered the authority of Council as set out in the Hiring Policy in relation to the appointment, promotion, demotion, suspension, or dismissal of Directors, which actions require the approval of Council.

Analysis

It is our opinion that section 284.6 has modified the provisions of the Hiring Policy as they relate to the hiring and dismissal of the head of any division or the head of any other part of the City's organizational structure. This would, in our view, include Directors at the City who are effectively the division heads or other heads within the City's organizational structure.

Accordingly, wherein the Hiring Policy provided that the appointment, promotion, demotion, suspension and dismissal of Directors would be determined by Council, section 284.6 has revised that procedure and has provided that the power to hire and dismiss Directors (to the extent that a Director is a head of a City division or other head of a City department, branch or section) is assigned to the Mayor (who has delegated such authority to the CAO).

However, a head of council's power to hire and dismiss division heads or other heads within the City's organizational structure is subject to the limitation in subsection 284.6(3). This provision restricts a strong mayor (or their delegate) from hiring or dismissing a statutory officer or other person that is required to be appointed under the *Municipal Act, 2001* or any other statute.⁸

In our view, with respect to the persons listed in paragraphs 1-12 of subsection 284.6(3), their hiring and dismissal could only be effected by either:

- (i) Council (if such person is a Director); or
- (ii) in accordance with the Hiring Policy (if the person was not a Director).

To the extent that the Hiring Policy does not align with the Mayor's authority over the City's organizational structure and related employment matters, the Hiring Policy will be read down and not be applicable.

Section 284.6 of the *Municipal Act, 2001* takes precedence over subordinate legislation and this principle is also codified in the statute:

Conflict between by-law and statutes, etc.

- 14** (1) A by-law is without effect to the extent of any conflict with,
- (a) a provincial or federal Act or a regulation made under such an Act; or
 - (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.

⁸ Such other officers may include, for example, building inspectors who are required to be appointed under s. 3(2) of the *Building Code Act, 1992*, S.O. 1992, c. 23 or by-law enforcement officers appointed under the *Municipal Act, 2001*.

Same

(2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

However, to the extent that the Hiring Policy does not conflict with section 284.6, the Hiring Policy continues to apply.

As noted above, subsection 284.6(3) sets out a number of persons that a *head of council* cannot hire or dismiss via the strong mayor's powers. To be clear, a head of council (or the delegate of the head of council) cannot hire or dismiss the persons set out in subsection 284.6(3) *pursuant to the powers set out in section 284.6*.

However, a strong mayor or their delegate can continue to exercise powers of hiring and dismissal if they have been assigned to them other than through the strong mayor powers in section 284.6. Stated another way, if the CAO has been assigned certain powers by Council to hire or dismiss any of the persons who are listed in subsection 284.6(3) (which he has been via the Hiring Policy), those powers do not disappear simply because the Mayor (and the CAO as delegate) cannot take such action pursuant to the powers in section 284.6.

As set out above, Council had assigned various powers to the CAO in the Hiring Policy to hire and dismiss any "employee of the City below the rank of Director not covered by a collective agreement." The CAO's authority to hire and dismiss such employees arises by way of a direct assignment from Council under the Hiring Policy (not from the delegation of authority by the Mayor pursuant to subsection 284.13).

There are a number of persons set out in subsection 284.6(3) – including deputy clerk, deputy treasurer and chief building official – who are employees below the rank of Director. While the Mayor cannot hire or dismiss such persons (and neither can the CAO *as delegate of the Mayor*), the CAO retains the authority to do so under the Hiring Policy because he is acting pursuant to the specific assignment of that authority from Council.

We also wish to note that unlike the Hiring Policy which refers to a list of employment law matters such as "appointment, promotion, demotion, suspension, or dismissal", section 286.4 only refers to "hiring, dismissal."

We submit that this creates no material difference at law as the powers to hire and dismiss are at the two ends of the spectrum of employment and it is to be implied that all related powers in between have also been conferred.⁹

Therefore, it is our view that "all necessary incidental powers" between the extremes of hiring and dismissal would include "promotion, demotion, suspension" as set out in the Hiring Policy.

⁹ This principle is codified in s. 78 of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F:

Incidental powers

78 If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental powers are included.

Finally, we also would like to address the issue of “hiring” versus “appointment”. The term “appointment” is often considered to be synonymous with “hiring”. But they are not the same thing.

Pursuant to the *Municipal Act, 2001*, an appointment connotes a formal assignment of a person or body to a particular office or role.¹⁰

The terms “appoint” and “appointment” are not defined in the *Municipal Act, 2001*. Accordingly, they are to be accorded their plain and ordinary meanings. Below are some dictionary definitions:

Concise Oxford Dictionary

appoint – to choose someone officially for a job or responsibility

Merriam-Webster Dictionary

appoint – to fix or set officially; to name officially

Collins Dictionary

appoint – to assign officially; to prescribe or ordain

There is one commonality amongst the dictionary definitions: “official”. In our view, the appointment of certain officers under the *Municipal Act, 2001* was intended to be an “official” assignment by council, that endorses or validates the importance or status of the position. However, the appointment should not be confused with the hiring or retention of such officers, which is an entirely different matter.

The *Municipal Act, 2001* provides a municipality with a general authority to delegate its powers and duties under the statute to a person or body.¹¹

The statute requires the appointment of certain statutory officers and provides municipalities with discretion to appoint other named statutory officers. For example with respect to a clerk and treasurer, subsections 228(1) and 286(1) of the *Municipal Act, 2001* provide that a municipality *shall* appoint these officers. There are other officials, such as deputy clerk and deputy treasurer, that *may* be appointed by a municipality.¹²

The power to appoint or remove an officer of the municipality whose appointment is required by the *Municipal Act, 2001*, such as the clerk or the treasurer, may not be delegated. This is made explicit by paragraph 23.3(1) 1 of the statute:

¹⁰ For example, in s. 296(1) of the *Municipal Act, 2001*, a municipality “shall *appoint* an auditor”. Subsection 296(4) then provides that “the auditor of a municipality shall *not be an employee* of the municipality.”

¹¹ *Municipal Act, 2001*, s. 23.1(1).

¹² *Municipal Act, 2001*, s. 228(4) [deputy clerk] and s. 286(2) [deputy treasurer]. We also note that the wording of these provisions refers to “a municipality” – not “council”. In our opinion, this is a deliberate choice on the part of the legislative drafters whereby the authority may be carried out by council or may be delegated to another person or body. There is nothing in the statute that derogates from this interpretation and application.

Powers that cannot be delegated

23.3 (1) Sections 9, 10 and 11 do not authorize a municipality to delegate any of the following powers and duties:

1. The power to appoint or remove from office an officer of the municipality whose appointment is required by this Act.

The power to delegate such a responsibility extends to any officer whose appointment is not required by the *Municipal Act, 2001*.

Conclusions

For all of the reasons set out above, it is our opinion that section 284.6 of the *Municipal Act, 2001* has altered the Hiring Policy and Council's direct authority with respect to certain employment law matters. The statute has primacy over the Hiring Policy to the extent of any conflict or frustration of legislative purposes. However, the Hiring Policy continues to apply to the extent that it does not conflict with or frustrate the purposes of section 284.6 of the *Municipal Act, 2001*.

Yours truly,

AIRD & BERLIS LLP



John Mascarini

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