

October 3, 2012

Clerk Carolyn Kett
Town of Fort Erie
1 Municipal Centre Drive
Fort Erie, ON L2A 2S6

Dear Ms. Kett,

Re: Closed Meeting Complaint – July 9 and July 16, 2012 Meetings of Council

I am writing further to our telephone conversation of October 3, 2012 regarding the results of our review of complaints that Council held a closed meeting regarding the terms of the Bay Beach cost sharing agreement between the Town and a developer, Molinaro Group Inc.

The complaint stated that the meeting should have been held in public due to the fact that local taxpayers may be responsible for a portion of the costs associated with the terms of the agreement.

In addition, individuals raised concerns that due to length of the closed meeting on July 9, 2012 (extending beyond midnight), it was difficult for residents to wait for Council to reconvene in open session and to find out about what transpired in the closed session.

The complaint also raised concerns that issues concerning a road allowance on the beach were discussed in a closed meeting and not addressed publicly.

As you are aware, the *Municipal Act, 2001* (the Act) requires that all meetings of Council, their committees, and most local boards be open to the public. A municipal or local board meeting, or a portion of that meeting, may be closed under specified exceptions defined by the Act and subject to certain procedural requirements.

In reviewing this complaint our Office reviewed the meeting minutes and agendas, in addition to the Town's Procedure By-Law and relevant sections of the Act.

Procedure By-Law

Regular meetings of Council are held on the second and fourth Monday of the month at 6:00 p.m.

The Town's Procedure By-Law references the open meeting requirements and provides for public notice of meetings, as required under the Act.

According to the By-Law, closed session meetings shall be held prior to the Regular meeting as a "Special Council-In-Committee" meeting or prior to the adjournment of the regular meeting, "as deemed necessary and stated in the agenda."

Council meetings are to conclude not later than 10:00 p.m. unless the time is extended by a vote of the majority of members.

July 9, 2012 Special Council-In-Committee Meeting

The Agenda for the meeting posted on the website stated that a closed meeting would be held prior to the regular Council meeting to discuss "legal matters" regarding the Bay Beach Maintenance and Cost Sharing Agreement and road allowance issue, under s. 239 (2) (f) of the Act - advice that is subject to solicitor-client privilege.

Council resolved to proceed in camera at 5:15 p.m. under the exception noted above, as required under the Act.

All Council members were present at the meeting, along with the Acting CAO, the Clerk and four other senior staff members. John Mascarin, a Solicitor with Aird & Berlis, also attended.

The closed meeting record, which is available to the public, states that during the closed meeting, the CAO introduced Solicitor Mascarin to Council and a discussion took place regarding the draft terms of the Bay Beach Maintenance and Cost Sharing Agreement. In addition, Council discussed a report prepared by the CAO regarding the concerns that a road allowance issue on the Bay Beach property had not been addressed. The Solicitor responded to questions from Councillors and provided advice regarding the agreement and road allowance.

The meeting adjourned at 5:58 p.m., and the Regular Council Meeting proceeded until 8:05 p.m. at which time Council passed a resolution to go into closed session again to continue its discussion of the Cost Sharing agreement with Solicitor Mascarin.

Prior to proceeding in camera, the Mayor advised the public that he was not certain how long the closed session would last but that Council would return to Council Chambers to report on the meeting.

The record of the meeting notes that during the meeting Council received advice from the Solicitor and voted on various amendments to the terms of the agreement. The votes are described in the record as instructions to the Solicitor.

Council did not return to open session until 12:03 a.m. and, as stated, the duration of the meeting was the subject of complaints to our Office.

The meeting record shows that, at approximately 9:30 p.m., Council unanimously voted to extend the meeting beyond 10:00 p.m.

After returning to the public session, at which fourteen members of the public were present, Council passed a number of resolutions regarding the proposed Cost Sharing Agreement, including a resolution to direct the Solicitor to act in accordance with its instructions regarding amendments to the draft and a resolution to direct staff to prepare a by-law to be presented to Council authorizing the Mayor and Clerk to execute the Maintenance and Cost Sharing Agreement.

The By-Law authorizing the agreement was passed at the public meeting on July 16, 2012.

In regard to the road allowance matter, Council passed a resolution to accept a report prepared by the CAO on the issue and to take no further action.

Analysis

Council's discussion and consultation with the Solicitor, during which Council received legal advice regarding the proposed terms of the Cost Sharing Agreement to be negotiated with the Molinaro Group, fits within the "advice that is subject to solicitor-client privilege" exception.

The agenda and resolution, as well as the closed meeting minutes available to the public, provided general information about what was being discussed in the closed meeting.

In terms of the votes taken in the closed session, the Act prohibits voting in closed meetings, unless the meeting is properly closed under one or more exceptions under the Act, and the vote is "for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality..."

In this case, Council's closed meeting discussion was permitted under the Act and the votes related to instructions to the Solicitor, an agent of the municipality. As such, the votes were permitted in the closed meeting.

Although the closed meeting was lengthy, Council voted to extend the meeting, as required in the Procedure By-Law. Council also passed resolutions pertaining to the agreement in the public session, shedding light on what transpired in the closed meeting.

July 16 Closed Meeting (within Regular Meeting of Council)

The original agenda stated that a closed meeting would be held to discuss a legal matter pertaining to the Bay Beach Maintenance and Cost Sharing Agreement under s. 239 (2) (f) of the Act – advice that is subject to solicitor-client privilege.

A second item concerning litigation (Nowak et al. v. Town of Fort Erie) – was added to the Agenda by way of an Addendum issued on July 16, 2012. This matter was closed under the “litigation or potential litigation” exception.

Council resolved to proceed *in camera* under the exceptions noted above. All of Council attended the meeting, along with the CAO, the Clerk, and other members of senior staff. The Solicitor, John Mascarin, was also in attendance.

The closed meeting record indicates that Council discussed a revised draft of the Maintenance and Cost Sharing agreement. Based on the information provided, the Solicitor discussed the terms in greater detail and answered Council’s questions. The Solicitor also provided an update on the Nowak appeal of an Ontario Municipal Board decision.

When Council reconvened in open session it reported that the Solicitor was “directed to act in accordance with the instructions of Council respecting a further amendment to the draft Bay Beach Maintenance and Cost Sharing Agreement and that, regarding the Nowak matter, the information be received.

As previously indicated, Council then passed a By-Law (No. 76-12) in the open session authorizing the Mayor and the Clerk to execute the Cost Sharing agreement.

We note that the agreement was signed by the Town and the Molinaro Group on July 24, 2012. The final agreement is available on the Town’s website.

Analysis

The Agenda and Resolution to proceed *in camera* confirmed that a closed meeting would take place on July 16, 2012 and provided information about the nature of the topics to be discussed.

Council is permitted under the Act to hold closed meetings to seek legal advice and to discuss pending litigation.



The closed meeting record, a general description of which is included in the publicly available minutes, shows that the purpose of the July 16 meeting was to obtain legal advice from the Town's Solicitor and to discuss Nowak et al's pending appeal of an Ontario Municipal Board decision. As such, the discussions fit within the "legal advice" and "pending litigation" exceptions under the Act.

During our discussion on October 3, 2012, we asked that this letter be shared with Council at the next public Council meeting on October 9, 2012 and that a copy be made available to the public.

Thank you, once again, for your cooperation with our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer