



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

April 16, 2013

Dwight McTaggart, Clerk-Treasurer
P.O. Box 40
Larder Lake, ON
P0K 1L0

Dear Mr. McTaggart,

Re: Complaint regarding meetings held September 10 and December 7, 2012

I am writing further to my conversation of April 15 with you and Mayor Patricia Bodick regarding the outcome of our Office's review of a complaint that the Planning Committee held an improper closed meeting on September 10, 2012, and that council held an improper closed meeting on December 7, 2012.

As you know, the *Municipal Act, 2001* (the Act) requires all meetings of council, local boards, and their committees to be open to the public with limited exceptions.

In reviewing this complaint our Office spoke with you and the Mayor, and considered the relevant sections of the procedure by-law and the Act, as well as additional documentation you provided. We also reviewed the open and closed meeting materials for the meetings in question.

September 10, 2012 Planning Committee Meeting

The Planning Committee (the Committee) is comprised of 10 members, four of whom are members of council. The remaining six members are members of the public who are appointed to the Committee by council. It is an advisory committee responsible for reviewing planning matters and making recommendations to council.

The September 10 meeting was a special meeting of the Committee, which was called to discuss a building permit application. Both you and the Mayor advised that notice of the meeting was posted on the Town's website and on the bulletin board in Town Hall at least 24-hours in advance, which is the usual practice for advisory committee meetings.

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Only four of the ten members of the Committee were able to attend the meeting. Three of the attendees were members of council. The permit applicant also attended the meeting, and the building inspector was present via telephone. The meeting proceeded even though a quorum of the Committee was not present.

The information provided to our Office indicates that the purpose of the September 10 meeting was to gather additional information on the permit application and to provide members of the Committee with the opportunity to ask general questions of the Building Inspector about the permit application approval process and about the specific application. We were advised that the meeting lasted approximately fifteen minutes and that no decisions were made.

Council approved the permit, with conditions, in open session on September 11.

Analysis:

The *Municipal Act* defines “committee” for the purpose of the open meeting requirements as “any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards.” The Planning Committee does not come within this definition, as only four of the 10 members sit on council.

Under Larder Lake’s procedure by-law, advisory committees are not formally required to comply with all the meeting rules established for Council. However, Larder Lake does have a guideline entitled “Committees of Council for Larder

Lake Township”, which was approved in January 2011. This guideline states that the Clerk-Treasurer is responsible for keeping minutes and agendas of Planning Committee meetings, and making them available to the public. The guideline also notes that meetings of the Planning Committee are open to the public (s. 6.7).

We noted that there are five members of Council, and four of them participate on the Planning Committee. Whenever a quorum of Council is present at a Committee meeting, they have the legal authority to transact business on behalf of Council.

In the case of the September 10 meeting, three councillors, representing quorum of Larder Lake’s Council, participated in the meeting to discuss a building permit application. The presence of quorum means that these councillors had the authority to

conduct council business. The following day council considered the same matter and voted to approve the application. Clearly, the building permit was discussed and advanced at the September 10, 2012.

Given the composition of the Planning Committee, its meetings should always be held in compliance with the open meeting requirements of the *Municipal Act* and the procedure by-law. While we were told that advance notice is provided of Planning Committee meetings and they are held in open session, and while the guideline provides for meetings to be held in open session, this should also be reflected in the procedure by-law for the sake of clarity.

Although the complaint to our Office alleged that the September 10 meeting was improperly closed to the public, the information provided during our review indicates that the September 10 meeting was in fact an open meeting. Notice of the meeting was provided in advance, and the public was able to attend the meeting.

December 7, 2012 Special Closed Meeting of Council

You advised our Office that the agenda for the special December 7, 2012 meeting was posted the day before on the Town's website. During our call, the Mayor advised that notice was also posted in the foyer of the municipal office.

The agenda indicated that council would be proceeding *in camera* to discuss "potential property litigation."

The minutes from the closed session do not provide any information regarding the substance of matters discussed *in camera*. However, you and the Mayor advised that Council discussed the possibility of legal action resulting from a building permit infraction. Council recently had received legal correspondence from the other party to this matter, and this correspondence was considered during the meeting. Council considered what direction to provide to its own legal counsel in order to respond to this matter, and also voted to provide direction to staff. The directions related to commencing legal action.

Analysis

It appears that notice of this meeting was provided in advance, as required.

Council also is required to identify the general nature of the subject matter to be discussed in a closed session in its resolution authorizing a closed session. In this case, the Town referred to “potential property litigation” to describe what it would be discussing. In the course of its meeting, it considered taking legal action in relation to a property matter, and gave direction for its legal counsel in relation to this issue. Council is permitted pursuant to s. 239(2)(e) of the Act to consider litigation or potential litigation in closed session.

Procedure by-law

As noted above, the Town should amend its procedure by-law to confirm that the Planning Committee is required to follow all the same open meeting requirements as Council when it meets.

We also discussed that the procedure by-law does not specifically provide for notice to the public of special meetings, and that this is a procedural violation of the Act. As noted in our Office’s previous letter of November 29, 2011, in accordance with s. 238(2) of the Act the procedure by-law must provide for notice of all meetings, including special meetings. Council should update its by-law to bring it into compliance with the Act.

Meeting Record

In accordance with s. 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions and other proceedings at its meetings.

We found that the record of the September 10, 2012 meeting took the form of a report to Council, which provided a brief description of the discussions. With respect to the December 7 meeting, the Town’s closed meeting minutes did not provide a clear and comprehensive record of what occurred during the *in camera* session. The only record of the meeting provided to our Office was a copy of the vote taken *in camera* to provide direction to staff.

We discussed that the written record of both the open and closed portions of a meeting should include reference to:

- o where the meeting took place;
- o when the meeting started and adjourned;
- o who chaired the meeting;

- o who was in attendance, with specific reference to the clerk or other designated official responsible for recording the meeting;
- o whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- o a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
- o any motions, including who introduced the motion and seconders; and
- o all votes taken, and all directions given.

While the Act prohibits “notes or comments” from being included in the official record, this does not mean that the subjects discussed in a meeting should not be documented.

The various substantive and procedural items that were discussed at a meeting should be recorded. The requirement to keep a meeting

record should be interpreted in a manner that is consistent with the intent of the municipal meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government.

The Ombudsman also encourages municipalities to audio or video record both open and closed meetings whenever possible. As the Ombudsman noted in this year’s Annual Report on Closed Municipal Meetings, the practice of audio recording both open and closed meetings inspires community trust in the transparency and accountability of local government. It also ensures that a clear, accessible record exists for closed meeting investigators to review.

Reporting back

We were advised that it is council’s practice to report back after a closed session, by providing essentially the same information that is included in the resolution to proceed *in camera*. This report back was not reflected in the minutes of the December 7, 2012 special meeting.

As a best practice, our Office encourages municipalities to report publicly in open session on what transpired in closed session, at least in a general way. In some cases, public reporting might simply consist of a general discussion in open session of subjects considered in closed session, similar to the information in the resolution authorizing the session together with information about staff directions, decisions and resolutions. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.



We encourage council to follow a practice of reporting back after a closed session. Any reporting back should be captured in the open session minutes.

We reviewed our findings with you and the Mayor on April 15 and provided an opportunity to provide relevant feedback and any additional pertinent information, which has been noted in this letter.

Please share this letter with the public and with council as soon as possible, and in any event no later than the next council meeting.

Thank you for the cooperation our Office received during this review.

Sincerely,

Michelle Bird
Legal Counsel
Open Meeting Law Enforcement Team