



July 17, 2013

Mayor John Henry and
Acting City Clerk Mary Medeiros
The Corporation of the City of Oshawa
50 Centre Street South
Oshawa, ON L1H 3Z7

Dear Mayor Henry and Ms. Medeiros,

Re: Complaint about March 20, 2013 Closed Meeting of Council

I am writing further to our conversation on July 17, 2013 regarding the outcome of our investigation of a complaint that subject matters discussed by Council during a March 20, 2013 special closed meeting did not qualify for closed meeting consideration under the *Municipal Act, 2001*.

The complainant raised concerns that certain members of the public, including CUPE Local 250 President Jim Lines and three consultants, were permitted to attend and present to Council during the closed meeting at which Council considered the acquisition of property, including 199 Wentworth Street East, for a new “Centralized Operations Centre”

Further, the complainant suggested that Council may have held an improper vote during the closed meeting as, when Council returned to open session, it introduced and voted on a By-Law authorizing the City to borrow \$18.8 million to acquire the property, although this By-Law was not on the meeting agenda.

The purchase of 199 Wentworth Street East was recently the subject of a report by the City’s Auditor General (AG-13-09) who alleged that the City overpaid for the property based on misleading information from staff. It should be noted, however, that the Ombudsman’s mandate concerning municipalities is restricted to assessing whether a meeting of Council, Local Board, or their committees contravenes the open meeting requirements of the *Municipal Act* and/or the City’s Procedure By-Law. Therefore, our investigation did not include an examination of the validity of written or verbal representations by staff to Council on the subject property.

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As you know, the *Municipal Act* (the Act) requires that all meetings of Council be open to the public with limited exceptions and subject to certain procedural requirements.

Upon receipt of this complaint on May 29, 2013 our Office contacted the City Clerk and issued a Notice of Investigation that day in order to obtain the meeting documents, including the agenda, minutes, and the closed session audio recording, which were received by our Office on June 5, 2013.

Meeting Agenda

The Agenda for the March 20, 2013 Special Closed Council meeting was posted on the City's website on March 15, 2013. The City's Procedure By-Law permits the Mayor or a majority of Council to summon a special meeting "subject to notice and other requirements of the standing rules and orders of Council."

The Agenda stated that Council would consider in closed session a confidential report (CM-13-29) prepared by City Manager Bob Duignan and the Commissioner of Community Services, Jag Sharma, regarding a proposed acquisition of land. The Agenda also itemizes the recommendations from the report to be considered by council, including that staff be directed to proceed with the acquisition of land, that the Mayor and Clerk be authorized to execute the necessary documentation, and that the project budget of \$25 million be "financed from \$18.8 million in debentures and \$6.2 million in reserve funds, and that the necessary by-laws to authorize the issue of debentures of \$18.8 million by the Regional Municipality of Durham, be provided to Council for approval."

Report CM-13-29

As per a June 10, 2013 Council directive, report CM-13-29 that was the subject of discussion at the March 20, 2013 closed session and other reports concerning the acquisition of property for the Consolidated Operations Centre are now posted on the City's website.

Report CM-13-29 provides an overview of information about the proposed acquisition of 199 Wentworth Street East from Durham College for the Consolidated Operations Centre, including the status of the Purchase and Sale Agreement and environmental assessments, as well as an update regarding the proposed purchase of two other properties – 945 and 1001 Ritson Road South.

In addition, the report sets out the structural and logistical problems with the existing public works building, and argues that there is a cost advantage in purchasing the

proposed property versus renovating the existing buildings. The report itemizes the potential risks associated with maintaining the current building.

Meeting Minutes and Audio Recording

Council passed a resolution in open session to proceed in camera to discuss a potential acquisition of land under s. 239 (2) (c) of the Act.

The public and closed meeting minutes state that all Council members were present for the closed meeting. Also in attendance were the City Clerk, City Manager, Solicitor, Commissioner of Development Services, Commissioner of Community Services, the Auditor General, the Acting Treasurer/Director of Finance, and other senior staff.

The public minutes state that, “all members of the public left the meeting except Tom Williams, XCG Consultants Ltd., Tom McElwain, Golder Associates Ltd. and Denis O’Connell, Independent Property Managers.”

The minutes of the meeting and audio show that Council considered the information and recommendations outlined in the report with respect to the potential acquisition of the properties described. Council posed questions to both staff and consultants on information specific to the environmental assessments, the status of negotiations, the valuation of the subject properties, the project financing and feasibility, and the rationale for proceeding with the purchase.

At the beginning of the meeting, and as reflected in the publicly available minutes, Council voted by a 2/3 majority of members to waive the rules of procedure in order to hear a delegation from Jim Lines, President, CUPE Local 250. Under the Procedure By-Law, a delegation is required to present before a Standing Committee prior to presenting to Council but Council is permitted under the By-Law to suspend the rules of procedure with a 2/3 majority vote.

The purpose of Mr. Lines’ presentation was to provide Council with a detailed account of the conditions in the current public works depot. Mr. Lines expanded on the report’s comments about the deficiencies in the building. Council then posed questions to Mr. Lines and he left the meeting.

The Commissioner of Community Services also presented on the current public works depot conditions and responded to questions.

Council then posed questions to the Consultants and Senior Staff about the environmental assessments, the proposed site's ability to meet the City's needs, and property valuation and financing.

A vote took place in the closed session to direct staff to provide Council members with copies of all property appraisals for the subject property, and this vote was confirmed in the public session. Council did not hold any other votes in the closed meeting.

The closed meeting recessed at 4:00 p.m. for ten minutes and then adjourned at 4:40 p.m.

When Council reconvened in open session it passed the following motion with a 2/3 majority vote of members present,

That By-Law 42-2013 be added to the Special Meeting Council Agenda for March 20, 2013 at 1:30 p.m.

Council then introduced and passed By-Law 42-2013 "to authorize the Regional Municipality of Durham to issue debentures on the maximum principal amount not to exceed \$18, 800,000.00 as partial financing for the Consolidated Operations Centre."

Analysis

Council is permitted under s. 239 (2) (c) of the Act to consider the potential acquisition or disposition of land in a closed meeting.

A review of the history and case law concerning this exception suggests that its primary purpose is to protect the municipality's bargaining position in property negotiations. The exception is discretionary and, therefore, it is up to Council to determine whether it is necessary to discuss the matter in camera.

As indicated above, once the purchase of the property for the proposed Consolidated Operations Centre was finalized, Council voted to publicly disclose the confidential reports prepared by staff with respect to the property acquisition.

The minutes and audio recording of the March 20, 2013 closed meeting show that the issue before Council was whether or not to approve the recommendations outlined in confidential report CM-13-29 in regard to the acquisition of subject lands for the purpose of a new Consolidated Operations Centre.

Council's discussion during the three hour closed meeting, as described above, focused on the status of negotiations for the purchase of the land, the outcome of environmental

assessments, the valuation of land and available financing, and whether the proposed site would sufficiently meet the City's immediate and future requirements. These matters all clearly fall within the acquisition of land exception.

In terms of the in camera presentation by the CUPE Local 250 President, while the information presented on the condition of the current public works building on its own would not likely fall within the acquisition of land exception, the purpose of the presentation directly related to Council's deliberations on whether or not to proceed with the acquisition. As stated above, the purpose of the acquisition of land exception is to protect the municipality's bargaining position in property negotiations. In this case, the argument could be made that disclosing the details of Council's alternatives to purchasing the property could have affected their position in subsequent purchase negotiations.

As such, it was within council's discretion to discuss the report in closed session under the cited exception.

In regard to the complaint that Council may have voted improperly within the closed session, the audio recording of discussions showed that the only vote taken in the closed meeting was a direction to staff to provide council with the property appraisals. Section 239 (6) (b) of the Act permits Council to vote in camera "for giving directions or instructions to officers, employees, or agents of the municipality...."

We would again like to commend the City's practice of audio recording its closed meetings as this greatly facilitated our investigation of this complaint.

During our conversation on July 17, 2013 we asked that you include this letter on the public Council meeting agenda scheduled for September 3, 2013 and make a copy available to the public on your website.

Thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team