

January 4, 2013

CAO/Clerk-Treasurer Judy Kosowan
Township of Ryerson
R.R. #1, 28 Midlothian Road
Burks Falls, ON P0A 1C0

Dear Ms. Kosowan,

Re: Closed Meeting Complaint – November 5, 2012 Special Meeting of Council

I am writing further to our conversation on January 4, 2013 regarding the results of our review of a complaint that Council held an improper closed meeting on November 5, 2012 to discuss a zoning application for a proposed quarry on Peggs Mountain Road.

The complainant alleged that the meeting was held without notice and the subject matter discussed was not appropriate for a closed meeting. In addition, the complainant suggested that a vote may have taken place in the closed meeting to approve a cost sharing arrangement between the Township and the owner of the proposed quarry.

As you know, the *Municipal Act, 2001* (the Act) requires that meetings of Council, Local Boards, and their committees be open to the public, with limited exceptions.

The Ombudsman is the closed meeting investigator for the Township of Ryerson. In reviewing this complaint our Office obtained and reviewed the meeting agenda and minutes, as well as the relevant sections of the *Municipal Act* and the Township's Procedure By-Law.

The Procedure By-Law

The Act requires that municipalities provide for public notice of meetings within the Procedure By-Law. The Township's Procedure By-Law (# 16-10) states that regular meetings of Council are held on the first and third Tuesday of each month starting at 7:00 p.m. (with some exceptions).

In addition, the Reeve "may at any time call a special meeting of Council."

In regard to notice, the By-Law states that, “public notice of any meeting shall be posted on or adjacent to the main municipal office door, posted on the municipal website, and recorded on the telephone answering machine message available to anyone who call the municipality.” Notice is to be posted “at least twenty four hours prior to the said meeting.”

However, it states that, “where such meeting is a special meeting called pursuant to this By-Law, and it is not possible to provide the afore-mentioned notice, the Clerk shall make reasonable efforts to provide notice to those concerned and shall be posted as soon as is practicable after the meeting has been scheduled.”

The Meeting

A special closed meeting of Council was held on November 5, 2012. The Agenda states that the meeting was called in order for the Reeve to receive information regarding the “Thompson Re-Zoning for a Pit Quarry.”

The Agenda indicates that Council members were notified of the Special meeting by phone and e-mail on October 26 and November 1, 2012 and also in the agenda package for the regular Council meeting on November 6, 2012.

According to the information provided, you submitted the agenda to the Township’s web master for posting on November 1, 2012 and posted notice of the closed meeting on the municipal office door on the same date. The complainant reported observing this notice on the municipal door.

The meeting minutes state that all members of Council, the Clerk, a Municipal Planning Consultant, a representative from AECOM Engineering, the Public Works Supervisor, and the proponent of the quarry attended.

Council passed a resolution to proceed in camera to discuss “the Thompson re-zoning application under s. 239 (2) (e): ‘litigation or potential litigation’.”

You advised us that Council relied on this exception to close the meeting due to the high probability that any decision respecting the zoning application would be appealed by either the applicant or the public. You said that the proposed quarry has been a controversial and divisive topic within the community.

The closed meeting lasted approximately an hour and forty-five minutes and a number of issues concerning the proposed quarry were discussed.

The closed meeting record shows that a staff member from AECOM Engineering presented to Council a cost proposal for a road sustainability study, which is required as part of the zoning application. Council then discussed suggestions for sharing the cost of the study between the Township and the applicant and measures to limit the study's cost.

You said that no votes were taken but Council came to some consensus about the scope of the road sustainability study to be conducted. It was reported in the publicly available minutes of the meeting that the Mayor wanted to discuss the scope of the study with a neighbouring municipality, Armour Township.

The closed meeting record also shows that Council discussed a response to a letter received from the Magnetawan First Nation, which is publicly available, in which the First Nation raised concerns about the Township's lack of consultation with them and about the quarry's potential impact on the local environment and water quality. The fact that the Mayor signed a response letter to the Magnetawan First Nation was confirmed at the November 6, 2012 regular Council meeting.

During the closed meeting, the Municipal Planning Consultant provided a verbal report to Council on the planning documents and studies received to date in relation to the zoning application. The Consultant noted that he would provide a written report to Council following the completion of the road sustainability study.

Toward the end of the meeting Council received and reviewed a memo from their Solicitor containing legal advice related to the quarry application.

Analysis

We have found that council contravened the open meeting provisions of the *Municipal Act*, in the following respect:

The exception relied on for closing the meeting – s. 239 (2(e) “litigation or potential litigation, including matters before administrative tribunals” requires more than a concern or possibility that litigation may be commenced at a later date as a result of a decision. Although the exception is not explicitly defined in the *Municipal Act*, in *RSJ Holdings Inc. v. London*, the Ontario Court of Appeal rejected the suggestion that Council's discussion of an interim control by-law, a decision on which may be appealed

to the Ontario Municipal Board, came within the “potential litigation” exception. In that case, the court found that a matter could not be considered potential litigation “simply because there is a statutory right of appeal by a person affected by the interim control by-law or because the interim control by-law may be subject to a motion to quash. The fact that there might be, or even inevitably would be, litigation arising from the interim control by-law does not make the subject matter under consideration ‘potential litigation’.

Although Council anticipated that litigation might arise as a result of any decision on the zoning application for a new quarry this is not sufficient for the matter to be discussed in closed session under the exception for ‘litigation or potential litigation’. It is noted that at the time of the November 5 meeting the application was still incomplete and no decision had yet been taken. There was also no specific notice provided by any group of an intention to pursue legal action.

As such, Council’s discussion of the zoning application, including consideration of the cost of the road sustainability study, a response to the Magnetawan First Nation, and the Planning Consultant’s comments on the re-zoning application, does not fall under s. 239(2)(e) or under any of the other permitted exceptions for holding a closed meeting.

Council’s review of legal advice at the end of the closed session, after third parties left the meeting, is the sole topic discussed that does qualify for closed meeting consideration, as it falls under the solicitor-client privilege exception contained in s. 239 (2) (f) of the Act.

As discussed, in future Council must carefully consider what topics are discussed in-camera to ensure the subject matter is appropriate for a closed meeting and genuinely reflects the exception relied on to close the meeting to the public.

You confirmed that this letter would be added to the January 22, 2013 public Council meeting agenda and a copy made available to the public on your website.

We would like to thank you for your cooperation during our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team