



ONTARIO'S WATCHDOG  
CHIEN DE GARDE DE L'ONTARIO

November 8, 2013

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

Dear Reeve Miller and Ms. Kosowan,

**Re: Closed Meeting Complaints – September 24, 2012 and July 9, 2013 Special Closed Council Meetings**

I am writing further to our conversation on November 7, 2013 regarding the outcome of our review of complaints that Council discussed, in closed session, matters that did not fall within any of the permitted exceptions to the open meeting requirements of the *Municipal Act, 2001*.

- (1) At a September 24, 2012 Special Closed Meeting, Council discussed an alleged road blockage on McIndoo Falls Trail and,
- (2) On July 9, 2013 Council held a Special Closed Meeting to discuss a draft haul route and site plan for the Thompson quarry/pit, a proposed quarry/pit on Peggs Mountain Road

As you know, the *Municipal Act, 2001* (the Act) requires that all meetings of Council, local boards, and their committees are open to the public with limited exceptions, and subject to certain procedural requirements. For instance, a municipality's Procedural By-Law must provide for public notice of meetings and Council must pass a resolution identifying the general nature of subject matters to be discussed prior to proceeding in camera.

In reviewing these complaints, our Office spoke with the Reeve, the Clerk and a member of Council in attendance at the September 24, 2012 meeting, as well as the Township's Solicitor with respect to the July 9, 2013 closed session. We also obtained and reviewed the meeting documents, and considered the relevant sections of the Township's Procedure By-Law and the Act.

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## **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 calls the municipality." Notice is to be posted "at least twenty four hours prior to the said meeting."

However, "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."

## **September 24, 2012 special closed meeting**

### **Notice/Agenda**

At the September 18, 2012 regular public Council meeting, Councillors and the public were notified that a special meeting would be held at 1:00 p.m. on September 24, 2012 and that it would be "a closed meeting for educational purposes to review submissions regarding the Thompson re-zoning application for a pit/quarry."

The agenda that was posted on the office door noted that the purpose of the special closed meeting was "to receive information and submissions regarding the Thompson Re-Zoning for a Pit/Quarry."

### **Minutes**

According to the public minutes, Council passed a resolution in the public session of the September 24 special council meeting to move to a closed session at 1:05 p.m. under:

- s. 239 (2) (e) as the subject matter being considered is regarding potential litigation, including matters before administrative tribunals affecting the

municipality or local board. The general nature of the closed meeting is to discuss: the Thompson Re-Zoning Application for a pit/quarry.

The public meeting minutes also state that during the closed session, “a new matter arose regarding a letter received on September 22, 2012 regarding McIndoo Falls Trail.”

All of Council attended the closed meeting. The Clerk and Public Works Supervisor were also in attendance. Both the Reeve and the Public Works Supervisor left the meeting after discussing the re-zoning issue and Councillor Rosalind Hall declared a pecuniary interest prior to the discussion of the McIndoo Falls Trail matter and removed herself.

In regard to the Thompson re-zoning application, Council considered and discussed in the closed session submissions from the public about the quarry, a peer review of a ‘Traffic Impact Study’ prepared by an engineering consulting company, and a report from the Public Works Supervisor about traffic impact and quarry road condition issues. Council then reviewed a draft haul route agreement submitted by the quarry applicant’s planner. Council directed staff to communicate with the applicant’s planner and the Township Solicitor that a road sustainability study was required before any final decision could be made on the re-zoning application. This decision was made public at the next Council meeting held on October 2, 2012.

After discussion on the quarry ended and the Reeve and Road Supervisor left the meeting, a Council member raised a separate matter about a resident’s complaint letter pertaining to a dispute among property owners on McIndoo Falls Trail with respect to road access, ownership boundaries, and an allegation that one of the residents blocked the trail/road. Council contacted the individual who submitted the complaint to have a conversation about his concerns and to clarify certain information about road access issues.

The Clerk and Councillor Doug Weddel, who was present for this portion of the closed session, acknowledged that the McIndoo Falls Trail issue arose spontaneously and forethought was not given to whether the subject matter fell within one of the permitted exceptions to the open meeting requirements. Both the Clerk and Councillor Weddel said that, in retrospect, the matter may have fallen within the “personal matters about an identifiable individual” exception to the open meeting requirements, as they were talking about a neighbour dispute. The Clerk advised that under normal circumstances, one member of Council would place a call to a complainant to discuss such a matter, which was considered a private neighbour dispute.

The closed meeting adjourned at 3:50 p.m.

## **Analysis**

Our Office previously reviewed a complaint about another closed meeting held by Ryerson Township Council on November 5, 2012 at which Council considered the Thompson re-zoning application for the proposed pit/quarry on Peggs Mountain Road.

Similar to the September 24, 2012 meeting, Council relied on the open meeting exception under s. 239 (2 )(e) of the Act- “litigation or potential litigation, including matters before administrative tribunals” – in order to close the meeting to the public. Our review found that discussion of the re-zoning application did not qualify for closed meeting consideration under the “litigation” exception; although litigation was anticipated to arise as a result of any decision on the zoning application, no decision had yet been reached and at that time no specific legal action was initiated or notice of the intent to pursue legal action received by the Township. These findings were communicated to Council in a letter dated January 4, 2013 and shared at a public Council meeting on January 22, 2013.

At the September 24, 2012 closed meeting, Council discussed components of the re-zoning application, including the draft haul route agreement and a traffic impact study. As no decision had yet been reached on the zoning application and there was no pending litigation or notice of an intent to take specific legal action, the subject matter did not fall within the “litigation or potential litigation” exception to the open meeting requirements. As noted in our January 4, 2013 letter, in order for the exception to apply, there must be more than a concern or possibility that litigation may occur at a later date as a result of any decision. We understand that Council did not receive any formal notice of litigation regarding the Thompson quarry and the amended zoning by-law until July 29, 2013.

Given that the subject matter pertaining to the re-zoning application and the proposed pit/quarry did not fall within one of the permitted exceptions under the *Municipal Act*, the September 24, 2012 closed meeting violated the Act.

With respect to Council’s discussion of a complaint letter and comments regarding blockage of the McIndoo Falls Trail, the topic was not included in Council’s resolution to proceed *in camera*. The Act requires that Council confirm the general nature of matters to be discussed in the resolution to proceed *in camera*. Although some of the discussion may have fallen within the “personal matters about identifiable individuals exception” Council did not reference this exception in closing the meeting, or indicate in its resolution that it intended to discuss the matter. Consequently, the matter should not have been included in the September 24, 2012 closed session.

## **July 9, 2013 special closed meeting**

### **Notice**

Notice of the July 9, 2013 special meeting was posted on the municipal office door and on the website on July 8, 2013. Council members were notified by phone on July 8 also.

The July 9, 2013 meeting agenda stated that Council intended “to consider correspondence from the municipal solicitor concerning draft haul route and site plan agreements for the Thompson pit/quarry rezoning application.”

### **Public Minutes**

All of Council attended the closed meeting along with the Clerk, the Public Works Supervisor and Mr. Glen Thompson (the quarry applicant).

At 7:01 p.m. Council passed a resolution to proceed in camera...

...pursuant to the Municipal Act 2001, c. 25, Section 239 (2) (f) as the subject matter being considered is regarding advice that is subject to solicitor-client privilege, including communications necessary for that purpose. The general nature of the closed meeting is to discuss: correspondence received from Robert van der Wijst dated July 3, 2013 regarding Thompson pit/quarry rezoning application draft haul route and site plan agreements.

Based on information from the Reeve and the Clerk as well as the closed meeting minutes, Council met with the quarry applicant, Mr. Thompson, behind closed doors to review the proposed draft terms for the haul route and site plan. Council then suggested that Mr. Thompson review the proposed terms with his lawyer. The Clerk and the Reeve said that the draft agreements were discussed in closed session as the draft terms were considered confidential and had not been finalized.

Our Office obtained a copy of the documents that were the focus of discussion in the closed session. The draft haul route and site plan were accompanied by a cover letter dated July 3, 2013 from the Township's Solicitor addressed to Mr. Thompson care of Mr. Thompson's planning consultant. The Solicitor's letter sets out his position on the draft terms, and notes that the documents were being provided to Mr. Thompson and his planner for discussion purposes only, as they had not been approved by Council. The letter did not include advice directed to Council.

The public minutes show that Council returned to open session at 8:08 p.m. and the Reeve reported on what transpired in the closed session. He indicated that Council reviewed a draft haul route and site plan agreement for the rezoning application for a pit quarry “with Glen Thompson during the closed meeting”. It stated that “Mr. Thompson will forward items he would like to see amended in the draft agreements to the Municipal Solicitor for future consideration by Council.”

### **Analysis**

The July 9, 2013 Special Closed Meeting was closed under the open meeting exception 239 (2) (f) – “advice that is subject to solicitor-client privilege”.

Solicitor-client privilege is a protection that applies to communications between a lawyer and his or her client that: (a) entails the seeking or giving of legal advice; and (b) which is intended to be confidential by the parties<sup>1</sup>. It is intended to ensure that a client will be able to speak freely to his or her lawyer without fear that what they say will be disclosed.  
<sup>2</sup>

The communications reviewed in the closed session do not appear to include any specific advice from the Solicitor to the Township but rather sets out a draft proposal for Mr. Thompson to consider. The Reeve confirmed that no other advice or correspondence from the Solicitor was considered in the closed session. Regardless of whether the draft agreements could have been considered advice to the Township, in sharing the information with a third party – Mr. Thompson – Council waived any privilege that may have applied.

The subject matter would also not qualify for closed meeting consideration under the “litigation or potential litigation exception”.

Although the *Municipal Act* does not specifically define this exception, one can refer to court interpretations as a guide. In a 2006 Supreme Court of Canada decision, *Blank v. Canada (Minister of Justice)*, the Court stated in reference to litigation privilege that,

Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation,

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<sup>1</sup> *Solosky v. The Queen*, [1980] 1.S.C.R. 821, at pg. 837.

<sup>2</sup> *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46

represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

The Court also stated that for a record to fall under the litigation privilege, it must have been “created for the dominant purpose of litigation.”

The documents reviewed with Mr. Thompson were draft haul and site plan agreements that were created for the purpose of responding to a re-zoning application for a quarry, not for the purpose of existing or contemplated litigation. In addition, with respect to the objective of “litigation” to enable parties to “prepare...their positions in private...”, having Mr. Thompson present clearly defeats that purpose.

Therefore, the July 9, 2013 meeting violated the open meeting requirements of the *Municipal Act*.

We discussed our review and findings with you on November 7, 2013 and provided you with an opportunity to provide feedback. You stated that the matters above were discussed in closed session as the draft terms were still being negotiated and were intended to be confidential. As the correspondence reviewed was from the Solicitor and involved Mr. Thompson, you believed that solicitor-client privilege applied. However, as indicated, solicitor-client privilege applies to communications between the solicitor and client involving the seeking or provision of advice that is intended to be confidential between the Solicitor and the client.

You agreed to share this letter with Council at your next public Council meeting on November 19, 2013 and to 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