



Ombudsman Report

**Investigation regarding the meeting practices
of the Board of Management for the Greater Napanee
Business Improvement Area**

**Paul Dubé
Ombudsman of Ontario
January 2021**

Complaint

- 1 My Office received several complaints related to the meeting practices of the Board of Management for the Greater Napanee Business Improvement Area (the Greater Napanee BIA), which is a local board in the Town of Greater Napanee. Specifically, the complainants alleged that the board made a decision about charging a levy without holding a properly constituted board meeting. They also alleged that on June 24, 2020, board members met in private at a local business contrary, to the *Municipal Act's* open meeting requirements.

The Greater Napanee BIA

- 2 The Town of Greater Napanee is a lower-tier municipality located in Lennox and Addington County.
- 3 Council for the Town of Greater Napanee has designated a business improvement area in its community, known as the Greater Napanee BIA. The boundaries of the BIA were established through a by-law passed by council. Business properties that fall within the geographic boundaries of the Greater Napanee BIA are required to pay a levy, which is included on the tax bills of commercial properties.
- 4 In accordance with the *Municipal Act*, council also established a board of management for the BIA. According to the BIA's constitution and procedures, the board of management (the "board") consists of a Chair, Vice-Chair, Secretary, Treasurer and between two and four members at large. In addition, there must be one council member appointed to the board, and the previous Chair is also a member. All board members are appointed by council for the Town of Greater Napanee, although the board holds elections among its membership to determine who to put forward to council for consideration.

Ombudsman jurisdiction

- 5 Under the *Municipal Act, 2001*¹ (the Act), all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.

¹ SO 2001, c 25.

- 6 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality or local board has complied with the Act in closing a meeting to the public. Municipalities and local boards may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities and local boards that have not appointed their own.
- 7 Section 204(2.1) of the *Municipal Act* specifies that a board of management for a business improvement area is a local board of the municipality for all purposes. Accordingly, the board of directors for the Greater Napanee BIA is a “local board” and its meetings are subject to the Act’s open meeting requirements.
- 8 The Ombudsman is the closed meeting investigator for the Greater Napanee BIA.
- 9 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s or local board’s procedure by-law have been observed.
- 10 To assist municipal councils, local board members, staff, and citizens, we have developed an online digest of open meeting decisions that contains summaries of the Ombudsman’s open meeting cases. This searchable repository was created to provide easy access to the Ombudsman’s past decisions on, and interpretations of, the open meeting rules. Councillors, local board members, and staff can consult the digest to inform their discussions and decisions on whether a matter should or may be discussed in closed session, as well as issues related to open meeting procedure. Summaries of the Ombudsman’s previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Investigative process

- 11 In August 2020, we advised the board of our intent to investigate these complaints.
- 12 Our staff reviewed relevant meeting agendas and minutes for board meetings from March to June 2020, as well as the board’s constitution and procedures document. In addition, we reviewed various email correspondence between board members and the municipality related to the charging of the BIA levy. We also reviewed screenshots from an online platform that the board uses for communication between board members and with members of the local business community.

- 13 We interviewed all BIA directors who were on the board between March 2020 and June 2020. We also interviewed individuals who attended the June 24 gathering who are not BIA directors. We spoke with the BIA's current Operations Manager, who began work at the BIA after the events under investigation. We also spoke with the Clerk, the Treasurer, and the General Manager of Community & Corporate Services for the Town of Greater Napanee.
- 14 My Office received full co-operation in this matter.

The BIA levy

Framework for charging the levy

- 15 As set out in the *Municipal Act*, municipalities may establish business improvement areas with set boundaries to organize, finance, and carry out physical improvements to promote economic development in their districts. Businesses within the set boundaries are required to become BIA members and pay a BIA levy along with their property tax.
- 16 The Ministry's handbook² explains that each year, BIAs must prepare a proposed annual budget reflecting the priorities and needs of the BIA as determined by the board and membership. The board holds meetings to discuss the proposed budget and determine priorities, and then submits it to council for approval. The budget is usually financed primarily by BIA levies, and the expected expenditures in the budget often impact the levies charged to local businesses. While the municipality is ultimately responsible for setting the BIA levy, this typically occurs in close consultation with the BIA. Once the BIA levy has been set and funds are collected through property tax invoices, the municipality disburses the funds to the board.
- 17 We were told that for the Greater Napanee BIA, this budgeting process typically begins in November or December, with the goal of having a finalized budget in January or February. This allows the municipality time to approve the budget and to set the levy for the upcoming tax year. We were told that in the Town of Greater Napanee, property taxes are invoiced on two tax bills, with each having two installment due dates. Only the second tax bill, which is issued at the end of May and is payable in June and September, includes the BIA levy.

² *Business Improvement Area Handbook*, online: <<https://www.ontario.ca/document/business-improvement-area-handbook>>.

Impact of COVID-19 on the BIA and the levy

- 18 We were told that the BIA proceeded with its typical budgeting process for the 2020 tax year. However, after the town approved the budget and the levy was set for each business, two major developments impacted the BIA's operations. The first was the COVID-19 pandemic restrictions, which closed the vast majority of businesses within the BIA's boundaries beginning in March 2020. The second was the unrelated loss of the BIA's only staff person, who resigned shortly before these mandatory business closures.
- 19 As a result of these circumstances, the BIA board met for an emergency meeting on March 25, 2020, to determine how to proceed. This meeting was approximately 10 days after the province declared a state of emergency and ordered all non-essential businesses to close. According to the meeting minutes, the then-Chair presented information to the Board about recent discussions with the town about how the BIA could respond to the sudden shutdown. One suggestion was that the BIA temporarily suspend its operation and go on "hiatus" for the period of the COVID-19 crisis. The then-Chair indicated that the municipality was considering a reprieve or deferral of property taxes and the BIA levy to assist struggling businesses. The then-Chair said that any such action would eliminate the BIA's cash flow and its ability to cover rent, salary, and beautification expenses.
- 20 According to the minutes, the BIA members discussed this information and ultimately resolved "to approve the immediate suspension of operations 'hiatus' of the BIA until further notice and/or the lifting of emergency restrictions and regulations, and to issue an official press release." The meeting concluded following this resolution.
- 21 After some delay, the BIA sent an email to all BIA members on April 10 announcing the hiatus. The email read, in part:

As many are now aware the Town of Greater Napanee will be implementing a number of financial benefits and support mechanisms for business owners, property owners, and residents of Greater Napanee. One initiative is to provide a deferral of property tax and the levy, which remains the most substantive part of the BIA budget.

In light of this municipal plan to alleviate the economic impacts of this pandemic, and effective immediately, the BIA Board of Directors has agreed to temporarily suspend all BIA operations, events, and committee meetings until July 1, 2020, at which time the BIA will re-examine its next course of action...

During this temporary hiatus, the BIA will be represented by the BIA Board Chair, [name omitted]. [The Chair] will be supported by a dedicated team of board members working in close partnership with the Town of Greater Napanee. Please continue to forward your inquiries to the BIA through our regular channels of communication.

- 22 The materials we reviewed indicated that the next BIA meeting was on May 1, 2020. According to the minutes, there was no specific discussion regarding the deferral of the BIA levy. General updates were shared about initiatives to support local businesses and operations during the board's hiatus.
- 23 According to emails we reviewed, on May 8, 2020, the municipality's General Manager of Community & Corporate Services contacted the Chair to check on plans for the BIA levy. The email indicated that the municipality's finance department was finalizing the second tax bill and that the municipality wanted to get the BIA board's decision regarding the charging of the levy. As discussed previously, the second tax bill is the only tax statement each year that includes a charge for the levy. The email also discussed summary financial information regarding the BIA's operations.
- 24 On May 11, the then-Chair responded to municipal staff with what he described as an "official statement", which said:

Dear Town of Greater Napanee,

After careful consideration, the BIA Board of Directors believes it is in the best interest of downtown businesses and our membership to begin the measured process of returning to increased operations by re-instating the levy on the official tax statements issued by the town. The BIA has welcomed the spirit of cooperation and support between the BIA and the Town of Greater Napanee offering direct support to our business community as they navigate these challenging conditions. We look forward to further cooperation and remain eager to continue to promote, support, and maintain our downtown businesses as part of a strong and vibrant community.

Kindest Regards,

BIA Board of Directors

- 25 We have not been provided with any evidence that a BIA board meeting occurred between the May 1 board meeting and the then-Chair's May 11 email. When asked, the then-Chair told our Office that his email to the municipality reflected a resolution passed by the BIA board. However, he was unable to provide a date for this meeting or any supporting materials. No one else we spoke with recalled a meeting matching this description.
- 26 In response to the then-Chair's email, the municipality indicated that the levy would go out with the final tax bill scheduled for late May and payable in June and September. The email indicated that staff would be recommending that council waive late payment penalties, which would provide some relief to business owners. We were told that the levy was ultimately included on the second tax invoice and payable according to the municipality's typical schedule. This is consistent with previous years' practice.
- 27 The minutes from the BIA's next meeting on May 22, 2020 indicated that the Board did not discuss whether or not to reinstate the levy. Instead, several portions of the discussion indicated that the levy would be included in the upcoming tax bill and that the BIA would have cash flow for various expenses.

General understanding of the board's levy decision

- 28 Our Office spoke to each BIA board member from the relevant period, as well as various members of municipal staff, to determine what each person believed the BIA board had decided about the levy. We also spoke with some members of the local business community who are not on the board.
- 29 Those we spoke with had conflicting accounts of what decisions the board had made regarding the levy. The then-Chair told us the levy was "put on hiatus" from March to June with no repayment obligation and then reinstated. It is not clear what this means since the levy is typically only payable in late June and September. One board member remembered that the board had discussed deferring the levy but chose not to do so. Another said it was the municipality's decision on whether to charge the levy, not the BIA board's decision, and couldn't remember a meeting where the BIA had discussed this issue. Several board members believed the levy had been deferred but not cancelled. Many board members were not familiar with the details of how the levy is charged on property tax bills as they rent rather than own the commercial properties for their businesses. Nearly everyone acknowledged being confused about the status of the levy.

- 30 A local business owner told us that after virtually attending the March 25 board meeting, she understood that the 2020 levy was being deferred. Other business owners we spoke with believed the levy had been cancelled and were surprised to see it on their second tax invoice.
- 31 The municipality told our Office that they spoke with the BIA in March 2020 about various measures to assist the business community in responding to COVID-19, including a potential deferral of the levy. The municipality said that ultimately the BIA did not accept any of these offers or choose to defer the levy. From the municipality's perspective, the levy was never cancelled or deferred, and simply showed up on tax bills in accordance with the municipality's typical process.

Analysis

- 32 My Office received a complaint alleging that the BIA board made a decision about charging a levy without holding a properly constituted Board meeting. We also received a specific allegation that the then-Chair acted unilaterally without the BIA board's approval in deciding to reinstate the levy.
- 33 My Office has found that the *Municipal Act's* definition of "meeting" in section 238(1) requires a quorum of councillors or board members be physically present³ and discuss a matter in a way that "materially" or "significantly" advances council's or the local board's business or decision-making.⁴ Subsequent changes to the *Municipal Act* have allowed electronic participants to count for quorum where a municipality's or local board's procedure by-law provide for it.⁵
- 34 According to the best evidence available to my Office, the BIA board passed a resolution on March 25 suspending the operations of the BIA and going on "hiatus" until further notice. The resolution did not directly speak to the issue of the levy and no further board resolutions addressed the issue in any fashion. Accordingly, there is no evidence that the BIA board officially deferred or cancelled the levy and there was therefore no need for it to pass a resolution "reinstating" it. This documentary evidence is consistent with municipal staff's understanding that the levy was not suspended or deferred, and only the municipality has legal authority to impose, defer, or suspend the levy.

³ *Hamilton (City of) (Re)*, 2019 ONOMBUD 7, <<http://canlii.ca/t/j2pwf>>.

⁴ *Casselman (Village of) (Re)*, 2018 ONOMBUD 11, <<http://canlii.ca/t/hvmtk>>.

⁵ *Municipal Act*, section 238 (3.1-3.4)

- 35 My Office found no evidence that the BIA board met in secret regarding the charging of the levy. No one we spoke with had any recollection of discussions about BIA business among a quorum of board members outside of formal BIA meetings. Further, my Office found no evidence that the then-Chair acted unilaterally in reinstating the levy as it had never been officially deferred.
- 36 However, despite the clear wording of the BIA board's March 25 resolution, there is substantial evidence that many people believed that the BIA levy had been deferred. The then-Chair's email to the BIA membership on April 11 and his subsequent correspondence with municipal staff each suggest that he believed that the levy had been cancelled or deferred for a period of time. His interview with our Office reiterated this point, as well as his belief that board members had changed their minds and passed a subsequent resolution to this effect. We found no evidence that this occurred.
- 37 This mistaken understanding may have been reinforced by the municipality's practice of only including the levy on the second property tax invoice, something few we spoke with were aware of. In addition, these communications occurred during the height of the first wave of COVID-19, where all non-essential businesses were closed and Ontarians were forced to contend with a profoundly changed reality. It is understandable that the then-Chair, who was a small business owner volunteering his time for the local BIA while it operated without any staff support, may have, in the circumstances, misremembered the situation. We were told that the board subsequently invited the municipality to a board meeting to provide information about the levy and its payment schedule, as well as to answer questions from local business owners.
- 38 Clearer communication to the local BIA business community, as well as greater accountability and transparency in the board's meeting practices, may help ensure that similar misunderstandings do not arise in the board's future. These practices will be discussed in a later section of this report.

June 24 alleged informal meeting

- 39 My Office also received complaints alleging that on June 24, 2020, a quorum of board members met in private at a local business contrary to the *Municipal Act's* open meeting requirements. The complainants provided a list of attendees at the gathering, which included both BIA board members and others from the local community. The complainants indicated that while they had not attended the gathering, they had been told about the topics of conversation from those who did. The complainants said the gathering

included discussions about future steps the Board should take and who will stay on the Board.

- 40 Our Office spoke with each of the alleged attendees and confirmed that a gathering occurred on the evening of June 24, 2020, at a local business owned by a BIA board member. Based on our interviews, seven people were present at the gathering, including one individual who was not a BIA board member and another who had recently resigned. Those we spoke with indicated that the five BIA members present at the gathering constituted the entire BIA board as of June 24 due to a number of resignations between February and June 2020.
- 41 Most people we interviewed did not remember how they were invited to the gathering and suggested it was likely via email or text message. Many stressed that Greater Napanee is a small community where the local businesses all know each other and are in frequent communication. The individual who owns the business where the gathering was hosted told us that the idea to meet-up emerged organically from an in-person discussion on the main street of the downtown area shortly after businesses were allowed to reopen.
- 42 However, we were provided with screenshots from an internal message board software the BIA board uses to communicate among member businesses and board members, suggesting that the meeting was at least partially arranged through the software. According to these screenshots, on June 23, 2020, a BIA board member suggested that he would like to organize an “open” board meeting for the following day. The evidence we were provided indicates that five board members and one former board member participated in a discussion about where and when to hold this gathering. In the messages, a virtual Zoom meeting is initially scheduled, but a board member later offers her establishment to meet in a socially distant manner. The posted messages reference various offline/in-person conversations about the proposed gathering. During our interviews, many indicated that they found the BIA’s message board software confusing and difficult to use.
- 43 At the conclusion of the message thread, an individual raises concerns about the proposed gathering, noting that the BIA board must provide notice of its meetings, create an agenda, and keep minutes. He suggested postponing the gathering until these steps can be taken. Another individual responds, stating that:

This is not a formal meeting [name omitted]. This is an informal gathering. Everyone has confirmed they are comfortable with attending. Some drinks and light conversation... Thus why we are not holding at the BIA conference room.

- 44 Everyone we spoke with noted that the gathering location was licensed to serve alcohol and that the purpose of the gathering was to relax, socialize, and catch up.
- 45 When asked to recall the topics discussed at the gathering, everyone remembered that COVID-19 and the province's reopening was the primary topic of conversation. As everyone present was a small business owner, there were discussions about the new safety and distancing requirements for businesses, the government's rent-relief program for small businesses, and related COVID-19 issues. We were told that the group also chatted about personal updates that had occurred over the last few months.
- 46 Those we interviewed indicated that the discussion lasted for a little over an hour. Everyone we spoke with said that there was no BIA board business discussed and that the gathering was merely a social gathering for BIA board members and others to reconnect.

Analysis

- 47 As previously explained, the *Municipal Act's* definition of "meeting" in section 238(1) requires a quorum of councillors or board members be physically present⁶ and discuss a matter in a way that "materially" or "significantly" advances council's or the local board's business or decision-making.⁷
- 48 My investigation indicates that all active BIA board members (5/5) were present at the June 24 evening gathering. Despite the assertion of the complainants who contacted my Office, the investigation found no first-hand evidence that those present discussed any BIA business. We were consistently told that the gathering focused on social matters and discussions about how each business owner was coping with COVID-19. Accordingly, this gathering did not materially advance the BIA's business or decision-making and was not a "meeting" contrary to the *Municipal Act's* open meeting requirements.

⁶ *Hamilton (City of) (Re)*, 2019 ONOMBUD 7, <<http://canlii.ca/t/j2pwf>>.

⁷ *Casselman (Village of) (Re)*, 2018 ONOMBUD 11, <<http://canlii.ca/t/hvmtk>>.

General meeting practices

- 49 During the course of my investigation, I also identified various issues with the accountability and transparency of the BIA board's meeting practices that may have contributed to complaints being brought forward to my Office.

Notice

- 50 We were told that the Greater Napanee BIA provides notice of its board meetings via an email distribution list that consists of all local BIA member businesses. Meeting notice is not posted on the BIA's or the municipality's website, or in any other public fashion, and it is not clear how a member of the public who is not a local business owner would be aware of the time and place of the BIA board's meetings.
- 51 Section 238(2.1) of the *Municipal Act* requires that every municipality and local board pass a procedure by-law that "shall provide for public notice of meetings." Public notice for meetings is pivotal to their openness, as the public must be aware that a meeting is set to occur in order to exercise their right to attend and see decision-making in process.
- 52 The BIA's own constitution and procedures only speak to providing public notice for its "general meetings", which typically occur annually, but not for "special general meetings" or routine meetings of the board of management. Going forward, the Greater Napanee BIA should ensure that it provides notice to the general public for each of its board meetings, as required by the *Municipal Act*.

Virtual meetings

- 53 In light of the gathering restrictions mandated by the COVID-19 pandemic, the legislature has amended the *Municipal Act* to provide municipalities and local boards the flexibility to hold virtual meetings. Specifically, the Act was amended to allow electronic participants to count for quorum where a municipality's or local board's procedure by-law provide for it.⁸ Our investigation found no evidence that the BIA had amended its by-law to allow for electronic meeting participants to count for the purposes of quorum. If the board wishes to continue holding electronic meetings, it should take this step to ensure its meetings are in compliance with the *Municipal Act*'s quorum requirements.

⁸ *Municipal Act*, section 238 (3.1-3.4)

Meeting minutes

- 54 During this investigation, Ombudsman staff struggled to obtain copies of agendas and minutes for BIA board meetings held between March and June 2020. The newly hired BIA staff person only had access to some of these materials, while others could only be obtained from specific BIA board members. We were told that the BIA had historically sent copies of its minutes to the municipal Clerk for inclusion on upcoming council meeting agendas, but this practice stopped when the staff person left. The municipal Clerk was not able to provide my Office with any relevant BIA meeting materials from March to June 2020. The board also used to circulate meeting minutes to its membership via email, although our review indicates that this did not occur after the staff person left.
- 55 Section 239(7) of the *Municipal Act* requires that all resolutions, decisions and other proceedings that take place during a meeting be recorded without comment. Meeting minutes are one of the best ways for the public to understand what a municipal council or local board has decided, and public access to the board's meeting minutes from March 25, 2020, may have alleviated some of the confusion surrounding the board's decision regarding the levy. As a best practice, the BIA board should ensure that all its meeting minutes are accessible by BIA staff and board members, as well as being available to the public and my Office for review.

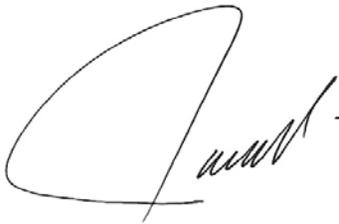
Opinion

- 56 Based on the available evidence, my Office has determined that the Board of Management for the Greater Napanee Business Improvement Area did not meet in private, contrary to the *Municipal Act's* open meeting requirements, regarding the charging of a levy. I also found no evidence that the then-Chair acted unilaterally and contrary to the Act in reinstating the levy, as it had never been officially deferred.
- 57 The Board of Management for the Greater Napanee Business Improvement Area also did not contravene the *Municipal Act's* open meeting requirements on June 24, 2020, when it met for a social gathering at a local business. This was not a "meeting" of the board because the board members did not materially advance the business or decision-making of the BIA.

- 58** To improve the accountability and transparency of its meeting practices, I encourage the Greater Napanee BIA to review its meeting practices and procedures, including those related to public notice, minute keeping, and virtual meetings, to ensure they reflect best practices and the requirements of the *Municipal Act*.

Report

- 59** Ombudsman staff reviewed a preliminary version of this report with the Vice Chair and Operations Manager of the Greater Napanee Business Improvement Area and provided the opportunity to comment. Any comments received were taken into account in preparing this report.
- 60** The Vice Chair indicated that my report would be shared with the board and made available to the public no later than the board's next council meeting.



Paul Dubé
Ombudsman of Ontario