



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

March 5, 2014

Mayor Morgan Pitfield and
Clerk Candy Beauvais
Municipality of Killarney
32 Commissioner Street
Killarney, ON P0M 2A0

Dear Mayor Pitfield and Ms. Beauvais,

Re: Closed Meeting Complaints – Ad Hoc Committee Meetings and October 18 and October 21, 2013 Council Meetings

I am writing further to our discussion on February 11, 2014, regarding the outcome of our review of complaints that:

- 1) the Ad Hoc Committee violated the *Municipal Act, 2001* (the Act) in holding closed meetings in 2013 to discuss a review of the Ward and “Councillor at Large” governance systems.
- 2) Council did not provide 48 hours notice prior to holding its October 18 and October 21, 2013 special closed meetings, and may have discussed topics in closed session (municipal wharf lease) that were not permitted under the open meeting exceptions of the Act.

Procedure By-Law

Regular meetings of Council are held on the second Wednesday of each month at 7:00 p.m.

The date, time, and place of a regular meeting may be altered with approval of a majority of Council, provided 48 hours notice is provided and posted at the municipal office.

The Procedure By-Law defines “Committee” as “any advisory or other committee, subcommittee or similar entity composed of one or more members of council, and established by council from time to time.” A “meeting” means any regular or special meeting of Council or of a committee.

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Section 20.1.0 states that, “all Council and Committee meetings shall be open to the public,” unless the subject matter falls within one of the permitted exceptions under s.239 of the *Municipal Act*.

A special meeting may be called by the Mayor or by petition of the majority of Council or Committee members, with 48 hours notice to the members of Council. Despite the 48 hours notice requirement, “a special or emergency meeting may be held as soon as practicable following receipt of the summons or petition...”

In terms of public notice, the By-Law states that the Clerk “shall give notice of the meeting to all Council members or Committee members, and where required, to such other persons the Chair or Clerk shall deem advisable.”

The Clerk said that the municipality’s notice practice for both regular and special meetings is to post public notice of meetings on the municipal bulletin boards at the municipal office and on the municipal website. She said that staff strive to provide 48 hours notice to the public of special meetings, but it is not always possible.

Ad Hoc Committee Meetings

Background: A number of Killarney residents raised concerns to Council that the current ward governance system was unfair to residents in Ward 2, who were only represented by one Council member, compared to three Council members (quorum) representing Ward 1. These residents requested that Council look into the possibility of replacing the ward system with a “councillor-at-large” system, whereby Council members represent the entire community rather than a particular ward or district.

On April 10, 2013 Council passed a resolution in the public session stating that “Mayor Pitfield will strike an in-house Ad Hoc Committee to study this request and the possible change to our current municipal structure.”

The Ad Hoc Committee, as established, was comprised of the Mayor, Councillor Chet Patterson, and three staff members – the Clerk, Deputy Clerk, and an administrative assistant. The Committee was tasked with studying and comparing the current ward system versus implementing a councillor-at-large system.

The Committee held four public meetings – two public input meetings on June 1 and 4, 2013, and two meetings to present the draft report on August 6 and 7, 2013. The

complaint alleged that, in between these public meetings, the Committee met behind closed doors to discuss the review and recommendations and that such closed meetings contravened the open meeting requirements of the Act.

The Mayor, Councillor Patterson, and the Clerk advised us that the Ad Hoc Committee did hold a number of “working meetings” between the June 2013 public input meetings and the release of the draft report in August 2013. Those interviewed could not recall the number of meetings or the specific dates when they took place. The Clerk advised that minutes of the meetings were not taken because it was believed that the Ad-Hoc Committee was not subject to the open meeting requirements of the Act.

We received consistent information that the meetings involving all Ad Hoc Committee members included updates from staff members on the research they were conducting on the ward and “councillor-at-large” governance systems, as well as direction from the Council members on the Committee to staff about next steps and any additional information that should be sought. Those interviewed stated that the staff on the Committee conducted the majority of research on the project and drafted the report. However, we were told that all Committee members came together to review the draft report before it was presented to the public, including reviewing the options and recommendations.

Analysis

As the Clerk noted to us, the Ad Hoc Committee does not meet the definition of a “committee” for the purposes of the open meeting requirements under the *Municipal Act*, as less than 50% of the committee members are members of Council.

However, the Procedure By-Law defines “committees” as “any advisory or other committee, subcommittee or similar entity composed of one or more members of council, and established by Council from time to time.” The By-Law states that all Council and Committee meetings shall be open to the public, unless the subject matter falls within one of the permitted exceptions of the Act. The By-Law defines a ‘meeting’ as “any regular or special meeting of Council or of a Committee.” Thus, according to the City’s procedure by-law, all of the Ad Hoc Committee meetings should have been public. The subject matter discussed in the meetings held between June and August 2013 – also does not fall within any of the *Municipal Act* exceptions which would have allowed for a closed meeting.

Special Meetings Held October 18 and October 21, 2013

October 18, 2013 Meeting

Part of the complaint about the October 18, 2013 special meeting was that the municipality did not provide public notice 48 hours in advance of the meeting. The Procedure By-Law does not require 48 hours advance notice to the public, but rather to Council members. Further, despite the 48 hours notice requirement, the By-Law states that, “a special or emergency meeting may be held as soon as practicable following receipt of the summons or petition...” of the meeting.

The Clerk stated that public notice of the October 18, 2013 special council meeting was posted on the municipal website sometime between October 16 and 17, 2013.

The October 18, 2013 special meeting agenda stated that a closed session would be held to discuss a legal matter with respect to a draft wharf lease, as well as a personnel matter.

The complainant suggested that discussion about a lease for the local wharf should have been held in public.

The public meeting minutes show that all four of the existing Council members (one seat vacant) attended the meeting and Council passed a resolution in open session to meet in camera...” to discuss a legal matter regarding a lease issue as well as a personnel matter.”

The purpose of the closed meeting was to discuss the terms of the proposed lease that was being negotiated with Herbert Fisheries, which included an expansion of the wharf. The closed meeting record showed that Council reviewed the draft terms of the lease and the Clerk relayed advice from the municipal solicitor about the terms and the outstanding matters that needed to be addressed in order to finalize negotiation of the lease agreement.

During the closed session, Council directed staff to forward documents regarding the lease and construction plans to the municipal solicitor and to direct the solicitor to communicate with Herbert Fisheries’ solicitor about the outstanding issues.

Analysis

Council is permitted under s. 239 (2) (f) of the *Municipal Act* to hold a closed meeting to receive and consider “advice that is subject to solicitor client privilege.” Council also has discretion under the Act to consider a “proposed or pending acquisition or disposition of land” in a closed session.

Council's consideration of confidential legal advice regarding the draft terms of a lease agreement under negotiation with respect to the municipal wharf falls within both the "solicitor-client privilege" and the "acquisition of land" exceptions to the open meeting requirements.

The Clerk was asked to arrange a follow-up Council meeting on October 21, 2013. We were advised that Council was anxious to finalize negotiations in order to start work on the wharf expansion prior to winter.

October 21, 2013 Special Closed Council Meeting

The Clerk advised us that public notice of the October 21, 2013 6:00 p.m. special council meeting was posted on the municipal website on October 18, 2013.

The meeting agenda stated that the closed meeting would be held to discuss "lease matters/review draft wharf lease." After the closed session, Council was scheduled to consider "By-Law to enter into a lease agreement with Herbert Fisheries" (By-Law 2013-32).

All Council members were present and passed a resolution to proceed in camera to discuss "legal matters."

The closed meeting minutes show that Council discussed an active appeal before the Ontario Municipal Board prior to discussing the wharf lease.

The minutes state that the Mayor provided Council with an update on the status of the wharf lease negotiations after he and Councillor Peter McMullen met with Mr. Herbert (the lessee) and his solicitor. Council then reviewed and discussed the proposed changes to the terms of the lease, any associated implications, and their response to the ongoing negotiations.

Council did not consider legal advice about the terms of the lease in this closed meeting, but did review correspondence between the municipal solicitor and Herbert Fisheries' solicitor with respect to the outstanding issues that needed to be resolved to reach agreement.

Council then passed a resolution "that the lease with Herbert Fisheries be approved with the addition of the eight (outstanding) items from the September 18, 2013 meeting...."

The closed meeting minutes further note that once the outstanding items were resolved and the lease was reviewed for discrepancies, “the Clerk will prepare the by-law and a special meeting to pass the lease will be called.”

Analysis

Council’s discussion of the draft terms of a proposed lease agreement and the status of lease negotiations was permitted under the “proposed or pending acquisition or disposition of land” exception.

The *Municipal Act* prohibits Council from voting in a closed meeting unless the vote pertains to a procedural matter or for providing direction to “officers, employees or agents of the municipality... or persons retained by or under a contract with the municipality.” The Mayor advised us that the resolution voted on during the October 21 closed meeting was intended as a direction to the municipal solicitor, as negotiations on the lease were ongoing. The minutes confirm that there were issues that needed to be addressed by the Solicitor and that, once those outstanding items were addressed, the Clerk was to draft a by-law to be considered at a public meeting. In future, council may wish to ensure that any resolutions voted on in closed session clearly reference when direction to staff is being given.

On February 11, 2014, we discussed our review and findings with you and provided you with an opportunity to provide feedback. You stated that you were concerned that our Office determined that the Ad Hoc Committee “working” meetings were required to be open to the public, as you said that you did not change the final report’s recommendations and all proposed options were presented in the August public sessions and ultimately any decisions required the approval of Council. As indicated, the Municipality’s Procedure By-Law requires all Council and Committee meetings to be open to the public unless the subject matter falls within one of the permitted exceptions of the Act. The Ad Hoc Committee’s discussion of the report and recommendations regarding the municipality’s governance structure does not fall within any of the permitted exceptions to the open meeting requirements under the Act and, as such, the meetings were required to be held in public as per the Procedure By-Law.

You agreed to include this letter on the agenda for your next public Council meeting, to be held on March 12, 2014, and to post a copy on your website.

Thank you for your cooperation with our review.



Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team