

February 3, 2014

Mayor Rick Hamilton,
Deputy Mayor Al Collett,
CAO Rob deBortoli and
Clerk Lesley Sprague
45 Hillside Drive North
Elliot Lake, ON P5A 1X5

Dear Mr. Hamilton,

Re: Closed Meeting Complaint – November 1, 2013 meeting with the Serpent River First Nation

I am writing further to our conversation on January 24, 2014 regarding the outcome of our review of a complaint that a quorum of Elliot Lake Council violated the open meeting requirements of the *Municipal Act* when they met behind closed doors with the Chief of the Serpent River First Nation in order to discuss Council business – specifically the Cottage Lot Program.

As you know, *the Municipal Act, 2001* (the Act) requires all meetings of Council to be open to the public, with limited exceptions and subject to certain procedural requirements.

In reviewing this complaint, our Office spoke with Chief Administrative Officer (CAO) Robert deBortoli, who confirmed that he was at the meeting on November 1, 2013 with his Executive Assistant and four Council members: Deputy Mayor Al Collett and Councillors Tom Farquhar, Chris Patrie, and Sandy Finamore. Also in attendance were Serpent River First Nation Chief Isadore Day, the Chair of the Serpent River First Nations Economic Development Corporation and local MPP Mike Mantha. The meeting took place at the First Nation's Economic Development Office.

According to the CAO, the purpose of the meeting was to hear Chief Day's concerns about an impasse reached in the negotiations between the First Nation and the City's Joint Relations Committee with respect to acquiring Crown Land for the second phase of the Cottage Lot Program (waterfront development project). The City requires the First Nation's agreement to acquire Crown Land located in its ancestral territory.

The CAO said public notice of the November 1, 2013 meeting was not provided because it was not viewed as a meeting of Council.

We spoke with the councillors who attended the November 1, 2013 gathering, as well as the Mayor, and obtained and reviewed a copy of the meeting minutes/notes in order to assess whether this gathering was actually a meeting of Council that was subject to the open meeting requirements of the Act.

Arranging the November 1, 2013 meeting

Deputy Mayor Al Collett attended a Land/People/Economy Summit hosted by the Serpent River First Nation (the First Nation, or “SFRN”) on October 24, 2013, at which Chief Day announced that the First Nation would no longer negotiate with the Joint Relations Committee that was tasked by Council with reaching agreement with the First Nation for acquisition of Crown land for the Cottage Lot Program.

Deputy Mayor Collett shared this information with Council at an October 28, 2013 public Council meeting and Council (in the absence of the Mayor, who was on vacation), passed a motion to suspend the notice requirements of the Procedure By-Law in order to introduce a motion to appoint Councillor Tom Farquhar “to begin immediate discussions with the SRFN on the Cottage Lot Program, Phase II.”

Councillor Farquhar and Deputy Mayor Collett said they met with Chief Day at a coffee shop on October 29, 2013 to hear his concerns, but the Chief requested to meet with the other Council members in order to express his views, and he proposed that Council meet with him on November 1, 2013. Councillor Farquhar said he then called the other Council members (except for the Mayor, who was out of the country), and made them aware of the Chief’s invitation to meet at the First Nation’s Economic Development Office on November 1, 2013 at noon. He said he did not consider whether a quorum of Council would be present, but thought it important to extend the invitation to all available Council members.

Councillor Finamore and Councillor Patrie confirmed that they received a call from Councillor Farquhar and said they thought it was important to attend the meeting to hear Chief Day’s concerns, particularly since the Cottage Lot Program was one of the City’s most important economic development projects and they wanted to ensure that negotiations would proceed. Some Council members had the impression that they would be attending a First Nation Council meeting.

Councillors Farquhar, Patrie, and Finamore attended the meeting together and Deputy Mayor Collett met them there. As indicated, the CAO and Executive Assistant also attended.

November 1, 2013 gathering

The minutes of the November 1, 2013 gathering were taken by the Executive Assistant to the CAO.

The minutes of the meeting note that Chief Day opened the meeting. He expressed his views on how the City and the First Nation had worked well in the past, and the need to find collaborative ways to move forward on the Cottage Lot Program.

Councillor Farquhar noted that the Council members were not at the meeting as “Council” and that no decisions could be made. Councillor Farquhar and MPP Mantha also commented on the benefits of working together. Various participants commented on the need to overcome barriers to doing so.

Chief Day relayed his concerns about the impasse that was reached with the Joint Relations Committee and his disappointment that a proposed partnership on the Cottage Lot Program was scrapped after receiving a legal opinion that the tax sharing provision in the proposal was not legally possible. Chief Day commented that the purpose of the meeting was to “flush out issues” that led to the impasse. He said a partnership still had to be worked out for the Cottage Lot Program to move forward. He and the Chair of the First Nation Economic Development Corporation also expressed the need for provincial support to make this happen, and possibly legislative changes to allow for tax revenue sharing.

Councillor Farquhar stated that any legislative changes would take time, and suggested creating a joint commission made up of three members from each community and a neutral chair.

The minutes reflect that Councillors Finamore and Patrie commented briefly on the barriers to moving forward. Deputy Mayor Collett noted that they were “all agreeing to process” and questioned what was happening with the existing Joint Relations Committee that was originally tasked with negotiating with the First Nation regarding the coveted Crown land.

The minutes state that Deputy Mayor Collett left the meeting at 1:15 p.m., after which general discussion continued on the proposed new joint commission as well as confirmation of next steps in the process, including that Chief Day would share the

information from the meeting with the First Nation Council, and that a formal public 'Council to Council' meeting would be arranged.

A public meeting was held on December 2, 2013, at which Council and the Serpent River First Nation again discussed barriers to reaching agreement on the Cottage Lot Program and options for moving negotiations forward. This included discussion of the proposed Joint Commission. However, no decisions were reached.

Views from Council members about the nature of the meeting

All Council members in attendance at the November 1, 2013 gathering and the CAO expressed the view that the gathering was not a meeting of Council, as it was called by Chief Day and/or was simply an information-sharing session aimed at relationship building.

Based on his review of the November 1, 2013 meeting minutes and information he obtained about the substance of the gathering, the Mayor expressed concern that this meeting proceeded behind closed doors. He stated that, in his view, the meeting should have been open to the public, as it involved a quorum of Council discussing and advancing Council business with respect to how negotiations would proceed.

Analysis

Gatherings of a purely social nature or exchanges of information with constituents are not subject to the open meeting requirements of the Act. However, where Council members come together for the purpose of exercising the power or authority of Council or for the purpose of laying the groundwork necessary to exercise that power or authority, then the gathering is considered a "meeting" that is subject to the open meeting rules.

In 2012, we reviewed similar complaints that a quorum of Council attended closed meetings of the Nuclear Waste Management Organization and the Elliot Lake Residential Development Corporation and discussed matters before Council. At that time, our Office cautioned Council about discussing Council business at closed meetings hosted by third parties, and advised that the obligation to comply with the open meeting requirements is not waived when the meeting is hosted by a third party.

While it is understandable that Council members wanted to meet with Chief Day to discuss his concerns about an important economic project, the information from Council members and the minutes shows that the meeting went beyond information sharing and relationship-building. A quorum of Council (four of seven members) was present and, in the course of the meeting, considered a proposed new Joint Commission to continue the

stalled negotiations. The minutes reflect that Deputy Mayor Collett himself noted that the meeting participants were “agreeing on process” with respect how negotiations would move forward. Council had not at that point publicly considered or approved a new Joint Commission. The Council members were clearly laying the groundwork for future Council decisions. As such, this was a “meeting” to which the open meeting requirements apply.

Public notice of the meeting was not provided, and members of the public were not permitted to attend. The subject matter – how to resume negotiations on the Cottage Lot Program – also does not qualify for closed meeting consideration. For all these reasons, the November 1, 2013 meeting contravened the *Municipal Act*.

On January 24, 2014, we discussed with you our review and findings and provided you with an opportunity to provide feedback. The Deputy Mayor and the Clerk questioned whether the meeting with the Serpent River First Nation was not similar to a quorum of Council’s attendance at the Association of Municipalities of Ontario (AMO) conference and meetings held between Council members and provincial government ministries and ministry representatives. As discussed, these meetings differ from the November 1, 2013 meeting with the Serpent River First Nation in that the purpose of Council’s attendance at the AMO meetings was simply to raise municipal issues and concerns to the Ministry to seek support for local projects. Council did not exercise any decision-making authority or lay the groundwork for future decision-making. In contrast, at the November 1, 2013 meeting, matters that had yet to be considered by Council were discussed, and proposals were advanced on how Council would move forward with respect to negotiations on the Cottage Lot Program.

For further details about our review and findings regarding Council’s attendance at the AMO conference, please refer to our October 25, 2012 letter, available on our website at: www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Elliot-Lake-Oct-25.pdf

You agreed to include a copy of this letter on the February 10, 2014 public Council meeting agenda and to post a copy of the letter on your website.

Thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team