

  
**Ombudsman**  
ONTARIO  
ONTARIO'S WATCHDOG  
CHIEN DE GARDE DE L'ONTARIO

July 22, 2014

Mayor Doug Martin  
Ms. Carolyn Kett, Town Clerk  
Town of Fort Erie  
1 Municipal Centre Drive  
Fort Erie, ON  
L2A 2S6

Dear Mayor Martin and Ms. Kett:

RE: March 31, 2014 closed meeting of Council

I am writing further to our discussion on July 21 regarding the outcome of our review of a complaint that council discussed a grant in closed session on March 31, 2014. The complaint alleged that discussion of this matter did not fall within the exception cited in the resolution to proceed in camera, or within any exception to the open meeting requirements.

As you are aware, the *Municipal Act, 2001* (the Act) requires all meetings of council, local boards, and their committees to be open to the public, unless the subject matter falls within one of the permitted exceptions under the Act, and certain procedural requirements are followed.

In reviewing this complaint, our Office reviewed the meeting documents, including the agenda and publicly available minutes. We also spoke with both of you, and considered the relevant sections of the Township's Procedure By-law (By-law 145-06) and the Act.

Procedure By-law

Regular meetings of council are held the second and fourth Monday of the month at 6:00 p.m.

The Town's Procedure By-law references the open meeting requirements and provides for public notice of meetings, as required by the Act.

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### March 31, 2014 meeting

The agenda for the March 31 meeting stated that council would hold a closed session to discuss a property matter pursuant to section 239(2)(c) of the Act (“A proposed or pending acquisition or disposition of land by the municipality or local board”). The agenda specified that the discussion was with respect to a proposal for the Town to purchase vacant industrial land. An addendum to the agenda added that the discussion would also involve “Sustainability of Fort Erie Race Track”.

The minutes indicate that the first part of the meeting was a closed special council-in-committee meeting, which began at 5:00 p.m. Because the session went longer than anticipated, a second closed session was added later in the regular meeting.

Present in camera were all of council, members of staff, and representatives of the Fort Erie Live Racing Consortium (FELRC). During the closed session, council discussed a letter the FELRC had received that day from the Ontario Racing Commission, which indicated that provincial funding provided to the racetrack would be less than anticipated. You informed us that the racetrack required a \$500,000 contribution from the Town by midnight that night, or the track would cease to operate. This was relevant to the Town’s purchase of the vacant lands, because the land deal could not proceed if the racetrack was not operational. You said council also discussed potential purchase prices for the land, and other details of the purchase and sale that were still confidential at that time.

After the second closed session, council returned to open session at 7:59 p.m. and passed the following resolution:

In further consideration of the proposed purchase of vacant industrial lands considered by Council in the Closed Session Council-in-Committee meeting held March 24, 2014, Council hereby commits to a grant of \$500,000 to the Fort Erie Live Racing Consortium to assist with the sustainability of the Fort Erie Race Track for the 2014 season.

### Analysis

#### *The application of s. 239(2)(c)*

During our conversation of July 21, we discussed that the use of the “acquisition or disposition of land” exception is discretionary. As noted by the closed meeting investigator for the City of Kingston in a 2010 report:

It must be again emphasized that the *Municipal Act* permits a municipal council, local board, or a committee of either of them, to go into closed session for “a proposed or pending acquisition” of land. However, that is not a *mandatory* exception to the open meetings provision – it is *discretionary*. In our view, a

municipal council, local board or committee should only exercise its discretion when there is some potential harm, financial or otherwise, of having a discussion on a pending acquisition held in open session... Concern over public reaction should not be a basis for a closed session discussion<sup>1</sup>. (italics as in original)

You advised our Office that confidential information related to the land deal, including potential purchase prices, was discussed during the in camera session. You noted that public discussion of this information could have harmed the Town's bargaining position in the potential purchase of the vacant lands.

Based on the information provided, council was permitted to exercise its discretion to discuss this matter in closed session under the "acquisition or disposition of land" exception.

*Discussion of the grant and presence of third parties in camera*

You acknowledged to our Office that the sustainability grant to the racetrack was not a matter that would normally be permitted for in camera discussion. The information provided to our Office confirmed, however, that in this specific circumstance, the discussion of the potential acquisition of vacant lands was directly related to the necessity of additional funding for the racetrack, such that both matters could not fully be discussed separately.

We also discussed the fact that third parties were permitted to attend the closed session. You explained that the presence of the FELRC representatives was necessary in order to address any questions that council members may have had about the grant and the operation of the racetrack. As the decision on the grant had to be made that day, there would be no time to gather additional information after the meeting.

*Procedural Matters*

During our conversation of July 21, we also suggested that council consider audio recording its closed meetings. As noted in the Ombudsman's 2011-2012 annual report on open meetings:

Audio or video recording of council meetings should be routine – not just the open sessions, but the closed ones too. This would assist immeasurably in ensuring officials do not stray from the legal requirements once they retreat behind closed doors, and would provide a clear, accessible record for investigators to review.

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<sup>1</sup> Report of Amberley Gavel Ltd., January 7, 2010, regarding meetings held by Council for the City of Kingston on May 5 and November 3, 2009

As noted, we are aware of several municipalities that follow this practice, including the Townships of Tiny and Madawaska Valley, the Town of Midland, the Municipality of Lambton Shores and the City of Oshawa.

When we spoke, I gave you the opportunity to provide feedback on our Office's findings. You advised that you had nothing further to add.

You agreed to include this letter on the agenda for council's public meeting on August 18, 2014, and to make a copy available to the public.

I would like to thank you for your cooperation during this review.

Sincerely,

Michelle Bird  
Legal Advisor  
Office of the Ontario Ombudsman