

February 11, 2013

Clerk Andrea Fay  
Town of Midland  
575 Dominion Avenue  
Midland, ON L4R 1R2

Dear Ms. Fay,

**Re: Closed Meeting Complaint – November 7, 2012 Planning & Development Committee Meeting**

I am writing further to our conversation on February 11, 2013 regarding the results of our review of a complaint that the Planning and Development Committee held an improper closed meeting on November 7, 2012 to discuss the zoning of a particular property. The complainant alleged that since the zoning issue was discussed publicly on previous occasions and any decisions on the property zoning had implications for other properties in the area, it did not qualify for closed meeting consideration.

The *Municipal Act, 2001* (the Act) requires that all meetings of Council, Local Boards, and their committees be open to the public with limited exceptions. Midland's Planning and Development Committee is a Committee of Council, comprised of all nine Council members, and therefore it is subject to the open meeting requirements of the Act.

In reviewing this complaint our Office spoke with you and the Director of Planning and Development (as the designated Deputy Clerk for the Planning Committee responsible for recording the meeting minutes); obtained and reviewed the Committee meeting agenda, minutes, and a copy of the confidential report discussed at the closed meeting; and considered the relevant sections of the Town's Procedure By-Law and the *Municipal Act*.

**Procedure By-Law**

The Act requires municipalities to provide for public notice of meetings in the Procedure By-Law. The Town's Procedure By-Law indicates that the Clerk posts the meeting agendas, including committee meeting agendas, on the municipal website on the Friday prior to the meeting.

### **November 7, 2012 Planning & Development Committee Meeting**

The Agenda for the November 7, 2012 Planning and Development Committee (the Committee) meeting stated that a closed meeting would be held at 6:30 p.m. under the “litigation or potential litigation” exception to the open meeting requirements (s. 239 (2) (e)). The Agenda noted that the Committee would be reviewing a confidential staff report about the zoning of an identified property.

Seven of the nine Committee members were present at the meeting, along with the Director of Planning and Development (the Director), a Planner, the Technical Services Manager, and an Executive Assistant. The Director stated that at the start of the meeting the Committee had a discussion about whether the subject matter properly fell within the “potential litigation” exception and ultimately determined that it did based on the fact that the property owner’s lawyer and representative stated an intent to take legal action and the purpose of the meeting was to discuss the Town’s response. However, the minutes did not reflect this discussion.

The public minutes show that the Committee passed a resolution to proceed in camera under the “litigation or potential litigation” exception. The public record states that Council discussed a confidential report about a zoning issue with respect to an identified property and the Committee provided direction to staff about this matter.

You provided our Office with a copy of the October 30, 2012 confidential report reviewed at the November 7, 2012 meeting. The report, prepared by Planning Department staff, includes a history of the zoning issues for the property in question. It includes a copy of correspondence from the property owner’s lawyer dated November 5, 2010 and a copy of a letter from that owner’s representative dated September 24, 2012 letter. Both letters indicate that specific legal action would be taken if the zoning dispute was not resolved to the property owner’s satisfaction.

Also attached to the report was a June 16, 2011 legal opinion from the Town’s Solicitor in respect to the ongoing zoning dispute.

The report indicates that, as a result of the September 24, 2012 letter, Planning Staff were seeking instruction from the Committee on how to respond.

According to the information provided, the Committee voted on a direction to the planning staff on what action to take in response to the potential legal action. There is no detail in the minutes about who initiated the motion and/or the substance of the motion. As indicated above, the public meeting minutes confirm that the Committee provided direction to the Planning Staff during the closed session.

## **Analysis**

### **Litigation Exception**

The “litigation or potential litigation” exception to the open meeting requirements, should be narrowly interpreted. Mere speculation that litigation may arise at some point in the future is not sufficient to bring closed meeting discussion within the exception.

In this case, the Town received correspondence on more than one occasion from the property owner’s lawyer and representative indicating that specific legal action would be taken if the zoning dispute was not resolved. As a result, the Committee perceived that there was a real potential for litigation. The Committee then considered how Planning Staff should respond to the potential for legal action. Given the explicit reference to legal action being taken if the matter was not resolved, our Office agrees that this matter falls within the parameters of the cited “potential litigation” exception and the Committee was permitted to discuss the matter in a closed meeting.

As the Committee considered a previous written opinion from its Solicitor, the “solicitor-client privilege” exception of the Act (s. 239 (2) (f)) could also have been cited.

### **Voting**

The *Municipal Act* prohibits voting in a closed meeting unless the meeting is properly closed under one of the legislated exceptions to the open meeting requirements, and the vote is for a procedural matter or for giving instructions to officers, employees, or agents of the municipality.

The stated purpose of November 7, 2012 closed meeting is reflected in the confidential report considered at the meeting – Planning Staff were seeking instruction from the Committee on how to proceed in light of a potential legal action. The public minutes state that the Committee provided direction to staff with respect to the recommendations in the report. Since the subject matter considered qualified for closed meeting consideration and the vote was to provide instruction to Town employees, the vote was permitted in the closed meeting.

### **Record Keeping**

As noted, the meeting minutes do not confirm the substance of the motion that was considered in the closed session in terms of providing direction to staff. We relied on the confidential report, statements from you, and a general statement in the public minutes to confirm the nature of the vote.

In the Ombudsman's September 2012 Report to Midland Council on his investigation into closed meetings held between December 2011 and March 2012, including a January 11, 2012 meeting of the Planning and Development Committee, the Ombudsman noted that closed meeting minutes did "not provide any information about the directions to staff given by council..."

Although the public minutes of the November 7, 2012 meeting state that the Committee provided direction to staff in reference to recommendations made in the confidential report, the closed meeting record should have provided more detail about the motion upon which Council voted as well as identifying who initiated and seconded the motion.

The meeting record was also deficient in that it did not document the discussion that took place among Council members about whether the subject matter slated for closed meeting consideration appropriately fell under the "litigation or potential litigation" exception.

As discussed, the meeting record should accurately reflect those matters discussed in the closed meeting. Consistent with the Ombudsman's recommendation in the September 2012 report, the Town of Midland should also consider audio or video recording its in camera meetings to ensure a complete and accurate record.

When we spoke on February 11, 2013 you said that this letter would be added to Council's February 19, 2013 meeting agenda and a copy made available on the Town's website as part of the meeting agenda package.

We would like to thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie  
Early Resolution Officer  
Open Meeting Law Enforcement Team

cc. Wes Crown, Director of Planning and Development