



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

August 16, 2013

Mr. Doug Luker, Clerk
Township of Tiny
130 Balm Beach Road West
Tiny, ON
L0L 2J0

Dear Mr. Luker,

Re: Complaint regarding closed meetings

I am writing further to my conversation with you and the Mayor on August 12, 2013 regarding the outcome of our Office's review of a complaint that some members of Council of the Township of Tiny may have met in secret prior to the passage of By-law 13-008 regarding the installation of industrial wind turbines in the Township.

By way of background information, By-law 13-008 did not appear on the agenda for the Committee of the Whole Meeting or the Regular Meeting of Council on January 14, 2013. In the agenda for the Regular Meeting of Council, there was a Notice of Motion that there would be a discussion about "specific environmental, financial and health impacts of wind farm developments." However, after information on that topic was presented during the Committee of the Whole Meeting, staff was instructed to bring forward a draft by-law for formal consideration during the Regular Meeting of Council later that evening. By-law 13-008 was added to the agenda at the beginning of the Regular Meeting of Council and it was passed later in the meeting.

Due to the manner in which By-law 13-008 was quickly introduced and passed, the complainant alleged that there would have been secret meetings of members of Council shortly before the January 14, 2013 Council meeting in order to lay the groundwork for the passage of the By-law. Our Office was also provided with a copy of a January 16th email about By-law 13-008 from the Deputy Mayor to a member of the public, who is a member of a local ratepayers' association, in which the Deputy Mayor thanked the member of the public and made reference to "special meetings."

The complainant also raised concerns that another meeting about industrial wind turbines had taken place on January 6, 2012 between some members of Council and members of the public.

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Our Office's review process

As you know, the *Municipal Act, 2001* requires that meetings of Council be open to the public, subject to the limited exceptions outlined in section 239 of the Act. Council must also observe certain procedural requirements in order to close a meeting to the public. Our Office reviewed this complaint to assess whether the gatherings complained of were meetings of Council for the purposes of the Act, and therefore subject to the open meeting requirements. In reviewing this complaint, our Office spoke with you, the Deputy Clerk, all members of Council and four members of the public. We also reviewed the agendas, the minutes and the audio recordings relating to the January 14, 2013 Council meetings, the minutes of the December 10, 2012 Council meetings and the Township's Procedure By-law. We received full cooperation from Township staff and members of the public during our review.

Information obtained during our Office's review

Special Meetings

The Deputy Mayor explained that the reference to "special meetings" in his email was in relation to a number of community meetings regarding wind turbines that he and the member of the ratepayers' association had participated in over recent years, many of which took place before the Deputy Mayor became a member of Council.

During our inquiries, we were also informed of a gathering that took place over lunch in December 2012 that involved the Deputy Mayor, Councillor Nigel Warren and two members of the public, one of whom is the same person who received the email from the Deputy Mayor and the other of whom is on the Board of Directors of Wind Concerns Ontario. We were told that this meeting was arranged by the member of the ratepayers' association and that the purpose of the meeting was to receive information from the member of the Board of Directors of Wind Concerns Ontario on how other municipalities had dealt with the issue of wind turbines and on the by-laws that other municipalities had passed in that regard.

January 6, 2012 meeting

Our inquiries also confirmed that the Deputy Mayor and Councillor Warren met with three members of the public on January 6, 2012 at the Township of Tiny offices for the purpose of discussing a potential application by the Beausoleil First Nation to construct

industrial wind turbines on Christian Island. The information we received indicated that this meeting was also arranged by one of the members of the public.

Analysis

The first issue to be determined is whether the above meetings fall under the definition of a “meeting” in the *Municipal Act*, and are therefore subject to the open meeting requirements in the Act. In section 238 of the Act, a meeting is defined as “any regular, special or other meeting of a Council, of a local board or of a committee of either of them.”

The Ombudsman has developed the following definition to determine whether a Council gathering is subject to the open meeting requirements of the Act:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.¹

While the question of whether a quorum of Council was present is a consideration in determining whether a gathering constitutes a meeting under the open meeting requirements of the Act, there are circumstances where the issue of quorum will not be determinative. For instance, gatherings of a purely social nature, at which a quorum of Council may be present, are not subject to the open meeting requirements of the Act. On the other hand, gatherings may sometimes constitute meetings subject to the open meeting rules, even though no quorum of Council is present. For instance, in the Ombudsman’s report on his investigation into the Council of the Township of Nipissing’s special meeting of April 25, 2008,² he found that an improper closed meeting had taken place when the Mayor initiated a series of individual telephone calls with councillors to approve an invoice. Although a quorum of Council was never present, Council clearly came together through serial contacts for the purpose of exercising its authority.

With respect to the January 6, 2012 and December 2012 gatherings involving members of the Township of Tiny Council, the information we received during our review indicates

¹ Further information on the caselaw and principles considered in formulating this definition can be found in the appendix to the Ombudsman’s April 25, 2008 report: “*Don’t Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal*,” available at <www.ombudsman.on.ca>

² *Investigation into the Council of the Township of Nipissing Special Meeting of April 25, 2008*, Report of André Marin, Ombudsman of Ontario, February 6, 2009.

that two of the five members of Council were present at each meeting, so a quorum of Council (or any committees) was not present. The purpose of the gatherings was for two members of Council to inform themselves with respect to concerns relevant to the municipality and to obtain information about developments and practices in other municipalities. These types of informal information gatherings and meetings with citizens and constituents are not precluded by the open meeting provisions of the Act. Therefore, these gatherings did not fall within the definition of a meeting for the purpose of section 238 of the *Municipal Act* and the open meeting requirements of the Act did not apply.

By-law 13-008

The complaint also alleged that secret meetings must have been held in order to lay the groundwork for the passage of By-law 13-008, which was not included on the agenda for the January 14, 2013 Regular Meeting of Council. During our inquiries, we were informed that the normal process for the introduction of new business, such as a by-law, is that a Notice of Motion would be brought forward in accordance with Article 14 of the Township's Procedure By-law (By-law 04-056), and the matter would then be added to the agenda for a subsequent Council meeting. With respect to new by-laws, we were advised that the Township staff would usually be involved in the drafting process and would be given an opportunity to provide a report to Council.

By way of background information for the review of this complaint, the minutes for the December 10, 2012 Regular Meeting of Council indicate that the Deputy Mayor verbally provided a Notice of Motion for a discussion regarding the "specific environmental, financial and health impacts of wind farm developments." This item was put on the agenda for the January 14, 2013 Regular Meeting of Council in the "Notices of Motion" section.

Based on our review of the audio recordings, the Deputy Mayor presented information on this issue and on the By-law itself during the Committee of the Whole Meeting, which took place earlier in the day on January 14, 2013, and the members of council who were present were given an opportunity to comment. Staff was then "instructed to bring forward a draft by-law at the Regular Meeting of Council for formal consideration." The minutes of the Regular Meeting of Council show that By-law 13-008 was added to the agenda at the beginning of the meeting. The minutes also indicate that one member of Council commented that "a full complement of Council should be present" when considering the By-law, but the motion to add By-law 13-008 was still carried

unanimously. Later in the meeting, By-law 13-008 was read together with the other by-laws, which had been included in the agenda, and was passed without any further debate.

Our Office asked the Deputy Mayor for further information on who was involved in drafting By-law 13-008 and whether anyone else reviewed it before it was put before the Council. The Deputy Mayor told us that he was involved in drafting the By-law and he did receive some assistance, but he was not able to recall who else may have been involved. We also followed up with the other members of council to inquire if they had any role in drafting or reviewing By-law 13-008. All of the members of council indicated that they were not involved in drafting the By-law.

Analysis

The manner in which By-law 13-008 was introduced was unusual in that the Township staff had no involvement in drafting or reviewing the By-law prior to it being put before Council. The fact that the Deputy Mayor was unable to recall any of the details of who else was involved in drafting By-law 13-008 is also a matter of concern, particularly since he was responsible for bringing it forward and laying it before Council. However, the minutes of the December 10, 2012 Regular Meeting of Council show that the Deputy Mayor did provide notice that there would be a discussion regarding wind turbines at a subsequent meeting, and the By-law was discussed during the Committee of the Whole Meeting on January 14, 2013 prior to it being introduced at the Regular Meeting of Council later that day. Given that we were unable to obtain any evidence that any other members of Council had been involved in drafting or reviewing the By-law, we were unable to conclude that there had been any secret meetings of members of Council prior to the January 14, 2013 meeting, as alleged in the complaint.

The lack of transparency around the creation of the draft by-law on an issue which has been the subject of public interest, along with the absence of advance notice that the By-law 13-008 would be introduced at the meeting clearly added to the suspicion that led to the complaint to our Office. In order to promote openness and transparency, members of Council should not make last minute additions of substantive items, such as a new by-law, to the agenda unless the matter is of an urgent nature.

On August 12, 2013, we shared our findings with you and the Mayor and offered an opportunity to provide any additional information or comment. We are requesting that you share this letter with the public and with Council as soon as possible, and in any event no later than at the next Council meeting on August 26, 2013.

We would also like to acknowledge that the municipality has begun audio recording the *in camera* and open sessions of its Council meetings, as suggested by the Ombudsman in his last annual report on open meetings. The January 14, 2013 meetings were the first meetings during which the open sessions were recorded, and at the same meeting Council voted in favour of recording all subsequent *in camera* sessions. We encourage the municipality to continue its practice of audio recording its meetings.

In closing, we would like to thank you for your cooperation during this review.

Ronan O'Leary
Investigator
Open Meeting Law Enforcement Team