



Ombudsman Report

**Investigation into a complaint about closed
meetings held by
Council for the Township of Georgian Bay
on
October 13, 2015 and January 11, 2016**

**Paul Dubé
Ombudsman of Ontario
January 2017**

Complaint

- 1 On June 6, 2016 my Office received a complaint about closed meetings held by council for the Township of Georgian Bay on October 13, 2015 and January 11, 2016. The meetings were held to discuss a shoreline structure built by a local cottage owner, consisting of a deck and dock, which did not meet the requirements of the township's zoning by-law. The complaint alleged these meetings were closed to the public in violation of the open meeting requirements of the *Municipal Act, 2001* (the "Act").

Ombudsman jurisdiction

- 2 Under the *Municipal Act*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 4 The Ombudsman is the closed meeting investigator for the Township of Georgian Bay.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's procedure by-law have been observed.

Council procedures

- 6 The township's current procedure by-law states that all meetings shall be open to the public, except as provided for in section 239 of the Act. The only votes that may be taken during a closed session are with respect to procedural matters, or directions to staff or agents of the municipality. The older version of the procedure by-law (by-law 2015-99) that was in force at the time of the October 2015 meeting had the same provisions.

Investigative process

- 7 On July 29, 2016, after conducting a preliminary review, we provided the township with notice that we would be investigating this complaint.
- 8 Members of my Office's Open Meeting Team reviewed relevant portions of the township's procedure by-law and the Act, as well as the materials for the meetings in question. They also spoke with the mayor and municipal staff.
- 9 My Office received full co-operation in this matter.

Background

The shoreline structure

- 10 In the summer of 2014, a cottage owner in the Go Home Bay community of the Township of Georgian Bay built a shoreline structure, consisting of a dock and on-shore deck. The township had issued a building permit for the structure, however it was subsequently discovered that the structure did not comply with the zoning by-law in several ways.
- 11 In July 2014, the township received correspondence regarding the shoreline structure from a representative of a club made up of cottage owners along Go Home Bay (the Club). In this correspondence, the Club noted that neighbouring cottage owners had a number of concerns about the deck and dock, including encroachment of privacy, boating noise, and aesthetic concerns. A letter from the neighbours outlining these concerns was included in the correspondence to the township.
- 12 The township wrote to the Club and acknowledged that the dock did not meet the requirements of the zoning by-law.
- 13 The Club continued to follow up on the matter for more than a year. In November 2015, another cottage owner in Go Home Bay advised the Club that council had decided the deck of the shoreline structure would have to be cut down in size, but that there would be no changes made to the dock to bring it into compliance with the zoning by-law.
- 14 The Club requested further information from the township, including why the public had not been given the chance to speak on this issue. In a letter dated November 26, 2015, the township's Director of Development Services informed the Club that council considered the shoreline structure

- in closed session, and council “rendered a decision that requires modifications to the onshore deck only...as there was no development application associated with this property, there is no forum for public input.”
- 15 On January 3, 2016, the Club wrote to council to complain about council’s decision to “ignore the clear provisions of the municipality’s legal documents that provide clear direction on the matter, namely its Official Plan and Comprehensive Zoning By-law”. The Club requested that council reconsider its position.
 - 16 The Club requested a response within 15 days and noted that if council chose not to uphold the provisions of the zoning by-law, “we will be left with no alternative but to seek legal advice on how to remedy the inappropriate actions of the key decision makers in the Township”.
 - 17 The Director of Development Services wrote to the Club on January 15 to advise that council discussed the letter in closed session on January 11 and determined it would take no further action.

The October 13, 2015 council meeting

- 18 The October 13, 2015 meeting began at 9:00 a.m. The first item on the agenda was a closed session to deal with six matters. The third item on the agenda was a “zoning compliance issue” and was closed under the “litigation or potential litigation” exception to the open meeting requirements, found in s. 239(2)(e) of the Act. This item pertained to the Go Home Bay shoreline structure.
- 19 Staff told our Office that the matter was considered in camera due to concerns about possible legal action against the township, either from the property owner or neighbouring cottagers. We were advised that staff had received verbal notice that a member of the public may be proceeding with litigation.
- 20 According to the open session minutes, council passed a resolution to proceed in camera for the reasons outlined on the agenda.
- 21 While in camera, the Director of Development Services provided a written report to council and also gave a brief history of the shoreline structure. The written report outlined efforts staff had made to rectify the situation, and provided two options for council's consideration. The report recommended that council direct staff to exercise one of the options.

22 Council members discussed the options and the potential costs associated with each. They also discussed the possibility of a court action, and whether a legal opinion should be sought.

23 At the end of the closed session, council passed the following resolution:

BE IT RESOLVED that council accepts a dock 12 feet/3.66 metres wide and a deck of 40 square metres/430.56 square feet, in its current location.

Analysis

The closed session discussion

24 The *Municipal Act* does not specifically define what constitutes “litigation or potential litigation.” In past reports, when deciding whether this exception applied to a particular in camera discussion, our Office has considered whether there was a reasonable prospect of litigation at the time of the discussion.

25 Our Office found in a report regarding the Village of Westport that there was sufficient reason for the municipality to anticipate that litigation was a realistic possibility, even though no litigation had been initiated at the time of the in camera discussion.¹ Similarly, our Office recently found that when the City of Port Colborne² faced a specific threat of litigation related to prayers at council meetings, discussion of that threat fit within the s. 239(2)(e) exception.

26 In a review of a meeting held by council for the Town of Midland³, our Office found that the town’s Planning and Development Committee was permitted to close a meeting under the litigation or potential litigation exception when the committee was considering a letter from a property owner indicating that specific legal action would be taken if a zoning dispute was not resolved to the property owner’s satisfaction. In all of these cases, there was a reasonable prospect of litigation, rather than a general speculation that litigation might arise.

¹ Ombudsman of Ontario, *Investigation into whether Council for the Village of Westport held an illegal closed meeting on October 28, 2014* (January 2015), online:

http://www.ombudsman.on.ca/Files/sitemedia/files/Westport_2015_Final.pdf

² Ombudsman of Ontario, *Investigation into whether Council for City of Port Colborne held illegal closed meetings on March 8, 2010, January 27, 2014, and December 8, 2014*, (November 2015) online: <https://www.ombudsman.on.ca/Resources/Reports/City-of-Port-Colborne.aspx>

³ February 11, 2013 letter, available online:

<https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Midland-Nov2012-EN-accessible.pdf>

27 At the time of the October 13, 2015 meeting, council was aware that a shoreline structure had been built that did not meet the requirements of the zoning by-law. Neighbouring cottage owners complained about the structure, but re-building it would be costly. Municipal staff had received verbal threats of litigation. Given this context, it was not unreasonable for council to believe that litigation was a reasonable prospect. Council was permitted to rely on the exception for litigation or potential litigation in these circumstances.

The vote

28 Section 239(6) of the Act allows a vote to be closed to the public if the vote is for a procedural matter, or to give direction to staff. While in camera, council passed a resolution to accept the dock portion of the shoreline structure as-is, and to allow the deck to remain in its current location while being reduced in size.

29 Township staff advised my Office that this vote should be read as a direction to staff to convey council's decision to the property owner. However, as written, the motion reads as a substantive council decision on how to deal with the structure.

30 As noted in our November 2015 report regarding the Municipality of Brighton⁴, even if the purpose of a resolution is to provide direction to staff, failing to word it as such is still a violation of the voting provisions of the Act and of the municipality's procedure by-law.

The January 11, 2016 meeting

31 The January 11, 2016 meeting began at 9:00 a.m. The first item on the agenda was a closed session to deal with four matters. Item a) on the agenda was a "zoning compliance matter" and was closed under s. 239(2)(e) of the Act for litigation or potential litigation. This item pertained to the shoreline structure. Township staff advised my Office that the matter was considered in camera due to a recent letter, which was believed to threaten litigation against the township.

32 According to the open session minutes, council passed a resolution to proceed in camera for the reasons outlined on the agenda.

⁴ Ombudsman of Ontario, *Investigation into the Municipality of Brighton's alleged violation of the Municipal Act, 2001 on May 28, 2015* (November 2015), online: [https://www.ombudsman.on.ca/Resources/Reports/Municipality-of-Brighton-\(2015\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Municipality-of-Brighton-(2015).aspx)

- 33 In closed session, council considered recent correspondence from the Club. In the letter, the Club requested that council reconsider its recent decision on the shoreline structure, and stated that if council chose not to uphold the provisions of the zoning by-law the Club would seek legal advice on “how to remedy (these) inappropriate actions”.
- 34 The closed session minutes indicate that staff provided a recommendation on how to proceed. Council discussed the township’s potential liability exposure, and whether to seek legal advice. Council chose to take no action regarding the letter, although no formal vote was held and no resolution was recorded.
- 35 Council reported out of closed session on other in camera matters, but no information was provided regarding the zoning compliance issue.

Analysis

- 36 While in camera, council considered a letter from the Club. The letter indicated that if council did not change a previous decision, the Club would seek legal advice on how to proceed regarding council’s failure to uphold the provisions of the zoning by-law.
- 37 The Ontario Superior Court considered a similar situation in *Ross v. Muskoka Lakes (Township)*⁵. In that case, a local fishing club was seeking to add an addition to a residential building. The lawyer for the fishing club wrote to the municipality asking whether the permit would be issued and demanding a reply within a few days. The next day, council discussed the matter in camera under the litigation or potential litigation exception. Ultimately, the permit was issued.
- 38 The owner of a neighbouring property sought an order quashing resolutions of council relating to the approval of the fishing club’s site plan application, on the basis that the process used was contrary to the *Municipal Act*. Specifically, the property owner argued that council had improperly discussed the matter in closed session.
- 39 In considering whether it was appropriate for council to consider the issue behind closed doors, the court noted that there was a very real prospect of legal action:

...it was entirely reasonable for Council to believe that the issue before it could potentially be litigious. It is too narrow an interpretation of (the exception) to say that because no legal or

⁵ 2004 CanLII 18309 (ON SC)

privileged advice was received in the closed session Council had no right to go into a closed session. There will be occasions when Council will want to take stock of an issue which could blossom into a lawsuit without the municipal lawyer being present or having given legal advice.

- 40 The court held that the council was entitled to meet behind closed doors to consider the matter.
- 41 At the January 11 meeting, council for the Township of Georgian Bay considered the letter from the Club that cited council's failure to follow its own zoning by-law, and stated that the Club would be seeking legal advice. Given the entire context of this matter, I am satisfied that it was not unreasonable for council to believe that litigation was a reasonable prospect. Council was permitted to rely on the exception for litigation or potential litigation in these circumstances.

Conclusion

- 42 Council for the Township of Georgian Bay was permitted to close discussions to the public under the litigation or potential litigation exception on October 13, 2015 and January 11, 2016. However, the township's in camera vote at the October 13 meeting was contrary to the Act, as it consisted of a substantive resolution of council and was not framed as a direction to staff.
- 43 It is clear in this case that there was a level of community interest in the shoreline structure and the associated by-law infractions and how these would be resolved. Council could have considered exercising its discretion to discuss these matters, at least to some degree, in a public forum. It must be noted, however, that the exceptions to the open meeting requirements of the Act do permit council to go into closed session in order to protect its legal interests in cases where there is the potential of litigation. Given the threats of legal action put forward by various parties in this case, council had reason to believe that litigation was a reasonable prospect.

Procedural matters

- 44 Council did not provide any information to the public about the closed session discussions of the shoreline structure at either of these meetings once the open portion of the meeting resumed.

- 45 I encourage municipalities to report publicly in open session on what transpired in closed session, at least in a general way. This is particularly important in cases such as this, where the public has a keen interest in the outcome.
- 46 Sometimes public reporting might consist of a general discussion in open session of subjects considered in closed session, similar to the information in the resolution authorizing the session together with information about staff directions, decisions and resolutions. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.

Opinion

- 47 Council for the Township of Georgian Bay was permitted to rely on the exception contained in section 239(2)(e) of the Act when it went into closed session on October 13, 2015 and January 11, 2016 to discuss issues related to construction of a shoreline structure that did not meet the requirements of the zoning by-law.
- 48 However, council for the Township of Georgian Bay contravened the *Municipal Act, 2001* when it voted on a substantive resolution rather than a direction to staff during its in camera meeting on October 13, 2015.

Recommendations

- 49 I make the following recommendations to assist the township in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

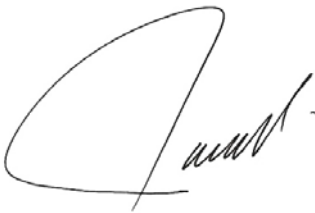
The Township of Georgian Bay should refrain from voting on matters in closed session unless the vote is clearly for a procedural matter or for giving direction to staff.

Recommendation 2

The Township of Georgian Bay should ensure closed session resolutions intended to provide direction to staff are clearly worded as such.

Report

- 50 Council for the Township of Georgian Bay was given the opportunity to review a preliminary version of this report and provide comments. All comments were considered in the preparation of this final report.
- 51 My report should be shared with council for the Township of Georgian Bay and should be made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ontario Ombudsman