



## **Ombudsman Report**

**Investigation into a complaint  
about meetings held by the Ad Hoc  
Committee of the Town of Goderich's  
Recreation Board of Management from  
July 2015 to May 2016**

**Paul Dubé  
Ombudsman of Ontario  
September 2016**

## Complaint

- 1 On April 5, 2016, my Office received a complaint alleging that the Ad Hoc Committee of the Town of Goderich's Recreation Board of Management held meetings in 2015 and 2016 that were closed to the public to discuss a project related to the town's Agricultural Park. The Recreation Board of Management was a body created to provide guidance to the YMCA in the course of its operation of the town's recreational facilities.
- 2 The Clerk and the Chair of the Recreation Board of Management confirmed that the Ad Hoc Committee met on a number of occasions in 2015 and 2016 to provide feedback and advice to the Recreation Board of Management regarding the revitalization of Agricultural Park. Neither the Recreation Board of Management nor the Ad Hoc Committee provides public notice of meetings and neither follows formal meeting procedures.

## Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001* (the Act), all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 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. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 5 The Ombudsman is the closed meeting investigator for the Town of Goderich.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the committee's governing procedures have been observed.

## Investigative process

- 7 On June 6, 2016, we advised the Recreation Board of Management and the Clerk of our intent to investigate this complaint.

- 8 Members of my Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the town's by-laws and policies, and the Act.
- 9 We reviewed the terms of reference for the Ad Hoc Committee, as well as an agreement between the town and the YMCA for the delivery of recreation services in the town, pursuant to which the Recreation Board of Management was created. We also reviewed the minutes of meetings held by the Recreation Board of Management and the Ad Hoc Committee in 2015 and 2016.
- 10 We interviewed the Clerk, the Chair of the Recreation Board of Management, the President and CEO of YMCA Southwestern Ontario, and the Senior Vice President, Operations of YMCA Southwestern Ontario.
- 11 My Office received full co-operation in this matter.

## **Background**

### The Agricultural Park revitalization project

- 12 The Agricultural Park is a recreational facility located in the town. It currently contains open space, a horse track and baseball diamonds. Since 2012, the town has been exploring options for the revitalization of Agricultural Park through redevelopment.

### Creation and structure of the Recreation Board of Management

- 13 The Recreation Board of Management was created pursuant to an operating agreement between the town and the YMCA (the "agreement") to engage the YMCA to operate certain recreational facilities in the town. The agreement was enacted by By-law No. 43-2008 and was renewed on April 23, 2013 by By-law No. 50-2013.
- 14 Pursuant to Article 5 of the agreement, the Recreation Board of Management was created to provide guidance to the YMCA and oversight in the course of its operation of the town's recreational facilities.
- 15 Council for the Town of Goderich appoints members to the Recreation Board of Management for a one-year term. During the 2015-2016 term there were nine members appointed, and there were twelve members appointed for the 2016-2017 term. Mr. John Cove is the current chair.

- 16 The Board of Management of Recreational Services is listed on the town's website as a 'Board'.<sup>1</sup>

### Role and function of the Recreation Board of Management

- 17 The Recreation Board of Management has delegated operational and management power from the Town. Its oversight responsibilities include reviewing and presenting to council the YMCA's annual budget, operating plan and recommended capital improvements and purchases. The Recreation Board of Management is also tasked with providing a five-year capital plan for improvements and a strategic plan for the operation of the facilities in accordance with council's wishes and the capabilities of the YMCA.
- 18 Ms. Kathi Lomas-McGee, the Southwestern YMCA Senior VP of Operations, told my Office that the YMCA considers the Recreation Board of Management an "advisory committee" of the YMCA that provides stewardship between the YMCA and the town. Ms. Lomas-McGee and Mr. Jim Janzen, the CEO and President of Southwestern YMCA, stressed in their interviews with my Office that the members of the Recreation Board of Management are volunteers who receive assistance from YMCA staff in carrying out the Board's duties and functions.

### Creation, structure, and dissolution of the Ad Hoc Committee

- 19 In order to assist council with finalizing the Agricultural Park revitalization plan, the Recreation Board of Management, with council's approval, created the Ad Hoc Committee to provide advice on the revitalization design.
- 20 At a July 13, 2013 council meeting, council approved terms of reference for the Ad Hoc Committee. The Ad Hoc Committee's purpose was to advise the Board of Management and recommend policies on recreation matters including services, facilities, and specific community interests regarding the revitalization of Agricultural Park.
- 21 According to the terms of reference, the Ad Hoc Committee was limited to twelve members and was required to include at least one member of

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<sup>1</sup> <http://www.goderich.ca/en/townhall/liasionscommitteesboards.asp>

council, two members of the Board of Management, community members, a municipal staff representative, and the YMCA Senior VP of Operations (or designate). In practice, however, Ms. Lomas-McGee told my Office that the Ad Hoc Committee membership was not limited to twelve members and did not have a municipal staff member. Additionally, anyone who expressed an interest in joining the Ad Hoc Committee was made a member.

- 22 On October 5, 2015, the Ad Hoc Committee presented a report to council, which included a new revitalization design for the Agricultural Park.
- 23 Council dissolved the Ad Hoc Committee on May 24, 2016. The Clerk told my Office that the Ad Hoc Committee was dissolved because it had fulfilled its mandate to provide a design for the future Agricultural Park. At the same meeting, council approved the formation of a planning committee to provide advice to council on the implementation of the approved design. The Clerk told my Office that the planning committee would be a committee of council.

## **Board of Management and Ad Hoc Committee procedures**

- 24 The Recreation Board of Management does not have a procedure by-law governing the calling, place, and proceeding of meetings. Neither the Recreation Board of Management nor the Ad Hoc Committee provide public notice of meetings.
- 25 Ms. Lomas-McGee told my Office that Board of Management meetings typically occur monthly and the Ad Hoc Committee met six times in 2015 and 2016. Members of both bodies were informed of meetings through emails from YMCA staff. Members of the public were advised of meetings only if they had previously requested notice.
- 26 The Clerk told my Office that the town occasionally provided space at Town Hall for the Board of Management and Ad Hoc Committee meetings.
- 27 Ms. Lomas-McGee and Mr. Janzen told my Office that the Board of Management and Ad Hoc Committee meetings proceeded in accordance with the YMCA's "procedural policy". My Office was provided with a copy of the YMCA's constitution and by-laws, which contains a section governing the procedure of meetings. While this document technically governs the

YMCA, the Recreation Board of Management held its meetings in accordance with its rules of procedure for meetings.

- 28 The Terms of Reference for the Ad Hoc Committee state that meetings will be convened and administered in accordance with Perry's Rules of Order.
- 29 YMCA staff kept minutes of the meetings of the Board of Management and the Ad Hoc Committee but the minutes were not made publicly available.
- 30 Ms. Lomas-McGee and Mr. Janzen told us they were aware of the open meeting requirements of the Act but did not believe the requirements applied to the Board of Management or the Ad Hoc Committee. The Clerk agreed, and told us s/he believed the Recreation Board of Management was not a local board and the Ad Hoc Committee was not a committee of a local board, and accordingly that these bodies were not subject to the open meeting provisions of the Act. The Clerk acknowledged that if the Recreation Board of Management and the Ad Hoc Committee were subject to the open meeting provisions, public notice of both entities' meetings would have been required.
- 31 My Office was provided with a copy of a legal opinion that had been given to the town dated April 30, 2013, which states that the Board of Management is not a committee of council because it is not made up of at least fifty percent council members, as required by the Act.

## Analysis

- 32 Section 239(1) of the *Municipal Act* states that "[e]xcept as provided in this section, all meetings shall be open to the public". The Act defines a "meeting" as:  
[a]ny regular, special or other meeting of a council, of a local board or of a committee of either of them.<sup>2</sup>
- 33 A meeting of a local board or a committee of a local board may be closed to the public only if the exceptions found in subsection 239(2) apply.

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<sup>2</sup> *Municipal Act, 2001*, S.O. 2001, Ch. 25, s. 238(1).

## What is a committee?

- 34** Subsection 238(1) of the Act defines a “committee” for the purposes of section 239 as:

Any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are members of one or more councils or local boards.

- 35** A body that does not meet the fifty percent requirement may still be considered a committee of council, if it is designated as such by the municipality’s own by-laws.

## What is a local board?

- 36** Subsection 1(1) of the Act broadly defines a “local board” as:

a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission committee body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority. [emphasis added]

- 37** My Office has identified four criteria as relevant to determine whether an entity is a local board. These criteria were summarized in my Office’s 2014 letter to the City of Elliot Lake<sup>3</sup>:

1. The entity must be carrying on the “affairs of the municipality”;
2. There is a direct link between the entity and the municipality (either by way of legislation or authority from the municipality);
3. There must be a connection to or control by the municipality; and
4. There must be an element of autonomy.

## Is the Recreation Board of Management a local board?

- 38** In order to answer this question, I must apply the criteria above to the Recreation Board of Management.

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<sup>3</sup> Letter from Ombudsman of Ontario, *Complaint that White Mountain Academy Board is violating the open meeting requirements of the Municipal Act, 2001* (June 2014), online: <<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Elliot-Lake---June-2014.pdf>>

*1. The entity must be carrying on the “affairs of the municipality”*

**39** The courts have considered whether an entity is carrying on the affairs or purposes of a municipality in a number of cases.<sup>4</sup> Generally, factors that indicate that a body is not carrying on the affairs of a municipality include:

- the body has an object of carrying on operations for a private, rather than a public municipal, purpose (for example, the benefit of its shareholders);
- the body is independent;
- the body is created by another level of government;
- the body is not responsible to the municipality; and
- the body requires the approval of another entity before acting.

**40** The Recreation Board of Management is responsible for oversight of the YMCA’s operation and management of the town’s recreation facilities. In this way, the Board of Management is carrying on the “affairs of the municipality” for the benefit of the town.

**41** The Recreation Board of Management was created by an agreement between the town and the YMCA that was enacted by by-law. The Recreation Board of Management is not responsible to another level of government. Further, the Recreation Board of Management is responsible to the town, as it must submit operational documents to council for approval.

*2. There is a direct link between the entity and the municipality (either by way of legislation or authority from the municipality)*

**42** The agreement between the town and the YMCA is evidence of a direct link between the Recreation Board of Management and the town. As mentioned previously, this agreement was enacted by by-law and is renewed periodically.

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<sup>4</sup> See *Toronto & Region Conservation Authority v. Ontario (Minister of Finance)* [1999] OJ No 4349, and *St. Lawrence Power Co. v. Ontario (Minister of Revenue)*, 1978 CarswellOnt 583 (Sup Ct Ont).

### 3. A connection to or control by the municipality

- 43 In *Toronto & Region Conservation Authority v. Ontario (Minister of Finance)*<sup>5</sup> the court examined whether a conservation authority fell within the definition of a “local board” for the purposes of the *Retail Sales Tax Act*, R.S.O. 1990, c. R.31. The court noted that the members of the conservation authority were appointed by various municipalities, however, were not answerable to the municipalities, did not specifically represent the municipalities, and were not paid by the municipalities. No single municipality had voting control.
- 44 Town of Goderich has connection to and at least some degree of control over the Recreation Board of Management. Members of the Recreation Board of Management are not paid by the town but are appointed by council. The town does not set the practices and procedures of the Recreation Board of Management. However, on the whole, by entering into the original agreement, the town had input and control over the creation, role and responsibilities of the Recreation Board of Management. The Recreation Board of Management must also seek council approval of operational documents such as the annual budget and capital expenditures.

### 4. There must be an element of autonomy

- 45 In case law, this factor is relied on to differentiate an advisory committee without decision-making functions from an entity with some level of independent authority.<sup>6</sup>
- 46 The Recreation Board of Management has authority to carry out its principal scope of influence (ensuring the YMCA carries out its duties), and to execute and interpret the agreement. Its autonomous duties include providing oversight over the YMCA’s programming, recreational facilities and employees (who were previously considered employees of the town), as well as providing a five-year capital plan for improvements and providing a strategic plan for the operation of the recreational facilities.
- 47 Based on my analysis of these four factors, the Recreation Board of Management is a local board of the Town of Goderich.

<sup>5</sup> *Toronto & Region Conservation Authority*, *supra* note 4.

<sup>6</sup> *Mangano v. Moscoe*, [1991] OJ 1257 at para. 4.

Is the Ad Hoc Committee a “committee” for the purpose of the open meeting requirements?

- 48 In order to be considered a committee of a local board for the purposes of the Act, a body’s membership must be composed of at least fifty percent of members who are also members of one or more councils or local boards.
- 49 The Ad Hoc Committee membership fluctuated between 13 and 16 members in 2015 and 2016. The membership included members of the Recreation Board of Management, town council, and other local boards in the town. At specific times while it was constituted, the Ad Hoc Committee may have qualified as a committee under the Act.

## Opinion

- 50 The Recreation Board of Management for the Town of Goderich falls within the *Municipal Act*’s definition of a “local board.”
- 51 The Recreation Board of Management is subject to the open meeting requirements of the *Municipal Act*, including requirements with respect to public notice of meetings. The Board of Recreation has failed to provide public notice of its meetings since it was created in 2004.
- 52 The Recreation Board of Management should turn its mind to the open meeting rules and the definition of a committee when creating bodies like the Ad Hoc Committee to ensure that the requirements of the *Municipal Act* are met.
- 53 In making the above findings, I acknowledge that the Recreation Board of Management and the Ad Hoc Committee operated in good faith but under the mistaken impression that both bodies were not subject to the requirements of the *Municipal Act* based on advice received by town staff. Both bodies are primarily composed of volunteers who dedicate their time for the benefit of the community. Neither the Recreation Board of Management nor the Ad Hoc Committee excluded members of the public from meetings and attempted to provide notice of meetings to people who expressed interest in attending meetings.

- 54 The revitalization of the Agricultural Park is a subject of great interest to the community of the Town of Goderich. The Ad Hoc Committee was created to provide advice on the design of the revitalized park and would have only benefited from greater public participation in its meetings. Moving forward, by providing public notice of meetings in accordance with the *Municipal Act*, the Recreation Board of Management will enhance the transparency and accountability of its future operations and decisions.

## Recommendations

- 55 I make the following recommendations to assist the Town of Goderich and the Recreation Board of Management to improve its practices with respect to open meetings:

### Recommendation 1

The Town of Goderich should formally recognize the Recreation Board of Management as a local board subject to the open meeting requirements of the *Municipal Act, 2001*.

### Recommendation 2

The Recreation Board of Management should adopt a procedure by-law governing the calling, place, order and procedures for its meetings and the meetings of its committees, as required by s. 238(2) of the Act.

### Recommendation 3

All members of the Recreation Board of Management for the Town of Goderich should be vigilant in adhering to their individual and collective obligation to ensure that the Recreation Board of Management complies with its responsibilities under the *Municipal Act, 2001* and an applicable procedure by-law.

### Recommendation 4

The Recreation Board of Management should ensure that it and its committees adhere to the open meeting requirements of the *Municipal Act 2001*, especially with respect to public notice of its meetings.

## Report

- 56 The Recreation Board of Management was given the opportunity to review a preliminary version of this report and provide comments to our Office. Comments received were considered in the preparation of this final report.
- 57 My report should be shared with the Recreation Board of Management and made available to the public as soon as possible, and no later than the next Board meeting.



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Paul Dubé  
Ontario Ombudsman