



Final Report

**Investigation into complaints about a
closed meeting held by
Council for the County of Norfolk
on May 24, 2016**

**Paul Dubé
Ombudsman of Ontario
November 2016**

Complaints

- 1 In June 2016, my Office received three complaints about a closed meeting of council for the County of Norfolk held on May 24, 2016. Each of the three complaints raised similar issues that will be addressed in this report.
- 2 The complaints alleged that council for the County of Norfolk held an illegal closed meeting to discuss the development of a site-specific zoning by-law for an area in the county known as Hastings Drive, contrary to the open meeting provisions of the *Municipal Act, 2001* (the “Act”). The complaints also alleged that council improperly voted to remove an option for the zoning by-law from consideration during the closed meeting.

Ombudsman jurisdiction

- 3 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.
- 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 County of Norfolk.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.

Council procedures

- 7 The county’s procedure by-law (by-law no. 2015-25) states that all meetings shall be open to the public except as provided in section 239 of the Act. Prior to proceeding in camera, council must state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered.
- 8 The procedure by-law also prevents the closure of a meeting to the public during the taking of a vote, except where the meeting is required to be

closed under the procedure by-law or the Act, and the vote is for a procedural matter or for giving directions or instructions to county staff or persons retained by the county.

Investigative process

- 9 On July 18, 2016, after conducting a preliminary review, we advised the municipality of our intent to investigate this complaint.
- 10 Members of my Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the county's by-laws and policies, and the Act. We reviewed the minutes of a public meeting on May 10, 2016, the closed meeting of council on May 24, 2016, and the public council meeting on June 14, 2016. We also reviewed an audio-video recording of the open meeting of council on June 14, 2016. The county does not audio-video record its closed meetings.
- 11 We interviewed the clerk, deputy clerk and members of council who were present at the closed meeting.
- 12 My Office received full co-operation in this matter.

Background

Hastings Drive

- 13 Hastings Drive is a beachfront area adjacent to Lake Erie. In 1985 the area was struck by a severe storm that caused extensive property damage to cottages located along a section of Hastings Drive. After the storm, new development was prohibited due to the area's hazardous conditions.
- 14 In more recent years, owners of vacant lots on Hastings Drive have placed recreational vehicles and trailers on their lots for seasonal recreational and residential purposes.
- 15 The county is currently in the process of adopting a site-specific zoning by-law for the Hastings Drive area. As part of that process, the county retained an external planning consultant to undertake a study to set out the land use options available for Hastings Drive.
- 16 On May 10, 2016, the study was considered by council at a public meeting. The study outlined a number of possible options for the Hastings Drive site-specific zoning by-law. For example, one option (option 5) would permit

recreational vehicles and trailers while another option (option 7) would permit the full development of new single, detached residences for year-round occupancy.

- 17 At the conclusion of the public meeting, council directed staff to further investigate zoning by-law possibilities based on options 5 and 7 in the study.

The May 24, 2016 closed meeting of council

- 18 Following the May 10 public meeting, council met with the county solicitor and county staff in closed session on May 24, 2016, to receive further information on zoning by-law possibilities based on the two previously identified options.
- 19 The meeting agenda stated that council would be proceeding in camera under the “litigation or potential litigation” and “solicitor-client” exceptions found in ss. 239(2)(e) and (f) of the Act. The topic of discussion was described as “Verbal Discussions with County Solicitor re: Hastings Drive.” The meeting minutes indicate that council passed a resolution to proceed in camera, which did not include the specific exceptions.
- 20 The deputy clerk took minutes of the meeting.
- 21 During the in camera meeting, the county solicitor provided legal advice to council should either option 5 or 7 be implemented through a zoning by-law. The solicitor also provided legal advice on how to prepare for an appeal of the adopted zoning by-law to the Ontario Municipal Board, and responded to questions from council.
- 22 After receiving legal advice, council directed staff to proceed with preparing a draft zoning by-law allowing for seasonal placement of recreational vehicles and trailers on vacant lots on Hastings Drive (option 5). Council did not direct staff to prepare a draft zoning by-law allowing permanent structures on Hastings Drive (option 7).

Council's actions between May 25 and June 14, 2016

- 23 The day after the closed meeting, the mayor consulted with the deputy clerk with respect to conveying to the public council's direction to staff to prepare a draft zoning by-law based on option 5. The mayor told my Office that he

was concerned that the public would be surprised that a draft by-law permitting permanent structures would not be presented to council.

- 24 A public memorandum was prepared by staff and posted on the county's website on June 10, 2016. The memorandum stated that a draft zoning by-law permitting permanent structures on Hastings Drive was no longer being considered by the county because of holding tank allowance and building permit issues. However, the memorandum did not address council's direction to staff to prepare the draft zoning by-law allowing for seasonal placement of recreational vehicles and trailers on vacant lots based on the legal advice of the county solicitor.
- 25 In an effort to increase transparency, the mayor requested that council reconsider the Hastings Drive draft by-law at the next council meeting on June 14, 2016.
- 26 The minutes of the June 14 council meeting indicate that council considered five resolutions regarding Hastings Drive:
 - Council waived the rules of order to allow the introduction of a motion to reconsider.
 - Council moved that its decision of May 24, 2016 to eliminate option 7 be reconsidered.
 - A motion that a by-law respecting option 7 be brought forward for consideration.
 - Council received the staff memo of June 10 for information.
 - Council received for information correspondence from a resident related to the June 10 staff memo.
- 27 The clerk told my Office that, in hindsight, the motion to reconsider option 7 was poorly worded and could have resulted in confusion about council's actions during the closed meeting.
- 28 Despite the wording of the motion, which indicates that council made a decision on May 24 to eliminate option 7, council did not in fact make any decision during its closed session with respect to option 7. Council simply did not provide direction to staff to proceed to draft a by-law based on option 7.
- 29 The motion that a "by-law respecting option 7 be brought forward for consideration" failed on a tie vote.

Analysis

- 30 The complaints to our Office alleged that the in camera discussions of council did not fit within the closed meeting exceptions and were therefore contrary to the *Municipal Act*. The complaints also alleged that council violated the provisions of the *Municipal Act* when it voted to eliminate option 7 from consideration during the closed session.

May 24 closed session

- 31 The May 24 meeting was closed under the “litigation or potential litigation” and “advice subject to solicitor-client privilege” exceptions in sections 239(2)(e) and (f) of the Act.

“Litigation or potential litigation” exception

- 32 The *Municipal Act* does not specifically define what constitutes “litigation or potential litigation.” The exception in s. 239(2)(e) for litigation or potential litigation is reserved for circumstances where the matter discussed is the subject of ongoing litigation or there is a reasonable prospect of litigation.
- 33 In *RSJ Holdings v. London (City)*, the Ontario Court of Appeal considered the exception in s. 239(2)(e) for litigation or potential litigation. The Court observed that, “The fact that there might be, or even inevitably would be, litigation arising from the [matter discussed] does not make the “subject matter under consideration” potential litigation”.¹
- 34 My Office has found that the exception applies in the context of anticipated litigation where there is more than a remote possibility litigation may commence, although the litigation need not be a certainty. Council must believe that litigation is a reasonable prospect and must use the closed meeting to explore that prospect in some way.²
- 35 The closed meeting investigator for the City of Ottawa has made similar findings. In its 2010 report, it stated that in order for the exception to apply, the dominant purpose of the meeting must be to discuss some pending or realistically contemplated litigation.³

¹ *RSJ Holdings Inc. v. London (City)*, [2005] OJ No 5037.

² Ombudsman of Ontario, *Investigation into the Township of West Lincoln’s alleged violation of the Municipal Act, 2001 on June 15 and June 22, 2015* (November 2015), online: <<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/Ontario-Ombudsman---Final-report---West-Lincoln-linked.pdf>>.

³ Douglas R Wallace, *Report to the Council of the City of Ottawa* (May 2010), online: <<http://ottawa.ca/en/city-hall/accountability-and-transparency/accountability-framework/april-21-2010-and-may-26-2010>>.

36 When considering whether there was a reasonable prospect of litigation involving the potential by-law options, which council was discussing during its closed meeting, it is important to also understand the broader context surrounding the zoning of Hastings Drive. At the time of the May 24 meeting, the county's comprehensive zoning by-law (By-law No. 1-Z-2014) enacted in 2014 was subject to two appeals before the Ontario Municipal Board on the basis that it did not address the zoning for Hastings Drive. Those appeals were adjourned by the Ontario Municipal Board to permit the enactment of a site-specific zoning by-law for Hastings Drive. During the public consultation for the zoning by-law, council was also informed that identifiable community members planned to file an appeal of the final zoning by-law if any permanent development or recreational vehicles were permitted. During the May 24 in camera meeting, the county solicitor provided advice to council on the potential legal consequences of the various zoning by-law options. The county solicitor also advised council on how to prepare for an appeal of the adopted zoning by-law to the Ontario Municipal Board.

37 I am satisfied that at the time of the May 24 closed meeting there was sufficient reason for the county to believe that there was reasonable prospect of litigation surrounding the options it was considering. During the closed session discussion, the county solicitor also provided advice to council regarding its legal position with respect to the appeals, which it was expected would be launched following council's decision.

38 For these reasons, the May 24 closed session discussion fit within the cited exception for potential litigation.

“Solicitor-client privilege” exception

39 The “advice subject to solicitor-client privilege” exception permits closed session discussions where advice from a solicitor or related communication is considered by council.⁴

40 As noted by my Office in its 2015 City of London report:

Communication will only be found to be subject to solicitor-client privilege if it is: (a) between a client and his or her solicitor, where the solicitor is

⁴ Ombudsman of Ontario, *Municipal Government By Stealth” Investigation into Council of the Township of Emo Closed Meeting of April 8, 2008* (January 2009), online: <<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/emofinaleng.pdf>>

acting in a professional capacity; (b) made in relation to the seeking or receiving of legal advice; and (c) intended to be confidential.⁵

- 41** The discussions during the closed meeting involved consideration of solicitor-client advice and communications with the county solicitor for the purpose of obtaining legal advice with respect to the proposed by-law options for Hastings Drive, as well as the City's legal position in relation to expected appeals.
- 42** The May 24 closed session discussion fit within the cited exception for advice subject to solicitor-client privilege.

Direction to staff during the closed session

- 43** The Act permits voting during a closed session of council where "the vote is for a procedural matter or for giving directions or instructions to ... employees...or persons retained by or under a contract with the municipality."⁶
- 44** The clerk told my Office that council does not make motions or take formal votes during closed session. Instead, the mayor or chair of the meeting will ask whether any council members would like to put a direction forward and, if so, whether there is support for the direction. Council members indicate verbally whether they support the proposed direction.
- 45** During the closed meeting on May 24, using this procedure, council gave direction to staff to proceed with preparing a draft by-law allowing for seasonal placement of recreational vehicles, trailers, etc. on Hastings Drive. The direction was permissible under the Act.
- 46** Council's subsequent actions and public statements about the proposed option 7 for the by-law appear to have led to significant confusion about what transpired during the May 24 closed meeting.
- 47** I am satisfied that council did not improperly vote to drop or eliminate option 7 from consideration during the closed meeting. Council simply did not provide direction to staff to proceed to draft a by-law based on option 7.

⁵ Ombudsman of Ontario, *Investigation into whether the City of London's Strategic Priorities and Policy Committee held an illegal meeting on March 2, 2015* (June 2015), online: <<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/Final-Report---London-June-2015-linked.pdf>>

⁶ *Municipal Act, 2001*, s. 239(6).

- 48** In order to avoid similar confusion in the future, council should clearly identify the specific direction given to staff during closed session, formally vote on it, and record the outcome in the closed meeting minutes. Where appropriate in the future, council may also wish to consider providing direction to staff in open session, once its closed session discussions have concluded.

Other procedural issues

Resolution to proceed in camera

- 49** The complaints alleged that council's resolution to proceed in camera was vague and possibly misleading, as it did not provide sufficient information about the subject of council's decision.
- 50** The resolution described the subject matter to be considered as "verbal discussions with county solicitor regarding Hastings Drive."
- 51** Subsection 239(4) of the Act requires that the resolution to proceed in camera include the general nature of the subject matter to be considered. The county's procedure by-law has equivalent requirements.
- 52** The Court of Appeal in *Farber v. Kingston (City)*⁷ stated that:

the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public. Where the exception to the presumptive openness of Council meetings is that of privileged solicitor-client advice, there may be circumstances where the need for confidentiality encompasses even the information that such advice has been obtained on a specific issue.

In that case, the court found that a description that only stated "legal matters" without more specifics was inadequate.

- 53** In this case, the resolution to enter closed session referenced the general nature of the matter to be considered (Hastings Drive) and the type of discussion that would ensue (verbal discussions with county solicitor). This is sufficient to satisfy the requirements of the Act. Although council might

⁷ *Farber v. Kingston (City)*, 2007 ONCA 173 at para 21.

have provided more detail in its resolution, it was not required to do so. Council was also justified in considering that greater specificity may have impacted on the confidentiality of the discussions.

Resolution to proceed in camera did not reference the specific closed meeting exceptions

- 54** Council's resolution to proceed in camera failed to identify the specific exceptions that applied to Council's discussions. While citing the specific exceptions in the resolution is not a requirement of the Act, my Office recommends this approach as a best practice.
- 55** The clerk told my Office that council's resolutions to move into closed session typically include the specific exceptions relied upon and that the resolution from May 24, 2016 was an anomaly. I am satisfied that moving forward, council will take care to cite the specific exception(s) in the Act that apply to the closed session discussions.

Reporting back after closed session

- 56** Council does not report back to the public after a closed session, even to provide general information about what occurred. Although there is no requirement in the Act for council to report back in public after the completion of a closed meeting, my Office recommends this practice to increase transparency of the closed meeting process.
- 57** In this case, some of the ensuing confusion about council's direction to staff during its closed session may have been alleviated by council reporting back in open session about what it had directed staff to do.

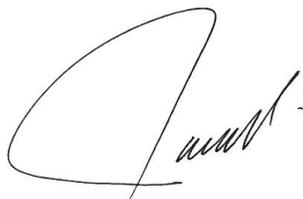
Opinion

- 58** Council for the County of Norfolk did not contravene the *Municipal Act, 2001* during its in camera meeting on May 24, 2016.

Report

- 59** OMLET staff provided the county with an opportunity to review a preliminary version of this report and provide comments to our Office. Any comments received were considered in the preparation of this final report.

60 My report should be shared with council for the County of Norfolk and made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ontario Ombudsman