

December 2, 2010

Yvonne Aubichon  
Clerk Administrator  
Town of Kearney  
P.O. Box 38, 8 Main Street  
Kearney, Ontario  
POA 1M0

Dear Ms. Aubichon:

**Re: Our File No. 212230**

I am writing further to our telephone conversation of December 1, 2010, regarding the results of our Office's review of a complaint received on September 1, 2010 about a closed session held at a special meeting of council on August 25, 2010. The complainant alleged that the Mayor had improperly called the closed session, and that prior notice of the closed session had not been given.

During the course of our review, we spoke with you and also reviewed relevant meeting documents, including the notice, agenda, minutes, and resolutions for the August 25, 2010 special meeting, the Town's Procedure By-Law (By-Law No. 2009-39) and relevant provisions of the *Municipal Act, 2001*.

When we spoke on December 1, we summarized the results of our preliminary review. We also provided suggestions regarding some "best practices" for closed meetings, which we asked that you share with council.

**Re-Zoning: Application**

The complaint we received focused on council's consideration of a planning matter in closed session at the August 25, 2010 special meeting.

The planning issue had come before council in the past. At a public council meeting on February 10, 2010, council had recommended conditional approval of a resident's application for a zoning amendment, which would permit the creation of two new residential lots. However, at a public council meeting on August 18, 2010, council had declined to approve the resident's application for re-zoning of the land under the *Planning Act*.

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Council was scheduled to consider the planning matter again in closed session during the special meeting on August 25, 2010. The complainant alleges that this was improper. During our review, we determined that the planning issue was not in fact addressed during the closed session, but was deferred and considered in an open meeting on August 31, 2010, at which point the re-zoning application was approved.

### **Notice**

The Town of Kearney's Procedure by-law requires that notice be provided of all council meetings, including special meetings. Notice of meetings is to be posted and/or advertised in appropriate places, including on the municipal website and in the foyer of the municipal building (article 5.5(a)).

Our review confirmed that the Town provided advance notice of the August 25, 2010 special meeting, in accordance with the Town's procedure by-law. The meeting agenda was posted to the municipality's website and on the bulletin board in the foyer of the community centre, housing the municipal offices. The public agenda stated that the special meeting would be held in Council Chambers at 1 p.m. on August 25, 2010. The agenda also specified that a request from the Emsdale Agricultural Society to borrow the Town's security fencing for the Fall Fair on August 28, 2010 would be considered; that there would be a verbal report from the Mayor; and, that "[a] closed session is scheduled for the purposes of discussing Planning matters."

### **Resolution authorizing Closed Session**

The *Municipal Act, 2001* requires that before holding a meeting or part of a meeting that is to be closed to the public, a municipality must state by resolution the fact that a closed meeting will be held, as well as the general nature of the subject matter to be considered (s. 239(4)). The resolution must occur in public before the closed meeting takes place.

According to the information provided in the open meeting minutes for August 25, 2010, council passed the following resolution before entering into closed session:

BE IT RESOLVED that in accordance with Section 239, (1), (2), (3) and (3.1) of the *Municipal Act, c. 25, S.O. 2001*, as amended, the Council for the Corporation of the Town of Kearney will convene in Closed Session for discussion regarding:

- litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.
- the receiving of advice that is subject to solicitor-client privilege including communications necessary for that purpose.

The closed session resolution for the August 25 meeting was very generic and simply repeated the language of the statutory exceptions in the *Municipal Act*. We discussed that resolutions should be as detailed and as specific as possible. As our Office also noted in a June 2, 2009 letter to the Mayor of Kearney regarding the Ombudsman's investigation of a June 26, 2008 closed meeting, generally, resolutions should provide meaningful information about the issue to be discussed in closed session. In the Ontario Court of Appeal's decision in *Farber v. Kingston (City)*, [2007] O.J. No. 919, it stated, "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."

Understandably, there may be instances when providing more information about a subject to be considered *in camera* might effectively compromise the need for confidential discussion.

The agenda that was distributed to members of council for the August 25 closed session stated that two issues, a re-zoning application and the Lakeshore road closures, would be discussed *in camera* under the open meeting exception of litigation or potential litigation, and that the OMB Appeal regarding another matter would be discussed under the exception of solicitor-client privilege.

### **August 25, 2010 Closed Session**

Council had the discretion under s. 239 of the *Municipal Act, 2001* to close meetings to the public to discuss matters referred to in its resolution convening the closed session on August 25, 2010, provided that they properly came within the exceptions cited.

Based on our review of the meeting materials, it appears that the OMB-related appeal was capable of consideration in closed session under s. 239(f) of the *Municipal Act, 2001* on the basis of solicitor-client privilege. We understand that during the closed session when this matter was raised, staff presented a communication from the municipality's solicitor, advising council of the solicitor's legal opinion on this issue. Council then directed staff to invite the solicitor to attend a future council meeting to discuss this matter further.

The other two matters considered by Council *in camera* were closed to the public on the basis of "litigation or potential litigation" under s. 239(e) of the Act.

During our conversation, we noted that while the meaning of "litigation or potential litigation" has not been explicitly defined in the *Municipal Act, 2001* the courts have provided some insight on the application of this statutory exception.

In *Ross v. Muskoka Lakes (Township)*, [2004] 46 M.P.L.R.(3d) 119, the Ontario Superior Court considered whether council had met properly in closed session to discuss potential litigation. In that case, a dispute had arisen between adjacent property owners regarding a building permit that had been issued by the municipality in error, and which had been later quashed on appeal. Council had received deputations from the parties two days before the closed meeting. In addition, the lawyer for the party seeking the permit had written to the municipality the day before the meeting asking whether the permit would be issued and demanding a reply within a few days. The next day, Council met in closed session to discuss the matter. In these circumstances, the court considered that there was a very real prospect that the municipal official who had issued the original permit would be sued, and held that the council was entitled to meet behind closed doors to consider the matter.

In *RSJ Holdings Inc. v. London (City)* [(2005), 205 O.A.C. 150 (C.A.)], the court rejected the suggestion that a matter came within the "potential litigation" exception. In that case, the court found that the closed meeting in question had been held to consider an interim control by-law, and was not convened to discuss potential litigation. In addition, the court noted that a matter could not be considered potential litigation, "simply because there is a statutory right of appeal by a person affected by the interim control by-law or because the interim control by-law may be subject to a motion to quash. The fact that there might be, or even inevitably would be, litigation arising from the interim control by-law does not make the "subject matter under consideration" potential litigation."

Regarding the road closures, council considered a solicitor's letter threatening litigation as a possible next step. It appears that there was a real possibility that litigation over this matter might take place. Under the circumstances, this item could be seen as coming under the exception of litigation or potential litigation.

With respect to discussion of the re-zoning application, you advised that staff had placed this issue on the closed session agenda since the landowner would ultimately have a right to appeal council's decision. You also stated that you believed that staff might be advised by the landowner that he or she intended to appeal council's decision in the event that council denied the rezoning application. We understand that when staff introduced this matter in closed session and advised Council of the reasons this item was considered to come within the exception for "potential litigation", the Mayor took objection; and Council did not discuss the matter in closed session. While no vote was taken in closed session, the closed meeting minutes do state: "Mayor Johnson upon hearing the (staff member's) reasons for potential litigation indicated that this was a political decision and should be heard in open session and ceased discussions at that time." You clarified that the "discussion" referred to in the minutes was the staff member presenting Council with the reasons the item was placed on the agenda as being potential litigation and did not include Council actively considering or discussing this matter in closed session.

When Council reconvened in open session, a recorded vote was taken to, "give reconsideration to Resolution #10(a)(i)/18/08/2010 regarding approval of the rezoning .... " Immediately following that resolution, Council also passed the following resolution in open session: "BE IT RESOLVED that the Council of the Corporation of the Town of Kearney deems it necessary to call a special meeting of Council on August 31, 2010 at 1:00 p.m. for the purposes of reconsideration of the ... rezoning application."

It does not appear that the re-zoning matter had reached a point at which it could be said with any degree of certainty that there was a very real potential for litigation. As with any zoning matter appeal was one possibility. Accordingly, council prudently chose to defer consideration of this matter to a public meeting. However, we suggested that in future items should be carefully reviewed before they are placed on a closed session agenda to ensure they clearly come within the exception relied on to justify consideration behind closed doors.

We also discussed that most of the exceptions to the open meeting requirement are discretionary, and that the Ombudsman is of the view that these exceptions should be interpreted narrowly and applied prudently, given the principles of openness, transparency and accountability, which the open meeting provisions promote.

**Return of Members of the Public After Closed Session and Reporting Back**

You advised that at some meetings, the Mayor notifies members of the public that they can return to council chambers after the closed session, but confirmed that this is not a regular practice. The Ombudsman encourages councils; as a best practice, to make it clear that the public is welcome to return when open session resumes following a closed session, and to report back to the public on what transpired during the closed session.

You stated that members of the public rarely return to council chambers following a closed session, but agreed that it might be useful for council to report back on closed session discussions in a general manner, regardless of whether any resolutions stemmed from these *in camera* items.

You indicated general agreement with the observations and suggestions made by our Office and committed to share our Office's suggestions with Council. We encourage you to discuss our review and suggestions with Council publicly, and request that you notify our Office when this occurs.

I would like to thank you for your cooperation during our review. Should you have any questions or concerns, please feel free to contact me at (416) 586-3405.

Yours truly,



Trish Coyle  
Investigator