



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

March 2, 2021

Council for the City of Sault Ste. Marie
99 Foster Drive
Sault Ste. Marie, ON
P6A 5X6

Sent by email to mayor.provenzano@cityssm.on.ca

Dear Council for the City of Sault Ste. Marie:

Re: Closed meeting complaint

My Office received a complaint about a closed meeting held by council for the City of Sault Ste. Marie (the "City") on July 13, 2020. The complainant alleged that council decided to purchase a property in closed session in violation of the open meeting requirements of the *Municipal Act, 2001* (the "Act").

I am writing to advise that my review has determined that council did not violate the *Municipal Act*, as it did not decide to purchase the property during the closed session, but instead directed an officer of the municipality to proceed with negotiations, as permitted by the Act.

Ombudsman jurisdiction

As of January 1, 2008, the *Municipal 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.¹ Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. I am the closed meeting investigator for the City of Sault Ste. Marie.

Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's decisions

¹ *Municipal Act*, SO 2001, c 25, s 239.1.

on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedure. Summaries of previous Ombudsman decisions can be found in the digest at www.ombudsman.on.ca/digest.

Review

My Office reviewed the relevant meeting agenda, open and closed session minutes, a video recording of the July 13, 2020 closed session, and other relevant documents. We also spoke with the City Clerk and the Mayor.

Council cited two open meeting exceptions from the Act in its resolution to proceed *in camera*. These were the exceptions to discuss a proposed acquisition or disposition of land (s.239(2)(c)), and to discuss a matter subject to solicitor-client privilege (s.239(2)(f)). The Clerk told my Office that council discussed two unrelated matters during the closed session. The complaint to my Office only concerned the matter of the proposed acquisition or disposition of land.

Vote during the closed session

The complainant alleged that council decided to purchase land while in closed session on July 13, 2020, contrary to the open meeting requirements set out in the Act.

The Act requires that all municipal meetings be open to the public with some limited exceptions. One of the exceptions allows municipal councils to go into closed session to discuss a proposed acquisition or disposition of land (s.239(2)(c)).

Section 239 of the Act requires that all votes of council be taken in open session, except where the matter is permitted to be discussed *in camera*, and the vote is procedural or a direction to staff or officers of the municipality. My Office has found that a decision based on council consensus is, for all intents and purposes, a vote for the purposes of the open meeting rules.²

² *South Bruce Peninsula (Town of) (Re)*, 2015 ONOMBUD 25 (CanLII), online: <<http://canlii.ca/t/gtp6t>>.

The July 13, 2020 meeting was closed in accordance with the Act

Section 239(6) of the Act permits voting *in camera* for procedural matters or for giving directions to officers, employees, or agents of the municipality if the meeting has been properly closed to the public.

On July 13, council for the City cited the “acquisition or disposition of land” exception (s.239(2)(c)) to discuss a potential purchase of land in closed session. The purpose of this exception is to protect the municipality’s bargaining position by permitting closed session discussions about a proposed or pending acquisition or disposition of land by a municipality.

Generally, a municipality must be either the seller or purchaser of the land in order for the exception to apply.³ The exception does not apply to discussions that involve speculation about a land transaction or discussions about land transactions that may or may not happen in the future.⁴ The discussion must involve an actual land transaction that is currently pending or has been proposed.⁵

At the time of the July 13, 2020, *in camera* meeting, the City’s land acquisition was still under negotiation. The final decision to effect the purchase of the land took place at a meeting on September 14, 2020, when a resolution was made and passed in open session regarding the purchase.

My Office reviewed the portion of the video recording that documented council’s discussion concerning the potential acquisition or disposition of land on July 13, 2020. According to the video recording and my Office’s conversation with the Mayor, council received an update from the Mayor regarding ongoing discussions about acquiring a specific piece of land. Council discussed the potential cost of the land and possible terms of sale. Council directed the Mayor to continue negotiations for the acquisition of the land.

This discussion fit within the exception for acquisition or disposition of land in section 239(2)(c) of the Act.

³ Port Colborne (City of), 2015 ONOMBUD 32 (CanLII), online: <<http://canlii.ca/t/gtp7c>>.

⁴ Fort Erie (Town of) (Re), 2015 ONOMBUD 12 (CanLII), online: <<http://canlii.ca/t/gtp5w>>.

⁵ Burk’s Falls / Armour (Village of / Township), 2015 ONOMBUD 26 (CanLII), online: <<http://canlii.ca/t/gtp6w>>.

Council voted by consensus to direct an officer of the municipality

The complainant alleged that council for the City decided to purchase a piece of land while in closed session.

The Act permits votes *in camera* for procedural matters or to give directions to officers, employees, or agents of the municipality.

In a report to the Town of South Bruce Peninsula, my Office found that council directed staff in several closed sessions to make an offer and a counteroffer to sell an airport.⁶ Staff were directed to negotiate the sale of the airport, while the final decision to effect the sale of the airport took place at a subsequent open meeting of council. Accordingly, the direction to staff was permitted during the closed meeting.

In this case, the closed meeting minutes and the video recording indicate that council for Sault Ste. Marie directed the Mayor, an officer of the municipality, to continue negotiations with a private individual regarding a proposed acquisition of land. The vote was permissible under s.239(6) the Act.

Resolution to proceed into closed session

The resolution to proceed into closed session was recorded in the open session minutes for the July 13, 2020, meeting. The open session minutes state:

Resolved that this Council proceed into closed session to discuss:

- a proposed acquisition or disposition of land; and
- a matter subject to solicitor/client privilege

Council cited two open meeting exceptions from the Act in its resolution to proceed *in camera*. These were the exceptions to discuss a proposed acquisition or disposition of land (s.239(2)(c)), and to discuss a matter subject to solicitor-client privilege (s.239(2)(f)). The Clerk told my Office that council discussed two unrelated matters during the closed session.

Section 239(4) of the Act provides that before moving into closed session, a municipality must state by resolution in open session that a closed meeting will be held, and state the general

⁶ *South Bruce Peninsula (Town of) (Re)*, 2015 ONOMBUD 25 (CanLII), online: <<http://canlii.ca/t/gtp6t>>.

nature of the matter to be considered at the closed meeting. In *Farber v. Kingston (City)*, the Ontario Court of Appeal determined that the resolution to go into a closed meeting should provide a general description of the issue to be discussed in a way that maximizes the information available to the public without undermining the reason for excluding the public.⁷

In this case, it was unclear based on the open meeting minutes alone whether council discussed one matter that related to the acquisition or disposition of land and was subject to solicitor-client privilege, or if they were two unrelated matters. No information was provided to the public to indicate the nature of the land acquisition being considered by council.

I encourage the City of Sault Ste. Marie to ensure its resolutions to close a meeting maximize the information provided to the public regarding the matter to be discussed, without undermining the reason for closing the meeting.

Conclusion

My review indicates that the *in camera* discussion on July 13, 2020, relating to the proposed acquisition of a piece of land, fit within the exception for acquisition or disposition of land. Further, council's vote by consensus to direct an officer of the municipality to continue negotiations for a proposed acquisition of land was permissible under s.239(6) of the Act.

I would like to thank the City of Sault Ste. Marie for its co-operation during our review. The Mayor confirmed that this letter would be included as correspondence at an upcoming council meeting.

Sincerely,

Paul Dubé
Ombudsman of Ontario

Cc: Rachel Tyczinski, City Clerk r.tyczinski@cityssm.on.ca

⁷ *Farber v. Kingston (City)*, 2007 ONCA 173 (CanLII), online: <<http://canlii.ca/t/1qtzl>>.