



Ombudsman Report

Investigation into a complaint about the
Elliot Lake Residential Development
Commission

“Public Notice”

**Paul Dubé
Ombudsman of Ontario**

August 2017

Executive Summary

- 1 After the last uranium mine in Elliot Lake closed in 1996, the city looked for ways to encourage economic development. It approached the province for assistance. And in 2001, the *Elliot Lake Act, 2001* was passed, creating the Elliot Lake Residential Development Commission. As the city's agent, the Commission manages the development for residential purposes of land acquired from the province.
- 2 Under Ontario's *Municipal Act*, municipal councils, local boards and their committees must provide public notice of their meetings and conduct them openly, subject to limited exceptions. The requirement that municipal bodies hold their meetings publicly allows citizens to witness the democratic process in action. It also furthers the principles of transparency, accessibility and accountability at the local level. Since January 2008, my Office has had the authority to investigate complaints about breaches of the open meeting rules where a municipality hasn't appointed its own investigator.
- 3 My Office is the closed meeting investigator for the City of Elliot Lake, and has issued several reports related to complaints about closed meetings there. However, the Residential Development Commission is **not** a committee or local board subject to the open meeting requirements of the *Municipal Act*. As such, we could not conduct a closed meeting investigation in this case.
- 4 Nevertheless, the Commission **is** expressly required to hold meetings open to the public under section 4 of the *Elliot Lake Act*. It can **only** close a meeting if it "is of the opinion that intimate financial or personal matters may be disclosed at a meeting and that the desirability of protecting against the consequences of their public disclosure outweighs the desirability of holding the meeting in public." The Commission's by-law confirms that meetings are to be open to the public, although it only requires that notice of meetings be given to the Commission's directors.
- 5 My Office's authority in the municipal sector was expanded in January 2016 to include general complaints about municipal administration. We were thus able to look into the complaint we received in December 2016 about the Commission's failure to provide public notice of its meetings – not through our role as closed meeting investigator, but as part of our new, general mandate. It was suggested that the Commission's meetings could not be considered open to the public if the public didn't know about them. As we do

with most general complaints we receive about municipal bodies, we initially attempted to resolve the matter through informal discussion with the Commission. However, the Commission persisted in the view that it was unnecessary to provide public notice and that its meetings were open to anyone who happened to attend.

- 6 Given the importance of ensuring public access to open meetings, I decided to initiate a formal investigation into this issue. Based on my investigation, I have concluded that the Commission's practice of not providing public notice of its meetings is unreasonable and wrong. While the *Elliot Lake Act* does not expressly require that the Commission provide for public notice of meetings, the failure to alert citizens to the fact that a meeting is taking place effectively defeats the intent of the open meeting requirement in that Act.
- 7 I have recommended that the Commission amend its by-laws to provide explicitly for notice to the public of its meetings going forward. I am hopeful that in future, the residents of Elliot Lake will have a realistic opportunity to attend a Commission meeting whenever they so choose.

Investigative Process

- 8 As a result of legislative amendments which came into force in January 2016, my Office has the authority to investigate complaints about the administration of municipal entities, including municipally-controlled corporations like the Elliot Lake Residential Development Commission. In December 2016, we received a complaint that the Commission was closing its meetings to the public in violation of the *Elliot Lake Act, 2001* because it did not provide public notice of its meetings.
- 9 My Office receives more than 20,000 complaints annually, most of which are resolved expeditiously using alternative dispute resolution techniques. Consistent with our practice of attempting to resolve complaints quickly and informally wherever possible, we initially contacted the Commission to attempt to facilitate a solution. The Commission was not amenable to changing its practices or implementing our suggestions relating to improving accessibility to its meetings.
- 10 On March 21, 2017, my Office issued notice that we would be formally investigating the complaint.

- 11 The investigation was assigned to counsel with our Office with experience in open meeting and municipal issues. In considering this matter, we spoke with the Commission's Recording Secretary and former Chair¹, and obtained and reviewed relevant documentation.
- 12 The Commission co-operated with our investigation.

The Elliot Lake Residential Development Commission

- 13 After 1996, which marked the end of the mining industry in Elliot Lake, the city was dependent on its residential/farm and commercial tax base for revenue. It applied to the provincial government to create legislation to permit it to develop shoreline and other land for residential purposes and to use the proceeds for the economic development of the city. The *Elliot Lake Act, 2001* was the result of that request.
- 14 The Elliot Lake Residential Development Commission is a corporation without share capital established under s. 3(1) of the *Elliot Lake Act*. The Commission is composed of two council members and five members of the public, all of whom are appointed by city council. The Commission's members serve as the Board of Directors.
- 15 The Commission's mandate is to manage, as the city's agent, the development for residential purposes of land acquired from the province. Council can pass by-laws delegating certain powers to the Commission, pertaining to the purchase, sale and development of land.
- 16 The city's By-law 03-51 delegates the authority to the Commission to carry out certain acts necessary to develop land, including surveying, constructing docks, and preparing applications under the *Planning Act* and the *Environmental Assessment Act*. After a period of sustained development activity after its creation (Phase 1), the Commission has been relatively inactive while it waits for the necessary approvals to develop and sell new land (Phase 2). At present, the Commission is actively marketing and selling approximately 10 waterfront properties. It is also conducting the necessary environmental testing and development planning to sell additional properties.
- 17 According to section 4 of the *Elliot Lake Act*, meetings of the Commission must be open to the public, unless the Commission "is of the opinion that

¹ The Commission's Chair resigned during the course of our investigation.

intimate financial or personal matters may be disclosed at a meeting and that the desirability of protecting against the consequences of their public disclosure outweighs the desirability of holding the meeting in public.”

- 18 In 2002, the Commission passed By-Law 1 (“A By-law relating generally to the conduct of the affairs of the Elliot Lake Residential Development Commission”). The by-law provides that meetings are held at least once a month and may be called by the Chair, Vice-Chair, the Secretary-Treasurer, or any two directors. However in recent years, the Commission has passed resolutions to meet less frequently, and in 2016, it only met five times. Board meetings are held in the boardroom of a non-municipal building that houses various public services (e.g. public health, legal aid clinic). Members of the public are allowed to attend these meetings and have done so on several occasions. At meetings, the Commission discusses the marketing of its available properties and receives updates regarding future developments that are in the process of being environmentally tested. We were told the Commission discusses how each property will be priced, how properties should be marketed, and how roads and other services will be developed. Recently, the Commission discussed five properties on a particular lake that will soon be ready for sale.
- 19 The by-law states that meetings shall be open to the public, subject to the exception found in s. 4(6) of the *Elliot Lake Act*. With respect to notice, s. 5.02 of By-law 1 states that notice of meetings shall be delivered to each director at least two days before the meeting is to take place. The by-law does not provide for notice to the public of the Commission’s meetings.

The Commission’s take on openness

- 20 The Commission is of the view that it is complying with the open meeting requirements of the *Elliot Lake Act*. The Commission’s Recording Secretary told us it has no obligation to post notice of meetings and that the Commission’s meetings are open, in the sense that people can come in if they happen to be there. She noted that although the meetings are usually held at the same place and time, they might not proceed if there is no business or no quorum. She also explained that sometimes meetings are called at the last minute, and By-law 1 provides for flexibility, as only two days’ notice to the directors is required. She suggested that providing notice to the public would be impractical under the circumstances. When questioned about how members of the public would even know that a meeting was taking place, she answered that they could ask the Commission if they were interested.

- 21 The Commission’s former Chair expressed the view to us that notice of Commission meetings could be posted to the city’s website with a disclaimer that they might not proceed if a quorum of directors was unavailable. The designated number of directors to constitute legal quorum is required to conduct Commission business. The former Chair told us that he raised this suggestion at a Commission meeting, but was voted down. The majority of the Commission’s directors were apparently of the view that it was complying with the *Elliot Lake Act* and was not required to let the public know about its meeting schedule.

Analysis

- 22 Under the *Municipal Act, 2001*, every municipality and local board must pass a procedure by-law governing the calling, place and proceedings of meetings. The by-law must also provide for public notice of meetings. Municipal councils, local boards and their committees are required to hold their meetings open to the public, subject to limited exceptions. Since 2008, my Office has had the authority to investigate complaints about improperly closed municipal meetings in cases where the municipality has not appointed its own investigator. We have had considerable experience addressing the municipal open meeting rules, which are intended to reinforce accountability, transparency and accessibility at the local level and promote the public’s right to witness democracy in action.
- 23 Although this is the first time my Office has investigated a complaint about the Elliot Lake Residential Development Commission, we did review a closed meeting complaint in 2012 about the City of Elliot Lake council’s attendance at a meeting of the Commission². The 2012 complaint alleged that a quorum of council attended a meeting of the Commission, and laid the groundwork for council business. There was no public notice of the Commission’s meeting, and accordingly members of the public could not attend. Our Office found that in attending this meeting, a quorum of city council violated the *Municipal Act*.
- 24 Our August 10, 2012 letter to the city noted:

We received conflicting information about whether this meeting was considered open or closed. However, the Commission’s

² Letter from Ombudsman of Ontario to City of Elliot Lake, (10 August 2012), online: <<https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Elliot-Lake---closing-letter.pdf>>.

meeting agenda is not publicly available and, according to the Commission Chair, members of the public can only find out about meeting dates and matters to be discussed at the meetings by inquiring with the municipality and arranging to attend.

Given that there was no public notice of the meeting and no members of the public attended, the meeting cannot be considered an open meeting for purposes of the *Municipal Act*.

- 25 The 2012 review was conducted under my Office's authority as a closed meeting investigator for the City of Elliot Lake. Thereafter, we discussed that the city should ensure future meetings between its council and the Elliot Lake Residential Development Commission were conducted in a manner that respects the requirements and intent of the *Municipal Act*.
- 26 In reviewing the current complaint about the Commission, I have to determine under my general investigative authority whether the Commission is holding closed meetings in violation of the provisions of the *Elliot Lake Act*.
- 27 Unlike the *Municipal Act*, the *Elliot Lake Act* does not expressly require that the Commission provide for public notice of its meetings. However, in practice, failure to publicly post notice defeats the purpose of the legislative requirement to hold meetings open to the public. If information about meeting dates, times and places is not readily accessible, members of the public will never know to attend, and the meetings will effectively remain closed. This lack of transparency is contrary to the spirit and purpose of the relevant legislation and undermines the democratic process.
- 28 I am not persuaded by the Commission's position that providing public notice would be impractical. The need for flexibility in scheduling meetings and the prospect of last-minute cancellation for lack of quorum can be accommodated while still providing for public notice. It is not unusual for councils, committees and local boards to meet on short notice. Many municipalities have procedure by-laws allowing for waiver of regular notice and modified public notice provisions in urgent circumstances. In addition, if the Commission regularly finds itself unable to proceed because of insufficient quorum, it can always include reference in meeting notices to the fact that meetings will only proceed if a quorum of directors is present.
- 29 Accordingly, the Commission's By-law 1 should be amended to provide for public posting of meeting notices.

Opinion

- 30 In my opinion, the Elliot Lake Residential Development Commission's failure to notify the public of its meetings is unreasonable and wrong, in accordance with s. 21(1)(a), (b) and (d) of the *Ombudsman Act*.

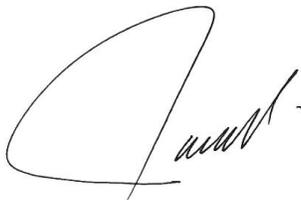
Recommendations

- 31 To address the concerns that I have identified in my investigation and improve the accessibility, transparency and accountability of the Elliot Lake Residential Development Commission's administration, I make the following recommendations:

1. **The Elliot Lake Residential Development Commission should provide notice to the public of all meetings.**
2. **The Elliot Lake Residential Development Commission should pass a by-law requiring that public notice be given for all meetings and specifying how notice of its meetings will be provided to the public.**

Response

- 32 The Commission was given the opportunity to review a preliminary version of this report and provide comments to our Office. No comments were received from the Commission.
- 33 My report should be shared with the Commission and made available to the public as soon as possible, and no later than the next Commission meeting.



Paul Dubé
Ombudsman of Ontario