



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

September 17, 2013

Chair Nancy Wilkes
Acton Business Improvement Area Board
29 Mill St. East,
Acton, ON L7J 1H1

Dear Chair Wilkes,

Re: Complaint about June 18, 2013 Closed Board Meeting

I am writing further to my discussion with you, Vice Chair Dr. Dana Selby, and Halton Hills Councillor and Board member Clark Somerville, on September 16, 2013. During the call I explained the outcome of our review of a complaint that the Acton Business Improvement Area Board (the Board) held an improper closed session on June 18, 2013 to discuss renting new office space and that the Board improperly voted in the closed session to enter into a new lease agreement. The complainant questioned whether the Board was permitted to discuss a proposed lease in a closed session.

The complaint also stated that two members of the Business Improvement Area (BIA) who were not on the Board were permitted to attend the closed session.

Under the *Municipal Act, 2001* (the Act), all meetings of Council, Local Boards, and their Committees must be open to the public, with limited exceptions. Section 204 (2.1) of the Act states that a Board of Management of a Business Improvement Area “is a local board of the municipality for all purposes”.

The Ombudsman is the closed meeting investigator for the Town of Halton Hills and its local boards, including the Acton Business Improvement Area (BIA) Board. In reviewing this complaint, our Office obtained and reviewed the meeting documents via the Vice Chair and the Manager, and spoke with member of Halton Hills Council, Clark Somerville, who sits on the Board. In addition, our Office considered the relevant sections of the Board’s Procedure By-Law and the Act.

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Procedure By-Law (2009)

According to the Act, municipalities and local boards must have a Procedure By-Law that provides for public notice of meetings¹.

The Acton BIA Board's Procedure By-Law states that "meetings will be at the call of the Chair, a minimum of 10 per fiscal year" and that meetings "will be open to any member of the Acton BIA or the public..."

We were advised that notice of meetings is sent to the BIA membership via e-mail and that the next meeting date is typically announced at the end of the previous Board meeting. Meetings are generally held on the first Tuesday of the month but this may vary and there is no consistent practice in place to notify the general public of the date, time, and location of meetings. As discussed, the Board should formalize a public notice procedure and include it in the Procedure By-Law, in order to comply with the Act.

We also noted other deficiencies in the Procedure By-Law. The By-Law incorrectly states that closed sessions may be held "to consider matters of finance and personnel". As discussed, there are many financial and personnel issues that do not qualify for closed meeting consideration and, as such, this general statement should be removed from the By-Law. We note that the By-Law does also correctly reference the *Municipal Act's* permitted exceptions itemized under s. 239.

In addition, the By-Law states that the Board of the Acton BIA is a "standing committee of Council of the Town of Halton Hills". As indicated previously, the Act defines Boards of Management of Business Improvement Areas as "local boards", which are differentiated from committees of Council. For the purposes of the open meeting provisions, the *Municipal Act* defines a committee as "any advisory or other committee, subcommittee or similar entity of which at least 50% of the members are also members of one or more councils or local boards." Apart from one member of Council from Halton Hills, the eleven-member Board is comprised of members of the local business

¹ *Municipal Act, 2001* s. 238 (2), (2.1)

Procedure by-laws respecting meetings

(2) Every municipality and local board shall pass a procedure by-law for governing the calling, place and proceedings of meetings. 2001, c. 25, s. 238 (2).

Notice

(2.1) The procedure by-law shall provide for public notice of meetings. 2006, c. 32, Sched. A, s. 102 (3).

community. As such, the Board should clarify in its Procedure By-Law that it is a local board.

June 18, 2013 Acton BIA Board Meeting

Board members were notified of the June 18, 2013 meeting via a June 15, 2013 e-mail sent by the Acton BIA Manager. The meeting was also announced at the end of the May 14, 2013 Board meeting. However, as indicated, a general notice to the public was not issued.

The meeting agenda provided to members stated that the issue of “rental properties” would be discussed but did not state that a closed meeting would be held.

The minutes of the meeting show that the Board passed a resolution in open session to proceed in camera to discuss “property”. However, there is no record of the closed meeting discussions as it has not been the Board’s practice to record or keep minutes of closed sessions, which we were informed occur very infrequently.

In terms of the substance of the closed meeting discussion, we were advised that the Board considered a list of potential rental units as the current lease was due to expire and the Board was seeking a rental space to better serve its needs. A number of the potential properties were quickly eliminated and the Board members compared the remaining units in terms of cost, square footage, utilities, etc. in order to assess which one best suited their needs.

According to Councillor Somerville, there were certain aspects of the lease that could be negotiated, such as the term of the lease. Councillor Somerville said that direction was given to the BIA Manager during the meeting to contact one property owner and negotiate a lease agreement.

Councillor Somerville said that the matter was discussed in the closed meeting because the Board was discussing its interests in terms of a rental agreement, which still needed to be negotiated with the landlord.

In regard to the complaint that two non-Board members were permitted to remain in the closed session, we were told that, as they were members of the Business Improvement Area and not interested in rental properties, they were permitted to remain for the closed session.

When the Board returned to the open session, it announced that the Acton BIA Chair and Manager were to “proceed as directed”.

Analysis

A Council or Local Board is permitted under s. 239 (2) (c) of the Act to consider a proposed or pending acquisition or disposition of land in a closed meeting.

A review of the history and case law concerning this exception suggests that its primary purpose is to protect the municipality’s bargaining position in property negotiations.

In order to assess whether the Board’s discussion of a lease agreement falls within this exception, we considered whether the definition of “land” could include a lease of a rental unit. The *Municipal Act, 2001* defines “land” in the definition section as “including buildings”, and in relation to ‘fortification of land’ as, “including buildings, mobile homes, mobile buildings, mobile structures, outbuildings, fences, erections, physical barriers and any other structure on the land or on or in any structure on the land.” As such, the definition of land appears broad enough to include a lease of land or rental unit.

As the Board was contemplating a pending lease of office space and terms of the lease were reportedly open for negotiation, we found that the subject matter falls within the “proposed or pending acquisition or disposition of land” exception.

In terms of the vote taken in closed session to direct the Manager to proceed with negotiating the lease, the Act permits voting during a closed session “if the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee.....” The vote appears to be a direction to staff that is permitted in a closed session.

In regard to the non-board members who attended the closed session, we would like to caution that permitting third parties to remain for the closed meetings should be avoided in cases where such individuals do not have direct knowledge to share with the Board with respect to the issue at hand, as this may negate the reason for closing the meeting to the public.

Procedural Violations

Resolution

The Act requires that Council confirm in the resolution to proceed in camera, “the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting...”

The Board’s resolution to go into closed session at the June 18 meeting only stated that the Board intended to discuss property.

As noted by the Ontario Court of Appeal in *Farber v. Kingston City*², “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.”

During our discussion on September 16, 2013 we noted that the Board could have provided more information in the resolution to confirm the nature of the topic to be discussed in closed session. For instance, the Board could have indicated that it intended to discuss leasing rental space.

Record Keeping

The Act requires that municipalities, local boards, and their committees, “record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not.” (s. 239 (7)) Failing to maintain a record of a closed session of the Board is a contravention of the Act.

As a best practice, the Ombudsman recommends that municipalities and local boards audio or video record meetings, including closed meetings, in order to ensure a complete and accurate record. Any meeting record should capture all substantive discussions that take place.

During our discussion we reviewed the above information with you and provided you with an opportunity to provide your feedback and any additional relevant information. You stated that you are in the course of amending your Procedure By-Law to better reflect the provisions of the Act, including the public notice requirement.

² [2007] O.J. No. 919, at page 151.



You confirmed that this letter would be included on the October 8, 2013 public Board meeting agenda and a copy made available to the public.

We would like to take this opportunity to thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team