



Ombudsman Report

**Investigation into a complaint about a meeting
held by the Township of Russell on November 16, 2020**

**Paul Dubé
Ombudsman of Ontario
December 2021**

Complaint

- 1 My Office received a complaint about a closed meeting held by council for the Township of Russell (the “Township”) on November 16, 2020. The complaint alleged that a proposed land transaction between the Township and the upper-tier municipality of the United Counties of Prescott and Russell (the “United Counties”) was improperly discussed in the course of this closed meeting.

Ombudsman jurisdiction

- 2 Under the *Municipal Act, 2001*¹ (the “Act”), all meetings of a council, local board, and committees of either must be open to the public unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, the Act gives anyone 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 or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 4 The Ombudsman is the closed meeting investigator for the Township of Russell.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality’s governing procedures have been observed.
- 6 Since 2008, our Office has investigated hundreds of closed meetings in municipalities throughout Ontario. 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 on, and interpretations of, the open meeting rules. Summaries of the Ombudsman’s previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Investigative process

- 7 On December 8, 2020, we advised the Township of our intent to investigate the November 16, 2020 meeting.

¹ SO 2001, c 25.

- 8 Members of my Office's open meeting team reviewed relevant portions of the Township's by-laws and policies, as well as the Act. We reviewed the meeting records, including the agenda and minutes. We interviewed members of council, the Chief Administrative Officer (CAO), the Executive Director of Infrastructure Services, the Deputy Treasurer, the Director of Planning, Building and Economic Development, and the Clerk.
- 9 My Office received full co-operation in this matter.

Background

- 10 Township council met on November 16, 2020 to discuss the possible acquisition of land to build new transportation infrastructure at an intersection in Embrun. At issue at the time of the meeting was whether or not the Township should proceed at its own expense with a proposed project for the intersection that had already been approved in the subdivision plan, or if it should consider a different infrastructure project for the intersection that would require a land purchase but that could be better for long-term development.
- 11 Since this alternative project would have been interconnected with the United Counties' infrastructure, funds and approvals were required from the United Counties. The alternative project also required the acquisition of land, either from a group of residential owners or from a property developer. We were told the property developer had informally spoken to a Township official already and suggested a purchase price per acre. Ultimately, the United Counties had decided not to proceed with this project.

November 16, 2020 council meeting

- 12 Council met virtually for a regular meeting at 6:00 p.m. on November 16, 2020. Council went into closed session to discuss five matters, including an "Update on a Proposed or Pending Acquisition of Land in Embrun – Verbal Report." This matter was closed under the exception for acquisition or disposition of land at s. 239(2)(c) of the Act.
- 13 In the closed session, council was briefed on the matter and directed the Mayor to write a letter to council for the United Counties to reconsider its previous decision on the issue. Council reconvened in open session at 8:22 p.m. and adjourned at 8:26 p.m.

Analysis

Applicability of the exception for acquisition or disposition of land, s. 239(2)(c)

- 14 In its resolution to close the session, council cited the exception for acquisition or disposition of land. This open meeting exception allows discussions about a proposed or pending acquisition or disposition of land by a municipality to be held in closed session.² As I have previously held, the exception is discretionary and does not apply to speculative discussions about land transactions. Rather, its primary purpose is to protect the municipality's bargaining position where there is potential harm to the municipality.³
- 15 Where a land transaction is not pending, the exception for acquisition or disposition of land has nevertheless been found to apply if discussions relate to specific lands and a municipality's bargaining position is at risk of being compromised by public discussions.⁴
- 16 The proposed land transaction in this case would have involved specific lands – those of the property developer – at a specific cost per acre known to council at the time of the meeting. Council had a bargaining position to protect with respect to the potential acquisition of land as it would have contribute to the purchase cost. Thus, the discussion about the potential acquisition of the property developer's lands fit within the open meeting exception for acquisition or disposition of land.

Applicability of the exception for plans and instructions for negotiations, s. 239(2)(k)

- 17 Despite council not citing the exception for plans and instructions for negotiations when they closed the session on November 16, 2020, we considered whether it also applied to the discussions in closed session.

² Letter from Ombudsman to the Town of Orangeville (24 January 2014) [*Orangeville*], online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2014/town-of-orangeville>>.

³ *Burk's Falls / Armour (Village of / Township) (Re)*, 2015 ONOMBUD 26, online: <<https://canlii.ca/t/gtp6w>>.

⁴ *Norfolk (County of) (Re)*, 2021 ONOMBUD 6, online: <<https://canlii.ca/t/jdr8d>>.

- 18 Section 239(2)(k) of the Act allows discussions about plans and instructions for negotiations to be closed to the public. The purpose of this exception is to allow a municipality to protect information that could undermine its bargaining position or give another party an unfair advantage over the municipality during an ongoing negotiation.⁵ In order for the exception to apply, the municipality must show that:
- i. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
 - ii. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
 - iii. The negotiations are being carried on currently, or will be carried on in future; and
 - iv. The negotiations are being conducted by or on behalf of the municipality.⁶
- 19 The discussions in the present case were about positions, plans, and instructions related to the proposed infrastructure. Per the minutes, council requested that the United Counties reconsider its decision to not proceed with the alternative infrastructure project at the intersection.
- 20 These discussions were intended to be applied to negotiations. The minutes provide that council gave specific instructions to the Mayor to write a letter asking council for the United Counties to reconsider its decision.
- 21 At the time of the November 16, 2020 meeting, the Township was carrying out negotiations with the United Counties about the development of transportation infrastructure at an intersection.
- 22 Finally, the negotiations were being carried out by the Mayor of the Township on its behalf.
- 23 Despite satisfying the aforementioned test, the complaint alleged that the Township's bargaining position could have been compromised because of the Mayor's dual role at the time of the meeting, as Mayor of the Township and as Warden of the United Counties. A previous investigation by my Office in a different municipality found that the protection of the municipality's bargaining position was defeated, and the open meeting exception did not apply, because the other party to the negotiation was present during the closed meeting.⁷

⁵ Letter from the Ombudsman to the City of Pickering (23 September 2020), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2020/city-of-pickering>>.

⁶ *St. Catharines (City of) (Re)*, 2019 ONOMBUD 1, online: <<https://canlii.ca/t/hxrk5>>.

⁷ *Orangeville*, *supra* note 2.

- 24 When determining whether the Mayor's presence during the closed meeting compromised the Township's bargaining position, we must consider the intent of the Act with respect to members' participation on both levels of council.
- 25 The Act, at s. 218(2)(b), expressly contemplates that council members may serve on the council of both the upper-tier and the lower-tier municipality. Under ss. 9-11, relating to general municipal powers, an upper-tier municipality may determine the composition of its council and whether or not the head of the upper-tier council can sit on a lower-tier council. Therefore, the legislation is clear that it was not improper for the Mayor of the Township to act also as the Warden for the United Counties.
- 26 Courts have already held that the duty to act in the interest of the municipality is not compromised by the dual mandate of municipal elected officials alone, nor does such a mandate give rise to a reasonable apprehension of bias.⁸ Furthermore, material provided by the provincial government suggests that a Mayor/Warden has the necessary resources to delineate their role on both councils.⁹
- 27 The Mayor's presence during the Township's closed meeting did not compromise its bargaining position with respect to the potential land acquisition from the developer or the negotiations with the upper-tier municipality. The Mayor must discharge their duties honourably on both councils simultaneously, as intended by the legislation. Accordingly, the Mayor of Russell's dual mandate did not independently establish that the Township's bargaining position was compromised.

Opinion

- 28 Council for the Township of Russell did not contravene the *Municipal Act, 2001* on November 16, 2020 when it went *in camera* to discuss the pending acquisition of land in Embrun. The discussion fell within the open meeting exceptions at s. 239(2)(c) and (k) of the Act, namely the acquisition or disposition of land, and plans and instructions for negotiations.

⁸ *Orangeville (Town) v Dufferin (County)*, 2010 ONCA 83 (CanLII), online: <<https://canlii.ca/t/27tk4>>; *Mariano v Mississauga (City)*, 1992 CanLII 7557 (ONSC), online: <<https://canlii.ca/t/g1b71>>.

⁹ Government of Ontario, "The Ontario Municipal Councillor's Guide," Section 5, Municipal Organization, online: <<https://www.ontario.ca/document/ontario-municipal-councillors-guide/5-municipal-organization>>.

Report

- 29 The Mayor for the Township of Russell was given the opportunity to review the preliminary version of this report and provide comments to our Office. Any comments received were considered in the preparation of this final report.
- 30 The Clerk indicated that my report would be made available to the public no later than council's next meeting. It will also be published on our website at www.ombudsman.on.ca.



Paul Dubé
Ombudsman of Ontario