

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2012-0080 (web version)

THE TOWN OF NEEPAWA

REPORT ISSUED ON AUGUST 16, 2013

SUMMARY:

A complainant alleged that a Town of Neepawa councillor had placed himself in a conflict of interest position by being present at two meetings of council that included discussions of an item in which the councillor had a personal interest.

Based on the evidence disclosed by the investigation, the acting ombudsman found that although the councillor was present in both council meetings wherein items in which he had a personal interest were discussed, there was no conflict of interest because there was nothing formally before council to vote upon or decide.

However, the manner in which this matter was dealt with gave rise to the perception of a conflict of interest. At the conclusion of the investigation, Manitoba Ombudsman suggested administrative improvements to avoid any perception of conflict and to ensure that appropriate procedures for declaring conflict of interest are followed.

THE COMPLAINT

On November 9, 2012, the complainant filed a written complaint concerning the Town of Neepawa, alleging that a town councillor had placed himself in a conflict of interest by failing to declare a conflict of interest and recuse himself from two meetings of council. These council meetings each included an agenda item in which the councillor had a personal interest.

The complainant attended a meeting of council wherein council considered a request to subdivide a parcel of land, listed on the agenda under "New Business." He further advised that he observed the councillor leave the meeting for a brief period and return while the agenda item was still being discussed. He alleged that the councillor "did not declare his conflict in any way acceptable" under *The Municipal Council Conflict of Interest Act* and was present during the discussion of the agenda item in which the councillor had a pecuniary interest.

The complainant further alleged that in a subsequent council meeting the councillor remained in the room and participated in council's discussion on the matter of the councillor's own subdivision request. It is the contention of the complainant that on both occasions the councillor was in a conflict of interest.

BACKGROUND INFORMATION

Conflict of Interest:

Under certain circumstances complaints of conflict of interest may be raised through an application to the Court of Queen's Bench pursuant to *The Municipal Council Conflict of Interest Act*.

Application by elector to Q.B.

20(1) Where it is alleged that a councillor has violated a provision of this Act, and if there is no previous application outstanding or determined on the same facts, **an elector** may apply ex parte to a judge of the Court of Queen's Bench for authorization to apply for a declaration that the councillor has violated a provision of this Act. [emphasis added]

In order to pursue a matter under the act one must be an "elector" within the community, defined as a person entitled to vote at an election of members to a council. Because the complainant is not an elector within the town, he would not be able to pursue a matter of a conflict of interest through the Court of Queen's Bench in accordance with the act.

Accordingly, the complaint to our office was investigated as an alleged maladministration pursuant to section 15 of *The Ombudsman Act*.

Investigations

15 The Ombudsman may, on a written complaint or on his own initiative, investigate

- (a) any decision or recommendation made, including any recommendation made to a minister, or any act done or omitted, relating to a matter of administration in or by any department or agency of the government, or by any officer, employee or member thereof, whereby any person is or may be aggrieved; or
- (b) any decision or recommendation made, including any recommendation made to a council, or any act done or omitted, relating to a matter of administration in or by any municipality or by any officer or employee of a municipality, whereby any person is or may be aggrieved.

The Municipal Council Conflict of Interest Act deals with conflicts arising from pecuniary (financial) interests. Traditionally, parliamentary ombudsmen have taken a broader approach to conflict of interest. In our 2009 publication *Understanding Fairness, A Handbook on Fairness for Manitoba Municipal Leaders*, a conflict of interest is defined as when one's personal interest conflicts with the public's interest, or with one's duty as a public official. Further it states, "The appearance or perception of conflict can be as harmful to public confidence as actual conflict."

Once a conflict between a public official's personal interests and a public decision is identified, it can be difficult to demonstrate that the decision was not influenced by their personal interest.

A significant difference between the ombudsman investigation process and the court process is the remedy available to a complainant/applicant in these distinct processes. The Manitoba Ombudsman does not have the jurisdiction to make orders or impose a remedy on an individual councillor or on a municipality. The goal of a complaint investigation under *The Ombudsman Act* is to determine whether there has been maladministration and, if so, to make recommendations for administrative improvement. These recommendations usually arise from an individual complaint, but often serve to identify administrative improvement that can benefit both government and the public.

While the ombudsman cannot make the determinations and grant the remedies available through the court process under *The Municipal Council Conflict of Interest Act*, ombudsman investigations consider and take guidance from the various provisions of the act that reflect the intent of the legislature. Frequently, statutory requirements are used as a benchmark against which we examine administrative actions and decisions.

SCOPE OF THE INVESTIGATION

Our investigation considered the issues the complainant raised with us and we undertook to address the following questions:

- Did the actions of the councillor that resulted in the complaint amount to a conflict of interest, or give rise to a perception of conflict?
- Was the administrative process followed by the town in this matter adequate and appropriate?

As part of our investigation, we considered certain provisions of *The Municipal Council Conflict of Interest Act* which outline the actions required for members of council and the clerk of the municipality when dealing with matters surrounding a potential conflict of interest. We also considered the relevant provisions of *The Municipal Act* concerning the duties and required actions of a councillor.

We reviewed DVD recordings and meeting minutes of the two council meetings in question. We also considered the information provided by the complainant and discussed the specifics of the matters we would be investigating with him. We requested and received information relevant to our investigation from the Town of Neepawa, the Neepawa and Area Planning District, and the councillor named in the complaint. Prior to concluding our investigation we met with the current mayor and CAO and communicated with the town, planning district and the councillor to ensure we understood the issues surrounding the complaint made to our office.

POSITION OF THE TOWN OF NEEPAWA

During the course of our investigation, our office contacted the Town of Neepawa and identified the concerns raised in the letter submitted by the complainant. In the town's response, they advised that "Council has reviewed the allegations of improper conduct and have found them without foundation." In addition, they provided the council meeting minutes and two DVD recordings of the council meetings in question for our review. The information obtained from these submissions is as follows:

DVD Recording for the first referenced Council Meeting:

The DVD of the first council meeting had a recorded time of one hour and fifty-seven minutes. Within this recording, the councillor was present at the meeting and shown seated with other councillors at the council table. There was a public gallery for this meeting, but it was not within the focus of the camera. The former mayor presided over this meeting as chair. Subsequent to the events complained about, a new mayor was elected and there were staffing changes in the position of chief administrative officer (CAO).

In our review of this recording, we saw no evidence that a conflict of interest was disclosed or recorded. However, we note that immediately following the former mayor's introduction of an agenda item concerning the councillor and his wife's (the applicants) request for a subdivision, the councillor excused himself from the proceedings indicating that he required a personal break.

The council meeting proceeded and the initial request outlining the applicant's desire to subdivide their property was presented to council members as the first item of "New Business" by the acting CAO of the Town of Neepawa. This request was presented to council to clarify several issues prior to a formal subdivision request being submitted. Throughout the presentation, various issues were identified within the applicant's correspondence as items that needed to be addressed before this request for a subdivision could proceed.

The presentation disclosed that the applicants had previously made inquiries to both the planning office and town council, and also indicated that additional information was required from town staff surrounding various issues, prior to the applicants proceeding with their subdivision request.

Following the staff presentation of this agenda item, the councillors discussed the subdivision request and the various questions posed by the applicants to be investigated by the town. Additionally, the councillors were provided with the opportunity to voice any further concerns they could foresee surrounding the subdivision request and to identify any additional items that may need to be considered prior to a subdivision application being made.

At some point during the presentation, the councillor returned to the meeting but the timing of his re-appearance is not captured on the video. Throughout the presentation, the councillor in question does not engage in the conversation with other councillors. At the conclusion of these discussions, the former mayor advised that the matter would go back to the town staff to further investigate the identified issues and for "fact finding." The matter was concluded for this meeting.

Minutes for the First Council Meeting:

A review of the minutes for the council meeting, which is available on the town's website, confirms the following under the heading of New Business:

Subdivision Request – [Names]:

[Names] are looking at sub-dividing their property to provide rural residential acreage options for potential residents. Currently there are no such properties available within Town limits. They have had numerous inquiries for small two acre parcels over the years and feel it is time to pursue this endeavor.

[Name] has inquired to the Planning Office and Town Council with responses from both. However there are more answers from Town staff needed.

Council questioned how we address emergency situations with only one access road that is not 100% dependable, and at what point does this get addressed. Fire hydrants are another issue that needs to be looked at. Staff answers should be based on our existing policies and how this fits together.

Council would like staff to look into putting in extra culverts and dredging the ditches to prevent spring runoff damaging the road.

Staff to further investigate and come up with answers.

DVD Recording for the Second Council Meeting:

The DVD of the meeting in question had a recorded time of two hours and fifty minutes. Within this recording, the councillor was present at the meeting and shown seated with other councillors at the council table. There was a public gallery for this meeting but it was not within the focus of the camera. The former mayor also presided over this meeting.

In our review of this recording, we note that the councillor remained at the table when the agenda item of his subdivision request was introduced by the former mayor. The former mayor addresses the councillor, asking if he was going to stay for the discussion of the item.

The DVD captures a clear view of the councillor responding to the inquiry of the former mayor, stating "that this item is still on the agenda as old business as the information he is waiting for hasn't come forth and that we will just have to address it as staff is able to put the information together." The acting CAO identifies that "this is an ongoing project of [staff names] and we are just trying to work out a few things to present back to [names]." The former mayor then states that as the staff project "is not complete yet" that it concludes the agenda item at this time and the meeting moves on to the next agenda item.

Minutes of the Second Council Meeting:

A review of the minutes for the council meeting on the town's website, confirms the following under the heading of Old Business:

Subdivision Request – [Names]:

The information required has not been completed yet and a few details are being worked on to present back to [names]. [Name], NAPD and [name], Engineering Assistant are working on this.

POSITION OF THE COUNCILLOR

The councillor acknowledged having been in attendance at the first council meeting wherein his subdivision request was introduced to council. The councillor advised that prior to this meeting, he had met and declared a personal conflict of interest regarding a request to subdivide his land to the acting chief administrative officer and the former mayor.

The councillor further advised that he had asked the acting CAO and former mayor if he should remain seated at his regular chair during the council meeting while the request was being presented to council. He indicated that the former mayor had advised that it was acceptable to remain seated in his regular chair at the council table and further identified that physically moving to a different chair was not required. He also stated the matter of his subdivision request was being held in the council chambers at a regular council meeting, wherein requests were frequently presented to council by other individuals, who would occupy a designated chair at the council table during their presentation.

The councillor also acknowledged that he was in attendance at the second council meeting in question. He indicated that he was not in a conflict of interest because the appearance before council was to respond to the council's inquiries and that the matter was not being voted on. He advised that he did not try to influence anyone and that the matter of his subdivision request is still outstanding with council. The councillor also stated that he has a right like anyone else to appear before council on a matter of personal business in accordance with subsection 17(1) of the act. He further advised that both he and his wife have only consulted with the Neepawa and Area Planning District and have never submitted a formal subdivision application to proceed with subdividing their land.

ANALYSIS OF ISSUES AND EVIDENCE

The following provides the results of our investigation as it relates to concerns the complainant raised with the ombudsman, regarding the councillor's alleged conflict of interest.

We note that subsection 6(1) of the act states that the clerk of the meeting shall record the disclosure, confirm the interest and withdrawal of the councillor from the meeting and file a record of these with the clerk of the municipality as follows:

Record of compliance

6(1) Where a councillor has complied with subsection 5(1), the clerk of the meeting shall record

(a) the disclosure;

(b) the general nature of the direct or indirect pecuniary interest or liability disclosed; and

(c) the withdrawal of the councillor from the meeting;

and the clerk of the meeting shall subsequently file with the clerk of the municipality

(d) the information recorded under clauses (a), (b) and (c); and

(e) a notation indicating whether the meeting in question was open to the public, or was a closed meeting or a meeting the minutes of which are not open to the public.

The town has not provided us with any information to confirm that these conditions have been met. From the information we have received, we can confirm that a conflict of interest disclosure was not made at either of the council meetings in question, or recorded within the meeting minutes.

In the course of our investigation, we were advised that a conflict of interest disclosure was made by the councillor to both the then acting CAO and the former mayor prior to the occurrence of these council meetings. Our office contacted the town to verify this information and spoke with the current CAO to determine if there would be a record of the councillor's declaration of a conflict of interest.

The current CAO advised that there was no formal documentation or procedure to record this type of information outside of meetings and that if it existed, it would likely have been recorded in the personal notes of the acting CAO and mayor at the time. This would not have met the requirements of the act.

In response to the councillor's position, our office considered the process by which an elected official can bring a matter of his own financial interest to council. In accordance with the act, the councillor would have the same rights as any other resident of the community to present a proposal to council concerning his own personal interests.

Subsection 17(1) of the act addresses the councillor's ability to appear before council on a matter of personal interests. It states:

Right to appear:

17(1) Notwithstanding anything in this Act, but subject to subsection(3), a councillor has the same right as any other resident of the municipality to appear before a meeting for the purpose of representing his personal interests in

(a) an application for a variance in a zoning by-law; or

(b) an application for a conditional use under a zoning by-law-law; or

(c) a complaint in respect of a business, realty or local improvement assessment.

No right to vote:

17(3) Where the councillor sits on any body which considers a matter referred to in subsection (1), the councillor shall not vote on the matter.

While the legislation is clear that a councillor can act as an applicant and make representation, there are expectations relating to how elected officials should govern themselves when making representations that involve their personal interests.

CONCLUSION

It is our understanding that the subdivision request by the applicants remains outstanding, without a vote ever being called by council. Additionally, the councillor is of the view that the information disclosed on behalf of he and his wife at the first council meeting, was only to advise that they were looking at subdividing their property, and to pose questions for council to address prior to the subdivision proceeding. Furthermore, we can confirm that a formal application for subdivision has never been submitted by the applicants to the Neepawa and Area Planning District.

The councillor further advised that his attendance at the second council meeting was to address questions from council generated from the discussion held at the previous meeting. We can confirm from the DVD recording provided by council, that the discussion which occurred during the course of this meeting, only confirmed that the matter was still ongoing and that additional information was still required to satisfy the questions presented during the first meeting.

Nevertheless, the expectation of a councillor when he/she has a personal interest in a matter before council is to make a disclosure of the interest, remove him/herself from the meeting, and not attempt to influence the matter in any way if it is a matter going to a vote. A councillor, who has declared a personal interest, has the obligation to not take part in the debates or discussions in respect of his/her interest or give the perception that a conflict of interest may exist.

In our publication, *Understanding Fairness, A Handbook on Fairness for Manitoba Municipal Leaders*, it states:

The appearance, or perception, of conflict can be as harmful to public confidence as actual conflict.

Once a connection between your personal interests and your public decisions is made, it can be difficult to demonstrate that your decision was not influenced by your personal interest.

Conflict, or the perception of conflict, can occur even when there is no financial interest. This happens in cases where you are seen to be too close to the parties on one side of a dispute, or where you are seen to be at odds with one of the parties.

The intent of the legislation is to preserve the integrity of council's decision making process, and to prevent councillors from being involved in the decision of a matter in which they may have a personal financial interest.

In this case it would appear that the councillor made representation which is permitted pursuant to subsection 17(1) of the act. However, while there appears to be no evidence to suggest that the councillor attempted to influence anyone, his attendance at the council table may have given the perception of a conflict of interest to the public.

It would have been beneficial had the councillor did the following:

1. Clearly identified his personal interest for the record within the council meetings; and
2. Made representation as would any other applicant and not remain seated with the council.

As a result of this investigation, we identified a potential administrative improvement in that the Town of Neepawa does not have a clear policy to address situations like this. As result, our office met with the mayor and chief administrative officer on June 28, 2013, and they have committed to the following actions:

1. To ensure a written procedure exists to address councillor's disclosure of any personal interest in an item on council's agenda, and to record such disclosure in accordance with the requirements of subsection 6(1) of the act; and
2. To ensure a written procedure exists to address councillors making representation as would any other applicant, in the designated spot for that purpose, and not remain seated at the council table.

We appreciate the cooperation and assistance provided to our office by the Town of Neepawa, and the town's commitment to implement administrative improvements based on our suggestions. The implementation of the suggested changes should bring transparency to future council meetings and address the problem that gave rise to the perception of a conflict of interest in this case.

As the town has embraced the administrative improvements identified and suggested during the course of the investigation, no formal recommendations were made in this case.

MANITOBA OMBUDSMAN
August 16, 2013