Manitoba Ombudsman

**REPORT UNDER**

***THE OMBUDSMAN ACT***

**CASE FILE NUMBER 2013-0222**

**RURAL MUNICIPALITY OF DE SALABERRY**

**REPORT ISSUED OCTOBER 16, 2015**

## CASE SUMMARY

Eight individuals complained about the process in which a new sewage system was approved in the Rural Municipality of De Salaberry (the RM). The complaints focused on the basis for initiating the project and raised concerns about whether council met statutory requirements in seeking approval for this local improvement project

In dispute were a number of issues including; the validity of a petition referenced in the project documentation, the adequacy of notice provided for the public hearing, the accuracy of information provided to taxpayers by the RM at the public hearing, and the accuracy of the information ultimately provided by the RM to the Municipal Board of Manitoba for final approval of the project.

It is also alleged that the borrowing by-law to fund this project was defeated and that two council members were in conflicts of interest when they participated in debates and voted on the installation of the new sewage system.

Manitoba Ombudsman supports the complaint that the RM did not fulfill all of its statutory obligations with respect to the local improvement by-law for the new sewage system. As a result, we have made the following recommendations:

**Recommendation 1:** The RM should provide an updated fact sheet to all taxpayers affected by this local improvement. This information should include, but not necessarily be limited to, the following:

- a breakdown of costs to date and a breakdown of any further costs required to complete this project
- a detailed map showing the exact number and size of lots in the area

- the number of pre-existing sewer connections (pre-2014) identified in the local improvement area
- information on the tendering process,
- any unanticipated costs related to this project
- any anticipated cost overruns

**Recommendation 2:** To improve accountability and transparency, the RM should post all minutes of council and council committee meetings on the RM website and at the RM office. Further, the RM should post the terms of reference for each council committee, including membership and the frequency of meetings, and provide sufficient prior notice of meeting dates and times at the RM office and on its website.

**Recommendation 3:** The RM should update the *Council Member's Code of Conduct* to be consistent with the *Code of Conduct of Municipal Employees*, and post both codes of conduct at the RM office and on the RM website. Further, each council member should sign a document acknowledging that they have read and understand the *Council Member's Code of Conduct.*

**Recommendation 4:** The RM should use the registered mail service provided by Canada Post to inform objectors to local improvement plans of their right to attend and participate in public hearings held by the Municipal Board in accordance with *The Municipal Act*.

**Recommendation 5:** The RM should update its tendering and procurement policy to comply with section 251.1 of *The Municipal Act* and post it at the RM office and on the RM website. Further, this updated policy should provide guidance on the appropriateness of sole source contracts.

**Recommendation 6:** The RM should amend their *Procedures and Policy By-law* to stipulate that all motions, with the sole exception of the Motion to Adjourn, be provided in writing prior to any vote.

**Recommendation 7:** That council members and administrative staff for the RM undergo training to acquire a better understanding of legislative and policy requirements regarding conflicts of interest, procurement and tendering, and the principles of procedural fairness.

**Recommendation 8:** That the RM develop a policy for how it will address instances of conflict of interest and the perception of bias to ensure compliance with all legislative and policy requirements.

**Recommendation 9:** The RM should record each meeting of council or council committee in order to provide a definitive record of what was discussed. This can be an audio or audio-video recording and copies of this record should be stored with the minutes of the relevant meeting.

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## OMBUDSMAN JURISDICTION AND ROLE

As set out in section 15 of *The Ombudsman Act*, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, municipalities, and their officers and employees:

> ***Investigations***
>
> *15 The Ombudsman may, on a written complaint or on her 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 investigative process we follow is non-adversarial. We carefully and independently consider the information provided by the complainant, the decision maker(s), and any witnesses we determine to be relevant to the case. Administrative investigations can involve an analysis of statute or by-law provisions, document reviews, interviews and site visits.

The ombudsman will either support a complaint and identify the appropriate corrective or restorative action, or provide a reasonable explanation for the conclusion that a complaint cannot be supported. If a complaint is supported by a finding of maladministration, the ombudsman may make recommendations pursuant to section 36 of *The Ombudsman Act*.

Administrative investigations can also identify areas where improvements may be suggested to a government body without a finding of maladministration. Such suggestions are made to support and help government bodies achieve better administration, often through the adoption of best practices. Improved administrative practices can improve the relationship between government and the public, and reduce administrative complaints.

## THE COMPLAINT

Eight individuals complained about the process by which a local improvement project (the installation of a new low-pressure sewage system) was approved for the area north of Gosselin Road in St. Malo in the Rural Municipality of De Salaberry.

The complainants are seasonal residents in the affected area and raised a number of concerns with how the RM initiated the local improvement project, secured funding, and allocated the cost for the project. The complainants also believed that the RM was not forthcoming with

information about the project. They alleged that the project was being undertaken to benefit local developers and construction firms and that seasonal residents would bear a disproportionate amount of the cost.

## OUR INVESTIGATION

In our investigation of these complaints, we considered whether the RM fulfilled its statutory obligations regarding the implementation of the local improvement project. We also reviewed the RM's administrative practices regarding record keeping and meeting minutes, the transparency of tendering and awarding of contracts, and concerns about conflicts of interest.

Our investigation included the following:

- Interviews with the complainants, reeve and council, the chief administrative officer (CAO), the former CAO, and other municipal staff

- An interview with the private consultant who was the project lead for the local improvement project

- A review of the relevant sections of *The Municipal Act*, *The Municipal Council Conflict of Interest Act* and *The Planning Act*

- A review of the following sections of the *Municipal Act Procedures Manual*:
    - Part 5 Practice and Procedures
    - Part 6 Financial Administration
    - Part 10 Powers of Taxation
    - Part 14 Public Notices
    - Part OM Conflict of Interest

- A review of the following RM of De Salaberry documents:
    - Council and committee meeting minutes dating back to June 2010
    - RM of De Salaberry application by-law approval package to Municipal Board
    - RM of De Salaberry organizational by-law 2282-10
    - RM of De Salaberry procedures and policy by-law 2281-10
    - RM of De Salaberry tendering and procurement policy (updated on February 14, 2012)
    - RM of De Salaberry listing of cheques from 2010 to December 2013
    - RM of De Salaberry Statement of Assets and Interests of all council members

- A review of *The Interpretation Act* regarding notice requirements

- Consultation with Manitoba Municipal Government and the Manitoba Municipal Board to obtain additional information on by-law applications and statutory declarations with respect to local improvements

- A review of the recording of the Municipal Board hearing held on April 12, 2013

- Consultation with Manitoba Conservation (now known as Conservation and Water Stewardship) to confirm information about the cottage lot draw and requirements for sewage with respect to these cottages

- A review of publications available relating to municipal meeting procedures, including:
    - *Municipal Council Meeting Guide* published by Advisory Services and Municipal Relations Branch, Government of Saskatchewan, October 2013
    - *Robert's Rules of Order*
    - *Parliamentary Procedure*, The Government of Manitoba
    - *The Municipal Councillor's Guide 2010*, Ontario Ministry of Municipal Affairs and Housing
    - *Guide to Meetings of Council 2005*, Nunavut Municipal Training Organization.
    - *Municipal Councillor's Handbook*, second edition, Province of Newfoundland and Labrador, Department of Municipal and Provincial Affairs and Dr. Peter G. Boswell
    - *A Handbook for Municipal Councils*, November 2008, Lorena Staples, Q.C; Staples, McDannold, Stewart; Victoria, British Columbia

- A review of council meeting minutes from other Manitoba municipalities to compare methods of recording decisions, and readings of by-laws

A draft version of this report was previously provided to the RM for their review and comment. Based on feedback we received from the RM in July 2014, we revised the report. Given that council membership changed significantly following the October 2014 election, we again submitted the report to the RM for review and comment. We received the RM's feedback on May 19, 2015 and have included comments from the RM in this report.

## BACKGROUND INFORMATION

### Local improvements

*The Municipal Act* provides municipalities with the legislative authority to govern and provide municipal services. A local improvement is one means by which a municipality can borrow money for large capital projects and then raise the funds through municipal taxes to repay that money.

*The Municipal Act* requires council to communicate with potential taxpayers and make information accessible to allow taxpayers to review, consider, support or object to a proposed local improvement plan before it is adopted. As the *Municipal Act Procedures Manual* states:

> *Local improvement and special service by-laws allow municipalities to tax only the taxpayers who will benefit from the local improvement or special service provided. Given the uniqueness of this financing method,* The Municipal Act *imposes obligations on councils to communicate with the public, hold public meetings and make information accessible. This allows the taxpayers the opportunity to review, consider and support or object to the plan or proposal before it is adopted.*[1]

The local improvement process allows citizens who believe a decision by their elected representatives is unreasonable to exercise veto power when two-thirds of potential taxpayers are opposed to a project and file objections to it in accordance with the provisions of *The Municipal Act.*

Provincial law requires that a proposed local improvement plan identify the cost of the project for which money is to be borrowed, who is to bear the tax burden, how that burden is to be distributed, and the details of the borrowing.

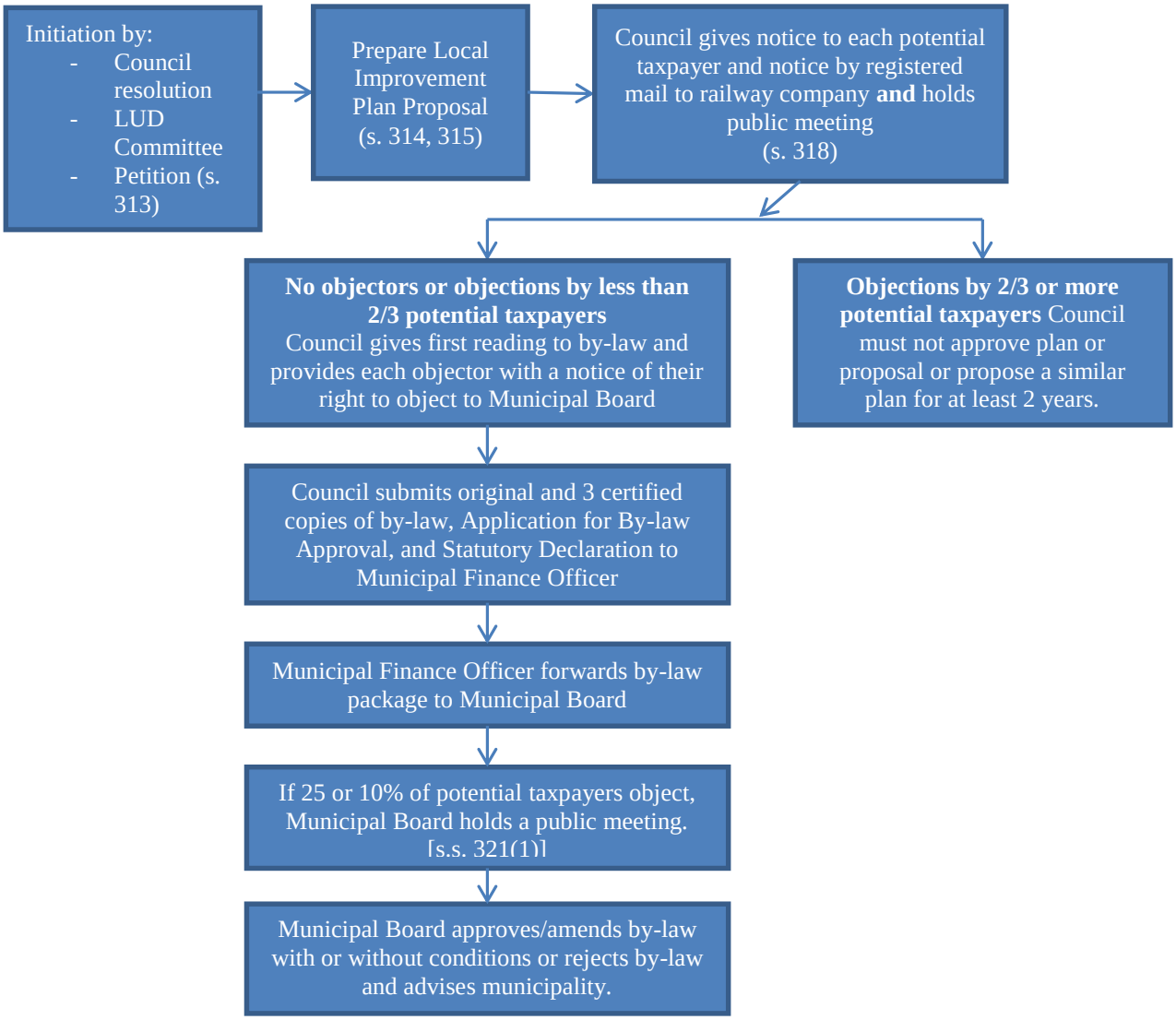
Provincial law also requires that citizens be notified of a local improvement plan and that they be given the opportunity to express their support or opposition, first to their municipal council at a public hearing and, if required, to the Municipal Board. Notice of the public hearing must be mailed to individual property owners affected or, if everyone is affected, published in a local newspaper. Notices must contain specific information about the plan.

Municipalities interested in undertaking a local improvement can refer to the *Municipal Act Procedures Manual* produced by Manitoba Municipal Government (MMG) to assist them with the interpretation of *The Municipal Act.* This manual provides samples of by-laws, procedures, policies, and letters to assist municipal administration staff. As well, municipal staff can contact MMG for advice and guidance.

[1] Page 10.1.1

The process for a local improvement is set out in Part 10, Division 4 of *The Municipal Act*. *The Municipal Act Procedures Manual* provides a chart that illustrates this process.[2] This chart is replicated below.

**Process for Local Improvements – *The Municipal Act Procedures Manual***




## Low-Pressure Sewage Systems

A low-pressure sewage system (LPSS) can be a cost effective alternative to gravity-based sewage systems commonly used in larger centres. With the LPSS, individual submersible pumps at each connection push liquids out of the septic tank into sewer pipes. Property owners require a two-stage septic tank so solid waste can settle and biodegrade into a liquid that can be pumped

[2] This chart can be found on Page 10.1.7 of *The Municipal Act Procedures Manual*.

into a liquid chamber and then into the low-pressure sewer system. In contrast, a gravity-based sewage system is more expensive, does not use septic tanks and requires larger pipes.

## The LPSS for the cottage area at St. Malo

Manitoba Conservation held a cottage lot draw in 2004 and several lot owners expressed interest in a low-pressure sewage system at that time. In response, the RM hired consultants to complete design work and conduct surveys and feasibility studies between 2005 and 2008.

In a January 8, 2008 letter, the CAO advised cottage lot owners and lot owners in the neighbourhood that the proposed LPSS was being put on "pause" as the RM had received a petition from 12 out of 20 cottage lot owners indicating that they, along with another six lot owners in the immediate neighbourhood, disagreed with the current proposal:

> *Therefore, due to the resounding response received through this petition and individual phone calls to the office, council has decided to put this project on "pause" until there is a considerable change in the dynamics of the area such as development of* [Name Redacted] *property at the corner of Forest Road and Gosselin Road or further development in the Bocage area. Once the area benefits from increased development where we can share the cost of infrastructure over more lot owners to lessen the initial cost of the lines, then council will reopen the file and continue investigating the possibility of these services. In the interim, council will lobby both levels of government for some 'green funding/grants' to help with the elimination of septic fields or illegally installed/faulty holding tanks around the lake.*

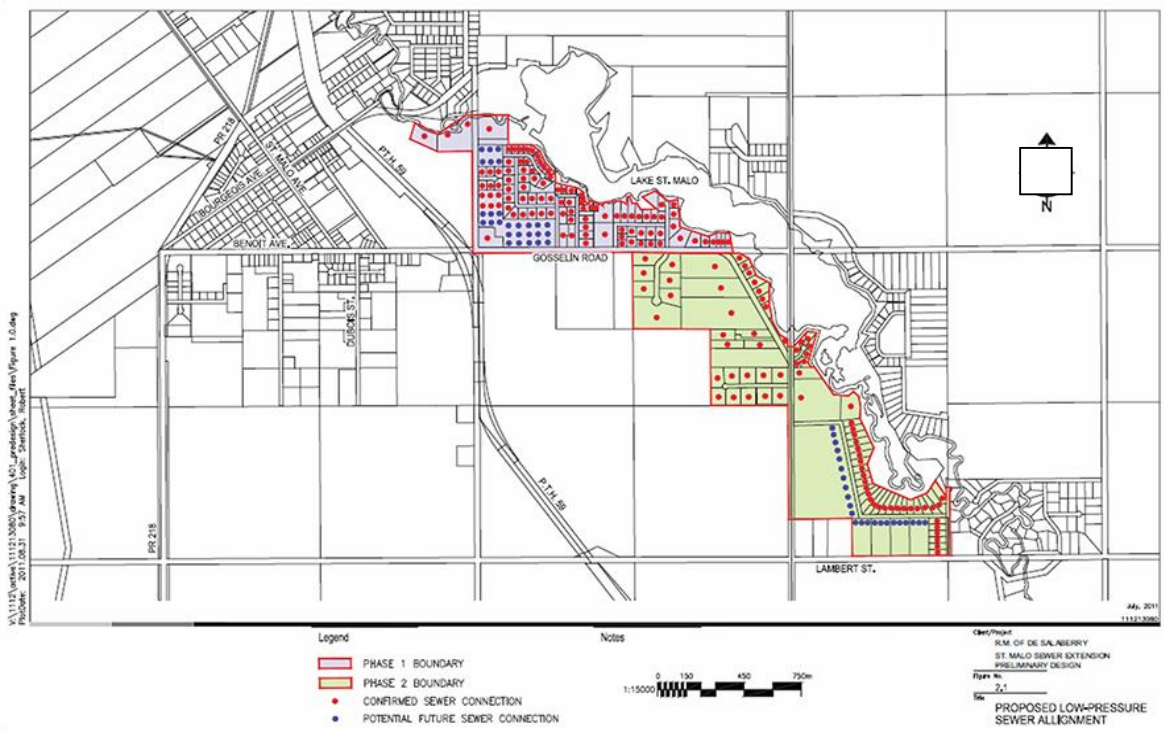
The matter resurfaced in June 2010 when a petition of 46 signatures[3] supporting the installation of a low-pressure sewage system was presented to councillors at a council meeting. Council subsequently hired a consulting firm to update cost estimates for the project.

Shortly thereafter, the RM decided to proceed with a local improvement project to construct the LPSS to service 100 lots in the area between Lake St. Malo and Gosselin Road. The affected taxpayers who would benefit from the local improvement would be charged a tax levy over a period of years to pay for the project. As per statute, the term of the borrowing would not exceed the estimated useful life of the capital property.

A map of the area, prepared by an engineering firm and posted on the RM website, outlines the size of lots in the affected area. The complainants have property in Phase 1 of the plan (outlined in purple in maps on the following page). Other property owners who are located in Phase 2 of the development and will be affected at a future date, are shown in green on the maps.

[3] There were a total of 46 signatures on the original petition. There were some other notes on the original petition document that indicated a total of 67 signatures, but these notes refer to lots rather than to individuals. Eight signatories qualified their support for this project with the phrase "subject to cost."


** enhanced view of area identifying affected lots in phase 1*




** Original map with dots showing existing and potential future lots for phase 1 and phase 2 of local improvement*

# FINDINGS AND ANALYSIS

## The Local Improvement Plan

### Initiating the local improvement process

We reviewed the steps the Rural Municipality of De Salaberry took with respect to the local improvement process. Section 313 of *The Municipal Act* outlines the requirements for local improvements and the circumstances in which such a plan can be initiated.

> ***Plan or Proposal***
> ***313*** *A municipality must prepare a local improvement plan or special service proposal if the local improvement or special service has been*
> *(a) Proposed by the council;*
> *(b) requested by the committee of a local urban district; or*
> *(c) requested in a petition to the council signed by at least 2/3 of the potential taxpayers under the plan or proposal.*

In order to determine how this project was initiated, we reviewed the relevant minutes of council and committee meetings. The June 29, 2010 council meeting minutes state that a petition was presented to council by a local property developer and a local contractor. As a result, a resolution was passed to authorize an engineering firm to update the costs of the project:

> [Name Redacted] *and* [Name Redacted] *presented a petition requesting the revival of a dormant project council initiated 3 years ago to extend a low-pressure sewer line along the south shore of St. Malo Lake. This project was tabled due to lack of interest at the time from the local ratepayers. This proposed line would replace existing septic fields, leaking holding tanks and many unserviced lots. The petition has 49 signatures, not including the Spillway Cove and area subdivision which would bring the number to 67 new service connections. The motion was moved by Councillor* [Name Redacted] *and seconded by Councillor* [Name Redacted]*."*
>
> *Council resolved that it authorized the CAO to contact* [Company Name Redacted] *to update the Gosselin Road Low-Pressure Sewer Project cost estimates.*

On January 10, 2012, council passed Resolution 245-10. This resolution acted as the initiating resolution for the local improvement process:

> *Be it resolved that council hereby approve that the municipality commence the Local Improvement Plan process for the Gosselin Road Low Pressure Sewer Project.*

The complainants, however, indicated that they were not aware of the initiating resolution or the existence of the petition until just prior to the December 10, 2012 public hearing for the project. The notice for the public hearing that was mailed to local taxpayers contained the following statement:

> *The council of the RM of De Salaberry received a petition from residents to establish a sewer system for the north of Gosselin Road in the community of St. Malo. In order to address the request of the residents a consultant was hired.*

The statement above was also included in the background information provided by the RM at the December 2012 public hearing. Despite the presence of the initiating resolution, the RM continued to publicly rely on the petition as evidence of public support for this plan.

The complainants advised our office that they were informed by the RM at the December 2012 public hearing that the petition with 46 signatures was the basis for proceeding with the proposed local improvement. Moreover, a January 16, 2013 public notice issued by the RM titled "Objections to the Municipal Board in respect of local improvement plan by-law 2310-12" stated that council was acting in response to the request of local residents:

> ***(a) Description of the Proposed Local Improvement***
>
> *The council of the RM of De Salaberry received a petition from residents to establish a sewer system for the area in question. The RM then hired a consultant to establish a low-pressure wastewater collection system for the area north of Gosselin Road in the community of St. Malo. In order to address* ***the request of the residents*** *this local improvement is proposing the construction of a new low-pressure wastewater collection system that will connect to the existing wastewater system.* [**emphasis added**]

As well, the *Decision and Order* issued by the Municipal Board references the presentation by the RM's consultant in which the link between the petition and the proposal is acknowledged. The consultant is noted as stating the following:

> *The present proposal is in response to a petition received by the Council in 2010 for servicing the area south of Lake St. Malo.*

Despite many references to the petition, the RM in its initial response to our office stated:

> *There is no evidence confirming that the local improvement plan by-law was initiated by a petition. The petition initiated Council for the Rural Municipality of De Salaberry to hire a consultant. Based on the researched findings provided by the consultant, Council initiated the local improvement based on a recommendation from the LID*[4] *Committee*.

[4] "LID" refers to Local Improvement District. This footnote does not appear in the RM response.

Further, the RM stated:

> *The petition was never filed with Council, the petition was presented at the Regular Council Meeting of June 29, 2010 (see attached meeting minutes). The resolution to follow was to authorize the CAO to contract* [Company Name Redacted] *to update the Gosselin Road Low Pressure Sewer Project cost estimates. The petition was not the basis for this specific local improvement and, in fact, not what Council relied on to initiate by-law 2310-12.*

Section 313 of *The Municipal Act* outlines three ways in which a local improvement plan can be initiated:

- proposed by the council;
- requested by the committee of a local urban district; or
- requested in a petition to the council signed by at least 2/3 of the potential taxpayers under the plan or proposal.

Given that the RM repeatedly referred to a petition in its documentation, it is understandable why the complainants believed that the petition was the basis for the plan.

While the RM stated to us that the petition was not the basis for proceeding with this local improvement and that it passed an initiating resolution, the RM did not clearly communicate that information to taxpayers affected by the local improvement. In reviewing the documentation and how the petition was represented by the RM, it would be our view that the petition was the basis publicly offered by the RM for proceeding with the local improvement.

## Sufficiency of the petition

As a result of the RM's references to the petition, the complainants obtained a copy of the document in June 2013. After reviewing the petition and comparing it to the requirements in *The Municipal Act*, the complainants questioned its validity as the basis for initiating the proposed local improvement project.

We note that that the complainants first requested a copy of the petition from the RM when they learned of its existence in December 2012. This request was refused by the RM. The complainants then made a formal application to the RM under *The Freedom of Information and Protection of Privacy Act* (FIPPA). When that was not successful, they made a complaint under FIPPA to the Access and Privacy Division of Manitoba Ombudsman. The ombudsman supported the complaint and the RM provided the petition to the complainants.

As part of our investigation, we reviewed the petition to determine if it would have been sufficient to initiate a local improvement plan, as set out in *The Municipal Act*. Subsection 156(1) of *The Municipal Act* requires that the CAO determine the sufficiency of a petition. Section 154 sets out sufficiency requirements:

***Sufficiency of petition***
***154(1)*** *A petition is sufficient if it complies with this section.*

***Information about each petitioner***
***154(3)*** *A petition must include the following:*
*(a) in printed form, the surname and given name or initials of each petitioner;*
*(b) each petitioner's signature;*
*(c) the date on which each petitioner signs the petition;*
*(d) the address of each petitioner's residence;*
*...*
*(g) in the case of a petition under clause 313(c) (local improvement or special service), the address of the property in respect of which each petitioner is liable to pay the tax.*

***Petitioners for local improvement or special service***
***154(6)*** *In determining the number of petitioners required on a petition under clause 313(c),*
*(a) where a parcel of land or a business is owned by more than one person, only one person is counted;*

*The Municipal Act Procedures Manual* also has a section dedicated to determining the sufficiency of petitions. The manual indicates that the following information is required for each petition:

- A statement of purpose on every page
- The petition must be filed with the CAO
- The signatures on the petition have to be witnessed and the witness has to sign opposite the petitioner's signature
- The petition requires the name and address of a representative of the petitioners
- If the petition is related to a local improvement, only one person is counted where a parcel of land is owned by more than one person

The RM provided us with a copy of the petition, titled *Petition to bring low-pressure sewer line to east side of PTH 59 to service houses and cabins south of St. Malo reservoir,* which it received at its June 29, 2010 council meeting.

As a petition requesting a local improvement plan, it could only be sufficient if signed by at least two-thirds of the potential taxpayers, as per clause 313(c) of *The Municipal Act*. We note that the proposed plan was to include 100 lots. Thus for the petition to be considered sufficient, 67 eligible signatures would be required. The petition, however, contained only 46 signatures. In addition, there were other statutory requirements in which the petition, in our view, was deficient. This would include the following:

- signatures not witnessed or dated
- some parcels of land had more than one signature attached to them
- some signatures did not include the address of the property

- ineligible entries, including two entries that give an address but do not include signatures of any people
- the notation of 6 [redacted address] and "13 Additional Lots" appeared to have been counted as 19 individual signatures
- the name and address of a representative of the petition sponsors, which should appear on each page of the petition, is not provided

Based on the information we reviewed, the petition did not meet sufficiency requirements of *The Municipal Act.* There is also no record of the CAO having determined the sufficiency of the petition before it was presented to council.

When the validity of this petition was challenged by residents, council took the position that the petition was not the basis for proceeding with the local improvement and therefore it was not required to consider its sufficiency. It is clear, however, that council accepted the petition as evidence of public demand for this project.

Although the RM insists that they initiated this project through a resolution, they do not mention this fact in any of their public communications. Instead, communications from the RM repeatedly mention the petition as the reason for this project, including in their submission to the Municipal Board. It is not surprising, therefore, that those opposed to this project focused their attention on the petition.

It is also of concern to our office that the petition was not available for taxpayers to review at the public hearing or when they initially requested this document from the RM. Had the complainants not made a FIPPA request to the RM and a subsequent complaint under FIPPA to the ombudsman, the petition would have been kept private and the noted deficiencies would not have been discovered.

Unnecessarily withholding this information contributed to a lack of trust between the complainants and municipal officials that could have been avoided. Given the RM and their consultant referenced this petition, it should have been available for public review.

## Notice of plan and public hearing

The complainants state that they first heard about this proposed local improvement when they received a notice of the December 10, 2012 public hearing. The complainants advised that the RM mailed the notice on November 19, 2012. According to the complainants, this timing would not have met the requirements of The *Municipal Act* in terms of providing sufficient notice of the upcoming public hearing.

The requirements for notice of a public meeting relating to a proposed local improvement are set out in section 318 of *The Municipal Act*:

> ***Notice of plan or proposal and public hearing***
> ***318(1)*** *After preparing a local improvement plan or special services proposal, a municipality must send a notice of the plan or proposal by mail to each potential*

*taxpayer under the plan or proposal and hold a public hearing with regard to the plan or proposal.*

***Time to send notice***
***318(1.1)*** *A notice under subsection (1) must be sent to each potential taxpayer at least 21 days before the date of the public hearing.*

The information we reviewed indicates that the notice was sent out by the municipality on November 19, 2012 for the public hearing scheduled on December 10, 2012. This information was confirmed by the CAO at the Municipal Board hearing.

We calculated the number of days between the time the notice was sent, November 19, 2012, and the date of the public hearing, December 10, 2012. We noted that, in accordance with *The Interpretation Act*, the date of the occurrence of the public hearing is not included in the number of days counted:

***Time period beginning after a specified day***
***22(2)*** *A period of time described as beginning after, or as being from, a specified day does not include that day.*

***Number of days between events***
***22(3)*** *A reference to a number of clear days or a minimum number of days between two events does not include the days on which the events happen.*

***Within a time***
***22(4)*** *When anything is to be done within a time after, from or before a specified day, the time does not include that day.*

The provision in question requires notice to be sent "at least 21 days before the date of the public hearing." The time is not expressed to be clear days, nor does it say that there are to be 21 days between the giving of notice and the hearing. As such, the time does not include the date of the hearing.

In light of the specific statutory requirement for 21 days notice, we conclude that the RM did meet the statutory requirement for notice of the public hearing relating to the proposed local improvement plan.

## Local improvement costs and related information

Under section 315 of *The Municipal Act*, the RM is required to provide potential taxpayers with a reliable estimate of the costs related to a proposed local improvement project.

As required by subsection 318(1) of *The Municipal Act*, the RM held a public hearing to inform potential taxpayers about the proposed local improvement plan. Each council member confirmed their attendance at the public hearing in December 2012 as required under subsection 160(2) of the act. We were advised by the complainants that the CAO chaired the public hearing and that a

consultant who was hired by the RM used a PowerPoint presentation to provide information about the proposed sewage system.

At the hearing, the complainants were advised that the tax levy would be based on a "per parcel of land" basis. The complainants took issue with this method of taxation. They believed that the RM determined the tax levy in a way that benefited larger land owners in the area, such as developers, and placed a disproportionate cost on smaller land holders like themselves, many of whom are seasonal residents. Under this method of taxation some complainants, who own older and smaller seasonal cottages, would pay the same amount as owners of newer, larger homes, which were likely to have a higher assessed value.

Subsection 316(1) of *The Municipal Act* outlines the options available to calculate the tax:

> ***Basis for calculating taxes***
> ***316(1)*** *Local improvement taxes or special services taxes must be calculated on the basis of one or more of the following:*
> *(a) the portioned value of assessable property that is real property;*
> *(b) the annual rental value of premises as assessed for the purpose of a business tax;*
> *(c) an amount for each unit of area of the lands benefited by the improvement or service;*
> *(d) an amount for each unit of frontage of the lands benefited by the improvement or service;*
> *(e) an amount for each business;*
> *(f) an amount for each parcel of land.*

The complainants stated that at the public hearing, there was no discussion of the various approaches to the tax levy and no explanation for the RM's decision. Given the impact of the decision regarding the method of taxation, the complainants felt that they should have been provided with the rationale behind council's choice of method for distributing the cost. Potential taxpayers benefit from knowing the reasons for council's decisions in order to decide whether they support the proposed local improvement plan.

We reviewed the RM's presentation and other information used at the public meeting. We were not able to find evidence of any information provided to potential taxpayers about how council reached its decision regarding the per parcel of land method of tax calculation for this local improvement plan.

In our interviews with the CAO and councillors, we were told that the RM chose the per parcel of land option because all individuals would use the sewage system regardless of the value of the dwelling on the property. We note that the issue of method of taxation was also raised at the Municipal Board hearing. In doing so the board noted:

> *The Board does not find reason to suggest changes to the method of financing. The Board does, however, make two recommendations to Council:*

1. *That Council consider the possibility of a seasonal sewer rate for seasonal cottage owners.*

2. *That in the matter of dealing with the per lot payment from future lot subdivisions within the L.I.D. and in the event that a significant number of potential 27 future lots move through the rezoning, subdivision, and by-law amendment process at the same time, Council carefully consider its two options under The Municipal Act, Excess Taxes Section 324 both (a) and (b). Section 324(a) speaks to the contribution to reserve option; Section 324(b) speaks to a refund option.*

*The Board took note that Council reduced the cost of hooking up to the system to a quarter of the cost and will not require properties within the L.I.D. to contribute to the financing of the new lift station even though they will benefit.*

In the July 2014 response to our draft report, the RM stated:

> *The choice of parcel of land method of taxation is very commonly used. The Municipal Act allows for municipalities to amend a by-law after subdivision and the protocol on handling excess funds associated with local improvement and special services...The local improvement has not been complete [sic] and the costs have not been determined. Once the project has been completed Council will decide on the appropriation of funds."*

In addition to concerns about the method of taxation, the complainants did not believe that other costs associated with the project were fully discussed at the public hearing. Complainants indicated that costs for the annual inspection fee, annual tank maintenance, user fees, possible electrical panel upgrades, the removal of old holding tanks, and installation of septic tanks were not included in the cost estimates.

Despite the complainants' view that they were not provided with all the costs associated with the project, the PowerPoint presentation prepared on behalf of the RM for use at the public meeting contained information on estimates for other costs that would be absorbed by potential taxpayers. We noted the presentation included a slide that states the following:

> *On-site connection costs will vary for each property owner as requirements for the system will require each property to have an approved septic tank (which must be inspected and approved for use by an individual appointed by the RM), a submersible pump, a backflow prevention value and a 32 mm service to property line.*
>
> *estimated cost to supply and install:*
>
> - *septic tank* *$3,000*
> - *submersible pump and valve* *$1,500*
> - *32 mm services* *$ 75/m*

*connection to existing plumbing $1,500*

While the above information was helpful, we note that after the public hearing additional expenses were added to the project by the RM without informing the affected taxpayers. Council held a special meeting the day before the April 12, 2103 Municipal Board hearing to pass a resolution charging an additional $500 per lot offsite service connection fee to potential taxpayers involved in the project.

Given the timing of this decision, potential taxpayers would not have been aware of this additional expense at the December 2012 public hearing nor is it likely that they would have been aware of this increase prior to the Municipal Board hearing on April 12, 2013. The timing of the decision regarding the additional expense to potential taxpayers increased concern about how the municipality was managing or sharing information about this local improvement project.

Subsection 318(1) of *The Municipal Act* does not specify the type, extent or accuracy of summary information that municipalities are required to provide to potential taxpayers. Although the RM provided some cost estimates with a disclaimer that costs may vary for each property owner, complainants felt that information provided by the RM was not adequate. For example, information about the average length of pipe required for properties, the costs for removal of holding tanks, and the required inspection and annual costs associated with this type of system would have been helpful for affected taxpayers.

We also note that affected taxpayers were not provided with all of the information about the number of lots, prior sewer connections, easement agreements, and the possibility of other projects in the community tapping into this sewer connection.[5]

Given that taxpayers already had concerns regarding this project, including the perception that they would be carrying a disproportionate share of the project costs, failing to provide this information increased the level of mistrust between taxpayers and the RM.

Many of the affected taxpayers still have outstanding questions that have not been answered by elected officials or municipal staff. Complainants who did their own calculations of costs with respect to this project found that the estimated costs in the presentation by the RM were far lower than what they estimated would be incurred.

While it is difficult to predict the exact costs of projects, it is incumbent on the municipality to provide enough information for taxpayers to clearly understand the implications and costs of the proposed local improvement plan

[5] There was tender for work on this project that was advertised on February 26, 2014. This advertisement indicates that the work is for **88** sewer services to property line in the St Malo low pressure sewer system. Subsequent to sending the draft report to the RM for comment, our office was informed that some of the developer lots within the local improvement had existing sewer connections without the necessary approval from provincial departments and, further, that subdivisions were approved by the RM in 2011. From our review of the RM files, this information would have been known to the RM.

## The Borrowing By-Law

### First reading of the borrowing by-law

The first reading of By-Law No. 2310-12 to authorize the LPSS local improvement and impose taxes as set out in the plan was held on October 30, 2012. This by-law was given first reading prior to the public hearing on December 10, 2012. Although first reading of a by-law is often considered a routine matter, this first reading occurred prematurely in the process.

According to *The Municipal Act* and *The Municipal Act Procedures Manual*, the RM should have held a public hearing to determine if any of the potential taxpayers objected to the plan before proceeding to give first reading of the by-law.

The local improvement plan process contemplates the active participation and consent of affected taxpayers. It provides taxpayers with an opportunity to contribute to the decision-making process and to express their support or opposition to the details of the plan before first reading of the by-law. In this case, the occurrence of first reading prior to the public hearing contributed to the perception that council had predetermined the outcome of this process and was not open to the needs and wishes of taxpayers.

In their July 2014 response to our initial draft report, the RM acknowledged their awareness of the process recommended in the procedures manual but took the position that the procedures manual was "advice only" and that this process "is not governed in The Municipal Act."

Manitoba Ombudsman disagrees and believes that the manual provides substantive guidance to municipalities when dealing with the statutory requirements that apply to many of their activities. The manual is based on the *The Municipal Act* and other pieces of provincial legislation relevant to municipal administration and is designed to support the efforts of municipalities as they deal with complex procedures as required by law.

### Notification about right to exercise objection at Municipal Board hearing

Subsections 320(4) and (5) of *The Municipal Act* require a municipality to give notice to each person who filed an objection to the local improvement plan of its intention to give third reading of the by-law, and of that person's right to object to the Municipal Board:

> ***Requirements before third reading***
> ***320(4)*** *Before giving third reading to a proposed by-law to approve a local improvement plan or special services proposal, a council must*
>
> > *(a) give notice to each person who filed an objection under subsection 319(1) of its intention to give third reading , and of that person's right to object under subsection (5); and*
> >
> > *(b) submit the by-law to The Municipal Board for its review and approval*

***Taxpayer objection to third reading***
***320(5)*** *A potential taxpayer under a proposed local improvement or special services by-law may, by filing a notice of objection with The Municipal Board within 30 days after notices are sent under clause (4)(a), object to the by-law being given third reading.*

One complainant advised our office that he filed an objection at the RM's December 2012 public hearing but was not notified of his right to attend or present at the Municipal Board hearing on April 12, 2013. In fact, he remained unaware of the Municipal Board hearing until after it had occurred.

The *Municipal Act Procedures Manual* states that the RM should maintain "*records of the name of each person in attendance at the public hearing and the name and mailing address of each person who files an objection (written or verbal).*"

Prior to the December 2012 public hearing, the project consultant working for the RM sent the deputy CAO an email on November 20, 2012, reminding the deputy of the need to record the names and mailing addresses of attendees, specifically those of objectors. Although the RM did not maintain records of each person in attendance at the public hearing, it did retain letters from 25 individuals who objected to the proposed local improvement plan.

We reviewed the RM file and noted that the RM did send a public notice to objectors informing them of their right to attend or present at the Municipal Board hearing. The document, "Public Notice for Objections of the Municipal Board in respect of local improvement plan by-law 2310-12, identifying council's intention to give third reading to by-law with respect to the local improvement," was dated January 16, 2013 and was signed by the CAO. This two-page document included a section in bold print that advised potential taxpayers to object directly to the Municipal Board within 30 days of the date of the notice.

We could find no evidence to confirm or deny the assertion of the single complainant that he was not notified of his right to object to the Municipal Board. While the municipality kept a copy of the notice sent to objectors, it failed to keep a list of people who were mailed this notice.

Subsection 421(1) of *The Municipal Act* deals with how notices should be delivered:

***Service of notices and other documents***
***421(1)*** *Except when this Act provides otherwise, where a notice or other document is required to be given, sent to, or served on a person, service may be effected*

*(a) by delivering a copy of it personally; or*

*(b) by sending a copy of it to the person by registered or certified mail or by other type of mail, delivery or facsimile transmission or other type of communication facility, for which confirmation of the notice having been sent may be obtained.*

Given only one person raised this issue and that the municipality was able to provide us with a copy of the notice it sent to objectors, it would appear that the requirements of the act were generally met and the failure of this one individual to receive a notice could have been an administrative oversight or simply that the notice was lost in the mail.

In the future, we suggest that the RM keep a record of all objections (verbal and written) it receives and a list of those who receive notice in respect of a Municipal Board hearing. Additionally, the RM should inform participants at public meetings that they have the option to document their presence at the meeting through a sign-in form.

In response to our initial draft report, the RM noted that it did retain all the letters from individuals who objected to the project and provided copies of these letters to the Municipal Board. The RM indicated that it did send objectors a notice of their right to attend or present at the Municipal Board hearing and that it is considering the use of registered mail to send Municipal Board notices to objectors in the future which, we believe, would provide reasonable assurance and documentation that notice was sent.

The RM also informed our office that it has implemented a sign-in and attendance sheet for all public hearings and will maintain copies of this record. It noted that participation in this process is voluntary.

## Information provided by the RM to the Municipal Board

In order to obtain approval for a borrowing by-law, municipalities must submit documentation to a municipal finance officer at Manitoba Municipal Government (MMG) for review prior to it being sent to the Municipal Board.

The complainants believed that the RM provided inaccurate and incomplete information to the Municipal Board for the hearing on April 12, 2013. They claimed that the RM incorrectly stated that proper notice of the December 2012 public hearing had been provided and that the RM had underestimated the costs of emptying holding tanks and the cost of upgrading in order to connect to the sewage system.

Our office contacted the Municipal Finance and Advisory Services (MFAS) branch[6] at MMG and the Municipal Board to request additional information concerning this allegation. We were advised by the Municipal Board that it is the responsibility of the parties involved to provide the evidence for the hearing. Further, we were informed that the board makes its decisions based on the evidence presented and generally does not verify statutory declarations and affidavits of municipal staff.

[6] Municipal Finance and Advisory Services (MFAS) is a branch of Manitoba Municipal Government, a Manitoba government department. MFAS provides a number of services to municipalities, including consulting or advisory services, training, statistical information as well as policy and legislative support. As noted in the excerpt from *The Municipal Act Procedures Manual*, MFAS also reviews submissions from municipalities that are to be brought before the Municipal Board for completeness and regulatory compliance.

We referenced the *Municipal Act Procedures Manual* and spoke with MFAS regarding the requirements of the documentation to be submitted to the municipal finance officer and the Municipal Board. With respect to this process, the procedures manual states:

> *3. Submit the original and three certified copies of the local improvement or special service by-law, the Application for By-law Approval, and a Statutory Declaration to:*
>
> *Municipal Finance Officer*
> *Municipal Finance and Advisory Services*
> *Box 22080*
> *Brandon, Manitoba R7A 6Y9*
>
> *Note: Samples of the Application for By-law Approval and the Statutory Declaration are available from the Municipal Finance Officer.*
>
> *4. The Municipal Finance Officer will review the documents before they are submitted to the Municipal Board, to ensure that all relevant documentation has been prepared, that proper notice has been given, and all necessary information included in the notice.*
>
> *5. Following the review, the Municipal Finance Officer will submit the municipality's by-law to the Municipal Board on behalf of the municipality. The Municipal Finance Officer will also advise the Municipal Board if there are any issues or concerns in regard to the plan or proposal.*

The RM submitted the following items in the by-law application package for review by MMG prior to submission to the Municipal Board:

- The application including information on the number of objectors and the estimated impact of this project.
- The statutory declaration of the CAO.
- The public notice of the local improvement plan and the date of the public hearing.
- The courtesy letter sent to potential taxpayers prior to the December 10, 2012 public hearing.
- The map of the proposed local improvement.
- The Schedule C-list of 100 properties by roll number, legal description, and costs listed.
- A copy of the envelope addressed to Councillor [Name Redacted] to show the Board the type of mailing that used for the notice.
- A copy of the RM Facebook page dated November 19, 2012 which contained a copy of the notice sent out to potential taxpayers.
- A copy of the notice that was posted on the RM website on November 19, 2012.
- Schedule B to By-law No. 2310-12.

On February 1, 2013, MFAS raised a number of issues in an email to the RM. MFAS noted that some clauses were missing or improperly completed in the statutory declaration and, as such, requested the municipality forward it the following documents; the Notice to Objector, copies of all written objections, and minutes from the public hearing.

We note that in the RM's submission package to the Municipal Board, the attached schedule "C" includes a listing of 100 properties, including the legal description and assessment roll number of each potential taxpayer. However, the same assessment roll number is used three times, indicating that there are possibly only 98 properties affected.

There were other deficiencies noted in the RM's proposed submission to the Municipal Board that was reviewed by MFAS. For example, the minutes of council's December 2012 public hearing about the proposed local improvement plan were not included in the package. As well, the statutory declaration provided by the RM to the Municipal Board stated that each taxpayer was mailed a notice of the local improvement plan. No date for this action, however, was indicated in the package reviewed by MFAS.

The email from MFAS allowed the RM to correct the deficiencies in the statutory declaration before it was officially filed with the Municipal Board. In their July 14, 2014 response to our draft report, the RM stated:

> *The information provided to the Municipal Board was accurate and sufficient and if any discrepancies were noted the office accepted the notices and corrected them.*

The RM further explained that these errors were minor and clerical in nature. Taxpayers, however, expect that proposed local improvement plans and accompanying documents are complete and prepared with due diligence. There was an apparent error in the number of lots considered in this local improvement, an absence of information about agreements pertaining to roadways and easements, and the RM neglected to include any of the existing agreements with developers which should have been part of the package provided to the Municipal Board. This information would have been important to all parties involved with this project.

## Third reading of the borrowing by-law on June 11, 2013 and June 25, 2013

Second and third reading of this by-law were listed as agenda items for the June 11, 2013 council meeting. Second reading was carried without a recorded vote, and there is a significant dispute surrounding the vote with respect to third reading. The complainants stated that third reading of the by-law took place at the June 11, 2013 council meeting and that the borrowing by-law was defeated in a tied vote of the RM council. As a result, the complainants believe that the RM council did not have the authority to proceed with the project.

There is no consensus among council members as to whether third reading was defeated on June 11, 2013 or deferred to a subsequent meeting. Council members agree that a vote took place during the June 11, 2013 meeting, but the subject of the vote remains in dispute. Some indicated that the vote was on third reading of the by-law, while others indicated that the vote was to

decide whether to hold the vote that day or defer the decision regarding third reading until the next council meeting.

After second reading was passed but before third reading occurred, members of council and a member of the public in attendance at the meeting reported that the CAO advised council of numerous inquiries about the project. He indicated that there were many taxpayers who were apparently dissatisfied with the decision of the Municipal Board to approve the project.[7]

According to information obtained through our interviews with the reeve and individual council members, a councillor stated during the meeting that council should go ahead and vote on third reading for the project. He noted that the Municipal Board had supported the project and that council had stalled long enough.

The reeve indicated that that he advised this councillor to make a motion if he wanted the matter to proceed to third reading. The councillor then verbally moved this motion.[8] Another councillor confirmed to our office that he seconded the motion, and indicated to council that he too thought the matter had gone on for long enough.

During the discussion and prior to the vote, a third councillor apparently asked what the vote was on. Witnesses, including members of council and a member of the public, were of the view that both the reeve and the CAO indicated that council was voting on third reading.

A vote took place and the result was a tie vote with three members voting for the motion and three members voting against. Both section 138 of *The Municipal Act* and section 11.3 of the RM's *Procedures and Policy By-Law* state that a tie vote on any resolution or by-law defeats that resolution or by-law.

The defeat of a by-law on third reading comes with certain consequences. According to section 144 of *The Municipal Act*, the defeat of a by-law on second or third reading rescinds the previous readings of the by-law, which resets the process to a state prior to first reading (and eliminates the possibility of simply having a "re-vote" on third reading). Further, under section 139 of *The Municipal Act*, the RM council cannot revisit this matter until a year has passed.[9]

During our interviews, some council members advised that they were confused about the vote. Some thought the vote was to determine if they should vote on the by-law during that council meeting or if it was a motion to defer the vote to the next council meeting later in June. Other council members believed that it was a vote on third reading and that they voted against the project as there were outstanding concerns raised by taxpayers about the local improvement.

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[7] As noted earlier, there were concerns expressed about the accuracy and completeness of the RM's submission to the Municipal Board as well as the hearing process itself.

[8] It is unusual in parliamentary practice for a motion to be moved without being presented in written form and available to all voting members. The only exception to this general rule is the motion to adjourn. In *The Procedures and Policy By-Law (#2281-10)* of the RM, it is stated in 13.1 "Preferably, a motion shall be put into writing, with the exception of a motion to adjourn which need not be in writing."

[9] Section 139 of *The Municipal Act* addresses the limited exceptions to this rule.

Clearly a written motion would have been beneficial to the understanding of the business at hand. The *Municipal Act Procedures Manual* (page 5.4.11) provides a sample procedures by-law with an example about motions that states:

> *13.1 No motion shall be debated or put unless it is in writing and is seconded, excepting only a motion to adjourn which need not be in writing.*

The RM of De Salaberry's procedures by-law states that a motion "preferably" be put in writing with the exception of a motion to adjourn. As this case indicates, it can be problematic to allow the presentation of verbal motions especially on an issue that is controversial, requires the expenditure of significant funds raised through taxation, and imposes a significant cost burden on property owners.

In a June 21, 2013 email, the reeve attempted to explain to a complainant what occurred at the June 11, 2013 meeting:

> *In regards to the Resolution regarding the proposed low pressure sewer by-law No. 2310-12 for St. Malo, we have to go to the mover and seconder of that resolution to determine their intention regarding that resolution. I have done just that and can confirm that the mover and seconder's intentions were to bring this matter up for consideration for 3rd reading at last regular meeting; if approved, another resolution would have been brought up to give 3rd and final reading; the motion was defeated, so the matter was left undecided (3rd and Final Reading).*

With respect, we cannot conclude that this email message from the reeve clarifies the matter or provides proof that the motion was to delay third reading. It is highly irregular that the reeve cannot himself say what the motion that council voted on was and that "*we have to go to the mover and seconder of that resolution to determine their intention regarding that resolution."* As the presiding officer of the meeting, the reeve should have understood what the motion was and ensured that other council members understood as well before a vote was taken. To have a vote, and then to rely on the mover and seconder to inform other councillors of the intention of the motion they have voted on, is contrary to the principles of democratic government and parliamentary procedure. The interpretation of a motion should not be left to the discretion of the mover and the seconder. The motion should be clear as to the direction it gives, which is another reason why motions should be written.

In the RM's response to our draft report received May 19, 2015, it stated:

> *Under the Municipal Act if a vote on a resolution is tied, the resolution is defeated. This means that no decision recognized under the Act has been made as a result of the resolution being defeated. To be a decision recognized under the Act, the resolution must be approved by a majority of council present at the meeting. Here this means that third reading approving the By-law was not approved initially. However, the defeat of the resolution does not mean that a decision has been made deciding not to proceed with the By-law. To make a decision not to proceed with the By-law, a resolution would have to be approved.*

> *No such resolution was approved by Council. It was therefore open to Council to consider a resolution to approve 3rd reading of the By-law.*

The only written record of the resolution voted upon on June 11, 2013 appeared in the minutes of the meeting circulated for consideration at the following meeting on June 25, 2013. The text reads as follows:

> *Whereas council has recently received inquiries regarding the Gosselin Road Project, and whereas council requested a motion to determine if third reading to by-law 2310-12 should be considered today or tabled to the following meeting of council.*
>
> *Be it resolved that council consider the third reading to by-law 2310-12 today. Defeated.*

It is of great concern to have a motion that was presented verbally on June 11, 2013 appear in the official record with wording that was written after the vote was taken. It is not impossible that the moving councillor said those specific words as a verbal motion on this controversial topic, however it cannot be verified that this text accurately represents the verbal motion.

Similar to the third reading vote, the minutes of the June 11, 2013 meeting are also in dispute. During the June 25, 2013 council meeting, not all council members were willing to adopt the June 11, 2013 minutes. There were also email exchanges between the CAO and two different councillors prior to the June 25, 2013 meeting confirming the councillors' clear understanding that they had in fact voted on third reading. Both councillors wanted that reflected in the minutes.

We note that the reeve did not sign the minutes of this meeting as required by *The Municipal Act*, and the minutes of the June 11, 2013 meeting are not available through the RM website.[10]

We also note that one of the councillors who voted to approve the June 11, 2013 minutes did not attend that meeting and therefore would not be in a position to confirm that the minutes as presented constituted an accurate record of what occurred.

In its July 14, 2014 response to our draft report, the RM noted that:

> *The Municipal Act is silent on voting to accept meeting minutes if Councillors are present or not. Only the Councillors themselves can decide of their abstention. A member of council may abstain from voting whenever he wishes. Just because he/she was not present does not mean that he/she should not vote on the minutes.*

While there may be a tendency to view the approval of minutes as a routine and non-contentious matter, we believe that it is inappropriate for council members who are absent from meetings to

[10] Although there is a link to these minutes on the RM website, following the link leads to a "page not found" error message. The minutes of the June 25, 2013 meeting, as well as many others, can be found through the links featured on this page.

approve minutes from those meetings as they cannot verify if the minutes are a reflection of what occurred.

It would be a serious breach of parliamentary procedure to use the approval of minutes as a way to validate a decision that may not have been properly made.[11] The approval of minutes cannot be used as a substitute for the regular decision-making process.

Despite the dispute about whether council voted on third reading of the borrowing by-law on June 11, 2013, third reading of the by-law was an agenda item for the June 25, 2013 meeting. One councillor abstained from voting on the by-law on June 25, 2013. The minutes record that he abstained because, according to his understanding of procedure, the motion had been voted on and defeated during the June 11, 2013 meeting of council. Despite this councillor's assertion that third reading was defeated at the previous meeting, the by-law was given third reading on June 25, 2013.

The complainants believe that the June 25, 2013 vote on third reading was an attempt to overcome the defeat on June 11, 2013 in favour of a different result that some council members desired**.**

Given the awkward wording of the June 11, 2013 resolution, the dispute among councillors about what they voted on, and the failure to produce the June 11, 2013 motion in writing until well after the fact, the complainants' assertion can neither be proven nor discounted.

It is disconcerting for all taxpayers that there was confusion regarding a vote on third reading of a by-law for a local improvement costing $1.14 million. Confusion over a vote of this importance calls into question the legitimacy of the project and has the likely potential to undermine public confidence in council.

In their July 14, 2014 response to our office, the RM provides the following view:

> *The First and Second Reading of By-Law 2310-12 was passed unanimously. Council was debating/discussing openly to give third reading or not. Therefore council would contest that was the motion being debated.*
>
> *Without a written motion, it would be very uncertain to have evidence as to the intent of what Councillors were voting on. Every person has different opinions and points of view which brings a great thought process but can also lead to confusion. Council has reviewed their meeting procedures and ensuring resolutions are written and appear on the screen not only for Council but for the public as well.*

We note that first and second readings of the by-law were carried without a recorded vote, meaning council members were not canvassed regarding their individual support or opposition to

[11] General guidance on the principles of parliamentary procedure can be found at http://www.parl.gc.ca/procedure-book-livre/Document.aspx?sbdid=3F9BF9DA-8073-48FA-A8B9-651585F97654&sbpidx=1&Language=E&Mode=1

this by-law during the first two readings. Ultimately, the majority of council members voted to approve third reading on June 25, 2013.

In order to maintain public confidence, public business should be conducted in an open and transparent manner. A requirement to have motions written and available to all councillors is a mandatory requirement for procedural fairness.

In this case, the RM may have exposed this project to an application to the courts to have the by-law quashed as set out in subsection 382(1) of *The Municipal Act*. This section states:

> ***Application for declaration of invalidity***
>
> *382(1) A person may make an application to the court for a declaration that a by-law or resolution is invalid on the ground that*
>
> *(a) the council acted in excess of its jurisdiction;*
>
> *(b) the council acted in bad faith;*
>
> *(c) the by-law is discriminatory; or*
>
> *(d) the council failed to comply with a requirement of this or any other Act or the municipality's procedures by-law.*

While there is a one-year time limit to bring an action based on clause 382(1)(d), there is no specific time limit on the other causes for action in this subsection.

## Council Members and Conflicts of Interest

The complainants alleged that two councillors had conflicts of interest when participating in the process of approving this local improvement project. One councillor owned land in the local improvement area while the other councillor was alleged to be in a conflict of interest because his brother, a local contractor, was one of two people who presented the petition in support of the low-pressure sewage system at the council meeting of June 29, 2010. The councillor's brother owns one of the two local businesses that were pre-qualified to undertake sewer work for the municipality. It was the perception of the complainants that, in submitting the petition, the local contractor was seeking approval for a project that might create opportunities for his company. Given that this work might generate a benefit for his brother's company, the complainants believed it would be a conflict of interest for the councillor to participate in these discussions and votes.

In addition to *The Municipal Council Conflict of Interest Act* (MCCIA), the *Municipal Act Procedures Manual* published by Manitoba Municipal Government, the *Council Members Guide* published by the Association of Manitoba Municipalities, as well as our guide, *Understanding Fairness: a Handbook on Fairness for Manitoba Municipal Leaders*, all provide guidance on the benchmarks and standards related to conflicts of interest.

The MCCIA sets out standards related to conflicts of interest on the part of municipal officeholders. In addition to defining direct and indirect conflicts of interest, the act requires the

declaration of any conflicts of interest and the recusal of officeholders from participating in related debates, discussions or votes. Further, the act states that a municipal officeholder cannot use information gained from their position to benefit themselves or others and forbids the exercise of influence with other officeholders that might result in a financial (pecuniary) benefit to themselves or their dependents as defined in the act.

The MCCIA, however, is not a complete code of ethical behaviour for council members. This fact is recognized in section 84.1 of *The Municipal Act*, which requires each council to establish a code of conduct *"to set guidelines that define the standards and values that the council expects members to meet in their dealings with each other, employees of the municipality and the public."* Manitoba court decisions have also spoken to the reality that ethical behavior cannot be completely defined or limited by statute.[12]

Under certain circumstances, complaints of conflict of interest may be raised through an application to the Court of Queen's Bench pursuant to subsection 20(1) the MCCIA. While the MCCIA allows an elector to bring forward a complaint of conflict of interest to the court, *The Ombudsman Act* allows any person who is or may be aggrieved to make a complaint about a matter of administration to the ombudsman, which could include matters related to conflict of interest in a municipality.

A significant difference between the ombudsman investigation process and the court process is the remedy available to a complainant/applicant in these processes. If a court determines that a council member has violated the MCCIA, the council member may be disqualified from council and may be required to make restitution to any person or the municipality affected by the financial gain. The goal of a complaint investigation under *The Ombudsman Act* is to determine whether there are administrative issues, and if so, to make recommendations for administrative improvement that could benefit both government and the public.

Provincial ombudsman offices take a broad approach to conflict of interest matters. While we consider various provisions of the MCCIA in our investigation process, we also consider whether or not a decision has been made in a procedurally fair manner.

All decision-making bodies, including municipal councils, have an obligation to make fair decisions. When making a procedurally fair decision, a decision maker must be impartial or

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[12] In *Chan v. Katz*, [2013] M.J. No. 323, 2013 MBCA 90 the Court of Appeal, after finding that the MCCIA was not engaged on the facts of the case went on to say that

> *This should not be taken as an indication of approval of the conduct, nor do we express any comment on whether it meets appropriate ethical standards for elected officials.*

In *Dunn v. Struthers;* [2013] M.J. No. 402, 2013 MBQB 281, a case under *The Legislative Assembly and Executive Council Conflict of Interest Act*, a judge of the Court of Queen's Bench said:

> *The Act does not purport to establish a general provision to provide ministers with "the normative standard of conduct by which they should conduct themselves.*

unbiased, without a personal interest in the outcome of a decision and be open to persuasion on the merits of an issue. Participation in discussions and votes by a council member who is sufficiently self-interested or tainted by bias could invalidate the decision or the process by which it was made.

As we point out in our *Understanding Fairness* publication, "*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 personal interest.

There have also been a number of court cases where the decisions speak to the issues of bias and conflict of interest at the heart of this aspect of the complaint. Bias or favour is clear when the councillor or office holder is the applicant on a matter. But bias or favour is also an issue when the office holder stands to benefit (or suffer) from a decision where they are not an immediate party.

In an interview[13] with our staff, one of the councillors alleged to be in a conflict of interest confirmed that he owned land in the local improvement area. This councillor described the history of the properties and its relationship with his family. In addition to property that he personally owned in the area, his children also owned property in the area. In the opinion of the councillor, the LPSS might benefit one of his children but the others would see it as "a tax burden."

The councillor declared that *"there is absolutely no conflict of interest"* on this matter because the installation of the LPSS would create a burden, and not a benefit, to himself and his children. He indicated that because he is not interested in selling his property, he would not benefit from any potential increase in property value that would be attributable to the installation of the LPSS.

In its response to our office, the RM stated that this councillor, who voted on matters and participated in discussions related to the LPSS, was not in a conflict of interest because he owned only "*one lot out of the approximately 100 lots included in the area."* According to the RM:

> *This alone is not enough to be in a conflict of interest, as the councillor's interest must be significant. Section 4(5) provides that if the interest does not exceed the interest of an ordinary resident in the matter, then there is no conflict of interest. The councillor's interest here was no different than the other 99 lot owners and did not exceed the interest of an ordinary citizen in this matter.*

Section 4(5) of *The Municipal Council Conflict of Interest Act*[14] refers to the interests of the ordinary residents of the municipality as a whole. While this councillor shared the same interest

[13] Interviews with all council members took place over the course of November 2013.

[14] This section of the MCCIA reads as follows:

**Interest or liability must be significant**

4(5) For purposes of this Act, and notwithstanding any other provision of this Act,

as the owners of the 99 lots in proposed local improvement area, this interest would not be the same for all residents of the municipality.

The RM also stated:

> *There is no support or evidence that this project will increase the value of land holdings. Some complainants actually contradict this in providing evidence of the opposite. They refer to Property Value Analysis done in the Winnipeg Beach Area that indicated an average of $8,542 less in properties that were serviced by sewer. I have contacted the assessment branch and they confirm that the assessment of a property does not change with providing sewer services and value of property can fluctuate by so many factors.*

Our office also contacted the Assessment Branch of Manitoba Municipal Government with regard to this question and it is generally agreed within the branch that adding sewer services to a property would increase its value. That said, the question of whether or not an office holder receives a financial benefit is not a necessary condition for a conflict of interest to exist. In this instance, it is the potential for the councillor to realize a financial benefit that is at issue.

We believe that because the councillor owned land in the local improvement area, he had a conflict of interest with regard to this local improvement project. We note that he did not declare this as a pecuniary interest or recuse himself from any discussion or votes on this project that would affect his property. He also moved the initiating resolution for this project.

It was alleged that another councillor was in a conflict of interest because his brother, a local contractor who has done and continues to do significant amounts of work for the RM, was one of the two people who presented the petition requesting the low pressure sewage system at the June 29, 2010 council meeting. The approval of this project had the potential to create a business opportunity for his company, either bidding on the main project or by performing other work that may be required by the municipality or by local property owners. This councillor seconded the motion to approve the hiring of a consultant to provide an updated cost for this project – a decision that was made as a direct result of his brother's presentation of the petition to council.

While this councillor may not be in a conflict of interest situation with respect to the MCCIA as there was no pecuniary interest, the councillor participated in debates and voted on a matter brought before the council by his own brother. These are circumstances that could well be found to create a reasonable apprehension of bias.

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(a) where the direct or indirect pecuniary interest of any person, corporation, partnership, or organization in a matter does not exceed the pecuniary interest of an ordinary resident in the matter, the person, corporation, partnership, or organization shall be presumed not to have a direct or indirect pecuniary interest in the matter;

(b) where the direct or indirect pecuniary liability of any person to another person or to a corporation, partnership, or organization does not exceed the pecuniary liability of an ordinary resident to the same person or to the same corporation, partnership, or organization, the person shall be presumed not to have a direct or indirect pecuniary liability to the other person or to the corporation, partnership, or organization; and

(c) no person shall be presumed to have a direct or indirect pecuniary interest in any matter, or a direct or indirect pecuniary liability to another person or to a corporation, partnership, or organization, unless the value of the pecuniary interest or liability is $500 or more.

Council as a whole, and individual councillors, should be alert to questions of reasonably perceived or actual bias and other issues fundamental to procedural fairness. It is important that they take the steps necessary to prevent any perceived or real bias from tainting their deliberations. The activities and resulting resolutions and by-laws passed by council may be reviewed by a court under subsection 382(1) of *The Municipal* Act and possibly quashed if a court considers that the resolution or by-law was so tainted by bias as to render the jurisdiction of the council invalid.

The jurisprudence on conflict of interest matters is clear – office holders must avoid participating in decisions that affect members of their close social circle.

In response to the allegation of a conflict of interest discussed in our draft report, the RM noted that the councillor's brother has been in business with the municipality for many years prior to the election of the current council and had met the eligibility criteria for companies who want to do business with the RM.

The RM also explained that in smaller communities, it is not uncommon for members of council to be related to local business owners who conduct business with the municipality. Further, the RM stated that it would be speculative to conclude that the councillor's brother would benefit from the local improvement plan relative to any other eligible contractor.

Whenever a family member does business with a municipality (large or small) – whether it is applying for work, bidding on a project, or requesting a variance – a municipal office holder must take care to avoid any perception of bias or preference. The best way to avoid this conflict is to declare a conflict and recuse him or herself from the discussion and decision.

In reviewing this matter, we noted that the RM's *Municipal Employee Code of Conduct Policy* adopted February 23, 2010, includes a "use of influence" section that states:

> *The municipality strives to ensure fairness and objectivity in its decision-making process. Employees must not use their positions to give anyone preferential treatment that would advance their own interests, or that of any member of the employee's family, friends, or business associates.*
>
> *Employees who have a financial interest in a municipal contract, sale or other transaction, or knowingly have family members, friends (individual with whom the employee has a close personal relationship) or business associates with such interest, must not participate in any discussion, evaluation or recommendation with respect to the matter.*

It is important to note that while this stringent requirement is applicable to employees, it is not included in the RM's *Code of Conduct for Council Members* adopted by council resolution on January 29, 2013. The *Code of Conduct for Council Members* includes a "preferential treatment" section that states:

> *No member of Council shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based solely on the identity of the person or organization.*

If a certain level of conduct is expected for municipal employees there should also be, at a minimum, the same expectation of council members. It would be inconsistent to expect a lower standard of ethical behaviour from councillors than from employees.

The July 2014 response from the RM to our draft report also stated:

> *It is up to that council member to ensure they are in compliance with the requirements and obligations.*
>
> *There is no evidence that any council members or any of his dependants has a direct or indirect pecuniary interest in the project. By abstaining from the vote it would indicate that they do and that would give an appearance or perception of conflict which can harm the councillor and the general public.*

While it is the responsibility of a council member to determine whether he or she is in a conflict of interest, this does not mean that they are the sole arbiters of this issue. The relevant sections of *The Municipal Act, The Municipal Act Procedures Manual, The Municipal Council Conflict of Interest Act* and the Association of Manitoba Municipalities' *Council Members Guide* advise the office holder to consult with the CAO or legal counsel if they have any questions or concerns about any personal conflict of interest issues.

It is likely that council members are engaged in their communities and may have personal, professional or business interests in the communities where they live. The response from the RM confirms that the councillors in question were, in fact, active and long-standing members of their community. As such, they were likely to have interests that might conflict with their role as municipal office holders and therefore should have been sensitive to those situations.

We disagree with the assertion made by the RM that a councillor declaring a conflict and recusing themselves from the discussion or decision where they have a conflict of interest could "*harm the councillor and the general public*." In fact, it is the <u>failure</u> to declare a conflict and recuse themselves which harms the councillor and the general public.

The MCCIA outlines a process by which a councillor can protect themselves, the RM, and the general public from the perception of undue influence in local decision making. The declaration and recusal is an essential part of this process. By declaring a conflict and recusing themselves in these instances, a councillor is upholding the provisions of the act and demonstrating their personal integrity.

Moving forward, the RM needs ensure that council members comply with the provisions of the MCCIA, other relevant provincial laws, and jurisprudence. In addition to revising the RM's *Code of Conduct for Council Members*, council members need to understand the code and abide

by its provisions. Since this code is a public document, it should be posted on the RM website and available for public review at the RM office.

## The RM's Purchasing and Tendering Policy

The RM has a purchasing and tendering policy that was updated on July 31, 2012. Effective January 1, 2013, municipalities were required to have a tendering and procurement policy pursuant to section 251.1 of *The Municipal Act*. The purpose of the amendment to the act was to ensure that there is transparency in goods and services obtained by municipalities with established procurement guidelines, including advertising bid opportunities, establishing criteria for evaluation of tenders and the process of awarding contracts.

The *Municipal Act Procedures Manual* (pages 6.8.1 to 6.8.17) contains a sample policy indicating what is needed to achieve compliance with the act. In comparing the RM's current policy with the sample policy, we noted deficiencies in the following areas:

- when and how the municipality advertises bid opportunities for formal tenders
- when bid opportunities will be advertised in the local newspaper
- the forms of contracts and when they are to be used
- procurement accounting and management in a procurement tracking system
- the process for selling surplus capital assets through a publicly advertised competitive bid process
- the communication of the RM's purchasing and tendering policy on its website

In their initial response to our draft report, the RM acknowledged that it need to address issues identified with its purchasing and tendering policy.

With respect to the local improvement in question, the RM tendered for engineering services for the LPSS in the summer of 2013. The tender, however, did not meet the minimum number of four invitations for the tender opportunity as required by the RM's policy. Our review of the RM file showed that there were only two invitations for this tender.

The RM noted that "*The policy does not address, if the minimum number is not received, what protocols are applied."* The issue, however, is not the number of bids received but the number of bid invitations issued. While the number of qualified bidders within the RM might be limited, it is likely that other firms would be interested in submitting bids.

Moreover, local governments cannot limit competition for tenders to businesses within their municipal jurisdiction. The Manitoba government, which is a signatory to the Agreement on Internal Trade, maintains a policy that municipal construction tenders that exceed $250,000 are open to competition to firms from any province or territory. Given the size of the LPSS project, the RM should have extended the geographic area of the invitations to tender to meet the requirements of their own policy.

The RM should also examine their use of sole source contracts. In their response to us, the RM stated:

> *[Engineering Firm] completed the pre-design study component and therefore they were directly awarded the remainder of the contract to [Engineering Firm], as per their sole source proposal, based upon their knowledge of the pre-design and skill set of the Engineers.*

The RM *Purchasing and Tendering Policies* does not include a section on awarding sole source contracts. There is a provision to acquire services in an emergency situation but, overall, there appears to be no RM policy that provides guidance on the awarding of sole source contracts.

*The Municipal Act Procedures Manual* provides guidance on page 6.8.3 with regard to sole source purchases.

> *Sole source purchases are generally used in the following circumstances:*
> - *when there is only one available supplier of a required product or service that meets the needs of the municipality (e.g. a rental contract with a purchase option, where the purchase must be compatible with existing equipment, etc.).*
> - *during a state of local emergency where due to immediate need and time constraints normal procurement methods cannot be followed.*

Neither of these circumstances applied to the RM's situation where a sole source contract was issued. Presumably, there are numerous qualified engineering firms that might have been interested in reviewing the tender documents and submitting a bid in a fair and competitive process. There was also no state of local emergency that would have dictated the issuing of a sole source contract.

There may be other situations where awarding a sole source contract may be appropriate, however, without a defined policy in this area, the RM should limit its use of sole source contracts.

## Additional Administrative Matters

Section 133 of *The Municipal Act* requires that minutes be taken of each council meeting, that they be signed off by the presiding officer, and be available for public review. These requirements are also applicable to council committees as provided in subsection 109(1) of *The Municipal Act*. Minutes help promote accountability and transparency as they serve as a public record of the proceedings and the decisions made by the elected officials during these meetings.

As part of our review of council meeting minutes, we noticed that the Local Improvement District committee held a meeting on June 12, 2013 and that the Gosselin Road LPSS was an item on the agenda. The minutes of the meeting, however, do not provide a record of who was present at this meeting or identify the person presiding over the meeting who would have been required to sign the minutes.

Also, in order for a meeting to take place, there must be a sufficient number of qualified participants to make quorum – the minimum number of persons required to conduct business. The minutes for the September 13, 2012 meeting of the St. Malo Utility Committee which dealt with items related to the LPSS, show that only one council member was present. As a result, quorum requirements were not met for the meeting, pursuant to section 135 of *The Municipal Act*. Without the necessary quorum, no decisions could be made during this meeting. The meeting, however, did proceed as if quorum was met and the consultant was given permission by the committee to proceed with the project.

In the course of our interviews for this investigation, we asked council members about the taking of minutes at committee meetings. We were told that some committees were not recording minutes but were instead taking notes of what transpired. Some council members agreed that they were not as formal about the minutes as they should be.

## RECOMMENDATIONS

Manitoba Ombudsman supports the complaint that the RM did not fulfill all of its statutory obligations with respect to the local improvement by-law relating to the low pressure sewage system north of Gosselin Road in St. Malo.

Section 36(2) of *The Ombudsman Act* provides the option to make recommendations as a result of an investigation. In light of the findings from this investigation, we make the following recommendations to the RM of DeSalaberry:

**Recommendation 1:** The RM should provide an updated fact sheet to all taxpayers affected by this local improvement. This information should include, but not necessarily be limited to, the following:

- a breakdown of costs to date and a breakdown of any further costs required to complete this project
- a detailed map showing the exact number and size of lots in the area
- the number of pre-existing sewer connections (pre 2014) identified in the local improvement area
- information on the tendering process,
- any unanticipated costs related to this project
- any anticipated cost overruns

**Recommendation 2:** To improve accountability and transparency, the RM should post all minutes of council and council committee meetings on the RM website and at the RM office. Further, the RM should post the terms of reference for each council committee, including membership and the frequency of meetings, and provide sufficient prior notice of meeting dates and times at the RM office and on its website.

**Recommendation 3:** The RM should update the *Council Member's Code of Conduct* to be consistent with the *Code of Conduct of Municipal Employees*, and post both codes of conduct at

the RM office and on the RM website. Further, each council member should sign a document acknowledging that they have read and understand the *Council Member's Code of Conduct.*

**Recommendation 4:** The RM should use the registered mail service provided by Canada Post to inform objectors to local improvement plans of their right to attend and participate in public hearings held by the Municipal Board in accordance with *The Municipal Act*.

**Recommendation 5:** The RM should update its tendering and procurement policy to comply with section 251.1 of *The Municipal Act* and post it at the RM office and on the RM website. Further, this updated policy should provide guidance on the appropriateness of sole source contracts.

**Recommendation 6:** The RM should amend their *Procedures and Policy By-law* to stipulate that all motions, with the sole exception of the Motion to Adjourn, be provided in writing prior to any vote.

**Recommendation 7:** That council members and administrative staff for the RM undergo training to acquire a better understanding of legislative and policy requirements regarding conflicts of interest, procurement and tendering, and the principles of procedural fairness.

**Recommendation 8:** That the RM develop a policy for how it will address instances of conflict of interest and the perception of bias to ensure compliance with all legislative and policy requirements.

**Recommendation 9:** The RM should record each meeting of council or council committee in order to provide a definitive record of what was discussed. This can be an audio or audio-video recording and copies of this record should be stored with the minutes of the relevant meeting.

## RM RESPONSE TO RECOMMENDATIONS

The Rural Municipality of De Salaberry was given an opportunity to review and provide a response to the recommendations for inclusion in the report. Our office did not receive a response from the RM prior to finalizing the report. We will, however, monitor the RM's progress towards meeting these recommendations.

**MANITOBA OMBUDSMAN**