

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2013-0414

TOWN OF THE PAS

REPORT ISSUED ON DECEMBER 4, 2014

CASE SUMMARY

An owner/operator of a hotel in The Pas, Manitoba, made a complaint to Manitoba Ombudsman alleging that the Town of The Pas improperly used tax revenues that had been collected pursuant to a special accommodation tax by-law. The tax was imposed on accommodations purchased at hotels in the town; the revenue collected was deposited in a special-use fund intended for the purpose of promoting the town with a destination marketing strategy created by a special committee. The complainant alleged that the town did not follow the necessary steps under the by-law and/or *The Municipal Act* to use the collected tax revenues on permissible marketing activities, instead using it for unrelated expenditures that were not permissible under the by-law.

The ombudsman's investigation revealed that the Town of The Pas had used in excess of \$90,000 of accommodation tax revenues for purposes other than those set out in the by-law. The town took the position that this was permissible under *The Municipal Act*, asserting that it had 'transferred' the money in the town's *2013 Financial Plan* in accordance with the applicable laws, after giving proper notice of its intention to do so.

The ombudsman's investigation found that the town acted unfairly, unreasonably and contrary to law, when it took revenues from the special-use accommodation tax fund for expenditures unrelated to the purpose for which the tax was collected. The town had no legal authority to transfer the funds, nor did it comply with its own by-laws or the notice requirements under *The Municipal Act*.

The ombudsman recommended that the money removed from the special-use accommodation tax fund be returned or replaced. The town agreed to develop a plan to return the money to the fund.

OMBUDSMAN JURISDICTION AND ROLE

Manitoba Ombudsman is an independent office of the Legislative Assembly of Manitoba, reporting to the assembly through the Office of the Speaker. The responsibilities and authority of the ombudsman are set out in *The Ombudsman Act*, *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act*, and *The Public Interest Disclosure (Whistleblower Protection) Act*.

Under *The Ombudsman Act*, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, and municipalities, and their officers and employees. Investigations may be undertaken on the basis of a written complaint from a member of the public, or upon the ombudsman's own initiative.

The actions and decision complained about are matters of administration arising from the handling of special tax revenues by the town council.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation or a municipal by-law. On other occasions, it is written policy or established procedures implemented to give effect to legislative purpose. In cases concerning an impact on individual rights or benefits, we also examine the fairness of the action or decision. A complaint can raise questions of procedural fairness, substantive fairness or relational fairness. Procedural fairness relates to how decisions are reached including the steps followed before, during and after decisions are made. Substantive fairness relates to the fairness of the decision itself and relational fairness relates to how people are treated during the decision-making process.

While our office has a mandate to investigate complaints, the investigative process we follow is non-adversarial. We carefully and independently consider the information provided by the complainant, the decision maker, 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 goal of administrative investigations is to determine the validity of complaints and to identify areas requiring improvement. 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

In November 2013, the owner of a hotel in the Town of The Pas, Manitoba, made a complaint to the Manitoba Ombudsman. The complainant alleged that the town was acting in contravention of

the terms of its accommodation tax by-law, *By-law 4448*, which imposes an accommodation tax on all hotels in the municipality; he asserted that “*the bylaw clearly states that the money collected is to be used for either destination marketing or community development,*” but that the town had circumvented this requirement and had transferred \$90,000 of accommodation tax revenues into another unrelated fund, without any public notice or hearing to declare their intent to do so. The complainant further alleged that the transferred funds were subsequently spent on purposes unrelated to the purpose for which the funds were collected. He sought to have the money returned to the fund from which it was removed, and used in accordance with the procedures set up in *By-law 4448*.

KEY ISSUES

1. **Was the town legally permitted to remove the tax revenues from the special-use fund as it did? If so, did it do so in a reasonable, fair, and transparent way?**
2. **Did the town satisfy the notice requirements of their by-laws and of *The Municipal Act*?**

BACKGROUND INFORMATION

The town imposed a tax on hotel accommodations within the Town of The Pas to raise funds for community enhancement and to promote tourism as per *The Municipal Taxation and Funding Act*, C.C.S.M. c.M265, s.3:

Municipality may impose taxes

3 The council of a municipality or in the case of a local government district, the resident administrator thereof, may pass by-laws imposing such forms of taxes as it deems advisable within the municipality and without restricting the generality of the foregoing, it may impose a tax on persons in the municipality who purchase or consume motel and hotel accommodation, or meals at a restaurant or dining room, or liquor, or on the transfer of land.

(emphasis added)

The act does not place restrictions on the expenditure of the monies collected as tax. As at the time of this investigation, few municipalities in Manitoba had imposed taxes pursuant to this act.

On October 19, 2011, the town enacted the accommodation tax *By-law 4448*, which imposes a five per cent tax on all accommodation shorter than 60 days, to be paid by the purchaser of the accommodation and then remitted to the town by the vendor of the accommodation (i.e. the hotel).

Subsection 3(4) of the accommodation tax *By-law 4448* reads:

3(4): The tax collected under subsection 3(1), remitted to the tax collector under subsection 5(2) and not refunded under section 6 is to be deposited appropriately into the according reserve funds; fifty percent (50%) into community enhancement project reserve fund for use by The Town of The Pas and fifty percent (50%) into destination marketing reserve fund for use by the Destination Marketing Committee. All deposited funds will be used only in accordance with the terms of each individual fund. (emphasis added)

The accommodation tax *By-law 4448* refers to two separate funds: first, the Community Enhancement Reserve Fund, for community enhancement projects, as determined by mayor and council; and second, the Destination Marketing Fund. All tax collected under the by-law is split 50-50 between the two funds. Only the second fund, the Destination Marketing Fund, is relevant to this complaint investigation.

The accommodation tax *By-law 4448* contains the following definitions:

*“committee” means: a committee appointed by a resolution of council which **shall be responsible for the establishment of the destination marketing strategy and administration of the marketing fund as per Schedule ‘A’ attached to this agreement.***

“Destination Marketing Fund” means a fund established for the purpose of providing financial means to establish a strategy to promote economic development of a destination by increasing visits from tourists and business travelers, which generate overnight lodging for a destination, visits to restaurants, and shopping revenues.
(emphasis added)

Schedule “A” of the accommodation tax *By-law 4448* is a proposed by-law creating the Destination Marketing Committee, which is the committee referred to in the definition above. The clear intent of *By-law 4448* is that the Destination Marketing Fund would be managed and administered by the Destination Marketing Committee.

Schedule ‘A’ of the accommodation tax *By-law 4448* was enacted in its own by-law, *By-law 4455*, which officially created the Destination Marketing Committee as was intended and required in *By-law 4448*. *By-law 4455* sets out the structure and duties of the Destination Marketing Committee. It states that the committee shall have regular meetings; that it shall keep accounting records; and that it shall “*plan, establish and promote a destination marketing strategy, and shall submit an annual budget to council using monies from the destination marketing fund*” (Part D, s.1). The by-law stipulates that the committee is to be made up of one representative from the town council; a representative selected by local hoteliers; and three citizens at large.

By-law 4454, titled “Being a by-law of the Town of The Pas in Manitoba to provide for the creation of a reserve fund for destination marketing,” creates the Destination Marketing Fund; this is the fund into which 50 per cent of accommodation tax revenues are to be deposited.

In summary, the tax regime is designed to create revenue in order to fund the promotional activities of the Destination Marketing Committee, which is tasked with creating a plan to generate tourism in The Pas. The local hoteliers are able to participate in the process by having a representative on the committee. The by-laws were presented this way to the public during the public hearing process, and the province granted its approval of the taxation regime under *The Municipal Taxation and Funding Act* on that basis.

The taxation by-laws were passed in late 2011/early 2012. The town began to collect the taxes from the local hoteliers in March 2012, and continues to do so. The appropriate 50 per cent share of the tax revenues have been, and continue to be, deposited in the Destination Marketing Fund.

However, once the taxation laws were passed, the Destination Marketing Committee never actually became a functioning body, notwithstanding that five persons were named to the committee by the town council on May 16, 2012 (Resolution 2012 128). The committee held only one meeting, on October 4, 2012, at which no official business was recorded. They did not meet again; they did not prepare a budget; there are no resolutions, or minutes of any meetings; no destination marketing strategy was ever prepared. No expenditures were ever made by the committee, with the exception of \$71.40 to cover the meal costs incurred at their single meeting. Further, the chairman's appointment expired on May 16, 2013, and he was not replaced.

The town's use of Destination Marketing Fund money

In the weeks prior to April 10, 2013, the town issued a public notice that it would be presenting its *2013 Financial Plan* at a council meeting on April 17, 2013, and that the plan itself would be available for inspection by April 10, 2013. The notice did not contain any indication that any "reallocation" of funds from the Destination Marketing Fund would be made.

The *2013 Financial Plan* contains a line indicating that \$90,000 would be "reallocated" from, and \$5,750 would be "withdrawn" from, the Destination Marketing Fund. The *2013 Financial Plan* does not contain any explicit indication of where the money would go, although in the reserve balances portion of the *2013 Financial Plan*, a fund called the Lakeside Fund (details of this fund follow) is shown to increase by an amount that corresponds to the amount removed from the Destination Marketing Fund and two other funds. During this investigation, it was confirmed by the town that the \$90,000 "reallocation" set out in the *2013 Financial Plan* did in fact go to the Lakeside Fund, a fund which does not have a purpose related to destination marketing.

On the date of the public hearing, no one from the public attended, and there were no objections to the Financial Plan, which was accordingly passed.

The Lakeside Development Fund Reserve

The town is currently developing property next to the town's airport. In order to facilitate this project, the town created the Lakeside Development Reserve Fund (called the Lakeside Fund),

pursuant to *By-law 4452*. The stated purpose of this fund is “for operating and capital expenditures for lakeside development at The Pas Airport.”

Other uses/handling of Destination Marketing Fund money by town council

Apart from the handling of the Destination Marketing Fund money as per the *2013 Financial Plan*, Manitoba Ombudsman was asked to review other instances where the town had used these tax revenues.

At a regular meeting of the town council held April 4, 2012, *Resolution 2012 090* was passed. It states:

Resolved That: Council authorize the Town of The Pas to enter into a Participation Agreement with [redacted company] in the amount of \$24,800 USD to be expended from the Destination Marketing Reserve Fund.

It appears that the company named in the resolution provides advertising and marketing services. The ombudsman notes that when council passed *Resolution 2012 090*, the town had only been collecting accommodation tax revenues for one month, did not have sufficient funds in the Destination Marketing Fund to cover this expenditure, and had yet to appoint members to the committee.

At a subsequent regular council meeting held September 5, 2012, *Resolution 2012 207* was passed, effectively revoking *Resolution 2012 090*:

Whereas Council has authorized the expenditure of [company redacted] to be taken from the Destination Marketing Reserve Fund;

And Whereas Council has agreed that this fund was to be designated for alternative purposes;

Therefore Be It Resolved That Council authorize the purchase of [company redacted] from the Economic Development Officers other Development Fund.

At the September 5, 2012 meeting, another expenditure from the Destination Marketing Fund that had previously been approved – being a grant to The Pas District and Chamber of Commerce, as set out in the Town’s *2012 Financial Plan* – was similarly reversed, in order to use money from a fund other than the Destination Marketing Fund. This was accomplished by way of *Resolution 2012 208*, which stated that the reason this was being done was because the Destination Marketing Reserve Fund ‘*was to be designated for alternative purposes.*’

By way of *Resolution 2013 116*, on May 1, 2013, the town council approved a grant of \$10,000 from the Destination Marketing Fund to The Pas Rotary Club, with no purpose or reason stated.

None of the expenditures from the Destination Marketing Fund set out in the above resolutions were the subject of any public notice, nor was there any involvement of the committee in these decisions.

POSITION OF COMPLAINANT

The complainant believes that the town acted without authority and in contravention of its accommodation tax by-laws when it removed money from the Destination Marketing Fund, and that the town failed to provide adequate notice of its plans to use money from the fund. He maintains that had the town provided notice of their plans, he and other interested parties would have objected at the public hearing for the *2013 Financial Plan* or at regular council meetings. He believes that the town has deliberately circumvented the process that gives hoteliers the right to participate in the expenditure of accommodation tax revenues, and wishes to see that process implemented as set out in the taxation by-laws if the town wants to spend the revenues.

POSITION OF THE TOWN

The town takes the position that its actions were compliant with *The Municipal Act*, and that there was nothing improper about its handling of the Destination Marketing Fund money. It provided three reasons:

- 1) The town says that the budgeted ‘transfer’ of funds from the fund as set out in the *2013 Financial Plan* does not meet the definition of an ‘expenditure’ under *The Municipal Act*, or in the Municipal Accounting Manual. Therefore, in the town’s opinion, they had the authority to transfer the money without having to provide notice or have a hearing, and no involvement of the committee was required, despite the fact that the money was used for purposes other than that for which it was collected.
- 2) The town says that even if it was required to give notice of its intent to withdraw money from the fund, that requirement was met when it gave notice of its *2013 Financial Plan* containing the information about the ‘transfer’ in the budget.
- 3) The town asserts that it never actually spent the money from the fund, because the account balance of the fund into which it was placed exceeded \$200,000, and therefore the \$90,000 from the fund was still held in that account (without being expended). The town characterized the transaction as a ‘loan from one fund to another,’ and stated that the town council had ‘verbally agreed’ to repay the money to the Destination Marketing Fund from the proceeds of cottage lot sales, at a future time.

SCOPE OF THE INVESTIGATION

This investigation was comprised of the following steps:

- Interviews and enquiries, both verbal and written, with the complainant, and with the CAO of the Town of The Pas;
- Interviews with representatives of Manitoba Municipal Government;

- Review of relevant legislation, by-laws, policies, guidebooks, council minutes, financial statements, and correspondence;
- Consultation with legal counsel.

LEGISLATION

The following legislative provisions apply to the matter under investigation:

The Municipal Act

Council may establish reserve funds

168(1) A council may by by-law establish reserve funds for any general or specific purpose.

Expenditure from reserve fund with specific purpose

168(2) A council that establishes a reserve fund for a specific purpose may provide in its operating budget or capital budget for an expenditure from the fund only for that purpose unless, before making the expenditure,

- (a) the council gives public notice, and holds a public hearing, in respect of the proposed expenditure; and*
- (b) in the case of a reserve fund that is supplemented with the approval of The Public Utilities Board, the Board approves the proposed expenditure.*

Expenditures

169(1) A municipality may make an expenditure only if it is

- (a) provided for in the council's interim operating budget, operating budget or capital budget;*
- (b) made in respect of a disaster or emergency declared by the council or head of council under The Emergency Measures Act;*
- (c) ordered by a court or The Municipal Board to be paid; or*
- (d) authorized by the council under this section.*

Expenditure for purpose not set out in budgets

169(2) A council may authorize the expenditure of an amount provided for in an operating budget or capital budget, other than an expenditure referred to in subsection 168(2), for a purpose other than is set out in the budget if the expenditure does not affect the total of the amounts estimated under subsection 164(1) (operating budget) and section 166 (capital budget).

Expenditure or transfer of revenue exceeding estimate

169(3) A council may authorize expenditures from its operating budget, or transfer amounts from its operating budget to the capital budget, that are not provided for in the operating budget if the total of the expenditures and transfers does not exceed the total of

- (a) the amount of revenue from grants and transfers in excess of the amount estimated under clause 164(2)(b); and
- (b) the amount of revenue from sources referred to in clause 164(2)(d) in excess of the amount estimated under that clause.

Expenditure from capital budget

169(4) A council may authorize expenditures from its capital budget that are not provided for in the capital budget if the total of the expenditures does not exceed the amounts transferred from the operating budget under subsection (3).

Expenditures exceeding budgets

169(5) A council may authorize an expenditure for an amount not provided for in an operating budget or capital budget, and may fund the expenditure

- (a) subject to subsection 164(5), by transfer from the municipality's accumulated surplus or its reserve funds; or
- (b) subject to section 174, by borrowing.

Public hearing necessary for some expenditures

169(6) Subject to subsection (7), a council must give public notice and hold a public hearing in respect of a proposed expenditure under subsection (5).

No public hearing if specific purpose reserve is used

169(7) No public notice or public hearing is required under subsection (6) for an expenditure funded by a transfer from a specific purpose reserve unless the expenditure is for a purpose other than that for which the reserve fund was established.

Content of notice

169(8) A notice under subsection (6) must include

- (a) the amount and purpose of the expenditure; and
- (b) the expenditure's sources of funding and the portion of its cost that will be paid by each source.

ANALYSIS OF ISSUES AND EVIDENCE

Was the town legally permitted to remove the tax revenues from the special-use fund as it did? If so, did it do so in a reasonable, fair, and transparent way?

Type of fund

The Destination Marketing Fund, which is created pursuant to *By-law 4454*, is clearly a ‘specific purpose’ fund, as opposed to a general reserve fund. This type of fund is provided for in *The Municipal Act*, subsection 168(1), and is subject to restrictions on how it may be treated by a municipality. Importantly, subsection 168(2) contains notice requirements for expenditures outside of the purpose of the fund, and subsection 169(7) allows for transfers out from these funds to pay for certain expenditures, without notice.

‘Expenditure’ versus ‘Transfer’

The town asserts that because what they did was a ‘transfer,’ and not an ‘expenditure,’ the provisions of *The Municipal Act* that require a public hearing under subsection 168(2) are not applicable.

If the town is correct that the ‘transfer’ of money out of the fund is not an ‘expenditure,’ then the source of the town’s authority to make such a transfer must be found. *The Municipal Act* authorizes transfers of funds in certain specified circumstances:

- a) From a municipality’s operating budget to its capital budget under subsection 169(3);
- b) From a municipality’s accumulated surplus, or its specific use reserve funds under subsection 169(5), provided there is a public hearing (except that no public hearing is required if the transfer is from a specific purpose fund for an expenditure of the type for which the specific fund was established).

Analysis of *The Municipal Act*’s terms that govern transfers reveals the following:

- a) A transfer from a specific use reserve fund may only take place to fund an expenditure;
- b) A transfer from a specific use reserve fund may be made without notice or a hearing, only if the purpose of the transfer and associated expenditure is within the specified purpose of the fund; and
- c) In all other instances, a transfer out of a specific use reserve fund (which must go towards an expenditure) requires a public hearing.

There is no provision in *The Municipal Act* that authorizes the transfer of funds from a specific-purpose reserve fund into another reserve fund without there being an associated expenditure. The town’s description of its actions as a ‘transfer’ does not relieve it from the requirements of the legislation, because such a transfer does not exist under the legislation. Any use of specific-purpose funds must be to fund an expenditure.

Manitoba Ombudsman finds that the town’s actions must be treated as an expenditure; more specifically, as an expenditure for a use other than the specific purpose of the fund. Therefore, the town was required to give notice and have a hearing in respect of that expenditure. In this

way, *The Municipal Act* ensures that specific-purpose funds are not used for a different purpose without the public being notified and given the opportunity to participate.

The town's accommodation tax by-laws

In addition to *The Municipal Act's* requirement for public notice, the town's accommodation tax by-laws must be considered. The town enacted these by-laws for the specific purpose of setting out how it would go about spending tax revenues. These laws direct the disposition of the tax revenues in specified ways, and do not grant the town council any discretion in their application.

The town was required to implement the processes and procedures under the by-laws and to give effect to the Destination Marketing Committee, and may not point to the fact that the committee was not functioning as justification for stepping in and acting when the committee was not. It was the town's responsibility to ensure the committee was doing its job. The town was obliged to respect the rights it granted to interested businesses to have a say in how the new tax revenue was spent.

Regarding the town's view that the Destination Marketing Fund money was never expended because the balance of the fund into which it was placed exceeded the amount that was taken from the fund, the ombudsman concludes that this fact, assuming it to be true, would not impact the conclusions reached in this report about the legality of the town's actions.

Other uses of Destination Marketing Fund money by the town

With regard to *Resolution 2013 116*, of May 1, 2013, wherein the town council approved a grant of \$10,000 to The Pas Rotary Club, the ombudsman concludes that this is not a use of Destination Marketing Fund money that is permissible under the accommodation tax by-laws. The committee was not involved with this action, as it had not considered or approved the grant; further, the use of the money was not related to destination marketing, as was required. As explained above, the function, purpose and intent of the town's accommodation tax by-laws, together with the provisions of *The Municipal Act*, operate to impose an obligation on the town to either use the tax funds for purposes acceptable under the by-laws, or to hold a public hearing prior to having the funds applied to alternate purposes. The Destination Marketing Fund is not a source from which the town can draw funds at its discretion for any purpose. The local hoteliers have participatory rights, specifically provided for in the by-laws, by way of their inclusion in the committee, and council may not circumvent these by acting in this fashion. Adherence to the process under *The Municipal Act* and the by-laws is required.

With regard to the town's decision in April of 2012 to use \$24,800 USD of Destination Marketing Fund money to engage the services of a marketing agency (a decision which was subsequently reversed), Manitoba Ombudsman concludes that this type of use, being one of money from a specific-purpose fund, would have been technically permissible under *The Municipal Act*. Assuming that the contract would have been for the provision of marketing for the town, this use would have been in accordance with the limited purposes of the fund. However, technical compliance with *The Municipal Act* notwithstanding, it would have been unfair to the local hoteliers, and to the residents of the municipality generally, for the town

council to avoid compliance with its own by-laws, which require that the Destination Marketing Committee be the entity that manages the accommodation tax revenues.

Did the town satisfy the notice requirements of their by-laws and of *The Municipal Act*?

The Manitoba Ombudsman has concluded that the town acted in contravention of its accommodation tax by-laws, as well as *The Municipal Act*, when it made use of accommodation tax revenues as it did. The issue of the sufficiency of the public notice the town gave of the 'expenditures' therefore became moot. However, as part of our investigation we considered the town's argument in respect of the effect of the notice it gave of its *2013 Financial Plan*.

Sufficiency of notice by way of the *2013 Financial Plan*

The town argues that even if what it did was an expenditure, then the notice requirements were met when it gave notice of a hearing for its *2013 Financial Plan*. The ombudsman notes that it is contradictory for the town to say on the one hand that what it did was not an 'expenditure,' and on the other that it gave notice of said expenditure.

There is no specific provision in *The Municipal Act* that addresses the notice that must be provided for an expenditure from a specific fund for a purpose other than the purpose of the fund, when the purpose of the expenditure is already provided for in the operating budget. Subsections 169(5) though 169(8) do not apply, because those sections apply to situations when the expenditure is not provided for in the budget; in this case the expenditure was provided for (Lakeside subdivision and development).

Due to a lack of a specific provision that applies, the general, or default, notice requirements of *The Municipal Act*, found at section 420, apply. Those requirements include that:

- a) Notice be published at least twice in a local newspaper, each notice at least 6 days apart from the other;
- b) The notices be published between 7 and 40 days before the hearing;
- c) The notice be posted in the municipal office for at least 14 days before the hearing;
- d) The notice contain the time, date, and place of the hearing;
- e) The notice contain:
 - a. a general description of the matter to be considered;
 - b. A statement that the purpose of the hearing is to allow for representations to be made and objections registered;
 - c. A statement that the information and documents concerning the matter and the procedures to be followed are available for review at a specified place.

In this case, sufficient notice was given of the *2013 Financial Plan*. However, the notice did not contain any general description or mention of the ‘transfer,’ or ‘expenditure,’ of funds from the Destination Marketing Fund for a purpose outside of the scope of that specific reserve fund. For members of the public to have had actual notice of the planned expenditure of funds from the fund for another purpose, they would have had to:

- a) See the notice of the *2013 Financial Plan*;
- b) Request a copy of the *2013 Financial Plan* between the dates of April 10, 2013 (if it was available on that date as expected) and the meeting on April 17th;
- c) Analyze the *2013 Financial Plan* carefully enough to discern that it contemplated using \$90,000 from the Destination Marketing Fund for the purposes of “Lakeside subdivision and development”;
- d) Understand that “Lakeside subdivision and development” was not within the specified purpose of the Destination Marketing Fund.

The notice did not make any mention of any intention to use funds from the Destination Marketing Fund for any purpose, authorized or not. Therefore, Manitoba Ombudsman concludes that by not including sufficient information in its notice of the *2013 Financial Plan* for the reader to be aware of the full effect of its use of the Destination Marketing Fund, the notice provided by the town was insufficient and non-compliant with *The Municipal Act*.

CONCLUSION

The statutory provisions of *The Municipal Act* balance the obligation of a municipality to use money in a manner consistent with its stated intentions with its prerogative as a democratic government to be flexible and change its course of action. This is accomplished by requiring that any use of funds outside of the stated intention be the subject of public notice and a public hearing. Added to this requirement are the terms of the town’s accommodation tax by-laws.

The ombudsman concludes that the town acted unreasonably and contrary to law when it ignored the requirements of and the purpose and intent of its own by-laws. The residents of the municipality are entitled to expect and trust that their elected government would respect and adhere to its own by-laws, which by-laws the municipality has the responsibility under provincial statute to impose and enforce. This is especially the case where the by-laws in question engage a municipal government’s power of taxation, a power the public expects and relies on being exercised in a fair, transparent, and lawful manner.

The town was required to allow the Destination Marketing Committee, which has the sole responsibility to manage and spend the Destination Marketing Fund money, to decide what use to make of the funds intended for the limited purpose of destination marketing. Instead, the town used the money in a way that was not provided for or permissible under *The Municipal Act*, or the taxation by-laws. By so doing, the town deprived the local hoteliers of their right to

participate, and the general public of its right to be notified of the town's intent to use tax revenues for a purpose other than that for which they were collected.

RECOMMENDATIONS

Section 36(1) of *The Ombudsman Act* authorizes the Manitoba Ombudsman to make such recommendation as he or she considers appropriate in situations where it has been found that the subject of the investigation has acted in a way that is contrary to law, unreasonable, or unjust.

The Town's 'transfer' of \$90,000 in accommodation tax revenues to the Lakeside Fund

The ombudsman finds that the town failed to comply with the terms of its own by-laws and with *The Municipal Act*. Consequently, pursuant to clause 36(1)(a) of *The Ombudsman Act*, the ombudsman finds that the town acted in a way that was unreasonable, and contrary to law. Its actions were unfair to the complainant, and to others similarly affected.

Recommendation #1:

In light of this, I make the following recommendation pursuant to clause 36(2)(g) of *The Ombudsman Act*:

- That the accommodation tax revenues that were removed from the Destination Marketing Fund by way of the town's *2013 Financial Plan* be replaced or returned to the fund.

The Town's grant of \$10,000 to The Pas Rotary Club

The ombudsman finds that the town failed to adhere to its accommodation tax by-laws, and therefore acted unfairly, unreasonably, and contrary to law.

Recommendation #2:

Accordingly I make the following recommendation pursuant to clause 36(2)(g):

- That the \$10,000 of accommodation tax revenues removed from the Destination Marketing Fund and granted to The Pas Rotary Club be replaced.

THE TOWN'S RESPONSE TO RECOMMENDATIONS

The ombudsman's report with recommendations was sent to the mayor and council of the Town of The Pas in December, 2014.

The town has accepted the conclusions of the report, and their reply is summarized as follows:

Recommendation #1:

The town will return the accommodation tax revenues to the Destination Marketing Fund. Given the current state of the town's finances, it is not feasible to return the full amount immediately, but rather it will be returned over a period of three years in equal installments of one third by way of the annual budget.

Recommendation #2:

The town provided further information to clarify the use to which the funds granted to the Rotary Club were put, which was to cover expenses related to a district conference held by the club. These expenses, in the opinion of the town, were within the stated purpose of the Destination Marketing Fund, in that they funded tourism related activities that benefited local hotels and businesses. The ombudsman agrees, as does the complainant, that although the process used by the town to make use of the accommodation tax revenues was improper, the ultimate use of the funds was within the scope of the intent of the by-laws. As such, the ombudsman considers that no further action is required.

In light of the town's response to the report and recommendations, the ombudsman considers this matter concluded.

MANITOBA OMBUDSMAN

JANUARY 2015