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File No.: 106879

Marnie Cluckie
Chief Administrative Officer
The Corporation of the Town of Niagara-on-the-Lake
1593 Four Mile Creek Road
P.O. Box 100
Virgil, ON
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Dear Ms. Cluckie:

**Re: Informal Site Visits by Members of Council
Open Meeting Requirements of the *Municipal Act*, 2001**

We have been asked to provide a legal opinion to The Corporation of the Town of Niagara-on-the-Lake (the “**Town**”) with respect to informal or “off the record” site visits attended by all members of Council vis-à-vis the application of the open meeting requirements of the *Municipal Act*, 2001.¹

Executive Summary

A site visit, attendance at a property, or any similar gathering of all (or a majority of) the members of Council can constitute an improper closed meeting under the *Municipal Act*, 2001. The members need not have an intention to convene a formal meeting, nor would any disclaimer of the meeting being “off the record” be relevant.

Whether a “meeting” has occurred is based on the statutory definition, which has two conjunctive factual requirements: (i) a quorum of members of the council are present, and (ii) those members “materially advance” the business or decision-making of council in any way.

If the context of a site visit satisfies the aforementioned two criteria, the site visit will constitute a “meeting.” To the extent it is not accessible to and observable by the public, the meeting can be found to be in contravention of the open meeting requirements of the *Municipal Act*, 2001.

In addition, there are practical and logistical issues with attempting to ensure such a site visit is open to the public. As such, we would recommend against authorizing a practice or protocol of attending site visits as a whole of Council.

¹ *Municipal Act*, 2001, S.O. 2001, c. 25.

Background

At its meeting on December 20, 2022, Councillor Vizzari raised an item of new business regarding the attendance by members of Council at facilities or sites. We understand that in the past, local businesses and organizations have occasionally invited all of the members of Council to their facilities or premises to provide information to the members about their business or some issue related thereto.

Councillor Vizzari raised a concern with such visits being held in the absence of the public. She suggested that instead of such visits, the Town should adopt a practice of inviting organizations to present at a regular meeting of Council where the public could attend and observe, and obtain the same information that would be provided to members of Council.

After some discussion, Council provided informal direction to Town staff to report back on options for adopting such a protocol.

Following this meeting, an issue was raised as to the legality of conducting site visits or facility tours with all members of Council. In particular, Town staff have raised a concern as to whether such gatherings would contravene the open meeting requirements of the *Municipal Act, 2001*.

Analysis

1. The History and Purpose of the “Open Meeting Rule”

Originally, in Ontario, all meetings or deliberations of a municipal council were held in private, to the exclusion of the general public. Under the common law, there was no obligation on a municipality to hold its meetings in a public forum.²

The first version of an “open meeting” requirement was introduced in *The Consolidated Municipal Act, 1922*, which required that “regular meetings” of a council to be open to the public, but still allowed committee and other meetings to be held in a closed forum.³ The statute led to an opaque decision-making process where municipal councils could cloak the substance of their discussions in the secrecy of a “committee meeting,” and subsequently ratify decisions in a brief “regular council meeting” without much discussion or public scrutiny.⁴

This historical practice was revised by the enactment of the *Planning and Municipal Statute Law Amendment Act, 1994*⁵ which adopted the contemporary version of the open meeting rule. The open meeting requirement is currently enshrined in subsection 239(1) of the *Municipal Act, 2001*, which provides as follows:

² See e.g. *Journal Printing Co. v. McVeity* (1915), 1915 CarswellOnt 86, 33 O.L.R. 166 (Ont. C.A.).

³ *The Consolidated Municipal Act, 1922*, S.O. 1922, c. 72, s. 199:

199 (1) The ordinary meetings of every council shall be open and no person shall be excluded therefrom except for improper conduct.

⁴ Ontario, *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information* (Toronto: The Committee, July 1984) at p. 2; [**“Working Committee on Open Meetings”**].

⁵ *Planning and Municipal Statute Law Amendment Act, 1994*, S.O. 1994, c. 23.

Meetings open to public

239 (1) Except as provided in this section, all meetings shall be open to the public.

The purpose of the open meeting rule is to promote transparency in local government. The courts have identified two rationales for the open meeting requirement: to increase public confidence in local government, and to prevent secrecy in decision making.⁶

However, the statute recognizes that in some circumstances, there is a legitimate need to discuss certain matters in private to protect the interests of the municipality.⁷ To this end, section 239 sets out fourteen (14) limited exceptions to this default rule based on the subject matter to be discussed at a meeting. This balances the important public purpose of transparency and the public's right to observe municipal government in process with the legitimate needs of a municipality to discuss certain matters in private.

2. Application of the Open Meeting Requirements to “Meetings”

The requirements of section 239 of the *Municipal Act, 2001* are engaged whenever a municipality holds a “meeting,” which bears a specific definition for the purpose of the open meeting rule:

Definitions

238 (1) In this section and in sections 239 to 239.2,

...

“meeting” means any regular, special or other meeting of a council, of a local board or of a committee of either of them, where,

- (a) a quorum of members is present, and
- (b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee.⁸

Previously, a “meeting” was defined in the *Municipal Act, 2001* as “any regular, special or other meeting of a council, of a local board or of a committee of either of them.”⁹ This changed with the enactment of the *Modernizing Ontario’s Municipal Legislation Act, 2017*,¹⁰ which amended a series of provisions in the *Municipal Act, 2001*, all aimed at enhancing transparency and accountability of municipal administration.

⁶ *Brantford (City) v. Montour* (2013), 15 M.P.L.R. (5th) 175, at para. 45 (Ont. C.A.).

⁷ See e.g., *Working Committee on Open Meetings*, supra note 4, at p. 7.

⁸ “Committee” is defined in subsection 238(1) of the *Municipal Act, 2001* as “any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards.”

⁹ *Municipal Act, 2001*, s. 238(1), *sub verbo* “meeting”, as it read on May 29, 2017.

¹⁰ *Modernizing Ontario’s Municipal Legislation Act, 2017*, S.O. 2017, c. 10 (Bill 68).

Currently, there are two requirements for a gathering of members to constitute a “meeting” for the purpose of the open meeting requirements of the *Municipal Act, 2001*:

- a “quorum” of members – or the majority of members of council¹¹ – must be present;¹² and
- the members discuss or otherwise deal with any matter in a way that “materially advances the business or decision making of council”.

Although the gathering must be attended by a majority of members, a social event or dinner would not automatically constitute a “meeting.” However, if the members assembled begin to discuss matters that would ordinarily constitute council business, it could constitute a “meeting” which would trigger the requirements of the open meeting rule.

While regularly scheduled meetings of a council are to be held at its public offices,¹³ holding a gathering outside of the traditional meeting place (i.e., council chambers) would not circumvent the definition of a meeting.

Furthermore, the intention of the members assembled is not relevant to this determination, nor any disclaimer that such a meeting is being held “off the record.” The key consideration is whether a quorum of members is present and “materially advances” some item of council business.

3. “Materially Advancing” the Business and Decision Making of Council

Much like any legislation, the definition of a “meeting” must be interpreted in accordance with the modern approach to statutory interpretation: the words of that provision must be read in their ordinary meaning, within their entire context in the *Municipal Act, 2001*, in a manner that is harmonious with the objective of the open meeting rule and the Legislature’s intention in enacting it.¹⁴ A textual analysis of this provision, when parsed into its operative components, also helps to better understand the scope of the definition.

i. Textual Analysis

First, the actions that may constitute a “meeting” require that the members “discuss” or “otherwise deal with” some item of council business. The inclusion of the words “otherwise deal with” in this provision indicates an intention on the part of the Legislature that any manner of dealing with council business might constitute a meeting. It is not strictly limited to dialogue or deliberations between members.

¹¹ *Municipal Act, 2001*, s. 237(1).

¹² Physical presence, rather than electronic participation, was previously required in order for a member to be counted toward a quorum. However, as a result of the COVID-19 Pandemic, s. 238 of the *Municipal Act, 2001* was amended to permit municipalities to amend their procedure by-law to allow members participating virtually to be counted toward quorum: see *COVID-19 Economic Recovery Act, 2020*, S.O. 2020, c. 18, Sched. 12, s. 1.

¹³ *Municipal Act, 2001*, s. 236(1).

¹⁴ Elmer A. Driedger, *The Construction of Statutes*, 2nd ed., (Toronto, Butterworths, 1983) at p. 87.

Second, the definition scopes the subject matter that might constitute a meeting to “the business or decision-making of council.” Socializing or discussing popular culture or sports would obviously not fall within the ordinary meaning of these words. However, where a topic relates to a municipality’s legislative mandate, powers, or matters of significance in the local community, it would relate more closely to the business or decision-making of council. The Legislature has chosen to describe the subject matter as including both “decision-making” (e.g., deliberating, voting, or reaching a consensus) but also the “business.” This parallelism must be understood as extending the definition of “meeting” beyond an informal version of the decision-making processes of council, such as straw poll votes or reaching a consensus. Rather, this phrase should be understood as also including a group consideration of the general affairs of the municipal corporation.

Lastly, and most importantly, the phrase “materially advances” establishes a threshold within the definition of “meeting.” It is not enough that a quorum of members be together where an item of council business is merely mentioned. Rather, the members must “materially advance” that matter.

The phrase “materially advances” is not defined in the *Municipal Act, 2001*, nor is it immediately apparent what the ordinary meaning of this phrase entails. In our view, whether something “materially advances” the business or decision-making of council is primarily a factual determination based on the subject matter, the nature of the discussions, and the surrounding circumstances.

Although not decided under the current iteration of the *Municipal Act, 2001*, early jurisprudence also articulated the standard of “materially advancing” council business. In *Southam Inc. v. Ottawa (City)*, the Ontario Divisional Court held that in assessing whether a meeting of council has taken place, it is not enough that a matter be discussed, but that it be “materially” moved forward toward a decision:

Clearly, it is not a question of whether all or any of the ritual trappings of a formal meeting of council are observed...The key would appear to be whether the councillors are requested to (or do in fact attend without summons) attend a function at which matters which would ordinarily form the basis of council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process? [emphasis added]¹⁵

Despite this guidance, it is not evident these words have a single plausible interpretation.

ii. Legislative History

Legislative debates on Bill 68 help shed light into the intent of redefining the word “meeting.” On the second reading of the Bill, the Honourable Bill Mauro, the then-Minister of Municipal Affairs and Housing, stated that the amendment to the definition of “meeting” would “provide greater clarity and help ensure that a simple coffee chat between two councillors is not considered a

¹⁵ *Southam Inc. v. Ottawa (City)* (1991), 10 M.P.L.R. (2d) 76, at para. 12 (Ont. Div. Ct.).

meeting requiring public scrutiny.”¹⁶ General debate on the Bill also demonstrates that the Legislature did not intend social gatherings to be caught by this definition.¹⁷

However, detailed discussion of Bill 68, and particularly hearings of the Standing Committee on Social Policy to which the Bill was referred, demonstrate a general confusion as to what was really meant by the standard of “materially advancing.” Although this amendment was intended to bring clarity to the previously circular definition of “meeting,” the legislation did not establish any “bright line” test.

To this end, Progressive Conservative MPP Ernie Hardeman, the then-Critic for Municipal Affairs and Housing, moved a motion at the Standing Committee in an attempt to clarify the words “materially advancing”:

“I move that section 26 of schedule 1 to the bill be amended by adding the following subsection:

“(0.1) Subsection 238(1) of the act is amended by adding the following definition:

““materially advances” means to measurably or identifiably advance;”

...

I think, Mr. Chair, we’ve had considerable debate at the public hearings on the word “advances,” that a decision being advanced at a meeting would constitute a requirement to be a meeting of council. In this bill the word “materially” was added, but no one seems to be able to identify—well, there seems to be some discrepancies as to how you identify what “materially” means.”¹⁸

A vote on the proposed amendment was lost, and the final version of Bill 68 passed by the Legislature did not contain any clarification.

iii. Case Law and Closed Meeting Investigation Reports

Reports from closed meeting investigators assist in understanding the ambit of whether an informal gathering will constitute a meeting. While these do not have the same effect as binding jurisprudence from the courts, we consider them to be persuasive.

Early closed meeting investigation reports formulated the following “working definition” of what would constitute a “meeting”:

¹⁶ Ontario, Legislative Assembly, *Hansard*, 41st Leg., 2nd sess. (Nov. 29, 2016), at 1730 (Hon. Bill Mauro).

¹⁷ Ontario, Legislative Assembly, *Hansard*, 41st Leg., 2nd sess. (Feb. 23, 2017), at 1630 (Percy Hatfield):

“Now, this doesn’t mean a few councillors can’t get together for a beer at a “buy one, get the second one free” chicken wings offer before or after a regular council meeting, but they can’t have a quorum of council at the table and they can’t cut deals on future votes.”

¹⁸ Ontario, Standing Committee on Social Policy, *Hansard Transcripts*, 41st Leg., 2nd sess. (April 25, 2017), at 1601 (Ernie Hardeman).

“Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.”¹⁹

This working definition was adopted and applied in a noteworthy but controversial report of the Ontario Ombudsman which determined that an informal lunch gathering when seven members of council of the City of London met at an eating establishment constituted a “meeting” that was improperly closed to the public.²⁰ The Ombudsman’s use of this working definition was criticized for failing to consider the jurisprudence on municipal meetings, including the “materially advanced” standard espoused in *Southam Inc. v. Ottawa (City)*.²¹

Following the changes to the definition of meeting resulting from Bill 68, reports of closed meeting investigators have looked to the factual circumstances to determine whether an informal gathering “materially advanced” the business of council. The Ontario Ombudsman has commented on these requirements as follows:

“...‘materially advances’ involves considering the extent to which the discussions at issue moved forward the business of the municipality, based on factual indicators.

Discussions, debates or decisions that are intended to lead to specific outcomes or to persuade decision-makers one way or another are likely to “materially advance” the business or decision-making of a council, committee or local board. Mere receipt or exchange of information is unlikely to “materially advance” business or decision-making, as long as there is no attempt to discuss or debate that information as it relates to a specific matter that is or will be before a council, committee or local board.”²²

One factor that would indicate a matter relates to council business is whether the particular subject or decision is set to come back to council for consideration.²³

¹⁹ Ontario Ombudsman, *Don’t Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 25, 2008) paras. 54-60 ; online: https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf

²⁰ See Ontario Ombudsman, *In the Back Room: Investigation into whether members of Council for the City of London held an improper closed meeting on February 23, 2013* (October 2013); online: https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/London_BT_Final-EN_1.pdf

²¹ See *ibid*, Appendix, “Letter from John Mascarini, Christopher J. Williams of Aird & Berlis, lawyers representing Mayor Fontana and Councillors Henderson, Orser, Polhill, Van Meerbergen and White” (September 27, 2013), at pp. 3-4.

²² Ontario Ombudsman, *Investigation into a complaint about March 7, 2018 information sessions involving a quorum of councillors for the Village of Casselman* (August 2018), at paras. 30-31; online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2018/village-of-casselman-en>

²³ Ontario Ombudsman, *Investigation into alleged closed meetings held by the Walkerton Business Improvement Area and the Municipality of Brockton on June 13, June 20, and September 27, 2016*, (February 2017), at para. 69; online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2017/municipality-of-brockton>

Similarly, the receipt of information that could inform members on an item of future business or decision-making can also be relevant to determining whether council business has been materially advanced.²⁴

The reports of the Ontario Ombudsman provide a helpful starting point, but in our view, focus too narrowly on the standard of “materially advance” without due consideration for the remaining words in the statutory provision or their entire context. For example, the Ombudsman’s interpretation would capture actions with the hallmarks of formal council decision-making, such as debating, reaching a consensus, or making decisions to be ratified at a later meeting. However, anything short of these indicia will not satisfy the standard. In our view, this narrow interpretation fails to consider the Legislature’s inclusion of the words “or otherwise deals with” in parallel to “discuss,” and also that it is not some outcome that must result (e.g, a decision or consensus), but rather the process of moving forward the “business” of council.

We would also note that the exact same verbiage in the definition of “meeting” exists elsewhere in the open meeting provisions of the *Municipal Act, 2001*, yet seemingly has been given a broader interpretation. The *Municipal Act, 2001* provides for the following closed meeting exception:

Educational or training sessions

239 (3.1) A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:

1. The meeting is held for the purpose of educating or training the members.
2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee. [emphasis added]

Subsection 239(3.1), which has existed in the *Municipal Act, 2001* since 2006, allows a council to hold an education or training session in closed session, subject to the caveat that members refrain from “materially advancing” council business at such a session.

Closed meeting investigation reports considering this exception also indicate that even though council may only be receiving information and not making any determinations, if the information discussed or exchanged relates to a matter that council is currently considering or will make a decision on in the near future, the discussions will not fall within the scope of that exception.²⁵ The conduct of transactional business or decision-making may also fall outside the scope of the exception,²⁶ as will the identification and ranking of strategic priorities for the municipality.²⁷

²⁴ Ontario Ombudsman, *Letter from the Ontario Ombudsman to the City of Elliot Lake* (10 August 2012) at p 5; online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2012/city-of-elliott-lake>

²⁵ Ontario Ombudsman, *Report regarding meetings held by Midland Town Council between December 2011 and March 2012*; cited in Ontario Ombudsman, *Letter to the Town of Moosonee* (September 4, 2014); online: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Moosonee-closing.pdf>

²⁶ Local Authority Services, *Report to the Corporation of the County of Essex* (September 2009) at 13.

²⁷ Local Authority Services, *Report to the Corporation of the Township of Brock* (September 2015).

As such, the definition of “meeting” should not be limited to instances where some decision is reached, but also key steps along the way to a council decision that would ordinarily occur at a formal meeting of council. In our view, the meaning of “materially advance” should also have consideration for the exchange of information that will inform council of an impending or potential matter that will come before it. This interpretation more closely reflects the underlying purpose of the open meeting rule.

iv. Summary on Interpreting the Definition of Meeting

In considering the definition of “meeting” in its entire context and with a view to the object and purpose of the open meeting requirements, we are of the opinion that the receipt or exchange of information that is pertinent to a matter Council will consider or has the potential to consider in the near future may constitute “materially advancing” the business of council.

In enshrining the open meeting rule into law, the Legislature intended that the decision-making process – not just decision-making outcomes – be observable by the electorate. An integral part of this process is the imparting of information to decision-makers, be it through reports from municipal staff or consultants, or information provided by third parties. The rationale behind the open meeting rule dictates that this information ought to be shared with the public, and not be cloaked in secrecy. This is because an informed electorate is more likely to understand the significance of particular issues and more likely to accept decisions when they are made if the basis for those decisions is shared with the public.²⁸

There may be some items of business or sensitive information that legitimately garner a greater level of secrecy. However, the open meeting rule, particularly the closed meeting exceptions, already recognize and protect these interests. Where information does not fall within the subject matter exceptions, and by fiat, does not engage the policy reason for secrecy, it is in the public interest that these matters be shared with the public.

Applying the meaning of this definition to the issue posed in this opinion, site visits and informal gatherings with community organizations can indeed meet the standard of “materially advancing” council business where their purpose is to better inform decision-makers of an issue that council will be called upon to consider.

We offer the following example to explain this reasoning. Council may be asked by a local organization to visit a facility that it is contemplating expanding in order to grow its business. In its role as an approval authority under the *Planning Act*, Council may be called on to consider an application to rezone the property to facilitate the expansion. If all members of Council attend the site, a quorum of members would be present. This would not automatically constitute a meeting. However, during this visit, members will gain information and develop an appreciation for the site, its characteristics, and perhaps some of the issues that will be taken into consideration for the rezoning application. This exchange of information would enhance the members’ ability to make an informed decision on the application. The exchange of this information is not inappropriate in and of itself. However, to the extent information exchanged will inform a future decision of Council, that may help move Council’s decision-making process along. This might constitute “materially advancing” council business, and inadvertently constitute a “meeting.”

²⁸ *Working Committee on Open Meetings*, supra note 4, at p. 3.

As such, in our opinion, despite being informal or “off the record,” a facility tour, site visit, or attendance at a property by members of Council can constitute a “meeting” for the purposes of the open meeting rule. The intention of the municipal officials in attendance, or the fact of other individuals being in attendance, is irrelevant to whether the gathering will constitute a meeting. The only relevant considerations are whether a quorum is present, and whether the members discuss or in any other way deal with a matter that materially advances council’s business.

4. Practical Considerations and Recommendations

In addition to the legal limitations discussed above, there are important practical considerations that the Town should have regard to in relation to attending site visits or informal gatherings.

As mentioned above, the undeniable purpose of the open meeting rule is to promote openness and transparency in local government. Democratic values require that electors and the public generally be able to observe the decision-making process. The rationale behind these values was stated by the Working Committee on Open Meetings and Access to Information as follows:

The basic reason for supporting open meetings...at the local level is to foster and promote values considered essential to the democratic process. If electors are to choose their leaders intelligently; evaluate decisions and judge decision-makers; correct misinformation; respond to policy initiatives; and avail themselves of the opportunity to shape their own communities, knowledge and involvement are key.

To become knowledgeable, citizens need access to the same information as the decision-makers have before decision are made. The public should be made aware of the considerations upon which governmental decision are made. They should be allowed to go behind and beyond the decision made to see the advantages and disadvantages and possible consequences of various courses of action. Ideally, the information made available to them should be timely and presented in a form which is both usable and comprehensive. With this information, involvement becomes meaningful. Hence the further and corresponding need for citizens to be able to attend meetings, hear deliberations and make representations before municipal councils.²⁹

These essential values must be kept in mind not only in how Council conducts itself, but also how Council is seen by the public to be conducting itself.

First and foremost, based on the definition of a “meeting,” there is always some level of risk involved when a quorum of members gather together or attend a site. As indicated above, whether council business is “materially advanced” is a highly factual determination that is based on the context. Often, this determination can only be made after the fact of a gathering, and there is no “bright line” test for what topics or discussion or actions may or may not cross the line. However, unlike a formal meeting, what is discussed at an informal gathering or site visit cannot be easily controlled by any rules of procedure, or an agenda. This is especially true where third parties attend and have items they wish to raise with the members of Council. Members of Council should not put themselves in a situation where council business might be transacted, lest they inadvertently constitute themselves in a “meeting” contrary to the open meeting requirements.

²⁹ *Working Committee on Open Meetings*, supra note 4, at p. 3.

On account of this inherent risk, which in our view is not easily mitigated, it is best to err on the side of caution by not conducting site visits or informal meetings with a whole of the members of Council, or even a majority of the members. In some limited circumstances, it might be appropriate for a single member of Council, such as a relevant local councillor, to attend a site or meet with members of the community. However, this would more closely reflect that member's representative capacity as a liaison with municipal administration, not their role as a member of a deliberative decision-making body.

Second, even if members of Council completely refrain from discussing any municipal business, there may still be some level of public scrutiny as to what transpired at the informal gathering. This is especially true if the site in question is directly related to a matter that has previously come before Council, or that the public has knowledge of, such as a development site, a prospective grant recipient, or heritage property. The mere fact of attending a site or facility with private third parties may give rise to some speculation that Council-business may have been transacted. The public may legitimately wonder what information was exchanged or discussed, or whether any deals have been cut. This is especially true given that no formal meeting minutes or a video recording would follow that gathering. This would detract from rather than enhance the important public purpose served by the open meeting rule, namely the democratic value of open and transparent local government.

Lastly, even if Council chose to convene itself as a formal meeting of Council at a site visit in an attempt to comply with the open meeting rule,³⁰ the logistical and practical difficulties would be significant. If Council convenes a meeting, all the substantive and procedural requirements of the open meeting rule would apply. Chief among these is the requirement that "all meetings...be open to the public," which means that the public must be able to observe all aspects of the meeting in process and not be practically excluded from the meeting.³¹

This begs the question of how the Town would uphold its statutory obligation to ensure that all members of the public have access to and can observe all aspects of a site visit. Some sites or facilities may, by their nature, not be able to accommodate a significant number of non-municipal attendees, and others may not have enough space to accommodate any at all. In addition, because such properties are privately-owned and not under the control of the Town, an owner could refuse to grant the general public access to their property, which would be inconsistent with Council's obligation.

Based on the above considerations, we would recommend against the adoption of a policy or protocol authorizing site visits by the whole of Council. From a legal perspective, such site visits can constitute a "meeting" to which the open meeting requirements would apply. However, there is no "bright line" test for what discussions or actions may "materially advance" council business that could inform the scope of risk.

³⁰ Subsection 236(1) of the *Municipal Act, 2001* provides that council meetings shall be held at a place set out in the procedure by-law, ordinarily, council chambers. In our experience, we have not seen a procedure by-laws that expressly allow for meetings to be conducted at any site outside of the municipality's offices (i.e., as a site visit).

³¹ See e.g., Ombudsman of Ontario, *Investigation into whether Council for the City of Clarence-Rockland held illegal closed meetings on August 27 and September 15, 2014* "Access Denied" (December 2014), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/city-of-clarence-rockland-access-denied%E2%80%9D>

From a practical perspective, holding such a site visit as an open meeting of Council presents many logistical challenges that would not allow for Council to transact business in an efficient manner. The important public purposes of transparency, openness, and accountability requires that the public be able to observe the process of how decisions are made, not only the outcome.

Conclusion

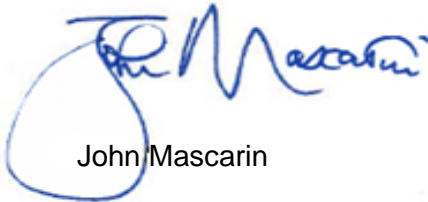
In conclusion, a site visit or attendance at a property by all the members of Council can constitute a “meeting” under the *Municipal Act, 2001*. To the extent a site visit “materially advances” Council business or decision-making in any way, it may constitute a “meeting.” This determination is highly factual, and there is no clear demarcation or general standard that could guide members as to what would cross the line in any given instance. If such site visits are not observable by the general public as they are in process, this can constitute a contravention of the *Municipal Act, 2001*.

In our view, the important public purpose served by the open meeting rule should be considered in determining the Town’s policy in relation to site visits by members of Council. In particular, the goal of the open meeting rule is to enhance transparency and openness of local government, and inform the electorate about how decisions are made and on what basis. Even if members of Council do their best to refrain from discussing Town business at a site visit, the surrounding context and mere fact of attending a site may lead to public speculation about what actually transpired. This can risk the loss of public confidence in local government which the open meeting rule seeks to enhance.

We support the position that Council invite any persons, parties or organizations wishing to inform members of their businesses, plans or proposals to present such information to Council and to answer any questions that members may have at an open meeting of Council.

Yours truly,

AIRD & BERLIS LLP



John Mascarin

JM/JGP

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