

***REPORT
ON A
CLOSED MEETING COMPLAINT***
by
Joyce Chevrier

**REGARDING
City of Kenora
CLOSED MEETING
FOLLOWING THE REGULAR COMMITTEE
MEETINGS OF COUNCIL
HELD
September 8, 2008**

**PAUL S. HEAYN, CLOSED MEETING INVESTIGATOR
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Complaint:

On August 14th, 2012 I received a Complaint Form from Joyce Chevrier, 28 Norman Drive, Kenora, ON P9N 3T4.

Ms. Chevrier's complaint centered around the City's Closed Meeting following the Regular Committee Meetings of Council on Monday, September 8, 2008. Specifically, the removal of the Norman Park Covenant placed on title in 1939 and passed onto the City when the City purchased the property in 1946. The registered covenant restricted the use of "Norman Park" for parkland and reforestation. Further, Ms. Chevrier was concerned that no by-law or resolution, which is normally brought forward to an open meeting of Council, was ever passed to approve this action. She questioned whether the act to remove the covenant, could be rescinded. She also had concerns with Council and the Property and Planning Committee to provide the necessary protection of this park by the Official Plan (OP) and the Zoning By-laws, siting those documents can be changed by the will of Council in the future – actions few residents pay attention to.

Documents Examined Investigating the Complaint:

I asked the City Clerk, Joanne McMillin for several documents and received:

- Copies of minutes open and closed in 2007 and 2008 where Council discussed removing the covenant.
- Copies of Property Planning minutes of Feb. 16, 2008.
- A copy of the title search of Feb. 2008
- A diagram showing the position of Pearson St. running through Norman Park
- A copy of the By-law that was supposed to be passed to correct Pearson Street designation
- A copy of the letter in 1988 to Mayor or Council from Boise Cascade's attorney, Bruce Ormiston indicating that the covenant **not be removed**.
- A copy of correspondence from Min. of Natural Resources & Abitibi Bowater indicating that they had no problem with the covenant being removed.
- A copy of instructions to the City attorney, Bruce Ormiston that the covenant **be removed**.
- A copy of any resolution or by-law of Council authorizing the removal of the covenant and the minutes in which such a resolution or by-law was passed. (*No resolution or by-law exists formally authorizing the covenant be removed. A copy of the Closed Meeting instructing Administration to remove the covenant was provided. A copy of the Confirmatory By-Law Number 131-2008 dated September 15, 2008 that authorized "the actions of Council and its Committee and other meetings", was also provided.*)
- Copy of the CAO's September 4, 2008 In-Camera Report recommending the covenant be removed.

Documents Examined in Addressing this Complaint:

The following documents were examined in addressing Ms. Chevrier's complaint:

- The Documents that were provided and particularly the Open and Closed meeting minutes of September 8, 2008.
- The Municipal Act, R.S.O. 2001, c.25 Section 239 (2)
- Letters from Abitibi Bowater
- Letters from Ministry of Natural Resources
- Letter from Howard Hampton
- Letters from Bruce Ormiston, Solicitor
- The Land Titles Act, R.S.O. 2001, c.L.5 Section 119 (9)

The Essence of the Complaint as it Relates to Section 239 of the M.A.:

Section 239 of the Municipal Act deals with Closed Meetings of Council. The preface of Section 239 states:

Meetings open to public

239. (1) Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

Of course, there are exceptions that enable Council to do business in a confidential manner and they are:

Exceptions

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

- (a) the security of the property of the municipality or local board;
- (b) personal matters about an identifiable individual, including municipal or local board employees;
- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
- (d) labour relations or employee negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. 2001, c. 25, s. 239 (2).

The Council approved reason for moving into Closed session to discuss the covenant on Norman Park was "Disposal of Land" or "(c) above.

While the Complaint in this instance clearly centered around the "removal of the Norman Park registered covenant", I decided to investigate the Complaint to make sure 1) there was a proper resolution authorizing entering into a closed session, 2) was the discussion appropriate to the reason for entering the closed session and 3) was the actions of Council during the discussions on topic and procedures were proper (example: no votes taken).

Findings:

It is clear to me that the Council meeting of September 8, 2008, closed session, was properly entered into and discussions within the meeting followed proper procedure. The reason for entering the closed meeting as documented was for the purpose to discuss a matter regarding the proposed or pending acquisition or disposition of land by the municipality as per the Municipal Act, 2001, c.25, Section 239(2) and in particular exception (c) under that subsection. However, in examining the minutes of that closed meeting, there was no acquisition or disposal of land and subsequent investigation found that section (f) solicitor client privilege would have been a better reason. That being said, entering into closed session by Council qualified under Section 239(2).

During the examination of the minutes, correspondence and discussions with the Mayor at the time, three Councilors at the time and the City's solicitor at the time, it was clear that there may be other issues to look at and besides a resident has lodged a complaint and an answer needs to be forthcoming.

So, if the closed session reasons, procedures and discussions were proper, there were some issues that needed some clarity:

- 1) Why was the covenant that restricted the use of the "park" to "reforestation and park purposes", removed?
- 2) What circumstances led up to the removal.
- 3) The Closed Meeting Minutes mention that a "Press Release will be prepared for the information to the public". Was the issue ever made public?
- 4) Was the action of releasing the covenant ever covered by a by-law or resolution?

Conclusion

- 1) Why was the covenant removed?

I asked this question of the Mayor at the time (Len Compton) and three Councilors at the time (David McCann, Rory McMillan & Chis Van Wallegem. There was a common theme among all four – that Abitibi Bowater was heading into bankruptcy protection and the mill could be closed or sold and if sold to a foreign company, the procedure to deal with the covenant in the future would be expensive and prohibitive. Also mentioned was the fact that such a covenant that has no termination date, would expire after forty (40) years. Since the covenant was first registered in 1939, forty years has past.

The forty year expiry provision is made under Section 119(9) of the land titles Act.

Irrespective of the forty year expiry, Abitibi Bowater actively sought to have the covenant released – (Abitibi Bowater's letter of July 22, 2008). In a letter August 11, 2008, the MNR District Manager questioned if there is a requirement to obtain consent of an interim property owner (which the Crown was until it sold the property to the Town of Kenora in 1946) they would require more details. A letter by MNR dated December 17, 2008 states that "it is our opinion that the covenant is deemed to have expired after 40 years (Land Titles Act, Section 119(9)". It is therefore clear; Abitibi Bowater sought to have the covenant released and all parties agreed – including the MNR.

- 2) What were the circumstances leading up to the release of the covenant?

While it was not clear what were the circumstances that lead to the release of the covenant, the common theme from Council of the day was the issue of Abitibi Bowater winding up their business in Kenora and the issue of the unknown future in dealing with land issues on the Norman Park. It is evident that the Company and the City shared those same concerns.

3) The Press Release

There is no evidence that a press release was every issued. Mayor Compton stated that he was sure the press was aware of the release of the covenant at the time.

4) Confirming By-Law

Although there was no specific resolution or by-law authorizing the removal of the covenant, there was a “confirming By-law #131-2008 was passed on September 15, 2008. A confirming by-law sanctions the all actions of Council at the previous Council meeting.

5) Can the covenant be reinstated?

Legal advice would conclude that it is possible to re-register the covenant but it could be taken off by the City so it would not be enforceable. An enforceable restrictive covenant requires two parties so that either one could not unilaterally remove it. As recently as September 27th, 2012, Council, Staff and the Property Planning Committee have discussed changing the Official Plan and Zoning By-law so as to highlight the use of Norman Park. However, it was thought that as there already exists restrictions on the use of the park in the Zoning By-law and Official Plan that further clarification is not needed.

Recommendations:

I have no recommendations for the procedures in place dealing with Closed Meetings.

I have two recommendations regarding the actions of Council and Administration:

1) It is more desirable to pass a resolution or a by-law specifically to address the actions or instructions of Council rather than a “confirmatory by-law” that picks up any actions that may have been missed resulting from prior Council deliberations. Confirmatory by-laws, although quite legal and expedient, are used as a sort of ”clean-up” by-law. I noted that when the Committee came out of the closed meeting, the following was included in the Open Meeting: “That Committee will accept a recommendation from the City Solicitor to proceed with the settling of a claim against the municipality.” . It would have been more transparent for Council to make a similar statement in the Open Council minutes to remove the covenant. As an example: “That Administration proceed with the removal of the Norman Park Covenant”.

2) The Closed Meeting minutes reflect directing Administration to release the Covenant and issue an *information package* be prepared for the public or a *Press*

Release for the information of the public. There is no evidence that this was ever done. It is my recommendation that action items resulting from Council deliberations be noted and Council's instructions followed.

With regard to the Norman Park restricted usage, any recommendations are outside of my mandate as the City's Close Meeting Investigator. I will leave this issue in the hands of the concerned citizens and the Council as their representatives, to determine how best to address the concerns of the potential uses of Norman Park.

Acknowledgements:

I would like to extend my appreciation to City Clerk, Joanne McMillin previous Mayor and Councilors of 2008 and the City's Solicitor for taking time to discuss this complaint and for sending the documentation to me to help me understand the issues surrounding this complaint

I would also like to thank Joyce Chevrier for her clear and concise explanation of her concerns and for taking my telephone calls on this issue.