



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

June 12, 2014

Mayor Rick Hamilton;
CAO Rob deBortoli and
Clerk Lesley Sprague
45 Hillside Drive North
Elliot Lake, ON P5A 1X5

Dear Mayor Hamilton, Mr. deBortoli, and Ms Sprague,

Re: Complaint that White Mountain Academy Board is violating the open meeting requirements of the *Municipal Act, 2001*

I am writing further to our conversation on June 10, 2014, regarding the outcome of our review of a complaint that meetings of the Board of the Northern Institute of the Arts (locally known as the White Mountain Academy) are closed to the public in violation of the *Municipal Act, 2001* (the “Act”).

The complaint alleged that Board meetings should be open to the public, given the presence of councillors of the City of Elliot Lake on the Board, and the alleged financial connection between the City and the White Mountain Academy.

The *Municipal Act, 2001* requires that meetings of council, local boards, and committees be open to the public, with limited exceptions. The focus of this review was on whether the White Mountain Academy Board constituted a “local board” for the purposes of the open meeting requirements, or a corporation, exempt from the open meeting requirements under the Act or related regulations.

In reviewing this matter, we spoke with the Board’s secretary and the Mayor, interviewed the City Clerk and Chief Administrative Officer, and obtained and reviewed the relevant documentation, including the incorporation documents, city minutes, an external auditor’s report, and a November 20, 2012 legal opinion provided to city council on the status of the White Mountain Academy Board.

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History of the White Mountain Academy /Northern Institute of the Arts¹

Prior to 1995, what is now the White Mountain Academy building housed the Department of Mines/Energy offices. After the collapse of the mining industry in the early 1990s, the building was vacated and the Northern Institute of the Arts took over the building.

Incorporation

The Northern Institute of the Arts was incorporated in 1995 under the *Business Corporations Act* as a non-profit corporation with non-share capital. According to the corporate filing documents, the objects of the corporation were to “plan, develop and establish a post-secondary visual arts educational institution...” and “to foster awareness of and interest in visual arts in Canada by offering public education programs...”

The corporation documents show that the City of Elliot Lake, along with a number of other organizations such as Laurentian University and the Serpent River First Nation, sponsored the educational institution and were considered “members” of the corporation, entitled to representation on the corporation’s Board of Directors.

Around this time, the City loaned the Northern Institute of the Arts \$950,000 to pay outstanding debts related to the building. The City took a lien against the corporation’s mortgage to ensure repayment at the time the building is sold. This amount remains owed to the City.

Amendments to incorporating documents/ Changes to the Board’s role

In 2005, when the arts school shut down due to lack of enrolment, the White Mountain Academy building was left vacant, and the City agreed to pay for minimal maintenance of the building to guard against its deterioration. Corresponding amendments were made to the corporation’s corporate filings in 2005, providing for the City of Elliot Lake to become the sole member of the corporation, with sole authority to nominate the Board of Directors.

The City began leasing space in the building for its Parks and Recreation department at a cost of \$1 per month, essentially in exchange for the City paying approximately \$65,000 per year in maintenance for the building.

¹ Information mainly gathered from incorporation documents and City staff.

With the closure of the school, the Board's sole responsibility became overseeing the building maintenance and acting as steward of a small art collection left behind after the school closed.

Role of White Mountain Academy Board since Algo Mall collapse

After the Algo Mall roof collapse disaster in June 2012, displaced services (e.g., the public library, Service Canada) were relocated to this building. A hearing room for the public inquiry into the mall collapse was also constructed in the building. Funding for the renovations to accommodate the new tenants was provided by the City and the provincial and federal governments.

The Board was charged with managing the construction and new tenancies, including hiring a general manager to oversee this. The City agreed to administer the funds for the building renovations, as well as any staff payroll, because the Board lacked the infrastructure and cash flow to do so, the building having been without any major tenants since 2005.

The City's external auditor, BDO, reported to Council² that the receipts for construction/renovation work submitted to and approved by the Board were sent to the City for bookkeeping and payment. The auditor reported that renovation costs exceeded the estimated budget by \$743,690. While noting a lack of reporting relationship between the Board and the City, the auditor found that the cost overruns may become a City expense if the Board is unable to repay this amount.

Analysis – Whether the Board is a “local board” for the purposes of the open meeting requirements of the *Municipal Act, 2001*

Background

Section 1 of the *Municipal Act* defines a local board as:

A municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority.

² BDO Auditor Report dated Jan 10, 2014 available as part of Elliot Lake's Finance and Administration Committee Agenda Package:
<http://www.cityofelliottlake.com/en/Calendar/Detail.aspx?Id=fcdb29f9-36e4-43eb-81e0-2a1c81b219b5>

Based on a review of the case law,³ there are four criteria that may distinguish an entity as a “local board”:

1. The entity must be carrying on the “affairs of the municipality” (as set out in the definition in s. 1);
2. A direct link with the municipality must be found (either by way of legislation or authority from the municipality);
3. There must be a connection to or control by the municipality; and
4. There must be an element of autonomy.

Application to the Board

1. *The entity must be carrying on the “affairs of the municipality” (as set out in the definition in s. 1)*

The corporation’s original purpose, as per the incorporation documents, was to establish and administer a visual arts school and to promote visual arts nationally,. Based on more current information gathered, the Board’s objects remain promotion of visual arts, as well as maintenance of the White Mountain Academy building and steward of a small art collection. Decisions regarding the building operation and the art collection are made by the Board.

Although the building houses some municipal entities, it also houses federal and provincial organizations. All of the building’s tenants are rent-paying, and thus, the relationship between the tenants and the corporation appear to be of a business nature. Thus, it does not appear that the Board is carrying on the “affairs of the municipality,” but rather, acting in the interests of the individual corporation.

2. *A direct link with the municipality must be found (either by way of legislation or authority from the municipality)*

The Northern Institute of the Arts was incorporated under the *Business Corporations Act* with sponsorship from a number of local and provincial sponsoring organizations,

³ Rick O’Conner, municipal lawyer and author of numerous texts on municipal law, noted that these four criteria are drawn from the case law, including *City of Hamilton and Hamilton Harbour Commissioners et al.* [1984] 48 OR (2d) 757 (QL) at page 11; *Westfall v. Eedy* [1991] O.J. No. 2125 at para. 23; *Mangano v. Moscoe* [1991] O.J. No. 1257 at page. 4; *Toronto and Region Conservation Authority v. Ontario (Minister of Finance)* [1999] O.J No. 4349

including the City. While members of council are represented on the Board of Directors, the corporation was not set up under the authority of council (i.e., by council resolution or by-law).

3. There must be a connection to or control by the municipality

In *Toronto Regional Conservation Authority v. Ontario*⁴, the court said that in order to be considered a local board, a body “must be connected to, or be controlled by, a municipality or municipalities.”⁵ In that instance, the factors leading the court to conclude that the TRCA was not subject to municipal control were the mixture of councilors and others on the board, as well as lack of control over the TRCA budget.

Similarly, in this instance, although the City has loaned the corporation money and administers the Board’s invoices in the wake of the Algo Mall collapse, there is no reporting relationship or control over the Board by the City. The Board hires its own staff and contractors, determines its own budget, and gathers revenue from tenants, without interference by the City.

As noted, the Board is currently comprised of two members of the public, two members of council and a Board secretary, but could, in the future, be differently constituted (i.e., one council member, four members of the public, etc.). The Board is responsible to the corporation, rather than to the City. This further suggests that the White Mountain Academy Board is not a “local board”.

4. There must be an element of autonomy

In the case law,⁶ this factor is relied on to differentiate an advisory committee, without any decision-making functions, from a entity with some level of independent authority. The Board clearly has autonomy to make decisions regarding its operations and budget.

Conclusion

The Board does not meet the criteria established in case law for local boards and is thus, in our view, not subject to the open meeting requirements of the *Municipal Act*.

⁴ *Toronto and Region Conservation Authority v. Ontario (Minister of Finance)* [1999] O.J. No. 4349 [hereinafter *TRCA v. Ontario*]

⁵ *Supra* note 11

⁶ *Mangano v. Moscoe* [1991] O.J. No. 1257 at page. 4



Although the Board might be encouraged to meet publicly where possible in order to be transparent and in recognition of the fact that public funds are being expended to maintain the building, there is no legal requirement under the *Municipal Act* that it do so.

On June 10, 2014 we discussed our findings with you and provided you with the opportunity to provide feedback. You acknowledged our findings, and did not raise any objections to our conclusions.

Please note that we will be sharing the results of our review with the complainant.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team