

**TO:** Mayor Kelly and Members of Halifax Regional Council

**SUBMITTED BY:** Original Signed by Director  
M.E. Donovan, Q.C., Director, Legal Services & Risk Management

**DATE:** July 26, 2011

**SUBJECT:** Councillor Role at Meetings Outside of Formal Council Meetings

**INFORMATION REPORT**

**ORIGIN**

Item 11.2.1 **Motion of Halifax Regional Council** – March 8, 2011

**BACKGROUND**

A motion was made by Councillor Watts for a staff report which outlines the rules and regulations concerning meetings between Councillors and proponents of projects, community and interest groups and HRM staff. Specifically, the following points are to be clarified:

- 1) When does a meeting of a group of councillors officially become a council meeting – both for Regional Council but also Community Councils and do the same rules and regulations apply for both and, if not, should they?
- 2) What constitutes a private meeting that may be seen to be prejudicial during the public hearing process?
- 3) When a public hearing has been scheduled, what is the role of the elected official in commenting on their support for or against the proposed project?

Further, at a subsequent meeting of the Environment & Sustainability Standing Committee, Councillor Watts requested that the roles of the standing committee chairs be clarified.

The reason for the request is to provide clarification of the rules concerning meetings between Councillors and proponents of projects, community and interest groups and HRM staff.

## DISCUSSION

- 1. When does a meeting of a group of councillors officially become a meeting of council within the meaning of s.16 of the HRM Charter – both for Regional Council but also Community Councils and do the same rules apply for both councils and, if not, should they?**

Pursuant to section 16 of the *Charter*, all meetings of Council have to be conducted in public except as provided in section 19 of the *Charter* which stipulates the circumstances when a Council meeting may be held in camera.

The rules that apply to Council meetings also apply to standing, special and advisory committees. Section 21(5) of the *Charter* states that a committee shall operate in accordance with the procedures provided in this Act and the procedural policy for the Council applies to committees unless the Council, by policy, decides otherwise.

There is no question that regular meetings of council must be held in public as required by s. 16 of the Charter subject to the in camera exceptions set out in s.19 of the Charter. Questions tend to arise when a “lunch and learn” or a workshop is scheduled as to whether those sessions also constitute a meeting for the purpose of s.16 of the Charter and whether the public is entitled to attend.

The issue of what constitutes a council meeting has been considered in a number of cases by the courts. The cases have been consistent in holding that it is not necessary for the purposes of considering such a question whether the usual trappings of a council meeting are present. Rather, what is critical is whether the councillors are requested to attend a function at which matters which 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’s decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process.

For example, in a 1998 case involving the City of Yellowknife, weekly briefing sessions chaired by the mayor were held which were intended to provide administrative briefings and to give members of council an opportunity to provide directions to the city’s administration. The decision was that since the briefing sessions were intended to move the issues materially along in the overall spectrum of council’s ultimate decision, that these were meetings within the terms of the applicable legislation and therefore had to be held in public.

Another example is a case involving the city of Ottawa. In that case, Ottawa decided to hold an in camera retreat at a resort facility to which all members of council and senior staff had been invited. The agenda included many items that would ordinarily be within the council’s jurisdiction. Again, the Ontario Court of Justice held that since matters which would ordinarily form the basis of council’s decision were dealt with in such a manner as to have matters move procedurally towards council’s final decision that this was a meeting which the legislation

required be held in public and therefore it was outside the council's jurisdiction to hold such a meeting.

A final example is a 1988 decision involving Hamilton-Wentworth. In that case, a standing committee of council held an "in-camera workshop" with staff (in a lounge) to review past, present and future economic development objectives and as well to discuss the committee's terms of reference. In that case, the court held that when all members of a committee are summoned to what would have been a regularly scheduled meeting, and hold an in-camera workshop, that that is a meeting of the committee within the meaning of the governing bylaw. However, the court helpfully noted that members of a committee, meeting informally, can discuss questions within the jurisdiction of the committee privately.

In the Hamilton-Wentworth case, one of the judges of the 3 judge panel dissented disagreeing that what some had described as a brainstorming session actually constituted a meeting within the meaning of the applicable legislation. This highlights the fact that even the courts, at times, struggle with what does or does not constitute a meeting. The courts have noted that in appropriate circumstances, private meetings can facilitate the functions of government. Public bodies require some breathing room to reflect upon their objectives and to study and share concerns privately, as a group, provided that open discussion precedes decision or recommendation.

In one American case, the courts have suggested that when commissioners [read councillors] gather and confer with one another to effectively collaborate in doing their homework that they be able to do so freely and without restraint. It was noted in that case: Like all who have the responsibility of making important decisions, they need an opportunity to express, exchange and test ideas, to deliberate freely, off the record, and without the restraint of outside influence. Freedom of discussion and the exchange of ideas are essential to an understanding of a problem.

**Bottom line:** Where all members of council are invited to attend, and the meeting is not just an educational session, such as is the case with many HRM "lunch and learns", but instead is a discussion leading to a reasonably imminent decision, such as on the budget, that meeting is a meeting which the public is entitled to attend.

## **2. What constitutes a private meeting that may be seen to be prejudicial during the public hearing process?**

Members of the public are entitled to lobby members of council. And that is the case regardless whether a public hearing has been scheduled in respect of either a bylaw of general application, such as the sign bylaw, or a public hearing scheduled for the purposes of considering a development agreement.

- a) *Bylaws of general application.* In the case of a bylaw of general application, members of council are in a position similar to that of the MLAs who also enact laws of general application. There is no legal impediment to members of the public speaking to members

of council during any stage of the process. Except, of course, they cannot interrupt Council meetings.

- b) *Council sitting in a quasi-judicial role.* Because members of council sit as a quasi-judicial body in respect of hearings which ultimately will affect private rights such as development agreement hearings, there are more restrictions. Members of the public are entitled to meet with members of council prior to the public hearing. There is no legal restriction against members of council meeting individually where there is a break between the public hearing and the council decision on the matter but a great deal of circumspection is required in such circumstances. The optics around such meetings are very challenging and it is recommended that members of council not engage in such meetings where at all possible. And such meetings have the associated risk of overturning the council decision depending on what may have transpired at such meetings given that the keeping of an open mind with respect to any decision where a public hearing is involved is required. No new information should be discussed which might influence the decision. Given the difficulties with avoiding the introduction of new information, such meetings should be discouraged.

### **Community Council Meetings**

Similarly, all meetings of community council must be open to the public but a community council may meet in private to discuss the same matters that fall within the exceptions for regional council.

Pursuant to section 218 (1) of the *Charter*, meetings of a planning advisory committee, joint planning advisory committee or area planning advisory committee or a commission are open to the public, unless the committee or commission, by a majority vote, moves a meeting in private to discuss matters related to:

- (a) personnel, labour relations, contract negotiations, litigation or potential litigation or legal advice eligible for solicitor-client privilege; or
- (b) a potential application for a development permit, land-use by-law amendment, development agreement or amendment to a development agreement before the applicant has applied to the Municipality or development officer.

The date, time and location of committee or commission meetings must be posted in a conspicuous place in the municipal office or another conspicuous place, as determined by the committee or commission.

**3. When a public hearing has been scheduled what is the role of the elected official in commenting on their support for or against the proposed project?**

Appendix “A” of *Administrative Order Number One* cites rules that are to be followed during the public hearing process. Except where otherwise stated, these Rules shall apply equally to public hearings conducted by Community Council as those conducted by Regional Council.

*(14) The role of Council at a Public Hearing is to listen to the public. Members of Council shall not debate nor challenge the comments being offered by the Speaker. Following a speaker’s presentation, Members of Council may ask questions of the speaker, seeking clarification of the points they have raised. Members of Council shall not enter into dialogue with the public during the Public Hearing.*

*(15) In order to ensure that no member of the public feels discouraged, intimidated or otherwise prevented from making his or her views known, no applause or other expressions of emotion, inappropriate language, outbursts or criticisms aimed at individuals or groups will be condoned. No signs shall be displayed.*

*(17) When the Public Hearing has been closed, staff will be provided an opportunity to briefly respond to points raised by the speakers.*

*(18) Council will then proceed to immediately consider the approval or disapproval of the matter under consideration and reach a decision. The Council decision will start with a motion from a member of Council (to refuse or approve the matter under consideration, or approve it in an amended form). The consideration of the motion is subject to the regular rules of procedure and debate. No further public presentations will be heard. In some instances, particularly when Council members need more time to consider what they have heard, or require further information from staff, the Council may defer the debate and decision until a later date, usually at the next regular meeting.*

During a public hearing, a councillor should not express an opinion on the matter that is being addressed until after the members of the public have had an opportunity to speak. Outside of the formal hearing itself, a councillor may at his or her discretion discuss an issue that is scheduled to be heard at a public hearing with a member of the public.

**Standing Committee Chair**

Section 70 of *Administrative Order Number One* states that a committee shall consider and report upon only such matters as have been referred to it as provided herein or such matters as come within or reasonably flow from its continuing terms of reference and jurisdiction as established from time to time by resolution of Council. Each committee shall diligently pursue its duties and the Chair of the committee shall promptly report to Council on every matter and question coming before it. Further, each committee shall unless otherwise determined by Council by administrative order, determine the procedure for electing its own Chair.

In particular, Section 74 of *Administrative Order Number One* states as follows:

*74. (1) The business of a committee shall be conducted according to the rules governing procedure in the Council except that:*

*a) ...*

*b) the Chair, or in the absence of the Chair, the Vice-Chair, shall preside and shall vote on all questions submitted, and in case of an equal division, the question shall be negative;*

*c) the name of the Chair shall appear upon any report and recommendation made by the Committee;*

*d) ...*

*e) no report or recommendation to do any matter or thing shall be recognized as emanating from any committee unless it is in writing and bears the name of the Chair, Vice-Chair or acting Chair.*

There is no procedural rule that requires the Chair to support a motion which is before the committee, nor to support that same motion when it comes before Regional Council. The same applies to members of the committee. All members, including the Chair, are free to change their vote once it reaches Regional Council.

### **BUDGET IMPLICATIONS**

There are no budget implications.

### **FINANCIAL MANAGEMENT POLICIES/BUSINESS PLAN**

This report complies with the Municipality's Multi-Year Financial Strategy, the approved Operating, Project and Reserve budgets, policies and procedures regarding withdrawals from the utilization of Project and Operating reserves, as well as any relevant legislation.

### **COMMUNITY ENGAGEMENT**

N/A

**ATTACHMENTS**

None.

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A copy of this report can be obtained online at <http://www.halifax.ca/council/agendasc/cagenda.html> then choose the appropriate meeting date, or by contacting the Office of the Municipal Clerk at 490-4210, or Fax 490-4208.

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