

March 19, 2021

Our File No.: 161878

Ms. Karen McIsaac
City Clerk
The Corporation of the City of North Bay
200 McIntyre Street East, P.O. Box 360
North Bay, ON
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Dear Ms. McIsaac:

**Re: North Bay (City) Closed Meeting Investigation 2021-01
Notice of Termination of Investigation for Lack of Jurisdiction**

The Corporation of the City of North Bay (the “**City**”) appointed Local Authority Services Inc. (“**LAS**”) as its Closed Meeting Investigator pursuant to section 239.1 of the *Municipal Act, 2001*.¹ LAS has delegated its authority to act as Closed Meeting Investigator to Aird & Berlis LLP.

We are providing this notice in our capacity as the City’s Closed Meeting Investigator. For the reasons outlined below, we have determined that we do not have jurisdiction to receive a complaint or commence an investigation in respect of Invest North Bay Development Corporation (“**Invest North Bay**”). We are hereby terminating our inquiry into this matter.

1. The Request

Our office received a formal request for a closed meeting investigation, dated February 4, 2021, filed pursuant to section 239.1 of the *Municipal Act, 2001* (the “**Request**”). The Request was filed directly with our office. The Request alleges that Invest North Bay, a City-established economic development corporation, held two virtual meetings on January 26, 2021 and February 1, 2021 that were improperly closed to the public. The Request also alleges that Invest North Bay regularly does not comply with the requirements of section 239 of the *Municipal Act, 2001*, being the so-called “Open Meeting” rule.

The substance of the Request alleges Invest North Bay is a “local board” within the meaning of the *Municipal Act, 2001*, although it does not acknowledge itself as such, and is therefore subject to the Open Meeting rule applicable to local boards under section 239 of the statute.

The Request referred to a report by the City’s Acting Integrity Commissioner, the Honourable George Valin, dated December 11, 2020, which found that Invest North Bay is a “local board” for the purpose of section 223.4 of the *Municipal Act, 2001* and the City’s Code of Conduct.

¹ S.O. 2001, c. 25.

However, we are also aware of a memorandum (provided as written advice to a member of City Council) from the City's Integrity Commissioner, Mr. Guy Giorno, dated February 15, 2021, that reached a contrary conclusion. That memorandum concluded that Invest North Bay is not a "local board."

The conclusions of the Acting Integrity Commissioner and the Integrity Commissioner considered this issue in the context of Part V.1 – Accountability and Transparency of the *Municipal Act, 2001*. Neither the Acting Integrity Commissioner nor the Integrity Commissioner considered Part VI – Practices and Procedures, which is the part of the *Municipal Act, 2001* applicable to our own inquiry and jurisdiction. We do not consider ourselves bound by the determinations or conclusions of either the Acting Integrity Commissioner or the Integrity Commissioner. We also note that the term "local board" does not have one fixed, universal meaning. It is defined differently in different parts and for different purposes within the *Municipal Act, 2001* itself and in other municipal legislation.

On February 26, 2021 and March 1, 2021, we wrote to the City Clerk and the Requestors, respectively, to advise of the preliminary jurisdictional issue as to whether Invest North Bay is a "local board" for the purpose of section 239 of the *Municipal Act, 2001*.

2. Review of Materials

In order to properly assess the Request, and in addition to the two documents from the Acting Integrity Commissioner and the Integrity Commissioner, we have reviewed the following materials:

- Confidential Report to Council CAO 2015-03 (dated April 19, 2015);
- Invest North Bay Letters Patent, dated October 19, 2015;
- Invest North Bay By-law No. 1; and
- the Operating Agreement between the City and Invest North Bay, dated July 29, 2016.

We have also had recourse to the provisions of the *Municipal Act, 2001*, the regulations made thereunder, and such secondary sources and applicable case law as we deemed necessary in our to make our determinations.

3. Invest North Bay – Background and Establishment

Invest North Bay is a corporation without share capital. It was incorporated by Letters Patent dated October 19, 2015 under the Ontario *Corporations Act*,² and pursuant to the City's powers under section 203 of the *Municipal Act, 2001*.

Invest North Bay was established pursuant to decisions of Council on December 8, 2014, April 28, 2015, and June 29, 2015. On June 29, 2015, Council directed City staff to file an application for incorporation to formally bring Invest North Bay into existence.

² R.S.O. 1990, c. C.38.

The City has always considered Invest North Bay to be an “economic development corporation,” a term with legal significance. The Staff reports and Council resolutions establishing and appointing members to Invest North Bay refer to the corporation as such.

Invest North Bay’s Letters Patent sets out the following objects for which it was incorporated, which can be generalized as economic development services:

Invest North Bay Development Corporation shall be incorporated for the general benefit of the public of North Bay and its purposes shall be:

1. foster the retention and growth of compatible employment and assessment to help meet the socio-economic needs of the community;
2. assist with the expansion and retention of local business;
3. identify and attract new business and foreign direct investment to the City of North Bay;
4. assist in the development of entrepreneurs across industries and stages of growth;
5. strengthen local industry and foster compatible new jobs;
6. work with new and existing companies to help stabilize local market conditions;
7. identify, leverage, transfer and utilize assets;
8. establish liaisons with The Corporation of the City of North Bay, the federal government of Canada, the Province of Ontario, other Provinces of Canada, other municipal and industry partners and other states and foreign governments;
9. advocate for improving the business environment of the City of North Bay;
10. provide workforce development leadership to connect business with educational institutions and employment sector agencies;
11. market and promote the City of North Bay for business opportunities around the world;
12. assist The Corporation of the City of North Bay in the development of strategic plans such as use of asset strategies; and
13. carry on business incidental to its main objects including but not limited to investing, raising capital, establishing other corporations and working collaboratively with an individual, sole proprietorship, corporation, limited liability company, limited or general partnership, joint venture association, joint stock company, trust, incorporated organization, institution, unincorporated organization, federal, provincial, municipal or state government or entity of any kind.

As a corporation without share capital, Invest North Bay has “members” as opposed to shareholders. According to By-law No. 1, membership in Invest North Bay is open to any person interested in furthering the objects of the corporation, so long as it is approved by the Board of Directors.

The affairs of Invest North Bay are managed by its Board of Directors, consisting of 14 individuals. By-law No. 1 provides Directors are elected by its members, subject to approval by Council. In addition, the Board of Directors must always include four representatives of the City: the Mayor, two members of Council, and the City’s Chief Administrative Officer.

By-law No. 1 also governs meetings of the Board of Directors as well as Annual Meetings of the Members.

An Operating Agreement between Invest North Bay and the City sets out many aspects of the governance of Invest North Bay and relationship between the two entities. The precise terms of the Operating Agreement are not particularly relevant to our inquiry. As Invest North Bay does not have “shareholders”, the Operating Agreement ostensibly functions in a similar manner to and in lieu of a shareholder declaration by the City.

4. Analysis

At its crux, the Request raises the issue of whether Invest North Bay is a “local board” for the purpose of the application of the Open Meeting rule. This exercise requires a close reading of several interrelated provisions of the *Municipal Act, 2001* and regulations made thereunder. The proper approach to such an interpretive exercise is well-accepted. The words of the legislation are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of legislation, the object of the legislation, and the intention of the Legislature.³

A. Jurisdiction of the Closed Meeting Investigator

The Closed Meeting Investigator derives its authority from the following provisions of the *Municipal Act, 2001*:

Investigation

239.1 A person may request that an investigation of whether a municipality or local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public be undertaken,

(a) by an investigator referred to in subsection 239.2 (1);...

...

Investigator

239.2 (1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an investigator who has the function to investigate in an

³ *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 at para. 21, citing and relying upon Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at 87.

independent manner, on a complaint made to him or her by any person, whether the municipality or a local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation. [emphasis added]

Our jurisdiction is limited to investigating the conduct of meetings of a “municipality or a local board”. In other words, our jurisdiction does not extend to an entity that is not a municipality or a “local board”.⁴

The general definition of “local board” in subsection 1(1) of the *Municipal Act, 2001* provides as follows:

...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.

If not expressly listed in the above definition, an entity may still be considered a “local board” where it exercises powers under legislation with respect to the affairs or purposes of the municipality.

This general definition is varied in different provisions of the *Municipal Act, 2001*. As such, it is important to interpret the phrase “local board” within the context and specific Part of the *Municipal Act, 2001* in which it appears.

For the purpose of Part VI of the *Municipal Act, 2001* and the Open Meeting rule, the definition of a “local board” expressly excludes a police services board and public library board,⁵ but says nothing more.

B. Legislation Governing Municipal Corporations

As set out above, Invest North Bay was incorporated by the City pursuant to the City’s authority under section 203 of the *Municipal Act, 2001*.⁶ Section 203 enables a municipality to establish corporations for municipal purposes, subject to rules as may be prescribed. Section 203 also gives the Lieutenant Governor in Council (i.e. Cabinet) regulation-making authority to govern the

⁴ On this point, see *City of Hamilton v. Ombudsman of Ontario* (2017), 68 M.P.L.R. (5th) 97, at para. 10 (Ont. Div. Ct.); aff’d (2018), 77 M.P.L.R. (5th) 230 (Ont. C.A.), holding that the Ontario Ombudsman did not have jurisdiction to conduct a closed meeting investigation in respect of a municipal Election Compliance Audit Committee and a Property Standards Committee as those entities were not “local boards”. The Ontario Ombudsman acts as a municipal closed meeting investigator where a municipality has not appointed its own closed meeting investigator, such as LAS. Both the Ontario Ombudsman and a municipally-appointed closed meeting investigator derive their jurisdiction from the same source, being subsection 239.1 of the *Municipal Act, 2001*.

⁵ *Municipal Act, 2001*, s. 238(1).

⁶ Technically, the City also exercised its powers pursuant to paragraph 203(1) 2 of the *Municipal Act, 2001*, to nominate and authorize individuals to act as first directors and incorporators of Invest North Bay.

powers of a municipality to establish a corporation, in addition to a number of other related matters.

Cabinet has exercised this authority by making Ontario Regulation 599/06 – Municipal Services Corporations (“**O. Reg. 599/06**”). Summarized at their highest level, O. Reg. 599/06 provides the following rules applicable to this inquiry:

- a municipality must incorporate a corporation in accordance with the rules and process set out in O. Reg. 599/06⁷
- a municipality can only establish a corporation if either:
 - the municipality itself can provide the system, service or thing that the corporation will provide, or
 - establishing the corporation is expressly authorized by O. Reg. 599/06⁸
- certain sections apply to a municipality where it establishes a corporation or nominates or authorizes individuals to incorporate a corporation,⁹ and certain other sections apply to the resulting corporation where it is established by the municipality or it is incorporated by individuals nominated or authorized by the municipality to do so¹⁰

Applicable to Invest North Bay but not determinative of our inquiry, section 9 of O. Reg. 599/06 sets out special rules in relation to a corporation designated as an “economic development corporation” that provides certain defined economic development services.

C. General Rule – A Municipal Corporation is Not a “Local Board”

One of the specific matters in section 203 of the *Municipal Act, 2001* delegated to Cabinet is the power to provide that “specified corporations are deemed to be or are deemed not to be local boards for the purposes of any provision of this Act.”¹¹

O. Reg. 599/06 operationalizes this authority by providing a general rule, with certain limited exceptions.

⁷ O. Reg. 599/06 - Municipal Services Corporations, s. 2(1).

⁸ *Ibid*, s. 3.

⁹ *Ibid*, s. 2(2).

¹⁰ *Ibid*, s. 2(3).

¹¹ *Municipal Act, 2001*, s. 203(4)(e):

203(4) The Lieutenant Governor in Council may make regulations...,

(e) providing that specified corporations are deemed to be or are deemed not to be local boards for the purposes of any provision of this Act;

Section 21 of O. Reg. 599/06 is an express, overriding general rule that offers a complete answer in these circumstances. It provides as follows:

Status of corporation

21. (1) A corporation is not a local board for the purposes of any Act.

Section 21 of O. Reg. 599/06 also enumerates the circumstances in which a municipal services corporation is deemed to be a “local board”:

(2) Despite subsection (1), a corporation shall be deemed to be a local board for purposes of subsection 270 (2) of the Act, and for the purposes of the *Environmental Assessment Act*, the *Municipal Conflict of Interest Act*, the *Emergency Management and Civil Protection Act*, and subsection 56.2 (3) of the *Capital Investment Plan Act, 1993*.

(3) Despite subsection (1), if a corporation is wholly-owned, it shall be deemed to be a local board for the purposes of the *Development Charges Act, 1997*.

It is our opinion that section 21 provides a complete answer to our inquiry. Invest North Bay is expressly deemed to be a local board for the purpose of a number of statutes. However, Invest North Bay is not deemed to be a local board for the purposes of section 239 of the *Municipal Act, 2001*. We will elaborate on a few additional points in support of our conclusion.

There are clear but narrow exceptions to the general rule. For example, subsection 9(2) of O. Reg. 599/06 provides that despite the general rule in section 21, where a municipality designates an “economic development corporation,” that corporation is a “local board” for the purpose of section 326 of the *Municipal Act, 2001*.¹² This section permits a municipality to recoup the costs of a “special service” provided by an “economic development corporation”; absent this provision, services provided by a corporation could not meet the definition of a “special service” as they would not be provided by a local board.

D. Principles of Statutory Interpretation

Our conclusion is also supported by the principles of statutory interpretation. The manner in which O. Reg. 599/06 is drafted provides a very clear indication of legislative intent: the default rule set out in subsection 21 (1) is that a municipal services corporation is not a “local board”, unless expressly provided otherwise.

¹² We note the Acting Integrity Commissioner’s report, dated December 11, 2020 (at para. 57), cites section 9 of O. Reg. 599/06 as supporting the conclusion that Invest North Bay is a “local board.” With the utmost respect to the Acting Integrity Commissioner, we disagree with his assessment. His conclusion overlooks the concluding portion of subsection 9(2), which provides that a designated economic development corporation is only a local board “for the purposes of section 326 of the Act.” When read in their entire context, the portions of O. Reg. 599/06 specifying when a corporation is and is not a local board, subsections 9(2) and 21(2) and (3) operate as limited exceptions to the general rule. This is supported with a view to the qualifying language in these provision “Despite section 21 of this Regulation...” and “Despite subsection (1)...”.

The “implied exclusion” rule of statutory interpretation provides that the legislature’s failure to mention one thing provides strong grounds to infer it was deliberately excluded.¹³ Applied to this case, if Cabinet had intended the Open Meeting rule to apply to the meetings of a municipal services corporation, it would have expressly referred to section 239 of the *Municipal Act, 2001* in drafting the regulation or have explicitly referred to a municipal services corporation (together with a municipality and local board) in sections 239.1 and 239.2.

O. Reg. 599/06 clearly demonstrates Cabinet knew how to express its intent as to when a corporation would be considered a local board. It was obviously capable of doing so; subsections 21(2) and (3) of the regulation list the circumstances in which Cabinet deemed it advisable that rules applicable to local boards apply to a municipal services corporation. Its choice not to include an express reference to section 239 of the *Municipal Act, 2001* is telling and must be respected.

5. Conclusion

Based on the foregoing, it is our opinion that Invest North Bay is not a local board for the purposes of the Open Meeting rule. Section 21 of O. Reg. 599/06 provides a unambiguous answer, and there is no express exception to the contrary.

As a result of this conclusion, it is our determination that we do not have jurisdiction as Closed Meeting Investigator under sections 239.1 and 239.2, to receive the Request or to investigate whether Invest North Bay contravened section 239 of the *Municipal Act, 2001* or a procedure by-law. The simple answer is that those statutory provisions do not apply.

We are hereby terminating our inquiry into the matter for lack of jurisdiction, and exercise our discretion to dismiss the Request in its entirety.

Should there be any questions, please do not hesitate to contact the undersigned.

Yours truly,

AIRD & BERLIS LLP



John George Pappas
Associate

JGP/JM

c. Requestors
John Mascarin

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¹³ See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada Inc., 2014) (online) at §8.90.