Decision

Case Number: 394806

BACKGROUND

The Issues as Raised in the Complaint:

Interference in the process by decision-makers

1. The complainant claims that the CALWMC Chair has interfered in the public consultation process, constituting a breach of objectivity and fairness. The complaint draws specific reference to a February 2016 Op-ed pieced submitted by the Chair and subsequently posted to the CRD wastewater planning page claiming that in this piece:
    a. The Chair discards McLoughlin Point as a potential option, despite the fact that it is an item for voting by the CALWMC at the February 24 meeting;
    b. The Chair declares fully tertiary treatment has been selected despite the inclusion of secondary treatment within the considered option sets;
    c. The Chair announces gasification, which is only an alternative option; and
    d. The Chair discounts a distributed tertiary system.

Adequacy of consultation materials and methods

2. The complainant raises issue with the Phase 2 public consultation process as it relates to the consultation materials and methods:

Materials:

a. That the survey did not provide information on negative impacts as the FTA required in the following recommendation from request no. 4: "Ensuring that the engagement materials (e.g., reports, presentations) are complete and address issues related to potential break downs.";
b. That the survey data is corrupted as a result of the fact that it includes data from an earlier version of the survey that forced the public to select 3 options from the considered option sets;

Methods:

c. That inadequate notice was given for a public consultation meeting of February 12th with respect to the claim that notice was given for the meeting the day-of;
d. That mail-outs were not adequately used for the public consultation sessions (as previously recommended by the FTA in the decision on request no. 4: "Exploring the feasibility for mail outs to targeted areas. If the costs are prohibitive, this should be made known so that the public understands that the policy maker has turned their mind to this issue.");
e. That the February 12 meeting did not include technical experts, rendering "effective" communication on the specifics of the considered option sets inadequate.

FINDINGS

1. Interference in the process by decision-makers

The issue that has to be resolved in this matter is whether elected municipal officials should be allowed to express their personal views or whether expressing such views and opinions constitutes bias or prejudgment.

As it relates to bias and conflict of interest the Courts have defined three (3) general classes of disqualification:

- Bias/Conflict of Interest Pecuniary (often business or employment relationships)/Familial;
- Bad Faith Beyond Authority of Office; and
- Bias/Prejudgment Closed Mind – Mind Made Up.

These categories may overlap but there are separate/distinct legal tests for each.

I believe the issues raised in this complaint relate to bias and prejudgment and having a closed mind.

First, I will note that as Chair of the CRD Core Area Liquid Waste Management Committee (CALWMC), the author of the op-ed piece presents her views as a municipal representative who functions alongside other members of various elected officials serving on the Committee.

The courts have addressed the rule against bias in several different cases. These include *Old St Boniface Residents Association v. Winnipeg (City), ; Save Richmond Farmland Society v. Richmond (Township)*; and *Newfoundland Telephone Company v. Newfoundland (Public Utilities Board of Commissioners)*.

> *"These cases establish that, when it comes to elected decision-makers, the rule against bias applies differently.* ***Given that elected representatives are expected to have expressed strong views about matters of public importance, a relaxed standard must generally be applied****. Accordingly, in order to make out a claim of bias against an elected representative,* ***the applicant must demonstrate a "closed mind" on the part of the councillor****."*[1] *[emphasis added]*

The current legal standard for assessing bias on the part of municipal councillors was first articulated by the SCC in the *Old St. Boniface* case where:

> *"…the Court began its analysis by noting that municipal councillors – like candidates for any public office - often campaign, and are elected, on the basis of the views they have articulated and positions they have taken on particular issues. That, of course, is an inherent and expected part of the democratic process. On that basis,* ***to impose upon a municipal councillor the same "reasonable apprehension of bias" standard which applies to decision makers in the judicial and quasi-judicial contexts would be***

[1] Municipal Councillors: Bias and Legislative Activities, Paul Daly, October 26, 2014

***unreasonable and irreconcilable with the inherent nature of the political process**."*[2] *[emphasis added]*

Accordingly, the Court proceeded to state as follows:

> *"In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile.* ***Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.*** *In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard".*[3] *[emphasis added]*

What is clear is that when municipal councillors are acting in their legislative capacity pursuant to a statute in which the nature of the decision is expressly mandated by statute, bias or prejudgment "*will be determined on the basis of a standard which is much more relaxed than the "reasonable apprehension of bias" standard that applies in the judicial and quasi-judicial contexts*".[4]

In *Old St. Boniface* the court introduced a more relaxed standard of "amenable to persuasion". This decision means that an aggrieved party bears the onus of proving that a councillor's mind was so closed that (s)he was incapable of being persuaded to change it. "*Typically this will require a candid admission from the member himself, or something tantamount to an acknowledgement to that effect. Moreover, even if there is conflicting evidence, courts will generally give the member of council the benefit of any doubt."*[5]

Conclusion

The key question now is - has the Chair reached a final opinion on the matter which could not be dislodged?

I find that there is no evidence that the CALWMC Chair made these statements for any reason other than what she believed to be the best interests of the process. Whether the electors of Victoria share in these opinions is a question that will be answered by them at the next election. But it is not for the FTA to suggest that a director of a CRD committee, as a municipal representative, should be prevented from taking an open

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[2] Municipal conflict of interest law: A law in conflict based on interest; Ontario Bar Association – "Counsel at municipal council" December 10, 2009

[3] Old St. Boniface Residents Assn. v. Winnipeg (City), supra at 409

[4] Municipal conflict of interest law: A law in conflict based on interest; Ontario Bar Association – "Counsel at municipal council" December 10, 2009

[5] Municipal conflict of interest law: A law in conflict based on interest; Ontario Bar Association – "Counsel at municipal council" December 10, 2009

leadership role for that is their function as elected representatives. The main concern is that directors remain receptive to persuasion from those who hold contrary views when they consider and vote upon issues. There is nothing in the record to suggest that the Chair was behaving beyond the parameters of these lawful expectations. In fact, we have evidence that on the Feb 24th, 2016 meeting of the CALWMC, the Chair supported and provided a deciding vote required to pass a motion to reconsider new potential sites for a wastewater treatment facility, including McLoughlin Point.

2. Adequacy of consultation materials and methods

The complainant raises issue with the Phase 2 public consultation process as it relates to the consultation materials and methods.

Materials

a. Did the survey provide information on issues related to potential plant break downs?

Review of available consultation materials reveals that there was little or no information included on potential negative impacts in the survey or in the accompanying Citizen's Guide, including information on issues related to a potential plant breakdown.

The survey was launched on January 26th, 2016[6] – i.e., 3 weeks following the January 5th release of the FTA's decision on request no. 4 (ID no. 395039). As noted, this decision included a recommendation to the CRD based on the FTA's finding that "there does not appear to have been any discussion on the effects of a breakdown of any facility (the impacts of such a break or the processes to inform the public, etc.)."

Based on this finding, the FTA specifically recommended: *"Ensuring that the engagement materials (e.g., reports, presentations) are complete and address issues related to potential break downs"* in order to *"further improve consultation during Phase 2 in 2016".*

Conclusion

I find no evidence that the survey launched after the FTA's recommendation was issued included information on potential breakdowns. Given that the FTA has no powers to impose remedies on the CRD, I cannot reasonably find that the lack of implementation of recommendations made by the FTA, is a diminishment of procedural fairness. There is no requirement for them to action any of my recommendations.

b. That the survey data was corrupted as a result of the inclusion of data from the earlier and later versions of the survey;

This issue relates to one which was raised in a previous complaint (see request no.11; ID no. 398233) that the survey was unfair in that it required survey respondents to select 3 of the 7 profiled option sets which they considered to be the "most acceptable". That complaint raised concerns with respect to the forced choice being a "leading" question because it did not offer respondents an option to select "none of the above."

Minutes of the CALWMC February 10th meeting (item 5.3) show that the Committee requested the consultant include a selection choice of "none of the above" for this survey question and separate the survey data from before and after the addition of that selection choice. This option was added. The overall

[6] This was noted to the public in a CRD press release titled "January 26, 2016: Core Area Wastewater Consultation Launches with Online Survey and Consultation Opportunities."

survey findings collected through the respective Eastside and Westside consultation processes are presented in two reports provided in the February 24th CALWMC meeting agenda.

A separate report entitled *CORE AREA WASTEWATER SURVEY Summary Results (Summary Report; February 22, 2016)* captures the survey data before and after the addition of the survey choice "none of the above". *S*urvey data from before (n=986) and after (n=371) the addition of the new selection choice are presented in two tables (page 8) in the Summary Report but I find it very difficult to interpret those results.

The survey results appear to be very different between before and after the survey change. However, the Summary Report does not provide a clear description of the methodology behind the tabulated data sets. Further, there is no narrative to help interpret the differences. I do not find the information to be in a readily comprehensible language and format.

The FTA finds that the data shown in answer to this question before and after the survey was changed are not comparable. Comparing these data, I note there are differences in sample size (986 vs. 371) and the number of options respondents could select (changed from 3 of 7 to 3 of 8 or 1 of 8). These factors affect the meaning behind the percentage values shown and demonstrate a lack of comparability between these data (pre-change and post-change) on options acceptability.

Conclusion

As a general response to the complaint, I would make the point that the FTA is in no way qualified to issue findings on survey polling. I cannot assess the adequacy of the survey design or analysis methodology as to whether or not the data was corrupted by a change to the survey question.

Having said that, it is my belief that the survey results in this instance were not designed to be, and are not in themselves, "determinative"; that is to say that while the survey is an important tool, it is only one of the tools used to help reach a decision. A key consideration underlying my view is the fact that the CALWMC is now considering options that were not mentioned in the survey.

This recent development (e.g. the CALWMC's agreement to determine the feasibility of additional siting options) must be considered in judging the fairness of the survey. At the February 24th CALWMC meeting, a motion was passed allowing consideration of additional options. The number of potential siting options thereby increased from the seven put forward in the survey, quite independent of the survey itself. Independence is evidenced by the fact that the motion to consider additional sites was raised by the Committee before the survey was launched to the public. This demonstrates to my satisfaction that the survey was not designed to be determinative and was but one of many tools in the site selection process.

Methods:

c. That inadequate notice was given for a public consultation meeting of February 12th with respect to the claim that notice was given for the meeting the day-of;

In order for the public to effectively engage in any public session they require proper and sufficient notice of the event. This is a fundamental cornerstone of procedural fairness. The CRD would normally be required to provide the public with adequate notice of a proposed public engagement followed by a meaningful opportunity to participate. Adequate notice of a proposed session would generally be achieved through the publication of a notice a minimum of one week prior to the event. It would include

(1) the time, place, and nature of proceedings; (2) the terms or substance of the meeting and/or a description of the subjects and issues involved.

However, the session in question was not an ordinary session as part of the consultation program; rather, it was an additional event staged at the special request of a local stakeholder group, the Victoria West Community Association (VWCA) which contacted the consultant after consultation had already begun. The VWCA asked if the consultation team could come out to provide an update to its community residents on Core Area wastewater management options. The request was for such a session on February 12th and this request was met.

d. That mail-outs were not used for the February 12th public consultation sessions;

This event was a targeted event for the members of the Victoria West Community Association. Members received an e-mail from the Association notifying them of this event. The text for the event was that the consulting team was coming to the Victoria West Community Association for a wastewater briefing and open house session on Friday February 12, 2016. The doors would be open at 6:30 pm. The evening would include a high-level look at the process and options that have emerged at 7 pm followed by a Question and Answer period and then an open house drop in until 8:30pm.

The consultants did invite the public broadly, noting that it was an additional opportunity but that it was an extra session driven by a stakeholder organization. Information was placed on the CRD website on Tuesday February 9th. There was an advertisement placed:

- in the *Black Press* on the Wednesday Feb. 10 paper promoting the public consultation website and events in general;
- in the *Times Colonist* again on Thursday Feb. 11 again promoting the public consultation website and events in general; and
- on Friday Feb. 12 directly promoting the Victoria West Open House (placement details not provided).

This is common practice within a consultation, and allows the process to be adaptive to community schedules and needs. I am satisfied that because the session cited in this complaint is not in the same category as a standing public meeting and open house, the organizers were appropriately responsive to this type of session; requested, hosted, convened and promoted by the local stakeholder organization. The notice in this instance is both understandable and justifiable. I find there to be no issue of unfairness.

e. That the February 12 meeting did not include technical experts, rendering "effective" communication on the specifics of the considered option sets inadequate.

In terms of representation by technical experts, Mr. Dan Huang was the Urban Systems representative who attended the February 12th event. I understand that Mr. Huang is a lead member of the technical study team and has been involved for considerable time. It seems, therefore, that the meeting did include a technical expert and I have no reason to judge that expertise and communication was inadequate.

Conclusion

Given the findings above, I am of the view that there was no diminishment in procedural fairness as it relates to the processes surrounding the February 12th public meeting.