



TO: The Blue Mountains Attainable Housing Corporation
FROM: Ismail Ibrahim, Robins Appleby LLP
SUBJECT: Corporate Governance and Public Board Meetings
DATE: October 5, 2022
FILE NO.: TBD

You have asked us to canvass the legal and other considerations with recording and posting of the Blue Mountains Attainable Housing Corporation (the “**BMAHC**”) board meetings.

As part of our review, we have canvassed BMAHC’s legal requirements, and the legal and other considerations with respect to the recording and posting of board meetings. We have also considered how other entities are approaching this decision.

SHORT CONCLUSION:

BMAHC is not required to record and post its Board proceedings, but it is also permitted to do so if it chooses. The decision on recording and posting videos of BMAHC board meetings is based on balancing transparency against risks that may arise from said recordings/postings.

It is our opinion that, on a balancing scale, the potential drawbacks to recording and posting videos of board meetings outweigh the benefits. This opinion is based on the following reasons:

- In the event of litigation, having an online record of board meetings can be a double-edged sword as it creates potential problems if the official minutes of the meeting are challenged by conflicting video records;
- Video records are also susceptible to audio and video manipulation that could have long-lasting reputational impacts, beyond strictly legal consequences; and
- Due to potential comfort levels of staff and directors, recording and posting of videos may impact the quality of board deliberations and recruitment/retention of directors.

DISCUSSION:

I. Records of Meetings

Under the Ontario *Not-for-Profit Corporations Act* (“**ONCA**”), BMAHC is required to maintain records containing the minutes of meetings and resolutions of all member and director meetings,



including meetings of any committee of members or committee of directors.¹ There are no other requirements under ONCA for any other type of recordings of the meetings or posting thereafter.

The *Municipal Act* (the “Act”) is also silent on the recording and posting of board meeting proceedings, but the Act has provisions related to how meetings are to be conducted. Subject to certain exemptions and other criteria under subsections 239(2), (3) and (3.1), the Act requires that all meetings be open to the public. These requirements apply to municipalities and other entities, such as local boards. They do not apply to Municipal Services Corporations such as BMAHC as it is not a municipality or local board.

We have reviewed BMAHC’s Letters Patent and its By-laws, and note that they are silent on the issue of recording and posting board meetings. Please note that the Letters Patent and By-Laws are also silent on requirements for open meetings.

II. Open Meetings

Our understanding is that the purpose of choosing to record and post videos of board meetings is to provide full transparency. Where public funding is being provided, there is often an expectation from the public that all efforts be made to show how the funding is being used. Although we were unable to find any cases related to recording and posting of board meetings, we were able to find a case where the above argument was accepted by the Courts regarding open meetings in the municipal context.

In *London (City) v. RSJ Holdings Inc.*², the Supreme Court of Canada commented that municipal law “was changed to require that municipal governments hold meetings that are open to the public, in order to imbue municipal governments with a robust democratic legitimacy”³ and “was intended to increase public confidence in the integrity of local government, by ensuring the open and transparent exercise of municipal power.”⁴ Having said that, it must be pointed out that there are three key factors that distinguish this case from our analysis:

1. BMAHC’s funding model is different than municipalities in that it primarily receives loans/financing that is to be paid back, and some limited grants and in-kind contributions;
2. The above case relates to having open meetings and is silent on recording and posting board meetings; and
3. The case relates to municipalities with prescribed legislation, where BMAHC is a Municipal Services Corporation, where no such requirements under legislation.

We are aware of some jurisdictions where large housing providers have been mandated by the municipality to have Open Meetings. In these cases, the housing providers are share-capital entities owned by the municipality and the municipality directs the housing provider to follow section 239 of Act via a Shareholder Direction. By providing a Shareholder Direction, the shareholder directs the Board of Directors on the actions to follow and, in return, assume the liability that may arise out of said action. If the members of BMAHC wish to provide a Member Direction (i.e. similar to a Shareholder Direction used by share-capital entities), the Members may

¹ *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c.15 at s. 92.

² 2007 SCC 29 ([CanLII](#)), [2007] 2 SCR 588

³ *London (City)* at para 38.

⁴ *London (City)* at para 19.



do so, but they would be taking on any liability that may arise out of said action. It should also be pointed out that such actions impede the independence of the board and may lead to challenges to recruitment/retention of directors in the future.

A second argument in support of recording and posting of board meetings is that this practice allows individuals that could not show up to a meeting to be able to review the meeting proceedings at a later date. This is a valid reason, but it is noted that individuals that are unable to make it to a meeting will still have access to the decisions that were made through the minutes, albeit without having access to the full deliberations.

As stated above, although there is no legal requirement to record and post board meetings, board may choose the practice for various policy reasons. We caution that such policy decisions be made by also weighing the risks associated with recording and posting board meetings.

III. Board Deliberations

The purpose of a board meeting is to make decisions related to the organizations. For this to happen, there is a requirement for an environment to allow directors and staff to have a thorough investigation of the issues associated with the decisions.

The comfort levels of directors and staff willing to speak publicly is likely going to vary, where there will be some directors and staff that may feel uncomfortable in expressing their opinions if the matters are to be broadcasted and made publicly available. As such, these directors and staff may not fully participate in the meetings, leading to a lower standard of discussion at the board level. As such, there is a risk that the oversight function of the board will be compromised where directors and staff are reluctant to have open discussions. In the extreme, the board meetings may become more political in nature, thus potentially hindering board dialogue. These factors may also create issues for BMAHC with the recruitment and retention of directors where individuals that are not comfortable with such environments may choose to not apply for board positions.

There is also a privacy concern with such recordings if consent has not been obtained from all directors, staff and others regarding the recording and posting. If proper consent is not obtained, BMAHC is opening itself up to potential liability.

IV. Challenging Official Minutes

As mentioned earlier, ONCA requires BMAHC to record minutes. The taking of minutes during meeting are the official records of the meeting and the decisions made during the meeting. The Institute of Corporate Directors, in its advisory document to not-for-profit boards, makes a number of recommendations related to the taking of minutes, which include:

- Not recording who said what about a particular item; and



- Not recording who voted for and against a particular decision unless a directors wants their vote “on the record.”⁵

There are good reasons for these recommendations as they allow for open discussion at the board level and a single “voice” for the board decisions. Having a unified message from the board often conveys certainty in the decision-making process, which can be helpful when communicating with external stakeholders such as tenants, lenders, media and politicians.

Furthermore, where a board decides to record and/or post board meetings, the question arises as to what would happen if there is discrepancy between the minutes and any recordings?

Given that online and publicly available board meetings have only recently started to be commonly adopted, we were not able to find any case law where video footage of board meetings were used to challenge the official minutes of the meeting. However, there are various examples where parol evidence, such as a director’s handwritten notes, are used to prove unrecorded resolutions/decisions or seemingly contradict the minutes of the meeting, where it is silent on a particular matter.⁶ For example, in *Hudbay Minerals Inc.*,⁷ the Ontario Securities Commission notes that “handwritten notes may be very relevant in another proceeding for purposes of determining matters such as what was discussed at a meeting and what was considered in making a decision.”

What this means is that the recordings is a double-edged sword, where extra evidence of a board meeting can provide more context to the minutes of the meeting and the same evidence may be used against BMAHC in the course of litigation or an audit.

V. Reputational Impact

While increased transparency into the inner workings of corporate entities can increase public confidence and provide reputational benefits, online and publicly available board meetings also have the potential to create adverse reputational effects for corporate entities, outside of a strictly legal sense. In the present age, audio and video footage can be manipulated in a variety of ways.⁸ By allowing board meetings to be available online and to the public, board members open themselves up to the potential for malicious actors to engage in deceptive editing that can distort what was done and said during the course of the meetings. While directors may have recourse to pursue these malicious actors in legal proceedings, the reputational harm they and the corporate entity can suffer in the interim period should not be understated.

⁵ 2017. E. Grant McDonald. *A guide to Not-For-Profit Board Minutes*. Adopted for the Institute of Corporate Directors.

⁶ *Hood v. Eden* (1905), 36 S.C.R. 476; *Wilson v. Woollatt*, [1929] S.C.R. 483; *Crawford v. Fullerton* (1918), 42 O.L.R. 256 (S.C. App. Div.)

⁷ 2009 ONSEC 18 ([CanLII](#))

⁸ The Washington Post’s guide to manipulated video. (2019, June 25). *The Washington Post*. <https://www.washingtonpost.com/graphics/2019/politics/fact-checker/manipulated-video-guide/>



A corporate entity's choice of host platform, such as YouTube, for streaming and playback of board meetings also makes it susceptible to the specific content and use policies of that platform.⁹

VI. Current Practices

To provide a comparative analysis of current practices in other jurisdictions, we evaluated different housing providers in the Province and found that only four of the fourteen providers allowed for online viewing of the board meetings and only three of the fourteen providers made the videos available as video-on-demand. As you will notice, the three housing providers that post their videos are three of the largest providers in the Province, and as such, have more resources available to them for such purposes. We also canvassed many smaller housing providers (i.e. under 100 units) and did not find any provider that posted the board meeting videos online.

As a practical issue, recording and posting of meeting minutes will become more challenging and costly, as online meetings are no longer held. Specialized equipment will be needed to record sound and video at a high quality in such meetings.

⁹ Caroline Anders, "YouTube yanked public meeting videos over covid misinformation. Now it's backtracking." (2021, August 7). *The Washington Post*.
<https://www.washingtonpost.com/technology/2021/08/07/youtube-covid-misinformation-city-council/>



SCHEDULE A - BOARD MEETING PRACTICES FOR HOUSING PROVIDERS

Name	Board Meetings accessible online in real-time?	Board Meetings available as video-on-demand?
City Housing Hamilton (CHM) ¹⁰	YES (starting January 25, 2021)	YES (starting January 25, 2021)
Community Living Meaford (CLM) ¹¹	NO	NO
Durham Regional Local Housing Corporation (DRLHC) ¹²	NO	NO
Durham Region Non-Profit Housing Corporation (DRNPHC) ¹³	NO	NO
Kawartha Lakes Haliburton Housing Corporation (KLHHC) ¹⁴	NO	NO
Kitchener Housing Inc. (and Kitchener Non-Profit Management Inc.) ¹⁵	NO	NO
Northumberland County Housing Corporation (NCHC) ¹⁶	NO	NO
Ottawa Community Housing (OCH) ¹⁷	YES ¹⁸	NO ¹⁹
Owen Sound Municipal Non-Profit Housing Corporation (OSMNPHC) ²⁰	NO	NO
Peel Living ²¹ (Peel Housing Corporation) ²²	NO	NO
Simcoe County Housing Corporation (SCHC) ²³	NO	NO
Toronto Community Housing Corporation ²⁴	YES (starting January 18, 2016)	YES (starting September 12, 2019)
Toronto Seniors Housing Corporation ²⁵	YES (starting November 23, 2021)	YES (starting November 23, 2021)
Windsor Essex Community Housing Corporation (WECHC) ²⁴	NO	NO

¹⁰ <https://www.hamilton.ca/cityhousing-hamilton/board-directors>

¹¹ <https://www.communitylivingmeaford.ca/Board-of-Directors/>

¹² <https://www.durham.ca/en/living-here/durham-regional-local-housing-corporation.aspx>

¹³ <http://www.durham-housing.com/about-us/board-of-directors/>

¹⁴ <https://www.kawarthalakes.ca/en/living-here/klh-housing-corporation.aspx>

¹⁵ <https://kitchenerhousinginc.ca/about-us/>

¹⁶ <https://www.northumberland.ca/en/living-here/northumberland-county-housing-corporation.aspx>

¹⁷ <https://www.och-lco.ca/public-meetings/>

¹⁸ We could not determine when OCH started live-streaming its virtual meetings.

¹⁹ The OCH maintains the VOD for its board of directors meeting held June 23, 2022 on its YouTube channel. No other meetings are available as VOD.

²⁰ <https://www.grey.ca/affordable-housing/affordable-housing-locations/owen-sound-municipal-non-profit-housing-corp>

²¹ <https://www.peelregion.ca/peelliving/>

²² <https://www.peelregion.ca/council/committees/peel-housing-corporation.asp>

²³ <https://simcoe.civicweb.net/Portal/MeetingTypeList.aspx>

²⁴ <https://www.torontohousing.ca/about/board-of-directors/board-meetings>

²⁵ <https://www.torontoseniorshousing.ca/>

²⁴ <https://www.wechc.com/>