

REPORT ON CLOSED MEETING INVESTIGATION 2022-01

THE CORPORATION OF THE CITY OF BURLINGTON

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INTRODUCTION

A request for a closed meeting investigation, dated February 15, 2022 (the “**Request**”), was filed with the Clerk of The Corporation of the City of Burlington (the “**City**”).

In our capacity as the closed meeting investigator for the City (“**Investigator**”), our office received a copy of the Request and all applicable documentation and records from the City Clerk’s office on March 2, 2022.

The Request seeks to confirm whether four (4) meetings of City Council (“**Council**”) and its committees, at which several discrete matters were considered, were permitted to be closed to the public pursuant to section 239 of the *Municipal Act, 2001*,¹ and whether Council’s resolutions to “report out” from each of those meetings complied with the City’s Procedure By-law.²

EXECUTIVE SUMMARY

Based on our inquiry and review of those meetings identified in the Request, we have concluded that the City did not contravene subsection 239(2) of the *Municipal Act, 2001* or the Procedure By-law.

It is a general rule that all meetings of a municipal council are to be open to the public. There are a number of subject matter exceptions to the general rule where the Legislature has determined there is some need for privacy in the decision-making process. The exceptions relevant to our inquiry share a common underlying theme: the existence of some adversarial relationship between the municipality and a third party.

The matters identified in the Request largely fall within two subject matters: appeal proceedings before the Ontario Land Tribunal (the “**Tribunal**”), and a proposed real estate transaction. These are matters which clearly fall within the scope of the closed meeting exceptions enumerated under subsection 239(2) of the *Municipal Act, 2001*.

Clause 239(2)(e) of the *Municipal Act, 2001* entitles Council and its committees to hold a closed session to discuss land use planning appeal proceedings before the Tribunal commenced under the *Planning Act*.³ The *Planning Act* sets out a process by which landowners may apply to a municipality for certain permissions to develop their lands. The process by which Council makes decisions under the *Planning Act* is generally marked by transparency, notice, and public participation.

¹ *Municipal Act, 2001*, S.O. 2001, c. 25.

² City of Burlington, Procedure By-law No. 31-2021, as amended (the “**Procedure By-law**”).

³ *Planning Act*, R.S.O. 1990, c. P.13.

However, certain decisions or non-actions by the City are subject to a right of appeal. When an appeal is filed, the City no longer has any decision-making authority on the underlying application. Rather, that authority falls within the exclusive jurisdiction of the Tribunal. The process changes from an open, public process to an adversarial legal proceeding.

The adversarial process requires the City, through Council, to consider its position and give directions to City staff with respect to those proceedings. The City (like any litigant) requires some degree of privacy in order to do so effectively and responsively. As such, the *Municipal Act, 2001* recognizes that where the City is involved in litigation, including matters before administrative tribunals (such as the Tribunal), it is entitled to consider those matters in closed session.

Where the City is involved in a proposed or pending real estate transaction, Council is entitled to rely on clause 239(2)(c) of the *Municipal Act, 2001* to consider that matter in a meeting that is closed to the public. While there might be some notoriety in the lands or transaction, or a general desire to keep the public apprised, there are extremely sensitive interests involved.

As a party to a commercial transaction, the City will try to maximize the value it derives from the exchange. In trying to get the best deal possible, Council will consider such information as the unique qualities of the lands, how the transaction may be structured, and, fundamentally, the purchase price that will be paid. There may be other competing bidders, and there will always be a vendor who is adverse in interest. As such, the City requires a high degree of confidentiality to consider business and legal advice related to the transaction, to formulate its bargaining position, and to give direction and instruction to staff and consultants or agents, all without compromising its bargaining position.

The *Municipal Act, 2001* recognizes that where the City is involved in a proposed or pending acquisition or disposition of land, matters related thereto may be considered, discussed and debated in a session that is closed to the public.

We recognize that there is a general public interest in keeping the public informed of what has been discussed *in camera*. However, that public interest in transparency must yield to the specific sensitive interests underlying the closed meeting exceptions. In addition, those concepts are not necessarily inconsistent. In some circumstances, full transparency in the immediate present term is simply not appropriate. In other circumstances, full disclosure may be highly prejudicial to the City's economic and other interests, and by fiat, the overall public interest. The closed meeting exceptions set out in section 239 of the *Municipal Act, 2001* serve to protect sensitive interests at play, and when appropriate to do so, the City may authorize the release of information at a later time.

Finally, despite the closed meeting exceptions, a municipality is free to dictate its practices and procedures for reporting closed session information to the public if and when advisable. The *Municipal Act, 2001* does not prescribe what must be reported out from a closed meeting to the public. The City's Procedure By-law contains a limited "report out" obligation whereby following a closed session, the public is informed of whether any direction was given to City staff, or whether a decision is to be made in open session. The Procedure By-law does not, however, require Council to publicly disclose the substance of what was discussed in a closed session. Council and its committees are proficient in this "report out" obligation, and we have found no contravention. While some may disagree with this degree of transparency, the Procedural By-law, being an enactment of Council, is entirely within the City's purview to amend or modify.

CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

The City appointed Local Authority Services Inc. (“**LAS**”) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act, 2001*. LAS has delegated to Aird & Berlis LLP its authority to act as the Investigator for the City.

Aird & Berlis LLP was selected by LAS through a competitive procurement process to provide closed meeting investigation services to its participating municipalities; Aird & Berlis LLP was not directly selected by the City as its Investigator to act in this particular matter. Prior to accepting any investigation mandate, Aird & Berlis LLP conducts a thorough legal conflict search and makes other conflict inquiries to ensure our firm is in a position to conduct an independent and impartial investigation. We do note that the City has engaged Aird & Berlis LLP on a separate engagement to conduct a review of the City’s closed meeting investigation practices and procedures, which was intended to follow this inquiry and Report.

Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*. Our function includes the authority to investigate, in an independent manner, a complaint made by any person to determine whether the City has complied with section 239 of the *Municipal Act, 2001* or a by-law enacted under subsection 238(2) (i.e. a procedure by-law) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation to Council, together with any recommendations as may be applicable.

THE REQUEST

The Request was properly filed pursuant to section 239.1 of the *Municipal Act, 2001*. As noted, the Request was filed directly with the City Clerk, and subsequently provided to our office.

The Request sought a review of four (4) separate meetings of Council and Council’s Corporate Services Strategy Risk and Accountability Committee (the “**Committee**”) which were held in closed session to consider a number of related matters. Those meetings were held on November 10, 2021, January 10, 2022, January 18, 2022 and February 2, 2022.

In essence, the Request seeks confirmation that Council and the Committee were entitled to consider each of these matters in closed session pursuant to the exceptions in subsection 239(2) of the *Municipal Act, 2001*.

Those items are identified as follows:

Corporate Services Strategy Risk and Accountability Committee, November 10, 2021 Meeting

Item 5.3, Confidential Real Estate Matter (CM-25-21)

Item 5.4, Confidential Real Estate Matter (L-26-21)

Corporate Services Strategy Risk and Accountability Committee, January 10, 2022 Meeting

Item 5.1, Confidential update on a litigation matter (L-06-22)

Item 5.3, Confidential update on a litigation matter (L-01-22)

Item 5.4, Confidential update on a litigation matter (L-02-022)

Item 5.5, Confidential update on a litigation matter (L-07-2022)

City Council, January 18, 2022 Meeting

Item 14.1, Confidential update on a litigation matter (L-02-22)

Corporate Services Strategy Risk and Accountability Committee, February 2, 2022 Meeting

Item 5.1, Confidential contingency report as at Dec. 31, 2021 (F-02-22)

Item 5.2, Confidential update on a litigation matter (L-01-22)

Item 5.3, Confidential triennial litigation update (L-03-022)

Item 5.5, Confidential update on a real estate matter (L-11-2022)

ISSUES

The Request raises the following issues:

Issue 1

Were Council and the Committee entitled to discuss those matters identified in the Request in closed session pursuant to a closed meeting exception in subsection 239(2) of the *Municipal Act, 2001*?

Issue 2

Did Council and the Committee's "report out" resolution passed following each closed session comply with the Procedure By-law?

INQUIRY

In order to properly and fully assess the Request and to make a proper determination on the issues, we have reviewed the following materials:

- the Request;
- the City's Procedure By-law; and
- the open and closed meeting agendas and minutes, closed meeting reports and other closed meeting materials related to the meetings identified in the Request.

Additionally, we conducted telephone interviews with two (2) persons (i.e. witnesses) with direct, relevant knowledge about the subject matter of the Request.

We also reviewed, considered and had recourse to such applicable secondary source materials, including other closed meeting investigation reports, that we believed to be pertinent to the issues at hand.

A draft copy of this Report was provided to the City to solicit its comments and feedback. The City and its representatives were fully cooperative and forthright during our inquiry and sought to assist us as required.

The inquiry was carried out in a confidential manner.

This is a report on our inquiry in respect of the Request made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.

APPLICABLE LAW

1. *Municipal Act, 2001*

Subsection 239(1) of the *Municipal Act, 2001* provides that all meetings are to be open to the public, unless otherwise excepted.⁴ Unless they deal with subject matter falling within a specific exception set out in subsection 239(2), all meetings are required to be held in an open forum where the public is entitled to attend.

The purpose of Ontario's "open meeting" rule is to foster democratic values, enhance the responsiveness of government and public confidence in government, and to increase transparency.⁵ By setting out specific exceptions to the general rule that all meetings must be open to the public, section 239 balances the need for confidentiality in certain matters with the public's right to information about the decision-making process of local government.⁶

The exceptions relevant to our inquiry include clauses 239(2)(c) and (e) of the *Municipal Act, 2001*:

Exceptions

239 (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

...

(c) a proposed or pending acquisition or disposition of land by the municipality or local board;

...

(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

⁴ The term "meeting" is defined in s. 238(2) of the *Municipal Act, 2001* as follows:

"meeting" means any regular, special or other meeting of a council, of a local board or of a committee of either of them, where,

(a) a quorum of members is present, and

(b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

⁵ See e.g. *R.S.J. Holdings Inc. v. London (City)* (2007), 36 M.P.L.R. (4th) 1 (S.C.C.).

⁶ Stephen Auerback & John Mascarini, *The Annotated Municipal Act*, 2nd ed., (Toronto, ON: Thomson Reuters Canada Limited, 2017) (e-loose leaf updated 2021 – rel 1) annotation to s. 239.

(a) Clause 239(2)(c) – “Proposed or pending acquisition or disposition”

The closed meeting exception in clause 239(2)(c) provides that a meeting may be closed to the public if the matter under consideration is a “proposed or pending acquisition or disposition of land by the municipality.”

The purpose of this exception is to protect a municipality’s interests and bargaining position in a land transaction.⁷ If a municipality could not consider the proposed terms and conditions of a land transaction in a private context, its overall bargaining power in the transaction could be severely prejudiced. This would be to the detriment not only of the municipal corporation, but also to the overall public interest the transaction serves.

That being said, the exception in clause 239(2)(c) is limited. It only applies to transactions that are “proposed” or “pending,” rather than speculative transactions that may or may not happen in the future.⁸ In order for this exception to apply, there must be some evidence to demonstrate an actual transaction is actively being negotiated, or that there is some proposed or potential transaction that will be negotiated.⁹

(b) Clause 239(2)(e) – “Litigation or potential litigation”

Clause 239(2)(e) provides that a meeting may be closed to the public if the matter under consideration is litigation or potential litigation involving the municipality, including matters before administrative tribunals, such as the Tribunal.

This closed meeting exception is designed to protect a municipality’s interests as a litigant or party to an administrative proceeding, and to protect its legal position and strategy from being disclosed to adverse parties.¹⁰

⁷ See *Final Order MO-2468-F, Toronto (City)(Re)*, 2009 CanLII 60399 (Ont. I.P.C.); cited in Ombudsman of Ontario, *Investigation into whether Council for City of Port Colborne held illegal closed meetings on March 8, 2010, January 27, 2014, and December 8, 2014* (November 2015), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/city-of-port-colborne>.

See also, Makuch, Stanley M. and John Jackson, *Freedom of information in local government in Ontario*, (Toronto: Commission on Freedom of Information and Individual Privacy, 1979) at p. 12:

Another area where a strong argument can be made for closed meetings or restrictions on information is one where premature publicity would be detrimental to the interests of the community. The most common example of this occurs where a body is contemplating a land acquisition and does not wish disclosure to affect the price of the property. Another example is the negotiating of a collective agreement with employees where undue public pressure affects the local decision makers; public discussion also allows the employees to discover the negotiating strategy of the authority. [emphasis added]

⁸ Ombudsman of Ontario, *Investigation into whether Council for the Town of Fort Erie held an illegal closed meeting on December 10, 2014* (April 2015), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/town-of-fort-erie>.

⁹ *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee, July 1984; cited with approval in *R.S.J. Holdings Inc. v. London (City)*, 2007 SCC 29 at para. 18.

¹⁰ See e.g. John Mascarin and Rebecca Hines, “The Ins and Outs of In Camera Meetings in Ontario”, 10 D.M.P.L. (2d), January 2021, Issue 1, p. 4-5.

Similar to the animating purpose of clause 239(2)(c), the exception recognizes the need to protect the municipality's interest where adversarial interests are involved.¹¹

The exception in clause 239(2)(c) permits a municipality to discuss and prepare for pending litigation before an administrative tribunal, as well as to receive and consider new information affecting an ongoing appeal.¹²

In addition to current litigation and administrative proceedings, the case law and other closed meeting investigation reports dealing with the litigation exception have adopted the "reasonable prospect of litigation" test from the civil litigation context. In order for this exception to apply, the dominant purpose of the meeting must be to discuss some pending or realistically contemplated litigation.¹³

The fact that there might be, or even inevitably would be, some form of litigation arising from a matter is not sufficient to bring the "matter under consideration" within the realm of "potential litigation."¹⁴

(c) "Parsing" Discussion

Matters that come before municipal council are often multi-faceted. In some circumstances, it is difficult to fully consider a matter that qualifies for a closed meeting exception without discussing information that does not, in and of itself, qualify for an exception.

The courts and closed meeting investigators have recognized this difficulty, and developed the concept of "parsing" discussion. It is not realistic (or practical) to expect that members of council will "parse" their discussion on a matter by moving into and out of closed session based on whether a closed meeting exception applies to the information. This would have the unintended effect of stifling free and efficient discussion by interrupting deliberation.

As such, a municipality has some limited ability to discuss matters that are incidental to the core matter or matters to which the closed meeting exception applies.¹⁵

¹¹ See e.g. Ontario, *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information* (Toronto: The Committee, July 1984), at p. 7.

¹² See Ombudsman of Ontario, *Investigation into meetings held by the City of Richmond Hill on April 16, 2019; May 14, 2019; April 1, 2020; April 22, 2020; and May 14, 2020* (March 2021) at para. 90 [**Report on Richmond Hill Investigation**], online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2021/city-of-richmond-hill>.

¹³ See *R.S.J. Holdings Inc. v. London (City)* (2007), 36 M.P.L.R. (4th) 1, at para. 22 (S.C.C.). See also Ombudsman of Ontario, *Investigation into complaints about a closed meeting held by Council for the County of Norfolk on May 24, 2016*, (November 2016), online: <https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Municipal-Meetings/Norfolk-Ombudsman-Final-Report-Nov-7-accessible.pdf>.

¹⁴ *R.S.J. Holdings Inc. v. London (City)* (2005), 16 M.P.L.R. (4th) 1 at para. 22 (Ont. C.A.); 36 M.P.L.R. (4th) 1 (S.C.C.).

¹⁵ *St. Catharines (City) v. Ontario (Information & Privacy Commissioner)* (2011), 81 M.P.L.R. (4th) 243, at para. 42 (Ont. Div. Ct.).

2. The Procedure By-law

Subsection 238(2) of the *Municipal Act, 2001* requires the City to pass a procedure by-law that governs the calling, place and proceedings of meetings.¹⁶

The relevant provisions of the City's Procedure By-law employs a common "Council and Committee" structure whereby business is first presented to a committee of Council for consideration and discussion, and a recommendation is presented to Council for ratification at a subsequent meeting.

(a) Closed Meeting Provisions

In summary, the closed meeting provisions in the Procedure By-law include:

- a provision that a meeting may be closed to the public if the subject matter being considered is a matter permitted or required by the *Municipal Act, 2001* to be discussed in closed session;
- a requirement that before holding a closed session, Council pass a resolution stating:
 - the fact that Council will be convening a closed session,
 - the specific provision of the *Municipal Act, 2001* that permits the closed session, and
 - the general nature of the matter to be considered;
- a list of City staff members who are entitled to attend a closed session;
- a prohibition on members of Council from discussing any additional matters other than those for which the closed session was convened;
- a prohibition on voting during a closed session, unless the vote is procedural in nature or for giving direction to City staff or another individual;
- a requirement that upon reconvening in public session, that the Chair of a meeting accept a motion regarding the matters discussed in closed session, or alternatively, advise that direction was given to City staff during the closed session;
- a prohibition on recording the proceedings of a closed session; and
- confidential record-keeping duties of the City Clerk.¹⁷

¹⁶ A procedure by-law is a rare "mandatory" by-law in that a municipality is required by statute to enact.

¹⁷ Procedure By-law, Section 27 "Closed Session".

(b) Council’s Obligation to “Report Out”

Unlike many aspects related to closed meetings, the “reporting out” from a closed meeting is not a statutory requirement of the *Municipal Act, 2001*. The practice of “reporting out” or “rising and reporting” is a voluntary municipal practice, adopted through a procedure by-law. However, the specific requirements, not being statutorily prescribed, vary from municipality to municipality.

Reporting out is a universally-recommended “best practice” aimed at enhancing the transparency and accountability of the municipal decision-making process.

Municipalities should aim to “report out” as much information as possible, while avoiding disclosing so much information that it would negate the very reason for holding a closed meeting in the first place. While this is a delicate balance and requires careful consideration, it enhances the public’s understanding of the municipal decision-making process.

Section 27.6 of the Procedure By-law sets out the City’s obligation to “report out” from a meeting that is closed to the public:

27. Closed Session

...

27.6 On reconvening in public session, the Chair will accept a motion regarding the matters discussed in closed session, or alternatively advise that direction had been given to staff during the closed session in accordance with the *Municipal Act*.

We note two observations about the “report out” requirements of the Procedure By-law.

First, the Procedure By-law sets out two possibilities following a closed meeting: either a member of Council brings forward a motion arising from the matters discussed in closed session, or the Chair advises that direction was given in closed session. In practice, the latter option is undertaken in the form of a formal resolution.

Second, relative to other municipal procedure by-laws, the Procedure By-law does not impose a requirement that Council report-out the substantive details of what was discussed in a closed meeting. This provision essentially calls for a *pro forma* resolution which does not reveal any substantive information.

That being said, our jurisdiction as Investigator is limited to determining whether a municipality has complied with its procedure by-law,¹⁸ not the perceived merits of that procedure by-law. We are required to apply the language of the Procedure By-law as applicable to the meetings under review.

¹⁸ See *Municipal Act, 2001*, s. 239.2(1).

THE MEETINGS

As noted above, the Request concerns four meetings where several discrete matters were considered. Our Report will deal with each matter separately, commenting on our findings immediately below each matter.

1. **Corporate Services Strategy Risk and Accountability Committee, November 10, 2021 Meeting**

The publicly-available minutes of the November 10, 2021 meeting indicate that the Committee convened in closed session by passing the following resolution:

6.1 Motion to Proceed in Closed Session

Moved by Councillor Nisan

Move into closed session in accordance with the following provisions under the Municipal Act:

Section 239(2)(c), a proposed or pending acquisition or disposition of land by the municipality or local board, with respect to confidential city manager's office report CM-25-21 and confidential legal department report L-26-21 regarding real estate matters.

CARRIED

The closed session minutes of the November 10, 2021 meeting reflect an identical resolution, noting that the Committee convened in closed session at 1:09 PM.

The Committee's closed session was divided into an afternoon session, taking place between 1:09 PM and 3:58 PM, and an evening session, taking place between 6:31 PM and 7:24 PM.

Upon the Committee's resumption of the closed session in the evening, the Committee passed a nearly-identical resolution to the one identified above.

(a) Item 5.1, Confidential Real Estate Matter (CM-25-21)

The Committee considered a confidential report from the City Manager's Office entitled "Confidential Real Estate Matter." Report CM-25-21 provided an update to the Committee on the City's due diligence in respect of the acquisition of a piece of land in the City.

The report was intended to serve as a covering note to a presentation prepared by the City's external project consultant. The report was also intended to be complimentary to a separate report prepared by the City's Legal Services Department on the same matter.

At the point in time Report CM-25-21 was prepared and presented to the Committee, the City had completed the due diligence phase of the potential transaction but had not yet made a formal offer to purchase the lands. At the time of the meeting, that offer to purchase was anticipated to be made in the following month.

Report CM-25-21 and the presentation provided a detailed briefing to the Committee on the nuances of a proposed strategic land acquisition. At a high level, Report CM-25-21 provided the following information:

- the value in the proposed acquisition was with the lands;
- technical aspects of due diligence in the acquisition had been completed;
- despite the due diligence, much work remained relating to the proposed future use of those lands; and
- potential options for adaptive re-use of the facility to accommodate potential future commercial tenancies.

At the November 10, 2021 meeting, members of City staff and representatives from the City's external project consultant delivered a presentation to members of Council on the business terms and strategic value of the proposed acquisition. Following the presentation, members of the Committee posed questions to City staff and the external project consultant.

FINDINGS:

Based on our review, the Committee was entitled to consider and discuss Report CM-25-21 in a session that was closed to the public.

The Committee cited clause 239(2)(c) for a "proposed acquisition." It was well-justified to do so. The Committee considered a potential land transaction involving a specific property and ongoing discussions with a specific vendor, as well as potential commercial tenants. At this stage, an offer to purchase had not yet been made to the vendor. Given the nature and relative complexity of the proposed transaction, including the unique characteristics of the lands and of the transaction itself, the Committee required a high degree of confidentiality to consider the business terms of the deal, formulate its bargaining position, and give appropriate direction to City staff.

(b) Item 5.3, Confidential Real Estate Matter (L-26-21)

At the November 10, 2021 meeting, the Committee also considered a separate report on the same proposed land acquisition. Report L-26-21, originating from the Legal Services Department, was titled "Confidential Update on Real Estate Matter," and was a companion item to City Manager's Report CM-25-21. This report was largely for information purposes and did not propose any immediate action.

Report L-26-21 provided a separate update on the legal aspects of the proposed land transaction, including the terms and conditions of the proposed transaction.

At the November 10, 2021 meeting, the Manager of Realty Services delivered the presentation to the Committee. Following the presentation, members of the Committee began a question period on the presentation. These questions were directly related to the presentation delivered by the Manager of Realty Services.

This question period was broken into two sessions given the Committee's need to continue with the open portion of its meeting in a timely manner.

Upon reconvening in closed session later that evening, the Committee continued its question period on both presentations.

FINDINGS:

It is our view that the Committee was entitled to consider and discuss Report L-26-21 in closed session.

Because Report L-26-21 was a companion item to Report CM-25-21, the Committee also cited clause 239(2)(c) for a "proposed acquisition." Given the subject matter of Report L-26-21, the Committee could have also cited the exception in clause 239(2)(f) for "solicitor-client privilege" as it also received legal advice on the legal terms and conditions of the proposed transaction.

Similar to Report CM-26-21, the Committee considered the legal aspects of the terms and conditions of the proposed land transaction. Again, the Committee required a high degree of confidentiality to consider matters relating to its bargaining position in the transaction. Considering these matters in a public session would be tantamount to the City "showing its cards" to the vendor and potentially other competing purchasers. This is the exact interest the exception in clause 239(2)(c) is designed to protect.

(c) The "Report Out" Resolution

At the conclusion of the November 10, 2021 meeting, the Committee voted to receive and file both reports. The Committee's publicly-available minutes of the November 10, 2021 meeting provide, in part, as follows:

5. Confidential Items

...

5.3 Confidential real estate matter (CM-25-21)

Moved by Councillor Sharman

Receive and file confidential city manager's office report CM-25-21 regarding a real estate matter.

CARRIED

5.4 Confidential update on a real estate matter (L-26-21)

Moved by Mayor Meed Ward

Receive and file confidential legal department report L-26-21 providing an update on a real estate matter.

CARRIED

No other instruction or direction was given to City staff at the November 10, 2021 meeting.

FINDINGS:

In our review, the Committee's resolutions passed following its closed session were in compliance with the requirements of the Procedure By-law. Each resolution constituted "a motion" on the agenda items considered in closed session, and the Committee was under no discrete obligation to disclose the substance of anything considered in closed session.

2. Corporate Services Strategy Risk and Accountability Committee, January 10, 2022 Meeting

The publicly-available minutes of the January 10, 2022 meeting indicate that the Committee convened in closed session by passing the following resolutions:

6.1 Motion to Proceed in Closed Session

Moved by Councillor Galbraith

Move into closed session in accordance with the following provisions under the Municipal Act:

Section 239(2)(e), litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board, with respect to confidential legal department report L-06-22 providing an update on a litigation matter.

CARRIED

6.2 Motion to Proceed in Closed Session

Moved by Councillor Sharman

Move into closed session in accordance with the following provisions under the Municipal Act:

...

Section 239(2)(e), litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board, with respect to confidential legal department report L-01-22, L-02-22, and L-07-22 providing updates on litigation matters.

CARRIED

The closed session minutes of the January 10, 2022 reflect an identical resolution, noting that the Committee convened in closed session at 9:38 AM.

The Committee's closed session was divided into two sessions: one session between 9:38 AM and 12:24 PM to discuss the first matter, and one session between 1:05 PM and 3:13 PM to deal with remaining matters.

Upon the Committee's resumption of the closed session in the evening, the Committee passed a nearly-identical resolution to the one identified above.

(a) Item 5.1, Confidential Update on a litigation matter (L-06-22) – 2020 Lakeshore Road

The Committee considered a report from the Legal Services Department that provided an update on a land use planning matter that had been referred to the Tribunal pursuant to subsections 22(6.2) and 34(10.5) of the *Planning Act*.

By way of background, the City had received applications for an Official Plan Amendment and Zoning By-law Amendment for a mixed-use development in the City. At the recommendation of City planning staff, Council passed a resolution deeming the application to be “incomplete” in accordance with the *Planning Act* and requesting that the applicant to file additional materials.

The significance of this resolution was to require the applicant to file additional materials in support of its development, and also to pause the timeframe within which the City was required to process the application.

The applicant “appealed” this determination by bringing a motion to the Tribunal pursuant to its statutory rights under the *Planning Act*. On hearing such a motion, the Tribunal will have jurisdiction to determine whether or not the materials had in fact been provided, or whether or not the request for additional information was reasonable.¹⁹ Both the City and the applicant would be bound by such a determination, which would affect the balance of the application process.

Report L-06-22 provided the Committee an update on the Tribunal’s process, legal advice on the matter, and sought the Committee’s instructions in the Tribunal proceeding. Report L-06-22 contained a recommendation that the City’s legal counsel be given direction to undertake certain steps, and to report back to the Committee of the progress of those steps.

When the Committee considered Report L-06-22, the City’s external legal counsel was also in attendance to speak to the matter along with the City’s Deputy Corporation Counsel.

On consideration of Report L-06-22, the Committee referred the item to the January 13, 2022 meeting of Council’s Environment, Infrastructure & Community Services Committee.

FINDINGS:

Based on our review, the Committee was entitled to consider and discuss Report L-06-22 in a meeting that was closed to the public.

The Committee relied upon clause 239(2)(e) on account of “pending litigation.” At the time the Committee considered this item, the matter was the subject of an active proceeding before the Tribunal. This proceeding falls within the ambit of the litigation exception, which expressly includes matters before administrative tribunals. Previous reports of closed meeting investigators have concluded that a municipal council is permitted to discuss and prepare for proceedings before the predecessor boards to the Tribunal in closed session, including receiving or considering new information regarding a proceeding.²⁰

¹⁹ *Planning Act*, ss. 22(6.2) and 34(10.5).

²⁰ See *Report on Richmond Hill Investigation*, *supra* note 12, at para. 90; see also Ontario Ombudsman, *Investigation into complaints about a closed meeting held by Council for the County of Norfolk on May 24, 2016* (November 2016), online: <https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Municipal-Meetings/Norfolk-Ombudsman-Final-Report-Nov-7-accessible.pdf>.

The reason why the Committee considered and discussed this item clearly falls within the purpose of the exception in clause 239(2)(e): to formulate its position in litigation and adopt a strategy in response to the Tribunal proceeding.

We acknowledge that some may view this item as a “planning matter” which should have been considered in an open session, and not as a purely litigation matter. However, we would disagree with that conclusion.

There is a strong imperative for openness and public participation in the municipal land use planning process. However, the land use planning regime in Ontario is marked by litigation before an administrative tribunal, namely, the Tribunal.

Appeal proceedings are a common feature of the planning process wherein disputes arise between municipalities and third parties. When disputes do occur, the parties, including municipalities, are required to respond strategically to preserve their interests in adversarial proceedings. This is contemplated by clause 239(2)(e), which has been interpreted to include appeal proceedings in land use planning matters.

(b) Item 5.3, Confidential update on a litigation matter (L-01-22) – 977 Unsworth Avenue

Report L-01-22 sought to provide the Committee with an update and to seek instruction on a matter relating to a Committee of Adjustment decision that was appealed to the Tribunal.

The Committee of Adjustment refused an application for a consent to sever a property listed on the City’s Municipal Heritage Register. The applicant subsequently appealed the refusal to the Tribunal pursuant to the *Planning Act*. On hearing the appeal, the Tribunal would have jurisdiction to grant the consent to sever and impose conditions.

Report L-01-22 provided an update to the Committee on the Tribunal proceeding, and sought the Committee’s instructions on the conduct of the proceeding.

On consideration of Report L-01-22, the Committee sought legal advice from the City’s solicitor on a legal issue related to the Tribunal proceeding.

FINDINGS:

It is our view that the Committee was entitled to consider and discuss Report L-01-22 in closed session.

The Committee cited clause 239(2)(e) on account of “pending litigation.” The applicant’s appeal to the Tribunal constitutes an administrative proceeding which involved the City.

The report and consideration by the Committee were intended to formulate the City’s position in response to the appeal, and respond to the appeal by directing City staff accordingly.

Again, although the core of the matter was an application made pursuant to the *Planning Act*, the existence of an appeal to the Tribunal – and possibility of an outcome adverse to the City’s interests – brought the matter within the exception in clause 239(2)(e).

(c) Item 5.4, Confidential update on a litigation matter (L-02-22) – 3088 Balmoral Avenue

Report L-02-22 also sought direction in respect of an appeal to the Tribunal pursuant to the *Planning Act* and, in this instance, one which was commenced by the City itself.

An application for minor variances was filed with the City regarding the property municipally known as 3088 Balmoral Avenue. The application sought approval to expand a legal non-conforming use pursuant to subsection 45(2) of the *Planning Act* in order to facilitate the construction of a covered deck at grade, and to expand an existing balcony on the second storey of the building.

The City's Committee of Adjustment approved the application in its entirety at its meeting on June 30, 2021. The City itself filed an appeal with the Tribunal.

Report L-02-22 was brought to provide the Committee an update on the Tribunal proceeding and seek direction from the Committee with respect to the conduct of the appeal.

When Report L-02-22 was considered by the Committee, members of the Committee asked the City's solicitor and the Director of Community Planning questions about the relative positions of the parties to the appeal.

The Committee ultimately referred the matter to Council's January 18, 2022 meeting to allow City staff to bring forward further information and legal advice on the appeal.

FINDINGS:

Based on our review, the Committee was entitled to consider and discuss Report L-01-22 in closed session.

The Committee relied on the exception pertaining to "pending litigation" in clause 239(2)(e). Similar to our findings above, the Committee was entitled to consider this matter in closed session. As a litigant in an administrative appeal proceeding, the Committee was entitled to consider the City's reasons for filing the appeal, the underlying interests in that appeal, and how the City should conduct the appeal, including the position it would take.

During discussion on the matter, the Committee also considered background information about the property and the application. While this topic in and of itself does not necessarily fall under a closed meeting exception, it was ancillary to the Committee's discussion of the main topic, being the conduct of an administrative appeal proceeding, and therefore could properly be discussed during a closed meeting.

(d) Item 5.5, Confidential update on a litigation matter (L-07-22) – Appeals to the New Official Plan

The final matter considered by the Committee at its closed session on January 10, 2022 was Report L-07-22, which was a status update on private appeals to the City's new Official Plan. This item was presented by the City's external legal counsel who had been retained to handle this matter.

By way of background, the City adopted a new Official Plan on April 26, 2018. Under the *Planning Act*, the approval authority for the new Official Plan was The Regional Municipality of Halton ("**Halton Region**"). On November 30, 2018, Halton Region approved the new Official Plan, with modifications. Following its approval, Halton Region had received 48 private appeals to the Tribunal pursuant to the *Planning Act*.

Report L-07-22 provided an update to the Committee on the Tribunal's hearing process and upcoming steps in that process, including matters that would be considered at a further Case Management Conference.

The report provided external counsel's legal advice regarding the recommended strategy for proceeding with the Tribunal's proceeding.

Report L-07-22 did not propose any specific recommendation or require a decision by the Committee. Members of the Committee asked external legal counsel questions to clarify their recommended strategy.

Ultimately, Report L-07-22 was received and filed for information.

FINDINGS:

Based on our review, the Committee was entitled to consider and discuss Report L-07-22 in closed session.

The Committee again cited clause 239(2)(e) on account of "pending litigation." Again, although the underlying subject matter was the City's new Official Plan, several appeals to the Official Plan meant that that planning instrument was subject to the exclusive jurisdiction of the Tribunal. The matter no longer rested in the sole domain of the City, and the City was required to respond to the litigation accordingly, including formulating its position, providing instruction to its legal counsel, and receiving information on the status of the litigation that would inform its choices.

(e) The "Report Out" Resolution

The Committee's publicly-available minutes of the January 10, 2022 indicated that the Committee passed the following resolutions upon reconvening in public session:

5. Confidential Items

5.1 Confidential update on a litigation matter (L-06-22)

Moved by Councillor Kearns

Refer confidential legal department report L-06-22 to the January 13, 2022 Environment, Infrastructure and Community Services Committee meeting.

CARRIED

5.2 Confidential update on a litigation matter (L-07-22)

Moved by Councillor Kearns

Receive and file confidential legal department report L-07-22 providing an update on a litigation matter.

CARRIED

...

5.4 Confidential update on a litigation matter (L-01-22)

Moved by Councillor Galbraith

Instruct the Executive Director of Legal Services and Corporation Counsel or their designate to proceed in accordance with the instructions sought in confidential legal department report L-01-22,

CARRIED

5.5 Confidential update on a litigation matter (L-02-22)

Moved by Councillor Stolte

Refer confidential legal department report L-02-22 to the January 18, 2022 City Council Meeting.

CARRIED

No other instruction or direction was given to City staff at the January 10, 2022 meeting.

FINDINGS:

The Committee's resolutions passed following its closed session were in compliance with the requirements of the Procedure By-law. Some resolutions constitute "a motion" on the agenda items considered in closed session, and where instruction was provided to City staff in closed session, the resolutions in respect of each item indicate the same. Again, the Committee was under no discrete obligation to disclose the substance of anything considered in closed session.

3. Council Meeting, January 18, 2022 Meeting

As indicated above, at its January 10, 2022 meeting, the Committee referred Report L-02-22, "Confidential update on a litigation matter (3088 Balmoral Avenue)" to the January 18, 2022 meeting of Council. Council's agenda for its January 18, 2022 meeting identified the following agenda item:

14. Urgent Business

14.1 Confidential update on a litigation matter (L-02-22)

Pursuant to section 239(2)(e) of the Municipal Act, litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.

Please note: This item was referred from the Corporate Services, Strategy, Risk and Accountability Committee Meeting of January 10, 2022

The publicly-available minutes of the January 18, 2022 Council meeting indicate that Council passed the following resolution convened in closed session:

14. Urgent Business

14.1 Motion to move into closed session

Moved by: Councillor Galbraith

Seconded by: Councillor Nisan

Burlington City Council moved into closed session at 1:23 p.m. in accordance with the following provisions under the Municipal Act:

Pursuant to section 239(2)(e) of the Municipal Act, litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.

IN FAVOUR: (7): Mayor Meed Ward, Councillor Galbraith, Councillor Kearns, Councillor Nisan, Councillor Stolte, Councillor Sharman, and Councillor Bentivegna

CARRIED (7 to 0)

Council's closed session minutes of the meeting on January 18, 2022 reflect an identical resolution, noting that the Committee convened in closed session at 1:23 PM.

Council met in closed session to consider one single item, being an update on Report L-02-22, which was referred from the January 10, 2022 Committee meeting. Following the Committee's meeting, the City's Legal Services Department authored a supplemental memorandum to address questions the Committee had posed to the City's solicitor.

The memorandum was provided to members of Council to address questions raised at the Committee meeting on January 10, 2022. The memorandum provided further legal advice related to the conduct of the Tribunal proceeding.

During the meeting, the City's solicitor provided an overview of the information in the supplemental memorandum. The City solicitor also answered questions about information underlying the supplementary memorandum and the appeal proceeding.

Council then deliberated on the instructions to be given to the City's solicitor.

At the conclusion of discussion, Council passed a resolution to direct Legal Services Department staff to undertake certain steps in respect of the appeal, and to report back on those steps.

Council reconvened in open session at 2:30 PM and passed the following resolution:

14.3 Confidential update on a litigation matter (L-02-22)

Moved by: Councillor Stolte

Seconded by: Councillor Kearns

Instruct the Executive Director, Legal Services and Corporation Counsel or their designate to proceed in accordance with the instructions sought in confidential legal department report L-02-22.

IN FAVOUR: (6): Mayor Meed Ward, Councillor Kearns, Councillor Nisan, Councillor Stolte, Councillor Sharman, and Councillor Bentivegna

OPPOSED: (1): Councillor Galbraith

CARRIED (6 TO 1)

FINDINGS:

Based on our review, Council was entitled to consider and discuss Report L-01-22 in closed session.

Similar to the Committee's consideration of this item, Council relied upon clause 239(2)(e) on account of "pending litigation." We adopt our earlier findings about the Committee's consideration of this item at its January 10, 2022 meeting.

In addition, there was significant Council discussion about what the prudent strategy in the litigation was. This exemplifies the core interest clause 239(2)(e) seeks to protect, being a municipality's ability to consider and formulate a position in litigation without fear of disclosing it to adverse parties.

In addition, as to Council's "report out" resolution, our opinion is that the resolution passed following its closed session was in compliance with the requirements of the Procedure By-law. The resolution indicates that Council provided City staff with instruction while in closed session. The Procedure By-law does not require that a "report out" resolution disclose what specific instructions were given, only that instruction was given.

4. Corporate Services Strategy Risk and Accountability Committee, February 2, 2022 Meeting

The final meeting we have been asked to consider is the February 2, 2022 meeting of the Committee. Incidentally, at this meeting, the Committee considered a number of matters discussed earlier in our Report.

The publicly-available minutes of the February 2, 2022 meeting indicate that the Committee convened in closed session by passing the following resolutions:

6.1 Motion to Proceed in Closed Session

Moved by Councillor Bentivegna

Move into closed session in accordance with the following provisions under the Municipal Act:

Section 239(2)(e), litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board, with respect to confidential finance department report F-02-22 providing the status of contingency reserve as at December 31, 2021, confidential legal department report L-02-22 providing an update on a litigation matter, and confidential legal department report L-03-22 providing the triannual litigation update.

Section 239(2)(c), a proposed or pending acquisition or disposition of land by the municipality or local board, with respect to confidential legal department report L-11-22 providing an update on a real estate matter.

CARRIED

During the vote on the resolution to move into closed session, one member of Council objected. They stated that they wished to be on the record as objecting to moving into closed session until such a time that the City developed a protocol guiding the City's consideration of matters in closed session. The resolution to move into closed session was carried nonetheless.

The closed session minutes of the meeting on February 2, 2022 reflect a nearly identical resolution, noting that the Committee convened in closed session at 1:09 PM.

Once in closed session, the Committee only discussed three of five items on its agenda.

(a) Item 5.1, Confidential Contingency Report – December 31, 2021 (F-02-22)

The Committee considered a report from the Finance Department, which was provided for information purposes only.

The City's litigation matters are funded through a contingency reserve fund, with funds allocated to specific matters as line items as deemed necessary. Report F-02-22 provided the Committee with an update on the status of reserve funds that had been set aside specifically for litigation, legal, and human resources matters. The purpose of the report was to keep the Committee (and Council) apprised of litigation spending.

No action was proposed by Report F-02-22, and the Committee took no specific action or discussion.

FINDINGS:

We have determined that the Committee was entitled to consider and discuss Report F-01-22 in closed session.

The Committee relied upon the exception in clause 239(2)(e) related to "pending litigation." We acknowledge that the report itself was not strictly related to the conduct of any one litigation proceeding. However, the intent of Report F-01-22 was to provide the Committee information on how all current litigation and potential litigation involving the City would be funded, and to what quantum.

To a large extent (and in some cases, unfortunately), a party's relative success in litigation is a factor of the resources it can devote to that proceeding. Accordingly, where a party is involved in several proceedings at the same time, it must decide how it will marshal its scarce resources. This includes the City, which at the timeframe mentioned in Report F-01-22, was involved in multiple litigation and administrative proceedings.

The "line items" to which the City had allocated its financial resources is an important aspect of its litigation management strategy; proceedings which are important or could result in significant outcomes may receive greater funding than inconsequential matters. The precise dollar figures allocated could express to adverse parties how seriously the City would approach each matter.

Furthermore, if an adverse party knew precisely how much money the City had allocated to a matter, that party could, in theory, adopt a more strategic (or nefarious) approach of forcing the City to exhaust its litigation budget.

(b) Item 5.2, Confidential update on a litigation matter (L-02-22) – 3088 Balmoral Avenue

At the February 2, 2022 meeting of the Committee, Report L-02-22 returned for consideration for a third time. The matter returned to the Committee in accordance with the instructions given by Council at its January 18, 2022 meeting.

The Legal Services Department authored a second supplemental memorandum related to the appeal. The second supplemental memorandum provided a further update to the Committee on City staff's actions taken in accordance with the instruction given by Council at its January 18, 2022 meeting. The second supplemental memorandum also contained a request that the Committee provide instructions in light of those further actions.

During the meeting, the City solicitor provided an overview of the second supplemental memorandum. The City solicitor also answered questions from members of the Committee about the proposed instructions.

FINDINGS:

Based on our review, the Committee was entitled to consider and discuss Report L-01-22 in closed session.

Once again, akin to the earlier consideration of this item, the Committee again cited the "pending litigation" exception in clause 239(2)(e) to convene in a closed session. It was entitled to do so. We adopt our earlier findings about the Committee's consideration of this item at its January 10, 2022 meeting and Council's subsequent consideration at its meeting on January 18, 2022.

The second supplemental memorandum provided the Committee an update on further steps taken by City staff at the direction of Council. At this meeting, the Committee considered the position it would take in the appeal proceeding, and also discussed the instructions it would give to the City's solicitor. Again, this is the core purpose underlying the exception in clause 239(2)(e).

(c) Item 5.3, Confidential triannual litigation update (L-03-22)

The Committee considered Report L-03-22 at its meeting on February 2, 2022. That report provided a comprehensive update on the status of all outstanding litigation matters that the City was involved in from the period September 2, 2021 to January 31, 2022. The update included general litigation, insurance litigation, matters before administrative tribunals, and quasi-criminal prosecutions.

We understand that this report is a part of a long-standing City practice whereby the City's Legal Services Department keeps the Committee (and Council) apprised of the status of the various litigation matters involving the City, and particularly where a separate report contemplating some action on a specific matter is not immediately necessary.

Report L-03-22 provided a detailed update on the status of the various litigation matters the City was currently involved in.

Two matters identified in the list were identified as requiring separate discussion and instruction by the Committee.

When the matter was considered by the Committee, City legal staff were asked questions clarifying the status of three litigation matters identified in the report.

FINDINGS:

In our view, the Committee was entitled to consider and discuss Report L-03-22 in closed session.

The “pending litigation” exception in clause 239(2)(e) was cited by the Committee. The report provided the Committee with a summary of all current litigation matters involving the City, including general civil litigation, administrative appeal proceedings, and quasi-criminal prosecutions. Although the Committee was not required to consider and formulate its position in response to all matters listed in the report, the Committee was entitled to receive updates in closed session, and in any event, the information provided to the Committee would inform subsequent decision-making in response to those litigation matters.

Further, upon consideration of the report, the Committee gave City staff and external legal counsel specific instructions on the conduct of two legal proceedings.

(d) Item 5.5, Confidential update on a real estate matter (L-11-22)

The final matter on the Committee’s agenda for the meeting on February 2, 2022 meeting was the same proposed real estate transaction it considered at its closed meeting on November 10, 2021 (i.e. Report L-26-21). Since that time, there had been developments in the transaction process that required further consideration and direction.

Report L-11-22 provided the Committee with an update on the progress of the proposed land transaction since City staff’s last report to the Committee. The report also outlined further steps that needed to be taken in the transaction. The report concluded with an outline of the precise steps City staff were seeking instruction on, and the timeline for taking those steps.

At the meeting, the Manager of Realty Services provided the Committee an overview and advice respecting the proposed transaction, and a timeline for when outstanding steps would be completed. The City’s external real estate counsel was also in attendance at the meeting to provide legal advice on discrete real estate law questions. Members of the Committee asked questions about information contained in the report and the instructions sought by City staff.

FINDINGS:

The Committee was entitled to consider and discuss Report L-11-22 in closed session.

Similar to its earlier consideration of this matter, the Committee also relied upon clause 239(2)(c) relating to a “proposed acquisition.” At the time of Report L-11-22, City staff required further direction to advance the next steps in the transaction, which required the City to formulate and consider its bargaining position. Report L-11-22 provided the Committee the technical and legal information it needed in order to make a well-informed decision as to its bargaining position.

The matters discussed fell within the exception in clause 239(2)(c), which recognizes the City requires a high degree of confidentiality to properly consider and make decisions on a proposed acquisition of land.

(e) The “Report Out” Resolution

The Committee’s closed session concluded at 2:47 PM. Upon reconvening in open session, the Committee passed the following resolution:

5. Confidential Items

5.1 Confidential update on a real estate matter (L-11-22)

Note: This item was approved at the February 3, 2022 Special Council meeting.

Moved by Councillor Sharman

Proceed with next steps, as amended, as outlined in confidential legal department report L-11-22; and

Authorize the City Manager to execute documents in connection with this matter, in a form satisfactory to the Executive Director of Legal Services and Corporation Counsel and with content satisfactory to the Manager of Realty Services.

CARRIED

5.2 Confidential contingency report as at December 31, 2021 (F-02-22)

Moved by Councillor Galbraith

Receive and file confidential finance department report F-02-22 providing the status of the reserve for contingencies as at December 31, 2021.

CARRIED

5.3 Confidential update on a litigation matter (L-02-22)

Moved by Mayor Meed Ward

Instruct the Executive Director of Legal Services and Corporation Counsel or their designate to proceed in accordance with the instructions sought in confidential legal department supplementary memorandum 2.

CARRIED

5.4 Confidential triannual litigation update (L-03-22)

Moved by Councillor Kearns

Direct the Executive Director of Legal Services and Corporation Counsel or their designate to proceed in accordance with the instructions sought in matters #8 and #34 and the balance of confidential legal department report L-03-22 be received and filed.

CARRIED

FINDINGS:

In our review, the Committee’s resolutions passed following its closed session were in compliance with the requirements of the Procedure By-law. On each agenda item, the Committee either passed a motion regarding that item, or indicated that City staff had been provided instructions. Similar to our findings above, the Committee was under no obligation under the Procedure By-law to disclose the substance of the closed session discussion.

CONCLUSIONS

Based on the foregoing, we conclude that all meetings of the Committee and Council under consideration were in compliance with section 239 of the *Municipal Act, 2001* and the Procedure By-law.

The matters considered by the Committee and Council fell within the scope of the closed meeting exceptions in subsection 239(2) of the *Municipal Act, 2001*. The City appropriately considered litigation matters, including land use planning disputes before the Tribunal, in closed session. The City was entitled to do so to protect its interests as a litigant and formulate its position and strategy in litigation.

Similarly, the Committee was entitled to consider a unique, highly-sensitive land transaction opportunity in closed session in order to formulate its bargaining position and give appropriate instructions to City staff. While there is certainly a desire to inform the public about these topics, there is an even stronger imperative to protect sensitive information that could compromise the overall public interest in these matters.

In addition, the Committee and Council complied with the requirements of the Procedure By-law as it pertains to “reporting out” following a closed session. Our immediate mandate as Investigator was to determine whether the City had complied with the terms of the Procedure By-law, not to assess the merits of the “report out” provisions of the Procedure By-law itself. In this regard, we have found no contravention.

Despite this, we do wish to note that the City itself can dictate the content of its “report out” obligations through its own Procedure By-law. In this regard, the City has an opportunity to improve the transparency of its decision-making processes by enhancing the “report out” practices to include a more substantive briefing to the public following closed session.

This Report has been prepared for and is forwarded to Council for its consideration. Subsection 239.2(10) of the *Municipal Act, 2001* provides that where the Investigator does not find a contravention of the *Municipal Act, 2001* or the Procedure By-law (as is the case with this Report), the Investigator has discretion to prepare a report to Council.

AIRD & BERLIS LLP



John Mascarin



John George Pappas

Closed Meeting Investigator for The Corporation of The City of Burlington

Dated this 22nd day of April, 2022