

REPORT ON CLOSED MEETING INVESTIGATION 2022-01

THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE

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THE TOWN OF NIAGARA-ON-THE-LAKE REPORT ON CLOSED MEETING INVESTIGATION 2022-01

INTRODUCTION

This is a report on the investigation of a request made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.¹

Our office received a request for a closed meeting investigation, dated January 4, 2022 (the “**Request**”). The Request was properly filed pursuant to section 239.2 of the *Municipal Act, 2001*.

We wrote to the Clerk of the Town of Niagara-on-the-Lake (the “**Town**”) in our capacity as the closed meeting investigator for the Town (the “**Investigator**”) to request copies of all applicable documentation necessary to undertake our review. Our office was provided with all required documentation on January 27, 2022.

The Request took issue with the Special Meeting of Council held on September 29, 2021 at 6:00 P.M. (the “**Closed Meeting**”). The Closed Meeting was styled as an “Education and Training Session” for members of Town Council (the “**Council**”) for planning matters, which would ordinarily be permitted to be closed to the public pursuant to subsection 239(3.1) of the *Municipal Act, 2001*.

In summary, the Request alleges that Council considered matters which were not permitted to be discussed in a meeting closed to the public pursuant to subsection 239(3.1) of the *Municipal Act, 2001*.

The Request alleges that at no time before convening into closed session did the Clerk refer to subsection 239(3.1) of the *Municipal Act, 2001*, which is the relevant closed meeting exception for training and education purposes.

The Request also asserts that, to the extent the Town relied on subsection 239(3.1) to hold the Closed Meeting *in camera*, the matters considered in closed session went beyond the scope of the subject matters permitted to be discussed in an “educational or training session”.

The Request additionally also alleges that upon rising from closed session, the Clerk reported aloud that Council would rise from closed session “with recommendations of the solicitor...facilitator...,” whereas no reference was made to the relevant closed meeting exception for advice which is subject to solicitor-client privilege in the initial verbal motion to convene in closed session.

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

For the reasons outlined in this Report, we have determined that Council contravened section 239 of the *Municipal Act, 2001* and the Procedure By-law by:

- holding the Closed Meeting to discuss subject matters it was not entitled to discuss in the absence of the public;
- failing to accurately state the “general nature” of the matters to be considered in closed session in its resolution before holding the Closed Meeting; and
- informally voting by consensus during the Closed Meeting which is not permissible in an “educational and training” session.

CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

The Town appointed Local Authority Services Inc. (“**LAS**”) as its closed meeting investigator pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated to Aird & Berlis LLP its authority to act as the Investigator for the Town. Aird & Berlis LLP was selected by LAS through a competitive procurement process to provide closed meeting investigation services to its participating municipalities, of which the Town is one.

Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*. Among other things, we are authorized to investigate, in an independent manner, a request made by any person to determine whether the Town 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 ISSUES

We draw the following issues from the Request, the Procedure By-law, and the materials provided to us by the Town related to the Closed Meeting:

1. Did the exceptions relied upon by Council apply to permit the Closed Meeting to be closed to the public?
2. Did Council's resolution to convene the Closed Meeting comply with subsection 239(4) of the *Municipal Act, 2001*?
3. Was Council entitled to vote to pass a motion, by consensus, in the Closed Meeting?

INQUIRY

To assess the issues raised in the Request and to make a determination on the issues, we reviewed the following materials, in addition to the applicable law (the “**Record**”):

- the Town's Procedure By-law;
- the open and Closed Meeting agendas and minutes, the presentation slides given in closed session, the transcript of the Closed Meeting, and the video recording of the open portions of the meeting; and
- relevant meeting agendas, materials, and minutes in the lead up to the Closed Meeting and after the Closed Meeting.

Additionally, we conducted interviews with three staff members of the Town who had direct, relevant knowledge about the subject matter of the Request. Town staff were fully cooperative and forthright during our investigation. We also reviewed and considered other closed meeting investigation reports that we believed to be pertinent to the issues at hand.

A copy of our draft Report was completed on May 27, 2022 and was provided to the Town for an opportunity to review and comment. Because of a number of issues, including the departure of the Town's Clerk, the Town was unable to provide comments to us until August and September 2022.

APPLICABLE LAW

1. *Municipal Act, 2001*

Subsection 239(1) of the *Municipal Act, 2001* provides that all meetings of Council are to be open to the public, unless an exception applies permitting a closed meeting.²

The open session minutes indicate that the exceptions relied upon by the Town, either before going into the Closed Meeting or on the conclusion of it, were the following:

Exceptions

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

...

- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (k) a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.

Educational or training sessions

(3.1) A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:

1. The meeting is held for the purpose of educating or training the members.

² 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.

2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

Section 239(4) of the *Municipal Act, 2001* requires the following:

Resolution

(4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,

- (a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or
- (b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject-matter and that it is to be closed under that subsection.

2. The Procedure By-law

Subsection 238(2) of the *Municipal Act, 2001* requires the Town to pass a procedure by-law for governing the calling, place and proceedings of meetings. The Closed Meeting is subject to the Town's Procedure By-law.

Clause 12 of the Procedure By-law addresses closed sessions. The Procedure By-law indicates that prior to going *in camera*, Council shall state by resolution:

1. the fact of holding the closed meeting and the general nature of the matter to be considered; or
2. in the case of a meeting under Section 239 subsection (3.1) of the [*Municipal Act, 2001*] the fact of the holding of the closed Meeting, the general nature of its subject-matter and that it is to be closed under that subsection.

The foregoing largely mirrors subsection 239(4) of the *Municipal Act, 2001*.

In addition, the Procedure By-law reflects the obligation to hold a vote in open session in accordance with subsection 239(5) of the *Municipal Act, 2001*. The Procedure By-law notes that a meeting may be closed to the public during a vote if the vote is for:

1. a procedural matter;
2. for giving directions; or
3. for giving instructions to officers, employees or agents of the municipality.³

For this voting exception to apply, however, the meeting must be permissibly closed under subsections 239(2) or (3) of the *Municipal Act, 2001*. This does not include subsection 293(3.1), which is the exception related to training. Presumably this is not included because the business or decision-making of the municipality is not to be materially advanced in a training session.

³ This reflects the authority to vote in a closed meeting under s. 239(6) of the *Municipal Act, 2001*.

We note that Council does not have any formal “report out” practice in the Procedure By-law. Reporting out following a closed meeting is a voluntary municipal practice used to enhance transparency of the municipal decision-making process. The practice is not a requirement of the *Municipal Act, 2001*, and, as such, the requirements vary from one municipality to the next.

LEAD UP TO THE CLOSED MEETING

At its meeting held on August 30, 2021, Council passed the following resolution:

WHEREAS almost all Planning reports to Council state that staff have reviewed the planning issue and it complies within the broad parameters of the Official Plan, the Planning Act etc.;

AND WHEREAS the reports do not provide recommend [*sic*] (whether tiered or otherwise) as to whether the proposal fits with the existing streetscape and character of the Town;

AND WHEREAS Council is elected by the residents, and represents the residents on planning issues;

THEREFORE BE IT RESOLVED that the following be discussed at the Planning training session held on September 29, 2021; in all future Planning reports to Council that, in addition to advising on conformity with statutes, and the Official plan, staff provide an opinion and/or options on the proposal and its compliance with the existing streetscape and character of our Town.

The Town hired legal counsel, who is also a planner by professional background, for the purposes of conducting the planning training session at the Closed Meeting. We were advised during our investigation that the purpose of the Closed Meeting was to provide a “Planning 101” session to members of Council, as well as to explain the role of a member of Council within that context.

We were also advised that legal counsel was engaged for the Closed Meeting as there was some concern that solicitor-client advice and/or discussions involving litigation may arise during the training, for which legal counsel could be required.

In preparation for the Closed Meeting, legal counsel met with and interviewed each member of Council to learn more about how they would like to see the urban structure of the Town evolve, with more refined discussions pertaining to land use planning. Based on his discussions with members of Council, counsel developed a series of recommendations to move forward and address the issues that had been discussed. This resulted in twenty-six options (the “**Options**”) that were presented to Council at the Closed Meeting, and which were subsequently presented in open session in November.

OPTIONS PRESENTED AT THE CLOSED MEETING AND RELEASE OF INFORMATION FOLLOWING THE CLOSED MEETING

The Closed Meeting began with an overview of “what the consultant heard” related to planning matters in the Town. It then moved into an extensive training session on the land use planning framework in Ontario. The topics of discussion ranged from the operation of the *Planning Act*,⁴ the land use planning appeals process, and the role of Council, individual members of Council, and Town staff within in this framework.

⁴ *Planning Act*, R.S.O. 1990, c. P.13.

Following this, the consultant proceeded to present the Options which were grouped into four categories and addressed a wide range of planning issues for the Town. The categories and topics were as follows:

- **Six “Priority Action” items**, related to rezoning in the Old Town, heritage training, expanding heritage districts and plans, processes, and policies; designating properties that warranted designation as heritage properties; confirming the direction for density in Glendale with The Regional Municipality of Niagara (the “**Region**”); and finalization of land use planning appeal OPA 78;
- **“Quick Wins”**, relating to hiring additional heritage staff; creating a roster of independent planning consultants; developing a yearly work plan for the Town’s Planning Department, retaining an external planner and lawyer to work on “intensification hearings”; enabling and encouraging planning staff to be solution oriented/creative; including executive summaries in planning reports to Council; using Ontario Land Tribunal-assisted and voluntary third-party mediation tools; putting “the best foot forward” at Ontario Land Tribunal hearings; making a periodic market adjustment in salaries to ensure the Town is competitive;
- **“Escalation Items”**, related to requesting a Minister’s Zoning Order (“**MZO**”) from the province; lobbying for more time to review intensification proposals and to provide relief such that the use of interim control by-laws do not count as a use; enhancing the complete application process; and
- **Items requiring more review**, being review of planning processes, updating secondary plans, hiring an in-house lawyer, comprehensively reviewing winery policies; having Council replace the Committee of Adjustment; reviewing the pros and cons of a Community Planning Permit System.

Following the presentation, Council approved the following resolution, by consensus, at the Closed Meeting:

That staff provide a report in support the six (6) recommendations "Priority Action Items" [*sic*] provided in the presentation ... as follows:

- Rezone the old with more restrict [*sic*] performance standards (height, coverage, side front and back setbacks, parking, etc.)
- Conduct a "beyond the basics" heritage training session for planners and members of Council and Heritage Committee.
- Expand the heritage district and update heritage plans, processes, and policies
- Designate properties and areas meriting designation
- Confirm the direction for density in Glendale with the Region
- Consider finalization of OPA #78

APPROVED

At its Special Council Meeting on November 8, 2021, Council passed a motion regarding the Closed Meeting. The motion authorized the release of the “options chart” containing the Options which were discussed at the Closed Meeting and a subset of the presentation entitled “Planning Law” provided to Council during that session. These items were released to the public at the meeting of Council on November 22, 2021.

The materials released identified the six priority items that Town staff were directed to report on, based on Council’s direction given at the Closed Meeting, and provided a review of next steps.

It further addressed direction on the “Quick Wins” items, seven of which were recommended to proceed, with two others to be reported on in Q1 2022; direction to report back on four “Escalation items” in Q1 2022; and items requiring more review prior to a recommendation being made to Council, suggesting that various items be held in abeyance and revisited in Q1 2022, with others to be discussed with Council at its meeting on November 22, 2021.

At the meeting on November 22, 2021, Council passed the following resolution:

THAT the following path be adopted as recommended ... in [the] presentation, Planning at Niagara-on-the-Lake: Planning for Progress, of November 22, 2021:

1. Six (6) Priority Items directed for implementation by Council on September 29, 2021 (Review of Next Steps);
2. Direction to:
 - Report on two (2) Quick Wins (Nos. 7 and 10) in Q1 2022;
 - Proceed on remaining seven (7) Quick Wins 4 recommended Council decision path [sic];
3. Direction to Report back to Council on four (4) Escalation Items in Q1 2022;
4. Council Review of Items Requiring more review before a recommendation to Council can be made, which [sic] suggestions that:
 - Items Nos. 20 21 22 23 24 and 25 be held in abeyance and revisited in Q1 2022;
5. With respect to Item No. 26, Council requests a report be presented in early 2022.

FINDINGS

The Town sought advice from the counsel retained to provide the training regarding which closed meeting exceptions were applicable. This advice was reflected in the Special Council Agenda.

The Special Council Agenda for the Closed Meeting referenced several subsections of the *Municipal Act, 2001*, that the Clerk was to read aloud before going into the Closed Meeting. However, the Clerk did not recite each closed meeting exception before the Closed Meeting convened. Clause 239(2)(k) of the *Municipal Act, 2001* was the only authority referenced as a basis for convening into closed session. Coming out of the closed session, all the exceptions intended to be relied on were read aloud. Given the agenda, we conclude failure to read this motion in its entirety was an oversight by the Clerk. The omission is a technical error.

Based on the resolution passed by Council on August 30, 2021, it is our understanding that the Closed Meeting was intended to be an education and training session.⁵

It is critical to understand that a meeting that is convened under subsection 239(3.1) must have training and education as its *sole* purpose: other topics that are not strictly educational in nature cannot be discussed.⁶ To that end, on this basis alone, even if other topics discussed in the Closed Meeting could be the subject of a closed session based on another exception in subsections 239(2) or (3), such matters could not be considered and discussed at the Closed Meeting because it was closed under the education and training exception.

Despite this, we have considered each exception that Council relied upon for convening the Closed Meeting, beyond the education and training exception, to determine whether the exceptions could nevertheless have applied outside of the education and training context.

1. Did the exceptions relied upon by Council apply to permit the Closed Meeting to be closed to the public?

(a) Training and Education Exception

Based on the evidence, Council was provided extensive, in-depth training related to land use planning at the Closed Meeting which constituted the majority of the session. This would have been a permissible closed meeting topic pursuant to subsection 239(3.1) of the *Municipal Act, 2001*. However, we conclude that the discussion went beyond the permissible bounds of a training and education session, thus contravening the legislative requirements.

The legislation is stringent: a closed meeting held as an “educational and training” session cannot “in any way” materially advance the business or decision-making of the Town. Despite this legislative restriction, Council did “materially advance” its business at the Closed Meeting by considering the Options relating to real, current planning issues in the Town, and by subsequently directing Town staff to move forward with a report related to six priority items.

It is our opinion that presenting the Options, even if not voted upon, formally or informally, constitutes materially advancing the business or decision-making of the Town “in any way”. The Options were directly presented to Council, not merely as passing references or items arising as part of the natural flow of conversation, and they remain to be considered and potentially actioned, as demonstrated by the discussion and resolution passed at the meeting on November 22, 2021. The purpose of the Options was to inform and set in motion future decisions by Council as to how current planning issues could be approached and resolved in the Town’s favour. Consideration of such topics in a closed meeting, especially under the guise of “planning training,” is improper.

(b) Solicitor-Client Privilege and Litigation Exceptions

Were this matter properly convened as a separate meeting from the “education and training” purpose for solicitor-client and/or litigation discussions, we conclude that the litigation exception was appropriate for a very limited portion of the discussion. We further conclude that no part of the discussion was captured on the basis of solicitor-client privilege. Indeed, we learned through our investigation that the reason these items were included was because of the possibility that litigation and related advice may arise in connection with the training.

⁵ The express reference in the resolution is to a “Planning training session.”

⁶ *Investigation into the City of Oshawa, Development Services Committee special meeting of May 22, 2008, “The ABCs of Education and Training”*, Ontario Ombudsman (March 2009) at para. 29.

However, in addition to misapprehending the limits of a closed session based on the statutory education and training exception, it appears there was also a misapprehension that the exceptions could be relied upon in anticipation that related litigation discussions, or solicitor-client advice, may be sought: the meeting must be properly closed for a known reason, that can properly be described on an agenda. Agenda items cannot be added in this manner.

Ultimately, based on our review of the transcript, the only discussion that could have plausibly justified these exceptions, for at least a portion of a closed meeting, if not this one, were related to a land use planning appeal of the Town's OPA 78. While strategic issues related to the OPA 78 planning appeal could properly be convened as a closed matter under the litigation exception in clause 239(2)(e), most of the discussion regarding OPA 78 was not about the litigation and was properly a matter for discussion in open session.⁷

(c) Negotiations Exception

Noting again that nothing other than education and training was permissible as part of the Closed Meeting, we have otherwise concluded that Council was not entitled to rely on the exception for "negotiations" under subsection 239(2)(k) of the *Municipal Act, 2001*.

Like the litigation and solicitor-client exceptions, the particular items which were considered to be captured under the negotiation exception were not identified in the resolution to convene in closed session. Apart from non-compliance with subsection 239(4), this made it difficult to know exactly what topics the Town intended to discuss under this exception.

Upon review of the entire transcript and presentation materials of the Closed Meeting, we conclude there were three matters that the Town could have plausibly considered as falling within the scope of the negotiation exception. Each of these is considered in turn, below, in light of the legal test established for reliance upon this exception.

i. The Test

The test adopted by the Ontario Ombudsman for this exception reflects jurisprudence developed in the context of Information and Privacy Commissioner ("**IPC**") decisions, orders and rulings. Flowing from that jurisprudence, the Ombudsman has indicated the following:

The IPC established a four-part test to determine whether an institution can refuse to disclose a record because it contains information related to negotiations carried on by the institution. The institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions;
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations;
3. the negotiations are being carried on currently, or will be carried on in future;
and
4. the negotiations are being conducted by or on behalf of the institution.

⁷ Matters that do not fit within an exception can sometimes be discussed during closed session if they relate to a discussion on a single topic, and if splitting the information would require unreasonable interruption in the conversation: *Ombudsman Report, Leeds and the Thousand Islands Final Report*, April 2022, para. 54. We find that the planning discussion could have been separated from any strategic litigation question that was briefly raised in the Closed Meeting.

In a 2002 decision that was upheld on appeal to the Divisional Court, the IPC determined that in order to satisfy the first part of the test, there must be “some evidence that a course of action or manner of proceeding is “pre-determined”, that is, there is some organized structure or definition given to the course to be taken.” The IPC found that a “plan” is “a formulated and especially detailed method by which a thing is to be done; a design, or scheme.” With respect to positions, procedures, criteria, and instructions, the Commissioner found that these terms “are similarly referable to pre-determined courses of action or ways of proceeding.”⁸ [emphasis added]

Negotiation has been interpreted by the Ontario Ombudsman by reference to the ordinary dictionary definition: to negotiate is “to confer (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to a settlement or compromise.”⁹

Each of the items below are considered in light of the test and ordinary meaning of negotiation, as appropriate. In sum, based on the evidence in our investigation, none of the items discussed addressed “a plan or position” as that is understood under this exception and/or they did not involve a negotiation, as that term is also generally understood in this context.

ii. The Town’s Secondary Plan for Glendale

The minutes of the Closed Meeting describe Priority Item 5 as: “Confirm the direction for density in Glendale with the Region.”

At the meeting on November 22, 2021, Priority Item 5 was described as: “to confirm the direction for density in Glendale with the Region through Terms of Reference (TOR) that are approved by Town Council and ensure that Council is consulted for approval at appropriate junctures as the secondary planning process is being shepherded by the Region and its consultant.” Town staff, as at November 22, 2021, had begun preparing terms of reference for this purpose.

This matter refers to the Town’s Glendale Secondary Plan, which we understand the Region is “shepherding through”, i.e. leading on behalf of the Town, and that the process is anticipated to be a collaborative one between the Town and the Region. As a result, it may be that the Region will not be approving the Secondary Plan as an exemption to that approval flowing from that collaborative process.

Town staff further explained that the Town has and will have the discretion to determine where and how the Town’s growth and density will be directed within the overall planning framework established by the Region.

Given the foregoing, we are not satisfied that the matter will be subject to some ongoing or future dialogue to secure a reciprocal exchange between the Town and the Region. In sum, the matter under discussion was not a “negotiation” as that term should be understood in the context of this closed meeting exception.

⁸ Ombudsman Report, *Investigation into a request about a closed meeting held by the City of St. Catharines on June 25, 2018*, February 2019, at paras. 31 and 32.

⁹ *Supra* 6, at para. 52

iii. Ministerial Zoning Order (“MZO”)

Escalation Item 16 was described as: “Request a Provincial MZO” at the Closed Meeting.

At the meeting on November 22, 2021, Escalation Item 16 was described as: “Request a Provincial MZO to eliminate appeals entirely in particular areas where sufficient justification can be provided.... Work is required before sufficient justification can be provided.”

In our review, this matter could not be considered in closed session under the negotiation exception in clause 239(2)(k).

Under section 47 of the *Planning Act*, the decision to make a MZO is entirely at the discretion of the Minister of Municipal Affairs and Housing. Unlike other municipal planning decisions, the decision does not necessarily entail a public process, nor are there any rights of appeal.

The Minister’s decision to make a MZO can, however, involve a negotiation, in the sense that it may involve the municipality and other interested parties conferring with the Minister for the purpose of arranging a MZO in a mutually satisfactory manner.

The Ombudsman has previously concluded that ongoing negotiations and discussions related to a MZO may be considered in a closed meeting.

The Ombudsman delivered correspondence to Pickering City Council dated September 23, 2020, relating to a closed meeting identified as follows on the agenda:

3.2 Verbal update from the Deputy Mayor and Interim Chief Administrative Officer
Re: Discussions with the Province of Ontario, Region of Durham and Town of Ajax
regarding the MZO for Durham Live.¹⁰

Pickering City Council relied on the negotiation exception to consider and discuss the item in a closed meeting. At the time, Pickering was actively engaged in discussions with other parties about a potential MZO in respect of a significant development project known as “Durham Live.” The Ombudsman concluded this exception was properly applied on the facts of that matter. In our view, the situation in the Ombudsman’s report is very different that the Town’s consideration of a potential request for a MZO.

While municipal powers should be afforded a broad and liberal interpretation,¹¹ the scope of the open meeting rule must take into account the notion that a municipal council “should only exercise its discretion [to hold a closed meeting pursuant to section 239] when there is some potential harm, financial or otherwise, of having a discussion...” in open session.¹²

¹⁰ Letter from the Ombudsman, dated September 23, 2020, to the Council for the City of Pickering.

¹¹ See *Municipal Act, 2001*, s. 8(1); see also *Croplife Canada v. Toronto (City)* (2005), 10 M.P.L.R. (4th) 1 (Ont. C.A.).

¹² See Ombudsman of Ontario, *Investigation into whether the Finance and Administration Committee for the City of Elliot Lake held an improper closed meeting on July 7, 2014 (City of) (Re)* (October 27, 2014): 2014 ONOMBUD 5.

With that guidance in mind and the factual matrix, we conclude that the negotiation exception could not be relied upon in this instance. At the time of the Closed Meeting, there were no plans, positions, criteria or instructions developed for consideration – there was simply an idea proposed by the consultant about how and when a MZO might be used.

There was no evidence or line of reasoning to suggest that a course of action or manner of proceeding was pre-determined, an organized structure given to the course to be taken, nor any plan by which a thing was to be done. Indeed, this is a matter that appears to require a significant amount of additional work prior to having any concrete potential plans being presented to Council.

It is our view that this early, high-level discussion about how an MZO might be used ought to have been conducted in an open session. It is at that point in time where the matter is ready to move towards formulating a detailed course of action with respect to current or future negotiations with the Minister on the possibility of a MZO that the negotiation exception might be relied on to convene a closed session of Council to consider, deliberate and debate the Town's bargaining position and strategy.¹³

iv. Lobbying the Province

Escalation Items 17 and 18 dealt with lobbying the Province for certain legislative changes. In the minutes of the Closed Meeting, these items were described as follows:

17. Lobby for more time to review intensification proposals.

18. Lobby to provide relief such that use of Interim Control does not count as a use.

These items were more fully described as follows at the meeting on November 22, 2021:

17. Lobby the Province to allow municipalities to have more time to review intensification proposals where municipalities have identified and finalized intensification areas for growth plan targets ... Intensification Planning is required before this item could proceed.

18. Lobby the Province to provide relief such that use of an Interim Control By-Law for Cannabis does not count as a use under the Planning Act. ... Consultation with Legal Counsel is advisable first.

“Lobby” is defined by the *Oxford Dictionary* as “to try to influence a politician or the government, and for example, persuade them to support or oppose a change in the law”. Used in its colloquial sense, the word can also mean to advocate for a particular outcome.

“Lobbying” does not necessarily involve a negotiation, wherein a party will “confer (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to a settlement or compromise.”

In this case, the matters to be “lobbied” for were more time for municipal councils to review intensification proposals, and to address how uses are treated under Interim Control By-Laws. Both matters relate to planning law reform. Neither can be said to be arranging some matter by mutual consent or discussing a matter with a view to a settlement or compromise. This is something in the hands of the Legislature, acting as a legislative body.

¹³ *Supra* 8, at para. 34.

2. Did Council's resolution to convene the Closed Meeting comply with subsection 239(4) of the *Municipal Act, 2001*?

Subsection 239(4) of the *Municipal Act, 2001* requires that before closing a meeting to the public, Council must pass a resolution stating the fact that it will be holding a closed meeting, and the "general nature" of the matters to be discussed in that meeting.

In *Farber v. Kingston (City)*, the Ontario Court of Appeal held that such resolutions "should provide a general description of the issue to be discussed in a way that maximizes the information available to the public, while not undermining the reason for excluding the public."¹⁴

The Town's Procedure By-law also requires that prior to proceeding *in camera*, Council must state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered.

In addition, where a meeting is closed for the purpose of holding an "educational or training session," subsection 239(4) of the *Municipal Act, 2001* requires that Council must also specifically state that the meeting is being closed pursuant to subsection 239(3.1).

The minutes of the open meeting do not accurately reflect what occurred at the beginning of the meeting, prior to the Closed Meeting. Only clause 239(2)(k) [negotiations] was referenced in the oral resolution to convene in closed session, whereas several other exceptions are noted in the minutes and the agenda.

We also note that while the overarching purpose of the Closed Meeting was to educate the members of Council on "planning training," the verbal resolution to convene in closed session did not cite subsection 239(3.1) of the *Municipal Act, 2001*.

Upon resuming in open session, Council passed a resolution which reflected a number of exceptions as the basis for convening the Closed Meeting, specifically clauses 239(2)(e) [solicitor-client privilege], 239(2)(f) [litigation privilege] and 239(2)(k) [negotiations]; and subsection 239(3.2) [regarding training] (erroneously referred to as "section 239(1)(3.2)"). The minutes accurately reflect the motion read in open session following the Closed Meeting.

In our view, the resolution passed before convening the Closed Meeting did not comply with subsection 239(4) of the *Municipal Act, 2001*. Other than as it related to the training exception, for the other exceptions, the resolution to convene in closed session did not properly or accurately identify the "general nature" of the basis for going into closed session. All of the exception items referred to "planning education" as the basis for closing the meeting to the public. This description did not accurately describe what was considered or what was intended to be captured by the exceptions relied upon.

The motion coming out of the Closed Meeting also indicated the following: "with the recommendations of the facilitator." This accurately indicated that more than planning training occurred at the Closed Meeting and that the business or decision-making of the municipality was, in fact, materially advanced.

As such, we find that Council contravened subsection 239(4) of the *Municipal Act, 2001*.

¹⁴ *Farber v. Kingston (City)* (2007), 31 M.P.L.R. (4th) 31, 2007 ONCA 173, at para. 21.

3. Was Council entitled to pass the motion, by consensus, in the Closed Meeting?

As previous set out above (at page 7 of this Report), Council provided a direction to Town staff by “consensus” (i.e., an informal vote) during the Closed Meeting. Staff were directed to provide a report related to the six recommendations addressed in the Closed Meeting.

It is our conclusion that this direction was given by an improper vote held during the Closed Meeting.

A council is expressly authorized to providing instructions or direction to municipal staff (and others) during a closed meeting. It is one of two acceptable closed session decisions that are permitted by subsection 239(6) of the *Municipal Act, 2001*.

However, such a vote may only be taken if the direction arises in the context of subject matter which is a valid basis to close the meeting to the public pursuant to subsections 239(2) or (3) of the *Municipal Act, 2001* – not the education and training exception that is set out in subsection 239(3.1).¹⁵

No vote is permitted to be taken during a meeting which is closed to the public as an “educational and training session,” given that no council business or decision-making is to be materially advanced in any way during such a meeting.

As we have concluded above, Council was not entitled to discuss the Options it did during the Closed Meeting. As such, the “vote” by Council by consensus did not comply with the requirements of subsection 239(6) of the *Municipal Act, 2001*.

In addition, while the Closed Meeting was also held as an “educational and training session,” Council was not entitled to materially advance its business or decision-making during that meeting.

However, when Council adopted the above direction to staff, it did just that. It identified six out of twenty-six priority action items to pursue, which were all specific, ongoing issues faced by the Town. It is our opinion that allocating fixed resources in a manner that identifies priorities clearly constitutes materially advancing the business of the municipality, and thus takes the meeting outside of the permitted confines of the exception respecting “educational and training”.

Accordingly, Council’s “vote” by consensus did not comply with subsection 239(6) of the *Municipal Act, 2001*.

CONCLUSIONS

Based on the foregoing, we conclude that Council contravened the *Municipal Act, 2001* and the Procedure By-law by its conduct of the Closed Meeting as follows:

- to the extent the Closed Meeting constituted an educational and training session on the topic of “planning education” pursuant to subsection 239(3.1) of the *Municipal Act, 2001*, Council contravened section 239 by materially advancing the business and decision-making of the Town during the Closed Meeting;

¹⁵ A vote is permitted under s. 239(6)(a) if “subsection [239](2) or (3) permits the meeting to be closed to the public.”

- Council convened the Closed Meeting in part on the basis of the litigation and/or solicitor client exceptions in the event that such advice or discussion might arise in the context of the training. This “peremptorily” expanded the closed meeting exceptions Council wished to rely on. Even if the meeting had been closed on exceptions that allow for business and decision-making to be materially advanced, peremptorily adding agenda items is not permissible and it had two consequences:
 - an accurate agenda could not be prepared, subverting the “open meeting” obligation, and
 - it resulted in the “general nature” of the item being described as “planning education” for every exception relied upon, even though that did not make sense other than for a session held for education and training purposes;
- to the extent that exceptions other than for education and training were relied upon, if they had properly been relied upon, they were required to form the basis of one or more separate closed meetings since “education and training” sessions cannot materially advance the business or decision-making of the Town and their sole purpose is to be for education or training purpose; and
- the informal “vote” by consensus to direct Town staff contravened subsection 239(6) of the *Municipal Act, 2001* as the subject matter under consideration was not permitted to be discussed in a closed meeting, and Council was not permitted to vote in a manner that “materially advanced” its business and decision-making when the purpose of the Closed Meeting was to be for education and training purposes.

At the root of the contraventions is the town misapprehension of the limits of closed meetings that are held in the absence of the public pursuant to subsection 239(3.1) of the *Municipal Act, 2001* whereby no member can discuss or otherwise deal with any matter that materially advances the business or decision-making of the Town.

RECOMMENDATIONS

Based on our conclusions, we recommend that Town staff and Council should be provided with education and training with respect to the proper application of section 239 of the *Municipal Act, 2001* pertaining to open and closed meetings.

During the course of our investigation, we learned the Town has no written protocol regarding the determination of whether a matter may be considered at a closed meeting. Rather, reference is made to the relevant sections of the *Municipal Act, 2001* as required and discussed with the senior management team.

We recommend that the Town prepare procedures or protocols related to closed meetings, with some basic guidance about how each exception is to be applied, including ensuring that the general nature of a matter is described in a way that maximizes the information available to the public, while not undermining the reason for excluding the public.

Finally, we understand that while speaking notes or a script are typically prepared for meetings to assist the Chair or the Clerk in announcing the reasons for convening in closed session, or simply more generally to run the meeting, this did not occur in this instance. To avoid errors, as occurred in this case, we recommend that the Town adopt the practice of preparing a script in every case to ensure that important motions are not inadvertently missed, or passed with errors or omissions.

This Report, including the recommendations contained herein, has been prepared for and is forwarded to Council for its consideration pursuant to subsection 239.2(10) of the *Municipal Act, 2001*. This report is to be made public pursuant to subsection 239.2(11). Subsection 239.2(12) requires that Council must pass a resolution stating how it intends to address this Report.

AIRD & BERLIS LLP

A handwritten signature in black ink, appearing to read "Paula Boutis". The signature is fluid and cursive, with a large initial "P" and "B".

Paula Boutis

Closed Meeting Investigator for The Corporation of the Town of Niagara-on-the-Lake

Dated this 3rd day of October, 2022