

**REPORT ON CLOSED MEETING INVESTIGATION 2022-02**

**THE CORPORATION OF THE TOWN OF WHITCHURCH-STOUFFVILLE**

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## TOWN OF WHITCHURCH-STOUFFVILLE REPORT ON CLOSED MEETING INVESTIGATION 2022-02

### I. INTRODUCTION

1. This is a report on the investigation of a request made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.<sup>1</sup>
2. A formal request for a closed meeting investigation, dated December 17, 2022 (the “**Request**”) was filed directly with our office, in our capacity as the closed meeting investigator (the “**Investigator**”) for The Corporation of the Town of Whitchurch-Stouffville (the “**Town**”). The Request seeks an investigation of a meeting of Town Council (“**Council**”).
3. The Request alleges that the closed meeting of the Town Council held on May 18, 2022 at 2:00 P.M. (the “**Meeting**”), contravened the *Municipal Act, 2001* and Council’s Procedure By-law No. 2016-001-RE (the “**Procedure By-law**”).
4. Upon concluding our investigation, we have found that the allegations in the Request cannot be sustained.

### II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JUSTIFICATION

5. 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 its authority to act as closed meeting investigator to Aird & Berlis LLP.
6. 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 Town 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.
7. 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 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.

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<sup>1</sup> *Municipal Act, 2001*, S.O. 2001, c. 25.

### III. REQUEST

8. The Request was properly filed pursuant to section 239.1 of the *Municipal Act, 2001*.

9. As indicated above, the Request alleges that the Meeting contravened the *Municipal Act, 2001* and the Procedure By-law. The Request speculates that at the Meeting, Council considered the purchase of the lands municipally known as 6343 Main Street from a private owner, who the Request alleges made some informal offer to sell that property to the Town.

10. The Request raises two issues with the Meeting. First, the Request alleges that Council was not entitled to consider the matter in closed session pursuant to clause 239(2)(c) of the *Municipal Act, 2001*. The Request takes the position that although this closed meeting exception authorizes a municipality to consider a potential acquisition of land in closed session, “Council can not discuss, the purchase in a Closed Meeting, if the property owner instigates the purchase to the Town” (*sic*).

11. Second, the Request alleges that if a decision to purchase land was made in closed session at the Meeting, Council should have reported upon it in open session immediately following the conclusion of the closed session, and the failure to do so constitutes a contravention of the Procedure By-law.

### IV. REVIEW OF MATERIALS AND INQUIRY PROCESS

12. In order to properly consider the allegations in the Request and make our determinations on the issues, we have reviewed the following materials:

- the Procedure By-law;
- Council Agenda (inclusive of staff reports) for the open session portion of the Meeting;
- Council Minutes for the open session portion of the Meeting;
- the Closed Meeting Agenda (inclusive of staff reports) for the closed session portion of the Meeting;
- the Closed Meeting Addendum Agenda (inclusive of staff reports) for the closed session portion of the Meeting; and
- the Closed Meeting Minutes for the closed session portion of the Meeting.

13. We have also reviewed other publicly available Council meeting documents we considered to be relevant to this matter, including the Council Minutes for the meeting of Council held on January 5, 2022

14. Following our review of materials, we conducted one telephone interview with one witness who had direct, relevant knowledge about the subject matter of the Request.

15. We have also had recourse to the provisions of the *Municipal Act, 2001*, and such secondary sources, case law, and reports of other closed meeting investigators as we deemed necessary in our to make our determinations.

## V. THE MEETING

16. At its regular Meeting held on May 18, 2022, Council convened a closed session meeting at 2:05 P.M. to consider three items. The open meeting minutes indicate that Council passed the following resolution:

### 5. Resolution to Hold a Closed Meeting

Moved by Councillor Smith  
 Seconded by Councillor Upton

That Council recess to permit the holding of a Closed Meeting in the Whitchurch Room to consider matters with the following exceptions:

...

- A proposed or pending acquisition or disposition of land for municipal or local board purposes (Municipal Act, Sec. 239(2)(c)).

Carried

17. At the closed session portion of the Meeting, Council considered Staff Report CM-015-22 from the Director of Public Works (the “**Report**”). The Report dealt with a proposed acquisition of lands from a public entity (the “**Vendor**”), for Town purposes, being the use of the lands as a public highway. The Report also sought Council direction on the proposed acquisition.

18. The Report provided a summary of discussions between Town staff and the Vendor’s staff about the proposed acquisition of lands, which are expected to be used as part of a public highway, and the steps that would be necessary to complete the purchase, including approval of the Vendor’s disposition of the lands by another government entity. The Report also contained information about the proposed purchase price of the lands, including how that amount was determined.

19. When the matter was before Council, the Director of Public Works spoke to Council about the report and the proposed purchase. Council then deliberated on the proposed purchase and the recommendation of Town staff contained in the Report.

20. After discussing the matter, Council passed a resolution providing specific direction to Town staff. Council recessed from closed session at 2:19 PM.

21. Council later reconvened in open session at 3:01 PM. The open meeting minutes indicate that Council passed the following “report out” resolution, based on the recommendation of the Report:

### 10. Items Arising from a Closed Meeting

...

#### 2. Land Acquisition

Moved By Council Upton  
 Seconded by Councillor Kroon

1) That Council authorize Staff to proceed as directed in Closed Meeting.

Carried

22. Town staff and members of Council present at the Meeting did not otherwise provide any update or other information upon reconvening in open session.

23. Council considered the matter in closed session again at its July 20, 2022 meeting, and provided a detailed report out resolution.

## VI. ANALYSIS

24. The Request raises two issues: whether Council was entitled under the *Municipal Act, 2001* to consider the subject matter of the Report in closed session, and whether Council failed to “report out” following its closed session.

25. Based on our review of this matter, and for the reasons outlined below, neither issue can be sustained.

### A. Consideration of the Report and Subject Matter in Closed Session

26. In our review of the Meeting, in light of the statutory framework and applicable case law, Council was entitled to hold a portion of the Meeting in closed session in order to consider the Report and the subject matter of the proposed acquisition.

#### (1) *Statutory Framework*

27. The so-called “open meeting” rule is enshrined in section 239 of the *Municipal Act, 2001*, which requires that all meetings of a municipal council be held in an open forum where the public is entitled to attend and observe local government in process. However, there are exceptions to this rule which balance the need for confidentiality in certain matters with the public’s right to information about the decision-making process of local government.<sup>2</sup>

28. Subsection 239(2) sets out eleven separate subject matter exceptions that entitle Council to hold a meeting that is closed to the public, including 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,

...

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

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

**(2) Exception for Proposed or Pending Acquisition of Land**

29. The closed meeting exception in clause 239(2)(c) allows a council to close a meeting to the public where it will discuss a proposed acquisition of land. The clear purpose of this closed meeting exception is to protect a municipality's interests and bargaining position in a land transaction.<sup>3</sup>

30. If a municipality were not permitted to consider the proposed terms and conditions of a land transaction in a private context, its overall bargaining position could be compromised. For example, if a municipality disclosed information about how much money the municipality is willing to pay for a property, or which terms were more agreeable than others, the vendor could use this information to its advantage, preventing the municipality from achieving the most optimal outcome in the transaction. This would be to the detriment not only of the municipal corporation, but also to the overall public interest that the transaction seeks to serve.

31. That being said, there are limits to clause 239(2)(c). This exception only applies to transactions which are "proposed" or "pending"; transactions which are speculative, or which may or may not happen in the future, would not be sufficient to permit a closed session.<sup>4</sup>

32. In order for this closed meeting exception to apply, there must be some evidence to demonstrate an actual land transaction is being negotiated or is being carried out at the time of the meeting, or that there is some real and discernible proposed or potential transaction to be negotiated.<sup>5</sup>

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<sup>3</sup> 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.

<sup>4</sup> 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>.

<sup>5</sup> *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.

**(3) Council was Permitted to Discuss the Report in Closed Session**

33. Based on our review, Council was entitled to consider and discuss the Report and the underlying subject matter in closed session in reliance on clause 239(2)(c).

34. Council considered a potential land transaction involving a specific property, and the ongoing discussions between Town staff and the Vendor. At the time of the Meeting, no formal agreement of purchase and sale had been entered into. This fact strengthens rather than negates the application of the closed meeting exception in clause 239(2)(c), and the need to protect the municipality's bargaining position.

35. The Report summarized previous discussions (i.e., negotiations) between Town staff and the Vendor's staff, which resulted in a framework for the overall transaction, and provided a recommendation as to the purchase price. Council, in turn, was required to consider and assess whether this purchase price was prudent, and whether to proceed with the overall transaction.

36. If Council was not entitled to some sphere of privacy to consider the details of the proposed transaction, it would necessarily reveal its position to the Vendor, who would then gain an advantage in the negotiation of the purchase. For instance, if the Vendor was able to ascertain how much money the Town was willing to pay for the lands, how motivated the Town was to purchase the lands, or whether the Town had no other practical alternatives but to enter into the transaction, the Vendor could have been in a position to extract greater concessions from the Town, including but not limited to an inflated purchase price.

37. In our review of the applicable case law and secondary sources, there is no basis to suggest that the application of clause 239(2)(c) depends on whether or not a transaction is initiated by a third party or the municipality. Nor is it relevant whether the lands are offered for sale on an "open market" with several potentially competing buyers, or offered in a private or direct sale.

38. It is not correct to say that the Town would not be entitled to rely on clause 239(2)(c) solely because the proper owner initiates the transaction, or that the Town is the only potential purchaser of the property. Again, the purpose of this closed meeting exception is to protect the Town's bargaining position from being disclosed to the opposite party in a transaction. Whether or not there are other competing bidders for a particular property, the Town would still be required to maintain a bargaining position as against the Vendor, who could use information and knowledge to extract greater concessions from the Town.

39. In summary, the Report, and the underlying subject matter, clearly fall within the ambit of the closed meeting exception in clause 239(2)(c). As such, Council was entitled to consider the matter in a closed session.

**B. "Report Out" Resolution**

40. The Request also alleges that Council failed to "report out" the decision to purchase a property following its closed session. For the reasons detailed below, Council's "report out" resolution, while sparse, was entirely in line with its protocol outlined in the Procedure By-law. We also note that Council reported out greater detail of the matter at a subsequent meeting.



**(1) The Requirement to “Report Out”**

41. “Reporting out” or “rising and reporting” from a closed session is not a statutory requirement set out in the *Municipal Act, 2001*. However, it is a universally recommended “best practice” aimed at enhancing transparency in the municipal decision-making process.

42. The scope of this practice is typically addressed in a municipality’s procedure by-law. The precise requirements, not being statutorily prescribed, vary from one municipality to the next. However, it is generally recommended that a municipality “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. In other words, in some circumstances, full and absolute disclosure in the immediate term is simply not appropriate given the subject matter being discussed.

43. Section 5.7 of the Procedure By-law, which governs closed meetings, sets out the extent of the Town’s “report out” procedures:

**(5.7) Closed Meeting**

...

- e) Where appropriate and where it does not conflict with the best interests of the Town, Council shall report any decisions made in the Closed Meeting immediately upon reconvening in Open Session.

44. Section 5.7 e) provides Council some degree of discretion to determine which Council decisions will be disclosed, based on whether disclosure would be appropriate or run contrary to the interests of the Town. Otherwise, “any decisions” made in the closed session must be reported out immediately.

**(2) Council’s Report Out was Permitted by the Procedural By-law**

45. In our opinion, Council’s “report out” resolution, while sparse, did not contravene the Procedure By-law in the manner alleged in the Request. Council did in fact “report out” following its consideration of the Report in closed session, and it was not required to provide an absolute disclosure of all details discussed in closed session.

46. In our review, the subject matter of the Report, being a proposed land transaction, did not lend itself to full and immediate disclosure. Town staff recognized this, given that Council’s report out resolution was precisely the recommendation in the Report. As such, both Town staff and Council understood that full disclosure of the specific details of Council’s direction to Town staff would not be appropriate. Again, the Procedure By-law recognizes this by providing Council discretion not to make full disclose in certain circumstances.

47. We are of the view that Council was justified in adopting the report out resolution it did. As discussed above, the subject matter of the Report was the active negotiation of a land transaction. Town staff required direction from Council on a critical step, and full disclosure of the details of these instructions in the immediate term would have potentially negated the very reason for holding the closed meeting in the first place, being to protect the Town’s bargaining position.

48. In summary, we cannot conclude that Council’s “report out” resolution contravened the Procedure By-law in the manner alleged by the Request.

## VII. CONCLUSION

49. Based on the foregoing, we find that Council did not contravene the *Municipal Act, 2001* or the Procedure By-law at the Meeting. Council was entitled to consider the Report and related subject matter, being the proposed purchase of land, in closed session pursuant to the closed meeting exception in clause 239(2)(c). Furthermore, in the circumstances, Council's "report out" resolution from closed session was in accordance with its Procedure By-law. As such, we see no basis on which the allegations in the Request can be sustained.

50. This Report has been prepared for and is forwarded to Council for its consideration. Given that we have not found a contravention of the *Municipal Act, 2001* or the Procedure By-law, no Council action is required.

51. We note that subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public.

Respectfully submitted,

Aird & Berlis LLP



John George Pappas

Closed Meeting Investigator for The Corporation of the Town of Whitchurch-Stouffville

Dated this 19<sup>th</sup> day of January, 2023

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