

REPORT ON CLOSED MEETING INVESTIGATION – 2020-01

THE CORPORATION OF THE TOWNSHIP OF SOUTH FRONTENAC

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INTRODUCTION

A request made pursuant to section 239.1 of the *Municipal Act, 2001*¹ (the “**Complaint**”) was filed with the office of the Clerk of The Corporation of the Township of South Frontenac (the “**Township**”) on August 17, 2020. Our office was provided with the Complaint and all applicable documentation and records on September 2, 2020 in our capacity as the closed meeting investigator (“**Investigator**”) for the Township.

The Complaint alleges that the Council of the Township (“**Council**”) and the Township’s Committee of the Whole (the “**Committee**”) contravened section 239 of the *Municipal Act, 2001* or the Township’s Procedure By-law.² Specifically, the Complaint asserts that a portion of the meeting of Council on October 18, 2016 (the “**October 18, 2016 Meeting**”) and a portion of the meeting of the Committee on July 14, 2020 (the “**July 14, 2020 Meeting**”) were improperly held in closed session.

CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

The Township 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 Township.

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 complaint made by any person to determine whether the Township 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 COMPLAINT

The Complaint was properly filed pursuant to section 239.2 of the *Municipal Act, 2001*.

The Complaint, as originally filed, contained extensive background information on the history of a longstanding and contentious development project within the municipality at Johnston Point

¹ S.O. 2001, c. 25, as amended.

² The Township had two (2) procedure by-laws in effect during the period of time of the two meetings in question: Procedure By-laws: 2015-56 and 2017-76 (collectively, the “Procedure By-law”). When a specific by-law is being referenced in this Report, the by-law number will be used. For the sake of completeness, we note that By-law 2017-76 was recently amended by By-law No. 2020-18 to permit electronic participation by members of Council and local boards at meetings. However, these amendments came into force and effect after the closed meetings in question were held. Therefore, we have not considered this matter in relation to By-law 2017-76 as amended.

(the “**Development**”). We understand this matter was before the former Ontario Municipal Board (the “**OMB**”) and has also been dealt with by the Ministry of Natural Resources and Forestry (the “**Ministry**”). With respect to the former, a settlement was reached between the Township and the proponent of the Development that included various conditions that needed to be satisfied before the Development could be finalized. With respect to the latter, the Ministry issued an Overall Benefit Permit with respect to the Development that we understand was also accounted for by way of the aforementioned settlement conditions.

Based on our initial review of the Complaint, we determined the Complaint was incomplete as it did not contain sufficiently clear allegations regarding matters within our jurisdiction as Investigator. As such, we provided the complainant with the opportunity to supplement the Complaint to address this issue. We received supplemental submissions in this regard from the complainant on October 8, 2020. We have considered and addressed these submissions as part of the Complaint in arriving at our determinations with respect to this matter.

Primarily, the Complaint appears to question the merit of various decisions made by Council and other actors and agencies with respect to the Development and specifically in relation to the protection and preservation of species at risk and natural heritage at Johnston Point.

In terms of the closed meetings in question, the Complaint alleges that the October 18, 2016 Meeting and the July 14, 2020 Meeting were improperly held in closed session. Specifically, we have gleaned that the allegations set out therein are as follows:

- Council contravened section 239 of the *Municipal Act, 2001* or the Procedure By-law by improperly holding a portion of the October 18, 2016 Meeting in closed session on the basis that the subject matter discussed related to the Conditions and the Permit; and
- the Committee contravened section 239 of the *Municipal Act, 2001* or the Procedure By-law by improperly holding a portion of the July 14, 2020 Meeting in closed session on the basis that the subject matter discussed concerned the Permit.

INVESTIGATION

In order to properly assess this matter and make a determination with respect to the issues, we have reviewed the following materials, in addition to the applicable law, as set out below:

- the Complaint and all attachments thereto, including the aforementioned supplemental submissions;
- the Township's Procedure By-laws: 2015-56 and 2017-76;
- the open and closed sessions meeting minutes, agendas and reports from the meetings at issue; and
- the applicable OMB decisions.³

³ *Magenta Waterfront Development Corp. v. South Frontenac (Township)* (June 28, 2016 and August 25, 2016) (PL150246) (unreported).

Additionally, we interviewed the Township's Clerk who was in attendance at the closed meetings that are the subject of the Complaint.

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.

The Township was fully cooperative with respect to the conduct of our investigation.

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

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 otherwise excepted.⁴ Therefore, all council or committee meetings, unless they deal with a subject matter falling within a specific exception, are required to be held in a public forum.

The exceptions that are relevant to this matter are set out in clauses 239(2)(e) and (f) 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,

...

- (e) litigation or potential litigation,⁵ 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;

⁴ The term "meeting" is defined in subsection 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 The *Municipal Act, 2001* does not define "litigation" or "potential litigation". However, the Ontario Ombudsman and courts have determined this exception is reserved for circumstances where the subject matter discussed is ongoing litigation or involves a reasonable prospect of litigation. See *Investigation into the Township of West Lincoln's alleged violation of the Municipal Act, 2001 on June 15 and June 22, 2015*, Ontario Ombudsman (November 2015) at para. 36 citing *R. (C.) v. Children's Aid Society of Hamilton* (2004), 50 R.F.L. (5th) 394 at para. 21.

Before proceeding *in camera*, a municipality is required to state by resolution the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting.⁶

Voting in closed session is permitted pursuant to subsection 239(6) provided that the closed meeting itself is permitted or required to be closed in accordance with subsection 239(2) or (3)⁷ and the vote is for a procedural matter or for giving directions or instructions to officers of the municipality, staff, and otherwise, as set out in the provision.

(2) Procedure By-law

Subsection 238(2) of the *Municipal Act, 2001* requires the Township to pass a procedure by-law for governing the calling, place and proceedings of meetings. As noted above, the closed meetings that are referenced in the Complaint are subject to two (2) different versions of the Township's Procedure By-law:

- the October 18, 2016 Meeting was subject to By-law 2015-56; and
- the July 14, 2020 Meeting was subject to By-law 2017-76.

The Procedure By-law provides that its rules of procedure “shall govern Council meetings and all Committees of Council”, which includes the Committee.⁸

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

- an indication that a meeting or part of a meeting may be closed to the public if the matter to be considered falls under one of the exceptions set out at subsection 239(2) of the *Municipal Act, 2001*, above; and
- a requirement that Council or the Committee, as the case may be, state by resolution the fact that a meeting or part of a meeting is being held in closed session and the general nature of the matter to be considered.

The Procedure By-law does not contain a requirement that, upon resuming open session, the chair of the meeting shall report to the public on what was discussed in closed session, such as information on any decisions, resolutions and directions given to staff, to the extent possible without undermining the purpose of considering the matter *in camera* to begin with. While this action, commonly referred to as “reporting out” or “reporting back”, is not required under the *Municipal Act, 2001*, it is common practice among municipalities and has been recommended as a closed meeting “best practice” by the Ontario Ombudsman.⁹

⁶ Clause 239(4)(a). Additional rules apply under clause 239(4)(b) in circumstances where the municipality proceeds *in camera* pursuant to subsection 239(3.1) (the “education and training” exception).

⁷ Subsection 239(3) requires a council or local board to consider certain matters in closed session. This subsection is not relevant to this matter and so is not set out or discussed further.

⁸ Section 2.2(b) of By-law 2015-56 and section 2(b) of By-law 2017-76.

⁹ See [this document](#) from the Ontario Ombudsman for information and guidance on the practice of “reporting back”.

THE MEETINGS

(1) The October 18, 2016 Meeting

The public minutes from the October 18, 2016 Meeting demonstrate that Council passed the following resolution before proceeding *in camera*:

THAT Council move into closed session to adopt previous closed session minutes and to discuss litigation.

In terms of what was discussed during the closed meeting, the closed meeting minutes indicate that Council received a verbal update on matters related to the aforementioned OMB matter from the Township's solicitor. Specifically, the closed meeting minutes demonstrate that the Township's solicitor discussed potential litigious proceedings that could arise in relation to the matter that had been before the OMB, and that legal counsel provided legal advice to Council in this regard.

(2) The July 14, 2020 Meeting

The public minutes from the July 14, 2020 Meeting demonstrate that the Committee passed the following motion before proceeding *in camera*:

That Committee of the Whole move into closed session as permitted by Sections 239. 2 of the Municipal Act,¹⁰ to discuss... (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose related to the Johnston Point Plan of Condominium Benefit Permit.

In terms of what was discussed during the closed meeting, the closed meeting minutes indicate that legal counsel provided advice to the Committee on the Township's obligations and options with respect to the aforementioned OMB matter, the Conditions of Draft Plan Approval and the Overall Benefit Permit.

The closed meeting minutes also demonstrate that the Committee engaged in a vote at this meeting. The minutes indicate that the vote was to direct staff to take certain actions in relation to the matter under discussion.

FINDINGS

(1) The October 18, 2016 Meeting

Based on the foregoing, it is our determination that Council did not contravene section 239 of the *Municipal Act, 2001* or the Procedure By-law in respect of the October 18, 2016 Meeting for the following reasons.

In terms of the resolution, as set out above, Council resolved to go into closed session, in part, "to discuss litigation". This resolution clearly indicates the fact that Council was proceeding into *in camera* as well as the general nature of the matter to be discussed. This satisfies the criteria set out in clause 239(4)(a) of the *Municipal Act, 2001* and the Procedure By-law.

¹⁰ This reference to "Section 239.2" is technically incorrect. The correct provision in the circumstances is subsection 239(2). As this is merely a technical deficiency, it has not impacted our findings in this matter.

In terms of the meeting itself, the evidence demonstrates that the matter discussed *in camera* was potential litigation, specifically regarding litigation that could arise in relation to the above-noted matter that had been before the OMB. This falls within the exception set out at clause 239(2)(e) for “litigation or potential litigation”. Accordingly, we find that Council was permitted to discuss this matter in a closed session.

Furthermore, we also find that the “solicitor-client privilege” exception under clause 239(2)(f) was applicable in this instance as Council received legal advice from the Township’s solicitor in relation to the OMB matter under discussion.

(2) The July 14, 2020 Meeting

Based on the foregoing, it is our determination that the Committee did not contravene section 239 of the *Municipal Act, 2001* or the Procedure By-law in respect of the July 14, 2020 Meeting for the following reasons.

In terms of the resolution, as set out above, the Committee resolved to go into closed session, in part, “to discuss... (f) advice that is subject to solicitor-client privilege”. The resolution satisfies the criteria set out in clause 239(4)(a) as it clearly indicates that the Committee was proceeding *in camera* and states the nature of the matter to be discussed, including an explicit reference to the applicable exception under the statute. This complies with the requirements set out in clause 239(4)(a) of the *Municipal Act, 2001* and the Procedure By-law.

In terms of the meeting itself, the evidence demonstrates that, as noted above, the Committee received legal advice from the Township’s solicitor at this meeting. This action (i.e. receiving advice from legal counsel) falls squarely within the exception set out at clause 239(2)(f) that allows the Committee to proceed into closed to discuss “advice that is subject to solicitor-client privilege”. Accordingly, the Committee was permitted to discuss this matter in closed session.

As noted above, the Committee also engaged in a vote at this meeting. The record shows the vote was to provide certain directions to staff arising from a matter that was permitted by the *Municipal Act, 2001* and the Procedure By-law to be considered in a setting that was closed to the public. Therefore, Committee’s vote satisfies the criteria set out at subsection 239(6) and was permitted.

CONCLUSIONS

On the basis of the foregoing, it is our determination that neither Council nor the Committee breached the closed meeting provisions of section 239 of the *Municipal Act, 2001* or the Procedure By-law.

RECOMMENDATIONS

Notwithstanding that we have found that neither Council nor the Committee breached the closed meeting provisions of section 239 of the *Municipal Act, 2001* or the Procedure By-law, we would recommend that the Township adopt the following best practices going forward to further enhance accountability and transparency within the municipality.

First, we recommend that Council amend Procedure By-law 2017-76 to add a requirement that the resolution to go into closed session include explicit reference to the applicable exception under section 239 of the *Municipal Act, 2001*. While we understand this is a practice that the Township has adopted informally, as demonstrated by the minutes of the July 14, 2020 Meeting, this practice has not been codified in By-law 2017-76.


Codifying this practice would increase certainty in terms of what is expected of Council procedurally in respect of closed meetings. This would also help to ensure that Council has adequately turned its mind to which exception, if any, applies in the circumstances.

Second, we recommend that Council amend By-law 2017-76 to add a requirement to “report out” after closed session. As discussed above, “reporting out” or “reporting back” is a best practice that is recommended by the Ontario Ombudsman and is practiced by many municipalities. This practice enhances accountability and transparency in local government by providing the public with some information on what was discussed and, if applicable, voted upon in closed session. This practice necessarily balances the interests of upholding the reason for which Council considered a matter in closed session to begin with and the interests of accountability and transparency. How much information is appropriate to disclose in any given case will depend on the particular facts of that case.

This report has been prepared for and is forwarded to the Council of the Township.

Council is not required to make this report public or to pass a resolution stating how it intends to address the report in accordance with subsections 239.2(11) and (12) of the *Municipal Act, 2001*, respectively, as no contraventions were found to exist. However, we would recommend that Council do so in any event as the matters set out herein are relevant to the ongoing conduct of the business of Council and the Committee and would serve to reinforce members’ obligations in relation to the confidential information that they receive as a result of their offices.

AIRD & BERLIS LLP



John Mascarin

Closed Meeting Investigator for The Corporation of the Township of South Frontenac

Dated this 30th day of November, 2020