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REPORT ON CLOSED MEETING INVESTIGATION 2024-01

THE CORPORATION OF THE COUNTY OF PRINCE EDWARD

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COUNTY OF PRINCE EDWARD REPORT ON CLOSED MEETING INVESTIGATION 2024-01

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*.¹
2. A formal request for a closed meeting investigation, filed in September 2024 (the “**Request**”), was filed with the Clerk of The Corporation of the County of Prince Edward (the “**County**”), and subsequently provided to our office, in our capacity as the closed meeting investigator (the “**Investigator**”) for the County.
3. The Request seeks an investigation of a meeting of the Council of the County (“**Council**”) held on September 10, 2024 (the “**Meeting**”), and more particularly, the closed session portion thereof. The Request alleges that Council contravened the *Municipal Act, 2001* by failing to provide a sufficient description of the matters to be discussed in closed session in its resolutions to proceed into closed session.
4. Upon concluding our investigation, some of the allegations made in the Request are sustained. In particular, it is our opinion that Council’s resolutions to proceed into closed session were deficient with respect to the information required by subsection 239(4) of the *Municipal Act, 2001*.

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

5. The County appointed Local Authority Services Inc. (“**LAS**”) as its Investigator pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated its authority to act as Investigator to Aird & Berlis LLP pursuant to its authority under section 239.2(6) of the *Municipal Act, 2001*.
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 County to act in this particular matter, or in general as its Investigator.
7. Prior to accepting any investigation mandate, Aird & Berlis LLP conducts a thorough legal conflict search and makes other conflict inquiries to ensure that our firm is in a position to conduct an independent and impartial investigation.
8. 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 County has complied with subsection 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.

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

9. Upon conducting an investigation, our office reports to Council on the outcome of the investigation, together with any recommendations as may be applicable.

10. Our role as Investigator does not include engaging with the merits of any particular item of municipal business, or questioning the policies or priorities of the County.

III. REQUEST

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

12. The Request raises two related issues with the Meeting.

13. First, the Request alleges that Council's resolution to convene in closed session passed at the Meeting did not comply with subsection 239(4) of the *Municipal Act, 2001*.

14. The Request asserts this resolution did not contain a sufficient description of the topic to be considered in closed session, which the Requestor infers through other items of business considered at the Meeting and Council's "report out" from closed session.

15. Second, the Request alleges that Council did not follow the proper procedure under the *Municipal Act, 2001* for adding an item to Council's closed session agenda, being an item related to a development agreement, thereby resulting in a contravention subsection 239(4) of the *Municipal Act, 2001*.

16. With respect to this issue, the Request refers to Item 12.2 on the open session agenda for the Meeting, being the adoption of the minutes of the August 27, 2024 meeting of Council. Item 11.2 in those minutes, being Motion 2024-382 passed at the meeting held on August 27, 2024, related to the acceptance of Staff Report DS-41-2024 and authorization of an agreement for a capital project and the execution of a subdivision agreement.

17. The Request speculates that there was some level of collusion related to this item, noting that when Council reached the end of its regular items of business, and before discussing this matter in closed session, the Mayor and Clerk engaged in a side discussion concerning the consideration of this item in closed session. Following the closed session, Council then considered and voted on two motions relating to this agreement.

18. The Request asserts, without reference to the provisions of Council's own Procedural By-law No. 16-2022 (the "**Procedural By-law**"), that Council did not follow proper procedure by utilizing a motion to reconsider to deal with its earlier resolution on the matter as opposed to "lifting" the minutes of the meeting of August 27, 2024.

IV. REVIEW OF MATERIALS AND INQUIRY PROCESS

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

- The County's Procedural By-law;
- The Agenda for the open session portion of the Meeting;

- The Minutes for the open session portion of the Meeting;
- The Closed Meeting Agenda for the closed session portion of the Meeting, including reports, correspondence, and attachments thereto;
- The Closed Meeting Minutes for the closed session portion of the Meeting; and
- Background documents and materials related to the items discussed in closed session at the Meeting.

20. In addition to our review of the materials referred to above, we have interviewed the Clerk who had relevant information regarding the Meeting.

21. 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 we deemed necessary in order to make our determination.

22. The County and its representatives were fully cooperative and forthright during our investigation process. We commend their efforts in providing assistance to us as requested.

V. THE MEETING

23. The Meeting took place on Tuesday, September 10, 2024, commencing at 6:00 p.m.

24. At the Meeting, Council convened in closed session twice: once at the start of the Meeting, and again after Council considered its items of business listed on the open session agenda, which we understand to be a continuation of the earlier closed session due to time constraints.

25. Before convening in closed session at first instance, Council passed the following resolution:

Motion 2024-392

Moved by Councillor Maynard

Seconded by Councillor Engelsdorfer

THAT Council move into closed session to consider:

- personal matters about an identifiable individual, including municipal or local board employees - Advisory Committee;
- litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

Pursuant to Section 239 (2) (b) (e) & (f) of the Municipal Act.

CARRIED

26. Council initially convened in closed session at 6:06 p.m. During this first session, which recessed at 6:59 p.m., Council received an update from its solicitor related to the proposed resolution of a longstanding legal dispute regarding the Picton Terminals, a deep water shipping port on Lake Ontario located in the County.

27. A detailed summary of this dispute and associated legal proceedings, which we understand is known to the community,² is beyond the purview of this Report. Briefly summarized, the crux of the dispute relates to whether certain municipal by-laws apply to Picton Terminals' operations and site.

28. In 2024, Council provided direction to staff and its legal counsel to engage in negotiations with Picton Terminals to resolve an ongoing legal proceeding commenced by the County. Those negotiations resulted in a resolution of the matter, endorsed by Council in June 2024. This resolution was formalized in Minutes of Settlement, a copy of which was included in the open session agenda for the Meeting as an attachment to a draft by-law authorizing execution of the Minutes of Settlement.

29. In advance of the Meeting, the County received correspondence from a lawyer raising issues with the Minutes of Settlement and Council's process in approving the settlement. This correspondence formed part of the closed meeting agenda. During the first portion of the closed session, Council considered this correspondence and related issues, and received advice from the County's solicitor. Upon reconvening in open session at 7:04 p.m., Council passed a resolution to seek a separate legal opinion on the advice it had previously received on the Minutes of Settlement prior to authorizing their execution.

30. Council proceeded to deal with its open session business before moving into the continuation of its closed session meeting at 9:15 p.m. Before reconvening in closed session at that time, Council passed a second resolution, essentially mirroring the wording of its first resolution, which provided as follows:

Motion 2024-405

Moved by Councillor McNaughton

Seconded by Councillor Branderhorst

THAT Council move into closed session to consider:

- Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- Advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- Personal matters about an identifiable individual, including municipal or local board employees – Advisory Committee.

Pursuant to Section 239 (2) (e) (f) and (b) of the Municipal Act.

CARRIED

² We observe that at the Meeting, four (4) individuals made deputations to Council about Picton Terminals.

31. During the continuation of the closed session meeting, Council considered two items of business, only one of which was raised in the Request. That item was Council's consideration of correspondence from a lawyer on behalf of a developer related to a development charges pre-payment agreement, servicing capacity allocation, and subdivision agreement (the "**Kaitlin Agreement**"), and the receipt of advice from the County solicitor regarding the same.

32. By way of background, at its meeting on August 27, 2024, Council passed a resolution to enter into a subdivision agreement with certain conditions related to servicing capacity allocation. Following the passage of this resolution, the County received correspondence from the developer's lawyer raising issues with aspects of the resolution relative to earlier agreements between it and the County.

33. During closed session, Council considered the issues raised in the correspondence from the developer's lawyer and how the County would address the same.

34. Following discussion of this and another item, Council reconvened in open session at 10:17 p.m. to consider a motion to reconsider its earlier resolution passed at the meeting on August 27, 2024, in accordance with Section 12.5 of the Procedural By-law.³ The motion to reconsider carried, and Council proceeded to pass a resolution to change its earlier resolution.

VI. ANALYSIS

35. Although framed as two separate issues dealing with two different matters, the crux of the Request raises one issue:

- Was Council's resolution to proceed into closed session sufficient to comply with subsection 239(4) of the *Municipal Act, 2001*?

36. For the reasons outlined below, we have determined that Council's resolution to convene in closed session to consider the matter related to Picton Terminals and the matter related to the Kaitlin Agreement were deficient.

³ The Requestor asserts that instead of proceeding in this manner, Council should have "lifted" this item from the minutes of the August 27, 2024 meeting, which were presented to Council for approval at the Meeting.

The concept of "lifting" items from meeting minutes is not reflected in the *Municipal Act, 2001*, nor, in our experience, is this a common procedure for revisiting matters previously decided by a municipal council.

In accordance with principles of parliamentary procedure and the *Municipal Act, 2001*, when a municipal council approves the minutes from a previous meeting, it is not confirming or endorsing its substantive decision such that those matters do not have legal effect until the minutes are approved.

Rather, approval of the minutes confirms that the formal record of a meeting is accurate and reflects the actions taken and decisions made by the council.

"Lifting" an item from the minutes therefore constitutes a purported attempt to revisit a decision previously made, which, in accordance with the Procedural By-law, must be achieved through the parliamentary procedure of a motion to reconsider.

In our view, proper procedure was followed.

(1) Statutory Framework

37. Ontario's "open meeting" rule is set out in subsection 239(1) 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.⁴

38. As a corollary to this, and to foster a transparent decision-making process, the *Municipal Act, 2001* also provides for certain procedural matters relating to closed meetings. This includes steps that Council must take before convening a closed session meeting.

39. Subsection 239(4) of the *Municipal Act, 2001* provides as follows:

Resolution

239 (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) Resolution to Convene in Closed Session

40. Subsection 239(4) of the *Municipal Act, 2001* requires that before holding a closed session, Council must pass a resolution stating both the fact that it will hold a closed meeting and the "general nature" of the matter that will be discussed in closed session. This requirement is also mirrored in Section 11(1) of the Procedural By-law.

41. The precise requirements of this obligation were articulated by the Ontario Court of Appeal in *Farber v. Kingston (City)*.⁵ In that case, the Court of Appeal held that a municipality's obligation to state the "general nature" of the matter to be considered in closed session is not discharged by merely reciting the applicable closed meeting exception. The Court of Appeal also commented that resolutions to convene in closed session should strive to balance the public interest in maximizing the information available to the public, while at the same time not undermining the very reason for excluding the public in the first place.

42. Relying on the Court of Appeal's decision in *Farber v. Kingston (City)*, the Ontario Ombudsman has consistently stated that a municipality must provide at least a brief description of the issue or topic to be discussed; simply reciting the verbiage of the relevant closed meeting exception does not generally satisfy this requirement.⁶

⁴ Stephen Auerback & John Mascarin, *The Annotated Municipal Act, 2nd ed* (Toronto: Thomson Reuters Canada, 2020) commentary on section 239.

⁵ *Farber v. Kingston (City)* (2007), 31 M.P.L.R. (4th) 31 (Ont. C.A.).

⁶ Ombudsman of Ontario, [*Investigation into whether the Town of Mattawa Council and its Ad Hoc Heritage Committee held improperly closed meetings*](#) (December 2010) at para. 51.

43. We make two observations about this requirement. First, in light of the interpretations of subsection 239(4), there is an important distinction to be made between the “general nature of the matter” and the language of the pertinent closed meeting exception in subsection 239(2). This means that such a resolution must describe *what* is being discussed in closed session, not simply *why*, or the justification for holding a closed meeting.

44. Second, there is no singular, universally correct verbiage that must be included in order to discharge a council’s obligation under subsection 239(4). Drafting a resolution to proceed into closed session requires a careful balancing of protection for municipal interests while also maximizing transparency as far as the circumstances allow. For example, in some circumstances, the mere mention that a council will consider a particular matter in closed session could compromise its interests. In other circumstances, no prejudice would result from enhanced transparency in the immediate term. This determination must be made by a municipality in the context of the matter to be discussed and the surrounding circumstances.

(3) Council’s Resolution to Proceed in Closed Session was Deficient

45. As indicated earlier in this Report, Council’s resolution to proceed into closed session passed at the Meeting contained the following operative text:

THAT Council move into closed session to consider:

- Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- Advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- Personal matters about an identifiable individual, including municipal or local board employees – Advisory Committee.

Pursuant to Section 239 (2) (e) (f) and (b) of the Municipal Act.

46. During our investigation, we obtained evidence about how this and similar resolutions to proceed into closed session come to be. The Clerk’s office, in preparing a meeting agenda, drafts the resolution to proceed in closed session based on the information provided by other members of County staff responsible for closed session items of business.

47. We understand that where the item originates from the Clerk’s office, additional information regarding what the matter concerns is included in the resolution, which the Clerk recognizes as a best practice. However, other departments do not include such information.

48. We also understand that this practice is not reflected in any policy or protocol, but rather reflects “status quo” of how Council’s agendas have historically been prepared.

49. The evidence in our investigation was that, as it relates to the Meeting, there was no specific consideration of whether to include additional information related to Picton Terminals and the Kaitlin Agreement in the resolution to proceed into closed session. This resolution was prepared in accordance with the County’s usual practice.

50. In our opinion, this practice needs to be strengthened in order to properly observe Council's obligation under subsection 239(4) of the *Municipal Act, 2001*. Where the statute requires a resolution to describe the "general nature" of the matter to be considered in closed session, the mere recitation of the language of the relevant closed meeting exception is not sufficient. The latter is precisely what Council did in respect of two of three matters considered at the Meeting. In our view, something more is required in order to achieve the balance between persevering secrecy over sensitive matters with maximizing the information available to the public to enhance transparency.

51. As noted in *Farber v. Kingston*, in some circumstances, the need for confidentiality may encompass the fact that such information will be discussed in closed session:

Reading subsections [239] (2) and (4)(b) together in the context of the desirability of open municipal government, I think that the resolution to go into closed session 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. Where the exception to the presumptive openness of Council meetings is that of privileged solicitor-client advice, there may be circumstances where the need for confidentiality encompasses even the information that such advice has been obtained on a specific issue.⁷

52. However, as it relates to the Meeting, there is no suggestion that the use of a general description about either of the Picton Terminals matter or the Kaitlin Agreement would have impaired any sensitive municipal interest animating the closed session in the first place. As it relates to Picton Terminals, we note that a directly related matter – a by-law authorizing execution of Minutes of Settlement – was already on the open session agenda, and Council received four (4) delegations on the topic. There is no reason to believe that some description that Council would be considering legal advice on the Picton Terminals Minutes of Settlement would prejudice its position in resolving the litigation. Moreover, as to the Kaitlin Agreement, in the surrounding circumstances, a public indication that Council would be receiving legal advice on a matter related to a development agreement involving the developer would not compromise the County's position.

53. In contrast to these two matters, Council discussed a third matter during the closed session, being a matter involving the Athol Recreation Committee. The resolution did contain some additional description of this matter (i.e. "Advisory Committee"). Although this matter was not raised in the Request, it provides a baseline example of the approach to be taken when drafting the resolution required by subsection 239(4) of the *Municipal Act, 2001*.

54. We urge the County to take steps to improve its processes for preparing resolutions to proceed into closed session, namely by including a sufficient description of the "general nature" of what is to be discussed in closed session. In almost all circumstances, reciting the relevant closed meeting exception will not be sufficient. The County must turn its mind to balancing the public interest in transparency by maximizing the information available to the public with not undermining the rationale for private discussions.

55. In summary, the County did not comply with subsection 239(4) of the *Municipal Act, 2001* by failing to include the "general nature" of the matters discussed in closed session.

⁷ *Farber v. Kingston*, *supra* note 5, at para. 21

VII. CONCLUSION AND RECOMMENDATIONS

56. For the reasons set out above, we have determined that the resolution contravened the requirements in section 239 of the *Municipal Act, 2001*. Before convening in closed session, Council must pass a resolution that contains a sufficient description of the “general nature” of the matter it will consider. This obligation is not discharged by reciting the language of an applicable closed meeting exception.

57. Our finding should not be taken to suggest that the County has acted in a deliberately secretive or opaque manner. Council was entitled to consider the matters it did in closed session at the Meeting. However, there are certainly opportunities for improvement that would enhance the transparency of Council’s decision-making process.

58. It is evident from the Request, and the Requestor’s inferences about the dialogue between the Mayor and the Clerk during the Meeting before the resumption of the closed session, that Council’s resolutions to proceed into closed session may result in some misunderstanding by the public about the matters Council will consider in closed session. The Requestor posited that Council added a last minute item to its closed session discussion, ostensibly to prevent public scrutiny. We found no evidence to support this allegation in our investigation; the matter related to the Kaitlin Agreement was, in fact, always listed as an item on Council’s closed meeting agenda. The issue, however, is that the publicly-available resolution to proceed in closed session made no reference to that matter, nor how many discrete matters would be considered in closed session. This has the potential to give the appearance of deliberate secrecy and to undermine public confidence in municipal decision-making.

59. In an effort to combat this, we would make the following recommendations.

60. First, we recommend that the County modify its standard form of resolution to proceed into closed session to specifically list how many items of business will be considered in closed session, the relevant closed meeting exception, and a general description of what that item is about. We have taken the liberty to demonstrate this with modifications to Council’s resolution passed at the Meeting, purely as an example:

Motion 2024-XX

Moved by _____

Seconded by _____

THAT Council move into closed session to consider:

1. **Picton Terminals Minutes of Settlement** – Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board; Advice that is subject to solicitor-client privilege, including communications necessary for that purpose – **Section 239(2)(e), (f)**.
2. **Agreement with Katilin Corporation** – Advice that is subject to solicitor-client privilege, including communications necessary for that purpose – **Section 239(2)(f)**.
3. **Advisory Committee** – Personal matters about an identifiable individual, including municipal or local board employees – **Section 239(2)(b)**.

61. Second, during the course of our investigation, we were advised that, apart from the Procedural By-law, the County does not have any formal policies or procedures dealing with closed sessions, including how items of business are brought forward to a closed session, who makes the determination that the item will be considered in closed session and under what exception, and standardized (and improved) resolutions. These matters, including the language of the resolution to proceed into closed session, are undertaken as a matter of historic practice.

62. We recognize that a closed meeting policy is not a requirement of the *Municipal Act, 2001*.⁸ In our experience, a closed meeting protocol is a helpful tool for ensuring compliance with the procedural and substantive requirements of the open meeting rule, but also for optimizing the transparency of municipal governance. As such, we recommend that Council and staff some give consideration to developing a closed meeting protocol which sets out the roles and responsibilities of staff and members of Council in respect of the holding of closed meetings.

63. This Report has been prepared for and is forwarded to Council for its consideration pursuant to subsection 293.2(10) of the *Municipal Act, 2001*. We note that subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public. We recommend that this be achieved by publishing the Report on a Council agenda.

64. In view of our finding of a contravention of subsection 239(4) of the *Municipal Act, 2001*, Council must pass a resolution stating how it intends to address this Report

65. As Investigator, we have discretion under the *Municipal Act, 2001* to disclose in our report such matters as, in our opinion, ought to be disclosed in order to establish our conclusions and recommendations.⁹ We have exercised that discretion to disclose only those matters we felt were necessary in order to consider and assess the issue raised in the Request.

66. The County was provided the opportunity to review a preliminary version of this Report and provide comments to our office. We have taken into account the County's comments and have incorporated such revisions as we believed to be necessary to address same.

Respectfully submitted,

AIRD & BERLIS LLP



Jonathan George Pappas

Closed Meeting Investigator for The Corporation of the County of Prince Edward

Dated this 6th day of January, 2025

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⁸ See *Municipal Act, 2001*, s. 270(1), which sets out nine (9) the mandatory policies a municipality is required to adopt.

⁹ *Municipal Act, 2001*, s. 223.15(2), as applicable by virtue of s. 239.2(9).