

REPORT ON CLOSED MEETING INVESTIGATION – 2020-01

THE CORPORATION OF THE TOWN OF WHITCHURCH-STOUFFVILLE

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INTRODUCTION

Our office received a request for a closed meeting investigation on November 9, 2020 (the “**Complaint**”). We wrote to the Clerk of The Corporation of The Town of Whitchurch-Stouffville (the “**Town**”) in our capacity as the closed meeting investigator (“**Investigator**”) to request copies of all applicable documentation necessary to undertake our review. Our office was provided with all applicable documentation and records on November 19, 2020.

The Complaint alleges that the Town’s Council (“**Council**”), at its Regular Meeting held on Tuesday May 19, 2020 at 1:00 PM (the “**Meeting**”), and in particular, the closed session portion thereof, contravened section 239 of the *Municipal Act, 2001*¹ and the Town’s Procedure By-law No. 2016-001-RE (the “**Procedure By-law**”).²

The Complaint alleges that the Meeting was closed to the public in contravention of subsection 239(2) of the *Municipal Act, 2001*, and that Council’s resolution upon reconvening in open session did not comply with the requirements of the Procedure By-law.

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.

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 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 COMPLAINT

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

The Complaint alleges that the Meeting was improperly held in closed session. In particular, the Complaint asserts that the subject matter considered at the Meeting did not entitle Council to consider the matter in closed session pursuant to the exception in clause 239(2)(c). The Complaint specifically asserts that “at no time was there a financial agreement between the town (*sic*) and the proponent of the application for the full disposition of the Town owned property.”

¹ S.O. 2001, c. 25.

² Town of Whitchurch-Stouffville, By-law No. 2016-001 RE, *Procedure By-law* [“**Procedure By-law**”].

The Complaint also alleges that Council's "report out" in open session was insufficient, noting that "a more in depth explanation should have been released."

ISSUES

The Complaint raised the following issues with respect to the Meeting:

Issue 1

Did the exception in clause 239(2)(c) of the *Municipal Act, 2001* apply to allow Council to hold a portion of the Meeting in closed session?

Issues 2

Did Council's resolution upon re-entering the open session portion of the Meeting provide sufficient detail to comply with the Town's Procedure By-law?

INVESTIGATION

In order to assess the Complaint and to make a proper determination on the issues, we have reviewed the following materials, in addition to the applicable law, as set out below:

- the Complaint, including additional correspondence and materials received from the Requestor;
- the Procedure By-law; and
- the open and closed meeting minutes, agendas and reports for the meetings at issue.

Additionally, we conducted telephone interviews with three (3) persons (i.e. witnesses) with direct, relevant knowledge about the subject matter 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 Town and its representatives were fully cooperative and forthright during our investigation and sought to assist us as required.

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

APPLICABLE LAW

(1) *Municipal Act, 2001*

Subsection 239(1) of the *Municipal Act, 2001* provides that all meetings of Council are to be open to the public, unless otherwise excepted.³ Therefore, all Council or committee meetings, unless they deal with a subject matter falling within a specific exception set out in section 239 are required to be held in a public forum.

The exception relevant to this matter is set out in subsection 239(2) of the *Municipal Act, 2001*:

Exceptions

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

...

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

(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 Meeting referenced in the Complaint is subject to the Town's Procedure By-law.

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

- a presumption that all meetings are open to the public unless certain subject matters are being discussed, which are identical to those contained in subsections 239(2), (3) and (3.1) of the *Municipal Act, 2001*;
- a provision that the Clerk or CAO shall advise the Chair if the issue being discussed at a closed meeting is not appropriate in accordance with the terms of the *Municipal Act, 2001* or the Procedure By-law;
- a requirement that before all or part of a meeting is closed to the public, Council state by resolution the fact of the holding of the closed meeting, and the general nature of the closed meeting;

³ 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.

- a prohibition on voting during a closed meeting, except where the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality;
- a prohibition on taking recorded votes during a closed meeting;
- a requirement that Council shall report any decision made in a closed meeting immediately upon reconvening in open session, but only where appropriate and where it does not conflict with the best interests of the Town;
- a requirement that members of Council ensure the confidentiality of all matters and materials provided during a closed meeting; and
- a provision permitting a person to request an investigation to determine whether Council complied with the requirements of the *Municipal Act, 2001* and the Procedure By-law.⁴

THE MEETING

On May 19, 2020, Council met virtually for a Regular Meeting at 1:00 p.m.

Council convened in open session to discuss a number of matters for approximately two hours before moving into closed session.

1. Council Convenes in Closed Session

The public minutes from the Meeting indicate that Council passed the following resolution before proceeding in a closed session:

Moved by Councillor Sherban
Seconded by Councillor Upton

That Council recess at 3:15 p.m. to permit the holding of a Closed Meeting to consider matters with the following exceptions:

- Personal matters about an identifiable individual, including municipal or local board employees (Municipal Act, Sec. 239(2)(b));
- A proposed or pending acquisition or disposition of land for municipal or local board purposes (Municipal Act, Sec. 239(2)(c)).

Carried

The agenda for the Meeting provided no further details about the items to be discussed in closed session.

At 3:24 p.m., Council convened in closed session to discuss two closed meeting agenda items. The Complaint only took issue with one of those items, namely the latter item dealing with the “proposed or pending acquisition or disposition of land.”

⁴ Procedure By-law, Section 5.7.

2. Background to Matter Discussed by Council in Closed Meeting

During closed session, Council considered a request by a private development proponent (the “**Proponent**”) to include a portion of Town-owned lands in a forthcoming application for site plan approval pursuant to the *Planning Act*⁵ for additions to a building to facilitate construction of a restaurant (the “**Matter**”).

The Proponent is the owner of lands immediately adjacent to municipally-owned lands which form the Town’s civic square (the “**Civic Square**”). The Civic Square is the site of the Old Town Hall and Clock Tower, a heritage-designated⁶ building that is presently used as a multi-purpose event venue, and an open courtyard that functions as a public space.

Town staff were approached by the Proponent during the Town’s planning application pre-consultation process to ask whether it would be permitted to include a portion of the Civic Square as a seasonal restaurant patio in its application for site plan approval.

In the normal course, where a development application includes lands that are not owned by the applicant, Town staff will require some authorization from the non-applicant owner. This is usually satisfied by an executed authorization form or consent letter.⁷ In the present instance, as the Town itself would be such a non-applicant owner, authorization would be required from Council. As such, Town staff presented the request to Council for its direction on whether or not it would provide its written authorization to the Proponent to include a portion of the Civic Square in its forthcoming site plan application.

3. Report from the Director of Development Services

Council considered a report from the Director of Development Services regarding the Proponent’s request (the “**Report**”). As noted above, the purpose of the Report was to seek Council’s authorization to allow the Proponent to include a portion of the Civic Square in its forthcoming site plan application.

The Report provided a high-level summary of the Proponent’s development proposal, including how the Civic Square lands would be integrated into the proposal and used as a seasonal restaurant patio. As noted in the Report, “the Town [had] not received a formal site plan application...” by the time the Report was put to Council. The proposal was still conceptual in nature, and there was some indication that formal submission would be contingent on securing permission to incorporate the Civic Square lands into the proposal.

The Report also noted that if Council gave its approval, the details and terms of the patio arrangement would eventually be secured through an agreement between the Town and the Proponent. However, no such agreement was before Council.

⁵ R.S.O. 1990, c. P.13, s. 41.

⁶ See Town of Whitchurch-Stouffville By-law 2002-269-DS, *A By-law to designate Old Town Hall and Clock Tower, 19 Civic Avenue, Stouffville of architectural and historic interest* (November 5, 2002): <https://whitchurch.civicweb.net/document/52898>.

⁷ We note that the Town’s *Pre-Application Consultation Guide* provides a standard form of “Owner’s Authorization”: <https://www.townofws.ca/en/residents/resources/Documents/Planning/FINAL-Pre--application-consultation-form-April-2019-003.pdf>.

In addition to the Report, Town staff in attendance at the Meeting answered questions from members of Council about the Report. This included clarification to the information in the Report, the planning merits of the proposal, and what effect Council's direction would have on the ultimate planning outcome. Town staff clarified to Council that these issues were not to be explored at the Meeting as they would be discussed during the planning process. All relevant details about the site plan would come to Council for approval in the future.

Town staff also clarified to Council that its decision on the request would not pre-determine the Town's decision on any eventual site plan application.

4. Council Discussion

(a) What Council Did Discuss

Council considered the proposal and the Proponent's request. Council discussed how the proposed patio would be physically arranged in relation to the Civic Square. As the Civic Square functions as a public gathering place, there was also discussion of whether there would be a need for replacement public space. As there was some possibility that a final site plan would entail the removal of trees, Council also discussed the impact of removing trees on the Civic Square, including whether and how trees would be graded and identified for removal.

Council also considered whether some form of agreement would be necessary to facilitate the patio. However, no such agreement or terms were presented to Council at the Meeting. There was some indication given by Town staff to Council that the matter of securing the patio through an agreement would be given to the Town Solicitor for further consideration. Council direction to this effect was given to Town staff.

(b) What Council Did Not Discuss

Based on our investigation, there was no evidence that any formal agreement, term sheet, or standing offer made by the Proponent was presented to, considered or discussed by Council at the Meeting.

Furthermore, there was no evidence to suggest that Council discussed the types of terms it would seek in any forthcoming agreement. Council did not consider nor discuss such matters as the length of term, monetary consideration, or other responsibilities of the parties. Members of Council understood that these details would be forthcoming if the Proponent received final site plan approval and negotiated an agreement with the Town. The only possible term of an agreement that was before Council at the Meeting was the amount of space the Proponent was requesting to use for the patio.

There was also no evidence that Council considered or discussed the relative risks or benefits of using one legal mechanism rather than another to secure the patio. Our investigation indicated that matters relating to how the patio would be secured was left to the Town Solicitor to research, consider and report back to Council.

5. Council Reconvenes in Open Session to Report Out

After considering a second matter in closed session (which we were not requested to investigate), Council reconvened in open session at 4:50 p.m. and adopted the following resolution:

1. Matters related to Town-owned Lands

Moved by Councillor Bartley

Seconded by Councillor Sherban

1) That Council direct Staff to proceed as instructed in Closed Meeting.

Carried

No other verbal report was provided in open session.

The Meeting adjourned at 4:52 p.m.

FINDINGS

1. Did the exception in clause 239(2)(c) of the *Municipal Act, 2001* apply to allow Council to hold a portion of the Meeting in closed session?

Based on our review of the evidence on a balance of probabilities, Council was not entitled to consider the Matter in closed session under the exception in clause 239(2)(c) of the *Municipal Act, 2001*.

(a) Statutory Provisions

As noted, clause 239(2)(c) of the *Municipal Act, 2001* provides as follows:

Exceptions

(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;

The purpose of Ontario's "open meeting" rule is to foster democratic values, enhance the responsiveness of government and public confidence in government and to increase transparency.⁸ By setting out specific exceptions to the general rule that all meetings must be open to the public, section 239 balances the need for confidentiality in certain matters with the public's right to information about the decision-making process of local government.⁹

⁸ See e.g. *R.S.J. Holdings Inc. v. London (City)* (2007), 36 M.P.L.R. (4th) 2 (S.C.C.).

⁹ Stephen Auerback & John Mascarini, *The Annotated Municipal Act*, 2nd ed., (Toronto, ON: Thomson Reuters Canada Limited, 2017) (e-loose leaf updated 2021 – rel 1) annotation to s. 239.

While municipal powers should be afforded a broad and liberal interpretation,¹⁰ the scope of the open meeting rule must take into account the proposition 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.¹¹

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

The exception in clause 239(2)(c) – which was cited and relied on by the Town – provides that a meeting may be closed to the public if the matter under consideration is “a proposed or pending acquisition or disposition of land by the municipality or local board.” Our review of the relevant materials and case law indicates that the purpose of this exception is to protect the municipality’s bargaining position in a land transaction.¹²

The exception only applies to transactions that are “proposed” or “pending,” rather than to a speculative transaction that may or may not happen in the future.¹³ In order for this exception to apply, there must be some evidence to demonstrate an actual transaction is actively being negotiated, or that there is some proposed or potential transaction that will be negotiated.¹⁴

Although “land” is not defined by the *Municipal Act, 2001*, it has been interpreted to include interests in land such as a lease, licence, or easement.¹⁵

(c) Meeting Not Closed for a Permitted Purpose

Based on our review of the relevant authorities and evidence obtained during our investigation, the Matter that Council considered was not a “proposed or pending acquisition or disposition of land” by the Town. Accordingly, this portion of the Meeting was not closed to the public for a statutorily-authorized purpose.

¹⁰ 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.).

¹¹ 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 (CanLII).

¹² 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>.

¹³ 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>.

¹⁴ *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)*, *supra* note 8 at para. 18.

¹⁵ See e.g. *Order MO-3073, Niagara District Airport Commission (Re)* (July 22, 2014), 2014 CanLII 41425 at para. 67 (Ont. I.P.C.); see also *Interim Order MO-1558-I, Conseil Scolaire de District du Centre-Sud-Ouest (Re)* (July 25, 2002) 2002 CanLII 46338 (Ont. I.P.C.). The latter decision dealt with an analogous provision under the *Education Act*, R.S.O. 1990, c. E.2. Clause 207(2)(c) of this statute permits a committee of a district school board or a school authority to consider “the acquisition or disposition of a school site” *in camera*.

At its crux, the Matter dealt with whether Council would give its consent as a non-applicant owner of land to the inclusion of Town-owned land in a forthcoming site plan application. By all accounts, the Matter was frequently characterized as “conceptual” and “high-level”, without any indication that the Proponent’s site plan application, and possible agreement, was imminent.¹⁶

The Report and Council’s consideration and discussion of the Matter recognized that eventually, and should the Proponent’s site plan application be approved by the Town, the restaurant patio arrangement would have to be secured through some legal mechanism. Council did instruct Town staff to report back with an agreement containing the details of any arrangement. While we agree that some form of “disposition of land” may eventually arise from the Matter, any disposition was too remote and too contingent for Council to be entitled to consider the Matter in a closed session at the time of the Meeting.

In order for any agreement between the parties to manifest, the Proponent would first require the consent of the Town, through Council, to include the Town-owned lands in a site plan application (which was the purpose of the Report). Next, the Proponent would be required to actually submit and pursue a site plan application, a months’ long process. Finally, any site plan would require final approval by the Town. Assuming the Proponent could obtain the Town’s approval of any final site plan, the Proponent and the Town would then be in a position to negotiate an agreement to secure the restaurant patio.

Notwithstanding and in addition to the outstanding events mentioned above, Council’s discussion of the Matter did not fall within the purpose underlying the exception in clause 239(2)(c), being to protect its bargaining position.

During the course of our investigation, there was no evidence that during the Meeting, Council discussed, formulated, or considered its bargaining position. Council did not have any formal offer or term sheet from the Proponent before it, which Council would have to consider and formulate a response. Council also did not discuss the type of terms it would seek in an agreement with the Proponent, including but not limited to monetary consideration. Moreover, Council did not discuss the types of legal mechanisms that could be used to secure the patio, and whether or not to proceed with one method or mechanism over another.

Consideration or discussion of any of the abovementioned topics would have indicated that Council turned its mind to its bargaining position or negotiation strategy, which is the underlying purpose of the closed meeting exception at issue. However, cursory discussions in relation to an agreement that may eventually be drafted and presented to Council, without any consideration or direction on the essential terms of the deal that Council would consider favourable to the Town, does not fit within the closed meeting exception.

Accordingly, it is our conclusion that the Meeting was not closed for a permitted purpose.

¹⁶ It is our understanding that several months after the Meeting at which Council gave its consent to the inclusion of Town-owned land in the Proponent’s future site plan application, the Proponent has not submitted a site plan application to the Town.

2. Did Council's resolution upon re-entering the open session portion of the Meeting provide sufficient detail to comply with the Town's Procedure By-law?

Based on our review of the evidence on a balance of probabilities, Council's resolution to "report out" in this instance did not comply with Section 5.7 e) of the Procedure By-law.

(a) Resolution to "Report Out"

The public minutes from the Meeting demonstrate that Council passed the following resolution upon re-entering open session:

17. Items Arising from a Closed Meeting

1. Matters related to Town-owned Lands

Moved by Councillor Bartley

Seconded by Councillor Sherban

- 1) That Council direct Staff to proceed as instructed in Closed Meeting.

Carried

Based on our investigation, we understand that Council's above-noted resolution was "pre-populated" by the author of the Report and presented to Council as part of the Report before the Meeting. We understand this to be the Town's general practice with respect to reporting out after a closed session.

The above resolution appears to be the extent of the information provided by Council about what transpired during the closed meeting.

(b) Requirement to "Report Out"

"Reporting out" or "reporting back" from a closed meeting is not a requirement that is set out in the *Municipal Act, 2001*.

The practice of "reporting out" from closed session is a matter that is typically addressed in a municipality's procedure by-law. The precise requirements, not being statutorily prescribed, vary amongst municipalities.

Section 5.7 e) of the Town's Procedure By-law sets out Council's obligations to "report out" from a closed meeting session and provides as follows:

Where appropriate and where it does not conflict with the best interest of the Town, Council shall report any decision made in the Closed Meeting upon reconvening in Open Session.

(c) Council's Resolution Did Not Reflect "Any Decision" Made

Based on the evidentiary record, we have determined that the resolution to "report out" in this instance does not comply with Section 5.7 e) of the Procedure By-law.

Taken at face value, and as drafted, Council's resolutions passed in closed session "direct Staff" to take certain actions in relation to the Matter. This included authorizing staff to allow the Proponent's site plan application to include Town-owned lands, directing staff to allow the proposed restaurant patio and address details through an agreement, and directing staff to report back to Council with an agreement.

To the extent that these resolutions provide mere directions to Town staff, the resolution to "report out" does "report any decision made." However, we are of the view that this is not an accurate or authentic characterization of what happened at the Meeting.

Viewed in totality, Council's resolutions passed in closed session effectively allow the Proponent to include Town-owned lands as part of its site plan application. We note that the purpose of bringing the Report to Council was for Council, as the non-applicant owner of lands, to give its consent to the Proponent's inclusion of a portion of the Civic Square in its future site plan application.

Although phrased as a direction to "allow" Town staff to accept such a site plan application, the effect of the resolution is that Council would provide its consent to the inclusion of municipally-owned lands in the site plan application. This, in and of itself, constitutes a "decision". Couching the language of substantive decisions in providing direction to municipal staff derogates from the accountability and transparency objectives of the *Municipal Act, 2001* and Procedure By-law.

We recognize that Section 5.7 e) provides some discretion as to which Council decisions will be disclosed, based on whether disclosure would be appropriate and not conflict with the best interests of the Town. However, there was no indication here that Council turned its mind to whether disclosure of its decision would not be appropriate or somehow conflict with the Town's best interests. Absent this, Section 5.7 e) provides that "Council shall report..." on any decision it makes during closed session.

CONCLUSIONS

Based on the foregoing, we conclude that Council contravened the *Municipal Act, 2001* and the Procedure By-law by its conduct of the Meeting in two respects.

We have determined that Council:

- was not permitted to discuss the Matter in closed session pursuant to clause 239(2)(c) at the Meeting; and
- did not provide a sufficient "report out" after closed session in accordance with Section 5.7 e) at the Meeting.

RECOMMENDATIONS

Based on our conclusions, we recommend that Town staff should familiarize themselves, and members of Council, with the proper application of section 239 of the *Municipal Act, 2001*.

During the course of our investigation, we learned that the preliminary determination as to whether a report will be considered by Council in closed session (and the applicable closed meeting exception) is typically made by a member of the Town's Senior Management Team before and during an Agenda Review Meeting. As such, it would be of great benefit to Town staff and members of Council to receive further training on the closed meeting exceptions and types of situations to which these exceptions may apply.

We also recommend that Council ensure its resolutions to "report out" from closed session accurately reflect any decisions it has made in closed session. Again, we understand that Town staff will typically provide a template resolution to "report out" as part of any closed meeting report. Town staff should give greater consideration to the objectives of open and transparent local government when drafting such "report out" resolutions and seek to provide further disclosure about the specifics of what was determined without negating the very reason for why the matter was considered in a closed setting.

This Report has been prepared for and is forwarded to Council for its consideration.

We note that subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public. Subsection 239.2(12) provides that Council shall pass a resolution stating how it intends to address this Report.

AIRD & BERLIS LLP



John George Pappas

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

Dated this 22nd day of February, 2021