

**REPORT TO
THE CORPORATION OF THE TOWN OF NEWMARKET
REGARDING THE INVESTIGATION OF THE CLOSED MEETING
OF COUNCIL HELD ON FEBRUARY 22, 2016**

I. Complaint

The Corporation of the Town of Newmarket ("Town") received a complaint about an in-camera ("closed") meeting held by the Council for the Town of Newmarket ("Council") on February 22, 2016.¹ The meeting was referred to as a "Council Workshop". The complainant requested an investigation into the validity of the closed meeting as it was alleged that the subject matter did not fit within one of the open meetings exceptions under the *Municipal Act, 2001*² because it was characterized as a "Workshop" rather than a meeting under the Procedure By-law.

This request was sent to the offices of Amberley Gavel Ltd. on February 22, 2016 for investigation.

II. Jurisdiction

The Town appointed Local Authority Services (LAS) as its closed meeting Investigator pursuant to section 239.2 of the *Municipal Act*. LAS has delegated its powers and duties to Amberley Gavel Ltd. to undertake the investigation and report to the Town.

III. Background

Section 239 of the *Municipal Act* provides that all meetings of a municipal council, local board or a committee of either of them shall be open to the public. This requirement is one of the elements of transparent local government.

The section sets forth exceptions to this open meeting rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public.

¹ The complaint is dated in advance of the meeting based on the public notice of the meeting.

² S.O. 2001, c. 25 (hereinafter "*Municipal Act*" or "*Act*").

Section 239 reads in part as follows:

Meetings open to public

239. (1) Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

Exceptions

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

- (a) the security of the property of the municipality or local board;
- (b) personal matters about an identifiable individual, including municipal or local board employees;
- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
- (d) labour relations or employee negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. 2001, c. 25, s. 239 (2).

Other criteria

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

(a) a request under the *Municipal Freedom of Information and Protection of Privacy Act*, if the council, board, commission or other body is the head of an institution for the purposes of that Act; or

(b) an ongoing investigation respecting the municipality, a local board or a municipally-controlled corporation by the Ombudsman appointed under the *Ombudsman Act*, an Ombudsman referred to in subsection 223.13 (1) of this Act, or the investigator referred to in subsection 239.2 (1). 2014, c. 13, Sched. 9, s. 22.

Educational or training sessions

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

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

2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee. 2006, c. 32, Sched. A, s. 103 (1).

Section 239 also requires that before a council, local board or committee move into a closed meeting, it shall pass a resolution at a public meeting indicating that there is to be a closed meeting. The resolution also must include the general nature of the matter(s) to be deliberated at the closed meeting.

Subsections 239 (5) & (6) limit the actions that may be taken by the council, local board or committee at the closed session. Votes may only be taken at a closed meeting for procedural matters, giving direction or instructions to staff or persons retained by the municipality such as a lawyer or planner. It provides as follows:

Open meeting

(5) Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote. 2001, c. 25, s. 239 (5).

Exception

(6) Despite section 244, a meeting may be closed to the public during a vote if,

- (a) subsection (2) or (3) permits or requires the meeting to be closed to the public; and
- (b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board. 2001, c. 25, s. 239 (6).

IV. Investigation

The investigation into the complaint began on May 12, 2016.

The Clerk was interviewed as part of the investigation process. Documents provided by the Town and reviewed during the course of the investigation included the Agenda and Minutes of the Council Workshop, all background documentation provided at the subject meeting, the Town's Procedure By-law, and applicable legislation.

(a) The Procedure By-Law

Section 238 of the *Municipal Act* requires that every municipality and local board pass a procedure by-law. Section 238 reads in part as follows:

1. Every municipality and local board shall pass a procedure by-law for governing the calling, place and proceedings of meetings.

- (2.1) The procedure by-law shall provide for public notice of meetings. 2006, c. 32, Sched. A, s. 102 (3).

The Town has a Procedure By-law that governs the calling, place and proceedings of meetings, including provisions for public notice of meetings.

The Procedure By-law³ provides for closed sessions of Council or its Committees if the subject matter being considered falls within the education and training exception in Section 239(3) of the *Municipal Act*.⁴ More specifically with respect to Council Workshops, the Procedure By-law provides for workshop “meetings” for Council to discuss issues in an informal venue, subject to the caveats that no motions are passed during such meetings and no matter is discussed which advances the business of the municipality.⁵

(b) Notice and Agenda for the Council Workshop, February 22, 2016

A Workshop Meeting of Council was held on February 22, 2016 for a presentation on the “Framework for Future Facilities and Land Use”. The first part of the workshop was planned to be held in open session. The second part was to be in a closed session under section 239(2)(c) of the *Municipal Act* as the subject matter was “proposed or pending acquisition/disposition of land by the municipality and a local board”. Notice of the date, time and location of the Special Meeting was provided to the public.

(c) Minutes of the Council Workshop (Open Session), February 22, 2016

The Minutes of the Council Workshop (“Minutes”) indicate that Council convened at 9:00 a.m., then moved into Closed Session at 9:19 a.m. and out of closed session at 11:30 a.m. At the open session, it received a presentation from the Commissioner of Community Services about the “Recreation Playbook”, the Town’s Recreation Master Plan.

(d) Minutes of the Council Workshop (Closed Session), February 22, 2016

At the in-camera session, Council heard a presentation by the Commissioner of Community Services about strategic properties and facilities of interest in

³ *A By-law to Govern the Proceedings of Council and Committee Meetings*, Corporation of the Town of Newmarket, By-Law Number 2015-50, enacted 26nd day of October, 2015 (“Procedure By-law”).

⁴ *ibid*, s.9. The Procedure By-law properly lists all of the exceptions from section 239 of the *Municipal Act*.

⁵ *Ibid*, s.8(h). The Procedure By-law also provides for notice, recording, and reporting out from such meetings.

furthering the established priorities of the Recreation Playbook. The properties and facilities were planned for potential acquisition by the Town or the Council's local boards, or were identified for possible disposition. No decisions were made in the Closed Session and no votes were taken.

ANALYSIS AND FINDINGS

(a) The Educational or Training Exception

The complaint alleges that a council does not have the authority to conduct its meetings as "workshops". However, the *Municipal Act* permits a municipal council to have a closed session for the purpose of educating or training the members. Whether it is called a workshop or a meeting, it is still a meeting required to be in compliance with the Municipal Act.

An educational or training session is a discretionary exemption to the open meetings rule of the *Act* and may be invoked at the option of the council or committee (but does not have to be). However, at the meeting, if closed to the public, no member can discuss or otherwise deal with any matter that materially advances the business or decision-making of the council. This exception covers closed meetings where the sole purpose is to provide education or training but where no transactional business, decision-making, or advancement of municipal business or decision-making occurs during the session.

"Education" and "training" are not defined in the *Act*. The dictionary definition⁶ for education is:

the process of educating, teaching, or training; the process of imparting or acquiring skills

And for "training":

to give the discipline and instruction, drill, or practice designed to impart proficiency

This discretionary exemption to the open meetings rule allows members of council to receive the benefit of education or training in an environment where they might feel more comfortable openly asking questions of the educators or trainers and when discussing their perceptions about their own personal level of knowledge or ability relating to a proficiency or skill. Examples of these types of sessions including training on communication skills, governance skills, team building, or leadership skills. The purpose of such training or education is not to

⁶ *The Canadian Living Webster Encyclopedic Dictionary of the English Language*, The English Language Institute of America, Chicago, Illinois, U.S.A. (1974).

discuss council business, either in terms of past business or decisions or potential future business or decisions.

In its 2013 publication entitled “What you need to know about: Closed Meetings”⁷, Amberley Gavel Ltd and LAS explain the purpose of this discretionary provision as follows [emphasis added]:

Ongoing training of members of council, local boards or committees is a necessity. There is discretion whether the training is done in public or at a closed meeting. If the council, local board or committee chooses to receive training at a closed meeting then the restrictions found in subsection (3.1) apply. **When utilizing this reason for a closed meeting there can be no debate on an issue, and no member may encourage other members to support a particular position. This restriction includes merely discussing a matter in a manner that is intended to assist in understanding the business of the municipality or local board.**⁸

Hence, the *Municipal Act* provides authority for a council, local board, or committee of either of them to go into closed session for training or education, subject to restrictions on matters that can be discussed and on voting. Whether it is called a session, a meeting, or a workshop is of no consequence. It is still a meeting under the *Act*.

(b) Potential or Pending Acquisition or Disposition of Land

The closed session provided details about the pending or potential acquisition or disposition of land by the Town for recreation facilities. Hence, the Clerk cited in the agenda section 239(2)(c) of the *Municipal Act* to provide greater clarity about what would be heard in the Closed Session.

The purpose of section 239(2)(c) is to allow a council or local board to give instructions to staff, a lawyer, or its agent (collectively, “agent”) in closed session respecting the acquisition or disposal of land within certain parameters. It makes sense that a council or local board would not have open public discussions about its negotiating strategy, most specifically the price it is willing to pay for lands that it wants to acquire title to or receive for lands that it wants to dispose of.⁹ Open disclosure that the municipality is interested – or no longer interested – in the land or the price that a municipality is willing to pay for acquisition of land, or willing to accept for disposal of land, could detrimentally affect the market value of the property itself and, potentially, surrounding properties.

⁷ Available at: <http://www.las.on.ca/PDFs/Services/Closed-Meeting-Investigator/Resources/2013ClosedMeetingBooklet-FINAL.aspx>.

⁸ *Ibid.* at p. 11.

⁹ However, the council or local board can only execute the actual acquisition or disposal of land by a by-law enacted in open session.

Further, potential purchasers or sellers of land ought not to know what value a council is willing to accept or pay. The exemption under the *Municipal Act* protects the municipality's economic interests by not compromising the municipality's bargaining position. Hence, the discussion can be held in closed session.

Having reviewed the materials, we are satisfied that the information was appropriate for a closed session involving the potential or pending acquisition or disposition of land by the municipality based on priorities that had been identified previously by Council and staff. In addition, no decisions were made that would advance the business of the municipality and no instructions were given to staff or others agents and thus it also complied with its Procedure By-law.

Conclusion

Amberley Gavel has concluded that Council for the Town of Newmarket did not breach the open meetings requirement of the *Municipal Act* on February 22, 2016 when meeting in a closed session "Workshop" format to deal with matters that engaged section 239(2)(c) of the *Municipal Act*, and neither did it breach its Procedure By-law.

Public Report

We received full co-operation from all parties that we contacted and we thank them.

This report is forwarded to the Council of the Corporation of the Town of Newmarket. The *Municipal Act* provides that this report be made public. It is suggested that the report be included on the agenda of the next regular meeting of Council or at a special meeting called for the purpose of receiving this report prior to the next regular meeting.

July 2016

Nigel Bellchamber

For

AMBERLEY GAVEL LTD.

Closed Meeting Investigator