**A REPORT TO THE COUNCIL OF THE TOWN OF WHITBY REGARDING AN INVESTIGATION OF A COMPLAINT REGARDING A CLOSED MEETING OF THE TOWN COUNCIL HELD ON NOVEMBER 26, 2012**

**A.THE COMPLAINT**

Pursuant to Section 239.1 of the Municipal Act (“the Act”) relating to closed meetings of council and committees of council, the Town of Whitby received a letter of complaint dated November 30th and delivered to the municipality on December 10th, 2012. The complainant asked for an investigation of a closed meeting of the Town Council held on November 26th, 2012.

The complainant alleged that during the closed session meeting held on that date the Council approved “a change to a by-law” relating to parking and towing “contrary to the Municipal Act”.

**B. JURISDICTION**

The Town of Whitby has appointed Local Authority Services (LAS) to act as its closed meeting investigator pursuant to Section 239.2 of the Act. LAS has, in turn, delegated its powers and duties to Amberley Gavel Ltd. to

undertake the investigation and report to the Council of the Town of Whitby.

The Review Officer for Amberley Gavel Ltd. conducted three interviews at the Whitby Town Hall. Unfortunately, despite numerous attempts to reach the complainant, the complainant could not be interviewed. However Amberley Gavel Ltd. is satisfied that its review of the documentation provided (including two letters received directly from the complainant), and the three interviews conducted has allowed it to investigate this matter in a thorough and fair manner.

**C. LEGAL BACKGROUND**

Closed Meetings:

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 is one of the elements of transparent, open government that the Act encourages. However the Act also provides for a limited number of exceptions that allow a local council or committee of council to meet in closed session.

Section 239 reads, in part, as follows:

[**239.** (1)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%20%5C%20s239s1) Except as provided in this section, all meetings shall be open to the public.

**Exceptions**

[(2)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%20%5C%20s239s2) 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.

Finally, subsections 239(5) and (6) limit the actions that may be taken by the Council at the closed session. Votes may be taken at the closed session only

for procedural matters or for giving direction or instructions to staff or persons retained by the municipality.

The role of an investigator of a complaint filed under Section 239.1 is fairly narrow. The investigator’s role is to determine “whether the municipality…has complied with section 239 or a procedure by-law under section 238(2) in respect of a meeting or part of a meeting that was closed to the public and to report on the investigation”. Accordingly, the role of the investigator is to examine the *process* followed and not the substance of any particular issue. Consequently, Amberley Gavel Ltd. has no jurisdiction to investigate the concerns raised by the complainant in letters submitted directly to it regarding the alleged actions of another agency of local government.

**D. FACTUAL BACKGROUND**

There is no dispute that the Town Council did in fact enter into a closed session meeting on November 26th and during that closed session meeting discussed matters relating to the municipality’s parking by-law (By-law 2916-90) and the towing of vehicles illegally parked pursuant to the provisions of the by-law.

The chronology of events relating to the issue that prompted the complaint, *as indicated on the public record,* is as follows:

1. In the late afternoon of Friday, November 23rd, 2012 the Town posted on its website an agenda for a “Special *In Camera* Meeting of Council” to be held on Monday, November 26rd, 2012 at 5:30 P.M.

2. The agenda indicated that two items were to be considered in the closed session meeting:

i) ‘a confidential memorandum from the Town Solicitor with Respect to ROPA 128” [Regional Official Plan # 128] and

ii) a “confidential verbal update on a Parking/Towing Matter”

3. The agenda further indicated that the reasons for the session being held “*in camera”* were twofold. The matters to be discussed related i) “to advice that is subject to solicitor-client privilege” and

ii) “personal matters about an identifiable individual, including municipal or local board employees”

Both of these justifications are pursuant to the exemptions that permit Council to go into closed session as enumerated in Section 239.2 of the Municipal Act (see above).

 4. At the scheduled time on Monday, November 26th Council convened.

 Firstly, in open session at the commencement of the meeting, a motion

was moved to go into closed session “in that the matters to be discussed relate to advice that is subject to solicitor-client privilege including communications necessary for that purpose and personal matters about an identifiable individual, including municipal or local board employees”.

 5. The *public* minutes of the Special Council meeting then indicate that

 Council first discussed Regional Official Plan #128 with advice from

 The Town Solicitor and then turned to the subject matter of this

 complaint. The minutes state that “R.Petrie, Chief

Administrative Officer, provided a verbal update to Members of

Council. A question and answer period ensued.” Council then moved

to go back into open session.

6. The minutes then summarize the discussion in open session as

follows:

 Confidential Verbal Update on a Parking/Towing Matter

Discussion ensued with respect to Parking By-law No. 2916-90, a copy of which was provided to Members of Council by the Chief Administrative Officer. Members of Council were also provided a copy of Policy 1-3-15 relating to Town Appointment of Private Security Personnel as Municipal Law Enforcement Officers for the purpose of Enforcing Parking Restrictions on Private Property.

The minutes continued with the following motion:

Moved by Councillor Mitchell

Seconded by Councillor Monague

1. That staff be directed to bring forward an amendment to By-law No. 2916-90 to delete Section 4(4) until such time that a further report regarding the licensing of towing is considered by Council;

2. That all affected property owners be notified of the decision in this regard; and

3. That By-law No. 6670-12 be deferred pending the above noted amendment.

By-law 6670-12 – Being a by-law to appoint a Municipal Law Enforcement Officer [Deferred]

7. Finally, at the regular Council meeting held on December 10th the Town Council passed, inter alia, two by-laws:

By-law 6685-12 - A By-law to amend Parking By-law No. 2916-90 to delete Section 4(4) relating to towing.

By-law 6686-12 - A By-law to Appoint a Municipal Law Enforcement Officer [The minutes also indicate that By-law 6686-12 replaced By-law 6670-12 as referred to at the November 26th Special Council Meeting]

**E.THE ISSUES:**

1. ***Whether Council approved an amendment to the Parking and Towing By-law in Closed Session***

As outlined briefly in the Complaint, the main issue is whether Council at its closed session meeting held on November 26th approved a change in a municipal by-law (the parking and towing by-law) contrary to the provisions of the Municipal Act.

It is not at issue that the Municipal Act would require that any amendment to the Town’s Parking and Towing By-law be approved in principle in open session and the implementing by-law also be adopted in open session.

However, as outlined above, the Municipal Act also provides that Council can go into closed session if the discussions fall into one of the exceptions set out in Section 239.1. Such discussions could include deliberations regarding a Parking By-law if one or more of the exceptions are applicable. The municipal staff interviewed as part of this investigation were *ad idem* that both of the exceptions enumerated in the resolution authorizing the closed session meeting on November 26th, 2012 applied to the parking and towing discussion that took place. The “solicitor-client privilege” exception applied because 1) there was a concern regarding municipal liability with the current provision in the Parking By-law that authorized the towing of vehicles parked on private property and 2) the Town Solicitor would be asked to opine on the issue. The “personal matters about an identifiable individual” exception applied because there was to be discussion about one or more individuals involved in the issue that prompted the *in camera* discussion.

Having reviewed the closed session minutes and based on the information received in the interview process, Amberley Gavel Ltd. is satisfied that both exceptions were properly applied and that the discussions that took place warranted an *in camera* discussion.

Although Council cannot vote on matters in closed session (except on procedural issues), subsection 239(6) of the Municipal Act does allow Council “to give directions” to staff in closed meetings. In the case at issue, the minutes show that following the closed session discussion Council reported out in open session and at that time “direction” was given to staff “to bring forward an amendment to By-law 2916-90 [the Parking and Towing By-law] to delete Section 4(4) [regarding the towing of vehicles on private property] and to bring forward “a further report regarding the licensing of towing”. The By-law amendment was subsequently made in open session at the regular Council meeting on December 10th and the evidence from the

interview process indicates that a report on the licensing of towing companies was scheduled to be considered by Council later in the spring.

Again, Amberley Gavel Ltd. is satisfied that the procedure used to move this issue forward was not contrary to the provisions of the Act.

***(b)Lack of Appropriate Notice***

It is the view of Amberley Gavel Ltd. that it also has jurisdiction to consider the appropriateness of *the notice* given of the Special Closed Session meeting of Council held on November 26th, 2012. Under Section 239.2 (1) of the Municipal Act the role of the investigator includes an examination of the issue whether the municipality has complied with a procedure by-law under Section 238(2) of the Act. Such a procedure by-law would include provisions relating to proper notice of *meetings*.

The staff and the member of Council interviewed in this investigation acknowledged that very short notice was given of the Special Council meeting to be held on Monday, November 26th at 5:30 P.M. Notice of the meeting by way of posting of the agenda on the Town website occurred shortly after 4 P.M. on Friday, November 24th. One of the staff interviewed did contend however that the short notice of the November 26th meeting was precipitated more by a time constraint relating to the Regional Plan issue rather than the parking/towing issue.

Although a member of the public would not have been permitted to attend the closed door session, if he or she had an interest in either of the two items on the posted agenda (“ROPA 128” or “a Parking/Towing Matter”), he or she would have had little time to make further inquiries or contact their Council representative to make representations.

Proper notice is recognized as one of the hallmarks of natural justice.

However the recognized right to make representations on issues of public interest is a hollow one if a member of the public is not given adequate notice of the meeting(s) where these issues are being debated by their elected representatives.

This investigation however discovered a more serious concern regarding the Town`s legislative provisions regarding notice of committee and council meetings, both Regular and Special.

In this regard, it should firstly be noted that the Town of Whitby has a tri-weekly system of committee and council meetings. The Planning & Development Committee meets on the Monday of the first week, followed by the Operations Committee on the Monday of the following week, followed then by a regular meeting of Council on the Monday of the third week. The cycle then repeats itself.

The Town has both a Notice By-law (5183-03) and a Procedure By-law (6125-08). However both by-laws are seriously deficient in regards to the issue of notice. The by-laws lack both clarity and mandatory provisions.

The Notice By-law includes the following provisions regarding notice:

1. Where the Town is required to give notice under a provision of the Act, the notice shall be given in a form and in the manner and at the times provided herein unless otherwise prescribed in the Act or otherwise directed by the Council. …

5. Every notice given under this by-law,

 (a) shall be published in a newspaper once a week for two consecutive

 weeks

 (b) shall be posted on the Town website of a minimum of ten days…

The Procedure By-law is generally silent regarding the issue of notice except for the following reference which is included under the heading of “Special Council Meetings”:

5(6) Despite any provisions of this by-law to the contrary, the Clerk shall make every effort to publish an agenda with respect to a Council meeting on the Wednesday of the week prior to such meeting and publish the agenda on the Town’s website the next business day after publishing the agenda.

Except for the above reference to ``Special Council Meetings``, neither by-law specifically addresses the issue of notice for regular council meetings, let alone committee meetings. This glaring deficiency has to be rectified.

The interviews conducted as part of this investigation revealed that “normally” notice of meetings of council were given on the Wednesday prior to the Monday meeting by posting the agenda on the Town website. No notice was regularly published in any newspaper although there is a newspaper published in Whitby thrice weekly. Whether this notice is adequate or not is something for the council to consider but at a minimum the *practice* should be given legislative authority.

It is acknowledged that the Municipal Act gives a municipal council a wide discretion on the type and length of notice to be given:

S.251 “…the municipality shall…give the notice in a form and manner and at the times that the Council considers adequate to give reasonable notice…”

However good practice dictates that notice provisions should

 1) have clarity in drafting,

 2) be mandatory (e.g. avoiding a clause such as “make every effort”) ,and

 3) be reasonable in length

However there is good news on this front. Independent of this investigation, the Town has recognized that there are deficiencies in its procedure and notice by-laws. They are now taking remedial measures to rectify these deficiencies. The Town Clerk has prepared a report that authorizes her to undertake a comprehensive review of the Procedure By-law with a public consultation component as part of this review. This report was approved by the Town Council on March 11th with an amending motion to ensure that the notice by-law would also be included in the review.It is anticipated that this review will be completed shortly.

**F. FINDINGS**

1. Amberley Gavel Ltd. finds that the basis of the complaint filed – that the Town passed an amendment to its parking and towing by-law in closed session on November 26th, 2012 – lacks merit.
2. Amberley Gavel Ltd. finds that the notice provisions relating to the Town`s committee and council meetings lack both specificity and clarity.

**G. RECOMMENDATIONS**

1. Amberley Gavel Ltd. recommends that the Town diligently proceed with its review of its procedure and notice by-laws and ensure that the revised by-laws emanating from this review include specific and clear provisions relating to notice of committee and council meetings and that these provisions meet ``good practice`` standards.

Finally, Amberley Gavel Ltd. would like to thank the Town for its co-operation during the course of this investigation. The Town Clerk assiduously followed up on every request for information. All three individuals from the Town interviewed indicated a commitment to open and transparent government.

AMBERLEY GAVEL LTD.

June 2013

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