**REPORT**

**TO**

**THE COUNCIL OF THE TOWN OF WHITCHURCH-STOUFFVILLE**

**REGARDING THE INVESTIGATION**

 **OF THE CLOSED MEETING**

**OF THE WHITCHURCH-STOUFFVILLE COUNCIL
HELD ON OCTOBER 18, 2011**

**Complaint**

The Town of Whitchurch-Stouffville (“Town”) received two similar complaints on November 11 and November 18, 2011 regarding a closed meeting of the Council held on October 18, 2011.

The complainant states the Town violated Section 239(5) of The Municipal Act 20019 (“ the Act”) by passing a by-law to amend a by-law altering the composition of the Preston Lake North Shore Roads Committee (“PLNSRC”) during a closed meeting without any public notice prior to the closed meeting. The complainant believes the amending by-law increases the number of members on the PLNSRC from seven to eight allowing the Town to fill two vacancies instead of one which was created due to the resignation of one member.

A second complaint was received on November 18, 2011 regarding a closed meeting of Council held on October 18, 2011. Similar to the first complaint, these complainants believe the Town violated Section 239(5) of The Municipal Act by passing an amending by-law to alter the composition of the PLNSRC during a closed meeting of Council without providing any public notice.

Both complaints indicate the residents of the Preston Lake North Shore community were informed the Town would make one appointment to PLNSRC to replace the member who resigned, however, with the enactment of an amending by-law to increase the number of members, two members were appointed without any prior public notice of the by-law amendment and ensuing second appointment to the PLNSRC.

The complaints were forwarded to the offices of Amberley Gavel Ltd. for investigation.

**Jurisdiction**

The Town of Whitchurch-Stouffville appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to section 239.2 of the Municipal Act 2001 as amended by Bill 130 (Municipal Act). LAS delegated its powers and duties to Amberley Gavel Ltd. to undertake the investigation and report to the Council of the Town of Whitchurch-Stouffville.

Section 239.1 provides that the role of the closed meeting investigator is to report to council on “whether a municipality or local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public”.

**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 does set 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.

Section 239 reads in part as follows.

*Meetings open to public*

[***239.****(1)*](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm#s239s1)*Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).*

*Exceptions*

[*(2)*](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm#s239s2)*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)*](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm#s239s3)*A meeting shall be closed to the public if the subject matter relates to the consideration of 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. 2001, c. 25, s. 239 (3).*

*Educational or training sessions*

[*(3.1)*](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm#s239s3p1)*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 moves 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.

No matter or item other than the matter(s) expressly referred to in the public resolution may be discussed or otherwise dealt with at the closed meeting.

Subsections 239 (5) and (6) limit the actions that the council, committee or local board may take at the closed meeting. Votes may be taken only for procedural matters or for giving direction to staff or persons retained by the municipality.

**Investigation**

The investigation into the complaints began on January 11, 2012 and the Town Clerk was so advised. The Town Clerk, Michele Kennedy, was interviewed on February 6, 2012 and the first complainant was interviewed by telephone on March 3, 2012. The second complainants were interviewed by telephone on February 6, 2012.

Documents provided by the Town and reviewed during the course of the investigation include a By-law to Govern the Proceedings of Council Meetings, By-laws to establish the Terms of Reference for the North Shore Roads Advisory Committee, Letter to the residents regarding a description of the PLNSRC and application for appointment, Council agenda for October 18, 2011, Council minutes for October 18, 2011, and a petition from residents of the Preston Lake North Shore community for the selection of the PLNSRC. The Town’s website was also reviewed.

**Findings**

**Preston Lake North Shore Roads Committee**

Properties located on the north shore of Preston Lake have been developed and improved over many years with ingress and egress being provided by a private road network. Ownership of the roads rests with a third party, being a numbered company, with each property having a right of way over these private roads. Some property owners have requested that the Town assume ownership of the private road network, however, the Town has refused primarily because the roads cannot meet municipal standards.

The Town has assisted the property owners by creating the PLNSRC as an advisory committee of the Town and collecting a levy from fifty-one properties to provide funding for the PLNSRC. The Town also provides liability insurance for the activities of the PLNSRC. The PLNSRC prepares an annual budget and work programs to maintain the private rights-of-way on the north shore of Preston Lake.

**By-laws**

**PLNSRC Establishing By-law**

The Town enacted By-law 2011-057-REon April 19, 2011 to establish terms of reference for the PLNSRC. The mandate is to prepare annual work programs, budgets, operations, and administration with respect to the upkeep and maintenance of all private rights-of-way on the north shore of Preston Lake. The composition is described as a minimum of five members but not more than eight members one of which is a member of Council and the others chosen from property owners of the North Shore Community of Preston Lake.

**PLNSRC Amending By-law**

The Town enacted By-law 2011-156-REon October 18, 2011 to amend the terms of reference for the PLNSRC. The composition was revised to provide for a minimum of five members but not more than nine members, with the member from Council now being a non-voting member and the others continuing to be chosen from property owners of the North Shore community. (Underlining used only to emphasize the changes made.)

**Council Procedural By-law**

The Town enacted this By-law 2008-112-MSon August 19, 2008 to govern the proceedings of Council meetings and to repeal By-law 2008-013-MS.

Among other matters, this by-law provides for notice of regular and special meetings of Council, for publication of meeting agendas, a procedure for adding agenda items after posting, and recites the Municipal Act 2001 requirements with respect to closed meeting procedures.

**October 18, 2011 Meeting of Council**

This meeting was duly scheduled, notice given, an agenda prepared and posted, and addenda distributed, all in accordance with the Procedural By-law.

The addenda did not indicate “urgency” or “rationale for inclusion” in accordance with the Procedural By-law but it is noted that Council at the start of the October 18 meeting agreed to their inclusion by motion.

At the meeting, prior to going into closed session, Council passed an appropriate resolution authorizing the closed session, indicating the general nature of the matters to be discussed.

After the Council reconvened in public session at 4:45pm , the Minutes of the meeting include the following:

*Resolution from in camera meeting:*

1. *Report of the Clerk re. Personal matter about an identifiable individual (Municipal Act, Sec. 239(2) (b)) – appointment to the North Shore Roads Advisory Committee.*

*Moved by Councillor Hargrave*

 *Seconded by Councillor Barley*

* + 1. *That the North Shore Roads Advisory Committee Terms of Reference be amended to allow for 8 members to be chosen from the Preston Lake North Shore Community;*
		2. *and that the North Shore Roads Advisory Committee Terms of Reference be amended to reflect the Council Liaison position as a Non-Voting role;*
		3. *and that Council appoint Bruno Pignatelli and Howard Bertolo to the North Shore Roads Advisory Committee for the 2010-2014 term of Council;*
		4. *and that staff prepare the necessary by-laws for inclusion*

 *in the October 18, 2011 Council agenda.*

*Carried*

Council then proceeded to pass eleven by-laws, including By-law 2011-156-RE to amend the PLNSRC composition and voting rights, and

By-law 2011-157-AP adding the new members as noted above in 3), make one proclamation, and then adjourn at 4:50 pm.

**Conclusions**

1. Council’s procedures with respect to closed meetings and related sections of its procedure by-law are in conformity with the Municipal Act 2001, and were followed with respect to the October 18, 2011 meeting of Council up until the point it began its closed session with respect to the matter that is the subject of this investigation.

2. In that closed session it did not follow the requirements of the Act as recited in their Procedural By-law as follows:

*Section 5.5 Voting in Camera*

*a) No vote at an in camera meeting shall be taken unless,*

 *I The subject matter is permitted as per sub-section 5.3 of this By-law, and*

 *ii The vote is for a procedural matter (i.e. to recess, adjourn, amend, table, refer or defer) or for giving directions or instructions to officers, employees or agents of the Town or Council appointed Board, Committee or Commission or persons retained by or under contract with the Town or Council-appointed Board, Committee or Commission*

 Clearly, as reported in the Minutes of Council, the in camera resolution indicated that decisions were made in camera regarding the Committee’s terms of reference and to appoint two specific individuals to the Committee, despite the Act’s limitation on votes only for procedural matters or to provide direction.

3. The composition and voting of the Advisory Committee is not a matter permitted for consideration in closed session under the Act.

4. One might argue that the resolution passed in closed session was indeed only a motion providing direction since it included the clause:

“ and that staff prepare the necessary by-laws for inclusion

 in the October 18, 2011 Council agenda.

However, Amberley Gavel rejects this argument based on the decision of the Supreme Court of Canada wherein it upheld a decision of the Ontario Court of Appeal in **London (City) *v.* RSJ Holdings Inc.**

Receiving two reports and passing eleven by-laws plus one proclamation in five minutes -4:45 to 4:50-leads to the conclusion that the decisions to amend the by-law and to make the appointments were improperly made in closed session, even though they were ratified in open session.

**Recommendations**

1. Council needs to exercise greater care in ensuring that it deal only with those matters in closed session that are permitted by the Act, and which are covered in the resolution citing the exception excluding the public from the session.

2. Staff should be expected to advise Council as soon as a member or members stray from matters covered in the resolution.

3. Votes in closed session, other than procedural votes, should only be taken to provide direction to staff. Best practice includes beginning any such motion considered in closed session with the wording such as “That xxx be directed to…….”.

4. Council should consider a practice that has been adopted in by many other Councils wherein appointments are made in open session with applicants clearly advised of this practice when their applications are solicited. Such a practice enhances transparency.

**Public Report**

We received full cooperation from the Town Clerk and extend our thanks to her.

This report is forwarded to the Council of the Town of Whitchurch-Stouffville. The Municipal Act provides that this report be made public. It is recommended that this 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.

AMBERLEY GAVEL LTD.

June 2012

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Per: