



City of
Peterborough

To: **Members of the Committee of the Whole**

From: **Patricia Lester, City Solicitor, Director of Legal Services**
John Kennedy, City Clerk

Meeting Date: **June 19, 2017**

Subject: **Report OCS17-006**
A report to provide information from the City's Closed Meeting Investigator

Purpose

A report to provide information to Council regarding the report from the City's Closed Meeting Investigator, Local Authority Services ("LAS").

Recommendation

That Council approve the recommendation outlined in Report OCS17-007 dated June 19, 2017, of the City Solicitor and Director of Legal Services and the City Clerk, as follows:

That Report OCS17-006 be received for information.

Budget and Financial Implications

There are no budget or financial implications arising out of this report.

Background

Closed Meeting Investigations

Section 239.2 of the **Municipal Act, 2001** ("Act") requires municipalities to appoint Closed Meeting Investigators. The Investigators are empowered to investigate complaints, and otherwise exercise the powers appointed to them by the municipality.

Upon conclusion of the investigation, the Investigator is required to report their conclusions and reasons to the municipality and make any such recommendations that are appropriate in the circumstances. If in the course of the investigation, it appears that the findings may adversely affect the municipality, the Investigator shall give the municipality the opportunity to make representations respecting the adverse report or recommendation.

The Investigator's conclusion was that the closed meeting on November 16, 2015, was improperly held in closed session. The Report prepared by Amberley Gavel, dated January 2017 (received by staff on January 24, 2017), is attached to this report as Appendix A. In addition, the Investigator did not deem its decision to "adversely affect" the City and thereby did not permit the City to make any representations. The decision of the Investigator is final, and there is no ability to appeal the decision.

The Act requires that the Investigator's Report be made public by Council, which staff complied with on January 25, 2017. There is no legislative requirement to provide a report to Council but as has been our practice, this Staff Report will discuss and analyze the Investigator's findings.

Complaint and Investigation into the November 16, 2015 Meeting

The City Clerk's Office was informed on August 22, 2016, by Amberley Gavel Ltd. that they were undertaking an investigation into a complaint received about the closed meeting held on November 16, 2015. Amberly Gavel Ltd. is the firm who has been delegated the powers and duties of the LAS, the City's Closed Meeting Investigator.

The complainant alleged that the planning issue regarding the casino ought not to have been addressed in a closed meeting and did not fall within one of the exceptions under the Act.

Following notification, a conference call was arranged for August 25, 2016 with the investigator, Brenda Glover and staff including the former Director of Planning and Development, City Solicitor, City Clerk and Deputy City Clerk.

In investigating the matter, Amberley Gavel reviewed the Agenda and Minutes for the November 16, 2015 meeting; the meeting Minutes from the public Planning Committee meeting of May 9, 2016; reviewed the City's Procedure By-law and materials provided by staff including: the presentation made by the former Director of Planning and Development and an excerpt from the Terms of Reference – Office of the Provincial

Land and Development Facilitator (directing that all boundary adjustment discussions be confidential).

In addition to the conference call of August 25, 2016, at which time staff provided an extensive history and review of the meeting in question, a second call was held with the Investigator on November 17, 2016. At that time the Investigator required further clarification on the exact location of the lands that would be acquired or disposed of by the City regarding the location of the casino.

Staff also provided the Investigator with the excerpt from the Terms of Reference – Office of the Provincial Land and Development Facilitator, which stated:

“Confidentiality: In addition to being “without prejudice,” the parties agree that all discussions, and any and all documents, minutes of meetings and correspondence, shall be kept confidential by all parties unless and until all parties consent to their being made public.”

Although Staff can only speak on behalf of the City, its their understanding that both parties respected and adhered to this direction from the Provincial Facilitator.

Facts Regarding the November 16, 2015 Meeting

The City had been in negotiations with the Township of Cavan Monaghan (the “Township”) regarding land boundary adjustments, which were being facilitated by a Provincial Facilitator. The basis for the boundary discussions were the City’s employment land need and land-use options for a proposed casino, as it had been announced in September 2015 that OLG had awarded the operation of gaming sites for the eastern part of the province to Ontario Gaming East LP (a company associated with Great Canadian Gambling Corporation “GCGC”). GCGC were looking to develop a casino in the “Peterborough area”.

Therefore land boundary adjustments and the potential location of a casino site was concurrently discussed between the City and Township. Potential casino sites could have been in either the Township or the City. Staff identified two potential locations within the City, one on lands the City owned - the Downtown Site and the alternate site on privately held lands adjacent to City owned lands that would likely be required for parking for the casino, known as the Gateway Site.

In order to apprise Council of the ongoing boundary and Casino negotiations, staff provided information for the November 16, 2015 Committee of the Whole meeting. The grounds relied upon by the Committee of the Whole to move in closed session was section 239(2)(c) of the Act, “a proposed or pending acquisition or disposition of land by the municipality of local board”.

As a result of the meeting, staff were directed to initiate the land use approval process (OP and rezoning) for the Gateway Site and if GCGC should be interested in an alternative site, Council agreed they would consider it.

Analysis of Investigator's Report

The Investigator provided her report to Nigel Bellchamber, a principle at Amberley Gavel for his peer review. Mr. Bellchamber concluded the following:

- a) the Gateway Site that staff had been directed to initiate the land use approval process for, was within the City limits and required no discussion with Cavan Monaghan;
- b) Committee of the Whole went beyond its negotiating strategy with Cavan Monaghan and gave staff direction in their resolution, stated above; and
- c) there is nothing in the Act that would allow the Provincial Facilitator to request that all negotiations between the parties be kept confidential.

Amberley Gavel thus concluded that Council breached the open meeting requirements of the Act.

Upon receipt of the Report on January 24, 2017, staff contacted Mr. Bellchamber to seek an amendment to the Report, prior to public release. The Investigator had found that the potential disposition of lands by the City (for a casino site) was not compliant with the exceptions under the Act because the casino discussion was only a part of Council's discussion and not the core of the discussion. He indicated that the disposition of land must be definitive and not a potential sale, concluding that the Report would not be amended.

Conclusion and Strategy

In Report OCS16-007, dated September 6, 2016, Staff reported to Council on a previous Closed Meeting Investigation into a meeting held on April 11, 2016. As Council is aware Amberley Gavel concluded in that instance the Committee of the Whole breached the Act. As a result of the findings from that investigation staff have taken the following actions:

- a) undertaken an extensive review of Amberley Gavel and other investigator's reports and prepared a summary of the narrowly defined matters that are allowed to be dealt with in closed meetings;
- b) rigorously reviewed draft reports to ensure that only those parts of a report that come within the exceptions under the Act are included; and
- c) provided greater specificity in the reason provided for going into closed sessions, in the agendas provided to the public.

With regards to Amberley Gavel's finding that the Provincial Facilitator does not have the authority to require a municipal council breach the open meeting provisions of the Act, its questionable whether or not staff should start to query the authority of provincial entities, when providing direction to a municipality.

If as Amberley Gavel states “this determination is consistent with previous closed meeting investigations we have performed”, then its staff’s hope this will be communicated to the Office of the Provincial Land and Development Facilitator, as Peterborough cannot be the only municipality who has so been directed by the province.

It’s unfortunate that the findings of this investigation pre-date the lessons that have been learned. Since the Act does not place any time limit on when a complaint about a closed meeting can be investigated, staff is aware that all of Council’s closed meetings from 2008 (when the Act allowed for such investigations) are subject to a closed meeting investigation.

Summary

The Closed Meeting Investigator’s Report has been a learning experience of what the exceptions are under the Act and how they can be applied to City Council business. While staff may not agree with all of the Investigator’s findings, staff respect the process and will continue to be vigilant in regards to closed meetings.

Submitted by,

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City Solicitor & Director of Legal Services

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City Clerk

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Attachments:

Appendix A – Report to the Corporation of the City of Peterborough Regarding the Investigation of the Closed Meeting of the Committee of the Whole of Peterborough Council on November 16, 2015.

Appendix A

**REPORT TO
THE COUNCIL OF THE CORPORATION OF THE CITY OF PETERBOROUGH
REGARDING THE INVESTIGATION OF A CLOSED MEETING
OF COMMITTEE OF THE WHOLE (COUNCIL)
HELD ON NOVEMBER 16, 2015**

I. Complaint

Amberley Gavel Ltd. received a complaint about a closed meeting held by Committee of the Whole of the Council ("Committee of the Whole") of the City of Peterborough ("City") on November 16, 2015. The complainant requested an investigation into the validity of the closed meeting as it was alleged that the subject matter of one or more of the items discussed at the meeting did not fit within one of the open meetings exceptions under the *Municipal Act, 2001*¹.

II. Jurisdiction

The City 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 City.

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.

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;

¹ S.O. 2001, c. 25 (hereinafter "*Municipal Act*" or "*Act*").

- (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).

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 or for 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 Clerk, City Solicitor, Director of Planning and Development, and Deputy Clerk were consulted as part of the investigation process. Documents provided by the City and reviewed during the course of the investigation included the Agenda and Minutes of the Committee of the Whole Meeting, background documentation provided at the subject meeting, the City's Procedure By-law, other relevant material, and applicable legislation.

(a) Notice and Agenda for the Committee of the Whole Meeting, November 16, 2015

The Agenda noted, among other items, that the Committee of the Whole was intended 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 or a local board". Notice of the date, time and location of the Meeting was provided to the public in accordance with the City's established procedures.

(b) Minutes of the Committee of the Whole Meeting, November 26, 2015

The Minutes of the Committee of the Whole ("Minutes") indicate that Committee of the Whole convened at 4:57 p.m., then immediately moved into Closed Session at 4:57 p.m. and back out of closed session at 6:38 p.m. In terms of the subject matter at issue in this complaint, Committee of the Whole received a presentation from staff about the "Cavan Monaghan Boundary Issue". The presentation suggested several key "directions" to staff as a result of that presentation. One involved the boundary issue with Cavan Monaghan. The other dealt with the designation of an alternate potential Casino site and was worded:

"That staff be directed to initiate the land use approval process (OP and rezoning) for the 'gateway site', and should the proponent be interested in an alternative site, Council will consider it."

The 'gateway' site was within the City limits and required no discussion with Cavan Monaghan.

V. ANALYSIS

(a) Potential or Pending Acquisition or Disposition of Land

In the closed session staff reviewed details about discussions regarding the ongoing and longstanding negotiations with Cavan Monaghan related to boundary adjustments, servicing allocations for the Township, and a potential casino for the area. According to staff, it was believed that all of these issues engaged the potential acquisition of land by the City.

In addition, the parties (i.e. the City and the Township) had sought the assistance of the Provincial Land and Development Facilitator to aid in the negotiation of the boundary adjustment issues. The Provincial Development Facilitator Coordinator ("PLDC") assists municipalities and other parties to resolve any land use disputes through negotiation and mediation. According to staff, it was practice at the time of that Office to insist upon confidentiality of the negotiation process.

Committee of the Whole went beyond its negotiating strategy with Cavan Monaghan at its meeting and gave staff direction in the resolution quoted above

Apparently the public was not aware of Council's direction with respect to the alternative site until almost six months later, in May 2016, when staff had already considered the options for Official Plan amendments and rezoning.

The complainant asked us whether or not Council had already made its decision as to the use of this property when it began the process in public in May of 2016. That determination is outside the mandate of a closed meeting investigator.

(b) Provincial Land and Development Facilitator

Staff indicated that the PLDF requires that all negotiations and discussions related to the negotiations between parties with respect to municipal boundary adjustment be confidential.

With respect, we see nothing in the *Municipal Act* that would allow the PLDF to request this requirement. We are unaware of any legislation that would give the PLDF or any other Provincial official the authority to require that a municipal council breach the open meetings provisions of the *Municipal Act*. This determination is consistent with previous closed meeting investigations we have performed.

Confidential discussions between staff or agents of councils are of course possible. But the direction that they take from Councils to follow in those discussions can only be given in a closed session if the subject matter itself meets one of the previously cited exceptions. Negotiating parameters for the acquisition of land for road widening is a common example of an allowable direction.

Amendments to the statutory exceptions that might consider such discussions as were held by Committee of the Whole in November 2015 are proposed in Bill 68, introduced in late 2016, but at all material times were not the law.

(c) Disclosing the General Nature of the Matter to be Discussed

The Agenda for the Committee of the Whole Meeting and the resolution to move into Closed Session cited the exemptions under the *Municipal Act* being used to justify why the meeting was to be closed to the public. In this particular case, the general nature of the proposed discussion disclosed was dealing with a "Cavan Monaghan Boundary Issue".

The public was not, and could not be aware, that Council would be asked to consider an alternate casino location in the event of failed negotiations with Cavan Monaghan for a Boundary Adjustment and partnership casino.

VI. Findings

It was argued that the City was following Provincial direction and believed that the discussions surrounding the Boundary Adjustment, which were linked to a possible casino site decision, had to be held in closed session.

We do not agree, in fact we do not believe that there is any authority for it to be in closed session under one of the discretionary exceptions to the open meeting requirement of the *Municipal Act* for the purpose of discussing municipal boundary adjustments.

It was also argued that the discussions involved the acquisition of land by a municipality and hence fell into one of the statutory exceptions possible.

We do not agree with this argument either as the municipality was not "acquiring" land. While it might take title to some roads as an incidental result of a boundary adjustment, the purposes of the discussions was not to actually take title to specific property or properties.

VII. Conclusion

Amberley Gavel has concluded that Committee of the Whole for the Council of the City of Peterborough breached the open meetings requirement of the *Municipal Act* on November 16, 2015 when meeting in closed session.

VIII. 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 City of Peterborough. 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.

January 2017

**Closed Meeting Investigator
AMBERLEY GAVEL LTD.**

Nigel Bellchamber

Per: