



Amberley Gavel Ltd.

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**CLERK'S**

**INVESTIGATION INTO  
THE CITY OF CAMBRIDGE  
SPECIAL COUNCIL MEETING  
HELD ON MARCH 31, 2008**



**REPORT TO THE COUNCIL OF THE CITY OF CAMBRIDGE  
INTO THE INVESTIGATION OF THE SPECIAL COUNCIL MEETING  
HELD ON MARCH 31. 2008**

**Complaint**

The City of Cambridge (City) received a complaint on April 24, 2008 in regard to a special Council Meeting held on March 31, 2008. The complainant requested an investigation alleging that this special council meeting was closed to the public and therefore constituted an illegal in-camera meeting.

The complaint is that the special council meeting was not advertised in the City's usual manner, through the City's web site. The complainant is of the opinion that the public was not advised legally and therefore in the complainant's opinion the meeting was therefore closed to the public. The complainant also alleges that only a select few were invited to the meeting. Also alleged was that only supporters of the proposal, on the agenda, were advised of the meeting.

This request for an investigation was forwarded to the offices of Amberley Gavel Ltd. for investigation.

**Jurisdiction**

The City of Cambridge 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 has delegated its powers and duties to Amberley Gavel Ltd. to undertake the investigation and report to the Council of the City of Cambridge.

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) 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 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) 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 of the complaint began on May 30, 2008. The complainant was interviewed and the City Clerk was advised that an investigation was underway. The City Clerk, Chief Administrative Officer and the Mayor were interviewed in June during the course of the investigation. Documents provided and reviewed during the investigation included agendas, minutes, notices relating to the meeting, the City's Procedure By-law with amendments and Notice Policy.

### **The City's Procedural By-Law**

Subsection 238 (2) of the Municipal Act requires that every municipality and local board pass a procedural by-law for governing the calling, place and proceedings of meetings. Subsection 238 (2.1) was added by Bill 130 and provides that the procedure by-law shall provide for public notice of meetings. The City's Procedure By-law 77-03 together with several amendments provides that special meetings of council may be called by the mayor or by the clerk when in receipt of a petition by a majority of members of council (section 1.07).

Article 3 of the Procedure By-law provides for notice of meetings of council. This section was amended in 2007. The preamble to amending By-law 156-07 reads in part as follows:

*"AND WHEREAS pursuant to Section 238 (2.1) of the Municipal Act, 2001, S.O. 2001, c. 25, requires that the procedural by-law shall provide for public notice of meetings".*

Subsection 3.05.1 and 3.05.2, among other changes, were added to the

Procedure By-law. They read:

*"3.05.1 Where notice of intention to pass a by-law or notice of a public meeting is required to be given, the Clerk shall cause such notice to be published in a newspaper.*

*"3.05.2 Where notice of intention to pass a by-law or notice of a public meeting is required to be given, such notice shall be provided in the time frame prescribed in the Act or its regulations, and if not shall be given at least once no less than 21 days prior to the proposed action being taken."*

The complaint was that the special council meeting was not advertised in the City's usual manner, through the City's web site. There is no reference in the Procedure By-law nor in the Notice Policy in By-law 213-02 to notice being given on the city's website. In both by-laws reference is to notice in a newspaper.

The City has a 3 week cycle of regular meetings as follows:

1 <sup>st</sup> week	General Committee
2 <sup>nd</sup> week	Council
3 <sup>rd</sup> week	Blank

The meeting of Council on March 31, 2008 was a special meeting of Council. The City does on occasion have special meetings of Council usually requested by the Mayor. This is not an unusual event. Council may have 3 or 4 special meetings a year. In this particular instance, the Mayor requested a special meeting of Council be held to have a presentation and full discussion in bringing the Venice Biennale to the City of Cambridge.

The agenda for the special meeting indicates that the meeting of Monday, March 31, 2008 was to be a public meeting beginning at 7:00 PM. The agenda provided for declarations of pecuniary interest and listed two presentations following which there was a motion to move into a closed meeting under the heading of "other business". The final item on the public agenda, following the closed meeting portion was By-law 41-08, a confirmatory by-law.

The minutes of the March 31, 2008 meeting indicate that public presentations were made by the Chair of the Library Board, by the Director University of Waterloo School of Architecture and by the Gallery Director of Cambridge Galleries.

The Mayor wanted these presentations and the discussion that followed to be widely publicized. Reporters from the Kitchener Record were in attendance as well as the local media. The Chamber of Commerce was notified of the meeting and invited to attend by the Mayor. We were advised that the usual number of

the general public were also in attendance.

The normal practice for the City in advising the public of a meeting whether it is a regular meeting or a special meeting is as follows:

- The agenda is available on Thursday of the week prior to the Monday meeting.
- All members of Council and senior staff receive the agendas on that Thursday.
- The media receive the agenda on Friday at noon.
- The City website is posted by the Clerk's office on Friday afternoon.

This process is not reflected in the City's Procedure By-law. In regards to the meeting in question on March 31, 2008 the above procedure was followed with one exception. The notice was not posted on the website until the Wednesday following the Monday meeting. The reason for this was that the City's provider of the web service was having technical difficulties. It was an exception that was not caused by any official of the City. It was not the intention of City staff or the Mayor to not notify the public of the meeting. However, no additional steps were taken to bring attention to the special meeting because the website was down.

It was estimated that this special council meeting had 30 to 40 members of the public in attendance, which is the norm. As noted previously the media were in attendance at the meeting.

The agenda for the Special Council meeting of March 31, 2008 notes that a closed meeting is to follow this public meeting.

The motion included on the public agenda to convene a closed session of Council read as follows:

*"THAT in accordance with Section 239(2)(e) of the Municipal Act, 2001, Council convene in Closed Session to consider litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board."*

The recommendation to convene a closed session of Council does not mention two matters that were discussed in the closed session. These pertained to possible acquisition of land and an identifiable individual.

The motion that was duly moved and seconded to go into closed session only noted litigation or potential litigation including matters before administrative tribunals affecting the municipality or local board. The investigation has revealed that an identifiable individual and possible land acquisition was discussed.

The minutes of the public portion of the Special Meeting do not indicate that the Chair rose and reported on the matters discussed in closed session. Although the Municipal Act does not expressly require a report following a closed meeting, it is good practice to confirm in a public meeting that the closed meeting was held and that the matters deliberated were those for which the council was authorized by the public resolution to meet in closed session.

## **Conclusion**

The mandate of a closed meeting investigator is narrow and is focused upon "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". The complainant in this instance was concerned that the special meeting of council on March 31, 2008 was closed to the public because notice was not provided on the City's website.

It is apparent that the special meeting was intended to be public. The media were notified and attended as did over 30 members of the public. Because of website difficulties the City's usual practice of posting the notice on the website did not happen. The fact that the meeting was not posted on the City's web site as the usual policy allows, although unfortunate, did not deter the public from attending the meeting.

The media received the agenda on the Friday prior to the Monday date of the meeting. The agenda was available to the general public through the Clerk's office or the public's representatives on Council. Calls were made to the Clerk's office asking if there was a meeting scheduled for Monday March 31, 2008 and were answered in the affirmative.

The Mayor did invite the Chamber of Commerce to the meeting as well as the media. He wanted this meeting widely publicized. There was no evidence that only a select audience was in attendance nor that there was a deliberate attempt to exclude the public.

It is however not the mandate of the closed meeting investigator to determine whether notice of a public meeting of council, a committee or local board was properly given. But it is within the mandate to determine if the municipality complied with its own by-law. It did not. And it is apparent that the practices for giving notice to the public are different from what council has adopted as its policy as found in the Procedure By-law and Notice Policy. While the City did use a reasonable practice in giving notice, it did not comply with its own Procedure By-law's requirements for giving notice of the meeting.

The Procedure By-law was amended by By-law 156-07. The amendments were

made to meet the requirements of section 238. This intention was recited in the preamble to By-law 156-07. The purpose of the amendment to section 238 was to ensure that public notice be given by municipalities prior to meetings being held. Public notice is required.

As noted above, section 3:05.1 requires the clerk to give public notice of a meeting when required by publishing in a newspaper. Section 3:05.2 requires the public notice be given no less than 21 days prior to the public meeting. There is no other provision in the City's by-law regarding public notice of meetings.

The Clerk does have a discretion in section 3:05.11 to use more comprehensive methods of notice beyond publication in a newspaper or to extend the notice period. There is no discretion to shorten the 21 day time period.

Although it is the requirement of the Procedure by-law, it has not been the practice of the City to give 21 days public notice of its meetings. There is no other public notice provision in the Procedure By-law.

With respect to the closed session on March 31, 2008, it is clear that it was included on the agenda for the special meeting. A motion was included on the agenda and according to the minutes it was passed by council in the same wording.

The motion that was duly moved and seconded to go into closed session only noted litigation or potential litigation. The investigation revealed that an identifiable individual and possible land acquisition was discussed. These deliberations were not authorized to be dealt with at the closed meeting. Therefore, the public resolution required by section 239 was not passed by council.

The Municipal Act, 2001 with the Bill 130 amendments has made it clear that municipal councils must be transparent in their conduct and be accountable to the public for their actions. Each municipality must have an Accountability and Transparency Policy outlining how the council and indeed the entire municipal organization will be accountable and transparent. The City of Cambridge does have one.

The legislative intent is clear when it states in section 239 that all meetings of council, committees and local boards shall be open to the public. This open meeting requirement is fundamental to the ability of the public to observe and participate in a real and meaningful way. If a council, committee or local board intends to hold a closed meeting it may only do so for reasons set out in section 239.

Another element of this open and transparent policy is that council, a committee or local board must pass a resolution at a public meeting before going into the closed meeting. Subsection 239 (4) reads:

**"Resolution**

*(4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,*

*(a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or*

*(b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject-matter and that it is to be closed under that subsection."*

This resolution must include two elements. First, the public is entitled to know when a closed meeting is about to be held. The resolution must indicate the fact that the closed meeting is about to occur.

Second, and equally important, the public is entitled to know the general nature of the matter being considered. That did not happen in this instance. The public was told about the fact of the closed meeting and that the subject matter was litigation or potential litigation. That was not sufficient.

The evidence of the city officials and the closed meeting minutes itself was that there were deliberations with respect to an identifiable individual and possible land acquisition. These were not authorized by the public resolution.

The closed meeting deliberations were not authorized by an appropriate public resolution.

**Recommendations**

1. That the public motion to go into closed session comply with the requirements of the Municipal Act, 2001 and that council only deliberate matters at a closed meeting that have been authorized in the public resolution.
2. That the Procedure By-law be amended to include public notice for meetings as required by the Municipal Act, 2001, including time and location, that reflect the City's current practice including posting on the website. The rules should distinguish the differences between a regular and a special meeting of council.

3. That after closed sessions of Council the chair of the closed session rise and report to the extent possible and that this be reported in the minutes of the public meeting.

While Cambridge City Council and staff intended that this meeting be given wide public notice it did not do so in a way that their bylaw requires and did not disclose to the public in an appropriate way the topics discussed in the closed portion of the meeting. Staff and Council are encouraged to review and amend their by-laws and procedures so that the public can rely on them in a predictable way with the knowledge that Council is acting within the requirements of the Municipal Act for meetings where all or a portion is closed to the public.

### **Public Report**

We received full cooperation from the Mayor and staff of the City and we thank them.

This report is forwarded to the Council of the City of Cambridge. The Municipal Act provides that this report be made public. It is recommended that this report be included on the agenda on 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, 2008

### **Closed Meeting Investigator**

**AMBERLEY GAVEL LTD.**

A handwritten signature in cursive script, appearing to read "M. J. Dean", is written over a solid horizontal line.

**Per:**