**REPORT TO**

**THE CORPORATION OF THE CITY OF BURLINGTON REGARDING THE INVESTIGATION OF A COMPLAINT WITH RESPECT TO THE SPECIAL MEETING OF COUNCIL FOR THE CITY OF BURLINGTON IN CLOSED SESSION ON MARCH 4, 2013**

1. **COMPLAINT**

The Corporation of the City of Burlington (“City”) received a complaint about a Special Meeting of City Council in Closed Session on March 4, 2013. The essence of the complaint is that various aspects of the closed meeting were in contravention of the open meetings provision of the *Municipal Act, 2001*[[1]](#footnote-1),as amended by Bill 130[[2]](#footnote-2) (“*Municipal Act*” or *“Act*”) or of the City’s Procedural By-law[[3]](#footnote-3).

This request was sent to the offices of Amberley Gavel Ltd. (“Amberley Gavel”) for investigation.

1. **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 to undertake the investigation and report to City Council.

1. **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 meetings rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public. The section confers discretion on a council, committee or local board to decide whether or not a closed meeting is required for a particular matter. That is, it is not required to move into closed session if it does not feel the matter warrants a closed session discussion.

Section 239 reads in part as follows:

Meetings open to public

**[239.](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s1)**[(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%22%20%5Cl%20%22s239s2)  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).

**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.

The *Municipal Act* also requires a council to have a procedure by-law which governs the calling, place and proceedings of meetings (section 238.(2)) and provisions for public notice of meetings (section 238.(2.1)).

The *Act* authorizes the municipality to appoint an investigator who has the function to investigate in an independent manner, on a complaint made to him or her by any person, whether the municipality or a 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, and to report on the investigation (section 239.(2)).

1. **INVESTIGATION**

Documents reviewed during the course of the investigation included the Agenda and Minutes of the Special Council Meeting of March 4, 2013, the Procedural By-Law and Notice By-law, and other documentation regarding City Council’s Quarterly Governance Meetings. The City Clerk was also consulted during the course of the investigation.

1. **BACKGROUND**
2. **The Complaint**

The complaint deals with various aspects of a Special Meeting of City Council held on March 4, 2013. Concerns itemized in the complaint are:

* Why are routine quarterly governance Council meetings for the purpose of training deemed “Special Meetings” and, as such, not approved in advance by Council resolution as per the City’s procedural by-law or otherwise accounted for in the City’s annual calendar of meetings?
* Why was notice for this meeting not provided in a manner that was consistent with past practice of the City (i.e. through notice in the local newspaper)?
* Why has the public been specifically and wrongfully informed repeatedly that it cannot attend the portions of the meeting that are supposed to occur in public?
* Why was the meeting conducted in a private venue unfamiliar to the public and away from City Hall and Council Chambers where Council normally meets?
* Why was a closed Council meeting called for a half hour before any agenda items were scheduled to be discussed and what was discussed in the absence of the public from 8:30 to 8:56 a.m.?
* Why was the closed meeting in session from 12:00 to 1:00 p.m. with no agenda items scheduled and what was discussed during that period?
1. **Agenda for the Special Council Meeting of March 4, 2013**

The Agenda for the Special Meeting of Council on March 4, 2013 indicates that it was a “Quarterly Governance Meeting” and that it would be closed to the public in accordance with section 239(3.1) of the *Municipal Act*. The Agenda indicates that Council and its Senior Management Team would meet from 9:00 a.m. to 12 noon on a “Leadership and team decision-making case study” presented by an Associate Professor at the Ivey School of Business. It also indicates that Council and select City staff would meet from 1:00 p.m. to 4:30 p.m. in a workshop format to address “Council decision-making”, facilitated by external training consultants.

1. **Minutes of the Special Council Meeting on March 4, 2013**

The Minutes for the Special Meeting of Council on March 4, 2013 indicate that the meeting convened in open session at 8:55 a.m. and, after canvassing “declarations of interest” convened into closed session at 8:56 a.m. by Council resolution.

Council remained in closed session until 4:20 p.m. The Minutes note the arrival and departure of various consultants and staff through the day. In the open session of the meeting, just prior adjourning, Council received and filed the various presentations that it received during the day relating to the education and training objectives of the day. It then adjourned.

1. **ANALYSIS AND FINDINGS**

The complaint will be assessed in light of the concerns identified.

1. **Section 239.(3.1) of the *Municipal Act***

The *Municipal Act* permits the holding of a closed meeting for the purposes of educating or training members of council. However, at any such meeting, members are prohibited from discussing or otherwise dealing with any matter in a way that materially advances the business or decision-making of the council.

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 training facilitators and discussing their perceptions about their level of knowledge on an issue.

1. **Purpose of the Special Meeting**

According to the Clerk, the Mayor had suggested to Council at some point early in this Council’s term that Council have meetings that would focus on specific aspects of Council’s governance mandate. Council agreed to the establishment of quarterly governance meetings in May 2012.[[4]](#footnote-4) The Clerk indicated that City Manager is charged with the responsibility, in concert with the Mayor and the Clerk, to schedule and plan the quarterly governance meetings.

The quarterly governance meetings generally focus on key aspects of the City’s strategic plan, to advance its objective toward “excellence in government|, and to facilitate the working relationship as between Members of Council as a governance body and as between Members of Council and senior staff.

Not all of Council’s governance meetings are held in closed session. For example, Council had a special meeting on November 19, 2013 at which time it considered two agenda items in open session relating to the future vision and strategic plan of the City.[[5]](#footnote-5)

The particular meeting at issue in this complaint was closed to the public as it was specifically for the educating and training of Members of Council on the practice of good governance. Workshop topics focused on the process of making efficient and effective decisions (through case study analysis) and team-building.

The Clerk indicated that Members of Council, City staff, and the workshop facilitators are all aware of the rules governing these closed session workshops, specifically that no items can be discussed that are either not part of the specific training themes (e.g. the process of decision-making or team-building) or that materially advance the business or decision-making of the municipality.

The Clerk was in attendance at all times during the workshop sessions. She testified that no discussion or deliberation occurred in the closed session that was not part of the education or training themes or that materially advanced the business or decision-making of the municipality.

1. **Deeming the Meeting as a “Special Meeting”**

The complaint alleges that this Special Meeting was not approved by resolution in advance of the holding of the meeting.

The City Clerk indicated that education or training sessions are called “Special Meetings” solely to distinguish the meeting from the “Regular Meetings” of Council. The aim of this designation is to highlight for the public and the media that only specific agenda items will be covered. The public or media can then choose whether or not to attend depending on their interest in the agenda items.

The *Municipal Act* is silent on the distinction between a regular meeting and a special meeting. The City’s Procedural By-Law provides for the calling of a Special Meeting of Council by the Mayor and/or City Manager at any time and upon receipt of a petition of the majority of Members of Council or upon approval of a Council resolution authorizing a Special Council Meeting.[[6]](#footnote-6)

There was no petition of a majority of Members of Council or a Council resolution authorizing the particular Special Meeting of March 4, 2013. The Clerk indicated that it was not deemed necessary as all Members of Council knew that various governance meetings would be scheduled at quarterly intervals throughout the year.

The Procedural By-law provides that a petition be received or a resolution be made which indicates the purpose and/or the time mentioned for the holding of a Special Meeting. That was not done in this case. However, that was not an intentional breach of the Procedural By-law; the Clerk, reasonably in our opinion, was under the impression that a petition or resolution was not required by virtue of Council’s earlier decision in May 2012 that quarterly governance meetings would be scheduled.

Merely because a resolution or petition was not received for the particular Special Meeting of Council does not make the actual holding of the meeting invalid or improper.[[7]](#footnote-7) In addition, as indicated later in this report, Council did abide by the mandatory, substantive provisions of the *Municipal Act* in holding the closed meeting.

We would suggest that Council not call quarterly governance meetings as “Special Meetings”, as that phrase is understood in the Procedural By-law, if the purpose of the meeting is for educational or training purposes. Rather, it might be more appropriate to call such meetings an “educational or training workshop”. This clearly distinguishes for the public that the meeting is held under section 239.(3.1) of the *Municipal Act*.

We have found that there was no breach of the *Municipal Act* in deeming this meeting to be a “Special Meeting”, to distinguish it from a “Regular Meeting”. Strict adherence to the Procedural By-law would have required that a petition of the majority of Members of Council or a resolution of Council be received in order to hold this Special Meeting. However, that was a minor, unintentional, procedural oversight, in light of the history and purpose of quarterly governance meeting, which did not make the actual holding of the meeting invalid or improper.

1. **Notice for the Special Meeting**

Further, the complaint alleges that it was called a “Special Meeting” in order for the City to avoid inclusion of the meeting in the City’s annual calendar of Council meetings.

The *Municipal Act* provides that the procedure by-law provide for public notice of meetings.[[8]](#footnote-8) It does not generally dictate when or how the notices are to be published, unless certain notice requirements are prescribed through specific legislative provisions. The City’s Procedural By-Law does not specify when or how general notices of Regular Meetings or Special Meetings of Council or its Standing Committee will be published.[[9]](#footnote-9)

The City’s annual Calendar of Council and Standing Committee Meetings is normally established for the upcoming year at the end of a prior year. For example, the annual calendar for 2013 was established in October 2012.[[10]](#footnote-10)

The Clerk indicated that the Quarterly Governance Meetings were not listed on the 2013 calendar because she was still canvassing dates for the possible workshops depending on the availability of the facilitators, the Members of Council, and applicable staff.

However, Members of Council were aware that quarterly governance meetings would be held in 2013 beyond of the “Regular Meeting” stream.[[11]](#footnote-11)

The City’s Procedural By-Law defines as “Special Meeting” as “a meeting not scheduled in accordance with the approved calendar of meetings”.[[12]](#footnote-12) Hence, the Procedural By-Law recognizes that not all meetings which are to occur in a given year can, or will, be included on the annual calendar of meetings which is approved in the prior year.

The Clerk indicated that meetings of Council are published in the newspaper and on the City’s website. Burlington does not have a daily newspaper; the Burlington Post is published from Wednesday to Saturday.  The City has a weekly column in the Burlington Post and Regular Standing Committee and Council meetings are advertised in the City’s weekly column in the Burlington Post. However, because of publication deadlines, it is not always possible to advertise Special Meetings of Council. Hence, they are often published only on the City’s website and, if possible, disseminated through Twitter.

The Special Council meeting of March 4, 2013 was published through the online calendar on the City’s website as a Special Meeting of Council, noting the time, location, and duration of the meeting and indicating that it would be closed to the public in accordance with section 239(3.1) of the *Municipal Act*.[[13]](#footnote-13)

The fact that this particular Special Meeting was not listed on the 2013 Calendar of Council and Standing Committee Meetings is neither a breach of the *Municipal Act* nor of the City’s Procedural By-Law. Public notice of the Special Meeting was published on the City’s website as appropriate.

1. **Council Resolution for the Special Meeting**

Before holding a closed meeting for the purposes of education or training, a council is required to pass a resolution stating that such a meeting will be held, as well as the general nature of its subject matter and the relevant legislative provision.

A resolution was duly passed in the open session of the Special Meeting on March 4, 2013 to “move into closed session under Section 239 (3.1) of the *Municipal Act,* 2001 for education and training purposes”. This conforms to the requirements of the *Municipal Act*.

1. **Excluding the Public**

The complaint alleges that the wording of the Agenda for the Special Meeting seems to exclude the public from attending those portions of the meeting that must be open to the public under the *Municipal Act*.

The *Municipal Act* and/or the City’s Procedural By-law provide that the meeting must be open for the purposes of declaring pecuniary interests, resolving to move into closed session, receiving and filing any presentations or materials received in closed session, and adjourning the meeting.

The Agenda for the March 4, 2013 Special Meeting does not indicate which portions of the meeting will be open to the public and which portions will be in closed session. The Minutes for the March 4, 2013 Special Meeting clearly indicate that Council was in public session for those components of the meeting that it is legislatively required to be in open session.

In our opinion, if an educational or training workshop is properly closed to the public under the approved section of the *Municipal Act*, and the meeting notice states that the meeting will be closed, one could reasonably assume that the public would not want to attend just to hear declarations of interest, or a resolution to move into or out of closed session, or the motion to adjourn.

The fact that the Agenda did not specify which portions of the meeting would be open to the public, however brief those portions would be, is a procedural error in the design of the Special Meeting Agenda and could be easily corrected for future education and training sessions intended to be closed to the public.

1. **The Venue for the Meeting**

The complaint alleges that the venue for the Special Meeting is away from “where Council normally conducts business” and that this is a “deterrent to public attendance”. Further, the choice of location “ensured that the public portions of the meeting could not be broadcast or recorded”.

The *Municipal Act* does not require a council to hold its meetings at City Hall. It merely requires a council to hold meetings within the municipality or an adjacent municipality, except in the case of emergencies, in accordance with its procedural by-law.[[14]](#footnote-14) The City’s Procedural By-law provides that Regular Meetings of Council will be held in City Hall, unless otherwise determined by resolution of Council or in the case of emergency.[[15]](#footnote-15) It does not specify the location of Special Meetings.

The Clerk indicated that the Burlington Performing Arts Centre was chosen as the location of the Special Meeting because it is more conducive to a workshop setting. It is across the street from the City Hall. Further, since the workshop would be closed under 239(3.1) of the *Municipal Act*,broadcasting or recording was not necessary or required.

It is fairly usual that a council, committee, or local board would hold a workshop off site from the City Hall. Quite beyond the fact that the rooms in the off-site building might be more conducive to a workshop-type setting, off-site meetings are less distracting – attendees are not moving back and forth to their offices or being easily interrupted. It encourages the participants to participate more fully in the topics under discussion.

The Burlington Performing Arts Centre is approximately 0.21 kilometers away from City Hall. It is less than a three minute walk. In addition, it is well-known community facility. Even if the public had mistakenly shown up at Council’s “regular meeting place”, it takes only a few minutes to be at the alternate location. It cannot be said that the location of the Special Meeting deterred public attendance.

Neither the *Municipal Act* nor the City’s Procedural By-law requires that all meetings of Council, its committees, or local boards be broadcasted or recorded. It may be a service that the municipality provides to enhance access and accessibility of open meetings. Audio recordings of closed meetings may also be useful as an oral record of the meeting. However, broadcasting or recording of any meetings is neither legislatively required nor required by the Procedural By-law.

We have concluded that the location of the meeting, and the fact that it was not broadcasted or recorded, did not breach either a requirement of the *Municipal Act* or the City’s Procedural By-law.

1. **Agenda Timelines for the Meeting**
2. **The Morning Session**

The complaint alleges that the Special Meeting was called for 8:30 a.m. but no substantive items of business were scheduled until 9:00 a.m. Since the meeting did not officially convene until 8:56 a.m., and if a quorum of Council was present at 8:30 a.m., the complaint alleges that the City’s Procedural By-law would require that the meeting stand adjourned at 8:45 a.m. (i.e. 15 minutes after the time for which a meeting is called). The complaint offered no evidence that a quorum was present at 8:30 a.m.

The City’s Procedural By-Law stipulates that a quorum for a regular/special Council meeting must be present within fifteen minutes of the time fixed for the commencement of the meeting, or the meeting shall stand adjourned until the next meeting of Council called in accordance with the provisions of the Procedural By-Law.[[16]](#footnote-16)

The meeting notice indicates that the Special Meeting will be held from 9:00 a.m. to 4:30 p.m. The Agenda for the Special Meeting shows a start time of 8:30 a.m.

The Clerk indicated that the participants were invited by e-mail to have coffee from 8:30 a.m. to 9:00 p.m. In her opinion, this encourages participants to be ready to begin the formal session promptly at 9:00 a.m. Participants were aware that the actual meeting itself would not start until 9:00 a.m.

The Clerk further indicated that Members of Council arrived at various times throughout the period of 8:30 a.m. to 9:00 a.m. Since the participants were aware that the meeting was not officially starting until 9:00 a.m., there was no requirement for a quorum of Council until just before the commencement of the open session.

There is no evidence to suggest that a quorum of Council was or was not present during the period of 8:30 a.m. to 8:55 a.m. when the meeting officially convened. Further, since the meeting was not officially to start until 9:00 a.m., there was no need to ensure that a quorum was present until at least 9:00 a.m.

Hence, we have found that Council did not breach its Procedural By-Law by not adjourning the meeting at 8:45 a.m. if, indeed, a quorum was not present at that time. Further, it is customary at a workshop or conference to have a “coffee and refreshments” period prior to the start of the official proceedings in order to encourage prompt attendance.

**(ii) The Afternoon Session**

The complaint alleges that the afternoon session did not begin until 1:00 p.m. according to the published agenda. However, Council remained in closed session after the morning session concluded at 12:00 noon and before the beginning of the afternoon session at 1:00 p.m. The complaint alleges that “this brings into question what was discussed during this hour long timeframe and why Council remained in closed session during the lunch hour with no matters of business discussed”.

The Clerk indicated that the period between 12:00 noon and 1:00 p.m. was scheduled as the time when some staff would leave, some would attend, and those participants who were in the facility at various times during this hour would have a lunch break. She stated that several Members of Council left during various times in the hour – perhaps to attend to their office at City Hall, to return phone calls, or to attend to other business.

The Clerk was present throughout the lunch hour and testified that no substantive items were discussed.

An education or training workshop is a different forum than is a more formal meeting of a council. One can easily anticipate that early morning coffee would be provided before a workshop and that one would have a lunch provided if participants are expected to stay all day. This happens all the time in workplaces across Canada.

However, it may have been prudent to recess for the lunch hour and resolve to move back into closed session at 1:00 p.m. This would signal that the meeting is not still in process in closed session. At best, this is a procedural error. However, there is no evidence that business was discussed, and the Clerk testified otherwise, or evidence that there were enough Council members present to constitute a “meeting” during the lunch hour. It cannot be concluded that Council breached either the *Municipal Act* or the provisions of its Procedural By-Law.

**VII. CONCLUSION AND RECOMMENDATIONS**

Amberley Gavel has concluded that Council did not breach the open meetings requirement of the *Municipal Act* when meeting during closed session under section 239(3.1) of the *Municipal Act* for a quarterly governance meeting on March 4, 2013. Further, Council did not breach its own Procedural By-Law in the calling, place, and proceeding of the March 4, 2013 Special Meeting of City Council.

Council may wish to consider making amendments to the procedures for its quarterly governance meetings as suggested in this report relative to the more appropriate name for education and training sessions, the design of its agendas for such sessions, and the calling of recesses during break periods.

Also, it appears that there is no single place at a specified time interval prior to any meeting where a member of the public might look to determine if a meeting has been called, and the time and place. Transparency would be enhanced if the Procedural By-law were amended to include such a requirement, probably on the City’s website, for all meetings except those called for Emergency Management and Civil Protection.

**VIII. PUBLIC REPORT**

We received full co-operation from the Clerk and we thank her.

This report is forwarded to the Council of the City of Burlington. 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.

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**AMBERLEY GAVEL LTD.**

**October 2014**

1. S.O. 2001, c. 25. [↑](#footnote-ref-1)
2. *Bill 130: An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 (“Bill 130”). [↑](#footnote-ref-2)
3. City of Burlington, *Procedural By-Law, No 80-2012*, as of March 2013 (“Procedural By-Law”). [↑](#footnote-ref-3)
4. See the Report of the Clerk’s Department on “Governance”, Report CL-11-12, considered by the Budget and Corporate Services Committee on May, 2012 and adopted by City Council on May 22, 2012, available at http://cms.burlington.ca/AssetFactory.aspx?did=22767. [↑](#footnote-ref-4)
5. See the Minutes of the November 19, 2013 Special Meeting available at http://cms.burlington.ca/AssetFactory.aspx?did=29409. [↑](#footnote-ref-5)
6. *Procedural By-Law*, supra note 3, at section 11.1. [↑](#footnote-ref-6)
7. See *Farber v. Kingston (City)* (2007), 279 D.L.R. (4th) 409 (Ont. C.A.) (“*Farbe*r”), at para. 28 wherein the Ontario Court of Appeal held that procedural irregularities do not render a meeting or any decisions made at a meeting invalid. [↑](#footnote-ref-7)
8. *Municipal Act*, supra note 1, at section 2.(1). [↑](#footnote-ref-8)
9. Schedule E to the Procedural By-Law does set out the requirements for public notice for a number of specific subjects as prescribed by the *Municipal Act* or other legislation. [↑](#footnote-ref-9)
10. See Clerks Department Report dated September 19, 2012 on “2013 Meeting Schedule for Council and Standing Committee Meetings”, Report Number CL-18-12, approved by Council on October 15, 2013 available at http://cms.burlington.ca/AssetFactory.aspx?did=22767. [↑](#footnote-ref-10)
11. As approved by Council in the Report of the Clerk’s Department on “Governance”, Report CL-11-12, supra note 4. [↑](#footnote-ref-11)
12. *Procedural By-Law,* supra note 3, at 1. [↑](#footnote-ref-12)
13. Available at http://cms.burlington.ca/Page8052.aspx#.U8k\_9dBzbmJ. [↑](#footnote-ref-13)
14. *Municipal Act*, supra note 1, at section 236.(1). [↑](#footnote-ref-14)
15. *Procedural By-Law*, supra note 3, at section 10 and 10.1. [↑](#footnote-ref-15)
16. *Procedural By-Law,* supra note 3, at section 12.2. [↑](#footnote-ref-16)