**A REPORT TO THE COUNCIL OF THE TOWN OF DEEP RIVER REGARDING THE INVESTIGATION OF ALLEGED IMPROPERLY HELD CLOSED MEETINGS OF THE TOWN’S PROPERTY STANDARDS COMMITTEE**

**THE COMPLAINT**

Pursuant to Section 239.1 of the Municipal Act (“the Act”), Amberley Gavel Ltd. received a complaint relating to alleged closed sessions of the Property Standards Committee of the Town held on August 7, 2012; April 22, 2013; May 6, 2013; May 21, 2013; and June 3, 2013.

For the most part the facts in this case are not in dispute. The Town acknowledges that the Property Standards Committee met on the above noted days and both the complainant and the Town agree that the main items of discussion at the above meetings were as follows:

August 7, 2012 – Inaugural meeting and election of chair and vice-chair of the committee

April 22, 2013 - Election of a new chair of the committee

May 6, 2013- Review of the draft Rules and Procedures of the committee

May 21, 2013- Review of the draft Rules and Procedure of the committee (continued)

June 3, 2013 – Adoption of the Rules and Procedure of the committee

The complainant alleges that the meetings were closed to the public since there was no notice of any of the meetings given to the public, contending:

“A meeting of a local public body that is not closed pursuant to a specific statute but occurs in complete secrecy and hidden from public eyes, is in fact a meeting closed to the public. (excerpt from letter of complaint dated June 12th, 2013)”

**JURISDICTION**

The Town of Deep River has appointed Local Authority Services (LAS) 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 this investigation and report.

On September 3rd, 2013 the investigator for Amberley Gavel Ltd. travelled to Deep River and conducted interviews at the Town’s offices in Deep River. Two further telephone interviews were conducted on September 3rd and September 7th, 2013.

**LEGAL 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. [Emphasis added]

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 (i.e. *in camera).*

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.

Section 239 also requires that before a council moves into closed session it shall pass a resolution at a public meeting indicating that there is to be a closed meeting. The resolution must also include “the general nature of thematter to be considered at the closed meeting*”.*

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.

**FACTUAL BACKGROUND**

As stated above, most of the factual matters in this case are not in dispute.

In the fall of 2011 after several issues relating to the non-maintenance of certain properties in the town had come to the fore, the town council decided to adopt a Property Standards by-law to establish minimum standards for the maintenance of residential and commercial properties in the town. A by-law was drafted and eventually adopted on March 12, 2012. The by-law includes provisions regarding the establishment of a Property Standards Committee consisting of three members (Section 8.9). The primary purpose of the committee is to hear appeals from landowners who are not satisfied with the terms and conditions of any Property Standards Order that may be served upon him or her.

Pursuant to this by-law a committee of three citizens (non-council members) was appointed on June 20, 2012. The new committee held its inaugural meeting on August 7, 2012. The Town Clerk also served and continues to serve as the clerk of the committee.

**INITIAL LEGAL ISSUE RELATING TO JURISDICTION**

The question first arises whether the meetings of the Property Standards Committee of the Town of Deep River are subject to the closed meeting rules as set out in Section 239 above. The rules apply not only to a municipal council but also to a “local board or a committee of either of them”.

Section 238 of the Act defines a committee of council to mean any “advisory or other committee, subcommittee, or similar entity of which at least 50 percent of the members are also members of one or more councils or local boards”.  Since, as noted above, all three members of the Town’s Property Standards Committee are non-council members, the Property Standards Committee is not a “committee” as defined in Section 238.

However, the Town’s Procedure By-law 17-2012 provides in section 5.10.1 that, “*Except as provided in this By-law, all meetings of Council and its committees shall be open to the public”.*

Consequently, the Town’s own procedural by-law mandates that all of its own committees, including the Property Standards Committee, are to be open to the public and closed to the public only when specifically authorized under the by-law (Section 5.10.4).

Is the Property Standards Committee a “local board” which also is subject to the closed meeting rules set out in the Act? A “local board” is defined in Section 1 of the Act:

*“local board” means a municipal services board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any act with respect to the affairs or purposes of one or more municipalities excluding a school board and a conservation authority”.*

The definition of local board is fairly widely defined. However the question remains whether this committee is “exercising any power under any act with respect to the affairs or purposes” of a municipality.

The power of a municipal council to establish a Property Standards Committee is found in Section 15.1 of the Building Code Act which permits a council of a municipality to establish a Property Standards Committee to, amongst other things, hear appeals from Property Standard Orders issued by the municipality. Pursuant to this authority the Town of Deep River passed By-law 10-2012 on March 21, 2012 establishing a Property Standards Committee and prescribing standards for the maintenance and occupancy of all properties within the town’s boundaries.

Therefore, both under provincial legislation and the Town’s own procedural regulations, the Property Standards Committee is subject to rules stipulating when its meetings are to be open or may be closed to the public.

**FINDINGS**

Since the Property Standards Committee is subject to the open/closed meeting provisions in S. 239 of the Municipal Act and mirrored in the Town’s own procedure by-law the only issue remaining to be decided is whether the discussions at any of the meetings that are the subject of this complaint fall into the exceptions set out in S. 239 (2).

 Both a review of the minutes of all of the subject meetings and the interviews conducted as part of this investigation leads one to the firm conclusion that the discussions at four of the five meetings referenced in the complaint did not meet any of the criteria that would allow the meetings to be closed to the public.

At the meeting of May 21st, 2013, independent legal counsel, engaged by the Committee specifically for that purpose, attended the meeting to provide legal advice and direction to the committee as it continued its learning curve in its role as an adjudicative body. This meeting could have been properly closed to the public under Section 239(2)(f) of the Act which allows a closed meeting when the purpose is to receive legal advice, although assuming the advice was of a general educational nature it appears that it probably wasn’t necessary to have been conducted in closed session.

*Were the other four meetings closed meetings?*

As noted previously, the position of the complainant was that since no notice to the public was given of the subject meetings, the meetings were, in fact, closed to the public. Amberley Gavel Ltd. concurs with this argument. Proper notice is one of the hallmarks of natural justice. The ability of the public to make representations on issues of public interest and the right to simply observe are disregarded entirely if members of the public are not given adequate notice of the meetings where issues are being discussed and voted upon.

The initial position of the Town was that it “assumed in the onset that the meetings did not have to be advertised as the purpose of them was to establish the Chair and Vice Chair as well was work (sic) on the Rules of Practice and Procedure for the Committee…” (letter of Town Clerk dated July 10, 2013)

It might very well be argued that the average citizen would have very little interest in listening to and making representations on the issues being discussed at the subject meetings – the issues were for the most part confined to the rules of procedure and practice of the committee – but the principle of open government applies to both pedestrian and controversial discussions. And what one person considers trivial another person might consider significant. It is not for a municipality to pre-judge the disposition of members of the public to attend meetings that are public in nature.

The Town also initially took the position that notice only had to be given of any appeal hearings that were heard by the Committee. And in fact notice was given of the first *hearing* which occurred on April 22, 2013*.* This hearing had been immediately preceded by a short meeting of the committee of which notice was not given.

Finally, during the interview process comments were made by a couple of the interviewees that since the meetings were held in the council chambers and the doors were always open, any member of the public could have entered the room and listened to the discussions. This argument does not have merit. The principle of open meetings cannot rely on random visitors to be justified. As indicated above, adequate notice is a key component of the principle of transparency.

The Town’s position on the issue of notice changed however once the complaint was filed and Amberley Gavel Ltd. was contacted to commence this investigation. Following receipt of advice from the provincial “Municipal Advisor” the Town commenced to post agendas and meetings of the Property Standards Committee in the same manner that it now does with other committees of council.

**CONCLUSIONS**

With the possible exception of the meeting held on May 21st, 2013 which properly could have been a closed meeting, Amberley Gavel Ltd. finds that the complaint filed has merit. By failing to give proper notice, The Town of Deep River, in effect, made each of the subject meetings of the Property Standards Committee a closed meeting, and breached the Act and its own By-law.

However, Amberley Gavel Ltd. is of the view that this failure to conform to the provisions of the Municipal Act was not done out of malice or from any attempt to specifically exclude members of the public from attending any of these meetings. Rather the failure can be attributed to a misunderstanding of the principle of open meetings and a misconception of the ambit of jurisdiction of the rules relating to open and transparent government.

As noted above, this failure to comply has now been remedied.

Finally, Amberley Gavel Ltd. would like to thank both the complainant and the representatives of the municipality who all co-operated fully during the course of this investigation. During the interview process a couple of the interviewees expressed a desire that the investigation and the report to follow be a learning process for the Town. Hopefully this has been the case.

 Nigel Bellchamber

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 for AMBERLEY GAVEL LTD

November 2013