**A REPORT TO THE COUNCIL OF THE TOWNSHIP OF STRONG REGARDING THE INVESTIGATION OF CLOSED MEETINGS OF THE COUNCIL HELD ON:**

* **October 12, 2010**
* **November 23, 2010**
* **December 1, 2010**
* **December 13, 2011**
* **January 10, 2012**

**A. THE COMPLAINT**

Pursuant to Section 239.1 of the Municipal Act (“the Act”), Amberley Gavel Ltd. received a complaint dated February 6, 2012 relating to the closed sessions of the Township Council held on the above five dates.

The complaint contains the following alleged violations of procedure relating to these meetings:

1. The lack of any specificity in the resolution authorizing the Council to go into closed session.
2. The failure to “report out” on the “activities of the Council during the closed meeting session”.
3. The absence of the Town Clerk during two of the closed session meetings plus an error in the Township’s Procedure By-law relating to the recording of closed session meetings in the absence of the Clerk.
4. The discussion in closed session of matters that should have taken place in public.
5. The failure of a Councillor to specify the nature of a conflict of interest that was declared at the meetings held on December 13th, 2011 and January 10, 2012.
6. The failure of the Township to approve an Accountability Policy as required by the Municipal Act.

Underlying the complaint filed is a controversial issue relating to the closing and conveyance of a small portion of a shore road allowance on Lake Bernard (hereinafter referred to as “the shore road allowance” issue). Both the current Mayor and the former Mayor acknowledged during the interview process that this underlying issue was a significant issue during the 2010 mayoralty election held on October 25th, 2010.

Although Amberley Gavel Ltd. recognizes the importance of the larger issue, its jurisdiction, as indicated below, is fairly limited, and the comments in this report must accordingly be limited to the areas that fall within its jurisdiction.

**B. JURISDICTION**

The Township of Strong has appointed Local Authority Services (LAS) to act 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 April 2nd, 20112 the investigator for Amberley Gavel Ltd. conducted four interviews at the Township’s offices near Sundridge, Ontario located on the shores of Lake Bernard. As well, on April 9th, 2012 the investigator conducted a further telephone interview with the author of the complaint filed.

**C. LEGAL BACKGROUND**

Closed Meetings:

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 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\%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\%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.

Further, as indicated above, the role of the investigator is specifically limited to the process related to closed session meetings. Of the six issues raised in the complaint filed, four are related to closed session meetings but the latter two issues – an alleged breach of conflict of interest procedure and the alleged lack of an accountability policy are outside the proper scope of this investigation. Accordingly, only brief reference will be made to these two issues at the end of this report.

**D. FACTUAL BACKGROUND**

*The Underlying Dispute – a chronology*

Prior to dealing with the closed session meetings of council relating to the shore road allowance a short history of the shore road allowance issue is in order. The issue was before council at six of the seven council meetings held between September 14th, 2010 and December 1st, 2010. And then the issue returned to council for further debate and discussion a year later on December 13th, 2011and finally on January 10th, 2012.

Although the two triangular shaped parcels of land in dispute are relatively small they developed into a very large issue. Council first considered the matter on September 14th, 2010 and then again at the following council meeting on September 28th, 2010. On the latter date council initially approved “in principle” the closing of a portion of the shore road allowance pursuant to an application filed by a Mr. Jim Goodfellow. However one of the two abutting property owners (Ruth Millward) attended the meeting and expressed opposition to the proposed closing and conveyance and consequently council immediately rescinded their earlier motion at the very same meeting.

At the following meeting held on October 12th, 2010 Mrs. Millward again was in attendance along with her husband and requested that the triangular portion of the shore road allowance abutting their property that was going to be conveyed to Mr. Goodfellow be conveyed to them instead. Mr. Goodfellow was also in attendance at this meeting and distributed a written presentation to council in support of his application to obtain possession of the land in dispute.

A municipal election intervened on October 25th, 2010. The incumbent mayor, a consistent advocate of the “Goodfellow application”, was defeated. On the following day, October 26th, Council proceeded to hold its regular council meeting and in an attempt to bring some order to the process of the shore road allowance issue passed a motion to have the closing and conveyance be the subject of an advertised “Public Meeting” to be held during the next regular council meeting to be held on November 9th.

At the November 9th meeting, following the hearing of representations by Mr. Goodfellow, Ruth Millward, and Wilfred Sheffield (the abutting owner on the other side of the Goodfellow property) council moved a further motion that read in part: “…that the Township of Strong does not want to proceed with Mr. Goodfellow’s application to purchase the shore road allowance and will proceed with Mr. and Mrs. Millward`s application to purchase the shore road allowance”.

Finally, on December 1st, 2010 at the first meeting of the new council after the October 25th election the issue was again discussed during a closed portion of their regular meeting (as discussed below).

Lawyers’ letters then began to arrive at the Township offices. At the same time direction was given for a reference plan, a legal description, and draft by-law to be prepared to close and convey portions of the road allowance to the Millwards and Mr. Sheffield (but not to Mr. Goodfellow).

Aware of the possible legal ramifications of their actions council decided to hold another “Public Meeting” on the issue. This public meeting was held as part of the regular council meeting on December 13, 2011. Although no representations were made at this meeting, council decided to defer the passing of the draft by-law to the meeting of January 12, 2012. At this latter meeting the by-law was finally given three readings and passed. Pursuant to the by-law the conveyances of the closed road allowance to the Millwards and Mr. Sheffield was being processed as this investigation was taking place.

*The Closed Session Meetings*

As noted above, the complaint references five specific occasions in which the Lake Bernard shore road allowance issue was the subject matter of closed session meetings held by the Township Council: 1) October 12, 2010;

2) November 23, 2010; 3) December 1, 2010; 4) December 13, 2011; and

5) January 10, 2012

It should also be here noted that although the Closed Session Minutes provided to the investigator were, except for the meeting of October 12th, fairly clear and well prepared they failed to indicate the attendees at the closed session meeting either in terms of members of council or staff. A listing of attendees is necessary. Otherwise there is no evidence that quorum existed or was maintained.

*October 12, 2010*

The first meeting where this issue was discussed *in camera* was October 12th, 2010. On that date the Township Council went into closed session on two occasions during their regular Council meeting. The Council first went into closed session following passage of the following resolution:

Be it resolved that this council does hereby agree that in accordance with the Municipal Act, Section 239(2E) Council moves to a closed meeting at 6:15 p.m. in order to address a matter allowed for a closed session meeting.

The reference to “Section 239 (2E)” of the Municipal Act is the “litigation or potential litigation” exception to the norm of open meetings.

After an *in camera* discussion of approximately twenty-five minutes, the Council returned to their regular open meeting with the following resolution:

Be it resolved that this council does hereby agree that in accordance with the Municipal Act (Section 239(2E)) council moves out of a closed session meeting at 6:40 p.m. and returns to the regular meeting agenda.

Later in the meeting Council again had occasion to go into closed session following passage of the following resolution:

Be it resolved that this council does hereby agree that in accordance with the Municipal Act, Section 239 (2d) Council moves to a closed meeting at 7:05 p.m. in order to address a matter allowed in a closed session meeting, namely – employee negotiations.

In light of the passage of time, the number of occasions on which the shore road issue was discussed both *in camera* and in public session, and the availability of only the clerk’s hand-written notes of this particular closed session meeting on October 12, it is difficult to conclusively determine the extent to which the shore road allowance was discussed in closed session at this meeting. However the evidence does indicate that on the first of the two occasions on which the council went into closed session it discussed “a potential litigation” matter and then discussed the increasingly complex issue of the shore road allowance and the need to obtain legal advice on the issue.

Although the Act requires that the closed session minutes be more precise in nature, on the evidence presented, Amberley Gavel Ltd. is satisfied that the discussions were within the scope of appropriate closed session discussion.

On the second occasion that council went into closed session at this council meeting Council discussed an issue involving “employee negotiations” which was clearly a matter eligible for of closed session discussion.

*November 23, 2010*

As noted above, an election had been held on October 25th, 2010. The incumbent mayor had been defeated and although he still held office on the date of this meeting, he was not in attendance. The mayor-elect, an existing councillor, presided in his absence.

At this meeting council went into closed session following passage of the following resolution:

Therefore Be it Resolved that the Council for the Township of Strong does hereby agree that in accordance with the Municipal Act, Section 239 (2(d)) Council moves into closed session at 7:10 p.m.

“Section 239 (2(d))” references the “labour relations” exemption to the norm of open meetings. The closed session minutes and the oral evidence given to the investigator confirm that the subject of the short *in camera* discussion was compensation for staff for the following calendar year. The shore road allowance was not the subject of discussion at this closed session meeting.

*December 1, 2010*

This was the first meeting of the newly elected council – a council that included a new mayor (a former councillor) and two new councillors. At this meeting council again went into closed session following passage of the following resolution:

That the Council of the Township of Strong does hereby agree that in accordance with Municipal Act Section 239 (2E) this Council moves into a closed meeting at 8:32 p.m. to discuss matters in accordance with the Act.

“Section 239 (2E)” again references the “litigation or potential litigation” exemption under the Municipal Act. In the closed session discussion the mayor advised the new council of a lawyer’s letter that had been received regarding the shore road allowance issue and the two new members of council were briefed regarding the legal circumstances regarding this issue.

*December 13, 2011*

Over a year later council again resolved into closed session to discuss the shore road allowance issue after passage of the following resolution:

Therefore Be It Resolved that the Township of Strong hereby enter into a Closed Session of Council at 7:05 p.m. as per the Municipal Act, S.O. c.25, 2001 as amended under Section 239(2)(c)(e).

In this case the references to the Municipal Act include both the “pending acquisition and disposition of land” and the “potential litigation” exemptions.

Two matters were discussed *in camera.* Firstly, council briefly discussed an employee issue with potential legal ramifications. Secondly, council discussed a legal opinion that they had received on the shore road allowance issue. Both matters were clearly matters allowed in a closed session.

*January 10, 2012*

Finally, during their regular council meeting held on January 10, 2012 council again moved to go into closed session based on the following resolution:

Therefore Be It Resolved that the Council for the Township of Strong hereby enter into a Closed Session of Council at 5:37 p.m. as per the Municipal Act, S.O. c.25, 2001 as amended under Section 239(2) (c) (e).

The sections referenced again pertain to “a pending acquisition or disposition of land” and “potential litigation”. During the closed session meeting council discussed two issues – a property issue on another property about which they had recently received a legal opinion from their solicitors and again the shore road allowance issue. On the latter issue the solicitor who had provided the legal opinion to council which had been discussed at their closed session meeting of December 13, 2011was in attendance to give further legal guidance. Again, it is the view of Amberley Gavel Ltd. that this discussion of the shore road allowance was properly held in closed session

**G. FINDINGS**

In this section we will review the specific *allegations* as set out in the complaint filed.

It should also be noted at this time that early in 2011the Township of Strong undertook a badly-needed review of its Procedure By-law, assisted by a recognized Municipal Law expert. The by-law, as amended, was significantly improved.

1. *Alleged lack of specificity in the resolution authorizing the closed session meeting*

Section 239(4) of the Municipal Act requires that, prior to going into closed session, council or a committee of council must pass a resolution stating “the fact of the holding of the closed meeting and *the general nature of the matter to be considered at the closed meeting”*[emphasis added]. Unfortunately, it is the experience of Amberley Gavel Ltd. that many municipalities in the province do not *fully* comply with this provision to disclose “the general nature” of the item to be discussed. It is not uncommon for municipalities to simply reference one of the enumerated exceptions set out in Section 239 of the Act. This is the approach also taken by the Township of Strong. An interested citizen, unless he or she had a copy of the Municipal Act with them, would have no idea what the exemption in the resolution referred to let alone the general nature of the matter to be discussed.

It is the view of Amberley Gavel Ltd. that it is “a best practice” to include greater specificity in the resolution authorizing a closed session meeting. This can be done without compromising the confidentiality of the issue to be discussed and would be in keeping with the policy behind the provisions in the Act – to encourage as much transparency as possible in the decision-making process.

An *example* of the form of resolution that should be used that not only includes greater specificity but also simplifies the wording in the resolution would be as follows:

Be It Resolved that the Council move into closed session under Subsection 239(2) (c) of the Municipal Act to consider a matter involving “a pending acquisition or disposition of land” relating to the Lake Bernard shore road allowance.

This wording, it is suggested, discloses the “the general nature of the matter to be considered” without breaching any confidentiality. A member of the public attending the meeting or reading the minutes of the meeting would have a much better idea of what their elected officials would be discussing “behind closed doors”.

Further, although it is agreed that reference to the time that the closed session meeting commences (and ends) is “good practice” it is suggested that this information also be conveniently referenced by the Clerk in the open session minutes rather than just in the resolutions.

*2. The alleged failure to properly report out following the closed session discussion*

The complaint filed alleges that the Township does not properly report “on the activities of council during the closed session when council resumes into open session” as allegedly required by both the Municipal Act and the Township’s Procedure By-law.

As indicated above, the Township uses a fairly consistent wording when they exit from the closed session meeting. For example, at their January 10th meeting the following wording was used:

Therefore Be it Resolved that the Township of Strong hereby exit from a Closed Session of Council at 6:47 p.m. as per the Municipal Act, S.O. c.25, 2001 as amended under Section 239(2) (c) (e).

The Municipal Act is silent regarding reporting out procedure. Accordingly, the Township council cannot be considered in breach of the Act.

The Act however does include a provision relevant to this issue. Votes are only to be held in closed sessions for two reasons –if the vote is “for a procedural matter” or “for giving directions or instructions” to officers of the corporation (Subsections 239(5) and (6)).

Further, although not specifically required by the Act, the Township’s Procedure By-law includes the following provision:

20.3 Any actions taken at a Closed Meeting of Council shall be reported by the Mayor as soon as the Regular Council meeting reconvenes into Open Session.

Practically speaking, this is not required by the Act and it may in fact compromise the interests Council or the subjects of in camera discussions, and hence be inappropriate to follow.

Amberley Gavel Ltd. offers a further recommendation in the reporting out procedure used by the Township. It has been suggested above that the Township consider simplifying the resolution used when council wishes to move into closed session. The Township should also consider simplifying the wording of the resolution when they exit or report out of the closed session. The existing standard resolution used is redundant and overly complex. A simpler resolution could simply state as follows:

Be It Resolved that the Council move out of closed session and resume its regular meeting.

This is a procedural motion and should be considered in closed session.

When Council resumes the public portion of its meeting, best practice would be for the presiding officer to report that Council did discuss the matters it was permitted to under the resolution authorizing the public exclusion, and any information that could be made public at that time to the extent that it does not compromise the interests of parties involved in the closed meeting issues.

1. *The alleged absence of the Clerk at the closed session meetings held on December 13, 2011 and January 10, 2012 and an alleged error in the Township’s Procedure By-law regarding the recording of closed session meetings in the absence of the Clerk*

In regard to the first part of this allegation – that the Clerk was absent for all or a portion of the closed session meetings held on December 12, 2011 and January 10, 2012, Amberley Gavel Ltd. is satisfied that the Clerk was in fact in attendance at both of these meetings. The allegation seems to have arisen out of a misunderstanding of a comment made by the Clerk and perhaps some confusion regarding the exact time when the closed session meetings ended.

Without going into all of the details regarding this allegation the evidence of the Clerk herself as corroborated by two other attendees at the closed session meetings confirms that she was in fact present for the entirety of the closed session meetings in question. Amberley Gavel Ltd. accepts this evidence.

However the complainant does raise a valid point regarding a very specific provision in the Township’s Procedure By-law that requires revision. Section 20.5 of the Procedure By-law reads as follows:

Closed session Records are taken by the Clerk or Recording Secretary. In the event the Clerk or Recording Secretary is excused from the closed session portion of the meeting, *the mayor* [emphasis added] shall appoint some other person, other than a Councillor, to document the proceedings.

Under Section 228(1) of the Municipal Act it is the duty of the Clerk to record all resolutions, proceedings, and decisions of Council. This would include all closed session proceedings. The Act also contemplates special circumstances in which the Clerk would be absent from meetings (e.g. illness or vacation leave). In these situations Section 228 (4) provides the following procedure:

The clerk may delegate in writing to any person, other than a member of council, any of the clerk’s powers or duties under this or any other Act.

Accordingly, S. 20.5 of the Township’s Procedure By-law should be eliminated, or at least amended to provide that it is the Clerk (and not the Mayor) who is to appoint some other official to record meetings (either open or closed) in his or her absence.

However it should be noted that although the Procedure By-law should be amended as indicated above, the investigator found no breach of either the Municipal Act or the existing Procedure By-law provisions regarding the delegation of responsibilities in the absence of the Clerk.

1. *The alleged discussion in closed session of matters that should have been discussed in open session*

As indicated above, the shore road allowance issue was discussed at four of the five meetings that are the subject of this complaint. At the meeting of November 23rd, 2010, this issue was not discussed in closed session. However at the other four meetings the shore road allowance was admittedly discussed in closed session on the basis of either “a pending acquisition or disposition of land” or “potential litigation”. Clearly the shore road allowance issue involved the disposition of municipal land and clearly the *potential* of litigation was present almost from the beginning of the history of the issue. By letter dated October 12, 2010 addressed to all members of council Mr. Goodfellow had threatened that the issue “may have to go to: The Courts …The O.M.B….The Ethics Commissioner.” The Township also received letters from Mr. Goodfellow’s solicitors dated November 28, 2010 and December 5, 2011. Accordingly, the potential of litigation was present.

In light of this factual evidence and the oral evidence received as part of its investigation, Amberley Gavel Ltd. is satisfied that the discussions held *in camera* on the shore road allowance issue were properly held in closed session.

1. *The alleged failure of a councillor to specify the nature of his conflict of interest declared at the meetings of December 13th, 2011 and January 10, 2012*

As stated above, the jurisdiction of an investigator under Section 239.2 of the Municipal Act is fairly limited – to investigate closed meetings and alleged breaches of Municipal Act and Procedural By-law provisions relating thereto. Accordingly, Amberley Gavel Ltd. cannot give an opinion on whether any of the provisions of the Municipal Conflict of Interest Act were breached as alleged.

However the Municipal Conflict of Interest Act requires a councillor not only to disclose a conflict of interest but also to disclose “the general nature thereof” (Section 5).

1. *The alleged failure of the Township to have adopted an accountability policy*

A similar comment has to be made regarding this allegation. The jurisdiction of a Section 239.2 investigator does not extend to an investigation of the issue of whether a municipality has complied with provisions in the Municipal Act relating to required municipal policies.

However again suffice it to say that a municipality is required under Section 270(1) to adopt and maintain a policy with respect to, inter alia, the following matter:

“5. The manner in which the municipality shall try to ensure that it is accountable to the public for its actions and the manner in which the municipality will try to ensure that its actions are transparent to the public.”

**H. CONCLUSIONS**

In summary, Amberley Gavel Ltd. makes the following findings on the complaints filed:

1. The resolutions used by the Township to authorize closed meetings only obliquely disclose the nature of the closed meeting and should be improved.
2. At the meeting of October 12, 2010 the mayor was not required by the Act to report. The Township’s Procedure By-law should be amended and practice altered so that any commentary offered by the presiding office does not compromise the interests of parties involved in the closed meeting issue, but where possible information that can be reasonably disclosed should be in order to enhance transparency.
3. The Clerk was not absent from either of the two closed meetings as alleged in the complaint
4. The Council properly went into closed session to discuss the shore road allowance issue which was both a “pending disposition” of land and a “potential litigation” issue.

Further, in an attempt to put into action the transparency and accountability policy behind the closed meeting provisions as set out in the Municipal Act Amberley Gavel Ltd recommends that the council of the Township consider the following improvements and amendments:

1. That the resolutions used to move into a closed session more clearly specify “the general nature” of the matter to be discussed as per the example set out above in this report.
2. That the resolutions used to move into closed session and the resolutions used to exit from closed sessions be simplified as per the examples set out above in this report.
3. That the minutes of closed session meetings include reference as to who was in attendance at the closed meeting, including members of council, staff and outside consultants.
4. That the Township’s Procedure By-law be amended to indicate that it is the Clerk who is to delegate responsibility for record taking in his/her absence (as per the provisions of the Municipal Act).

Finally, Amberley Gavel Ltd. would like to thank both councillors and staff of the municipality who co-operated fully during the course of this investigation. During the investigation process both the members of council interviewed as well as the Clerk expressed a desire that the investigation and the report to follow be a learning process for the Township. Hopefully this has been and will be the case.

This report is provided to Council in accordance with the requirements of the Municipal Act. We recommend it be placed on the agenda of the next regular meeting of Council, or on the agenda of a special meeting called earlier for the purpose of receiving it.

August 2012

AMBERLEY GAVEL LTD.

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