+

**REPORT TO**

**THE CORPORATION OF THE CITY OF VAUGHAN REGARDING THE INVESTIGATION OF A COMPLAINT REGARDING THE SPECIAL MEETING OF COMMITTEE OF THE WHOLE FOR THE CITY OF VAUGHAN IN CLOSED SESSION**

**ON JANUARY 30, 2014**

1. **COMPLAINT**

The Corporation of the City of Vaughan (“City”) received a complaint about a Special Meeting of the Committee of the Whole for City Council (“Committee of the Whole” or “Committee”) in closed session held on January 30, 2014. The essence of the complaint is that the holding of a closed meeting was 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*”).

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 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" \l "s239s1)**[(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" \l "s239s2)  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).

1. **INVESTIGATION**

Documents provided by the City and reviewed during the course of the investigation included the Agenda and Minutes of the Special Committee of the Whole (Closed Session) on January 30, 2014, documents received by the Committee of the Whole during the Closed Session, and other relevant documentation. The Commissioner of Legal & Administrative Services/City Solicitor (“City Solicitor”) and the City Clerk were consulted during the course of the investigation.

**BACKGROUND**

1. **The Complaint**

The complainant asserts the following in its complaint:

“The closed meeting agenda reflects that Council discussed a long term ground lease between the City of Vaughan and MacKenzie Health. The subject matter justifying the closed meeting was described in the meeting notice as “a proposed or pending acquisition or disposition of land by the municipality or local board” exception of subsection 239(1)(c) of the Municipal Act, 2001. However, it is my understanding that representatives of MacKenzie Health attended the meeting.

Of course meetings held by a municipal council for the purposes of discussing a proposed disposition of land is properly the subject matter of a closed meeting. The rationale for allowing such a meeting to be held in camera is obvious; if the meeting was allowed to be open, then the municipality would be at a disadvantage in the negotiations with the other party. In this case however, the party with whom they are negotiating the ground lease (MacKenzie Health) was allowed into the meeting. On this basis alone, the exemption that was cited by the City Clerk cannot be relied upon to keep the meeting closed. By inviting their negotiating adversaries into the meeting, the City waived any right they had to have a closed meeting under Section 239(1)(c) of the Municipal Act. As a result, the City violated the Act by having a closed meeting.”

1. **Agenda for the Closed Session of Special Committee of the Whole**

The Agenda for the Closed Session of the Special Committee of the Whole contained an item listed as:

“4**.** **CONSIDERATION OF CLOSED SESSION ITEM**

1. **LONG TERM GROUND LEASE BETWEEN CITY OF VAUGHAN**

**AND MACKENZIE HEALTH**

(acquisition or disposition of land)

The agenda further notes that Special Committee of the Whole (Closed Session) would be receiving a verbal report from the Commissioner of Legal & Administrative Services/City Solicitor (“City Solicitor”) with respect to the item under consideration.

1. **Minutes of the Special Committee of the Whole (Closed Session)**

The Minutes for the Special Committee of the Whole (Closed Session) of January 30, 2014 indicate that it went into closed session at 6:10 p.m. and adjourned at 7:43 p.m. During the meeting, Special Committee of the Whole adopted a procedural motion which provided direction to staff.

1. **Interview and Notes of the City Clerk**

The City Clerk advised that representatives of MacKenzie Health made a presentation to Committee of the Whole in closed session with respect to the terms of a Long Term Ground Lease between the City and MacKenzie Health. Members of Committee of the Whole asked the MacKenzie Health representatives questions of clarification about their presentation. The MacKenzie Health representatives left the closed session at 7:10 p.m. Committee of the Whole then received a verbal report in closed session from the City Solicitor.

Committee of the Whole received the presentation and directed staff to “review the materials submitted by MacKenzie Health and prepare a response for presentation to Council” at a subsequent meeting.

1. **Interview of the City Solicitor**

The City Solicitor confirmed the City Clerk’s notes about the proceedings of the meeting.

The City Solicitor advised us that the negotiations about the Long Term Ground Lease were being conducted by a team of City staff, led the City Solicitor, on behalf of and under the instructions of Council. The staff negotiating team was assisted by outside legal counsel as necessary. During the negotiation process, MacKenzie Health sought to have a private meeting with Committee of the Whole to explain its position and needs on various terms and conditions that were being negotiated into the Long Term Ground Lease.

Although it was not the City’s normal practice to allow members of the public into a closed session of Committee, MacKenzie Health’s request to make a deputation was allowed under certain conditions. These conditions were conveyed to MacKenzie Health by letter from the Interim City Manager. Members of the Committee of the Whole were also advised about the conditions by City staff:

1. The meeting would be confined to issues dealing only with the Long Term Ground Lease.
2. Only designated representatives of the Board of Directors of MacKenzie Health would be permitted into the meeting as spokesperson;
3. Those representatives could be accompanied by advisers such as MacKenzie Health staff.
4. No other observers would be permitted to attend.
5. The format of the meeting would be that members of the Committee would listen to the deputation and be permitted to ask questions of the deputants. The Committee would then deliberate without further commentary from the deputants.
6. Although questions from Committee members would be permitted, the forum would not permit a negotiation.
7. No decisions would be taken at the Committee meeting.
8. Confidential recommendations, if any, would be submitted to a future meeting of City Council.

It was clear to the Members of Committee of the Whole (and to MacKenzie Health) that City staff were charged with the responsibility to conduct the negotiations about the terms of the Long Term Ground Lease with MacKenzie Health, on Council’s instructions, and to make recommendations to City Council flowing from those ongoing negotiations.[[3]](#footnote-3)

**ANALYSIS AND FINDINGS**

1. **Section 239(2)(c) of the *Municipal Act***

The Special Committee of the Whole met in closed session under section 239(2)(c) of the *Municipal Act* because it was dealing with a potential long-term lease of municipal property. Amberley Gavel accepts that consideration of the terms and conditions of long-term leases of municipal property falls within the exemption of the *Municipal Act* respecting “a proposed or pending acquisition or disposition of land” (section 239(2)(c)).

The purpose of section 239(2)(c) is to allow a council or local board to receive information and advice from; and to give instructions to staff, a lawyer, or its agent (collectively, “agent”) in closed session respecting the acquisition or disposal of land within certain parameters, following consideration of the advice and information received. It makes sense that a council or local board would not have open public discussions about its negotiating strategy, most specifically the price it is willing to pay for lands that it wants to acquire title to or receive for lands that it wants to dispose of (including through a long-term leasing arrangement).[[4]](#footnote-4) Open disclosure of the price that a municipality is willing to pay for acquisition of land, or willing to accept for disposal of land, could detrimentally affect the municipality’s interest. Potential purchasers or sellers of land ought not to know what value a council is willing to accept or pay. The exemption under the *Municipal Act* protects the municipality’s economic interests by not compromising the municipality’s bargaining position. Hence, the discussion may be held in closed session.

However, a council cannot negotiate behind closed doors with the very corporate entities (or their personal representatives) with which it wishes to enter into a long-term lease.

**Was this a Negotiation in Closed Session?**

The record indicates that MacKenzie Health representatives were in the Closed Session for approximately one hour. A presentation was made and questions were asked by members of Committee of the Whole. According to the City Clerk and City Solicitor the parties were not using a closed session in order to bargain over or agree upon terms of the long-term ground lease. Committee of the Whole was merely, and we have been advised, somewhat passively, receiving information from MacKenzie Health representatives. As a result of the deputation, Committee of the Whole directed staff to bring back a future report to Council.

The question to be answered is whether or not Committee of the Whole was engaged in negotiations behind closed doors with MacKenzie Health, as third parties.

Negotiation involves an interaction between two or more parties where each party is trying to meet its own needs, or accomplish its own goals, by reaching an agreement with the other party who is also trying to get its own needs met. The parties communicate directly for the purpose of coming to an agreement on some action that one or more of them will undertake. In the more typical negotiation approach, one party often attempts to exert influence over the other party in order to secure beneficial terms of an agreement or, if necessary, compromises between opposing positions.

It would appear that MacKenzie Health was not in agreement with certain positions advanced by the City staff negotiation team and as directed by Council. Hence, they wanted to meet privately with Committee of the Whole to advance their own positions and to underscore the importance of their positions on various matters dealing with the Long Term Ground Lease.

In that respect, the spokespersons from MacKenzie Health were attempting to influence members of the Committee and persuade them to take a different position on certain matters.

Attempting to persuade the other party to a negotiation to take a different position on key terms and conditions of an agreement, or to compromise on certain established positions, is part of the larger negotiation process. Having reviewed the presentation that was given by MacKenzie Health representatives to the closed session of Committee of the Whole, it is clear that MacKenzie Health was using the private meeting forum to attempt to influence members of City Council to “change their minds” on terms and conditions that had been advanced by the City staff negotiation team as directed by Council.

It could be argued that an outside party could be permitted to make a presentation to a body on a matter that the body was permitted by the Act to consider in a closed session. However, once members begin to pose questions to that party, the process strays from what the Act permits.

Whether or not the members were persuaded to take a different position, either at the meeting or in future discussions on the matter, is immaterial. What matters is that the members became engaged in MacKenzie Health’s efforts to persuade or influence them; key components in a negotiation process where one party wants to secure an agreement on its terms.

Every negotiation course includes advice to participants to observe not only the content of what is said, but the tone, facial expression, and body language of adversaries. We cannot reasonably conclude that the representatives of MacKenzie Health did not leave without a better understanding of their potential for success for their position in future negotiations on the matter at hand, with the City.

We accept that the members of the Committee of the Whole truly thought that they were not engaging in negotiations with MacKenzie Health during that meeting. Nothing was deliberated or agreed to at the time and the complete matter was, appropriately, referred to staff for consideration at a future meeting. We also accept that City staff were attempting to ensure that a closed meeting process was not being used improperly in light of the open meetings rule of the *Act*.

Nevertheless, we have concluded that the fact that representatives of MacKenzie Health were permitted to make a presentation, and to answer questions about its negotiating demands, in closed session, is not in accordance with the open meetings provisions of the *Act*. We have concluded, however, that Committee of the Whole did this inadvertently. and while under the mistaken but bona fide belief that the presentation session was not part of the overall negotiations respecting the Long Term Ground Lease.

It would have been more prudent, in our opinion, to conform to its normal practice to:

1) not allow members of the “public” (in this case representatives of MacKenzie Health) into a closed session; and

(2) conduct the ongoing discussions with representatives of MacKenzie Health on the terms and conditions of the Long Term Ground Lease through the staff negotiating team, as Council’s agents.

**V. CONCLUSION**

Amberley Gavel has concluded that the Committee of the Whole for the City of Vaughan Council was not properly in closed session on January 30, 2014 under section 239(1)(c) of the *Municipal Act* when it engaged with the deputation of representatives of MacKenzie Health respecting the Long Term Ground Lease between the City of Vaughan and MacKenzie Health.

**VI. PUBLIC REPORT**

We received full co-operation from all parties that we contacted and we thank them.

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

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**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. We were advised that this is in fact what occurred later in the Special Meeting of January 30, 2014, once the MacKenzie Health representatives had left the meeting, and in subsequent meetings of Committee of the Whole and Council. [↑](#footnote-ref-3)
4. However, the council or local board can only execute the actual acquisition or disposal of land by a by-law enacted in open session. [↑](#footnote-ref-4)