**REPORT TO**

**THE CORPORATION OF THE CITY OF BURLINGTON REGARDING THE INVESTIGATION REGARDING A COMPLAINT WITH RESPECT TO THE MEETING OF THE COMMUNTY SERVICES COMMITTEE FOR THE CITYOF BURLINGTON IN CLOSED SESSION ON OCTOBER 2, 2013 AND A MEETING OF COUNCIL FOR THE CITY OF BURLINGTON IN CLOSED SESSION ON OCTOBER 15, 2013**

1. **COMPLAINT**

The Corporation of the City of Burlington (“City”) received a complaint about a Meeting of the Community Services Committee (“CSC”) in closed session held on October 2, 2013 and a Meeting of City Council in Closed Session on October 15, 2013. The essence of the complaint is that the holding of the closed meetings 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 Open and Closed Sessions of the CSC meeting on October 2, 2013, the Agenda and Minutes of the Council meeting on October 15, 2013, background reports and documents received during the two meetings relative to the issue being complained about, and other relevant documentation. The City Clerk, Assistant City Solicitor, and the Committee Clerk for the CSC were consulted during the course of the investigation. The webcast recording of the open session of the CSC was also viewed.

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

The complaint deals with a decision by City Council to sell certain waterfront property owned by the City and the Ministry of Natural Resources to adjacent property owners. The waterfront property is situated between Market Street and St. Paul Street on the shore of Lake Ontario, known as the “Water Street land parcels”. The complainant alleges that the decision to sell this property was “made in closed session so the public does not know the rationale for disposing of this waterfront asset”.

1. **Agenda for the CSC Meeting of October 2, 2013**

The Agenda for the October 2, 2013 CSC meeting contained two agenda items relating to this particular property. One item, to be dealt with in open session, was a “Report recommending approval for the development of a parkette on the Water Street Land Parcels”. The other item was listed under “Confidential Matters for Consideration” and listed as “Confidential Legal department report L-20-13, regarding a real estate matter”.

1. **Minutes of the CSC Meeting on October 2, 2013**

The Minutes for the CSC Meeting of October 2, 2013 indicate that the meeting commenced at 6:30 p.m. in open session. The CSC went into closed session at 7:56 p.m. and returned to open session at 8:27 p.m. The CSC went into closed session a second time at 9:33 p.m. and returned to open session at 10:20 p.m. The CSC meeting adjourned at 10:43 p.m.

The Minutes of the CSC Meeting are written in the format of a report to City Council listing recommendations for consideration. Therefore, the Minutes do not reflect the actual order of the proceedings of the meeting. Movers, seconders and votes are not recorded. A reader could also assume that items considered but not receiving majority support are not reported. It appears that they are not compliant with Section 239(7) with respect to the recording of committee minutes.

The Minutes contain an item for consideration respecting the “Approval of Development for Windows-to-the-Lake on the Water Street Land Parcels”. The CSC made five recommendations for Council’s consideration on the matter at the Council meeting of October 15, 2013.

The webcast shows that the CSC first heard four deputations from, and asked questions of, members of the public interested in the subject of the Water Street land parcels. After asking staff various questions, the CSC passed a motion to go in-camera in order to hear from staff about confidential legal matters.[[3]](#footnote-3)

CSC reconvened in open session at 8:27 p.m. at which time the members of the CSC spoke to the issue and the various options and motions under consideration. The CSC then voted in open session on the subject matter.

1. **Minutes of the Closed Session of the CSC Meeting on October 2, 2013**

The Minutes of the Closed Session indicate that the CSC received a report from the Manager of Realty Services of the Legal Department with respect to the subject lands. CSC then heard from staff from the Legal Department about the various financial and legal considerations surrounding the Water Street land parcels[[4]](#footnote-4). There were no deliberations in the closed session with respect to the options as presented in the public report on the subject lands. No decisions were made in closed session as to the options in front of the CSC respecting the subject lands.

1. **Agenda for the Council Meeting on October 15, 2013**

The Agenda for the Council Meeting on October 15, 2013 indicates that Council would be dealing with the subject item under its consideration of Report No. 10-13 of the Community Services Committee Meeting of October 2, 2013. The Agenda does not indicate any items anticipated for consideration in closed session.

1. **Minutes of the Council Meeting on October 15, 2013**

The Minutes for Council Meeting of October 15, 2013 indicate that Council adopted the recommendations of the CSC Meeting of October 2, 2013 through several recorded votes in open session. Council did not go into closed session on any matters on October 15, 2013.

1. **ANALYSIS AND FINDINGS**
2. **Section 239(2)(a) of the *Municipal Act***

The City asserted that the subject matter of the closed meeting dealt with the proposed or pending acquisition of land by the municipality and, therefore, was exempt from the open meetings provisions of the *Municipal Act* by virtue of section 239(2)(a) of the *Act*.[[5]](#footnote-5)

Sections 239(2)(a) of the *Municipal Act* provides that a council, committee, or local board is permitted to close all or part of a meeting to the public if the subject matter being considered is a proposed or pending acquisition or disposition of land by the municipality or local board.

The purpose of section 239(2)(c) is to allow a council, its committees, or local boards 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. 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.[[6]](#footnote-6) 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 market value of the property. 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 dealing with land acquisition or land disposition. Hence, the discussion can be held in closed session.

It would appear from the reading of the Minutes of the Closed Session of the CSC that the CSC was dealing with its negotiating strategy on the potential acquisition or disposition of the subject lands, including the price it was willing to pay for the lands owned by the Ministry of Natural Resources or the price it would like to receive if it disposed of the land to the adjacent land owners. It was not making a decision on any one of the options in the closed session.

As a result, the exemption to the *Municipal Act* in section 239(2)(c) applies to the closed meeting of the CSC on October 2, 2013.

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

Although the exception under Section 239(2)(f) of the *Municipal Act* was not invoked by the CSC to convene into closed session, it is our opinion that the CSC could have done so. The Assistant City Solicitor was clearly providing advice to members of the CSC that would have been subject to solicitor-client privilege. Hence, the exemption to the *Municipal Act* in section 239(2)(f) respecting advice that is subject to solicitor-client privilege applies to the closed meeting of the CSC on October 2, 2013.

**VI. CONCLUSION**

Amberley Gavel has concluded that the CSC did not breach the open meetings requirement of the *Municipal Act* in closing part of its meeting to the public on October 2, 2013 during discussion of the proposed acquisition or disposition of the Water Street land parcels. Further, since City Council did not go into closed session on the subject matter of the complaint, it cannot be said that Council breached the open meetings requirement of the *Municipal Act* during its meeting of October 15, 2013.

**VII. RECOMMENDATIONS**

Although we have found that neither the CSC nor City Council breached the open meetings requirements of the *Municipal Act*, we offer one recommendation:

When convening into closed session, it is required for council, its committees, and local boards formally resolve to move into closed session by citing the specific applicable exemption in the *Municipal Act* allowing the closed session and the general nature of the matter to be considered, providing enough information to the public without undermining the reason for excluding the public. While it was clear to those present at the open meeting of the CSC that the CSC was convening into closed session to consider the legal implications of its pending considerations about the Water Street land parcels, it would not be so clear if one were reading the historical record of the meeting in the CSC’s Report to Council. In this particular case, it would have been appropriate if the motion had been:

*that the Community Services Committee convene into closed session under section 239(2)(c) of the Municipal Act dealing with the proposed or pending acquisition or disposition of the Water Street land parcels.*

**VII. 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 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. As a result, this decision to convene into closed session bifurcated the CSC’s closed sessions. Hence, CSC dealt with the Water Street land parcels during the first closed session from 7:56 p.m. to 8:27 p.m. It then dealt with other matters in its second closed session from 9:33 p.m. to 10:20 p.m. unrelated to the Water Street land parcels. [↑](#footnote-ref-3)
4. It would be improper, for Amberley Gavel to discuss in this report the detailed substance of the closed meeting discussions, since disclosure would offend the principle of confidentiality that closed meetings protect. In addition, to do so would allow complainants and other third parties to receive information through a closed meeting investigation that they would otherwise not be privy to; that is not the function of a closed meeting investigation. That is not to say that the complainant in this instance was attempting to do that, but rather that the possibility could be contemplated in other instances. [↑](#footnote-ref-4)
5. We note that two of the options in the staff report involve the purchase of land from the Ministry of Natural Resources and one related to the disposition of land to adjacent land owners. Effectively, the CSC was dealing with the proposed acquisition **or** disposition of land. [↑](#footnote-ref-5)
6. 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-6)