**REPORT TO**

**THE CORPORATION OF THE MUNICIPALITY OF KINCARDINE**

**REGARDING ALLEGATIONS OF AN IMPROPERLY CLOSED MEETING OF THE COUNCIL FOR THE MUNICIPALITY OF KINCARDINE**

**ON MAY 21, 2014**

**I. COMPLAINT**

Amberley Gavel Ltd. (“Amberley Gavel”) received a complaint on August 1, 2014 about a closed (in-camera) meeting of The Corporation of the Municipality of Kincardine (“Municipality”) Council (“Council”) held on May 21, 2014. The essence of the complaint is that the procedure for calling the closed meeting, the notice and information given to the public about this meeting, and the information provided to the public meeting following the closed meeting were insufficient and, as such, 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*”).

The Municipality was advised of the complaint by Amberley Gavel on August 5, 2014.

**II. JURISDICTION**

The Municipality 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 the Council of the Municipality.

**III. BACKGROUND**

Section 238 of the *Municipal Act* provides that all municipalities must have a procedure by-law governing the calling, place, and proceedings of meetings, including a provision for public notice of 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 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).

Section 239(4)(a) of the *Municipal Act* requires that, “before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting”.

Further, section 239(6) of the *Municipal Act* prohibits the taking of a vote in a closed meeting unless:

1. the *Act* permits or requires the meeting to be closed to the public; and
2. the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.

**IV. INVESTIGATION**

The investigation into the complaint began on August 5, 2014 with a request to the Municipality for background documents. Documents provided by the Municipality and reviewed during the course of the investigation included the Municipality’s Procedure and Notice By-laws, the Agendas and Minutes of the open and closed meeting of Council at issue, and other relevant documentation. The Clerk and the Municipality’s Solicitor were consulted during the course of the investigation.

It should be noted that 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” (Section 239.2). Accordingly, the role of the investigator is to examine and report on the *process* and not on the substance, timing, or community impact of the decision(s), made at closed or open meetings of a council, committee, or local board. Our authority is limited to assessing whether or not the *process* used to reach the decision conformed with the Municipal Act or the Municipality’s procedure by-law, rather than the substance of any decisions.

**V. BACKGROUND**

1. **SP Armow Wind Ontario LP Development Project**

The SP Armow Wind Ontario LP Development Project (“Armow Wind Project”) involves the construction, installation, operation, use and retiring of a Class 4 wind facility with 92 wind turbine generators. It received Renewal Energy Approval (“REA”) under the *Environment Protection Act* in October 9, 2013. The REA was upheld under appeal by the Environmental Review Tribunal on April 22, 2014.

The Municipality entered into a Memorandum of Understanding (“MOU”) with the developer of the Armow Wind Project on February 20, 2013. The MOU set out the process for the parties to reach a general development agreement (“the Development Agreement”) and a road use agreement (“the RUA”) in order to better protect the safety and wellbeing of the Municipality’s residents, to ensure substantial compliance with the Municipality’s Wind Generation Systems Development Policy, and to set out the respective rights and obligations of the developer and the Municipality. The MOU was adopted by by-law and made public on February 20, 2013.

As a result of the signing of the MOU, Council authorized the Chief Administrative Officer (“CAO”) and the Municipality’s Solicitor to negotiate the terms of the Development Agreement and the RUA.

Negotiations continued over a period from February 20, 2013 to approximately the beginning of May, 2014, with Council providing direction to the CAO and Solicitor at various points during this time. The terms of the Development Agreement and the RUA were made public on May 21, 2014.

1. **Municipality of Kincardine 2013 Procedure By-law**

The Municipality has a procedure by-law which governs the calling, place, and location of meetings, most recently amended December 18, 2013. Section A2.6.1 of the Procedure By-law provides that public notice of meetings will be provided on the Municipality’s website and in accordance with its Notice By-law. Section A.10 sets out the Order of Business for Regular Meetings of Council, including a provision to have a “Closed Session if required”.

The Procedure By-law sets out the provisions for the enactment of Council’s by-laws as follows:

A14.1 Every by-law shall have three readings prior to being passed.

A14.2 All by-laws shall be introduced by motion for a first, second and third reading and **passing under one motion**. Any member of Council may ask to debate the by-law, and that by-law shall be referred to Committee of the Whole under "Items for Discussion from Council" for further debate. [emphasis added]

…

A14.4 If Council so determines, a by-law may be taken as read at any stage of its presentation.

The Procedure By-law stipulates that all meetings shall be open to the public, unless one of the listed *Municipal Act* exemptions applies to the subject matter under consideration. The By-law also stipulates that before holding a closed meeting Council must state by resolution the (a) fact of holding a closed meeting and (b) the general nature of the matter to be considered. In addition, the By-law mirrors the provisions of the *Municipal Act* respecting the taking of votes in closed session.

1. **Notice of the Meeting**

The Council meeting for May 21, 2014 was listed in the “Municipal Calendar” published on the Municipality’s website. The meeting agenda was provided on the Municipality’s website in accordance with the customary practices and timelines of the Municipality.

1. **Agenda for the Meeting of Council on May 21, 2014**

The Agenda for the Meeting of Council on May 21, 2014 indicated that Council was expected to move into Closed Session:

**Motion #05/21/14 -**

Moved by:

Seconded by:

THAT Council move into closed meeting to consider advice that is subject to solicitor-client privilege, including communications necessary for that purpose (Armow Wind);

AND FURTHER THAT Council return to regular open meeting upon completion.

1. **Minutes of the Meeting of Council on May 21, 2014**

The Minutes of the Meeting of Council on May 21, 2014 in open session indicate that Council moved into Closed Session:

**Motion #05/21/14 - 13**

Moved by: Anne Eadie

Seconded by: Guy Anderson

THAT Council move into closed meeting to consider advice that is subject to solicitor-client privilege, including communications necessary for that purpose (Armow Wind);

AND FURTHER THAT Council return to regular open meeting upon completion.

The following resolutions were duly voted on as matters arising from the Closed Session:

**15.1 By-law to authorize the Signing of Development Agreement with SP Armow**

**Wind Ontario LP**

**Motion #05/21/14 - 14**

Moved by: Larry Kraemer

Seconded by: Mike Leggett

THAT the “Development Agreement with SP Armow Wind Ontario LP By-law” be deemed to be read a first, second and third time, finally passed and numbered as By-law No. 2014-080.

**15.2 SP Armow Wind Renewable Energy Approval Conditions**

**Motion #05/21/14 - 15**

Moved by: Mike Leggett

Seconded by: Maureen Couture

THAT staff be directed to advise the Ministry of Environment that Renewable Energy Approval conditions have been met for the SP Armow Wind Project.

**15.3 SP Armow Wind Development Media Release**

**Motion #05/21/14 - 16**

Moved by: Candy Hewitt

Seconded by: Kenneth Craig

THAT staff be directed to prepare media release to announce the details of the SP Armow Wind Ontario LP Development Agreement with the Municipality.

1. **Agenda for the Closed Session of Council on May 21, 2014**

The Agenda for the Closed Session of Council on May 21, 2014 indicated that Council would receive a presentation by the Municipality’s solicitor about the Armow Wind Project.

1. **Minutes for the Closed Session of Council on May 21, 2014**

The Minutes for the Closed Session of Council on May 21, 2014 indicated that Council went into closed session at 6:15 p.m. received a presentation by the Chief Administrative Officer and the Municipality’s solicitor about the Armow Wind Project. The discussion centred on the negotiated terms of the development agreement and the road use agreement. No votes were taken during closed session. Staff was directed to place the authorizing by-law as a “Matter Arising from Closed Meeting”. A motion and subsequent vote on such a direction is contemplated by the Act and it is appropriate to provide such direction by motion pursuant to Section 239(6)(b). Council moved out of closed session at 7:52 p.m.

The matters under consideration in the Closed Sessions were subjects that were dealt with in a closed meeting under the *Municipal Act* exemption of “solicitor/client privilege”.

**VI. ANALYSIS AND FINDINGS**

In summary, the complaint alleges that Council should have provided more advance notice of the closed session; should have been more specific in titling the closed session item; should have provided the public with more transparency around the fact that it was considering approval of the development agreement; and should not have passed the by-law the very same evening that the approval was considered.

It should again be underscored that our scope is limited to whether or not Council followed the provisions of the *Municipal Act* and its own Procedure By-law. We do not have the authority to comment on whether or not Council chose the best process to enact a decision, or on the substance of a decision on an issue. Our role is confined to interpreting whether or not Council followed the processes outlined in either the *Municipal Act* or the Municipality’s Procedure By-law.

1. **Notice for the Meeting**

The *Municipal Act* does not stipulate any general timeframes by which a council, committee, or local board has to provide notice of meetings, or of closed session items to be considered during its meetings. Although the complainants would have liked to have more notice that a closed meeting was being called on the issue, there is nothing in the *Municipal Act* or the Municipality’s Procedure By-law that provides for advance notice for closed session items on regular meeting agendas.

Hence, we have found that there was no breach by the Municipality, either of the *Municipal Act* or its Procedure By-law, with respect to the giving of notice for the closed session of Council on May 21, 2014. The Municipality provided notice in accordance with its Procedure By-law and its customary practices.

1. **The Titling of the Agenda Item and Greater Transparency**

The *Municipal Act* provides that before holding a closed meeting, the council, committee, or local board should state the “general nature of the matter to be considered”. It does not provide any further guidance in terms of how specific a council, committee, or local board must be in terms of the disclosing the “general nature”. The Ontario Court of Appeal has stated that the information provided should be “a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public”[[3]](#footnote-3).

The agenda item was titled “Armow Wind”. While this met the requirements of the Act, we see no reason why the item could have been titled “Armow Wind: Development Agreement and Road Use Agreement”. This would have maximized the information available to the public while not undermining the reason for excluding the public.

The exclusion of the public from the meeting was, in our opinion, appropriate since the Municipality’s Solicitor was presenting items that involved salient points of negotiation within the two agreements. The fundamental purpose of the open meetings rule in the *Municipal Act* is to foster transparency, openness, and accountability in municipal government. However, 239(2)(f) allows a council or local board to receive information that is subject to solicitor/client privilege in closed session when considering the terms of these types of agreements. It makes sense that a council or local board would not have open public discussions about its negotiating strategy.

Thus, even if the agenda item had been titled with more specificity, Council would still have been permitted to have a closed meeting in accordance with the exemption dealing with solicitor/client privilege. It would be entirely speculative for us to conclude that more members of the public would have been in attendance during, or after, the closed meeting if the item had been titled with greater specificity.

Since the *Municipal Act* does not stipulate the degree to which the “general nature” of the matter is to be divulged, we cannot conclude that the Municipality breached the provisions of the *Municipal Act* in this regard.

1. **Passing of the By-law**

The *Municipal Act* does not stipulate that there should be some period of time between first, second, and third reading of a council’s by-laws, except in legislatively defined situations (none of which are at issue in this complaint). The Municipality’s Procedure By-law provides that the passing of a by-law can be done summarily by including the first, second, and third reading in one motion. If a Member of Council objects, there is a process by which the by-law would be deferred for further and future discussion.

In our experience, it is not unusual that a council would combine first, second, and third readings into one motion rather than placing the item for three separate readings if its Procedure By-law allows the practice.

**VII. CONCLUSION**

Amberley Gavel has concluded that the Council for the Municipality of Kincardine did not breach any stipulated provisions of the *Municipal Act* or of its Procedure By-law in the processes leading up to or ensuing the closing of its May 21, 2014 meeting to the public.

**IX. PUBLIC REPORT**

This report is forwarded to the Council of the Municipality of Kincardine. 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.

We received full co-operation from the Municipality’s representatives during this investigation and we thank them for that co-operation.

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**AMBERLEY GAVEL LTD.**

**September 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. Farber v. Kingston (City), 2007 ONCA 173 (CanLII) at para. 21, <<http://canlii.ca/t/1qtzl>> retrieved on 2014-09-11 [↑](#footnote-ref-3)