**A REPORT TO THE COUNCIL OF THE CORPORATION OF THE TOWNSHIP OF MELANCTHON REGARDING THE INVESTIGATIONS OF TWO CLOSED MEETINGS OF THE COUNCIL**

**THE COMPLAINT**

Pursuant to Section 239.1 of the Municipal Act (“the Act”) relating to closed meetings of Council, the Township of Melancthon received two letters from the same complainant respecting a Special Meeting of council held on July 13, 2010 and a Regular Meeting of Council held on July 22, 2010. The two requests will be dealt with in this report as some of the recommendations are applicable in both instances.

The main issues raised by the complainant with respect to the July 13th meeting are:

* whether the subject matter of the closed session was permitted under the provisions of the Municipal Act and
* whether valid notice to the public was given of the meeting

The main issue raised by the complainant with respect to the July 22nd meeting is whether the report of the planning consultant should be considered by council at a closed session.

**JURISDICTION**

The Township of Melancthon 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 the investigation and report to the Council of the Township of Melancthon. The investigator interviewed the CAO/Clerk-Treasurer (“CAO”) of the Township as well as the complainant who was accompanied at the interview by two other ratepayers

**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 the matter to be considered at the closed meeting”. [emphasis added]*

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.

Each of the meetings will be examined separately.

**July 13, 2010 Special Meeting of Council**

**FACTUAL BACKGROUND**

A special meeting of township council was called to be held on July 13, 2010. The agenda for the meeting indicated that the purpose of the meeting was:

*“2. General Business*

1. *Review of Draft Agreement*
2. *By-law to enter into agreement.”*

In attendance were members of council, the CAO, the lawyer acting on behalf of the township and representatives of the company with whom the township was negotiating an agreement.

Notice for the meeting indicated that it was a closed session of council. It appears from the minutes that the meeting began as an open public meeting in order for the public resolution to be passed as required by section 239 (4) of the Municipal Act. On the face of it, the public portion of the meeting was a sham both at the outset and even more critically at the conclusion of the meeting.

According to the minutes, the meeting began at 8:30 AM. The closed portion ended at 8:55 AM and the meeting ended at 9:00 AM. There is no indication in the minutes of the time that the “public” resolution was passed or when council moved into the closed session.

The resolution passed by council at the beginning of the meeting read as follows.

*“Moved by White, Seconded by Elliott that we move into Closed Session in order to discuss a matter pertaining to the receiving of advice that is subject to Solicitor/Client Privilege, including communication necessary for that purpose.”*

Council moved from the closed meeting into the open meeting at 8:55 and in the five minutes before adjournment enacted By-law 22-2010 with a resolution that is recorded in the minutes as follows:

*“Moved by White, Seconded by Elliott that leave be given to introduce a by-law to enter into an Agreement with Plateau Wind Inc. Substantially in the form attached and it now be read a first, second and third time. Carried By-law numbered 22-2010 and given the required number of readings.”*

It is apparent that the public would not reasonably have known the real purpose of the meeting. The fact that it was indicated by the township that it was to be a closed meeting would discourage any public attendance. The placing of the notice in a different location on the website made it difficult if not impossible for the public to observe the actions of council. The conclusion can be reached that entire July 13th meeting was closed to the public.

**ISSUES**

Was the meeting properly called?

Was there adequate notice to the public?

Was the purpose of the meeting one for which a closed meeting may held pursuant to section 239 of the Municipal Act?

Was the by-law passed using best practice?

A special meeting of council may only be called by the Head of Council or by a petition of a majority of members of council. It appears in this instance that the Head of Council directed the CAO to call the meeting. It was intended that the meeting not be open to the public.

The notice placed on the township website indicated a closed meeting. It should be noted that the notice of this special meeting was not placed in the normal meeting dates location on the website. The agenda for the meeting indicated a closed meeting. But that was not the case.

Municipalities in Ontario have a duty to hold all of the meetings of council in open, that is, open to the public. Closed meetings may only be held if the subject matter fits into one of the exceptions listed in section 239. The public resolution is required before any closed meeting is held. This resolution, passed at a duly constituted public meeting must indicate that a closed meeting is to be held and must also indicate the general nature of the matter or matters to be deliberated. This is all part of the necessity of municipalities to be accountable and transparent.

The resolution indicates that the meeting was to be closed in order “to discuss a matter pertaining to the receiving of advice that is subject to Solicitor/Client Privilege, including communication necessary for that purpose”. Section 239 [(2)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm#s239s2) reads, “A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;”

The agenda provides for a review of the draft agreement. The township solicitor was present to provide advice. However, the presence of the party opposite in the agreement suggests that the real purpose was to finalize negotiation of the agreement. This is not an exception to the open meeting rules set out in section 239.

The question has to be asked whether By-law 22-2010 was properly enacted at an open public meeting. There is no ability for a municipal council to enact a by-law at a closed meeting. The validity of the by-law is not an issue to be dealt with as part of this investigation.

The by-law authorizes the execution of an agreement substantially in the form attached. What is the meaning of “substantially” and who has the authority to change the agreement?

**July 22, 2010 Regular Meeting of Council**

**FACTUAL BACKGROUND**

The Township of Melancthon retains a planner on a part time basis under contract. The planner is required to provide a written report to council for each regular meeting. The report is intended to keep members of council apprised of the planner’s activities. The request for an investigation is specifically directed to the July 22, 2010 meeting but it has been an ongoing practice.

**ISSUES**

The reason for the investigation request is that the planner’s report is prepared as a confidential document which is intended to be included on the closed meeting portion of the regular agenda.

The agenda for the meeting of July 22, 2010 was prepared in accordance with the Township’s Procedure By-law. Item 12 of the agenda reads as follows.

12. Closed Session (if required)

1. Personal matters about an identifiable individual, including municipal or local board employees – GW Jordan In House Planning Report for July 14, 2010.”

The minutes of the July 22nd meeting indicate that the resolution to move into the closed meeting was passed at 8:21 and the motion to rise and report from the closed meeting was passed at 8:25; a total of four minutes.

The CAO/Clerk/Treasurer indicated that this was the only written report from administration. All of the department heads report verbally to council. The planner’s report was given in writing because he was under contract.

The reason for placing the planner’s report on the closed meeting portion of the agenda was to protect anyone that the planner had dealt with and who was referred to in the report. This report, in the opinion of Amberley Gavel, does not fit within the exception relied upon in the public motion authorizing the closed meeting, namely, subsection 239 (2) (b) personal matters about an identifiable individual, including municipal or local board employees”.

Keeping members of council current with administration is helpful but the use of a closed meeting is not appropriate. If the planner’s report is going on a council agenda, it should be on the public portion.

**CONCLUSIONS**

Accordingly, as a result of its investigation of the complaints filed Amberley Gavel Ltd. would summarize its findings as follows:

1. The purpose for the Special Meeting of Council on July 13, 2010 was to finalize negotiations between the township and Plateau Wind Inc. And even though the township lawyer was present the purpose of the meeting went beyond “advice that is subject to solicitor-client privilege”.
2. The failure to give proper notice for the July 13, 2010 meeting did not provide the public with the opportunity to attend the open portion of the meeting. The notice on the website was not included in the regular meeting notice part of the website.
3. The meeting was to be closed yet the public resolution was required and the council enacted a by-law. From the public’s perspective the entire July 13, 2010 meeting was not open to the public.
4. The by-law is not definitive in that changes could be made after the fact as the by-law authorized the execution of an agreement substantially in the form of the agreement attached to the by-law.
5. The practice of including the planner’s report to council at a closed meeting was not unique to the July 22, 2010 Regular Meeting. It did not fit within the exception in section 239 (2) of the Municipal Act. There are other ways of providing information to council without the need of a closed meeting.

**RECOMMENDATIONS**

While council and the administration may be attempting to act in an honest and sincere way, it is apparent that there is a lack of training undertaken by members of council and staff. The following recommendations, if implemented, would assist council and the administration in serving their community.

1. The township’s Procedure By-law is out of date and is in need of a review and rewrite. This will clarify processes, better define relationships and create stronger links to the community.
2. Council should commit itself to a training plan for the organization. Training can be a combination of internal and external training. Municipalities in Ontario are all subject to the same rules imposed by the province. These rules found in provincial legislation and regulations must be followed. It requires an ongoing commitment by the organization, starting with council, to keep up to date with these requirements. Proper training will afford both staff and members of council the knowledge of what is best practice for a municipal corporation in Ontario.

Finally, Amberley Gavel Ltd. would like to thank the township officials who co-operated fully during the course of this investigation. Special note should be made of the thoroughness and diligence of staff of the CAO in the provision of the documentation required for this investigation.

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

August 12, 2011

AMBERLEY GAVEL LTD.