

**REPORT TO
THE CORPORATION OF THE COUNTY OF BRANT
REGARDING THE INVESTIGATION OF THE MEETING OF THE
CITY/COUNTY STRATEGIC GROWTH NEGOTIATIONS TASK FORCE OF
NOVEMBER 27, 2012**

I. COMPLAINT

The Corporation of the County of Brant ("County"), a single tier county, received a complaint on November 28, 2012 about a closed (in-camera) meeting held on November 27, 2012 between Members of Council of the County and Members of Council of the City of Brantford ("City"), sitting as the City/County Strategic Growth Negotiations Task Force ("Negotiations Task Force" or "Task Force"). The essence of the complaint is that the holding of a closed meeting was in contravention of the open meetings provisions of the *Municipal Act, 2001*¹, as amended by Bill 130² ("Municipal Act").

This request was sent to the offices of Amberley Gavel Ltd. ("Amberley Gavel") for investigation.

Immediately upon receiving the complaint the County Clerk consulted on a preliminary basis with Amberley Gavel. It was agreed that no further in camera meetings would be held by the Negotiations Task Force until this investigation was completed. Further, the County decided that the matter would not be put forward to County Council until either the investigation report was received from Amberley Gavel, or the City advised that the subject matter underlying the complaint should be considered in open session of County Council.

II. JURISDICTION

The County appointed Local Authority Services (LAS) as its closed meeting Investigator pursuant to section 239.2 of the Municipal Act.

¹ S.O. 2001, c. 25.

² *Bill 130: An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 ("Bill 130").

LAS has delegated its powers and duties to Amberley Gavel to undertake the investigation and report to the Council of the County.

III. 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 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. (1) Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

Exceptions

(2) 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).

IV. INVESTIGATION

The investigation into the complaint began on December 14, 2012.

The Clerk of the County of Brant and the Mayor of the City of Brantford were consulted during the course of the investigation.

Documents provided by the County and reviewed during the course of the investigation included the County's Procedure and Notice By-laws, the Agendas and Minutes of the subject closed meeting, a report dealing with the subject matter that was submitted by the Mayor of the City of Brantford to the Negotiations Task Force for consideration at the meeting, and other relevant documentation.

BACKGROUND

(a) The City/County Strategic Negotiations Task Force

The Negotiations Task Force is comprised of the Mayor of the County of Brant, three Members of County Council, the Mayor of the City of Brantford, and three Members of City Council. The first meeting of the Negotiations Task Force was held on June 26, 2012 at the City offices. The second meeting was held on November 27, 2012 at the County offices.

The mandate of the Negotiations Task Force is to explore the issue of boundary adjustments between the City and the County and to make recommendations to their respective Councils. The location of its meetings alternate between the City and the County. The meeting is chaired by the Mayor of the municipality in which the meeting is held (the "hosting municipality"). Clerk's support is provided by the hosting municipality. Any member of either County or City Council may attend the meetings.

The composition of this Task Force clearly indicates to Amberley Gavel that it meets the definition of a "committee" to which section 239 of the Act applies

(b) Agenda for the Negotiations Task Force Meeting of November 27, 2012

The Agenda for the November 27, 2012 meeting contained an item to be dealt with in-camera listed as:

“5. **In Camera** (security of the property of the municipality or local board and a proposed pending acquisition or disposition of land by the municipality or local board):

- a. Presentation of the City of Brantford proposal (to be provided at the meeting).”³

According to the City’s Deputy Clerk, the Mayor of the City asked that the presentation be dealt with “as a Private and Confidential item for discussion in closed session”.⁴ The Deputy Clerk advised the County Clerk that the reason(s) the item was to be dealt with in-camera was that the item to be considered dealt with “the security of the property of the municipality or local board and a proposed or pending acquisition or disposition of land by the municipality or local board”.⁵

(c) Minutes of the Negotiations Task Force Meeting on November 27, 2012

The Minutes for the Negotiations Task Force Meeting of November 27, 2012 indicate that the meeting commenced at 7:00 p.m. in open session. The meeting went into closed session at 7:10 p.m. and back into open session at 7:50 p.m. Prior to adjourning the meeting, an omnibus motion was moved and seconded and included recommendations to receive the City of Brantford’s presentation and to establish a meeting schedule for future meetings of the Task Force. Consideration of the motion was deferred pending a review of the proposed meeting schedule.

(d) Minutes of the Closed Meeting of the Negotiations Task Force on November 27, 2012

The Minutes for the Closed Meeting of the Negotiations Task Force on November 27, 2012 indicate that the Task Force received a presentation from the Mayor of the City with respect to the City of Brantford’s proposal for boundary adjustments (“Proposal”)⁶. The Proposal was tabled at the meeting as a “Private and Confidential Item” under sections 239(2)(a) and 239(2)(c) of the *Municipal Act*.

³ It is not clear whether the Negotiations Task Force conducts itself in accordance with the County’s Procedure By-law or the City’s Procedure By-law. If it is in accordance with the former, all supporting material is to be provided along with the Agenda forty-eight hours in advance of the meeting.

⁴ E-mail correspondence from the Deputy Clerk/Manager of Legislative Services, City of Brantford, to the Clerk of the County of Brant dated November 27, 2012.

⁵ *ibid.*

V. ANALYSIS AND FINDINGS

Three reasons were cited by the City as to why the Proposal could be dealt with in closed session:

- (a) The subject matter dealt with security of the property of the municipality and was exempt from the open meetings rule by virtue of section 239(2)(a) of the *Municipal Act*, and
- (b) The subject matter dealt with a proposed or pending acquisition or disposition of land by the municipality and was exempt from the open meetings rule by virtue of section 239(2)(c) of the *Municipal Act*, and
- (c) Prior discussions between the County and the City in 2007 were held "in confidence".

Each of those reasons will be canvassed in light of the proper interpretation of the *Municipal Act*.

(a) Section 239(2)(a) of the *Municipal Act*

The City asserted that the subject matter of the Proposal dealt with the security of the property of the municipality or local board and, therefore, was exempt by virtue of section 239(2)(a) of the *Act*. It contended that the City is dealing with issues around:

- (i) its ability to maintain and expand its existing infrastructure given the current boundary constraints; and
- (ii) the limits of its jurisdiction over certain planning and property standards for the lands that surround the Municipal Airport which are owned by the County.

The *Municipal Act* does not define the phrase "security of the property of the municipality". However, the Information and Privacy Commissioner ("IPC") considered the meaning of this phrase in a 2009 decision and stated in part that:

"In my view, 'security of the property of the municipality' should be interpreted in accordance with its plain meaning, which is the protection of property from physical loss or damage (such as vandalism or theft)...."⁷

Since the legislative aims of the *Municipal Freedom of Information and Protection of Privacy Act* are similar but not identical to the open meetings provision of the *Municipal Act*, in that the public has a right to open and transparent government, Amberley Gavel is guided in this instance by the meaning advanced by the IPC

⁷ Information and Privacy Commission Order MO-2468-F; re: City of Toronto (October 27, 2009).

relating to the "security of the property of the municipality or local board".

For the purposes of this investigation, in order to comply with section 239(2)(a) of the *Municipal Act* the Negotiations Task Force must be found to have discussed in closed session considerations related to protection of property from loss or damage.

- (i) The City of Brantford's ability to maintain and expand its existing infrastructure given the current boundary constraints

There is nothing in the Proposal Report that speaks specifically to any concerns that would compromise the security of the City's property. The County Clerk confirmed that the Mayor of the City did briefly touch upon infrastructure limitations in his presentation to the Negotiations Task Force.

Discussions about the lack of capacity of the municipal infrastructure to support current or future growth are not, in our opinion, matters of "security of the property of the municipality". The mere fact that the City lacks certain infrastructure capacity does not mean that its property is subject to loss or damage.

- (ii) The limits of the City's jurisdiction over certain planning and property standards for the lands that surround the Municipal Airport which are owned by the County

The fact that the City does not have jurisdiction over lands surrounding the Municipal Airport is known to the public. Further, the concerns of the Brantford Airport Board (a local board of the municipality) about the lack of zoning bylaws dealing with restrictions and or easements over the Municipal Airport have been discussed publicly.⁸ Indeed, the matter has been reported in the press.⁹

The City has an interest in enhancing its control over planning, zoning, and property standards in the vicinity of its airport but this interest is not a matter of "security of the property of the municipality". Open and transparent discussion of these concerns does not directly deal with the security of the airport as City property.

Hence, we conclude that it was not proper to invoke this section of the *Municipal Act* to deal with this matter in a closed session.

⁸ See for example the Minutes of the Brantford Airport Board dated January 9, 2012 wherein it addresses a request to the County for amendments to its zoning bylaws respecting tree height restrictions.

(b) Section 239(2)(c) of the *Municipal Act*

The City contended that the subject matter of the Proposal dealt with a proposed or pending acquisition or disposition of land by the municipality and, therefore, was exempt by virtue of section 239(2)(c) of the *Act*. In addition, it was indicated by the City that a public discussion about the boundary adjustments might lead to volatility in the real estate market, potentially affecting land values and property tax assessments in both the City and the County.

(i) Proposed or Pending Acquisition or Disposition of Land

The Proposal does not contain terms and conditions for acquisition of the County owned lands by the City; it merely outlines “points of negotiation” for the area that the City is seeking to include within the City’s expanded boundaries and suggests that the Task Force use the terms of the 2007 Letter of Intent¹⁰ as the starting point for negotiations between the City and the County.

The purpose of section 239(2)(c) is to allow a council or local board to instruct staff, a lawyer, or its agent (collectively, “agent”) in closed session to negotiate 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 including and 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.¹¹

However, we do not believe that it is a the proper interpretation of section 239(2)(c) that two councils can negotiate behind closed doors about issues related to tax increases, water rates, and other planning and development matters on land jurisdiction to be transferred between two public bodies as part of a boundary adjustment process. An individual council would not be permitted to discuss these issues in closed session, unless the matters clearly fell within an exception under the *Municipal Act* requirement that all meetings are required to be open to the public.

The issues that were being discussed did not, in our opinion, fall within the exceptions to the open meetings requirements.

¹⁰ On February 22, 2007, the Mayors of the City and County signed a Letter of Intent to allow the City’s expansion to occur. The document is formally called the “Working Draft Brant-Brantford Growth and Service Strategy – Letter of Intent (Appendix “B”)”. The Letter of Intent is a public document.

¹¹ However, the council or local board can only execute the actual acquisition or disposal of land by a by-law enacted in open session.

(ii) Real Estate Market Volatility

The fact that there may be volatility in the real estate market and a possible affect on land values resulting from a municipality's boundary adjustment does not fall within the permitted reasons for excluding the public from a meeting to have a closed session discussion.

Hence, it was not proper to invoke section 239(2)(c) of the *Municipal Act* to deal with this matter in a closed session.

(c) The 2007 Boundary Adjustment Process

The Mayor of the City of Brantford indicated that during the prior, unsuccessful boundary adjustment negotiations undertaken by the parties in 2007 the Provincial Development Facilitator ("PDF") required that all discussions between the City and the County and the PDF be held "in confidence". It is not our role to comment on the bona fides of that requirement in 2007 prior to the closed meeting investigator provision being legislated. However, we are unaware of any legislation that would give the PDF or any other Provincial official the authority to require that a municipal council breach the open meetings provisions of the *Municipal Act*.

It is important to point out that the parties were operating in accordance with what they thought was the proper process because of this prior dictate by the PDF. In other words, the fact that they held discussions "in confidence" in the past led them to believe that they had to hold the current discussions in closed session. This was confirmed by both the Mayor of the City and the County Clerk as the underlying impetus for having conducted the discussions in closed session.

Thus, although we have concluded that the Negotiations Task Force breached the open meetings requirements of the *Municipal Act*, we found that the members did not do so intentionally.

VI. CONCLUSION

Amberley Gavel has concluded that the Negotiations Task Force breached the open meetings requirement of the *Municipal Act* in closing its meeting to the public on November 27, 2012 during discussion of the City's proposal for boundary adjustments. We have found that it did so under the mistaken but bona fide belief that they were required to do so.

VII. RECOMMENDATIONS

As a result of the investigation, we offer several recommendations:

- (a) THAT the Negotiations Task Force consider whether it will operate in accordance with the County's or the City's Procedure By-law for the purpose of governing its meetings and processes;
- (b) THAT, should the parties involve the services of the Provincial Development Facilitator, the Negotiations Task Force seek advice on how to conduct its meetings in accordance with the open meetings provision of the *Municipal Act* in light of any requirements requested of it by the Provincial Development Facilitator.

VII. PUBLIC REPORT

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

This report is forwarded to the Council of the County of Brant. 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. Although not specifically required by the *Municipal Act*, we would also suggest that a copy be forwarded to the Council of the City of Brantford and that it also consider placing this on its public agenda.

AMBERLEY GAVEL LTD.

Per:

January 2013