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CLOSED MEETING INVESTIGATOR REPORT ON CLOSED MEETING INVESTIGATION 2024-01

THE CORPORATION OF TAY VALLEY TOWNSHIP

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION.....	1
III.	REQUEST	1
IV.	REVIEW OF MATERIALS AND INVESTIGATIVE PROCESS	2
V.	STATUTORY FRAMEWORK.....	2
VI.	PROCEDURAL BY-LAW	4
VII.	THE MEETINGS.....	5
VIII.	FINDINGS	7
IX.	CONCLUSIONS	8
X.	RECOMMENDATIONS	8

THE CORPORATION OF TAY VALLEY TOWNSHIP REPORT ON CLOSED MEETING INVESTIGATION 2024-01

I. INTRODUCTION

1. Aird & Berlis LLP is the Closed Meeting Investigator (“**Investigator**”) for Tay Valley Township (the “**Township**”).
2. In our capacity as Investigator, we received a formal request (the “**Request**”) dated April 10, 2024 for a closed meeting investigation (the “**Investigation**”).
3. The Request seeks an investigation concerning closed sessions of meetings alleged to have been held by the Township’s Council and Committee of the Whole. Specifically, the Request asserts that the Committee of the Whole meeting on November 5, 2019, Special Council Meeting on January 26, 2023, and the Special Council Meeting on February 16, 2023 were improperly held in closed session.
4. This is a report on our closed meeting investigation made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.¹

II. CLOSED MEETING INVESTIGATOR – AUTHORITY AND JURISDICTION

5. The Township appointed Local Authority Services (“**LAS**”) to perform closed meeting investigation services pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated its authority to act as closed meeting investigator to Aird & Berlis LLP.
6. Prior to accepting any investigation mandate, Aird & Berlis LLP conducts a thorough legal conflict search and makes other conflict inquiries to ensure our firm is in a position to conduct an independent and impartial investigation.
7. Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*. Our function includes the authority to investigate, in an independent manner, a request made by any person to determine whether the Township has complied with section 239 of the *Municipal Act, 2001* or a by-law enacted under subsection 238(2) (i.e. a procedure by-law) in respect of a meeting or part of a meeting that was closed to the public.
8. Upon conducting an investigation, we report to Council on the outcome of the investigation, together with any recommendations, as may be applicable. Our role as Investigator does not include engaging with the merits of any particular item of municipal business, or questioning the policies or priorities of the Township.

III. REQUEST

9. The Request was properly filed pursuant to section 239.1 of the *Municipal Act, 2001*. The Request identifies the Committee of the Whole meeting on November 5, 2019 and the Special Council Meetings on January 26, 2023 and February 16, 2023 as the meetings to be investigated.

¹ *Municipal Act, 2001*, S.O. 2001, c. 25.

10. Based on our initial review of the Request, we determined the Request was incomplete as it did not contain sufficiently clear allegations regarding matters within our jurisdiction as Investigator. As such, we provided the requester with the opportunity to supplement the Request to address this issue. We received supplemental submissions in this regard from the requester on April 18, 2024. We have considered and addressed these submissions as part of the Request in arriving at our determinations with respect to this matter.

IV. REVIEW OF MATERIALS AND INVESTIGATIVE PROCESS

11. In order to properly consider the Request and make our determinations on the issues, we have reviewed the following materials:

- the Request;
- Procedural By-law No. 2018-042 (the “Procedural By-law”); and
- Certified copies of the open and closed session agendas and minutes from the Committee of the Whole meeting on November 5, 2019 and the Special Council Meetings on January 26, 2023 and February 16, 2023;
- Certified copies of the notices for each of the above meetings; and
- The in-camera motion form for the November 5, 2019 Committee of the Whole meeting.

12. In addition, we had recourse to the provisions of the *Municipal Act, 2001*, and such secondary sources, case law, and reports of other closed meeting investigators as we deemed necessary in order to make our determinations.

V. STATUTORY FRAMEWORK

13. Ontario’s “open meeting” rule is enshrined in section 239 of the *Municipal Act, 2001*, which requires that “meetings” be open to the public, unless otherwise excepted.

14. Section 238 defines “meeting” broadly as:

“meeting” means any regular, special or other meeting of a council, of a local board or of a committee of either of them, where,

- (a) a quorum of members is present, and
- (b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

15. Unless they deal with a subject matter falling within one or more specific enumerated exceptions in subsections 239(2), (3) or (3.1), all meetings are required to be held in an open forum where the public is entitled to attend and observe local government in process.

16. The purpose of the “open meeting” rule is to foster democratic values, increase transparency, and enhance public confidence in local government. However, it has been long recognized that there are certain circumstances where open meetings, or full transparency in the immediate term, would not serve the public interest or the interests of the municipal corporation. In providing for certain limited exceptions to the general rule, section 239 seeks to balance the need for confidentiality in certain matters with the right of the public to information respecting the decision-making process of local government.

17. Subsection 239(2) lists eleven (11) matters that permit Council to hold a meeting that is closed to the public, including the following:

Exceptions

239 (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

...

- (e) litigation or potential litigation², 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;

18. Subsections 239(4) and 239(5) of the *Municipal Act, 2001* set out certain requirements for meetings that are closed to the public:

Resolution

239 (4) 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,

- (a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting;

...

Open meeting

(5) Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote.

Exception

(6) Despite section 244, a meeting may be closed to the public during a vote if,

² The *Municipal Act, 2001* does not define “litigation” or “potential litigation”. However, the Ontario Ombudsman and the courts have determined this exception is reserved for circumstances where the subject matter discussed is ongoing litigation or involves a reasonable prospect of litigation. See *Investigation into the Township of West Lincoln’s alleged violation of the Municipal Act, 2001 on June 15 and June 22, 2015*, Ontario Ombudsman (November 2015) at para. 36, citing *R. (C.) v. Children’s Aid Society of Hamilton* (2004), 50 R.F.L. (5th) 394 at para. 21.

- (a) subsection (2) or (3) permits or requires the meeting to be closed to the public; and
- (b) 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.

VI. PROCEDURAL BY-LAW

19. The following provisions of the Township’s Procedural By-law are relevant to the Investigation:

8.4 Special Meetings

...

8.4.6 A minimum of forty-eight (48) hours' notice of all Special Meetings shall be given to the Members and the public by posting the notice of the Meeting on the website and distributed via the newsfeed feature on the website.

8.9 Closed Session ("In Camera")

...

8.9.1 Except as provided in this By-Law, all Meetings of Council and its Committees shall be open to the public.

...

8.9.4 In accordance with Schedule “B” a Meeting or part of a Meeting may be closed to the public.

...

8.9.7 Closed Meetings are to be listed on the Agenda in such a way as to provide the most information possible without compromising confidentiality or adversely affecting the Municipal position. For example, the Agenda item may read: Litigation Matter — Litigation Regarding a Property Located at 123 Example Avenue

8.9.8 A Meeting shall not be closed to the public during the taking of a vote except where:

- a) the vote is for a procedural matter or giving directions or instructions to officers, employees or agents of the Municipality or persons retained by or under contract with the Municipality.

8.9.9. Confidential discussion during a Closed Session shall be limited to the issue described in the authorizing public resolution and nothing in this by-law confers the power of any Member or Members of Council to make any decision or take any action unless, or until such action is presented and decided upon at a duly called and constituted open Meeting of Council.

...



8.9.13 Upon returning to open session, the Chair shall rise and report the following:

- a) a statement resulting from the Closed Session;
- b) declarations of pecuniary interest during the Closed Session.

...

8.12 Notice of Meetings

8.12.1 The Clerk shall give notice of each Meeting to the Members, Department Heads, media and the public.

8.12.2 The Meeting Agenda shall constitute notice, except for Public Meetings (Statutory).

8.12.3 Notice for Public Meetings shall be as prescribed by an Act, Regulation or By-Law.

8.12.4 Council and Committee Agendas shall be made available by 12:00 noon on the Thursday prior to the Meeting.

8.12.5 Committee and Local Board Agendas shall be made available a week prior to the Meeting.

8.12.6 Agendas shall be posted on the Municipality's website and distributed via the newsfeed feature on the website.

VII. THE MEETINGS

(a) November 5, 2019

20. The November 5, 2019 meeting was a meeting of the Committee of the Whole.

21. The Township provided notice of this meeting by publishing the agenda on its website in accordance with the Procedural By-law.

22. The agenda for this meeting lists the subheading "Road Access Agreements For Un-Assumed Subdivision Roads" under the "Priority Issues" heading.

23. The agenda does not provide notice of a proposed closed session meeting.

24. The public minutes from this meeting indicate that Committee of the Whole discussed Report #CAO-2019-05, dealing with road access agreements for un-assumed subdivision roads. The Township's solicitor was present and addressed the Committee in open session. A large portion of the Committee's consideration of this matter appears to have taken place in open session, however, the public minutes indicate:

That Committee moved "in camera" at 9:06 p.m. to address a matter pertaining to litigation or potential litigation, including matters before administrative tribunals, affecting municipality or local board regarding road access agreements on unassumed subdivision roads and the Chief Administrative Officer, Clerk, Planner, Township Solicitor and Township Insurer remained in the room.

25. We have reviewed Township's *in camera* motion form from this meeting which confirms that the Committee passed a resolution to go into closed session for litigation or potential litigation, including matters before administrative tribunals, affecting the municipality.

26. The Committee returned to open session at 9:53 p.m. and adopted resolutions recommending that the Township eliminate the requirement for property owners to enter road access agreements on unassumed subdivision roads and that the relevant provisions of the Township zoning by-law be reviewed and revised.

(b) January 26, 2023

27. The January 26, 2023 meeting was a Special Meeting of Council.

28. The Township provided notice of the meeting by publishing the agenda on its website in accordance with the Procedural By-law.

29. The public agenda for this meeting lists one item under the heading "Closed Sessions" - *i. CONFIDENTIAL: Solicitor/ Client Privilege – Private Unassumed Roads.*

30. The public minutes from this meeting indicate that the Council passed a resolution in open session to move *in camera*, "...to address a matter pertaining to the receiving of advice that is subject to solicitor/client privilege, including communications necessary for that purpose regarding Private Unassumed Roads."

31. The public minutes also indicate that Council passed a resolution to return to open session. Once in open session, the minutes state that the Chair rose and reported that Council received a legal opinion on the topic and would hold another closed session on the same topic on February 16, 2023.

32. The confidential minutes from the closed session of the meeting on January 26, 2023 confirm that Council discussed a legal opinion from the Township's solicitor containing advice and recommendations. The Township's solicitor was not present at this meeting. Councillors were provided with a copy of the legal opinion and the opportunity to record questions which could be posed to the solicitor at the subsequent meeting of Council on February 16, 2023.

(c) February 16, 2023

33. The February 16, 2023 meeting was a Special Meeting of Council.

34. The Township provided notice of this meeting by publishing the agenda on its website in accordance with the Procedural By-law.

35. The public agenda for this meeting lists one item under the heading "Closed Sessions" - *i. CONFIDENTIAL: Solicitor/ Client Privilege – Private Unassumed Roads.*

36. The public minutes from this meeting indicate that Council passed a resolution to move *in camera*, "...to discuss "a matter pertaining to the receiving of advice that is subject to solicitor/client privilege, including communications necessary for that purpose regarding Private Unassumed Roads."

37. The confidential minutes from the closed session of this meeting confirm that Council discussed and asked questions of the Township's solicitor regarding a legal opinion.

38. The public minutes from this meeting indicate that Council passed a resolution to return to open session. Once in open session, Council voted on a resolution in respect of the matter discussed *in camera*.

VIII. FINDINGS

39. Based on the foregoing, it is our determination that neither the Committee of the Whole nor Council contravened section 239 of the *Municipal Act, 2001* or the Procedural By-law at the meetings held on November 5, 2019, January 26, 2023 and February 16, 2023.

40. From our review of the materials from the November 5, 2019 meeting, it appears that the Committee's decision to convene in closed session was made on the floor of the meeting. As such, the November 5, 2019 agenda did not contain notice of the closed session.

41. It is not uncommon for Council to determine during the course of an open meeting that it must convene in closed session pursuant to one of the open meeting exemptions contained in section 239 of the *Municipal Act, 2001*. Where a closed session arises under these circumstances, it is not possible to provide the requisite public notice.

42. Notice of the January 26, 2023 and February 16, 2023 meetings, including the closed sessions, was published in accordance with the Procedural By-law. At each of these meetings, the Council passed resolutions to convene in closed session and to return to open session. Based on our review of the meeting minutes of each of the three meetings, once in closed session, the Committee and Council's discussion remained clearly within the confines of the identified closed meeting exception.

43. The Ontario Ombudsman has determined that the "litigation or potential litigation" exception under clause 239(2)(e) of the *Municipal Act, 2001* is reserved for circumstances where the subject matter is either related to ongoing litigation or involves a reasonable prospect of litigation.³ There must be more than a remote possibility or a suspicion that litigation could arise, although it need not be a certainty.⁴

44. The closed session minutes from the meeting on November 5, 2019 demonstrate that the matter discussed *in camera* involved a reasonable prospect of litigation. Accordingly, we find that the Committee was permitted to discuss the matter in a closed session pursuant to clause 239(2)(e) of the *Municipal Act, 2001*.

45. The Ontario Ombudsman has also determined that the closed meeting exception for "advice subject to solicitor client privilege" under clause 239(2)(f) of the *Municipal Act, 2001* can only be used when advice from a solicitor or related communication actually exists for council's consideration. Communication will only be found to be subject to solicitor-client privilege if it is:

³ *Grey Bruce Health Unit (Re)*, 2023 ONOMBUD 6 at paras. 38-39, online: <https://canlii.ca/t/hqsph>

⁴ *Amherstburg (Town of) (Re)*, 2022 ONOMBUD 11 at para. 26, online: <https://canlii.ca/t/jr5rc>

- a) between a client and his or her solicitor, where the solicitor is acting in a professional capacity;
- b) made in relation to the seeking or receiving of legal advice; and
- c) intended to be confidential.⁵

46. While the Township's solicitor was not in attendance at the meeting on January 26, 2023, the discussion at that meeting properly related to a confidential communication from the Township's solicitor containing a legal opinion and recommendations. The Township's solicitor was in attendance at the meeting on February 16, 2023 and was actively involved in discussions centring around the legal opinion reviewed at the previous meeting.

47. The closed session minutes from the January 23, 2023 and February 16, 2023 meetings demonstrate that the matters discussed *in camera* fit squarely within the closed meeting exception for advice that is subject to solicitor-client privilege, including communications necessary for that purpose, pursuant to clauses 239(2)(f) of the *Municipal Act, 2001*. Accordingly, we find the meetings on January 26, 2023 and February 16, 2023 both complied with the requirements of the *Municipal Act, 2001* and the Procedural By-law.

48. As noted above, the Council also engaged in a vote at the meeting on February 16, 2023. The record shows the vote was taken in open session, in accordance with subsection 239(5) of the *Municipal Act, 2001* and section 8.9.8 of the Procedural By-law.

IX. CONCLUSIONS

49. On the basis of the foregoing, it is our determination that neither the Committee of the Whole nor Council contravened section 239 of the *Municipal Act, 2001* or the Procedural By-law at the meetings held on November 5, 2019, January 26, 2023 or February 16, 2023.

X. RECOMMENDATIONS

50. Although we have not found any breach, we recommend that to the extent possible, Council avoid going into closed session where it has not previously provided notice to the public of its intention to do so.

51. We understand that these circumstances may be unavoidable where Council requires legal advice "on the fly", however, section 8.9.7 of the Procedural By-law, as drafted, can be interpreted as requiring notice of a closed session to be provided in advance of the meeting. We note that such a procedural requirement extends beyond the requirements of the *Municipal Act, 2001* and would occasionally present an impediment to Council convening a closed session in short order.

52. We understand from a discussion with the Township's Clerk that section 8.9.7 of the Procedural By-law is intended to apply only to closed sessions that are pre-planned and which do not arise during the course of an in-progress open meeting.

⁵ *Solosky v. the Queen*, [1980] 1 S.C.R. 821 at 837.

53. The Township may consider revising its Procedural By-law to provide clarity regarding closed session notice requirements where Council or a Committee decides, during the course of a meeting, to convene *in camera*. We understand the Township will be undertaking a mid-term review of the Procedural By-law and may address this issue through that exercise.

54. Given that we have not found any contraventions, Council is not required to make this report public or to pass a resolution stating how it will address our recommendations. In any event, we recommend Council make this report available to the public for the purpose of ongoing transparency and accountability.

Respectfully submitted,

AIRD & BERLIS LLP



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Partner

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