



Date:	23/06/2021
Refer to:	Council
Meeting Date:	June 28, 2021
Action:	null
Notes:	Report
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Corporation of the Township of Brock

Staff Report to the Mayor and Members of Council

From:	Ingrid Svelnis
Position:	Chief Administrative Officer
Title / Subject:	Report on Closed Meeting Investigation 2021-01
Date of Report:	June 22, 2021
Date of Meeting:	June 28, 2021
Report No:	2021-CO-32

1.0 Issue / Origin

The Township received a request for a closed meeting investigation as per Section 239 (1) of the Municipal Act. An investigation by a closed meeting investigator was required to ensure the Township follows the rules outlined in the Municipal Act.

2.0 Background

The *Municipal Act*, 2001, as amended (Act), governs local government. Section 238(2) speaks to when a meeting of Council or part of a meeting may be closed to the public, along with the Township of Brock's procedural By-law. As per Section 239(1), a person may request that an investigation of whether a municipality or local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public be undertaken,

(a) by an investigator referred to in subsection 239.2 (1); or

(b) by the Ombudsman appointed under the *Ombudsman Act*, if the municipality has not appointed an investigator referred to in subsection 239.2 (1). 2006, c. 32, Sched. A, s. 104.

The Township appointed Local Authority Services Inc. (LAS) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act*, 2001. LAS has delegated to Aird & Berlis LLP its authority to act as the Investigator for the Township.

A request for a closed meeting investigation, dated February 19, 2021, was filed with the Clerk. The complaint was submitted by the Clerk to LAS who subsequently forwarded it to Aird & Berlis LLP. Mr. John Pappas of Aird & Berlis LLP was assigned lead on this file.

3.0 Analysis

The Complaint requested an investigation in regard to a Special Council meeting during a closed session on December 14, 2020 at 4:00 p.m. The specifics of the complaint are outlined in Attachment No. 1, "Report on Closed Meeting Investigation 2021-01" submitted by Mr. John Pappas of Aird & Berlis LLP on June 22, 2021.

Mr. Pappas' report provides details on all aspects of the applicable legislation, the complaint, the meeting and a recommendation.

It is important to note that Township staff, including the former Clerk, were fully cooperative during this investigation.

The closed meeting investigator concluded that Council was permitted to hold a closed session pursuant to clause 239(2)(f) at the Meeting to discuss the subject matter it did, being advice and communications that are subject to solicitor-client privilege in relation to the ICBL.

It was noted during the investigation that there the Township has experienced technical irregularities with closed meetings of Council and Township staff did express concern that the Township has no formal guidelines or policy in place to guide closed meetings. As such, it was recommended that the Township could benefit from a closed meeting protocol or policy. It is important to note that this something that was on the former Clerk's radar to implement and staff are supportive of.

As per subsection 239.2(11) of the Act, closed meeting investigation reports are prepared for and it forwarded to Council for its consideration and the report must be made public.

4.0 Related Policies / Procedures

Municipal Act, 2001, as amended

Township of Brock Procedural By-law No. 3017-2021

5.0 Financial / Budget Assessment

The cost of the closed meeting investigation will be paid through the Special Legal – Integrity Commissioner/Closed Meeting Investigation operating budget line item.

6.0 Communications

None

7.0 Conclusion


The closed meeting investigator concluded that Council was permitted to hold a closed session pursuant to clause 239(2)(f) at the Meeting to discuss the subject matter it did, being advice and communications that are subject to solicitor-client privilege in relation to

the ICBL. It was recommended that the Township would benefit from the development of a closed meeting protocol policy describing the roles and responsibilities of Township staff, external consultants, and members of Council in respect of scheduling and holding closed meetings. This is something that the former Clerk was very supportive in implementing and staff would recommend that this recommendation be acted on in the near future to help guide closed sessions of Council.

8.0 Recommendation

That Council received the Closed Meeting Investigation Report, dated June 22, 2021, prepared by Aird & Berlis LLP, for information; and

That Council direct Township staff to develop a closed meeting protocol or policy describing the roles and responsibilities of Township staff, external consultants, and members of Council in respect of scheduling and holding closed meetings.

Title	Name	Signature	Date
Chief Administrative Officer	Ingrid Svelnis		June 23, 2021

REPORT ON CLOSED MEETING INVESTIGATION 2021-01

THE CORPORATION OF THE TOWNSHIP OF BROCK

John George Pappas

Aird & Berlis LLP

June 22, 2021



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REPORT ON CLOSED MEETING INVESTIGATION 2021-01

INTRODUCTION

A request for a closed meeting investigation, dated February 19, 2021 (the “**Complaint**”), was filed with The Corporation of the Township of Brock (the “**Township**”).

In our capacity as the closed meeting investigator for the Township (“**Investigator**”), our office received a copy of the Complaint and applicable documentation and records from the Township’s Clerk on March 1, 2021.

The Complaint alleges that the Township’s Council (“**Council**”), at its Special Council Meeting held on December 14, 2020 at 4:00 p.m. (the “**Meeting**”), contravened section 239 of the *Municipal Act, 2001*.¹

In particular, the Complaint alleges that the Meeting was improperly closed to the public, in contravention of subsection 239(2) of the *Municipal Act, 2001*, to discuss the planning rationale and planning opinion for granting an exemption to an interim control by-law passed by Council pursuant to the *Planning Act*.²

CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

The Township appointed Local Authority Services Inc. (“**LAS**”) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act, 2001*. LAS has delegated to Aird & Berlis LLP its authority to act as the Investigator for the Township.

Aird & Berlis LLP was selected by LAS through a competitive procurement process to provide closed meeting investigation services to its participating municipalities; Aird & Berlis LLP was not directly selected by the Township as its Investigator to act in this particular matter. 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.

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 complaint 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, and to report on the investigation to Council, together with any recommendations as may be applicable.

¹ S.O. 2001, c. 25.

² R.S.O. 1990, c. P.13.

THE COMPLAINT

The Complaint was properly filed pursuant to section 239.1 of the *Municipal Act, 2001*. As noted, the Complaint was filed directly with the Township Clerk, and provided to our office, through LAS, on March 1, 2021.

The Complaint has requested an investigation on the following grounds. On November 23, 2020, Council passed Interim Control By-law No. 2994-2020 pursuant to section 38 of the *Planning Act* to prohibit the establishment of supportive housing and modular construction, including manufactured dwelling houses, in the Township for a period of twelve (12) months (the “**ICBL**”). The ICBL was ostensibly passed in response to a modular housing support and life stabilization facility proposed by the Regional Municipality of Durham (the “**Region**”) to be located in the Township. After passing the ICBL, Council was asked to consider whether it would offer any exemptions to the ICBL.

The Complaint alleges that, Council discussed the planning rationale and planning opinion for granting exemptions to the ICBL at the Meeting, and that such matters were not authorized to be discussed in closed session pursuant to section 239 of the *Municipal Act, 2001*. The Complaint takes the position that these matters should have been discussed in open session so that all members of the public could be aware of the possibility of an exemption to the ICBL and could have provided input to Council.

ISSUE

The Complaint raises one issue with the Meeting, being whether the exception in clause 239(2)(f) of the *Municipal Act, 2001* applied to allow Council to hold the Meeting in closed session.

INVESTIGATION

In order to assess the Complaint and to make a proper determination on the issues, we have reviewed the following materials, in addition to the applicable law, as set out below:

- the Complaint;
- the Township’s Procedure By-law 2890-2019, including various amendments thereto;³ and
- the open and closed meeting minutes, agendas and reports for the meetings at issue, including documents and materials related to the passage of the ICBL and subsequent events.

Additionally, we conducted telephone interviews with two (2) persons (i.e. witnesses) with direct, relevant knowledge about the subject matter of the Complaint. We have also received correspondence from one (1) additional witness having direct, relevant knowledge about the subject matter of the Complaint.

³ Procedure By-law No. 2890-2019 (Consolidated Version, as amended by By-laws No. 2940-2020, 2967-2020, and 2968-2020) (the “Procedure By-law”).

We also reviewed, considered and had recourse to such applicable secondary source materials, including other closed meeting investigation reports, that we believed to be pertinent to the issues at hand. The Township and its representatives were fully cooperative and forthright during our investigation and sought to assist us as required.

A draft copy of this Report was provided to the Township to solicit comments and feedback.

This is a report on the investigation of the Complaint made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.

APPLICABLE LAW

(1) *Municipal Act, 2001*

Subsection 239(1) of the *Municipal Act, 2001* provides that all meetings of Council are to be open to the public, unless otherwise excepted.⁴

Therefore, all Council or committee meetings, unless they deal with a subject matter falling within a specific exception set out in section 239, are required to be held in an open forum where the public is entitled to attend.

The exception that is relevant to this matter is set out in clause 239(2)(f) of the *Municipal Act, 2001*:

Exceptions

239 (2) 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;

Furthermore, clause 239(4)(a) of the *Municipal Act, 2001* sets out certain procedural requirements to be satisfied before the Township holds a closed meeting:

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,

⁴ The term “meeting” is defined in s. 238(2) of the *Municipal Act, 2001* as follows:

“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.

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

(2) Procedure By-law

Subsection 238(2) of the *Municipal Act, 2001* requires the Township to pass a procedure by-law that governs the calling, place and proceedings of meetings.

In summary, the closed meeting provisions in the Procedure By-law include:

- a statement, reflecting the provisions of the *Municipal Act, 2001*, that all meetings are to be open to the public except as outlined in the Procedure By-law;
- a list of the subject matters that may be considered in closed session, reflecting those outlined in the *Municipal Act, 2001*;
- a requirement that before holding all or part of a meeting in closed session, that Council state by resolution the fact of holding the closed meeting and the general nature of the matter to be considered;
- a prohibition on voting during closed session, except for a procedural matter or for giving direction or instruction to officers, employees or agents of the Township, and if Council deems it in the best interest of the Township to do so;
- a requirement that at the conclusion of the meeting that is closed to the public, Council pass a resolution to rise from the closed session and proceed into public session, which is to include the time that Council arose;
- a prohibition on disclosing any information, documentation or discussion from a closed session to anyone not entitled to be present at the meeting, and a statement that a breach of confidentiality is subject to the sanctions in the Code of Conduct.⁵

THE MEETING

As noted above, for the purpose of our investigation as to whether there was compliance with subsection 239(2) of the *Municipal Act, 2001*, the Complaint only took issue with whether Council was permitted to discuss the subject matter it did in a session that was closed to the public.

On December 14, 2020, Council met for a Special Council In Camera Session Meeting, commencing at 4:00 p.m.

Council's publicly-available agenda for the Meeting indicated that it would discuss one agenda item, being "Potential Legal Matter."

1. Council Convenes in Closed Session

The publicly-available Minutes indicate that Council passed the following resolution before moving

⁵ Procedure By-law, Section 4.4 – Closed Meetings.

into closed session:

Resolution Number 1-26

MOVED by Cria Pettingill and SECONDED by Walter Schummer that Council move in camera at 4:01 p.m. Pursuant to Section 239(2)(f) of the Municipal Act, 2001 to discuss advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

MOTION CARRIED

The publicly-available agenda for the Meeting provided no further details about the item to be discussed in closed session.

Council convened in closed session at 4:01 p.m.

2. Background to Matters Discussed by Council in Closed Meeting

The subject matter underlying the Meeting and the Complaint relates to the ICBL. We have not been asked to investigate the Township's passage of the ICBL, nor is it within our authority as Investigator to consider or assess the land use planning merits of the ICBL itself. Our comments in this Report should not be construed as such. For the purpose of this Report however, it is nevertheless important to understand the factual background underlying the Meeting and the Complaint.

As mentioned above, the Region has proposed to develop a modular supportive housing project on regionally-owned lands located at 133 Main Street in Beaverton, a small, mostly rural community in the Township. Once completed, the Beaverton Supportive Housing Project will contain 50 units and approximately 5,000 square feet of space for ancillary "wrap-around" support services for people experiencing homelessness and those requiring assistance with addiction or mental health issues.

To expedite the process of constructing the Beaverton Supportive Housing Project, the Region is proposing to use modular construction techniques whereby components of buildings are manufactured off-site and subsequently erected and installed on the building site. Modular housing has been used in other supportive housing projects as a time- and cost-efficient way to increase housing supply in the immediate term.

In order to construct the Beaverton Supportive Housing Project, the Region requires the approval of a site plan by the Township pursuant to section 41 of the *Planning Act*, in addition to building permits issued by the Township's Chief Building Official pursuant to section 8 of the *Building Code Act, 1992*.⁶

We understand that the Beaverton Supportive Housing Project was not well-received by the public and generated local opposition in response to the proposal. The Township received a petition from a significant number of Beaverton residents concerned about the suitability of the proposal within the local area and the supposed lack of community consultation. Moreover, many persons

⁶ S.O. 1992, c. 23.

requested that the Township oppose the project and utilize some mechanism to pause the development.

3. Interim Control By-law No. 2994-2020

At a meeting held September 28, 2020, Council directed Township staff to research mechanisms available to the Township in order to “pause and hold” the Beaverton Supportive Housing Project and report back with any suitable options.⁷

After staff reported back to Council on the matter, on November 11, 2020, Council directed Township staff to bring forward an interim control by-law for Council approval on November 23, 2020.⁸

An interim control by-law is a land use planning tool used to “freeze” development of certain lands in order to allow a municipality time to undertake a study or review of its land use planning policies. An interim control by-law can include a total prohibition of uses, or, as is the case with the ICBL, a targeted prohibition. The technical effect of an interim control by-law is to temporarily suspend the in-effect zoning for the area and the use specified.

Pursuant to recent amendments to the *Planning Act*, the initial passage of an interim control by-law is not subject to appeal by private parties. An interim control by-law may only be appealed if the municipality extends the period of time during which it will be in effect.

However, an interim control by-law, much like any municipal by-law, is subject to an application to quash for illegality pursuant to section 273 of the *Municipal Act, 2001*.⁹

On November 23, 2020, Council passed the ICBL pursuant to section 38 of the *Planning Act*.

The ICBL has two areas of prohibition. First, the ICBL prohibits “Modular Construction,” which is defined as a building or structure assembly or system thereof manufactured in its entirety, or in substantial part, off-site and transported to a site for installation, and also includes Dwelling Units, a Dwelling House, an Apartment Dwelling House, a Boarding or Lodging House, and a Manufactured Dwelling House, as those terms are defined in the Township’s parent Zoning By-law No. 287-78-PL.

Second, the ICBL prohibits “Supportive Housing Facilities”, defined as a building or structure used for the of accommodating persons, who, by reason of their emotional, mental, social or physical condition, or legal status, require a supervised group living arrangement for their wellbeing, including where “Wrap-Around Services” are provided to residents or visitor, and also includes Dwelling Units, a Dwelling House, an Apartment Dwelling House, a Boarding or Lodging House, and a Manufactured Dwelling House, as those terms are defined in the Township’s parent Zoning By-law No. 287-78-PL.

⁷ Council Resolution 3-10, September 28, 2020.

⁸ Council Resolution 4-22, November 11, 2020.

⁹ See, for example, *RSJ Holdings Inc. v. London (City)* (2007), 36 M.P.L.R. (4th) 1 (S.C.C), where the Supreme Court of Canada found that an interim control by-law passed following an improper closed meeting was liable to be quashed for illegality.

The prohibitions in the ICBL apply to all lands within the Township, and will be in force until at least November 23, 2021.

While the ICBL is in effect, the Township intends to study the land use planning implications of supportive housing facilities and modular and manufactured construction techniques that will assist in developing a new housing strategy and related planning instruments. There is no doubt (and the Township has publicly stated so)¹⁰ that the ICBL was passed in response to the Beaverton Supportive Housing Project in order to review whether the Township's planning framework adequately regulates this proposed use through sufficient performance standards.

4. Request for Exemptions to ICBL

Given that the ICBL applies to all lands within the Township, not just 133 Main Street Beaverton, the ICBL seemingly had an unintentionally greater application than anticipated. At the meeting of the Committee of the Whole ("**Committee**") on December 7, 2020, two delegations were made on the perceived over-breadth of the ICBL.

Committee heard about the effect of the intervening ICBL on a single family dwelling proposed to be constructed with modular construction techniques. An elderly couple, long-time residents of Beaverton, decided to build their "dream home", and in 2019 and 2020 began considering and retaining a contractor to build a modular home. Several sets of plans for the home were issued for the purpose of obtaining building permits from the Township. However, when it came time to apply for building permits, the residents would not legally be permitted to construct their home on account of the prohibition on "modular construction" set out in the ICBL.

Committee also heard a deputation from a local non-profit organization regarding the ICBL's impact on its proposal to develop a women's shelter in nearby Cannington, another community in the Township. The organization purchased a building and began the planning approvals process to establish a facility for women and children fleeing violence. However, the organization was concerned the ICBL prohibited this use as it would fall within the definition of "Supportive Housing."

After hearing the deputations, Committee passed resolutions to direct Township staff undertake a review of the request for an exemption and seek legal advice,¹¹ and that Township staff provide Council with options to respond in a future closed session.¹²

5. The Meeting

Township staff reported back to Council pursuant to the Committee's direction from December 7, 2020 at the Meeting, a Special Council Meeting held before its regularly scheduled meeting.

Prior to the Meeting, and in accordance with Council's direction, Township staff sought legal advice from the Township's external legal counsel on whether the Township would be able to

¹⁰ See e.g. the Letter from Dean A. Hustwick, Township CAO to Elaine C. Baxter-Trahair, Regional CAO, dated February 2, 2021; online: <https://www.townshipofbrock.ca/en/municipal-office/resources/Documents/Beaverton-Supportive-Housing---Letter-to-Region---February-02-2021-Signed-PDF-ID-7050.pdf>

¹¹ Council Resolution 3-12, December 7, 2020.

¹² Council Resolution 4-12, December 7, 2020.

grant specific exemptions to the ICBL, and the possible impact of doing so on the integrity of the ICBL. In accordance with Council's direction, Township staff received a 22-page legal opinion from its external solicitors, Loopstra Nixon LLP.

Based on our interviews with Township staff, we understand that legal advice was sought on four issues, including whether the Township could amend or provide exemptions to the ICBL, whether the Township's CBO could issue a building permit in light of the ICBL, whether the ICBL applied to the proposed women's shelter in Cannington, and whether amending or providing exemptions to the ICBL would render it subject to legal challenge.

The Meeting was held for the purpose of presenting the advice and recommendations in the legal opinion on how to proceed.

6. Closed Meeting Exception

The Meeting was closed pursuant to the exception for matters dealing with advice that is subject to solicitor-client privilege, including communications necessary for that purpose.¹³

We understand this closed meeting exception was selected because Township staff were presenting the conclusions of a written legal opinion to Council. The Township's external legal counsel was present at the Meeting for a discussion with members of Council.

The evidence of our investigation demonstrates that the Township's external legal counsel did prepare a comprehensive legal opinion for Council's consideration, was present at the Meeting, and answered questions from members of Council.

7. Council Discussion

The following discussion took place at the Meeting.

The Meeting began with the Township's CAO presenting the conclusions contained in the legal opinion. Following the CAO's summary of the legal opinion, the Township's external legal counsel spoke to Council to clarify certain points in the legal opinion.

After the Township's external legal counsel presented, members of Council asked questions about the legal implications of offering exemptions to the ICBL, should the ICBL be subject to legal challenge, and how exemptions to the ICBL could be implemented and the criteria they would be based on. The CAO subsequently advised that Township staff would work to implement the recommendations and advice given in the legal opinion, pending Council direction.

Members of Council subsequently expressed their satisfaction with the legal opinion and the conclusions and recommendations therein.

There was a brief discussion on some members' preference as to how the Township would implement the recommendations of the legal opinion, and whether it was a prudent course of action given the potential for legal challenge. The Township Clerk advised members of Council that no decision would be made in closed session, and that proposed resolutions to implement

¹³ *Municipal Act, 2001*, s. 239(2)(f).

the recommendations would be made available at the Regular Council Meeting immediately following the Meeting.

There was no evidence that Council discussed whether or not it should grant an exemption to the ICBL for any particular property or application.

The Township's external legal counsel left the meeting at 4:53 p.m., at which point Council proceeded to discuss a separate unrelated matter which was not the subject of the Complaint.

Council did not take any vote, give any direction, or make any decision during the closed session.

8. Council Reconvenes in Open Session

After considering another unrelated matter in closed session, Council rose from closed session at 5:20 p.m., passed a confirmatory by-law, and subsequently adjourned the Meeting at 5:22 p.m. Council did not take any other vote or give any other direction at the open portion of the Meeting.

Council reconvened in open session at 6:30 p.m. in a Regular Council Meeting. After considering its normal business, and during a portion of the meeting for "Closed Session," Council adopted the following resolutions:

11. Closed Session:

There was no closed session. The following resolutions were a result of the earlier December 14, 2020 Special Council meeting.

Resolution Number 23-13

MOVED by Walter Schummer and SECONDED by Cria Pettingill that Council receive the legal advice given by the Township Solicitor in closed session that the proposal for a women's shelter at 124 Laidlaw Street South is not prohibited by Interim Control By-law No. 2994-2020 enacted by Council at its meeting of November 23, 2020 and is permitted as a Crisis Care Residence in the R1 Zone.

MOTION CARRIED

Resolution Number 24-13

MOVED by Cria Pettingill and SECONDED by Lynn Campbell that Council direct staff to develop application criteria for any potential requests for exemptions to the Interim Control By-law, and that the deadline for applications to be submitted be March 1, 2021; and further, that staff be directed to make the application criteria and process available to the public through various means including our website.

MOTION CARRIED

We understand that these resolutions were passed by Council to implement the recommendations contained in the legal opinion. As is evident by the language of Resolution Number 24-13, Council did not make any decision to grant an exemption to any particular property or development proposal, but rather directed staff to develop an exemption request protocol.

Following this direction, Township staff did create an exemption request protocol, including an

application forms and other materials, with a deadline of March 1, 2021 to submit applications.¹⁴

FINDINGS

Did the exception in clause 239(2)(f) of the *Municipal Act, 2001* apply to allow Council to hold a portion of the Meeting in closed session?

Based on our review of the evidence, on a balance of probabilities, Council was entitled to hold the Meeting in closed session under the exception in clause 239(2)(f) of the *Municipal Act, 2001*.

(a) Statutory Provisions

As noted, clause 239(2)(f) of the *Municipal Act, 2001* provides as follows:

Exceptions

239 (2) 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 purpose of Ontario's "open meeting" rule is to foster democratic values, enhance the responsiveness of government and public confidence in government and to increase transparency.¹⁵ By setting out specific exceptions to the general rule that all meetings must be open to the public, section 239 balances the need for confidentiality in certain matters with the public's right to information about the decision-making process of local government.¹⁶

While municipal powers should be afforded a broad and liberal interpretation,¹⁷ the scope of the open meeting rule must take into account the proposition that a municipal council "should only exercise its discretion [to hold a closed meeting pursuant to section 239] when there is some potential harm, financial or otherwise, of having a discussion..." in open session.¹⁸

¹⁴ https://www.townshipofbrock.ca/en/building-and-business-development/resources/Documents/Supportive-Housing-and-Modular-Construction/Application-to-Request-Exemption-to-ICBL_FINAL.pdf

¹⁵ See e.g. *R.S.J. Holdings Inc. v. London (City)* *supra*, note 9.

¹⁶ Stephen Auerback & John Mascarin, *The Annotated Municipal Act*, 2nd ed., (Toronto, ON: Thomson Reuters Canada Limited, 2017) (e-loose leaf updated 2021 – rel 1) annotation to s. 239.

¹⁷ See *Municipal Act, 2001*, s. 8(1); *Croplife Canada v. Toronto (City)* (2005), 10 M.P.L.R. (4th) 1 (Ont. C.A.).

¹⁸ See Ombudsman of Ontario, *Investigation into whether the Finance and Administration Committee for the City of Elliot Lake held an improper closed meeting on July 7, 2014 (City of) (Re)* (October 27, 2014): 2014 ONOMBUD 5 (CanLII).

(b) Clause 239(2)(f) – “Solicitor-Client Privilege”

The exception in clause 239(2)(f) – which was cited and relied on by the Township – provides that a meeting may be closed to the public if the matter under consideration is the giving or receiving of “advice that is subject to solicitor-client privilege,” which includes communications necessary for giving or receiving legal advice. The purpose of this exception is to protect the municipality’s interests as a client seeking legal advice.

The case law and other closed meeting investigation reports considering this exception have adopted a three-part test for determining whether a verbal or written communication is subject to solicitor-client privilege. The communication must:

1. be between a client (i.e. the municipality or a local board) and its lawyer;
2. entail the seeking or giving of legal advice; and
3. be considered confidential by the parties.¹⁹

The mere presence of a lawyer at a meeting of the municipality or local board will not be enough for the meeting to automatically fall within the scope of this exception.²⁰ Conversely, a lawyer need not be present for this exception to apply; for example, municipal staff may convey legal advice from a lawyer to council in a meeting closed under this exception.²¹ However, an essential element of this exception is that some legal advice must actually be communicated.

(c) Exception for “Solicitor-Client Privilege” was Applicable in the Circumstances

Based on our review of the relevant authorities and evidence obtained during our investigation, the Meeting was held for the purpose of receiving and discussing advice that was subject to solicitor-client privilege, and discussing that legal advice with the Township’s external legal counsel. Accordingly, this portion of the Meeting was closed to the public in accordance with this statutorily-authorized purpose.

i. Communication between a Client and a Lawyer

The evidence clearly demonstrates that there were communications, both written and verbal, between the Township, through Council (i.e. the “client”), and the Township’s external legal counsel (i.e. the “lawyer”).

¹⁹ See *Solosky v. R.*, [1979] S.C.J. No. 130, [1980] 1 S.C.R. 281 (S.C.C.).

²⁰ Ombudsman of Ontario, *Investigation into the closed meeting held by the City of Niagara Falls on February 10, 2015* (November 2016) [“Niagara Falls”], online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2016/city-of-niagara-falls>

²¹ Ombudsman of Ontario, *Investigation into whether council for the City of Greater Sudbury held illegal closed meetings on March 2, March 23, and April 26, 2016* (January 2017), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2017/city-of-greater-sudbury>

ii. *It Entailed the Seeking and Giving of Legal Advice*

These communications were held for the purpose of giving and receiving advice about whether the Township had legal authority to amend or grant exemptions to the ICBL, the interpretation and application of the ICBL, and the potential for legal challenges to the ICBL. These topics all fall within the ambit of legal advice.

The Township was faced with a situation where it had passed a land use planning instrument which seemingly had unintended consequences. It required legal advice to ascertain the extent to which the current instrument actually applied, whether it could lawfully provide exemptions to that instrument, and whether any of its actions could result in a legal challenge to the validity of the instrument. In short, the Township needed to understand the limits of its statutory powers, and needed to have a discussion with its lawyer in order to obtain advice on how to proceed.

The fact that some limited discussion of possible exemption criteria took place in closed session does not change this conclusion. The courts and other closed meeting reports have recognized that in certain situations, it may be difficult, if not impossible, for a council to discuss a matter to which a closed meeting exemption applies without also discussing a matter to which no exemption applies. It is not realistic to expect the members of Council to “parse” their discussions by moving in and out of closed session. Council need not do so if the matters discussed are incidental to the matter to which the closed meeting exception applies.²²

As such, Council enjoyed some limited latitude to discuss facts incidental to the legal advice it received. Based on the evidence in our investigation, Council’s discussion did not cross the line as its discussion of related matters were incidental to the primary topic of discussion, being the recommendations of its legal counsel.

iii. *It Was and Is Considered Confidential by the Parties*

Lastly, the communications were and continue to be treated as confidential as between the parties. We understand the legal opinion was marked confidential, and the information therein was presented to members of Council as such. In fact, members of Council were not actually provided a copy of the legal opinion, electronically or digitally, on account of security and confidentiality concerns in the era of virtual meetings.

At all times, members of Council were aware that the discussion was to remain confidential. Near the end of the Meeting, the Clerk reminded the members that the only information that could be shared publicly is that which was on the open meeting agenda. Furthermore, we understand that the Township did not direct that the written legal opinion be disclosed or published, did not direct that the opinion be made public before the Meeting, or do anything else inconsistent with its status as confidential information.

As such, we find that the subject matter discussed at the Meeting fell within the exception for “solicitor-client privilege,” and Council was permitted to consider the matter in closed session.

²² *St. Catharines (City) v. Ontario (Information & Privacy Commissioner)* (2011), 81 M.P.L.R. (4th) 243, at para. 42 (Ont. Div. Ct.)

(d) The Requestor's Position

The Complaint alleges that the crux of the matters discussed at the Meeting were land use planning matters, including the planning rationale and planning opinion for any exemptions to the ICBL. The Complaint further submits these matters should have been discussed in open session so that all members of the public could be aware of the possibility of an exemption to the ICBL and could have provided input to Council.

We do not accept this interpretation of the Meeting or matters that followed. The evidence in our investigation made it clear that Council did not discuss the merits of any particular land use planning application or property in closed session. What was discussed was a related but ultimately foundational matter, being the Township's legal authority to deal with the ICBL after its passage. It would not have been prudent to offer an exemption on the basis of land use planning analysis without first confirming whether or not there was legal authority to do so.

To the extent Council considered any facts underlying a particular property (i.e. the proposed women's shelter in Cannington), it was necessary and incidental to receiving legal advice on whether or not the provisions of the ICBL applied as a matter of legal interpretation.

The Complaint's argument is also not supported by the facts and events following the closed session. At the Regular Council Meeting following the Meeting, Council did not amend the ICBL or grant any particular exemption – this would have led to an inference that planning matters were discussed in closed session, which is not the case. Instead, Council directed Township staff to develop an exemption request protocol, ostensibly to give effect to the legal advice it received. In other words, the closed meeting discussion was about whether it "could", not whether it "should."

In summary, the Meeting was properly held in closed session for a permitted purpose, namely, to receive and discuss legal advice on the ICBL.

CONCLUSIONS

Based on the foregoing, we conclude that Council was permitted to hold a closed session pursuant to clause 239(2)(f) at the Meeting to discuss the subject matter it did, being advice and communications that are subject to solicitor-client privilege in relation to the ICBL.

RECOMMENDATIONS

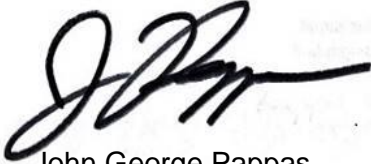
We recommend that Township staff and members of Council give greater consideration to the procedural requirements for holding a closed session.

During the course of our investigation, we became aware that the Township has experienced technical irregularities with closed meetings of Council. Members of Township staff expressed concern that the Township does not have a protocol or policy specific to closed meetings. We were directed to an example of a closed meeting protocol which enumerated the roles and responsibilities of various municipal staff in the process of holding a closed meeting, including how matters are identified for discussion in closed session, preparing closed meeting reports, selecting the appropriate closed meeting exemption, and drafting the necessary Council resolutions. In the view of those with whom we spoke, such a closed meeting protocol would be a helpful tool for ensuring compliance with the procedural and substantive requirements of the open meeting rule.

As such, we recommend that Council and Township staff give consideration to developing a closed meeting protocol or policy to set out the roles and responsibilities of Township staff and members of Council in respect of the holding of a closed meeting.

This Report has been prepared for and is forwarded to Council for its consideration. We note that subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public.

AIRD & BERLIS LLP

A handwritten signature in black ink, appearing to read 'J. Pappas', is written over a faint, circular official stamp. The signature is fluid and cursive.

John George Pappas

Closed Meeting Investigator for The Corporation of The Township of Brock

Dated this 22nd day of June, 2021