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**COMMITTEE OF THE WHOLE JANUARY 13, 2009**

**CLOSED MEETING INVESTIGATION REPORT  
MEETINGS OF COMMITTEE AND COUNCIL  
OCTOBER 6 AND 27, 2008**

**Recommendation**

The City Clerk recommends:

- 1) That the Closed Meeting Investigation Report of Amberley Gavel Ltd, dated January 12, 2009, be received.

**Economic Impact**

The cost of the investigation has not yet been invoiced by Amberley Gavel. A \$300 per year retainer has been paid to the firm for each of 2008 and 2009. A further fee of \$1,250 per day, plus taxes and reasonable out of pocket expenses, is also payable upon receipt of an itemized invoice. A filing fee of \$125 was paid by the complainant to the City at the time the complaint was filed.

**Communications Plan**

The Investigation Report is a public document and will be made available to the public upon request. A copy has been made available to the complainant.

**Purpose**

This report provides Council with the outcome of a closed meeting investigation conducted by the City's appointed investigator pursuant to sections 239.1 and 239.2 of the Municipal Act.

**Background - Analysis and Options**

On November 7, 2008, the City Clerk received a complaint with respect to Item 5 of Committee of the Whole (Closed Session) Report No. 50 originally titled "LITIGATION MATTER COURT APPLICATION UPDATE". The title was further clarified as Council resolved into closed session on October 27, 2008, so that the title became: "LITIGATION MATTER COURT APPLICATION UPDATE [LINDA JACKSON].

The complaint dealt with two issues:

- 1) Did the agendas for the Committee of the Whole and Council Meetings give sufficient information such that the public would know the general nature of the matter to be discussed at the closed session(s) as required by the Municipal Act?; and
- 2) Was the item a matter for which a meeting of the Committee of the Whole and/or Council could be closed to the public in accordance with the Municipal Act?

Under the authority of Item 2 of Committee of the Whole Report No. 55 (November 23, 2007), the matter was referred to Amberley Gavel Ltd. pursuant to the City's contract with AMO's Local Authority Services Ltd. (LAS). A record consisting of all related documentation, including applicable by-laws, meeting agendas and attachments, meeting minutes and contact information for all persons present at the meeting in question, was forwarded to Amberley Gavel as part of

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the investigation. As is indicated in the report, the City Clerk and the Commissioner of Legal and Administrative Services and City Solicitor were interviewed in the course of the investigation.

It was the conclusion of the Investigator that the matter was the subject of either litigation privilege or solicitor/client privilege, and so was a matter that could properly be considered in closed session. Further, the report found no serious deficiency in either the title of the item on the agenda for closed session or the form of resolution passed prior to entering closed session.

The entire report is attached for your consideration. It provides a full description of the relevant events, statutory references, and relevant City documentation.

### **Relationship to Vaughan Vision 2020/Strategic Plan**

This report is consistent with the priorities established by Council in the Vaughan Vision Strategic Plan 2020 particularly with respect to Leadership and Effective Governance.

### **Regional Implications**

N/A

### **Conclusion**

The Investigator has made no recommendations that the City modify its procedures relating to closed session matters. It is therefore recommended that the report be received.

### **Attachments**

Attachment Closed Meeting Investigation Report of Amberley Gavel Ltd.

### **Report prepared by:**

Jeffrey A. Abrams, City Clerk

Respectfully submitted,

Jeffrey A. Abrams  
City Clerk



ATTACHMENT

Amberley Gavel Ltd.

January 12, 2009

Jeffrey A. Abrams  
City Clerk  
City of Vaughan  
2141 Major Mackenzie Drive  
Vaughan, ON L6A 1T1

Dear Mr. Abrams:

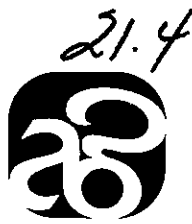
Enclosed please find the Report of Amberley Gavel Ltd. respecting the closed meeting investigation of the Committee of the Whole and Council meetings held on October 6 and 27, 2008. The Municipal Act, 2001 provides that this report be made public by the municipality. It is recommended that the Report 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.

Yours truly,

Fred Dean



RECEIVED  
JAN 12 2009  
CLERK'S DEPT.



Amberley Gavel Ltd.

**REPORT TO  
THE COUNCIL OF THE CITY OF VAUGHAN  
REGARDING THE INVESTIGATION OF THE CLOSED MEETING OF THE  
COMMITTEE OF THE WHOLE AND COUNCIL OF THE CITY OF VAUGHAN  
HELD ON OCTOBER 6 AND OCTOBER 27, 2008**

**Complaint**

The City of Vaughan ("City") received a complaint on November 7, 2008 about an in-camera ("closed") portion of a Committee of the Whole Meeting held on October 6, 2008 and an in-camera ("closed") portion of City Council on October 27, 2008.

The essence of the complaint is the subject matter of one of the items under consideration at the closed meetings was not a proper one for a closed meeting. Further, that the item discussed in the closed meeting of the Committee of the Whole was not properly titled on the Committee of the Whole agenda for October 6, 2008 such that members of the public, including the complainant, would be sufficiently aware of the subject matter under discussion.

The complaint was sent to the offices of Amberley Gavel Ltd. for investigation.

**Jurisdiction**

The City of Vaughan appointed Local Authority Services (LAS) as its closed meeting Investigator pursuant to section 239.2 of the *Municipal Act, 2001*<sup>1</sup>, as amended by Bill 130<sup>2</sup> ("Municipal Act"). LAS has delegated its powers and duties to Amberley Gavel Ltd. to undertake the investigation and report to the Council of the City of Vaughan.

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<sup>1</sup> s.o. 2001, c. 25.

<sup>2</sup> *Bill 130: An Act To Amend Various Acts In Relation To Municipalities*, s.o. 2006, c. 32 ("Bill 130").



## **Background**

### (1) The Municipal Act

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 meeting rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public.

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).

Section 239 also requires that before a council, local board or committee move into a closed meeting, it shall pass a resolution at a public meeting indicating that there is to be a closed meeting. The resolution also must include the general nature of the matter(s) to be deliberated at the closed meeting.

Subsections 239 (5) & (6) limit the actions that may be taken by the council, local board or committee at the closed session. Votes may only be taken at a closed meeting for procedural matters, giving direction or instructions to staff or persons retained by the municipality such as a lawyer or planner. It provides as follows:

**Open meeting**

(5) Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote. 2001, c. 25, s. 239 (5).

**Exception**

- (6) Despite section 244, a meeting may be closed to the public during a vote if,
- (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. 2001, c. 25, s. 239 (6).

**Investigation**

The investigation into the complaint began on November 21, 2008. The City Clerk and the complainant were so advised on November 21 and November 25, respectively.

The City Clerk and the City's Commissioner of Legal and Administrative Services and City Solicitor ("City Solicitor") were interviewed during the course of the investigation. The complainant was also interviewed. Documents provided by the City and reviewed during the course of the investigation included agendas, minutes, the City's Procedure and Notice By-laws, and applicable legislation.

**Facts and Evidence****(1) The City's Procedure By-law**

Section 238 of the Municipal Act requires that every municipality and local board pass a procedure by-law. Section 238 reads in part as follows:

- (2) Every municipality and local board shall pass a procedure by-law for governing the calling, place and proceedings of meetings.
- (2.1) The procedure by-law shall provide for public notice of meetings. 2006, c. 32, Sched. A, s. 102 (3).

The City has a Procedure By-law that governs the calling, place, and proceedings of meetings, as well as public notice of meetings.<sup>3</sup>

The Procedure By-law provides for closed meetings of Council and its Standing Committees, and requires that, prior to moving in-camera, Council or Standing Committees of Council pass a motion in public session stating:

<sup>3</sup> *City Of Vaughan, Procedure By-Law Number 400-2002, as amended.* ("Procedure By-law").

- i. the fact of the holding of the closed meeting;
- ii. the general nature of the matter to be considered at the closed meeting.<sup>4</sup>

## **(2) The City's Notice By-law**

The City's Notice Bylaw<sup>5</sup> provides for notice of matters where the municipality is required to give notice under the provisions of the Municipal Act. Notice of regular meetings of Council and Committee of the Whole are governed by the provisions of the Procedure By-law.

## **(3) Agenda for the Closed Meeting of Committee of the Whole**

The Agenda for the October 6, 2008 closed meeting of Committee of the Whole (Closed Session) was public and contains the follow business:

1. Confirmation of Agenda
2. Disclosure of Interest
3. Consideration of Closed Session Items
  1. The Disposition of City of Vaughan-Owned Property Located in Ward 2
  2. Committee of Adjustment Vacancy
  3. Vaughan Public Library Board Vacancy
  4. Ontario Municipal Board Hearing<sup>6</sup>
  5. Litigation Matter  
Court Application Update
4. Adjournment

Each of the items listed under "Consideration of Closed Session Items" detail the applicable, allowable exception to the open meetings stipulation in the Municipal Act.

The matter listed as 3.5. "Litigation Matter: Court Application Update" is the subject of the complaint. The Agenda notes that the item is to be considered in closed session because it deals with "litigation or potential litigation".

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<sup>4</sup> *ibid*, s.2.4(2).

<sup>5</sup> *The City Of Vaughan By-Law Number 394-2002*. ("Notice By-law").

<sup>6</sup> Details have been omitted since this item is not the subject of the complaint.

The public agenda also notes that the Committee of the Whole will be dealing with a "Verbal report of the Commissioner of Legal and Administrative Services and City Solicitor" under the item listed as "Litigation Matter: Court Application Update".

**(4) Agenda for the Council Meeting, October 27, 2008**

The Agenda for the Council Meeting of October 27, 2008 notes that the Council would be dealing with the report of the Committee of the Whole (Closed Session) of October 6, 2008, as Report No. 50.

Report No. 50 on the public agenda lists the item that is the subject of this complaint as "Litigation Matter: Court Application Update (litigation or potential litigation)".

**(5) Report No. 49 of the Committee of the Whole**

Report No. 49 of the Committee of the Whole meeting of October 6, 2008 ("Report") is a public report on the Council Agenda for the Council meeting of October 27, 2008. It notes that the Committee of the Whole resolved to go into closed session:

"The Committee of the Whole passed the following resolution:

That a closed session of Committee of the Whole be convened for the purpose of discussing the following matters:

- i) personal matters about an identifiable individual including municipal or local board employees;
- ii) a proposed or pending acquisition or disposition of land by the municipality or local board; and
- iii) litigation or potential litigation, including matters before administrative tribunals, affecting the City or local boards."

The Clerk provided a certified true copy of the "Resolution for Closed Session Meeting" dated October 6, 2008. That Resolution notes that Committee of the Whole will resolve into closed session to discuss, among other items, a "Litigation Matter: Court Application Update (litigation or potential litigation)".

The Clerk advised that the Chair of the Committee of the Whole in Public Session orally reads out the Resolution prior to taking a vote to move into closed session, a procedure that was carried out in this particular circumstance.



**(6) Report No. 50 of the Committee of the Whole (Closed Session)**

Report No. 50 of the Committee of the Whole (Closed Session) ("Report") is a public report on the Council Agenda for the Council meeting of October 27, 2008. With respect to the item that is the subject of this complaint, the Report indicates that:

**"The Committee of the Whole (Closed Session) recommends:**

**1) That the verbal report of the Commissioner of Legal and Administrative Services and City Solicitor be received.**

*Having declared an interest in this matter Mayor Jackson left the room when the matter was considered.*

*Having declared an interest in this matter Regional Councillor Frustaglio left the room when the matter was considered.*

*Having declared an interest in this matter Councillor Di Vona left the room when the matter was considered."*

No other action or vote was taken on the matter in the Committee of the Whole (Closed Session).

**(7) Minutes of the Council Meeting of October 27, 2008**

The Minutes of the Council Meeting of October 27, 2008 indicate that Council adopted the recommendation of the Committee of the Whole (Closed Session) contained in Report No. 50 of the Committee of the Whole (Closed Session). No other action or vote was taken on the matter in the closed session of the Council Meeting.

However, the Minutes note that the Litigation Matter: Court Application Update" refers to "Linda Jackson" by titling the matter as follows:

Item – 5      LITIGATION MATTER  
                   COURT APPLICATION UPDATE [LINDA JACKSON]

The Clerk indicated to Amberley that, prior to the start of the public session of the Council Meeting on October 27, 2008, he asked the Chair of the Council Meeting to clarify that the "Litigation Matter: Court Application Update" referred to litigation involving Linda Jackson. The Chair did so by oral announcement during the Public Session of the Council meeting and prior to resolving to move in-camera to discuss the matter.

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## **Findings**

Essentially, the complaint deals with two issues related to the matter in question.

- (1) Did the Agendas for the Committee of the Whole and Council Meetings give sufficient information such that the public would know the general nature of the matter to be discussed at the closed session(s) as required by the Municipal Act?; and
- (2) Was the item a matter for which a meeting of the Committee of the Whole and/or Council could be closed to the public in accordance with the Municipal Act?

### (1) The General Nature of the Matter to be Discussed

As stated earlier, the Municipal Act requires that before a council, local board or committee move into a closed meeting, it shall pass a resolution at a public meeting indicating that there is to be a closed meeting. The resolution also must include the general nature of the matter(s) to be deliberated at the closed meeting.

The Municipal Act cites the exceptions for which a meeting may be closed to the public. However, it does not provide guidance as to what language to use to convey "the general nature of the matter(s) to be deliberated at the closed meeting", other than by necessary reference to one of the exception criteria found in s. 239(2) of the Act.

Thus, the Clerk of a municipality, who is usually the individual charged with preparing the agenda, often must use some discretion when preparing the subsection 239 (4) resolution that is required to be passed before holding a closed meeting. That discretion involves a tension between inadvertently disclosing too much and disclosing too little.

The City's practice is to make public the intended agenda for the closed meeting. There is nothing in section 239 that requires a municipality to make a closed meeting agenda available to the public. Indeed, it is the practice in many municipalities to provide the closed meeting agenda and the supporting reports, if any, to members of council and the attending municipal staff only. This closed meeting agenda must provide Members of Council (or committee or board) with sufficient information to allow them to prepare for the discussion or to disclose pecuniary or other interests at the appropriate time.

The Municipal Act contemplates that the public resolution provides the transparency to the public of the fact of the intent to hold the closed meeting

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and the general nature of the matter to be considered. In the interest of disclosing enough information in the resolution, staff might prepare it such that the public knows *the essence* of the item under consideration without disclosing *the potential substance* of the ensuing deliberations.

The complaint alleges that the title of the item is not descriptive enough, such that the public or members of the Committee of the Whole would know specifically that the Committee would be dealing with the litigation matter involving Linda Jackson.<sup>7</sup> Although the fact that the City is involved in a litigation matter involving Linda Jackson is well known by the public, in this case, by what appears to be an inadvertent omission the Clerk's staff did not make specific reference to the Linda Jackson litigation in the either the agenda or the resolution. It is the resolution that is the determinative document.

By omitting the reference to the specific litigation in the resolution the public would not know specifically that the Committee would be dealing with the litigation matter involving Linda Jackson.

How does council (or a local board or committee) satisfy the requirement in subsection 239 (4) to state the general nature of the matter to be considered at a closed meeting?

There are circumstances when it would not be appropriate for the municipality to divulge any greater information than a subject matter listed in subsection 239 (2). For example, if the senior administrator needs to inform council about an employees' misconduct, it would be appropriate for council to pass a resolution specifying the subject matter as listed in subsection 239 (2).

However, if more information can be provided to the public in the resolution required by subsection 239 (4) then it should be provided. This was the situation in the *Farber v. City of Kingston* case. Therefore, it may be appropriate in circumstances where it can do so in a way that "maximizes the information available to the public while not undermining the reason for excluding the public".<sup>8</sup> Although it would have been appropriate to do so in this case, the fact that the municipality did not does not render the meeting invalid.

In this instance, the meeting was properly called, disclosures of pecuniary interests properly offered and recorded, the resolution to receive the item was properly presented, seconded, and carried, minutes were properly recorded, and there were no substantive irregularities.

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<sup>7</sup> However, the omission was corrected at the beginning of the Council Meeting on October 27, 2008 such that the Council records are clear about the matter that was considered at the closed sessions.

<sup>8</sup> See *Farber V. Kingston (City)* (2007), 279 D.L.R. (4<sup>th</sup>) 409 (Ont. C.A.), at para. 21.

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Further, as outlined in the next section of this report, the subject matter discussed at the closed meetings was of a nature that the meeting could be closed in accordance with the Municipal Act.

(2) A Matter for Which the Meeting Could Be Closed

The more substantive part of the complaint is that the complainant asserts that the matter was not one for which the Committee of the Whole could meet in closed session. She asserts that the court process dealing with the litigation is an open and public process and, as such, the Council process should also be open and public. The complainant characterizes the Committee of the Whole meeting as an "extension of the court application". She further asserts that no legal opinions were given during the closed session and that Committee and Council were not being asked to make a decision on a legal opinion or other matter requiring discussion in a closed forum.

During the course of the investigation, Amberley was advised about the substance of the discussion at the closed meetings and reviewed the in-camera notes from the closed meeting.

It would be improper, however, for Amberley to discuss in this report the substance of the closed meeting discussions, since disclosure would offend the principle of confidentiality that closed meetings protect.

In addition, to do so would allow complainants and other third parties to receive information through a closed meeting investigation that they would otherwise not be privy to; that is not the function of a closed meeting investigation. That is not the say that the complainant in this instance was attempting to do that, but rather that the possibility could be contemplated in other instances.

Having reviewed the content of the discussions and the minutes of the closed meetings, we are satisfied that the matter was covered either by litigation privilege or by solicitor/client privilege.

Although the Municipal Act does not specifically refer to these two legal privileges, in our opinion the language in s.239 would encompass those privileges. Litigation privilege is engaged in s.239(2)(e) when a closed meeting matter deals with litigation or potential litigation, including matters before an administrative tribunal. Solicitor/client privilege is engaged in s.239(2)(f) when a closed meeting matter deals with advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

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Since the matter under discussion at the time of the closed meetings likely straddled both privileges, it might be useful to explain the nature of the two privileges.

The Supreme Court of Canada recently considered the nature of the litigation privilege and solicitor/client privilege in *Blank v. Canada (Minister of Justice)*<sup>9</sup>:

"The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure."<sup>10</sup>

Both litigation privilege and solicitor/client privilege are invoked whether or not the communication is in written or oral form.

It is also worth noting that litigation privilege begins when litigation is contemplated and continues throughout the litigation process, including any appeal processes. The privilege expires at the end of the litigation. Solicitor/client privilege, on the other hand, survives even after the termination of the solicitor and client relationship.

The matter at issue in this particular complaint involves ongoing litigation between the City and Ms. Jackson. Although the City has contracted with external legal counsel to represent the City in the litigation, the City Solicitor is the City's liaison with external counsel and is also involved in recommending legal strategies and approaches in the actual litigation process.

Thus, any communication that the City's Solicitor would have with City Council respecting the matter would be covered by litigation privilege. Communication

<sup>9</sup> [2006] 2 S.C.R. 319, 2006 SCC 39 ("Blank").

<sup>10</sup> *ibid.* at paras. 28-29.

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would include both written communication and oral communication, the latter being the form of communication used at the closed meetings.

Given the fact that the litigation does not end until decisions are rendered by the court and all appeals, if any, are exhausted, Council's processes must be set up to allow Council, as a party in the litigation, to discuss their positions and strategies in private and "without fear of premature disclosure". For those reasons, Council conducts its deliberations in closed session. Meetings are not closed in order to exclude the public from the process, although that is the effective outcome. Meetings are closed to ensure that the opposing party is not privy to Council's deliberations on its positions and strategies.

It is also conceivable when Council is discussing legal strategies and positions (whether or not the City is involved in litigation or if litigation is pending), the City Solicitor would be called upon to provide recommendations or advice to Council. Those communications would be subject to solicitor/client privilege.

Council must be able to confide in the City Solicitor on all legal matters and to have "full, free, and frank discussions" without being concerned about whether the communication between the City Solicitor and the Council, as client, is going to be revealed in a public forum.

That is the purpose of solicitor/client privilege and is the reason why Council is permitted to go into closed session to deal with a matter involving solicitor/client privilege.

The complainant has characterized the Committee of the Whole meeting as an "extension of a court application". That is not the case. While it is true that the court process is open and public (unless ordered by the court otherwise), it is not a place where the client and his/her solicitor discuss in open forum their strategies, positions, and tactics. It is the stage where those strategies and positions are played out. It is the place where the opposing party tries to figure out the other side's strategies and positions in order to counteract them. The opposing party is not given a backstage pass to the strategy session (a closed meeting) as that would defeat the purpose of the adversarial system of litigation.

Without divulging the substance of the deliberations and discussions at the closed meetings, for reasons outlined above, we are satisfied that the content of the closed meetings involved matters covered by both litigation privilege and solicitor/client privilege. Hence, the matter was one for which the meetings could properly be closed under s. 239(e) or s.239(f) of the Municipal Act.

### **Conclusion**

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Based on the evidence and the interviews, it is our conclusion that the matter deliberated at the closed meetings fell within at least one, and likely two, of the exceptions in section 239 of the Municipal Act for which a closed meeting may be held.

Further, the fact that no words were added in the title of the item on the closed meeting agenda to augment the Municipal Act exception to the open meeting provision does not render the meeting or the outcome of the meeting improper, since the municipality is not required to augment the words of the Act.

### **Public Report**

We received full co-operation from the City Clerk, the Commissioner of Legal and Administrative Services and City solicitor, and the complainant and we thank them.

This report is forwarded to the Council of the City of Vaughan. 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.

January 12, 2009

### **Closed Meeting Investigator**

**AMBERLEY GAVEL LTD.**

Per:   
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