

COMMITTEE OF THE WHOLE MARCH 31, 2009

CLOSED MEETING INVESTIGATION REPORT MEETING OF COMMITTEE OF ADJUSTMENT NOVEMBER 13, 2008

Recommendation

The City Clerk recommends:

- 1) That the Closed Meeting Investigation Report of Amberley Gavel Ltd., dated March 17, 2009 be received.

Economic Impact

The cost of the investigation has not yet been invoiced by Amberley Gavel Ltd. 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 upon request. A copy has been made available to the Complainant.

Purpose

The purpose of this report is to advise Council of 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, 2001*.

Background - Analysis and Options

On December 1, 2008, the City Clerk received a Complaint with respect to Committee of Adjustment Minor Variance Application No. A235/08, considered at the November 13, 2008 meeting of the Committee of Adjustment (hereinafter "the Complaint").

The Complaint alleged that a portion of the Committee of Adjustment meeting took place *in camera*, contrary to section 239(2) of the *Municipal Act, 2001*, that one party made representations *in camera*, and that minutes were not taken. .

The Complaint was considered by the City's Closed Meeting Investigator (Amberly Gavel Ltd.), appointed pursuant to Sections 239.1 and 239.2 of the *Municipal Act, 2001*.

The Closed Meeting Investigator's Report concluded that the Committee of Adjustment is subject to the closed-meeting investigator provisions of the *Municipal Act, 2001*, and that a portion of the meeting held on November 13, 2008, was not held in accordance with the requirements of the *Municipal Act, 2001*. The Investigator found that a public resolution was not passed by the Committee of Adjustment prior to convening into closed session, and that additional minutes were not taken by the secretary-treasurer of the Committee who attended only a portion of the "closed meeting".

The following recommendations were made in the Report:

- i. That members of the Committee of Adjustment and its secretary-treasurer undertake the Ontario Association of Committees of Adjustment training;
- ii. That rules of procedure adopted by the Committee of Adjustment in 1987 be reviewed and updated; and,
- iii. That the City Clerk review the *Municipal Act, 2001* closed meeting requirements with members of the Committee of Adjustment and staff.

The Closed Meeting Investigator's Report does not render the Committee of Adjustment's decision invalid.

Additional information will be provided to Council in a confidential memorandum.

Relationship to Vaughan Vision 2020/Strategic Plan

This report is consistent with the priorities set forth in Vaughan Vision 2020, particularly the goal to "Demonstrate Leadership and Promote Effective Governance".

Regional Implications

Not applicable.

Conclusion

Staff is reviewing the recommendations in the Report to determine whether any actions need to be taken. A confidential memorandum from legal staff will be provided to Council at its meeting of March 31, 2009.

Attachments

Attachment #1: Closed Meeting Investigation Report of Amberley Gavel Ltd., dated March 17, 2009.

Report prepared by:

Nancy Salerno, Solicitor
Jeffrey A. Abrams, City Clerk

Respectfully submitted,

Jeffrey A. Abrams
City Clerk



Amberley Gavel Ltd.

March 17, 2009

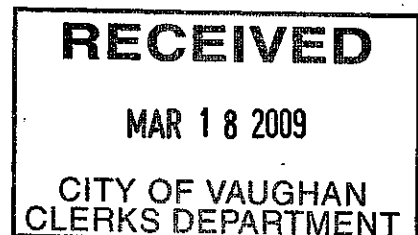
Jeffrey A. Abrams
City Clerk
City of Vaughan
2141 Major Mackenzie Drive
Vaughan, ON L6A 1T1

Dear Mr. Abrams:

Enclosed please find the Report of Amberley Gavel Ltd. respecting the closed meeting investigation of the Committee of Adjustment meetings held on November 13, 2008. The Report is also being forwarded to the Secretary - Treasurer to the Committee of Adjustment. 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



**REPORT TO
THE COMMITTEE OF ADJUSTMENT AND
THE COUNCIL OF THE CITY OF VAUGHAN
REGARDING THE INVESTIGATION OF A CLOSED MEETING OF THE CITY
OF VAUGHAN COMMITTEE OF ADJUSTMENT**

Complaint

The City of Vaughan ("City") received a complaint on December 1, 2008 about an in-camera ("closed") portion of a Committee of Adjustment meeting held on November 13, 2008.

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*¹, as amended by Bill 130² ("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 and to the Vaughan Committee of Adjustment.

Status of the Committee of Adjustment

Is a committee of adjustment required to comply with the closed meeting rules set out in sections 238 and 239 of the Municipal Act, 2001?

The definition of "local board" in section 1 of the Municipal Act, 2001 reads:

"local board" means a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority".

¹ s.o. 2001, c. 25.

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

This definition is modified in section 238 which provides, “local board” does not include police services boards or public library boards”.

A committee of adjustment falls within the definition of local board in section 1 as modified by section 238 of the Municipal Act, 2001. It is a local board for the purposes of sections 238 and 239.

Application of Closed Meeting Rules to the Committee of Adjustment

Except as provided in section 239, all meetings of municipal councils, local boards or committees of them shall be open to the public. A meeting includes a regular, special or other meeting. Subsection 239 (2) lists the exceptions. It provides a list of matters for which a meeting may be closed. Paragraph (g) provides that a meeting or part of a meeting may be closed if it is authorized under another Act.

Planning Act

Committees of Adjustment are authorized by section 44 of the Planning Act which permits a municipal council to appoint a committee of adjustment in circumstances where the council has passed a zoning by-law. The committee of adjustment will be composed of at least 3 persons that council appoints in the by-law.

The powers of the committee of adjustment are found in section 45 of the Planning Act. An application will result in a hearing. The section provides that notice shall be given by the committee before hearing an application to those persons and public bodies prescribed by provincial regulation. Subsection 45 (6) provides that, “the hearing of every application shall be held in public, and the committee shall hear the applicant and every other person who desires to be heard in favour of or against the application, and the committee may adjourn the hearing or reserve its decision”.

Subsection 45 (8) provides that a decision must be in writing, must set out the reasons for the decision and must be signed by the members who concur in the decision. The Act then provides that the committees’ decision be sent out. Subsection 45 (10) reads:

“Notice of decision

(10) The secretary-treasurer shall not later than ten days from the making of the decision send one copy of the decision, certified by him or her,

- (a) to the Minister, if the Minister has notified the committee by registered mail that he or she wishes to receive a copy of all decisions of the committee;

- (b) to the applicant; and
- (c) to each person who appeared in person or by counsel at the hearing and who filed with the secretary-treasurer a written request for notice of the decision,

together with a notice of the last day for appealing to the Municipal Board”.

Section 45 specifically requires the hearing be held in public after notice is given in advance. However, there is no express requirement in the Planning Act that the committee must reach a decision in public. Persons described in subsection (10) shall receive a copy of the decision of the committee. The decision making process is separate from the hearing. The same distinction is also apparent in section 3 of the Statutory Powers Procedure Act which provides that a tribunal shall “afford to the parties to the proceeding an opportunity for a hearing before making a decision”.

Statutory Powers Procedure Act

A committee of adjustment is subject to the Statutory Powers Procedure Act. Section 3 provides that “this Act applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision”.

The Statutory Powers Procedure Act provides that a tribunal governed by that Act has the power to determine its own procedures and practices. These rules and practices must be consistent with the Statutory Powers Procedure Act and with other Acts which govern them.

While a committee of adjustment created by a municipal council is a local board, the combined effect of the Planning Act and the Statutory Powers Procedure Act is to permit a committee of adjustment to determine its own practices and procedures, subject to those two Acts. These rules and procedures may differ from the rules and procedures that council sets for itself and its committees. In both instances the rules and procedures must be subject to the requirements of the closed meeting rules in section 239 of the Municipal Act.

Application of Section 239, Municipal Act, 2001

Since the City of Vaughan’s Committee of Adjustment is governed by the closed meeting rules in section 239 of the Municipal Act, 2001, it may hold a closed meeting for any of the subject matters set out in subsections 239 (2) to (4).

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).*

Other criteria

(3) A meeting shall be closed to the public if the subject matter relates to the consideration of a request under the Municipal Freedom of Information and Protection of Privacy Act if the council, board, commission or other body is the head of an institution for the purposes of that Act. 2001, c. 25, s. 239 (3).

Educational or training sessions

(3.1) A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:

- 1. The meeting is held for the purpose of educating or training the members.*
- 2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee. 2006, c. 32, Sched. A, s. 103 (1).*

The requirement that meetings of local government shall be open to the public means that meetings of council, local boards and their committees will be open and transparent to the public. In order to hold a closed meeting, the council, local board or committee must fit it within one of the exceptions to the general rule which are set out above.

If the Committee of Adjustment were granted specific, express authority to hold closed meetings to deliberate its decisions in either the Planning Act or the

Statutory Powers Procedure Act then it could rely upon the exception in section 239 (2) (g). However there does not appear to be any such express authority in either of the Acts; therefore, the Municipal Act closed meeting provisions apply.

This is in contrast with the Emergency Management Act which provides in subsection 2.1 (7) that the council shall close a portion of its meeting for purposes set out in the Act.

Public Resolution Authorizing the Closed Meeting

Subsection 239 (4) requires that before holding a meeting or part of a meeting that is closed to the public, a local board, including a committee of adjustment, shall pass a public resolution that must include two parts. First, it must state the fact of the holding of the closed meeting. Second, the resolution must include the general nature of the matter to be considered at the closed meeting.

The minutes of the meeting of November 13, 2008 do not reveal that the committee of adjustment passed a resolution at the public portion of the meeting required by subsection 239 (4) before moving into the closed meeting to deliberate. This was confirmed by the staff in attendance.

This resolution is an opportunity for the public to be aware of when a closed meeting is to be held and the general nature of the matter(s) to be considered. It is one element of the obligation to be open and transparent even when a closed meeting is permitted.

Investigation

The City Clerk was interviewed during the course of the investigation. The Secretary-Treasurer of the Committee of Adjustment and one other staff member in attendance at the meeting were also interviewed.

Both staff that were in attendance confirmed that the Committee of Adjustment did hold a closed meeting. They indicated that the chair requested that the members and the two staff meet in chambers apart from where the hearing was being held. They indicated that several technical questions were asked of the one staff member. Then the secretary treasurer and other staff member were asked to leave the closed meeting. They estimated that the first part of the closed meeting lasted between five and ten minutes and the second part when no staff were present lasted about the same length of time.

The secretary-treasurer advised that the City of Vaughan Committee of Adjustment deliberated in a closed meeting only rarely and that generally all deliberations were held at the public meeting. That was the case at the meeting

in question where a number of other applications were dealt with in the public meeting. He indicated that it was only on the occasional contentious matter that the committee would convene a closed meeting to deliberate. The rules of procedure governing the committee of adjustment were provided by the secretary-treasurer to the Review Officer. These rules were adopted by the committee on July 8, 1987.

The secretary-treasurer also confirmed that the City of Vaughan Committee of Adjustment was a member of the Ontario Association of Committees of Adjustment (OACA). He also confirmed that neither he nor any members of the committee had taken the training offered by the Association.

A member of the OACA executive advised that the training provided by the association recommends that all hearings and deliberations of a committee of adjustment be held in public. This we were advised was because of the recent Bill 130 changes in the legislation relating to closed meetings.

Conclusion

Based on the information provided, it is our conclusion that any closed meeting of the City of Vaughan Committee of Adjustment is governed by the closed meeting rules in section 239 of the Municipal Act, 2001. By virtue of the Planning Act and the Statutory Powers Procedure Act, the Committee of Adjustment is entitled to determine its own practices and procedures. But these are subject to the requirements of section 239.

The practice of the City of Vaughan Committee of Adjustment has been to not pass the required public resolution before holding a closed session. While the failure to pass the necessary resolution may not render any decision invalid the purpose of the resolution is to provide transparency to the process.

Minutes of all meetings of a local board, open and closed, are required by section 239 as follows:

Record of meeting

(7) A municipality or local board or a committee of either of them shall record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not. 2006, c. 32, Sched. A, s. 103 (3).

Same

(8) The record required by subsection (7) shall be made by,

- (a) the clerk, in the case of a meeting of council; or*
(b) the appropriate officer, in the case of a meeting of a local board or committee. 2006, c. 32, Sched. A, s. 103 (3).

Subsection (8) requires that they be taken by the appropriate officer which in the case of a committee of adjustment is the secretary-treasurer. Only a portion of the deliberations of the closed meeting in question were attended by the secretary-treasurer.

The closed portion of the meeting that is the subject of this request for an investigation was not held in accordance with the requirements of the Municipal Act.

Recommendations

Subsection 239.2 (10) permits the closed meeting Investigator to make such recommendations as the Investigator thinks fit. The following recommendations are submitted the City of Vaughan Committee of Adjustment for its consideration.

Recommendation 1

It is recommended that members and the secretary-treasurer undertake the OACA training.

Recommendation 2

It is recommended that the rules of procedure adopted by the Committee of Adjustment in 1987 be reviewed and updated.

Recommendation 3

It is recommended that the City Clerk review the Municipal Act closed meeting requirements with members of the Committee of Adjustment and its staff.

Public Report

This Report is forwarded to the Committee of Adjustment and 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 the Committee of Adjustment and Council or at a special meeting of either called for the purpose of receiving this report prior to the next regular meeting.

March 17, 2009

Closed Meeting Investigator

AMBERLEY GAVEL LTD.



Per: