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REPORT ON CLOSED MEETING INVESTIGATION 2025-01

THE CORPORATION OF THE MUNICIPALITY OF PORT HOPE

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November 24, 2025

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MUNICIPALITY OF PORT HOPE REPORT ON CLOSED MEETING INVESTIGATION 2025-01

I. INTRODUCTION

1. Aird & Berlis LLP is the Closed Meeting Investigator (the “**Investigator**”) for The Corporation of the Municipality of Port Hope (the “**Municipality**”).
2. We received a formal request for a closed meeting investigation dated July 31, 2025 (the “**Request**”). We sought and received additional information on August 5, 2025.
3. The Request alleges that Council for the Municipality held numerous closed meetings with respect to a development application and subsequent appeal to Ontario Land Tribunal (“**OLT**”) respecting 3852 Ganaraska Road in contravention of section 239 of the *Municipal Act, 2001*.¹
4. The Request also alleges that Council for the Municipality held numerous closed meetings with respect to the decision of the Ministry of Natural Resources to change the boundary of the Garden Hill Area of Natural and Scientific Interest (“**ANSI**”).
5. The Request seeks an investigation into whether Council of the Municipality held closed meetings with respect to these matters in contravention of section 239 of the *Municipal Act, 2001*.
6. The Request seeks an investigation into closed meetings held by Council on:
 - i. November 7, 2023;
 - ii. February 20, 2024;
 - iii. April 23, 2024;
 - iv. July 9, 2024;
 - v. March 4, 2025;
 - vi. May 13, 2025;
 - vii. May 20, 2025; and
 - viii. June 9, 2025 (collectively, the “**Closed Meetings**”).
7. This is a report on the investigation of a request made in accordance with section 239.1 of the *Municipal Act, 2001*.

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

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

8. The Municipality has appointed Local Authority Services (“**LAS**”) to perform closed meeting investigations pursuant to section 239.1 of the *Municipal Act, 2001*. LAS delegated its authority as Investigator to Aird & Berlis LLP. 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.

9. Our jurisdiction as closed meeting investigator is set out in section 239.2 of the *Municipal Act, 2001*. Our function includes the authority to investigate, in an independent manner, a request made by any person to determine whether the Municipality has complied with section 239 of the *Municipal Act, 2001* in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation to Council.

III. REQUEST

10. The Request was properly filed pursuant to section 239.1 of the *Municipal Act, 2001*.

11. As indicated above, the Request alleges that the Closed Meetings contravened section 239 of the *Municipal Act, 2001*. The Request alleged no breach of the Municipality’s Procedure By-law 80/2024 and, accordingly, we have only assessed the Closed Meetings for compliance with the requirements of section 239.

12. The Request makes the following allegation:

Since 2022, there has been a disturbing pattern of public exclusion with regard to a development application for 3852 Ganaraska Road. Information which could have and should have been shared with the public was, instead, withheld from the onset. As a result, when portions of information remained confidential, residents were left unaware of key developments. The ... development application has been discussed in-camera multiple times since 2022. Residents have requested meetings with staff several times regarding specific issues and questions, and have never received a reply. Were staff instructed by Council not to respond?

13. The Request further states:

The overriding concern is whether certain information could have been made public and allowed residents to participate meaningfully, but was instead kept in-camera without clear justification. Some residents have expressed concerns the process may have been kept in-camera deliberately, in order to avoid public engagement—and that this is what the community would like to see investigated.

The greatest concern to Garden Hill residents is long-term water safety and security since residents rely on either dug or drilled wells. Protection of the ANSI would have protected the community water supply. Residents want to know why Council has not objected to the actions taken by the developer during the OLT hearing and instead, has acquiesced to the actions taken by the developer at a great cost to the municipality...

IV. REVIEW OF MATERIALS

14. In order to properly consider the allegations in the Request and make our determinations on the issues, we have reviewed the agendas and minutes of the open and Closed Meetings.

V. ISSUE

15. Did the Closed Meetings comply with section 239 of the *Municipal Act, 2001*?

VI. ANALYSIS

(1) Statutory Framework

16. Ontario's "open meeting" rule is set out in section 239 of the *Municipal Act, 2001*, which requires that all meetings of a municipal council (or local board or a committee of either of them) be held in an open forum where the public is entitled to attend and observe local government in action.²

17. There are exceptions to this rule which balance the need for confidentiality in certain matters with the public's right to information about the decision-making of local government.³

18. Subsection 239(2) sets out eleven separate subject matter exceptions that entitle Council to hold a meeting that is closed to the public, including the following exceptions which were cited as the reason for Council to convene into the Closed Meetings:

Exceptions

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

...

(e) litigation or potential 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;

² *London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588, 36 M.P.L.R. (4th) 1 at para. 38:

Municipal law was changed to require that municipal governments hold meetings that are open to the public, in order to imbue municipal governments with a robust democratic legitimacy. The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference.

³ Stephen Auerback & John Mascarini, *The Annotated Municipal Act*, 2nd ed., (Toronto, ON: Thomson Reuters Canada Limited, 2017) (e-loose leaf updated 2021 – Rel. 1) annotation to s. 239.

(2) Exception for Litigation or Potential Litigation

19. The closed meeting exception in clause 239(2)(e) allows a council to close a meeting to the public where it will consider and discuss matters related to “litigation or potential litigation, including matters before administrative tribunals affecting the municipality or local board.”

20. The *Municipal Act, 2001* does not define “litigation or potential litigation,” but the Ontario Ombudsman (the default closed meeting investigator) and the courts have determined this exception applies in circumstances where the subject matter discussed is ongoing litigation or involves a reasonable prospect of litigation. The courts have found that in order for the exception to apply, “there must be more than a mere suspicion that there will be litigation.”⁴

21. This exemption in clause 239(2)(e) has been found to apply to discussions of municipal councils concerning appeals to the Ontario Land Tribunal of land use planning decisions made under the *Planning Act*.⁵

(3) Exception for Advice that is Subject to Solicitor-Client Privilege

22. The closed meeting exception in clause 239(2)(f) allows a council to discuss and consider advice that is subject to solicitor-client privilege. This exception also applies to discussions that include communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. The Ontario Ombudsman has found that the purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.⁶

(4) Requirement to Pass a Resolution

23. Prior to holding a closed meeting, a council is required to pass a resolution in accordance with subsection 239(4) of the *Municipal Act, 2001*:

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 *C. R., Re*, 2004 CanLII 34368 (ON SC), at para. 21 citing *Carlucci v. Laurentian Casualty Co. of Canada*, [1991] O.J. No. 269.

⁵ See, for example, Ontario Ombudsman, Closed Meeting Investigation, the Township of North Dumfries (October 23, 2013) online:

<https://www.ombudsman.on.ca/sites/default/files/Files/sitemedia/Images/Reports/North-Dumfries.pdf>;

Ontario Ombudsman, Closed Meeting Investigation, City of Pickering (August 31, 2022), online:

<https://www.ombudsman.on.ca/sites/default/files/Media/ombudsman/ombudsman/resources/Municipal-Meetings/Ombudsman-Ontario-letter-Pickering-August-2022-EN-accessible.pdf>

⁶ Ontario Ombudsman, Closed Meeting Investigation, City of Pickering (August 22, 2022), online:

<https://www.ombudsman.on.ca/sites/default/files/Media/ombudsman/ombudsman/resources/Municipal-Meetings/Ombudsman-Ontario-letter-Pickering-August-2022-EN-accessible.pdf>

- (a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or
- (b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject-matter and that it is to be closed under that subsection.

VII. FINDINGS

(a) Meeting - November 7, 2023

24. Council held a meeting on November 7, 2023. As noted in Item 3 of the open session minutes from this meeting, Council convened in closed session at 5 p.m. With respect to the Ganaraska Road matter, the resolution to convene into closed session provided, in part:

...litigation or potential litigation, including matters before administrative tribunals, affecting the Municipality or local board – Section 239(2)(c) and advice that is subject to solicitor/client privilege, including communications necessary for that purpose – Section 239(2)(f) – (OLT-23-00030 3852 Ganaraska Road)...

25. The open session minutes further provide:

...Mayor Hankivsky also advised that Council Received updates from staff and legal counsel on the above noted matters. Council provided direction with relation to OLT-23-000360 - 3852 Ganaraska Rd. She advised that direction with respect to this matter had been provided to staff and legal counsel, and would return to council for further consideration. She also advised that as more information becomes available, it will be shared through regular communication channels.

26. We have reviewed the closed session minutes and agenda and find that the closed session portion of the meeting of Council on November 7, 2023 complied with the requirements of the *Municipal Act, 2001*. It is clear that Council's discussion related to both a matter before the Ontario Land Tribunal as well as advice that is subject to solicitor-client privilege.

(b) Special Meeting - February 20, 2024

27. Council held a special meeting on February 20, 2024. As set out in Item 3 of the open session minutes from the special meeting, Council passed the following resolution to go into closed session:

Council will move into a closed session in accordance with the provisions of the Municipal Act - Section 239(2)(e) and Section 239(2)(f), with respect to litigation or potential litigation, including matters before administrative tribunals, affecting the Municipality, and for the purpose of receiving advice that is subject to solicitor / client privilege, including communications necessary for that purpose.

During the session, Members of Council will receive legal advice relating to OLT-23-000360- 3852 Ganaraska Road.

28. Item 4 of the open session minutes is “Business Arising From Closed Session”. The open session minutes note:

Council reconvened in open session at 5:27 PM. Mayor Hankivsky advised that during the Special In-Camera Session, Council approved minutes from the previous in-camera sessions on November 7, 2023 and February 6, 2024. She further advised that Council received legal advice and updates regarding OLT-23-000360 - 3852 Ganaraska Road, and provided direction to staff.

29. We have reviewed the closed session minutes and agenda and find that the closed session portion of the special meeting of Council on February 20, 2024 complied with the requirements of the *Municipal Act, 2001*. It is clear that Council’s discussion related to both a matter before the Ontario Land Tribunal as well as advice that is subject to solicitor-client privilege.

(c) Special Meeting - April 23, 2024

30. Council held a special meeting on April 23, 2024. As noted in Item 3 of the open session minutes from the special meeting, Council’s resolution to proceed into closed session provided:

Be it resolved that council move in-camera in accordance with the provisions of the *Municipal Act, 2001*, S.O. c. 25 in order to address a matter pertaining to litigation or potential litigation including matters before administrative tribunals, affecting the Municipality or local board – Section 239(2)(e) and advice that is subject to solicitor client privilege, including communications necessary for that purpose – Section 239(2)(f) (OLT-23-000360 – 3852 Ganaraska Road)

31. Item 4 of the open session minutes is “Business Arising From Closed Session”. The open session minutes note:

Council reconvened in open session at 7:46 PM. Mayor Hankivsky advised that during the in-camera session, council approved minutes from the previous in-camera session on April 16, 2024. She advised that Council received legal advice and updates regarding OLT-23-000360 - 3852 Ganaraska Road and provided direction to staff.

32. We have reviewed the closed session minutes and agenda and find that the closed meeting portion of the special meeting of Council held on April 23, 2024 complied with the requirements of section 239 of the *Municipal Act, 2001*. Council’s discussion related to a matter before the Ontario Land Tribunal and to the exchange of solicitor-client privileged advice.

(d) Meeting - July 9, 2024

33. Council held a meeting on July 9, 2024. Item 3 of the open session minutes from the Council meeting note, in part:

Council held at 4:30 PM in accordance with the provisions of the *Municipal Act, 2001* S.O., c. 25 in order to address a matter pertaining to litigation or potential litigation, including matters before administrative tribunals, affecting the Municipality or local board – Section 239(2)(e) and advice that is subject to solicitor/client privilege, including communications necessary for the purpose – Section 239 (2)(f) – (OLT-23-000360 – 3852 Ganaraska Road)...

34. The open session minutes from the Council Meeting do not identify any business related to 3852 Ganaraska Road arising from the closed session portion of the meeting.

35. We have reviewed the closed meeting agenda and minutes and find the closed meeting portion of the Council meeting complied with the requirements of the *Municipal Act, 2001*. Council discussed a matter that was before the Ontario Land Tribunal as well as advice that is subject to solicitor-client privilege.

(e) Special Meeting - March 4, 2025

36. Council held a special meeting on March 4, 2025. Item 3 of the open session minutes from the special meeting note that Council passed the following resolution to convene into closed session:

Be it resolved that Council move into a closed session at 5:30 p.m. in accordance with the *Municipal Act, 2001* S.O., c. 25 in order to address a matter pertaining to litigation or potential litigation, including matters before administrative tribunals, effecting the Municipality or local board – Section 239(2)(e) and advice that is subject to solicitor/client privilege, including communications necessary for the purpose – Section 239 (2)(f) – (Update on Legal Matter)

37. Item 4 of the open session minutes is “Business Arising from Closed Session”. The open session minutes provide:

Council reconvened in Open session at 6:10 p.m. Mayor Hankivsky advised that during the Special In-Camera Session, Council received information regarding an outstanding legal matter related to the Municipality and provided direction to staff.

38. Council passed the following resolution in open session:

That Council receive Confidential Report FS-03-25 for information; and

That Council confirm the confidential direction provided to staff during the March 4, 2025 In-Camera meeting.

39. We have reviewed the closed meeting agenda and minutes and have determined that the closed meeting portion of the meeting complied with the requirements of section 239 the *Municipal Act, 2001*. We find, however, that the description of the general nature of the matter to be considered at the closed session provided insufficient information to allow a member of the public to determine the precise matter that was subject to Council’s discussion. The matter discussed at this meeting did not relate to the subject matter of the Request.

(f) Special Meeting - May 13, 2025

40. Council held a special meeting on May 13, 2025. As noted in Item 3 of the open session minutes from the special Council meeting, Council passed a resolution to go into closed session which provided, in part:

Be it resolved that Council move into a closed session at 5:30 p.m. in accordance with the *Municipal Act, 2001* S.O., c. 25 in order to address matters pertaining to ... litigation or potential litigation including matters before administrative tribunals, affecting the Municipality or local board – Section 239(2)(e) and advice that is subject to solicitor/client privilege, including communications necessary for the purpose – Section 239 (2)(f) – (OLT-23-000360 – 3852 Ganaraska Rd.)

41. Item 4 of the open session minutes is entitled “Business Arising From Closed Session”. The open session minutes set out, in part, as follows:

...Council also received an update from staff and legal counsel regarding File OLT-23-000360 – 3852 Ganaraska Rd. Council received these items as information, and provided direction to staff. More information regarding this matter will be coming forward as it is available.

42. We have reviewed the closed meeting agenda and minutes and conclude that the closed meeting portion of the meeting adhered to the requirements of section 239 of the *Municipal Act, 2001*. It is clear that Council’s discussion pertained to both a matter before the Ontario Land Tribunal as well as advice that is subject to solicitor-client privilege.

(g) Meeting - May 20, 2025

43. Council held a meeting on May 20, 2025. As noted in Item 3 of the open session minutes from the meeting, Council passed a resolution to convene into closed session which provided, in part:

Be it resolved that Council move into a closed session at 5:30 p.m. in accordance with the *Municipal Act, 2001* S.O., c. 25 in order to address a matter pertaining to litigation or potential litigation, including matters before administrative tribunals, affecting the Municipality or local board – Section 239(2)(e) and advice that is subject to solicitor/client privilege, including communications necessary for the purpose – Section 239 (2)(f) – (Update on Legal Matter)

44. Item 4 of the open session minutes is “Business Arising from Closed Session”. The open session minutes provide:

Mayor Hankivsky advised that during the In-Camera Session, Council approved the in-camera minutes from May 13, 2025. This was the last time Council met in closed session. She further advised that Council received information regard an update on a legal mater in accordance with the provisions of the municipal act.

45. We have reviewed the closed meeting agenda and minutes, and we have determined that the closed meeting portion of the meeting complied with the requirements of the *Municipal Act, 2001*. We find, however, that the description of the general nature of the matter to be considered at the closed session provided insufficient information to allow a member of the public to determine the precise matter that was subject to Council’s discussion. The matter discussed at this meeting did not relate to the subject matter of the Request.

(h) Special Meeting - June 9, 2025

46. Council held a special meeting on June 9, 2025. Item 3 of the open session minutes from the meeting provided that Council passed a resolution to proceed into closed session which provided, in part:

That Council move into a closed session at 4:30 p.m. in accordance with the provisions of the Municipal Act, 2001 S.O., c. 25 in order to address items pertaining to...advice that is subject to solicitor / client privilege, including communications necessary for the purpose – Section 239(2)(f) – (OLT-23-000360 – 3852 Ganaraska Rd. and Update on a Legal Matter)...

47. Item 4 of the open session minutes is entitled “Business Arising from Closed Session”. The open session minutes note, in part:

Council reconvened in Open Session at 5:45 p.m. ...

Council received information and considered items pertaining to a proposed or pending acquisition or disposition of land by the municipality or local board and advice that is subject to solicitor / client privilege. This is regarding an update on a legal matter as well as OLT– 23 – 000360 – 3852 Ganaraska Rd...

Council considered these items and provided direction to staff. The Mayor advised there were two motions to be made in open session with respect to the confidential direction that was provided to staff.

48. Council passed the following resolution in open session related to 3852 Ganaraska Road:

That Council confirm the confidential direction provided to staff and legal counsel with respect to Confidential Report PS-10-25 and OLT-23-000360 – 3852 Ganaraska Rd.

49. Our review of the closed meeting agenda and minutes concluded that the closed meeting portion of the Council meeting on June 9, 2025 complied with the requirements of the *Municipal Act, 2001*. The matter discussed pertained to advice that was subject to solicitor client-privilege.

(i) Summary of Findings

50. The overriding concern noted in the Request is whether certain information considered by Council during the Closed Meetings should have been made public to allow residents to participate in matters related to the settlement of the Ontario Land Tribunal appeal related to 3852 Ganaraska Road.

51. The *Planning Act* provides various opportunities for public participation with respect to land use planning applications and matters. The public is to be provided with various notices, is allowed to attend public meetings, may witness council and committees discussing and making decisions on applications, can make submissions both oral and written, and can sometimes file appeals.

52. However, once an application under the *Planning Act* becomes the subject of an appeal, as in the case of 3852 Ganaraska Road, although there may be a desire by members of the public to have greater insight into any such matters, a municipal council is statutorily permitted to discuss

matters related to the appeal before the Ontario Land Tribunal in the absence of the public in accordance with clause 239(2)(e) of the *Municipal Act, 2001*. Issues that are directly related to the settlement of an appeal to the Ontario Land Tribunal would be captured by this exception.

53. The underlying reason for this exception is obvious: to protect the municipality's interests as a litigant or as a party to a proceeding in an adversarial proceeding before an adjudicative body, such as a court or an administrative tribunal, in order to formulate and protect its legal position and strategy in a manner that will not be disclosed to the other party or parties.⁷ This necessarily includes the public.

54. Similarly, Council is permitted, in accordance with clause 239(2)(f) to hold a meeting in the absence of the public to receive and consider advice that is subject to solicitor-client privilege, including communications necessary for that purpose. This includes advice related to matters that are before the Ontario Land Tribunal.

55. The underlying basis for the exception related to solicitor-client privileged advice is equally obvious: to protect the municipality's interests as a client in seeking and obtaining legal advice that is to remain confidential.⁸ Confidentiality is an essential component of the privilege between a solicitor and their client.

56. While the subject matter of the Closed Meetings on March 4, 2025 and May 20, 2025 did not relate to the subject matter of the Request and are outside the scope of the Request, we still note that a resolution to go into a closed meeting should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for proceeding into closed session.⁹

57. The description "Update on Legal Matter" does not provide sufficient information to the public to understand the nature of the matter to be discussed. We recommend the Town ensure that it consistently provides sufficient details in its resolutions to go into closed session.

VIII. CONCLUSIONS

58. Based on our assessment of the entire evidentiary record, we conclude that the Closed Meetings were validly authorized by resolutions pursuant to clause 239(4)(a) of the *Municipal Act, 2001* and were all properly conducted under the authority of clauses 239(2)(e) and (f) of the statute.

59. In our opinion, Council was entitled to convene in closed sessions at the various meetings to discuss matters related to the Ontario Land Tribunal appeal for 3852 Ganaraska Road, including solicitor-client privileged advice.

60. Without confirming or denying closed session discussions regarding the ANSI, we find it would be appropriate for Council to discuss such a matter *in-camera* if Council's discussion was connected to the Ontario Land Tribunal appeal.

⁷ *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 S.C.R. 319.

⁸ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁹ *Farber v. Kingston (City)*, [2007 ONCA 173](#) at para. 21.

61. The fact that there were a number of Closed Meetings does not equate to “a disturbing pattern of public exclusion” nor does it manifest an attempt by the Municipality to preclude residents from participating meaningfully in the democratic process. In our opinion, there was clear justification for Council to convene *in camera* at the Closed Meetings.

62. This Report has been prepared for and is forwarded to Council for information. Given that we have not found any contraventions of section 239 of the *Municipal Act, 2001*, Council is not required by subsection 239.2(12) to “pass a resolution stating how it intends to address the report.”

63. Subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public. The inclusion of this Report on a meeting agenda will, in our opinion, satisfy the requirement.

Respectfully submitted,

AIRD & BERLIS LLP



Laura Dean

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