

**REPORT ON CLOSED MEETING INVESTIGATION 2022-01**

**THE CORPORATION OF THE MUNICIPALITY OF MIDDLESEX CENTRE**

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## MUNICIPALITY OF MIDDLESEX CENTRE REPORT ON CLOSED MEETING INVESTIGATION 2022-01

### I. INTRODUCTION

1. This is a report on the investigation of a request made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.<sup>1</sup>
2. A formal request for a closed meeting investigation, dated December 18, 2022 (the “**Request**”), was filed with the Clerk of The Corporation of the Municipality of Middlesex Centre (the “**Municipality**”), and subsequently provided to our office, in our capacity as the closed meeting investigator (the “**Investigator**”) for the Municipality.
3. The Request seeks an investigation of a meeting of the Council of the Municipality (“**Council**”) held on March 2, 2022 at 9:30 A.M. (the “**Meeting**”), and more specifically, the closed session portion thereof.
4. Upon concluding our investigation, we have found that the main allegation in the Request, being that the Meeting was improperly closed to the public, cannot be sustained. However, our investigation also identified technical breaches of the procedural requirements for convening a closed session meeting.

### II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

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

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<sup>1</sup> *Municipal Act, 2001*, S.O. 2001, c. 25.

### III. REQUEST

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

10. The Request, as initially filed, requested a closed meeting investigation of all meetings during a specified time period related to the proposed declaration of the Komoka Community Centre as surplus lands. In essence, the Request postulated that at some closed meeting, Council must have given direction to municipal staff to declare municipally-owned lands surplus and offer to those lands to a private entity. The Request also asserted that there was no need for any closed session discussion because there was only one potential buyer of the property, which was not being sold on the open market, and accordingly the Municipality did not have a bargaining position to protect.

11. Upon our intake and review of the Request, we determined that it did not set out sufficient detail or reasonable particulars of an alleged contravention that our office, as Investigator, had authority to investigate. Between December 2022 and January 2023, our office corresponded with the Requestor in order to clarify the scope of the Request. On agreement, the scope of the Request was narrowed to one meeting of Council, being the Meeting. The scope of the allegations in the Request were limited to two issues.

12. First, the Request alleged that the closed session portion of the Meeting was improperly closed to the public in reliance on clause 239(2)(c) of the *Municipal Act, 2001*. The Request refers to the circumstances surrounding the Meeting and other publicly available information to assert that the Meeting related to the proposed declaration of surplus and sale of the Komoka Community Centre to a private proponent. The Request asserts that this matter was not permitted to be discussed in closed session in reliance on the closed meeting exception for “acquisition or disposition of land” for two reasons. First, the Municipality was not purchasing land to meet the needs of a private developer. Second, because there was only one potential buyer of the lands – which were not listed for sale publicly – the Municipality did not have any bargaining position to protect, and as such, there was no justification for a closed meeting.

13. Second, the Request alleged that the Municipality’s resolution to convene in closed session do not comply with subsection 239(4) of the *Municipal Act, 2001*. The Request asserts that the resolutions do not adequately state the “general nature” of the matters to be discussed in closed session in a manner that would inform the public of the reason for convening a closed session.

### IV. REVIEW OF MATERIALS AND INQUIRY PROCESS

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

- Procedure By-law No. 2017-156, as amended (the “**Procedure By-law**”);
- Council Agenda (inclusive of staff reports) for the open session portion of the Meeting;
- Council Minutes for the open session portion of the Meeting;
- the Closed Meeting Agenda for the closed session portion of the Meeting;
- the Closed Meeting Minutes for the closed session portion of the Meeting; and
- other Council agendas and minutes which we deemed to be relevant and necessary to consider.

15. Following our review of materials, we conducted telephone interviews with multiple witnesses who we determined had direct, relevant knowledge about the subject matter of the Request.

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

17. The Municipality and its representatives were fully cooperative and forthright during our investigation process. We commend their efforts providing assistance as was required.

## V. THE MEETING

18. Near the conclusion of its regular Meeting held on March 2, 2022 at 9:30 A.M., Council convened a closed session meeting to consider two listed agenda items. The open meeting minutes indicate that Council passed the following resolution:

### 12. CLOSED SESSION

#### Resolution # 2022-062

**Moved by:** Councillor Scott

**Seconded by:** Councillor Heffernan

THAT Council for the Municipality of Middlesex Centre adjourn to closed session at 11:03 a.m. pursuant to Section 239(2) of the Municipal Act, 2001, as amended to discuss the following matters:

Section 239(2)(c) a proposed or pending acquisition or disposition of land by the municipality or local board;

Section 239(2)(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.

**CARRIED**

19. The open meeting minutes also indicate the following items would be discussed at the closed meeting:

### 12.4 CLOSED SESSION ITEMS

12.4.1 OLT Appeal Update

12.4.2 Potential Property Disposition (Ward 4)

20. The above resolution and information is also reflected in the open session agenda for the Meeting, which was posted on the Municipality's website in advance of the Meeting.

21. At the closed session portion of the Meeting, Council considered Closed Session Item 12.4.2 "Komoka Community Centre", which was a verbal update from the Chief Administrative Officer ("CAO"). There was no written report associated with this item. The item dealt with an update on a proposal to sell lands owned by the Municipality, being the Komoka Community Centre, to a private party.

## **(1) Background**

22. In order to understand Closed Session Item 12.4.1, it is necessary to understand the background and evolution of this matter.

23. The Komoka Community Centre is a municipally-owned recreation facility located at 133 Queen Street in the community of Komoka within the Municipality. The facility contains a gymnasium, meeting rooms, and kitchen facilities. The building that comprises the community centre is set within the larger Komoka Park, comprising 28.9 acres of parkland with various amenities including sports fields, a pickleball court, and open space. Komoka Park also hosts the Komoka Railroad Museum, a privately-run facility.

## **(2) Inquiry to Municipality for Proposed Purchase**

24. The Municipality was approached by a private proponent, Dr. Chris Chant, an orthopaedic surgeon (the "**Proponent**"), about the possibility of purchasing a municipal facility that would be suitable for establishing of a state-of-the-art sports medicine clinic and athletic facility (the "**Facility**"). It was determined that the Komoka Community Centre could be a suitable location for the Facility, based on its proximity to two 400-series highways and availability of land. As such, the Proponent expressed an interest in purchasing the Komoka Community Centre.

25. At the time the Proponent approached the Municipality, the Proponent was also engaged with other municipalities in Southwestern Ontario about the possibility of establishing the Facility elsewhere.

## **(3) Proponent's Delegation to Council**

26. Following preliminary discussions with the Municipality, the Proponent made a delegation to Council on February 2, 2022 formally expressing his interest to purchase lands from the Municipality to construct the Facility. The Proponent provided Council with an overview of what the Facility entailed, and his reasons why the Municipality was an optimal location for the Facility.

27. Members of Council subsequently discussed the presentation and asked questions of the Proponent. Generally speaking, members of Council expressed excitement in the opportunity and the Proponent's interest in the community.

28. Following the delegation from the Proponent, Council did not make any decision or pass any resolution in respect of the project.

## **(4) Structure of the Proposed Transaction**

29. The proposed transaction was preliminarily structured through a series of discussions between the Proponent and the Municipality. However, at the time of the Meeting, no formal agreement of purchase and sale or term sheet had been entered into or even drafted.

30. First, like any land transaction, the Proponent would pay the Municipality a sum of money to purchase the lands, based on an appraised value and range determined by the Municipality. From the Municipality's perspective, not only would it receive a substantial sum which could be invested in other municipal facilities, but it would also save on significant capital costs required to renovate and repair the Komoka Community Centre in the near future.

31. The benefits of the proposal were not solely financial. Rather, the proposal represented a unique opportunity for a public-private partnership in the community. The Proponent suggested the project would proceed as a partnership between the Facility and the community. As part of this partnership, the Proponent would construct a new building on the property, which would include sports medicine facilities but also private recreation facilities, including a hockey rink, indoor basketball courts, and other uses.

32. As initial discussions with the Proponent proceeded, the proposed structure would ensure that the Municipality and the community would continue to benefit from the partnership in the longer term. First, the lands that would be purchased by the Proponent would only comprise 6 acres of a total 28.9 acres. This would include the Komoka Community Centre and ancillary parking, and portions of Komoka Park. The Municipality would retain ownership and operating responsibility of the remaining 22.9 acres, including the lands comprising the Komoka Railway Museum.

33. Furthermore, any municipal equipment or outdoor amenities that would be affected by the potential sale were required to be replaced by the Proponent elsewhere in Komoka Park or in a nearby facility. The new private amenities that would be constructed by the Proponent would be made available for use by the community. In addition, the facility would host sports medicine, musculoskeletal and orthopaedic physicians that the community could access through public health insurance.

34. In an effort to ensure the proposal would be developed by the Proponent and not “flipped” to a third party, the Municipality would retain a right of first refusal to bring the lands back into public ownership should the Proponent wish to sell the lands.

35. An essential precondition to the transaction actually proceeding was the declaration of the land surplus to the needs of the Municipality. Municipalities in Ontario are required to have a policy on the sale and other disposition of municipally-owned lands.<sup>2</sup> The Municipality adopted such a policy through By-law No. 2012-043, as amended.<sup>3</sup> The Sale and Disposition of Land By-law governs how the Municipality can sell its lands, and enables the Municipality to entertain unsolicited inquiries to purchase municipal lands. An important step in any sale process however is a declaration by Council that the lands to be sold are surplus to the needs of the Municipality. Such a declaration was essential to the proposed sale of the Komoka Community Centre proceeding.

## (5) The Meeting

36. At the Meeting, the CAO provided a verbal update to Council regarding the ongoing discussions with the Proponent. The CAO advised that the Proponent was specifically interested in purchasing the Komoka Community Centre and lands within Komoka Park. The CAO noted that the Municipality’s staff had been in continued discussions with the Proponent since his presentation to Council on February 2, 2022.

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<sup>2</sup> See *Municipal Act, 2001*, s. 270(1)1.

<sup>3</sup> Municipality of Middlesex Centre, revised By-law No. 2012-043, *Being a By-law to Govern the Sale and Other Disposition of Land*, as amended by By-law No. 2020-034 (May 13, 2020) (the “**Sale and Disposition of Land By-law**”).

37. The CAO described to Council how the proposed sale of the lands would be structured. In particular, the CAO outlined a preliminary concept plan for the layout of the site, including the size, dimensions and amenities of the Facility, the affect of the proposal on certain existing outdoor amenities, including their proposed relocation, and which portions of Komoka Park would remain in municipal-ownership. The CAO also outlined how the proposal would retain the Komoka Railway Museum on the site, including leasing considerations with the museum operator.

38. The CAO advised Council that the next step in the process of proceeding with project would require Council to pass a resolution deeming the Komoka Community Centre surplus to the needs of the Municipality. This step would be required by the Sale and Disposition of Land By-law in order for the Municipality to proceed with any sale. The CAO expressly advised Council that this next step would be implemented through a Staff Report to an upcoming open session meeting of Council. Members of Council were invited to express any concerns with the proposal, if any.

39. Following the CAO's verbal update, members of Council discussed the proposal. Discussion generally centred around the proposal itself, including the proposed layout of the site, perceived benefits and trade-offs of proceeding with the proposal, and what would happen to the Komoka Community Centre and Komoka Park should the transaction proceed.

40. Our investigation did not uncover any evidence to suggest that any member of Council expressed a concern with proceeding to the next step of the proposal, being the surplus declaration.

41. The closed session minutes of the Meeting do not indicate that Council took any vote or passed any resolution. The minutes also do not indicate that Council gave staff any direction, or that any member of Council have any specific input on municipal staff's next steps.<sup>4</sup>

42. The evidence obtained through our investigation demonstrates that the verbal update was an opportunity for members of Council to express any concerns with the details of the proposed transaction, including the immediate further action of a surplus declaration in a subsequent open session of Council.

## **(6) Events following the Meeting**

43. Following the Meeting, at the regular meeting of Council held on April 6, 2022, Council considered a Staff Report from the CAO regarding the next step to pursue the proposal, being a surplus declaration in respect of the Komoka Community Centre. The report, published in advance of the meeting, contained the following staff recommendation:

THAT Report CAO-10-2022, re: Declaration of Surplus Property – Komoka Community Centre be received;

AND THAT the Municipality of Middlesex Centre exercise its discretion and deem it desirable to declare the Komoka Community Centre at 133 Queen Street property as surplus property to the Municipality;

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<sup>4</sup> We do note, however, that a municipal council is expressly permitted to vote and to give instructions or direction to municipal staff during a closed meeting pursuant to s. 239(6)(b) of the *Municipal Act, 2001* if the council is permitted to convene in-camera.



AND THAT municipal staff be directed to draft an Agreement of Purchase and Sale with Dr. Chris Chant for the surplus property and report back to Council for review and comment;

AND FURTHER THAT should Council decide to sell the surplus property in accordance with the Purchase and Sale, that staff be directed to create a Reserve Fund for the community of Komoka-Kilworth based on the proceeds of the sale of the Komoka Community Centre.

44. In addition, the CAO's report provided staff's rationale for proceeding with the proposal, and future actions that would be required to give effect to the proposal, including land use planning approvals.
45. The proposed surplus declaration garnered significant public feedback. Council received 80 items of correspondence from members of the public regarding the Municipality's proposed surplus declaration.
46. The correspondence received by Council overwhelmingly opposed the Municipality's proposed surplus declaration, and implored Council to conduct public consultation to determine whether to proceed with the proposal.
47. On account of the public comments received in the lead up to the meeting on April 6, 2022, the CAO advised Council that staff requested that Council defer any decision to declare the property surplus so that the Municipality could conduct further consultation with the public as to whether it was in the best interests of the Municipality to move ahead with the proposal. On considering this item, Council voted to defer consideration of the surplus declaration to a future meeting of Council.
48. On April 27, 2022, the Municipality held a Special Meeting of Council to solicit public input on the proposed surplus declaration and partnership with the Proponent. Council received 18 delegations, and received 152 items of correspondence.
49. In advance of the meeting on April 27, 2022, staff also created a dedicated webpage containing a comprehensive summary of the proposal.
50. The Municipality held a further Special Meeting of Council on May 4, 2022 to consider the recommendation to declare the Komoka Community Centre surplus and proceed with the proposal.
51. After considerable discussion, Council voted against the staff recommendation to declare the property surplus. Council instead gave direction to staff to continue working with the Proponent to explore other potential viable locations for the Facility to be established in the Municipality.
52. Following this meeting, the Proponent and the Municipality decided to discontinue discussions.

## VI. ANALYSIS

53. The Request raises two issues:

- (a) Was Council entitled under the *Municipal Act, 2001* to hold a closed session meeting to consider the proposal?
- (b) Was Council's resolution to proceed into closed session sufficient?

### A. Consideration of the Proposal in Closed Session

54. In our review of the Meeting, in light of the statutory framework and applicable case law, Council was entitled to hold a portion of the Meeting in closed session in order to consider the proposal to sell the Komoka Community Centre.

#### (1) Statutory Framework

55. Ontario's "open meeting" rule is enshrined in section 239 of the *Municipal Act, 2001*, which requires that all meetings of a municipal council be open to the public, unless otherwise excepted. Unless they deal with a subject matter falling within a specific enumerated exception in subsection 239(2), all meetings are required to be held in an open forum where the public is entitled to attend and observe local government in process.

56. The purpose of the "open meeting" rule is to foster democratic values, increase transparency, and enhance public confidence in local government.<sup>5</sup> However, it has been long recognized that there are certain situations where open meetings, or full transparency in the immediate term, would not serve the public interest or the interests of the municipal corporation.<sup>6</sup> In providing for certain limited exceptions to the general rule, section 239 seeks to balance the need for confidentiality in certain matters with the public's right to information about the decision-making process of local government.<sup>7</sup>

57. To that end, subsection 239(2) sets out eleven subject matter exceptions that entitle Council to hold a meeting that is closed to the public, including the following:

#### Exceptions

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

...

- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;

<sup>5</sup> See e.g. *R.S.J. Holdings Inc. v. London (City)* (2007), 36 M.P.L.R. (4th) 1 (S.C.C.).

<sup>6</sup> See Ontario, *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information* (Toronto: The Committee, July 1984), at p. 7.

<sup>7</sup> 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.

## (2) Exception for Proposed or Pending Disposition of Land

58. The closed meeting exception in clause 239(2)(c) allows a council to close a meeting to the public where it will discuss a proposed disposition of land. The clear purpose of this closed meeting exception is to protect a municipality's interests and bargaining position in a land transaction.<sup>8</sup> If a municipality were prohibited from considering the proposed terms, conditions or structure of a potential land transaction in a private context, its overall bargaining position could be severely prejudiced. This would be not only to the detriment of the municipal corporation, in the immediate sense, but also the overall public interest that the transaction seeks to further.

59. For example, if a municipality disclosed information about how much money the municipality is willing to pay to purchase a property, or which terms were more agreeable than others, the vendor could use this information to its advantage, preventing the municipality from achieving the most optimal outcome in the transaction. In addition, where a municipality is in competition with other purchasers (or sellers), those competing parties may be able to utilize knowledge or information to undercut the municipality's position. These principles are equally relevant where a municipality is the vendor of lands, and a prospective purchaser is entertaining the purchase of other land, thereby placing the municipality in a competitive position vis-à-vis other sellers.

60. That being said, there are limits to clause 239(2)(c). This exception only applies to transactions which are "proposed" or "pending"; transactions which are speculative, or which may or may not happen in the future, would not be sufficient to permit a closed session.<sup>9</sup>

61. In order for this closed meeting exception to apply, there must be some evidence to demonstrate an actual land transaction is being negotiated or is being carried out at the time of the meeting, or that there is some real and discernible proposed or potential transaction to be negotiated.<sup>10</sup>

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<sup>8</sup> See *Final Order MO-2468-F, Toronto (City)(Re)*, 2009 CanLII 60399 (Ont. I.P.C.); cited in Ombudsman of Ontario, *Investigation into whether Council for City of Port Colborne held illegal closed meetings on March 8, 2010, January 27, 2014, and December 8, 2014* (November 2015), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/city-of-port-colborne>.

See also, Makuch, Stanley M. and John Jackson, *Freedom of information in local government in Ontario*, (Toronto: Commission on Freedom of Information and Individual Privacy, 1979) at p. 12:

Another area where a strong argument can be made for closed meetings or restrictions on information is one where premature publicity would be detrimental to the interests of the community. The most common example of this occurs where a body is contemplating a land acquisition and does not wish disclosure to affect the price of the property. Another example is the negotiating of a collective agreement with employees where undue public pressure affects the local decision makers; public discussion also allows the employees to discover the negotiating strategy of the authority.

<sup>9</sup> Ombudsman of Ontario, *Investigation into whether Council for the Town of Fort Erie held an illegal closed meeting on December 10, 2014* (April 2015), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/town-of-fort-erie>.

<sup>10</sup> *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee, July 1984; cited with approval in *R.S.J. Holdings Inc. v. London (City)*, 2007 SCC 29 at para. 18.

### **(3) “Parsing” Discussion**

62. It is an understatement that matters that come before a municipal council can be complex and multi-faceted. Often, it would be difficult for members of council to fully consider and discuss a matter that qualifies for closed session discussion without necessarily considering other items of information that may not, in and of themselves, fit within a closed session exception.

63. The courts and other closed meeting investigators have recognized the practical difficulties and unintended consequences that may result in the strict application of the open meeting rule: a council may validly begin discussion in closed session, but every time a member wishes to mention some ancillary detail that does not qualify for the exception relied upon, council must move back into open session to discuss the comment, and subsequently reconvene in closed session to continue. This would have the unintended consequence of inhibiting free and efficient discourse by interrupting council deliberations.

64. Municipalities therefore have some limited authority to discuss matters that are incidental to the core matter which the closed meeting exception applies.<sup>11</sup> As such, Council has some latitude to consider and discuss facts or topics incidental to the main closed meeting topic.

### **(4) Council was Permitted to Discuss the Report in Closed Session**

65. In our opinion, Council was entitled to hold a portion of the Meeting in closed session in reliance on clause 239(2)(c).

66. During the Meeting, Council considered a potential land transaction involving a specific property and a specific purchaser. Council was provided an update on ongoing discussions between the Municipality’s staff and the Proponent and the steps that lied ahead.

67. At the time of the Meeting, no formal agreement of purchase and sale had been entered into, nor had any formal offer to purchase been made to the Municipality. In our view, this fact strengthens rather than negates the application of the closed meeting exception in clause 239(2)(c), and the need to protect the Municipality’s bargaining position.

68. During the Meeting, the CAO summarized for Council the proposed structure of the transaction which had been discussed between staff and the Proponent. He also advised Council of the immediate next step the Municipality would be required to take in the transaction process. If Council was not entitled to some sphere of privacy to consider the details of the proposed transaction, or raise and discuss any questions or concerns, it would necessarily reveal its position to the Proponent, and perhaps to others who may have been in competition with the Municipality to secure the Facility.

69. To be clear, at the Meeting, Council did not decide to declare the Komoka Community Centre surplus. That assertion is simply not borne out on the evidence, nor in light of the circumstances that followed the Meeting, namely, the meeting of Council on April 6, 2022 at which the members considered the surplus declaration.

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<sup>11</sup> *St. Catharines (City) v. Ontario (Information & Privacy Commissioner)* (2011), 81 M.P.L.R. (4th) 243, at para. 42 (Ont. Div. Ct.).

70. In our review of the applicable case law and secondary sources, there is no basis to suggest that the application of clause 239(2)(c) is limited to circumstances where a municipality is acquiring lands, as opposed to disposing lands; the plain language of the exception applies to “proposed or pending...dispositions.” Nor is it of any immediate relevance whether the lands were proposed to be purchased for the eventual benefit of a private entity, as asserted by the Requestor.

71. Moreover, the fact that there was only one proposed purchaser of the lands, or whether or not the lands were offered for sale on an “open market” – as asserted by the Requestor – does not negate the application of the closed meeting exception in clause 239(2)(c). It is not correct to say that the Municipality would not be entitled to rely on clause 239(2)(c) solely because there was only one potential purchaser (i.e., the Proponent). Even in a closed or private transaction, of if the result of the transaction is purported to be a “partnership,” the parties will still have a negotiating position adverse one another. Both parties will seek to optimize the deal with regard to their own needs and interests. The existence of competing purchasers is not a precondition to the need to maintain one’s bargaining position.

72. In any event, while there may have only been one potential purchaser (i.e., the Proponent), that potential purchaser could have, at any time, opted to pursue another opportunity. In addition, the evidence in our investigation demonstrates that at the time when the Proponent and the Municipality were in discussions, the Proponent had also engaged with other municipalities about the possibility of establishing the Facility on suitable municipal lands.

73. To the extent that Council considered the topic of declaring the Komoka Community Centre surplus in accordance with the Sale and Disposition of Land By-law, that topic was incidental to the primary reason Council had convened in closed session, being a proposed land transaction. As mentioned above, Council did not make any decision to declare the property surplus at the Meeting. The record demonstrates Council only considered that action after the Meeting, at its April 6, 2022 meeting. However, at the time of the Meeting, the eventual surplus declaration was an essential condition in order for the overall transaction to proceed, and was therefore incidental to Council main topic of consideration.

74. The Ontario Ombudsman considered a similar situation in a closed meeting investigation report regarding the Town of Carleton Place.<sup>12</sup> As detailed in that report, a committee of the Town’s council held a closed meeting to consider a staff report on the proposed sale of unserviced lots in an industrial park owned by the Town. The committee’s discussions focused on the sale of the properties, but also considered how the sale process would be initiated. This included discussion of the need to declare the lands surplus in accordance with the Town’s policies. Immediately following the closed session, the committee passed a resolution to, among other things, declare the lots surplus so that their sale could proceed.

75. The Ombudsman found that the committee was entitled to consider the matter in reliance on clause 239(2)(c). While the properties had not yet been listed for sale, the committee’s discussion focused on their impending sale and ancillary steps to do so, including setting a purchase price and declaring the properties surplus.

<sup>12</sup> Ontario Ombudsman, *Investigation into a complaint about a closed meeting held by the Town of Carleton Place on June 12, 2018* (November 22, 2018); online: <https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Municipal-Meetings/Carleton-Place-Ombudsman-Final-Report-November-2018-accessible.pdf>

76. In summary, the subject matter of the proposed disposition of the Komoka Community Centre fell within the ambit of the closed meeting exception in clause 239(2)(c). As such, Council was entitled to consider the matter in a closed session.

## **B. “Report Out” Resolution**

77. The Request also alleges that Council’s resolution to convened in closed session failed to state the “general nature” of the matter to be discussed in the Meeting in contravention of subsection 239(4) of the *Municipal Act, 2001*. For the reasons detailed below, Council’s resolution to proceed in closed session was technically inconsistent with the requirements of the *Municipal Act, 2001*.

### **(1) Statutory Requirement for Resolution to go into Closed Session**

78. Subsection 239(4) of the *Municipal Act, 2001* requires that before holding a closed session, Council must pass a resolution stating both the fact that it will hold a closed meeting and the “general nature” of the matter that will be discussed in closed session. This requirement is also mirrored in Section 5.3 of the Procedure By-law.

79. The precise requirements of this obligation were well articulated by the Ontario Court of Appeal in *Farber v. Kingston (City)*.<sup>13</sup> In that case, the Court of Appeal held that a municipality’s obligation to state the “general nature” of the matter to be consider in closed session is not discharged by merely reciting the applicable closed meeting exception. The Court of Appeal also commented that resolutions to convene in closed session should strive to balance the public interest in maximizing the information available to the public, while at the same time not undermining the very reason for excluding the public in the first place.

80. Relying on the Court of Appeal’s decision in *Farber v. Kingston (City)*, the Ontario Ombudsman has commented that a municipality must provide at least a brief description of the issue or topic to be discussed, and that simply reciting the language of the closed meeting exception does not generally satisfy this requirement.<sup>14</sup>

81. We make two observations about this requirement. First, in light of the interpretations of subsection 239(4), there is an important distinction to be made between the “general nature of the matter” and the language of the pertinent closed meeting exception in subsection 239(2). This means a such a resolution must describe *what* is being discussed in closed session, not simply *why*, or the justification for holding a closed meeting.

82. Second, there is no singular, universally correct answer for what such a resolution must look like. Drafting a resolution to proceed in closed session requires a careful balancing of protection for municipal interests, while also being as transparent as the circumstances allow.

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<sup>13</sup> *Farber v. Kingston (City)* (2007), 32 M.P.L.R. (4th) 31 (Ont. C.A.).

<sup>14</sup> Ombudsman of Ontario, *Investigation into whether the Town of Mattawa Council and its Ad Hoc Heritage Committee held improperly closed meetings* (December 2010) at para. 51, online: <https://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/mattawafinal.pdf>

**(2) Council’s Resolution to Proceed in Closed Session**

83. During our investigation, we uncovered some discrepancies as to what information was included in the specific “resolution” to proceed in closed session, and what information was publicly available.

84. In a technical sense, a “resolution” is a formal declaration of a council’s intention with respect to a particular matter, which are typically temporary in nature and not meant to establish a permanent rule.

85. Resolutions can also have procedural functions in the parliamentary process, such as a resolution to move into closed session.

86. As resolutions are essentially actions of the council as a deliberative-body, they require a majority vote to carry. However, resolutions are distinct from items of business that may be listed on a deliberative body’s order papers or agenda.

87. The publicly-available Council documents related to the Meeting indicate that the resolution passed by Council to convene in closed session was as follows:

**Resolution # 2022-062**

**Moved by:** Councillor Scott  
**Seconded by:** Councillor Heffernan

THAT the Council for the Municipality of Middlesex Centre adjourn to closed session at 11:03 a.m. pursuant to Section 239(2) of the Municipal Act, 2001, as amended to discuss the following matters:

Section 239(2)(c) a proposed or pending acquisition or disposition of land by the municipality or local board;

Section 239(2)(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board

**CARRIED**

88. In addition, our review of the video recording of the Meeting indicates the Mayor verbally read the above verbiage before Council proceeded into closed session.<sup>15</sup>

89. However, we also observe that elsewhere in the Council’s agenda, the Municipality did disclose the general nature of what would be discussed in closed session. We observe that the publicly-available Council agenda for the Meeting, published several days in advance of the Meeting, lists the items to be considered during closed session:

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<sup>15</sup> Video Recording, Municipality of Middlesex Centre “March 2, 2022 - Middlesex Centre Council Meeting - Part A” at timestamp 1:33:12; online: <https://youtube.com/live/FGA4wgAJxI0?si=EnSikaIECMiOmarE&t=5592>

## 12. CLOSED SESSION

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### 12.1 CALL TO ORDER

### 12.2 DISCLOSURE OF PECUNIARY INTERESTS

### 12.3 ADOPTION OF MINUTES

12.3.1 Minutes of the January 12, 2022 Closed Session

### 12.4 CLOSED SESSION ITEMS

12.4.1 OLT Appeal Update

12.4.2 Potential Property Disposition (Ward 4)

### 12.5 ADJOURNMENT

90. Our investigation confirmed that the above is a skeletal version of the confidential closed session agenda for the Meeting.

91. It is clear from the above that the Municipality did in fact disclose to the public the matters Council would be considering in the closed session. However, this information was not contained in the “resolution” (i.e., Council’s declaration of a procedural action) to proceed into closed session which was voted on by Council.

92. In our opinion, this practice does not properly observe Council’s obligation in subsection 239(4) of the *Municipal Act, 2001*. That provision requires that the “resolution” – not some other component of the agenda – state the “general nature of the matter” that will be discussed in closed session. Functionally, the Municipality did take steps to disclose to the public what items of business would be dealt with in closed session. Technically however, this is not consistent with the requirements of subsection 239(4) of the *Municipal Act, 2001*.

93. We urge the Municipality to take steps to improve its procedures for convening a meeting in closed session, namely, that the resolution to proceed in closed session be combined with the skeletal closed meeting agenda, and that such resolution be read aloud to ensure that members of the public viewing the meeting have full knowledge of the general matters Council will consider in closed session. We would suggest the following format or such a resolution:

THAT the Council for the Municipality of Middlesex Centre adjourn to closed session at *(time)* pursuant to Section 239(2) of the *Municipal Act, 2001*, as amended to discuss the following matters:

Item 12.4.1 – Potential Property Disposition (Ward 4) – clause 239(2)(c) a proposed or pending acquisition or disposition of land by the municipality or local board.

94. In summary, we are of the opinion that while the Municipality did publicly disclose the matters Council considered in closed session, technically, the “resolution” to proceed in closed session did not comply with the precise requirements of the *Municipal Act, 2001*. Our finding should not be taken as suggesting that the Municipality has not acted as openly as it could have in the circumstances. However, there are certainly opportunities for improvement to enhance the transparency of Council’s proceedings.



## VII. CONCLUSION

95. Based on the foregoing, we find that Council did not contravene the *Municipal Act, 2001* at the Meeting by considering an update on the potential sale of the Komoka Community Centre. Council was entitled to consider that item in closed session pursuant to the closed meeting exception in clause 239(2)(c). Any consideration of a proposed surplus declaration was necessarily incidental to the main topic, being a potential sale of land.

96. However, Council's resolution to proceed in closed session technically did not comply with the requirements of subsection 239(4) of the *Municipal Act, 2001*. The "resolution" to proceed in closed session must itself state the "general nature" of the matter Council will consider in closed session. This requirement cannot be satisfied by including this information elsewhere on the agenda. While the Municipality did in fact disclose the general nature as part of the agenda published in advance of the Meeting, we suggest that the Municipality can improve its practices.

## VIII. RECOMMENDATIONS

97. Through our investigation, we have uncovered opportunities to enhance the openness and transparency of the Municipality's decision-making process and record creation practices. As such, we make the following recommendations to staff and Council.

98. During the course of our investigation, we were advised that in selecting the applicable closed meeting exception, staff regularly consult secondary source materials explaining what topics may or may not fall under a particular closed meeting exception. We commend the Municipality's staff on this practice as it demonstrates due diligence and a commitment to observing the open meeting rule. In addition, we suggest that there would be benefit to staff and members of Council in receiving further education and training on the closed meeting exceptions and types of situations in which the exceptions would apply.

99. We understand that apart from the Procedure By-law, the Municipality does not have any formal policies or procedures dealing with closed sessions, including how items of business are brought forward to a closed session, who makes this determination, and standardized (and improved) resolutions. We recognize that such a policy is not a requirement of the *Municipal Act, 2001*.<sup>16</sup> In our experience, a closed meeting protocol is a helpful tool for ensuring compliance with the procedural and substantive requirements of the open meeting rule, but also for optimizing the transparency of municipal governance. As such, we recommend that Council and staff give consideration to developing a closed meeting protocol which sets out the roles and responsibilities of staff and members of Council in respect of the holding of a closed meeting.

100. Lastly, as noted above, we have found that Council's resolutions to proceed in closed session are technically inconsistent with the requirements of subsection 239(4). The resolution itself, not some other public document, must state the general nature of what Council will consider in closed session. As part of the consideration of a closed meeting protocol referred to in paragraph 99 above, the Municipality should modify its resolutions to proceed into closed session to specifically list the items of business that will be considered in closed session. This resolution should be read out in full during the appropriate time in Council's meetings.

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<sup>16</sup> See *Municipal Act, 2001*, s. 270(1), which sets out the mandatory policies a municipality is required to adopt.

101. This Report has been prepared for and is forwarded to Council for its consideration pursuant to subsection 293.2(10) of the *Municipal Act, 2001*.

102. We note that subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public.

103. Given that we have found a contravention of subsection 239(4) of the *Municipal Act, 2001*, albeit technical, subsection 239.2(12) requires that Council pass a resolution stating how it intends to address this Report

Respectfully submitted,

Aird & Berlis LLP

A handwritten signature in black ink, appearing to read 'J. Pappas', with a long horizontal flourish extending to the right.

John George Pappas

Closed Meeting Investigator for The Corporation of the Municipality of Middlesex Centre

Dated this 31<sup>st</sup> day of May, 2023