

CITY OF VAUGHAN

EXTRACT FROM COUNCIL MEETING MINUTES OF NOVEMBER 26, 2014

Item 2, Report No. 40, of the Special Committee of the Whole, which was adopted without amendment by the Council of the City of Vaughan on November 26, 2014.

2 **CLOSED MEETING INVESTIGATION REPORT**
JANUARY 30, 2014 MEETING OF SPECIAL COMMITTEE OF THE WHOLE (CLOSED SESSION)
RESPECTING LONG TERM GROUND LEASE WITH MACKENZIE HEALTH

The Special Committee of the Whole recommends:

- 1) That the recommendation contained in the following report of the Commissioner of Legal & Administrative Services/City Solicitor and the City Clerk, dated November 26, 2014, be approved; and
- 2) That Communication C4, from Ms. Carrie Liddy, Humberview Drive, Woodbridge, dated November 26, 2014, be received.

Recommendation

The Commissioner of Legal & Administrative Services/City Solicitor and the City Clerk recommend:

1. That the closed meeting investigation report of Amberley Gavel Ltd. dated October 29 and set out at Attachment 3 to this report, be received.

Contribution to Sustainability

The considerations addressed in this report assist in the development of practices and procedures that support an accountable, transparent and pragmatic approach to deliberations undertaken in Council and at its various committees.

Economic Impact

The cost of the investigation has not yet been invoiced by Amberley Gavel Ltd. Under the City's contractual arrangements with the Local Authority Services arm of AMO, a \$330 per year retainer is paid to Amberley Gavel Ltd. to serve as the City's closed meeting investigator. A further fee paid at the rate of \$225 per hour, 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 being made public through publication of this report. A copy has been made available to the complainant.

Purpose

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

Background - Analysis and Options

By letter dated May 23, 2014, the City Clerk received a closed meeting complaint respecting the Special Committee of the Whole (Closed Session) meeting held on January 30, 2014, the sole subject of which was the long term Ground Lease between the City of Vaughan and Mackenzie

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EXTRACT FROM COUNCIL MEETING MINUTES OF NOVEMBER 26, 2014

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Health. The public agenda for the meeting is set out at Attachment 1 to this report, and the closed resolution appears at Attachment 2.

The meeting was conducted under the *Municipal Act* provision enabling Council to meet in the absence of the public to discuss matters pertaining to the acquisition or disposition of land.

The complainant acknowledged that the subject matter of the meeting was properly one that could be conducted in closed session. The essence of the complaint was that by allowing the third party negotiating the Ground Lease into the meeting, the protection of the provision was lost.

The matter was referred to Amberley Gavel Ltd. pursuant to the City's contract with AMO's Local Authority Services Ltd. (LAS). A record consisting of all related documentation, including applicable by-laws, meeting agendas, presentation materials and meeting minutes, was forwarded to Amberley Gavel Ltd. (the "Investigator") as part of the investigation. As is indicated in the report, the City Clerk and the Commissioner of Legal & Administrative Services/City Solicitor were interviewed in the course of the investigation.

The Investigator concluded that the portion of the special meeting of January 30 was not properly in closed session "*when it engaged with the deputation of representatives of Mackenzie Health respecting the Long Term Ground Lease between the City of Vaughan and Mackenzie Health.*"

In doing so the Investigator concluded that the presentation made by Mackenzie Health was a negotiation, notwithstanding the Investigator's acceptance that "*the members of Committee of the Whole truly thought that they were not engaging in negotiations with Mackenzie Health during that meeting.*"

The Investigator went on to conclude:

"that the fact that representatives of Mackenzie Health were permitted to make a presentation, and to answer questions about its negotiating demands, in closed session, is not in accordance with the open meetings provisions of the Act. We have concluded, however, that Committee of the Whole did this inadvertently and while under the mistaken but bona fide belief that the presentation session was not part of the overall negotiations respecting the Long Term Ground Lease.

It would have been more prudent, in our opinion, to conform to its normal practice to:

- 1) not allow members of the "public" (in this case representatives of Mackenzie Health) into a closed session; and
- (2) conduct the ongoing discussions with representatives of Mackenzie Health on the terms and conditions of the Long Term Ground Lease through the staff negotiating team, as Council's agents."

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

Relationship to Vaughan Vision 2020/Strategic Plan

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

Regional Implications

N/A

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Conclusion

The circumstances giving rise to the closed meeting and to the complaint arising from same are not typical of the City's closed session practices and so there is no need to modify existing practices. The advice set out in the Investigator's report will be kept in mind in the unlikely event that a similar situation arises.

Attachments

Attachment 1: Public Agenda, Special Meeting of Committee of the Whole (Closed Session), January 30, 2014

Attachment 2: Closed Meeting Resolution, Special Meeting of Committee of the Whole (Closed Session), January 30, 2014

Attachment 3: Report, October 29, 2014, Re: Complaint re Alleged Improperly Closed Meeting of Committee of the Whole of Vaughan City Council

Report prepared by:

Jeffrey A. Abrams, City Clerk

(A copy of the attachments referred to in the foregoing have been forwarded to each Member of Council and a copy thereof is also on file in the office of the City Clerk.)

SPECIAL COMMITTEE OF THE WHOLE – NOVEMBER 26, 2014

CLOSED MEETING INVESTIGATION REPORT JANUARY 30, 2014 MEETING OF SPECIAL COMMITTEE OF THE WHOLE (CLOSED SESSION) RESPECTING LONG TERM GROUND LEASE WITH MACKENZIE HEALTH

Recommendation

The Commissioner of Legal & Administrative Services/City Solicitor and the City Clerk recommend:

1. That the closed meeting investigation report of Amberley Gavel Ltd. dated October 29 and set out at Attachment 3 to this report, be received.

Contribution to Sustainability

The considerations addressed in this report assist in the development of practices and procedures that support an accountable, transparent and pragmatic approach to deliberations undertaken in Council and at its various committees.

Economic Impact

The cost of the investigation has not yet been invoiced by Amberley Gavel Ltd. Under the City's contractual arrangements with the Local Authority Services arm of AMO, a \$330 per year retainer is paid to Amberley Gavel Ltd. to serve as the City's closed meeting investigator. A further fee paid at the rate of \$225 per hour, 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.

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Purpose

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

Background - Analysis and Options

By letter dated May 23, 2014, the City Clerk received a closed meeting complaint respecting the Special Committee of the Whole (Closed Session) meeting held on January 30, 2014, the sole subject of which was the long term Ground Lease between the City of Vaughan and Mackenzie Health. The public agenda for the meeting is set out at Attachment 1 to this report, and the closed resolution appears at Attachment 2.

The meeting was conducted under the *Municipal Act* provision enabling Council to meet in the absence of the public to discuss matters pertaining to the acquisition or disposition of land.

The complainant acknowledged that the subject matter of the meeting was properly one that could be conducted in closed session. The essence of the complaint was that by allowing the third party negotiating the Ground Lease into the meeting, the protection of the provision was lost.

The matter was referred to Amberley Gavel Ltd. pursuant to the City's contract with AMO's Local Authority Services Ltd. (LAS). A record consisting of all related documentation, including

applicable by-laws, meeting agendas, presentation materials and meeting minutes, was forwarded to Amberley Gavel Ltd. (the "Investigator") as part of the investigation. As is indicated in the report, the City Clerk and the Commissioner of Legal & Administrative Services/City Solicitor were interviewed in the course of the investigation.

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It would have been more prudent, in our opinion, to conform to its normal practice to:

- 1) not allow members of the "public" (in this case representatives of Mackenzie Health) into a closed session; and
- (2) conduct the ongoing discussions with representatives of Mackenzie Health on the terms and conditions of the Long Term Ground Lease through the staff negotiating team, as Council's agents."

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

Relationship to Vaughan Vision 2020/Strategic Plan

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

Regional Implications

N/A

Conclusion

The circumstances giving rise to the closed meeting and to the complaint arising from same are not typical of the City's closed session practices and so there is no need to modify existing practices. The advice set out in the Investigator's report will be kept in mind in the unlikely event that a similar situation arises.

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Attachment 3: Report, October 29, 2014, Re: Complaint re Alleged Improperly Closed Meeting of Committee of the Whole of Vaughan City Council

Report prepared by:

Jeffrey A. Abrams, City Clerk

Respectfully submitted,

Jeffrey A. Abrams
City Clerk

MaryLee Farrugia
Commissioner of Legal & Administrative Services, City Solicitor



CITY OF VAUGHAN
SPECIAL COMMITTEE OF THE WHOLE
(CLOSED SESSION)

AGENDA

Committee Room 242
Vaughan City Hall
2141 Major Mackenzie Drive
Vaughan, Ontario
p.m.

Thursday, January 30, 2014

6:00

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-
1. CONFIRMATION OF AGENDA
 2. DISCLOSURE OF INTEREST
 3. COMMUNICATIONS
 4. CONSIDERATION OF CLOSED SESSION ITEM
 1. LONG TERM GROUND LEASE BETWEEN CITY OF VAUGHAN AND MACKENZIE HEALTH
(acquisition or disposition of land)
 5. ADJOURNMENT

Attachment 2
Closed Meeting Resolution

CITY OF VAUGHAN

EXTRACT FROM COUNCIL MEETING MINUTES OF JANUARY 28, 2014

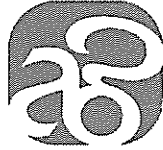
Item 26, Report No. 1, of the Committee of the Whole, which was adopted without amendment by the Council of the City of Vaughan on January 28, 2014.

26 SPECIAL COMMITTEE OF THE WHOLE (CLOSED SESSION) RESOLUTION
JANUARY 30, 2014

The Committee of the Whole passed the following resolution to resolve into closed session for the purpose of discussing the following:

1. LONG TERM GROUND LEASE BETWEEN CITY OF VAUGHAN AND MACKENZIE
 HEALTH

(acquisition or disposition of land)



Amberley Gavel Ltd.

October 29, 2014

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

Re: Complaint re Alleged Improperly Closed Meeting
of
Committee of the Whole of Vaughan City Council

Dear Mr. Abrams:

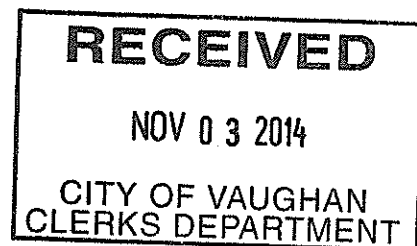
Attached is our report into an allegation of an improperly closed meeting of Committee of the Whole January 30, 2014.

This report is to be made public by Council, and in order to do so we suggest that it be placed on the agenda of the next meeting of City Council.

We thank you for your co-operation and that of your staff in providing us with the minutes of the Committee meeting and other information relevant to this report.

Sincerely yours,

Amberley Gavel Ltd.



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**REPORT TO
THE CORPORATION OF THE CITY OF VAUGHAN REGARDING THE
INVESTIGATION OF A COMPLAINT REGARDING THE SPECIAL MEETING
OF COMMITTEE OF THE WHOLE FOR THE CITY OF VAUGHAN IN
CLOSED SESSION
ON JANUARY 30, 2014**

I. COMPLAINT

The Corporation of the City of Vaughan ("City") received a complaint about a Special Meeting of the Committee of the Whole for City Council ("Committee of the Whole" or "Committee") in closed session held on January 30, 2014. The essence of the complaint is that the holding of a closed meeting was in contravention of the open meetings provision of the *Municipal Act, 2001*¹, as amended by Bill 130² ("*Municipal Act*" or "*Act*").

This request was sent to the offices of Amberley Gavel Ltd. ("Amberley Gavel") for investigation.

II. JURISDICTION

The City appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act*.

LAS has delegated its powers and duties to Amberley Gavel to undertake the investigation and report to City Council.

III. BACKGROUND

Section 239 of the *Municipal Act* provides that all meetings of a municipal council, local board or a committee of either of them shall be open to the public. This requirement is one of the elements of transparent local government.

The section sets forth exceptions to this open meetings rule. It lists the reasons for which

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").

a meeting, or a portion of a meeting, may be closed to the public. The section confers discretion on a council or local board to decide whether or not a closed meeting is required for a particular matter. That is, it is not required to move into closed session if it does not feel the matter warrants a closed session discussion.

Section 239 reads in part as follows:

Meetings open to public

239. (1) Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

Exceptions

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

- (a) the security of the property of the municipality or local board;
- (b) personal matters about an identifiable individual, including municipal or local board employees;
- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
- (d) labour relations or employee negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. 2001, c. 25, s. 239 (2).

IV. INVESTIGATION

Documents provided by the City and reviewed during the course of the investigation included the Agenda and Minutes of the Special Committee of the Whole (Closed Session) on January 30, 2014, documents received by the Committee of the Whole during the Closed Session, and other relevant documentation. The Commissioner of Legal & Administrative Services/City Solicitor ("City Solicitor") and the City Clerk were consulted during the course of the investigation.

BACKGROUND

(a) The Complaint

The complainant asserts the following in its complaint:

"The closed meeting agenda reflects that Council discussed a long term ground lease between the City of Vaughan and MacKenzie Health. The subject matter justifying the closed meeting was described in the meeting notice as "a proposed or pending acquisition

or disposition of land by the municipality or local board" exception of subsection 239(1)(c) of the Municipal Act, 2001. However, it is my understanding that representatives of MacKenzie Health attended the meeting.

Of course meetings held by a municipal council for the purposes of discussing a proposed disposition of land is properly the subject matter of a closed meeting. The rationale for allowing such a meeting to be held in camera is obvious; if the meeting was allowed to be open, then the municipality would be at a disadvantage in the negotiations with the other party. In this case however, the party with whom they are negotiating the ground lease (MacKenzie Health) was allowed into the meeting. On this basis alone, the exemption that was cited by the City Clerk cannot be relied upon to keep the meeting closed. By inviting their negotiating adversaries into the meeting, the City waived any right they had to have a closed meeting under Section 239(1)(c) of the Municipal Act. As a result, the City violated the Act by having a closed meeting."

(b) Agenda for the Closed Session of Special Committee of the Whole

The Agenda for the Closed Session of the Special Committee of the Whole contained an item listed as:

"4. CONSIDERATION OF CLOSED SESSION ITEM

**1. LONG TERM GROUND LEASE BETWEEN CITY OF VAUGHAN
AND MACKENZIE HEALTH**

(acquisition or disposition of land)

The agenda further notes that Special Committee of the Whole (Closed Session) would be receiving a verbal report from the Commissioner of Legal & Administrative Services/City Solicitor ("City Solicitor") with respect to the item under consideration.

(c) Minutes of the Special Committee of the Whole (Closed Session)

The Minutes for the Special Committee of the Whole (Closed Session) of January 30, 2014 indicate that it went into closed session at 6:10 p.m. and adjourned at 7:43 p.m. During the meeting, Special Committee of the Whole adopted a procedural motion which provided direction to staff.

(d) Interview and Notes of the City Clerk

The City Clerk advised that representatives of MacKenzie Health made a presentation to Committee of the Whole in closed session with respect to the terms of a Long Term Ground Lease between the City and MacKenzie Health. Members of Committee of the Whole asked the MacKenzie Health representatives questions of clarification about their presentation. The MacKenzie Health representatives left the closed session at 7:10 p.m. Committee of the Whole then received a verbal report in closed session from the City Solicitor.

Committee of the Whole received the presentation and directed staff to “review the materials submitted by MacKenzie Health and prepare a response for presentation to Council” at a subsequent meeting.

(e) Interview of the City Solicitor

The City Solicitor confirmed the City Clerk’s notes about the proceedings of the meeting.

The City Solicitor advised us that the negotiations about the Long Term Ground Lease were being conducted by a team of City staff, led the City Solicitor, on behalf of and under the instructions of Council. The staff negotiating team was assisted by outside legal counsel as necessary. During the negotiation process, MacKenzie Health sought to have a private meeting with Committee of the Whole to explain its position and needs on various terms and conditions that were being negotiated into the Long Term Ground Lease.

Although it was not the City’s normal practice to allow members of the public into a closed session of Committee, MacKenzie Health’s request to make a deputation was allowed under certain conditions. These conditions were conveyed to MacKenzie Health by letter from the Interim City Manager. Members of the Committee of the Whole were also advised about the conditions by City staff:

1. The meeting would be confined to issues dealing only with the Long Term Ground Lease.
2. Only designated representatives of the Board of Directors of MacKenzie Health would be permitted into the meeting as spokesperson;
3. Those representatives could be accompanied by advisers such as MacKenzie Health staff.
4. No other observers would be permitted to attend.
5. The format of the meeting would be that members of the Committee would listen to the deputation and be permitted to ask questions of the deputants. The Committee would then deliberate without further commentary from the deputants.
6. Although questions from Committee members would be permitted, the forum would not permit a negotiation.
7. No decisions would be taken at the Committee meeting.
8. Confidential recommendations, if any, would be submitted to a future meeting of City Council.

It was clear to the Members of Committee of the Whole (and to MacKenzie Health) that City staff were charged with the responsibility to conduct the negotiations about the terms of the Long Term Ground Lease with MacKenzie Health, on Council’s instructions, and to make recommendations to City Council flowing from those ongoing negotiations.³

³ We were advised that this is in fact what occurred later in the Special Meeting of January 30, 2014, once the MacKenzie Health representatives had left the meeting, and in subsequent meetings of Committee of the Whole and Council.

ANALYSIS AND FINDINGS

(a) Section 239(2)(c) of the *Municipal Act*

The Special Committee of the Whole met in closed session under section 239(2)(c) of the *Municipal Act* because it was dealing with a potential long-term lease of municipal property. Amberley Gavel accepts that consideration of the terms and conditions of long-term leases of municipal property falls within the exemption of the *Municipal Act* respecting “a proposed or pending acquisition or disposition of land” (section 239(2)(c)).

The purpose of section 239(2)(c) is to allow a council or local board to receive information and advice from; and to give instructions to staff, a lawyer, or its agent (collectively, “agent”) in closed session respecting the acquisition or disposal of land within certain parameters, following consideration of the advice and information received. It makes sense that a council or local board would not have open public discussions about its negotiating strategy, most specifically the price it is willing to pay for lands that it wants to acquire title to or receive for lands that it wants to dispose of (including through a long-term leasing arrangement).⁴ Open disclosure of the price that a municipality is willing to pay for acquisition of land, or willing to accept for disposal of land, could detrimentally affect the municipality’s interest. Potential purchasers or sellers of land ought not to know what value a council is willing to accept or pay. The exemption under the *Municipal Act* protects the municipality’s economic interests by not compromising the municipality’s bargaining position. Hence, the discussion may be held in closed session.

However, a council cannot negotiate behind closed doors with the very corporate entities (or their personal representatives) with which it wishes to enter into a long-term lease.

Was this a Negotiation in Closed Session?

The record indicates that MacKenzie Health representatives were in the Closed Session for approximately one hour. A presentation was made and questions were asked by members of Committee of the Whole. According to the City Clerk and City Solicitor the parties were not using a closed session in order to bargain over or agree upon terms of the long-term ground lease. Committee of the Whole was merely, and we have been advised, somewhat passively, receiving information from MacKenzie Health representatives. As a result of the deputation, Committee of the Whole directed staff to bring back a future report to Council.

The question to be answered is whether or not Committee of the Whole was engaged in negotiations behind closed doors with MacKenzie Health, as third parties.

⁴ However, the council or local board can only execute the actual acquisition or disposal of land by a by-law enacted in open session.

Negotiation involves an interaction between two or more parties where each party is trying to meet its own needs, or accomplish its own goals, by reaching an agreement with the other party who is also trying to get its own needs met. The parties communicate directly for the purpose of coming to an agreement on some action that one or more of them will undertake. In the more typical negotiation approach, one party often attempts to exert influence over the other party in order to secure beneficial terms of an agreement or, if necessary, compromises between opposing positions.

It would appear that MacKenzie Health was not in agreement with certain positions advanced by the City staff negotiation team and as directed by Council. Hence, they wanted to meet privately with Committee of the Whole to advance their own positions and to underscore the importance of their positions on various matters dealing with the Long Term Ground Lease.

In that respect, the spokespersons from MacKenzie Health were attempting to influence members of the Committee and persuade them to take a different position on certain matters.

Attempting to persuade the other party to a negotiation to take a different position on key terms and conditions of an agreement, or to compromise on certain established positions, is part of the larger negotiation process. Having reviewed the presentation that was given by MacKenzie Health representatives to the closed session of Committee of the Whole, it is clear that MacKenzie Health was using the private meeting forum to attempt to influence members of City Council to "change their minds" on terms and conditions that had been advanced by the City staff negotiation team as directed by Council.

It could be argued that an outside party could be permitted to make a presentation to a body on a matter that the body was permitted by the Act to consider in a closed session. However, once members begin to pose questions to that party, the process strays from what the Act permits.

Whether or not the members were persuaded to take a different position, either at the meeting or in future discussions on the matter, is immaterial. What matters is that the members became engaged in MacKenzie Health's efforts to persuade or influence them; key components in a negotiation process where one party wants to secure an agreement on its terms.

Every negotiation course includes advice to participants to observe not only the content of what is said, but the tone, facial expression, and body language of adversaries. We cannot reasonably conclude that the representatives of MacKenzie Health did not leave without a better understanding of their potential for success for their position in future negotiations on the matter at hand, with the City.

We accept that the members of the Committee of the Whole truly thought that they were not engaging in negotiations with MacKenzie Health during that meeting. Nothing was deliberated or agreed to at the time and the complete matter was, appropriately, referred

to staff for consideration at a future meeting. We also accept that City staff were attempting to ensure that a closed meeting process was not being used improperly in light of the open meetings rule of the *Act*.

Nevertheless, we have concluded that the fact that representatives of MacKenzie Health were permitted to make a presentation, and to answer questions about its negotiating demands, in closed session, is not in accordance with the open meetings provisions of the *Act*. We have concluded, however, that Committee of the Whole did this inadvertently, and while under the mistaken but bona fide belief that the presentation session was not part of the overall negotiations respecting the Long Term Ground Lease.

It would have been more prudent, in our opinion, to conform to its normal practice to:

- 1) not allow members of the "public" (in this case representatives of MacKenzie Health) into a closed session; and
- (2) conduct the ongoing discussions with representatives of MacKenzie Health on the terms and conditions of the Long Term Ground Lease through the staff negotiating team, as Council's agents.

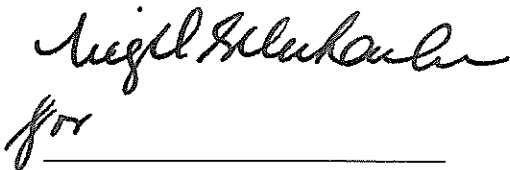
V. CONCLUSION

Amberley Gavel has concluded that the Committee of the Whole for the City of Vaughan Council was not properly in closed session on January 30, 2014 under section 239(1)(c) of the *Municipal Act* when it engaged with the deputation of representatives of MacKenzie Health respecting the Long Term Ground Lease between the City of Vaughan and MacKenzie Health.

VI. PUBLIC REPORT

We received full co-operation from all parties that we contacted and we thank them.

This report is forwarded to the Council of the City of Vaughan. The *Municipal Act* provides that this report be made public. It is suggested that the report be included on the agenda of the next regular meeting of Council or at a special meeting called for the purpose of receiving this report prior to the next regular meeting.



for _____

AMBERLEY GAVEL LTD.

October 2014