TO: Mayor and Council

FROM: Hal Linscott, City Solicitor and Director of Legal Services
      Carolyn Downs, City Clerk

DATE OF MEETING: March 2, 2010

SUBJECT: Report of Investigator
         Complaint Regarding Closed Meetings – Possible Acquisition of
         Barriefield Federal Lands for Affordable Housing

EXECUTIVE SUMMARY:

On October 9, 2009 the City received a complaint pursuant to section 239.1 of the Municipal Act, 2001. The complaint, which related to the closed meetings of Council regarding the possible acquisition of Barriefield federal lands for affordable housing, was forwarded to Local Authority Services (“LAS”), the City’s closed meeting Investigator. LAS has, in turn, delegated its powers and duties to Amberley Gavel Ltd.

Amberley Gavel Ltd has completed its investigation and the Report of the Investigator which was received by the City on February 8, 2010 is attached. The Municipal Act, 2001 provides that reports from the City’s closed meeting investigator be made available to the public.

RECOMMENDATION:

This Report is for information purposes only.
AUTHORIZING SIGNATURES:

<table>
<thead>
<tr>
<th>Name</th>
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<tr>
<td>Carolyn Downs, City Clerk</td>
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<td>Hal Linscott, City Solicitor and Director of Legal Services</td>
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<td>Gerard Hunt, Chief Administrative Officer</td>
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CONSULTATION WITH THE FOLLOWING COMMISSIONERS:

<table>
<thead>
<tr>
<th>Commissioner</th>
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<tr>
<td>Commissioner Beach, Sustainability &amp; Growth</td>
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<td>Acting Commissioner Willing, Community Development Services</td>
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<td>Commissioner Leger, Corporate Services</td>
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<tr>
<td>Jim Keech, President, Utilities Kingston</td>
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(N/R indicates consultation not required)
OPTIONS/DISCUSSION:

The Report of The Investigator makes the following conclusions:

As a result of its investigation of the initial and supplementary complaint filed on October 6th and November 5th, 2009 respectively Amberley Gavel would summarize its findings as follows:

1. Amberley Gavel is satisfied that both Kingston City Council and senior staff sincerely attempt to abide by a culture of open and transparent government as encouraged by the provisions in the Municipal Act. The advice given to Council by senior staff on process issues of this nature would appear to be of a very high standard.

2. The Barriefield lands issue was only discussed in camera on two occasions – on May 5th, 2009 and October 6th, 2009.

3. On May 5th, 2009 Council appropriately exercised its discretion to go into closed session to hear a staff presentation and to give direction regarding the pursuit of the possible acquisition of the Barriefield lands.

4. On October 6th, 2009 the staff presentation on the Barriefield lands issue and the Hughes, Downey Report should have been presented in open session.

5. The in camera session held on October 6th, 2009 did not result in a conclusive determination on the acquisition of the Barriefield lands and a process of extensive public consultation is currently in process. A final decision by City Council on the possible acquisition of the Barriefield lands issues is not anticipated until later this spring.

The conclusions of the Investigator will be taken into account by City staff when making future recommendations on matters that should be considered in closed session.

EXISTING POLICY/BY LAW:

Procedural By-Law No. 1

NOTICE PROVISIONS:

N/A

ACCESSIBILITY CONSIDERATIONS:

N/A

FINANCIAL CONSIDERATIONS:

N/A

CONTACTS:

Hal Linscott, Director of Legal Services and City Solicitor, (613) 546-4291 Ext. 1296
John Bolognone, Deputy City Clerk, (613) 546-4291 Ext. 1262
OTHER CITY OF KINGSTON STAFF CONSULTED:

N/A

EXHIBITS ATTACHED:

Carolyn Downs  
City Clerk  
City of Kingston  
216 Ontario Street  
Kingston, ON  
K7L 2Z3  

January 29, 2010  

Re: Complaint re Closed Meetings May 5 and November 3, 2009  

Dear Ms Downs:  

Enclosed please find the Report of the Investigator into the request for an investigation into the closed meetings of Council held as noted above.  

In accordance with our established procedure, this report was prepared by one of our Review Officers and then peer reviewed, not only for quality assurance and consistency with the meeting investigation process we are following across Ontario, but also with respect to the findings and interpretations arising from this relatively new process.  

For your information, since at the time the investigation Mr. Dean and I were involved with the City on another engagement on behalf of AMO, to avoid any perception of bias we had another of our Review Officers conduct the peer review, rather than one of us which is our usual practice.  

Please ensure that this report is made available to the public in accordance with the Municipal Act, 2001.  

We wish to thank you for the cooperation shown to our Review Officer,  
Mr. Jerry Bellomo.  

Sincerely yours,  

[Signature]  
Amberley Gavel Ltd.
A REPORT TO THE CITY OF KINGSTON
REGARDING THE INVESTIGATION OF CLOSED MEETINGS OF COUNCIL

A. The Complaint

Pursuant to Section 239.1 of the Municipal Act ("the Act"), the City of Kingston received a complaint on October 9th, 2009. This complaint related to the closed meetings of council held on September 15th and October 6th, 2009 in so far as these closed meetings may have considered a proposed acquisition of land for affordable housing (the "Barriefield lands"). Subsequently, on November 5th, 2009 the same complainant filed a second and "supplementary" complaint as a result of information that had come to his attention that "was not publicly available on the date of the original complaint". The complaint was widened to include all in camera Council meetings from May 5th, 2009 to November 3rd, 2009 that may have considered the Barriefield lands issue.

B. The Issue

In the submissions that were appended to both complaints filed, the complainant recognized the right of municipal councils to go into closed sessions for, inter alia, "a proposed or pending acquisition or disposition of land by the municipality". However, the complainant contended that, based on information that he had received, including information received through a Freedom of Information request, the in camera discussions on the Barriefield lands issue related more to issues of "land use planning, housing objectives, heritage conservation and the development of municipal funds to develop the [housing] concept". As such, the complainant asserted that those issues should have been discussed by Council in an open, public session.

C. Jurisdiction

In October, 2007 the City of Kingston appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to Section 239.2 of the Act. LAS has, in turn, delegated its powers and duties to Amberley Gavel Ltd to undertake the investigation and report to the Council of the City of Kingston.

On December 14, 2009 the Investigator appointed by Amberley Gavel Ltd separately interviewed:

- the complainant,
- the Commissioner of Community Development Services, and
- the City Clerk

It should be noted that in terms of staff responsibility, the Commissioner of Community Services has the lead on the Barriefield lands issue.
D. Legal Background

Closed Meetings:

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 is one of the elements of transparent local government. However, the Act also provides for a limited number of exceptions that would allow a local council to meet in closed session (i.e. in camera). Section 239 reads, in part, as follows:

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

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.

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

Finally, subsections 239 (5) and (6) limit the actions that may be taken by the Council, local board, or committee at the closed session. Votes may be taken at a closed meeting only for procedural matters or for giving directions or instructions to staff or persons retained by the municipality, such as a lawyer or planner.

Finally, it should also be noted that the role of an investigator of a complaint filed under Section 239.1 is fairly narrow. The investigator’s role is to determine “whether the municipality...has complied with section 239 or a procedure by-law under section 238(2) in respect of a meeting or part of a meeting that was closed to the public and to report on the investigation” (Section 239.2). Accordingly, the role of the investigator is to examine and report on the process and not on the substance of any particular issue.
E. Initial Findings

The City of Kingston has a fairly rigorous Procedure By-law and its sections on closed meetings (Articles 3.5 through 3.9) are more stringent than the provisions in the Municipal Act. Further, as a result of the interviews conducted on December 14th, a review of the city’s web-site, and a review of numerous other documents during the course of this investigation Amberley Gavel is satisfied that Kingston City Council is genuinely attempting to adopt the “open government” culture that has been encouraged by recent amendments to the Municipal Act.

Moreover, Amberley Gavel has concluded that the Barriefield lands issue was not discussed in camera between May 5, 2009 and November 3rd, 2009 other than on May 5th and October 6th. The complainant had specifically raised the concern that Council had, among other occasions, considered the Barriefield issue lands in camera on September 15th and October 20th. Although City Council did go in camera on both dates to discuss the possible acquisition or disposition of lands, on neither occasion were the Barriefield lands the lands in question.

Accordingly, the sole issue that remains to be addressed is whether the in camera discussions held on the Barriefield lands issue on May 5th and October 6th met the requirements of Section 239 of the Act.

F. Factual Background

Prior to reviewing the specific discussions held in camera on May 5th and October 6th it is important to understand the issue that has prompted this complaint and the chronology of its development through Council to date.

The Village of Barriefield, now part of the City of Kingston, is located on the east bank of the Cataract River and is composed of a diverse collection of buildings, mostly residential, with a distinct 19th century character. The Village is presently the only area in Kingston that has been honoured with a Heritage Conservation District designation under the Ontario Heritage Act.

In late 2008 or early 2009 the federal government declared surplus three parcels of vacant land located on the north and east boundaries of the Village. Notably, all three parcels of land are located within the heritage district designated by Kingston Council.

The chronology of the development of the Barriefield issue through City Council is as follows:

1. May 5th – Council resolved to move in camera to consider:

   “A proposed or pending acquisition or disposition of land - Expression of Interest in Acquiring Surplus Federal Lands”

In open session Council passed the following motion:

   “That Council rise from the Committee of the Whole “In Camera” without reporting.”
2. **October 6th** – Council resolved to move *in camera* to consider the following item:

“A proposed or pending acquisition or disposition of land – Affordable Housing.”

In *open session* Council considered and deferred the following motion:

“That Council continue to pursue the purchase of Federal Surplus Lands identified as Parcel 3 Parts 2 & 3 through the Surplus Federal Real Property for Homelessness Initiative (SFRPH) for the creation of affordable housing and further – That staff continue with the necessary research, planning and public consultation to bring these parcels of land to construction ready status and a Council Report be prepared to identify partnership options and potential funding sources.”

3. **October 20th** – Council, in *open session* debated and carried the above motion with the following amendment to the latter part of the motion:

“...and public consultation with respect to these parcels of land and a Council Report be prepared to identify partnership options and potential funding sources and community concerns.”

At the same meeting Council also carried the following additional motion in *open session*:

“That staff be directed to also pursue an investigation as to whether lands can be purchased to buffer Barriefield Village.”

4. **November 3rd** – Council considered a report in *open session* entitled “Exploring Merits of Affordable Housing Development in Barriefield Village on Surplus Federal Lands” that included, *inter alia*, the following recommendations:

"That Council:

1. Receive the preliminary affordable housing development concept prepared by Hughes/Downey Architects...
2. Direct staff to undertake a broad and inclusive public consultation process to seek neighbourhood and community input into the question of developing the subject lands for affordable housing purposes in accordance with the concept plan developed by Hughes/Downey Architects....."

The report and the recommendations contained therein were deferred.

5. **December 15** – Council again deferred the above referenced report as well as two recommendations emanating from the Municipal Heritage Committee (LACAC) that had requested a review of the zoning and an update of the Barriefield Heritage District. Both the report and the Municipal Heritage Committee recommendations were deferred pending completion of a public consultation process.
Once the issue became public in the early fall of 2009, the potential acquisition of the Barriefield lands and their use for affordable housing has become a significantly controversial issue, particularly for many residents of the Village and for heritage advocates in the community. Representations directly to Council on this issue were made on October 20th (three residents), November 3rd (three residents) and December 15th (1 resident). [It should be noted that there are procedural restrictions on citizens making representations before Kingston Council including the restriction that no more than three delegations are permitted per Council meeting. (Article 7.6)]

As well, on December 15th four petitions were presented to Council on the issue – three petitions containing a total of 748 names opposing the use of the subject lands for affordable housing and a counter petition with 543 names in favour of the use of the lands for affordable housing.

G. The In Camera Sessions of May 5th and October 6th

Section 239(1) of the Municipal Act sets out the general rule and key principle that all meetings shall be open to the public. There are seven discretionary exceptions to the open meeting rule as cited in the “Legal Background” section of this report. Council may exercise its discretion to move into closed session if the subject matter to be discussed falls within one of the statutory exceptions.

The exception that was relied on by the City of Kingston on May 5th and October 6th to discuss the Barriefield lands issue in camera was “a proposed or pending acquisition or disposition of land by the municipality or local board” (subsection 239(1)(c) of the Municipal Act).

Under Section 239(4) of the Municipal Act, Council is required, prior to going in camera, to state “the general nature of the matter to be considered at the closed meeting”.

The May 5th In Camera Meeting:

At the May 5th meeting, the general nature of the closed session discussion was described as the “Expression of Interest in Acquiring Surplus Federal Lands”. The purpose of the in camera report, presented to Council on this date, was essentially to determine from Council whether there was a “preliminary indication of interest” for staff to pursue the possible acquisition of the Barriefield lands for affordable housing purposes.

In fact, Council was specifically advised by staff that more than one property was potentially available for acquisition and “at this time there is no information as to the purchase price of these properties”. Staff was attempting to ascertain whether or not there was preliminary interest in any of the properties and whether or not Council was potentially interested in negotiating with the federal government over the price of one or more properties.

It is conceivable in this circumstance that a municipal council would want to discuss negotiating strategies and costs. A closed meeting is an appropriate forum in which to do so.
Notably, the report that was presented in closed session did not specifically refer to the “Surplus Federal Real Property for Homelessness Initiative” (SFRPHI) as subsequently described in the public report presented to Council on October 20th. The SFRPHI would allow for the subject lands to be “contributed” to the municipality if used for affordable housing in accordance with federal guidelines.

Accordingly, based on the fact that the May 5th closed session was for the sole purpose of obtaining a “preliminary indication of interest” in one or more potential properties, and the fact that the purchase price of the subject lands was still unknown, Amberley Gavel is satisfied that Council appropriately exercised its discretion in going in camera for a proper purpose, one that is recognized under the Act and in accordance with generally accepted practice.

The October 6th In Camera Meeting:

Following the May 5th meeting, City staff researched potential funding sources for a possible affordable housing project on the subject lands and entered into extensive consultations with federal and provincial staff relating to options for such a project. As well, as per direction received from Council, staff retained the architectural firm of Hughes Downey “to create a preliminary affordable housing development concept” for the Barriefield lands.

On October 6th City staff reported back to Council on the results of their research and the report prepared by Hughes, Downey. Following the adoption of a motion that Council resolve into closed session “for a proposed or pending acquisition of land by the municipality or local board – Affordable Housing”, Council went in camera and heard a staff presentation on the merits of developing affordable housing in Barriefield Village. On the invitation of Council, representatives of the Hughes, Downey firm were also invited into the closed session and gave a presentation on their report entitled “Barriefield Housing Concept Designs”. The staff in camera report, which included the Hughes/Downey Report as an appendix, subsequently became the basis of the public report that was presented to Council at the following meeting on October 20th.

It must be again emphasized that the Municipal Act permits a municipal council, local board, or a committee of either of them, to go into closed session for “a proposed or pending acquisition” of land. However, that is not a mandatory exception to the open meetings provision – it is discretionary. In our view a municipal, local board or committee should only exercise its discretion when there is some potential harm, financial or otherwise, of having a discussion on a pending acquisition held in open session. Clearly, for example, there would be potential financial harm if financial negotiations were continuing or in a situation where adjacent lands might attract speculative interest. Concern over public reaction should not be a basis for a closed session discussion.

In this case, as staff advised Council in their in camera October 6th report, the cost to the city to obtain the subject lands would be “nominal” under the federal homelessness prevention initiative program (SFRPHI). Accordingly, financial negotiations with the federal government were clearly not an issue.
Further, the stated purpose of inviting the representatives of the Hughes, Downey firm in camera was “to assist Council in determining where the land could accommodate an affordable housing project” [Agenda motion, as amended]. In some exceptional circumstances, it might be appropriate to bring outside planning or architectural consultants in camera to assist Council in a property acquisition issue.

However, based on the interviews conducted and a review of the in camera staff report and the Hughes, Downey Report that was appended to the staff report, the October 6th closed session on the Barriefield lands issue would not, in our opinion, qualify for such an exception. The information provided to Council by the outside architects was not confidential and, in our view, should have been given in open session. If, at any time during that open session there was a requirement for Council to receive confidential information, (e.g. the receipt of legal advice) Council always would have the option of adjourning in camera at that time for that limited purpose.

Further support of this conclusion lies in the fact that the staff report, substantially unchanged, and the Hughes, Downey Report in its entirety, were presented as part of the public agenda at the next subsequent Council meeting of October 20th. [See Report entitled “Exploring Merits of Affordable Housing Development in Barriefield Village on Surplus Federal Lands”- Report 09-312].

Subsequent proceedings

As indicated in the chronology set out above in Section F (Factual Background), Council came out of the in camera meeting on October 6th with a motion that Council “continues to pursue the purchase of [the Barriefield lands]...”. No final determination of the acquisition of these lands by the City of Kingston was made by Council either in camera or in public session on October 6th. In fact, the potential acquisition was again on the agenda (with public presentations on each occasion) on October 20th, November 3rd and December 15th.

Further, in consultation with both the local community and the heritage community, staff is presently in the process of developing a public participation process that is anticipated to take place in early 2010 with a final decision on the acquisition to be made by City Council later in the spring.

Moreover, no substantive decisions were made by Council in either of the closed sessions on the Barriefield issue. Votes were taken only to provide procedural direction to staff, as is permitted by the Municipal Act.

Consequently, although Council should not have discussed the Barriefield issue in closed session on October 6th Amberley Gavel is satisfied that, in light of the subsequent steps being taken by staff and Council, the principle of open and transparent government in the decision making process on this issue has been restored.