

## REPORT

### PLANNING AND DEVELOPMENT COUNCIL MEETING

MEETING DATE: MAY 13, 2019

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**FROM:** Legal Department

**DATE:** April 30, 2019

**SUBJECT:** 2019 Update on Committee of Adjustment Appeal Process Procedure

**LOCATION:** Town Wide

**WARD:** Town Wide

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#### **RECOMMENDATION:**

That the Committee of Adjustment Appeals Procedure G-GEN-007-004 be repealed and replaced with the Procedure as set out in Appendix D to the Report of the Legal Department, dated April 30, 2019.

#### **KEY FACTS:**

The following are key points for consideration with respect to this report:

- By Council Reports dated May 17, 2013 and July 18, 2015, the Legal Department reported to Council on the procedures for filing and dealing with Committee of Adjustment appeals.
- A Formal Procedure G-GEN-007-004 called “Committee of Adjustment Appeals Procedure” (“Procedure”) was created under the authority of the Town’s “Agendas, Meetings and Resolutions Policy”.
- This Report proposes replacing that Procedure with the new Procedure attached as Appendix D to this Report.
- The Procedure sets out the basis on which appeals are to be launched, who decides initially when appeals are to be launched, when reports to Council are necessary, the standardizing of reports to Council, and how to handle potential settlements of appeals.

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**BACKGROUND:**

In June 2013, Planning and Development Council was presented with a Legal Department Report regarding the process for appeals from Committee of Adjustment decisions (Appendix A). A formal procedure, G-GEN-007-004, called "Committee of Adjustment Appeals Procedure" ("Procedure") resulted, constituting "Standing Instructions" respecting such appeals (Appendix B).

In July 2015, Planning and Development Council was presented with a further Legal Department Report, recommending some refinements to the Standing Instructions (Appendix C).

The purpose of this Report is to update Council as to how the appeals process has been working to date and seek consideration of changes recommended by the Legal Department to the "Standing Instructions". Those changes represent what actually happens in practice today, plus some additional changes. The changes are included in the recommended replacement Procedure, attached as Appendix D.

There has been no change in how minor variance appeals are to be dealt with by the Local Planning Appeal Tribunal (LPAT) under the new LPAT legislation, Bill 139; namely as a "new" hearing and as a full hearing.

**COMMENT/OPTIONS:**Appeals Update

In terms of what has happened with appeals at the Committee of Adjustment since the last update from the Legal Department in 2015, the most recent statistical information has been in the annual Activity Reports for 2016, 2017 and 2018. In the case of all 27 appeals filed by the Town in those three years, the appeals were allowed and the variance applications were either approved as amended in a manner satisfactory to the Town in keeping with the concerns that the Town staff and Town Council had, or the variance applications were refused.

In addition, there were 24 appeals that were not filed by the Town in 2016, 2017 and 2018, in circumstances where the Town had identified no public interest in the particular applications, or was only looking for appropriate conditions to be attached to any approval granted by LPAT.

The statistics indicate, therefore, that to date the appeal process has been successful.

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The only concerns relate to:

1. reducing unnecessary “paperwork” in the processing of an appeal;
2. the lengthy time period to process an appeal to conclusion where there is a settlement; and,
3. certain aspects of the current process for implementing a settlement.

#### Addressing the Concerns

In terms of reducing unnecessary “paperwork” in the processing of appeals, currently, the process begins when the Secretary-Treasurer of the Committee of Adjustment sends Council and staff notice of each application made and a copy of each decision. Upon receipt of the decisions for each meeting, the Legal Department contacts the Planning Services Department to see if there are any appeals or other actions needed.

In the event that the Planning Services Department requests that an appeal be filed, the Legal Department does so, followed by a confidential report to Council seeking Council confirmation of the appeal, together with suggested instructions as to the position the Legal Department should take with respect to the presentation of the appeal, or instructions to withdraw the appeal.

Where any of the Committee decisions are contrary to the Town staff advice, then the Legal Department also currently contacts the Mayor and the Ward Councillors informing them of the Planning Services Department position as to an appeal and enquiring whether they support the Planning Services Department position to appeal or not, or where Planning is recommending no appeal, the Mayor and/or Councillors still wish an appeal filed. In the event that the Mayor or other Ward Councillors request that an appeal be filed, then the Legal Department does so, followed by a confidential report seeking Council direction as to the continuance or withdrawal of the appeal, and if continued, then the instructions as to the position the Legal Department should take with respect to the presentation of the appeal.

In addition, each report to date has also included a recommendation permitting appropriate staff to seek to negotiate a settlement within the scope of Council’s instructions.

The Legal Department does not contact the Mayor or Ward Councillors regarding any decisions where staff advice has been followed and no further action is recommended by the Planning Services Department.

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### Recommended Changes

A change is proposed in the Procedure to enhance efficiency in the process. This change involves those decisions where any of the Committee decisions are contrary to the Town staff advice. It is proposed that in the future the Legal Department will confirm with Planning Services staff that an appeal to LPAT should be launched, and on receipt of that confirmation, will automatically appeal those decisions to LPAT without first contacting the Mayor or Ward Councillors.

If, however, Planning staff are recommending no appeal, notwithstanding that the Committee decision is contrary to their initial advice, then in that case the Mayor and Ward Councillors would be contacted regarding the Planning position to see if the Mayor and Ward Councillors are in agreement, or would prefer that the Committee decision be appealed. Where an appeal is launched, the Legal Department will provide a confidential report recommending confirmation or withdrawal of the appeal and seeking the necessary instructions.

The reason for this proposed change is that over the last three years, the Mayor and/or the Ward Councillors have consistently requested appeals of Committee of Adjustment decisions that approve variance applications contrary to staff advice where Planning is recommending an appeal. Rather than sending out further emails beyond what the Secretary – Treasurer already sends to the Mayor and Ward Councillors, the Legal Department would in the future automatically launch the appeal in such circumstances if recommended by Planning, and the matter would then come to Council by way of the confidential confirmation report. If Planning is not recommending an appeal, the Mayor and Councillors would still be contacted and asked if they still wish to appeal and if so, an appeal will be launched and the matter would then come to Council by way of the confidential confirmation report.

This change does mean however that should there be any concern with any of the other applications or decisions made by the Committee, the Mayor or any Councillor, on receipt of the notice from the Secretary – Treasurer, will need to contact the Legal Department about the concern, and if necessary, an appeal can be launched at that time.

A second change proposed is to formally provide in the Procedure that the Town Solicitor and the Director of Planning Services and designates, in consultation with the Mayor and Ward Councillors, can always seek to negotiate settlements of Town concerns before or after appeals are launched. The recommendation permitting appropriate staff to seek to negotiate a settlement within the scope of Council's instructions shall always be included as a standard recommendation in any confidential report to Council. This is to encourage settlements to be pursued where possible. Council has consistently supported the pursuit of reasonable settlements,

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but this recommendation would codify that permission and standardize it as part of the Procedure.

As to other Reports that now come to Council, the Legal Department presently reports to Council on appeals in the following circumstances:

- On appeals by the applicant where staff did not support the application and the Committee denied the application. In these reports, staff are seeking instructions from Council as to whether it wishes the Town to oppose the applicant's appeal at LPAT; and
- In other unique or unusual situations that arise from time to time.

It is not proposed to change this reporting process for these other matters, and these types of reports will continue to be brought forward for Council's consideration.

A third change proposed is to recraft the "Criteria" Section of the Procedure to more properly reflect the current approach, which is that the Criteria are actually used as the basis on which Council decides to continue or withdraw an appeal, not to decide whether an appeal should be launched in the first place.

#### Settlement Recommendations

As stated previously, when any appeal report is sent to Council, one of the recommendations (now proposed to be a standard one) is to authorize the Director of Planning Services or designate and the Town Solicitor or designate, to negotiate a settlement if possible in keeping with the Town position on the particular variance or severance request. In the past, negotiating those settlements and then bringing them forward for approval by LPAT has been done without further consultation with the Mayor or Ward Councillors.

To address that, the Legal Department recommends that any proposed settlement first be shared with the Mayor and the Ward Councillors before final agreement and submission to LPAT for approval, to ensure that the proposed settlement is in keeping with the Town position as approved by Council. While for the most part this does happen, it has occurred on rare occasions that the actual settlement has come as somewhat of a surprise to the members of Council involved, despite the Legal and Planning Services Departments believing that it was in keeping with the Town position approved by Council.

There still may be times in the future where a settlement is achieved at the last minute at the hearing before LPAT, and in those cases there may not be an

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opportunity to first show the proposed settlement to the Mayor and the Ward Councillors, but those occasions will be rare.

A second suggested change is in situations where a settlement is negotiated and is to be brought before LPAT for approval where there is continuing opposition by neighbours or other citizens to the applicant's proposal, despite the settlement. It is proposed that in such circumstances the Legal Department would no longer take the "lead" in presenting the proposed settlement, including any amended application to LPAT, on behalf of both the Town and the applicant, as it has in the past.

Rather, the Procedure would require the Legal Department in the future to make it clear to the applicant in such situations that it is the applicant's responsibility to prepare any amended application and present the settlement and the amended application for approval by LPAT; the Town will simply consent to the settlement and proposed application.

The reason for this recommended change is that the past practice of the Town presenting all settlements has resulted in the Town being seen to favour one citizen over another where neighbouring citizens are not in favour of the proposed settlement. While "taking the lead" has been done in the past to assist the applicant in minimizing the extra costs of the appeal and to ensure the settlement is implemented in the way that the Town has agreed to, that has been seen as being unfair by those opposed to the application, where the matter before LPAT has effectively been narrowed to a neighbour-to-neighbour dispute.

So as to avoid the appearance in the future that the Town is favouring one citizen over another where there is continuing opposition to an applicant's proposal, despite a settlement with the Town, in such circumstances the Legal Department will simply consent to the settlement and the amended application, and the applicant will be required to prepare and present the case for approving the settlement and the amended application.

Where there is no continuing opposition to the proposed settlement or the application as amended, then the Legal Department will, if the applicant desires, continue to "take the lead" in presenting the proposed settlement and amended application with such evidence as Town staff can provide.

A third change with respect to settlements is to request a change in the tariff of fees for Minor Variance Applications under the Annual Town Fees and Charges to something less than the standard application fee for minor variance for a second application for the same property as part of implementing a proposed settlement and resulting amended application. Under the present procedure, there is a significant

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amount of time, three months or longer, to get a settlement dealt with by LPAT. This time delay is a disincentive to settlement discussions.

Where time is of the essence to the applicant, some settlements in the past have provided the applicant with the opportunity to file a new variance application with the Town to replace the original one, with the Town agreeing to reimburse the applicant for the cost of the second Committee of Adjustment application fee.

This has allowed the applicant to get a speedier approval of a settlement by way of the new second application, rather than waiting for a hearing before LPAT on the settlement and amended application. If the second application as agreed to by the applicant and the Town has been approved by the Committee of Adjustment with no appeals filed, then the first Committee of Adjustment decision approving the original application can, on consent of both Parties, be set aside by LPAT and dismissed.

The change recommended is to replace the reimbursement by the Town of a full Standard Application Fee for a second Committee of Adjustment minor variance application, with a fee that is not reimbursed by the Town, but rather is reduced as a matter of cost avoidance to reflect the fact that the second application is usually simpler to deal with and usually requires less staff time to process, as it has already been before the Committee. That reduced fee, while not a complete reimbursement to the applicant as at present, still would be a benefit to the applicant.

If the Owner does not wish to utilize the second application approach in the future because of the elimination of the 100% reimbursement, then the applicant can still wait for a hearing date before LPAT on the original application, where the original application could be amended in keeping with the settlement and approved as amended.

#### Criteria

This new Procedure also proposes changes in the current Procedure with respect to the Criteria. The new Procedure would clarify that the Criteria be used to guide staff and Council when the Legal Department seeks instructions in respect of whether an appeal of a Committee of Adjustment decision already launched should be supported or opposed. The changes also enhance and clarify the Criteria and expand them to apply to both minor variances and consent applications.

#### Concluding Comments

In conclusion, staff recommend that the existing Committee of Adjustment Appeals Procedure G-GEN-007-004 for the handling of appeals of Committee of Adjustment Decisions to LPAT be repealed and replaced with the new Procedure in Appendix D to this Report.

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## **CONSIDERATIONS:**

**(A) PUBLIC**

The current Committee of Adjustment notification processes will continue to be applied.

**(B) FINANCIAL**

The recommended procedure seeks to streamline the current appeal processes.

**(C) IMPACT ON OTHER DEPARTMENTS & USERS**

The Planning Services department, working with the Legal department, is involved in administering the Committee of Adjustment appeals procedure.

**(D) CORPORATE AND/OR DEPARTMENT STRATEGIC GOALS**

This report addresses the corporate strategic goal to:

- be accountable in everything we do

**(E) COMMUNITY SUSTAINABILITY**

The Committee of Adjustment appeals procedure impacts on a number of site specific issues that have the potential to impact upon all pillars of community sustainability.

## **APPENDICES:**

Appendix A – June 2013, Planning & Development Report

Appendix B - Committee of Adjustment Appeals Procedure G – GEN-007-004

Appendix C - July 2015, Planning & Development Report

Appendix D – Revised Procedure G-Gen-007-004

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