

REPORT

PLANNING AND DEVELOPMENT COUNCIL MEETING

MEETING DATE: JUNE 10, 2013

FROM: Legal Department

DATE: May 17, 2013

SUBJECT: Criteria regarding Committee of Adjustment Appeals

LOCATION: Town wide

WARD: Town wide

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RECOMMENDATION:

That Council have regard to the criteria described in the report of the Legal Department, dated May 17, 2013, in determining when Town staff should attend Ontario Municipal Board appeals of Committee of Adjustment decisions, or when decisions of the Committee of Adjustment should be appealed by the Town.

KEY FACTS:

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

- When a decision of the Committee of Adjustment is appealed to the Ontario Municipal Board, legal staff bring forward a confidential report seeking instructions from Council regarding Town participation in the hearing
- There are currently no criteria to guide Council in its decision on whether to direct legal staff to attend a hearing or initiate an appeal on behalf of the Town
- A policy and procedure with respect to criteria regarding Committee of Adjustment appeals, and the process for Council receiving advice from and providing instructions to legal counsel in respect of Committee of Adjustment appeals, will provide transparency for the public, as well as clarity and guidance to current and future members of Council and staff

BACKGROUND:

In accordance with the *Planning Act*, the Committee of Adjustment ("Committee") considers applications for minor variances from the zoning by-law, applications for land division (consent to sever land), and any other variances specified by Council that implement the official plan. The Committee is a local board constituted by by-law and its members are appointed by Council.

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Committee decisions on applications for minor variances from the zoning by-law under s. 45(1) of the *Planning Act* must meet the four tests:

- 1) The application must maintain the general intent and purpose of the official plan;
- 2) The application must maintain the general intent and purpose of the zoning by-law;
- 3) The application must be desirable for the appropriate development or use of the land, building or structure; and
- 4) The application must be minor.

Successful applications under this section must satisfy all four tests. The failure to meet just one of these tests is fatal to the application.

Over the last year, Building Services staff, in consultation with Legal, Planning Services, and the Clerks Departments, have led a review of the Committee of Adjustment practices and procedures. The Building Services Department reported on this review in its Committee of Adjustment Annual Activity Report to Planning and Development Council on March 18, 2013. As a result of this review, Legal staff reviewed our current practice related to appeals of Committee decisions to the Ontario Municipal Board ("OMB").

Over the past three years, the number of minor variance applications heard by the Committee and appeals to the OMB are as follows:

YEAR	APPLICATIONS	APPEALED
2012	226	14
2011	201	10
2010	201	16

Each time a decision of the Committee is appealed to the OMB, legal staff bring forward a confidential report seeking instructions from Council regarding Town participation in the hearing. The report generally outlines the nature of the appeal and seeks instructions as to whether the Town should either support or oppose the appeal to protect the Town's interests, or take no action and not be involved in the OMB hearing.

It has been the past practice of legal staff to recommend non-attendance in circumstances where the Town's interests in the matter are minimal. However, there are currently no criteria to guide Council in its decision on whether to direct legal staff to attend an OMB appeal that has been initiated by another party, or to move forward with an appeal on the Town's own behalf.

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This report outlines current practices in place regarding appeals of Committee decisions. Criteria are proposed to assist legal staff in developing recommendations, and Council in determining, whether the Town should proceed with an appeal of a decision of the Committee. A procedure with respect to Committee appeals, including the criteria regarding Committee of Adjustment appeals, and the process for Council receiving advice from and providing instructions to legal counsel in respect of such appeals, will assist in providing transparency for the public, as well as clarity and guidance to current and future members of Council and staff.

COMMENT/OPTIONS:

Criteria

Staff recommend that the criteria and process outlined below be used to guide decision-making when legal staff seek instructions in respect of an appeal of a Committee decision to the OMB. These criteria would be applicable whether the Committee approved or refused an application, and irrespective of whether an appeal has been launched by an applicant or an objector. They would also be applicable in determining whether the Town should proceed with its own appeal of a decision of the Committee.

Where a decision of the Committee is clearly dealing with a variance or severance request that has no or minimal material impact on Town-wide issues or interests, or where the appeal relates primarily to a dispute between neighbours without broader implications or ramifications to the Town, legal staff should be instructed to not attend the hearing.

It is recommended that Council should generally direct legal staff to attend a hearing or appeal a decision of the Committee in one or more of the following circumstances:

1. Where the issues raised on appeal could have significant broader impacts, or Town-wide implications;
2. Where the Committee's decision is not in keeping with the purpose and intent of Council's approved official plan and/or zoning by-law;
3. Where a decision could set an undesirable precedent with respect to the interpretation of the official plan and/or zoning by-law, and/or call into question or undermine the interpretation of the official plan and/or zoning by-law;

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4. Where the Committee has failed to impose conditions requested by staff, which are considered essential if the variance or severance is granted by the OMB; and/or
5. Where the Committee has made an error in law.

Where the Committee approves an application contrary to a planning staff recommendation, legal staff will assess the matter in accordance with the above criteria to determine whether an appeal should be recommended to Council.

Where a request for an appeal is made by the Director of Planning Services or a member of Council, or legal staff otherwise believes that an appeal is warranted, but a report recommending the appeal cannot be prepared and/or considered by Council prior to the expiry of the statutory appeal period, it has been the past practice of legal staff to file a "placeholder" appeal on behalf of the Town. When the staff report comes forward, Council can then either ratify and instruct staff to continue the appeal on behalf of the Town, or direct legal staff to withdraw the appeal.

It is recommended that planning staff or a councillor requesting an appeal provide legal staff with the reasons for the appeal in accordance with the criteria above, in order that such information may be included in the confidential report of the Legal Department to Council.

Accountability and Transparency

Legal advice on the issue of the position of the Town in respect of a Board hearing, or consideration of a placeholder or other appeal, is a matter subject to solicitor-client, as well as litigation privilege. As such, these reports are appropriately considered in a meeting or part of a meeting of Council that may be closed to the public in accordance with subsection 239(2) of the *Municipal Act, 2001*, and remain confidential.

The courts, including the very highest court, the Supreme Court of Canada, consistently provide a very high degree of deference to a client's right to advice that is subject to solicitor-client privilege. Solicitor-client privilege has now evolved in law from a rule of evidence to become a substantive legal right with quasi-constitutional status, and the municipality is entitled to that right to the same extent as any other person. Indeed, the courts have recognized that there may be circumstances where a municipality's need for confidentiality may encompass even the information that such advice has been obtained on a specific issue.

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However, in most cases, both the public Council agenda and, should Council resolve into closed session to consider a confidential legal report, the resolution of Council to do so, can provide sufficient information, in the interests of transparency and accountability, describing the general nature of the matter to be considered at the closed meeting, pursuant to s. 239(4) of the Act. In the case of confidential reports of the Legal Department in connection with Committee of Adjustment decisions, therefore, there would be no separate or additional public report, but both the Council agenda and any Council resolution to resolve into closed session could identify the specific Committee decision and property that is at issue and the subject of a confidential legal report. This would provide notice should any member of the public wish to delegate to Council.

Furthermore, once Council provides its instructions to staff, although the report of the Legal Department remains confidential, a public Council resolution is recorded in the minutes with the application and property identified. Where the Council direction is to participate in or proceed with an appeal, legal staff advises the OMB that the Town will be in attendance at a hearing based on the public resolution of Council.

Staff will bring forward a policy for Council approval, and will implement an associated procedure, that adopts these measures to maintain accountability and transparency in respect of OMB appeals of Committee decisions.

CONSIDERATIONS:

(A) PUBLIC

Members of the public are provided notice and have an opportunity to speak to a minor variance or severance application when the matter is considered by the Committee. Furthermore, once a Committee of Adjustment decision has been appealed to the OMB, responsibility for the decision on the application transfers legislatively to the Board, whose own processes provide an opportunity for public notice and participation in the appeal, which is a fresh hearing on the merits. The purpose of a confidential report of the Legal Department to Council in this regard is not to provide a report in the context of a public hearing before Council on the merits of a variance or severance application. Rather, the purpose is to give legal advice to and seek instructions subject to solicitor-client privilege from the municipal corporation, as client, as represented by Council, regarding the municipality's position in respect of specific Committee decisions, and existing or potential appeals of those decisions. Approved criteria and processes with respect to the Town's practice for Committee appeals will assist in maintaining transparency in the process for the public.

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(B) FINANCIAL

Appeals to the OMB from Committee decisions are generally handled using internal staff with no additional budget implications, depending on scheduling and staff resources. However, where Council instructs legal staff to attend in opposition to planning staff's opinion, external resources are required. Criteria and processes to guide decisions on appeals that are to be pursued will assist in the more efficient use of staff time as well as financial resources.

(C) IMPACT ON OTHER DEPARTMENTS & USERS

The Commissioner of Community Development and Director of Planning Services, as well as the Town Clerk, have reviewed this report.

(D) CORPORATE AND/OR DEPARTMENT STRATEGIC GOALS

This report addresses the corporate strategic goal to:

- be accountable in everything we do

(E) COMMUNITY SUSTAINABILITY

This issue impacts the pillar of economic sustainability through the appropriate use of internal and external resources.

Submitted by:
Douglas Carr
Town Solicitor