

City of Mississauga

Corporate Report



Date: September 25, 2020

To: Mayor and Members of Council

From: Andra L. Maxwell B.A., LL.B., CIC.C, City Solicitor

Originator's files:
LA.19.LPAT

Meeting date:
October 14, 2020

Subject

External Legal and Planning Costs for LPAT Appeals

Recommendation

That the report entitled "External Legal and Planning Costs for LPAT Appeals" dated September 25, 2020, from the City Solicitor, be received for information.

Report Highlights

- Council instructed staff to provide an overview, including the costs, of all Ontario Municipal Board ("OMB") and now Local Planning Appeal Tribunal ("LPAT") appeals in cases where a staff recommendation has not been adopted by Council.
- Council also requested that Legal Services advise whether Council has the authority to require that decisions instructing Legal Services to attend the LPAT and take a position that is contrary to a recommendation of Planning staff on a development application or a Committee of Adjustment ("CoA") appeal be supported by a two-thirds majority vote.
- The total cost to the City of retaining external legal and planning representation for OMB and LPAT appeals stemming from the above circumstances over the past 5 years is \$1,127,589.26., with some appeals still ongoing.
- The Ontario *Municipal Act, 2001* ("*Municipal Act*") gives Council broad powers to establish its own internal procedures including the voting threshold required when a staff recommendation is not to be supported. A requirement for a two-thirds majority vote will not affect the manner in which such decisions are considered by the LPAT, however, or result in the LPAT giving any greater deference to Council decisions. Indeed, other municipalities have established a two-thirds majority vote threshold in other circumstances.

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Background

On September 16, 2020, Council adopted a motion instructing staff to provide a detailed list of certain development application and CoA appeals to the former OMB and now the LPAT over the past five years. Specifically, staff were asked to list the key details, including the dates, outcomes and costs of those appeals involving City staff recommendations in support of development applications and CoA matters and appeals that were not adopted by Council or the CoA.

Further, Council has instructed staff to determine whether it has the legal authority to require a two-thirds majority vote at Council whenever a staff recommendation in support of an application or appeal is not to be adopted.

Comments

LPAT Appeals and Costs:

In situations as described above where a planning staff recommendation is not adopted by Council, it is the standing protocol of City staff to retain the services of external legal counsel and planning professionals to represent the City before the LPAT. This is done for a number of reasons that stem mainly from the adversarial nature of the LPAT appeals process and the need to avoid potential conflicts of interest with in-house counsel, who would otherwise be required to cross-examine City Planning staff and challenge their qualifications, expertise and judgment before the tribunal. Further, external planning professionals are typically retained to provide advice and to serve as expert witnesses before the LPAT to counter City planning staff whose recommendation(s) supported the developer/appellant.

Accordingly, the costs of representing the City in such LPAT appeals can be significant depending on the complexity of the issues and the duration of the matter. The total costs for external legal counsel and planning experts associated with all such LPAT appeals over the past five years can be found below under “Financial Impact”. This amount does not include the internal expense to the City of planning staff being placed under summons by appellants to attend and testify before the LPAT, nor the internal Legal Services costs.

It is important to note that in-house legal staff directly oversee the work of the external lawyers and wherever possible they are instructed to seek appropriate and acceptable resolutions at the earliest opportunity in order to reduce costs. In many cases, the City has successfully settled LPAT appeals without the need for sometimes long and often costly hearings.

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Two-Thirds Majority Vote Threshold:

Council has the authority to amend the Council Procedure By-Law to require a two-thirds majority vote by Council, Planning and Development Committee and the Committee of Adjustment when rejecting a staff recommendation in support of a development application or minor variance application.

Section 8 of the *Municipal Act* gives Council "...broad authority...to govern its own affairs as it considers appropriate..." and section 11 specifically permits Council to pass or amend by-laws concerning the "[g]overnance structure of the municipality..." Further, section 238 of the *Municipal Act* requires Council to "...pass a procedure by-law governing the calling, place, and proceedings of meetings." In essence, Council has been given broad discretion to establish its own procedures, practices and policies under the *Municipal Act* and this would include the required vote threshold for certain issues.

Under the current City of Mississauga Procedure By-Law (139-13), Council has established a 'simple-majority' threshold for all votes which in practice has been defined as an affirmative vote of more than one half of members present and voting. However, other municipalities have included so-called 'supermajority' thresholds which often require the support two-thirds of those present for an item to pass. Other municipalities in Ontario have adopted such two-thirds majority thresholds in a variety of circumstances.

For example, the Region of Peel Procedure By-Law requires a "two-thirds vote" for a wide range of issues including any amendments to the By-Law itself. Peel Region defines a "two-thirds vote" as "...at least two-thirds of the votes cast by members who are present and eligible to vote." Similarly, for some issues, York Region requires a "two-thirds majority vote" which is defined as "...an affirmative vote of at least two-thirds of the members present at a meeting."

Council has the broad authority to establish and define a two-thirds majority vote threshold for specific issues. This would include a Council vote on a staff recommendation in support of a development application or a CoA appeal. Council has the authority to amend the Council Procedure By-Law to require a two-thirds majority vote by Council, and the Planning and Development Community when rejecting a staff recommendation in support of a development application or minor variance application.

Financial Impact

Development Appeals:

Ward #	Case/File	Legal Fees	Planner Fees	Total	Dates	Outcome
9	2700 Aquitaine Avenue	\$143,325.52	\$122,116.77	\$265,442.29	2014 – 2017	City successful
2	1190 Lorne Park Road	\$35,880.31	\$42,887.75	\$78,768.06	2017 – 2019	City not successful
7	1646 Dundas Street West (Erindale Village)	\$174,274.98	\$79,666.28	\$253,941.26	2017 – 2020	City not successful
8	3355 The Collegeway	\$23,504.00	\$21,754.96	\$45,258.96	2017 – 2019	City not successful
3	4005 Hickory Drive	\$18,420.19	\$36,594.15	\$55,014.34	2017 – ongoing	Ongoing
7	3980-3900 Grand Park Drive	\$42,454.54	\$6,194.98	\$48,649.52	2019 – ongoing	Ongoing
7	2512, 2522, & 2532 Argyle Road	\$1,316.45	N/A	\$1,316.45	2020 – ongoing	Ongoing
	Total:	\$437,859.54	\$309,214.89	\$748,390.59		

Committee of Adjustment Appeals:

Ward #	Case/File	Legal Fees	Planner Fees	Total	Dates	Outcome
1	651 Beach Street	\$17,394.25	\$8,880.26	\$26,274.51	2016 – 2017	City successful
2	1654 Birchwood Drive	\$23,448.04	\$19,889.25	\$43,337.29	2018 – 2020	City not successful
1	1338 Broadmoor Avenue	\$34,091.40	\$71,133.47	\$105,224.87	2016 – 2017	City not successful
7	1576 Dundas Street West	\$17,446.54	\$11,839.04	\$29,285.58	2018 – 2019	City successful
2	1778 Fellen Place	\$14,335.05	\$20,220.71	\$34,555.76	2017 – 2019	City partially successful pursuant to settlement reached
1	1389 Glenwood Drive	\$16,189.52	\$9,861.16	\$26,050.68	2017 – 2018	City not successful
1	918 Goodwin Avenue	\$15,498.91	\$9,175.69	\$24,674.60	2016 – 2017	City not successful
7	2171 Hillfield Court	\$14,980.46	\$16,722.03	\$31,702.49	2016 – 2017	City successful
1	1158 Meander Court	\$14,507.65	\$26,554.55	\$41,062.20	2016 – 2017	City successful
7	2380 Tedlo Street	\$17,030.69	\$0.00	\$17,030.69	2015 – 2017	City not successful
	Total:	\$184,922.51	\$194,276.16	\$379,198.67		

The combined costs of the above appeals amounted **\$1,127,589.26** with some matters still ongoing.

Conclusion

As noted above, the costs of representing the City in LPAT appeals when staff recommendations are not adopted are significant. Should Council wish to establish a two-thirds majority vote in situations where a staff recommendation on a development application or a CoA appeal is not to be adopted, the *Municipal Act* has given it broad powers to do so. This could be achieved by way of an amendment to the City Council Procedure By-Law.



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