

Strip Plazas as Business Improvement Areas to Improve Private Property

Date:	May 22, 2007
To:	Economic Development Committee
From:	City Solicitor
Wards:	All
Reference Number:	

SUMMARY

The City Solicitor has been asked to determine what amendments are required to Municipal Code Chapter 19, Business Improvement Areas, in order to establish “Special Policy Areas” in relation to privately-owned strip plazas.

Existing Business Improvement Areas (“BIAs”) are designated by the City under authority from the *Municipal Act, 2001* to oversee the improvement of City-owned land, buildings and structures, and to promote the area as a business or shopping area. With the enactment of the new *City of Toronto Act, 2006* (“COTA”), boards of management for BIAs can be established as city boards. COTA clearly contemplates that BIAs will be established for the same purposes as set out in the *Municipal Act, 2001*, i.e. to promote the area as a business and shopping area, or to improve, beautify and maintain **City-owned land, buildings and structures** in the area beyond that provided at the expense of the City generally. Accordingly, Chapter 19 should not be amended to include strip plazas, where the BIA funds will be used to improve private property and not City-owned property.

Further, the improvement of private property and the operation of what is essentially a property management service are likely not municipal services that can be delegated to a city board. The proposal also likely conflicts with property standards legislation under the BCA and would be deemed to be without effect, if challenged, pursuant to section 11 of COTA.

While property standards legislation is currently the best way to deal with derelict strip plazas, it may be possible to designate them as Community Improvement Project Areas in the future, however, more analysis and research is required to determine if this is appropriate.

RECOMMENDATIONS

The City Solicitor recommends that:

1. Municipal Code Chapter 19, Business Improvement Areas, not be amended to allow for the creation of Special Policy Areas consisting of strip plazas.

FINANCIAL IMPACT

The recommendations in this report will have no financial impact.

DECISION HISTORY

The Economic Development Committee, at its meeting on April 11, 2007, requested the City Solicitor to report back to Committee regarding a communication from Councillor Moscoe in relation to Economic Development Committee Item 3.3, to determine what amendments are required to Municipal Code Chapter 19, Business Improvement Areas, in order to establish “Special Policy Areas” in relation to privately-owned strip plazas. The Committee decision and the communication from Councillor Moscoe can be viewed at <http://www.toronto.ca/legdocs/mmis/2007/ed/decisions/2007-04-11-ed03-dd.pdf>.

ISSUE BACKGROUND

Councillor Moscoe’s communication to the Economic Development Committee outlines several problems relating to maintenance and upkeep of common areas of older strip plazas. As a rule, each property owner owns the area of land upon which its portion of the building is located, as well as a small piece of land at the front and rear of the store. Although strip plazas under multiple-ownership vary greatly in terms of what, if any, collective property there is in a legal sense, often, no-one has overall responsibility for the management of the rear and parking areas and as a result, they often deteriorate rapidly to the level of the least successful business. As communicated by Councillor Moscoe, these problems are currently dealt with by property standards and solid waste inspectors, but results can be short-lived and the properties quickly begin to deteriorate again.

Councillor Moscoe proposes “organizing the plaza into a mini BIA”, i.e., a city board be established to organize property owners in strip plazas and provide a means of funding to improve their properties. Fees would be collected by the City from the individual property owners and redistributed to improve the common, though privately owned, areas of the strip plaza, and to manage such services as garbage storage and collection,

recycling programs and landscaping. It appears that the board is intended to have the power to overrule individual property rights.

COMMENTS

If the recommendations in Executive Committee Item 3.3, which will be before Council at its meeting on May 23, 2007, are adopted, City Council will have established all BIA boards of management as City boards, and will have prohibited BIA boards from funding improvements to private property, with the exception of graffiti and poster removal services. In addition to the fact that Council may have established a policy against BIAs funding improvements to private property, there are substantial legal impediments to doing so, as set out in the report, dated May 15, 2007 from the City Solicitor and the General Manager of Economic Development, Culture and Tourism (the “General Manager”) to City Council.

Legal Framework of City Boards

The City has broad authority under section 143 of COTA to establish city boards and can give them the control and management of such **municipal services and activities** as the City considers appropriate, by delegating the powers and duties of the City to the board in accordance with COTA. The powers provided to a city board are subject to limits on and duties related to, the power and any procedural requirements, including conditions, approvals and appeals which apply to the power.

To the extent that any provincial or federal legislation imposes procedural requirements, including conditions, approvals and appeals, those procedures must be incorporated in any by-law passed by the City. Furthermore, the City cannot pass a by-law that frustrates the purpose of any other provincial or federal legislation, including an order made or issued under provincial or federal legislation. Section 11 of COTA provides that a City by-law that frustrates the purpose of the legislation is without legal effect to the extent of any conflict with the legislation.

Establishment of a City Board to Improve Private Property

The City’s property standards by-law, Chapter 629, Property Standards, was enacted under the authority of the *Building Code Act, 1992* (the “BCA”), which allows the City to pass by-laws prescribing standards for the maintenance and occupancy of property, and requiring property that does not conform with the standards to be repaired and maintained to conform with the standards. The BCA contains precise procedural requirements that must be followed by the City before it can enforce its property standards by-laws, including the issuing of orders to conform, and the provision of appeal rights. Any by-law to establish a City board to compel the improvement of private property is subject to the limitation in section 12 of COTA, that all procedural requirements, in this case as set out in the BCA, must be followed before the City can perform the repairs for the property owner. The costs incurred by the City in carrying out the repairs are a lien against the property with priority lien status.

The City cannot do indirectly what it cannot do directly. The establishment of a city board to improve private property would likely be viewed as an attempt to circumvent the enforcement requirements set out in the BCA, as City boards are agents of the City, and their purpose can be said to be in conflict with or frustrating the purpose of the BCA.

In addition, the City and its city boards may charge fees under Part IX of COTA for services or activities provided or done by or on behalf of the City or city board. If the City or its city board lacks the necessary legislative authority to provide a service or activity, the City and its city board have no authority to charge a fee. City boards can only be established to control and manage municipal services and activities.

Aside from the issue of whether the funding of private property improvements is a municipal service, there are substantial legal impediments to removing the restriction on BIA funding of private property improvements due to the issues of vacancy tax and charity tax rebates, the priority lien status granted to BIA charges and bonusing. These issues, which were canvassed in the report dated May 15, 2007 from the City Solicitor and the General Manager to Council, are set out in Appendix A to this report.

Commercial Façade Improvement Program

The City's Commercial Façade Improvement Program has been approved by Council and is authorized under section 28 of the *Planning Act* and is an exception to the bonusing provisions of COTA. Section 28 permits Council to designate a Community Improvement Project Area and authorizes the City to make grants or loans to owners of buildings within the area to pay for the whole or any part of the cost of rehabilitating such buildings. In order to offer such grants, Council must first designate an area as a Community Improvement Project Area and adopt a Community Improvement Plan. Most BIAs are in Commercial Improvement Project Areas and therefore, commercial properties within those BIA boundaries are eligible for Façade Improvement Program grants.

The Commercial Façade Improvement Program/Community Improvement Plans apply to general areas, and individual property owners within the area become eligible for grants based on a number of objective criteria. While grants are provided to private property owners, facade improvements benefit the area as a whole as the improvements are perceptible from the public realm. To a large extent these criteria require owners to have demonstrated a long term commitment to the neighbourhood.

Despite that, the *Planning Act* does not expressly prohibit the designation of specific properties as Community Improvement Project Areas. However, the designation of a specific site as a Community Improvement Project Area is questionable as community improvement is targeted at area improvement and not individual property improvement. This point is substantiated by the *Planning Act's* definition of a Community Improvement Project Area and the description of the powers pursuant to the relevant provisions of the Act.

While it is not open to the City to establish strip plazas as BIAs for the purpose of improving private property, there may be an opportunity to designate them as Community Improvement Project Areas. The question as to whether it is possible and appropriate to designate a specific site as a Community Improvement Project Area to facilitate grants for property improvements requires further analysis. Consideration should be given to whether the improvements contemplated would benefit the area as a whole and improve the public realm. Further consideration should also be given to whether it is appropriate to be providing grants for private property owners to carry out work to accomplish what is required by property standards by-laws.

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SIGNATURE

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ATTACHMENT

Appendix "A" - Legal Issues Pertaining to BIAs Funding Private Property Improvements as set out in the Report dated May 15, 2007 from the City Solicitor and the General Manager to Council.

APPENDIX “A”

Legal Issues Pertaining to BIAs Funding Private Property Improvements as set out in the Report dated May 15, 2007 from the City Solicitor and the General Manager to Council.

BIA Tax Issues

COTA clearly contemplates that BIAs will be established for the same purposes as set out in the *Municipal Act, 2001*. Sections 329(12) and 331 of COTA (which provide for charity tax rebates and vacancy tax rebates) define “tax” to include fees and charges imposed for the promotion of the area as a business and shopping area, or the improvement, beautification and maintenance of **City-owned land, buildings and structures** in the area beyond that provided at the expense of the City generally, i.e. the same description of the purposes for which BIAs were established under the *Municipal Act, 2001*. Deviation from the definition of “tax” will jeopardize the eligibility of properties within the BIAs for charity tax rebates and vacancy tax rebates in relation to BIA levies.

Priority Lien Status

BIA charges are collected under the fees and charges sections of COTA (sections 258 - 266), for services provided on behalf of the City. Under Ontario regulation 594/06, fees and charges that are imposed by the City for the purpose of promoting the area as a business or shopping area, or to oversee the improvement, beautification and maintenance of **City-owned land, buildings and structures** in the area, beyond that provided at the expense of the City generally, are given priority lien status. Fees and charges for improvements to private property therefore do not have priority lien status.

Bonusing

Section 82 of COTA prohibits the City from **directly or indirectly** assisting any manufacturing business or other industrial or commercial enterprises through the granting of bonuses. The enhancement of private property using BIA funds, or funds from another city board established for that purpose, could be subject to legal challenge on the basis of bonusing by the City, especially as city boards are agents of the City. Such improvements arguably provide a greater benefit to the property owner than to the City, and are not necessary to maintain the economic and social well being of the community. There is no public nuisance to be eliminated and such a program is unlikely to be equally available to all property owners.

Section 83 of COTA allows the City to make grants for purposes that council considers to be in the best interests of the City, subject to the bonusing provisions in section 82 of COTA. Case law indicates that in order to avoid being a bonus, the City must receive sufficient consideration or public benefit in return for the assistance provided. Where the assistance provided is widely available to commercial enterprises, there is less chance that the assistance violates section 82.