TORONTO

STAFF REPORT
INFORMATION ONLY

Legislative Changes Regarding Section 37/45 Community Benefits in Ontario Municipal Board Decisions

Date:	October 21, 2008
To:	Planning & Growth Management Committee
From:	Chief Planner and Executive Director, City Planning
Wards:	All
Reference Number:	Pg080066

SUMMARY

City Planning staff consulted closely with Legal Services staff in the preparation of this report. Legislative changes that would mandate the use of Section 37 in appeals to the Ontario Municipal Board of rezoning applications involving increased density and/or height would offend principles of natural justice. Such legislative changes would inappropriately fetter the independence, objectivity and jurisdiction of the Ontario Municipal Board, and result in unfairness to parties involved in the appeal. Consequently, no recommendation is put forward and this report is for information only.

Financial Impact

This report will have no financial impact.

DECISION HISTORY

City Council on June 23 and 24, 2008, referred the following Motion (MM22.8) to the Planning and Growth Management Committee:

"Request the Provincial Government to Require Section 37
Donations in Every Ontario Municipal Board Decision."

At the September 10, 2008 meeting, Planning and Growth Management Committee (Item PG18.8) took the following actions:

1. deferred the item to the October 14, 2008 meeting of the Committee;

2. requested the Chief Planner and Executive Director of City Planning to submit a report at that time recommending legislative changes that would give effect to the intent of the Member motion; and that the report address public benefits provided under Section 45.

An information report dated September 29, 2008 from the Chief Planner and Executive Director was submitted to the October 14, 2008 meeting of Planning and Growth Management Committee (Item PG19.9), advising that there had been insufficient time to prepare the report and that the requested report would be submitted to the November 13, 2008 meeting. On October 14, 2008, the Committee deferred the item to the November 13, 2008 meeting.

City Council has previously (April, 2004) taken a position with respect to OMB reform in response to the provincial government's then-proposed legislation on planning reform. The following link is to Council's position on OMB reform taken at that time: http://www.toronto.ca/legdocs/2004/agendas/council/cc040415/cofa.pdf (see pp. 3-7). A summary of Council's position on OMB reform and recent related changes to legislation is contained in Appendix A to this report.

ISSUE BACKGROUND

The following link is to the motion referred by City Council: (http://www.toronto.ca/legdocs/mmis/2008/pg/bgrd/backgroundfile-14829.pdf).

The following link is to the report dated September 29, 2008, mentioned above, that was forwarded to the October 14, 2008 meeting of the Planning and Growth Management Committee:(http://www.toronto.ca/legdocs/mmis/2008/pg/bgrd/backgroundfile-16007.pdf).

COMMENTS

As the issue under discussion involves fundamental legal principles as well as how the appropriate Section 37 community benefits should be determined, Legal Services staff was consulted and the legal advice figures prominently in the following discussion. Because the Planning and Growth Management Committee requested a report on legislation to give effect to the intent of the motion, and because Section 37 may only be used in a zoning by-law to obtain community benefits in return for granting the increased density and/or height, an underlying assumption in this report is that the motion pertains specifically to applications to increase the zoning permissions for density and/or height.

In April, 2004, in response to proposed provincial legislation on Planning Act reform and a revised City of Toronto Act (see link in Decision History, above, and also see Appendix A to this report), City Council recommended, in summary, that:
- there be no *de novo* OMB hearings;
- the OMB become a true appeal body and not a substitute decision maker;
- there be a "leave to appeal" process;
- grounds for appeal be limited to Council acting "unreasonably", not being consistent with the Provincial Policy Statement or not in conformity with Provincial Plans;

- there be a local appeal body option for the City for Committee of Adjustment decisions.

While the subsequently enacted legislation did implement some reforms to OMB jurisdiction and process, only the last item in the above summary of Council's recommendations was implemented. Implicit in this discussion is an assumption that the OMB will continue with hearings *de novo*, since Council's previous request to eliminate such hearings was not implemented.

Given the above assumptions, Legal staff has advised that no recommendation should be put forward for legislative changes to give effect to the intent of the motion. The main reason is that the OMB is an independent, impartial, arms length tribunal, before which every application is judged on its own merits. Any appeal of a rezoning application is a hearing *de novo*, in which all pertinent facts and opinions (evidence) are put before the OMB panel hearing the matter and a decision is made based on all the evidence. Legislation that has the intent of fettering the independence, objectivity and jurisdiction of the OMB in a hearing would not be in the interests of natural justice and would almost certainly not be supported by the provincial government.

Council could conceivably again recommend eliminating hearings *de novo*, but staff did not interpret the Committee's direction as encompassing this possibility.

The whole of the proposed zoning by-law in question is subject to appeal, and legislation to give effect to the motion would have to identify and protect from appeal the use of Section 37, as one element of the case out of many under consideration; in effect, the use of Section 37 would be extracted from the hearing *de novo* and shielded from appeal. If the use of Section 37 is one of the issues in dispute between the applicant and the City, the question of how that dispute would be resolved remains unanswered. Further, assuming that such protection from appeal is feasible, the legislation would also have to prescribe how Section 37 should be used. Given that the use of the tool is first subject to Official Plan policies, the implementation of which is open to some interpretation, and secondly that the type and level of benefits are the subject of a negotiated agreement between the City and the applicant, a prescription for the use of Section 37 in appeals that is workable and fair to all parties (including the appellants if other than the applicant) would be virtually impossible to legislate.

As an example, the OMB has the power to modify the density, height, and built form of a proposed development, among other matters, when a zoning by-law is appealed. In situations where the OMB decides to change the density of the development, logic would suggest that the use of Section 37 as proposed by the City should also be modified, but if such use has been shielded from the appeal, meaning the OMB cannot adjudicate the use of Section 37, the issue of how the appropriate use of Section 37 could be determined again remains unresolved.

Furthermore, to suggest that the City's recommended use of Section 37 is in every situation the appropriate one, and that it would remain appropriate if the proposed development is changed by the OMB, conflicts with the principles of natural justice and

fairness that underpin the appeal process. The City may not always agree with the OMB decisions regarding Section 37, but the use of Section 37 in OMB appeals cannot be legislated while maintaining fairness to all parties involved.

Committee members in discussing the matter at the September 10, 2008 meeting mentioned the situation where the City refuses to approve a development and the applicant appeals. Where City Planning staff has recommended refusal, a separate recommendation could potentially be put forward in the same planning report that deals with the appropriate Section 37 community benefits in the event that the application is refused and appealed to the OMB. However, such a recommendation could appear to undermine the City's refusal by implying that the provision of community benefits might somehow compensate for the approval of the project or might mitigate to some degree those concerns that led to the recommendation of refusal in the first place.

A possible avenue for Council's future consideration is implementation of the Development Permit System (DPS), perhaps in a limited geographical area initially, because once established through an Official Plan Amendment, (which itself would be subject to appeal), the individual permit approvals would not be subject to appeal. Conditions can be imposed in conjunction with a development permit approval which are very similar to the use of Section 37 and would not be subject to appeal. Legislation (City of Toronto Act) and Regulations authorizing a DPS are already in place.

Based upon the above discussion, no acceptable recommendation for legislative change could be formulated by staff, and this report is for information only.

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ATTACHMENTS

Appendix A: Summary of City of Toronto Position and Legislative Changes Regarding Ontario Municipal Board Reform

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Appendix A

Summary of City of Toronto Position and Legislative Changes Regarding Ontario Municipal Board Reform

On April 15 and 16, 2004, Toronto City Council adopted the March 1, 2004, report from the Commissioner of Urban Development Services consolidating and updating positions previously taken by the City with respect to planning and OMB reform. Council's recommendations were forwarded to the Minister of Municipal Affairs and Housing. Planning staff consulted with interested Councillors and ratepayers on the subject of OMB reform, in preparing the March 1, 2004 report recommendations.

On June 1, 2004, the Province released 3 Consultation Discussion Papers dealing with OMB reform; Planning Act Reform & Implementation Tools; and a draft Provincial Policy Statement. On July 20, 21 and 22, 2004, City Council adopted a further report from the Commissioner of Urban Development Services, dated June 21, 2004, providing a comprehensive City position with respect to these Papers.

On December 12, 2005, the Province introduced Bill 51, *Planning and Conservation Land Statute Law Amendment Act, 2005* as part of its ongoing efforts to reform land use planning in Ontario and redefine its relationship with Ontario municipalities. The bill also contained a number of key reforms to the Ontario Municipal Board. Bill 51 received third reading and Royal Assent on October 19, 2006 and took effect January 1, 2007. On May 23, 2006, City Council adopted a report from the Chief Planner advising Council of the contents and implications of Bills 51 and 53, *Stronger City of Toronto for a Stronger Ontario Act, 2005* as they pertain to land use planning matters, including the shifting role and scope of the OMB.

What Council Recommended Regarding OMB Reform:

- There be no de novo hearings;
- The OMB become a true appeal body and not a substitute decision maker;
- There be a "leave to appeal" process;
- Grounds for appeal be limited to Council acting "unreasonably", not being consistent with the PPS or not in conformity with Provincial Plans;
- There be a local appeal body option for the City for disputed Committee of Adjustment decisions.

Key Council recommendations with respect to OMB reform were as follows:

(i) That municipalities be afforded adequate time to review and decide on an application, even where the legislated timeframes cannot be met, taking into account the complexity of the planning application and context and when the applicant has submitted the necessary information, and in particular:

- after an initial municipal review, the applicant and the municipality negotiate a realistic schedule for submission of necessary information and processing of the application;
- the OMB take on a case management role in mediating and/or adjudicating disputes or appeals based on "failure to proceed"; and
- the OMB refer back to Council for processing those "failure to proceed" appeals where the required information is incomplete or when there has been inadequate time for proper municipal review and decision-making and case manage "failure to proceed" appeals through mediation and adjudication.

(ii) That the role of the OMB should be to determine whether City Council has acted within its rules and regulations and, if it determines that City Council has not, the decision be referred back to City Council;

(iii) That the legislation governing the planning process and appeals to the OMB be amended to reflect the primacy of municipal decision-making on planning matters, subject to consistency with declared Provincial interests, and more particularly that a full OMB hearing "de novo" on an appeal of a planning application should not be automatic and should only be scheduled if the Board first finds that a municipality has acted unreasonably, or in a manner not consistent with the Provincial Policy Statement;

(iv) That the concept of denying appeals of non-municipally endorsed official plan amendments be broadened to areas other than "urban settlement boundaries", and in particular consider denying appeals of non-municipally endorsed official plan amendments regarding conversion of or change in boundaries to employment lands;

(v) That Committee of Adjustment matters are entirely local in nature and that as such should not be subject to review by a Provincial body. (Municipalities should have the option in legislation of establishing a "local appeal board" to hear appeals of Committee of Adjustment decisions).

Council also recommended a number of revisions to Board practices and procedures so as to facilitate improved public participation in OMB hearings and proceedings and administrative practices with respect to OMB appointments.

What the City Got:

The reforms contained in Bill 51 establish a higher standard for decision-making at the municipal level and impose significant limitations on the scope of the OMB's decision-making process. The reforms, however, are not as fundamental as Council had advocated in its submissions during the planning reform consultation period, to the Province. Although Council decisions can still be appealed to the Board, a number of changes

contained within Bill 51 circumscribe the scope of those appeals and establish limits on the Board's role.

Highlights of Bill 51 include:

(i) Bill 51 requires that the Board "should have regard to" Council decisions and any supporting information and materials that Council may have considered in making its decision;

(ii) Municipal councils are empowered to require that development applicants provide all and any information Council believes is necessary to make an informed decision – at the front end of the approvals proves (subject to having "complete application" official plan policies in place);

(iii) Setting restrictions on who may appeal Council decisions relating to Official Plan and zoning matters by limiting appeals by persons or public bodies to only those who had previously made oral submissions at a public meeting or written submissions to Council, before a council decision was made;

(iv) Setting restrictions on adding parties to OMB hearings to parties who had previously presented oral and/or written submissions before the Council decision was made or where the Board is of the opinion that there are "reasonable grounds" to add the person or public body as a party (This provision applies if info and material that is presented at the hearing of an appeal was not provided to the municipality before the council made the decision that is the subject of the appeal);

(v) Removing the right of appeal from a decision of Council that refuses an application to convert employment land to non-employment;

(vi) Setting restrictions on evidence presented at a hearing - limiting evidence to what had been provided to Council before its decision was made, unless the OMB is of the opinion that it was not reasonably possible to provide pertinent new info at that time;

(vii) To permit new information, the Board will be obliged to notify Council and give it the opportunity to reconsider its decision – Council must make its written recommendation to the Board within a prescribed time period of 60 days;

(viii) The OMB has been given a forth grounds for dismissal: It can dismiss an appeal or part of an appeal on the grounds of an "abuse of process" (This power was granted through by expanding Section 17 (45(a)) of the Planning Act. The three other reasons for dismissal currently in the Act include: no planning grounds; not made in good faith; for the purposes of delay.);

(ix) The OMB cannot undo what has already been approved (such as "in-effect"

official plan policies) nor approve anything that has not been dealt with in the decision of Council to which the notice of appeal relates;

(x) The OMB may, on its own initiative or on the motion of the municipality or the Minister, dismiss all or part of an appeal without holding a hearing, if, in the board's opinion, the application to which the appeal relates is substantially different from the application that was before council at the time of council's decision;

(xi) Municipalities can set up a Local Appeal Body (LAB) for disputed Committee of Adjustment decisions.

- Bill 51 gives all municipalities the opportunity to set up "LABs" – however they have to demonstrate to the province that they have the capability to undertake this function. Toronto's version of this new power is set out in Bill 53 and is automatic (as opposed to conditional).

What the OMB Changes Mean for the City:

- Higher expectations are established for local decision-making;
- Greater weight given to municipal decisions by OMB;
- Council decisions remain appealable to the Board, but the scope of appeals is circumscribed and limits are established re the Board's role;
- An approval authority or the OMB will need to "have regard to" any decision made by Council and any supporting information used by Council in that decision;
- The OMB and other government agencies will have to make decisions that are consistent with current and in-force provincial plans and policy statements.

As a package, the OMB reforms represent a substantial change in the planning approval and appeal process, but fall short of Toronto Council's recommendations to make the OMB a true appeal body.