



STAFF REPORT INFORMATION ONLY

Comments on a Communication to the North York Community Council Respecting 'Grandfathering' of a By-law to Restrict Reverse Slope Driveways

Date:	April 3, 2009
To:	City Council
From:	Chief Planner and Executive Director, City Planning and City Solicitor
Wards:	8, 9, 10, 15, 16, 23, 24, 25, 26, 33, 34
Reference Number:	cc090013

SUMMARY

North York Community Council requested a report directly to City Council on the comments of a communication respecting "grandfathering" clauses associated with the passing of zoning by-law amendments restricting reverse slope driveways. This report indicates that from a legal perspective, the Planning Act does not authorize a municipality to provide for grandfathering or similar exemptions in a zoning bylaw that are based on the status of a building permit application or other planning approval.

From a planning perspective, the proposed grandfathering clauses are inappropriate for a zoning bylaw and, more importantly, create an inequitable situation whereby current proposals for reverse slope driveways would be exempt and deemed conforming while existing properties with reverse slope driveways would become legal non-conforming. This proposal would be difficult to justify as good land use planning.

Financial Impact

There is no financial impact associated with this report.

DECISION HISTORY

North York Community Council, at its meeting held on March 26, 2009, held a statutory public meeting under the Planning Act to consider a report recommending zoning amendments to regulate reverse slope driveways in the North York Community Council District Boundary. North York Community Council's decision was to recommend to

City Council that the zoning amendments be passed on December 1, 2009. The full decision of the Community Council can be found here:

<http://www.toronto.ca/legdocs/mmis/2009/ny/decisions/2009-03-26-ny24-dd.pdf>

ISSUE BACKGROUND

At its meeting held on March 26, 2009, the North York Community Council received a communication related to the matter of zoning amendments to regulate reverse slope driveways. The communication contained the following request:

“The following are the scenarios which should be “grandfathered” and/or exempt from the application of the new by-law prohibiting below grade garages:

- 1) Complete applications for a preliminary zoning review which indicate no variance to permit a below grade garage is required, which means that such applicants have paid for architectural plans on a lot which was not prohibited from including a below grade garage;
- 2) Complete applications for building permits where a below grade garage is part of the design, whether the below grade garage was as of right and/or approved by way of a minor variance;
- 3) Applications for minor variance which have been approved prior to the passage of the by-law, where below grade garage variances were sought and/or included in the plans as a result of the below grade garage being permitted “as of right”;
- 4) Applications for minor variances which are pending, which involve plans that include a below grade garage, whether the below grade garage is sought by way of a variance and/or permitted “as of right”;
- 5) Applications for minor variance which have been approved and/or considered by the Committee and/or are under appeal to the Ontario Municipal Board and/or have been approved by the Ontario Municipal Board, all of which occurred prior to the passage of the by-law, which involve designs that include a below grade garage;
- 6) Complete applications site plan approval (sic) where a below grade garage is part of the design, whether the below grade garage was as of right and/or approved by way of a minor variance’
- 7) Applications for site plan approval which been approved (sic) and/or considered by Council and/or are under appeal to the Ontario Municipal Board and/or have been approved by the Ontario Municipal Board, all of which occurred prior to the passage of the by-law, which involve designs that include a below grade garage; and

- 8) Applications for zoning by-law amendment which been approved (sic) and/or considered by Council and/or are under appeal to the Ontario Municipal Board and/or have been approved by the Ontario Municipal Board, all of which occurred prior to the passage of the by-law, which involve designs that include a below grade garage.

North York Community Council requested the Chief Planner and Executive Director, City Planning and City Solicitor to submit a report directly to City Council on the scenarios proposed in the above communication.

COMMENTS

On January 13, 2009, at the request of City Council, a statutory public meeting was held before the North York Community Council to consider amendments to the zoning bylaws or portions thereof, that are within the boundaries of the North York Community Council District, that would restrict reverse slope driveways from being developed in connection with dwelling units that have direct street access. This request stemmed from a report City Council in September 2008 on basement flooding across the City by the General Manager, Toronto Water. The Toronto Water report advised that reverse slope driveways exacerbate basement flooding during particular storm events. At that meeting, City Council requested a report on zoning amendments to restrict reverse slope driveways in the North York Community Council District. The proposed by-law amendments, subject of the January 13, 2009 Community Council meeting, were passed by City Council on January 28, 2009.

Subsequently, City Council, at its meeting held on February 23, 24 and 25, 2009, passed a motion requesting the repeal of these zoning amendments restricting reverse slope driveways. The purpose for repealing these bylaws is to give opportunity to owners of house sites with development proposals that include reverse slope driveways that have received approvals through rezoning applications, variance applications to the Committee of Adjustment, or from the Ontario Municipal Board (OMB) on appeal, to obtain a building permit. This would also offer an opportunity to those who had purchased property with the intent of incorporating a reverse slope driveway, where previously permitted, to apply for a building permit.

City Council's direction from its February 23, 24 and 25, 2009 meeting also requests the reinstatement of zoning amendments restricting reverse slope driveways, however, at a later date. This would allow time for owners with current applications for reverse slope driveways to obtain a building permit. City Council also directed that North York Community Council recommend a date on which these new bylaws should to be re-enacted. The date recommended by North York Community Council is December 1, 2009. This date was chosen in order to give sufficient time for people that had proposed to construct with a reverse slope driveway and/or had obtained Committee of Adjustment approval and were contemplating a reverse slope driveway to obtain a building permit prior to the zoning amendments being passed. It is within this context that the communication concerning "grandfathering" should be read.

LEGAL COMMENTS

The Planning Act contains specific provisions regarding the date when a zoning by-law comes into legal force and effect. Where a zoning bylaw is passed under section 34 of the Planning Act, it is deemed to have come into force on the day it was passed. Even where an appeal has been made to the Ontario Municipal Board, once all appeals have been withdrawn or disposed of, the bylaw is deemed to have come into force on the day it was passed except for those parts of the bylaw that have been amended or repealed by the OMB.

There is no provision in section 34, or elsewhere in the Planning Act, allowing a municipality to provide for “grandfathering” or exemptions in a zoning bylaw based on the status of a building permit application by the owner or other planning approvals or processes. Even if such authority existed, the effect of including these types of exemptions would be to legalize any reverse slope driveway that came within such exemption, whereas reverse slope driveways existing prior to the enactment of the zoning restrictions would enjoy only legal non-conforming status. In addition to creating two separate classes of reverse slope driveways, this difference in status would appear to undermine the very intent and purpose of the proposed zoning amendments, which is to not allow such driveways.

If some types of applications currently in process are deemed by City Council as deserving of relief from the proposed restrictions on reverse slope driveways, the City Solicitor is of the opinion that the date of December 1, 2009, which has been recommended by North York Community Council as the proposed date of re-enactment of the amending bylaws or such other date as City Council deems appropriate, should be a sufficient “grace period” to provide such relief. This course of action is also more supportive of the fundamental rationale underlying the proposed zoning restrictions.

PLANNING COMMENTS

Even if there was legal authority to provide grandfathering in this manner, it would not be advisable to do so.

The term to “grandfather” is a general expression used to describe an exemption from a rule change. Because the term has no particular legal meaning, it must be understood in the context in which it is used. For example, it is common to provide exemptions to fee increases based on the date of application. Similarly, exemptions are offered in the case of process changes, honouring applications submitted prior to a selected date. In the case of development related applications, they are often referred to as “pipeline projects”, that is, applications prepared and submitted under the old rules. In such cases, “grandfathering” is applied out of a sense of fairness.

It is the pipeline projects that are at issue in this instance. Generally speaking, the Planning Act protects pipeline projects through legal non conforming status or the right of appeal to the Ontario Municipal Board. City Council’s decision to consider a report

for the repeal of the current zoning amendments to restrict reverse slope driveways indicates that legal non conforming status and the appeal procedure to the Ontario Municipal Board are unsatisfactory and a different approach to resolving pipeline projects is warranted. In this regard, proposing a future date of passing of by-laws that restrict reverse slope driveways (after the repeal of same) is the preferred approach.

In examining the list of possible grandfathering situations contained in the communication to North York Community Council, item number two, which references a complete application for building permit, is different from the other items referenced above. A complete building permit application is unique in that these types of applications include all information required to review and issue a building permit, including all applicable law approvals such as Site Plan Approval, Committee of Adjustment Decisions or Ontario Municipal Board Orders. In these situations the Chief Building Official would be in a position to issue a building permit but has not yet done so, whether for operational or other reasons. In this scenario, rights would crystallize and the building permit would be issued notwithstanding the zoning change. Therefore, there is no need to provide any relief.

The remainder of the suggested grandfathering items all reference applications of some type. The concept of referencing various types of applications in the zoning by-laws presents several problems and concerns. Foremost is the issue of conformity with the zoning by-law. These applications if exempted from the proposed zoning amendments would become effectively legal conforming, that is to say, the properties to which these applications apply would always have the right to a reverse slope driveway. Contrast this situation with that of existing reverse slope driveways. These properties that have existing reverse slope driveways are only offered the protection as a legal non-conforming use, which means that in time, through redevelopment, these existing reverse slope driveways could not be replaced as of right. On this basis, it is difficult to justify why pipeline projects should receive a different and more favourable treatment.

Another problem with the application based approach is that there is no understanding of number of properties affected and their locations. This means the test for conformity will be the application itself. In the case of Committee of Adjustment applications, Item 3 of the communication suggests approval being received prior to the passing of the proposed zoning bylaw amendments. On the other hand, Item 4 suggests the applications that are 'pending' also be exempt. Item 5 goes further to exempt Committee of Adjustment applications that are under appeal prior to the passage of the proposed by-law amendments. In the circumstance of appeals to the Ontario Municipal Board, it is difficult to rationalize how that is different, in terms of time and process, from the appeals submitted with respect to the original January 28 by-law zoning amendments.

An additional issue with including exemptions in the zoning by-law by way of type and timing of applications is the burden of proof. In reading the language in the communication it appears as though the applicant for a building permit will provide proof although this is unclear. In addition, the proposed grandfathering clauses capture any decision of the Committee of Adjustment approved prior to the passage of the by-law.

This means anyone who received a Committee of Adjustment approval last year or even years earlier would be exempt forever from the proposed by-law amendments.

The concern City Council should have with this approach to grandfathering is that it is treating groups of current property owners differently from others. Zoning is about land use. The regulations are applied to properties based on defined 'zones'. The regulations run with the property and not the property owner. The proposed 'grandfathering' clauses do not identify properties but rather a group of property owners that might be treated differently from other property owners by virtue of having applied for permissions to include a reverse slope driveway. Including such grandfathering clauses in the zoning by-law would be difficult to support as good 'land use' planning.

This report was prepared in consultation with the Chief Building Official.

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SIGNATURE

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ATTACHMENTS

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