



**STAFF REPORT
ACTION REQUIRED
Confidential Attachment**

**Metrolinx Rail-to-Rail Diamond Grade Separation Project
– Formal Noise/Vibration Complaint Process and Legal
Issues**

Date:	July 27, 2009
To:	City Council
From:	City Solicitor
Wards:	11, 13, 14, 17 and 18
Reason for Confidential Information:	This report is about litigation or potential litigation that affects the City and contains advice or communications that are subject to solicitor-client privilege.
Reference Number:	

SUMMARY

This report has been prepared for submission directly to City Council as requested by Council at its meeting of May 25, 26 and 27, 2009 to provide Council with information respecting the status of the formal noise/vibration complaint made by the West Toronto Diamond Residents Group to the Canadian Transportation Agency (“CTA”) and recommendations as to the City’s possible involvement in the process to support the local residents’ concerns.

Legal Services staff has been advised by CTA representatives that this is the first time that a complaint respecting an “urban transit authority” such as Metrolinx (formerly GO Transit) has been considered under the *Canada Transportation Act* process.

CTA staff has also advised that it is a recognized part of the process that the City will be requested to provide comments in respect of the complaint once the submissions of the parties have been received. Given the direct participation by the City, it is not necessary that Council consider the giving of a grant to support the activities of the residents.

RECOMMENDATIONS

The City Solicitor recommends that City Council:

1. Authorize the City Solicitor to prepare submissions for the City of Toronto in the proceeding before the Canadian Transportation Agency (“CTA”) to consider the complaint (included as Attachment 2 to this report) made by the West Toronto Diamond Community Group with respect to the noise and vibration caused by the rail-to-rail West Toronto Diamond grade separation project currently being undertaken by Metrolinx (formerly GO Transit).
2. Direct that the City Solicitor and other City staff, as directed by the City Manager, consult with the local residents in the preparation of submissions to the CTA.
3. Consider and receive Confidential Attachment 1 for information, and that the contents of Confidential Attachment 1 not be made public to avoid prejudicing the City and the residents’ case before the Canadian Transportation Agency.

IMPLEMENTATION POINTS

Legal Services staff has been in contact with both the residents group and CTA staff and shall prepare comments based upon the submissions of the parties.

FINANCIAL IMPACT

The recommendations in this report are not expected to have any direct financial cost implications.

DECISION HISTORY

At its meeting of May 25, 26 and 27, 2009, City Council adopted Notice of Motion 36.1 containing the following recommendations:

1. City Council express its support for the residents affected by the excessive vibration and noise emanating from the Rail-to-Rail Diamond Grade Separation Project.
2. City Council request the City Solicitor to report directly to the July 6 and 7, 2009 Council meeting on whether there is an opportunity for the City to participate before the Canadian Transportation Agency (CTA), whether there are potential improvements to the complaint mediation protocol which would facilitate City participation in support of its residents in this or future similar issues and if a grant to the residents to assist with the costs of retaining expertise such as a lawyer or consultant, is possible.

3. City Council invite Metrolinx to submit written comments on this issue to the July 6 and 7, 2009, meeting of City Council.

ISSUE BACKGROUND

As indicated the material submitted in support of Notice of Motion 36.1 and various media reports, residents in the vicinity of the Metrolinx Grade Separation Project have since the beginning of this year been experiencing significant noise and vibration impacts as a result of the pile driving operation undertaken by Metrolinx as part of the grade construction project. Metrolinx has so far taken the position that the current pile driving methods used are necessary for timing and cost reasons and that all reasonable measures have been taken to reduce noise and vibration emissions. The residents are maintaining in their complaint that other “low noise” methods can be used and have requested that the CTA immediately call a halt to the work and order the use of these other methods. This submission is set out in detail in the residents’ formal submission to the CTA as contained in Attachment 2 to this report.

COMMENTS

Included with this report as Attachment 2 is the main complaint document filed by the West Toronto Diamond Community Group with the CTA. For the convenience of Council, I have included only the main portion of the document, which included many pages of attachments documenting the history of the complaint and discussions with Metrolinx.

The complaint is requesting that the CTA deal with the complaint on an expedited basis and that the CTA issue an interim injunction to put a halt to the construction pending its consideration and determination of the complaint. The CTA has refused the request to expedite the process and has so far not granted an injunction. The residents are requesting that the CTA order that the project be completed by using “silent piling” technology which will, in their submission, address the noise and vibration concerns.

The CTA Process: In 2007, the Federal *Canada Transportation Act* was amended to include a specific complaints resolution process for noise and vibration complaints from the operation or construction of federally-regulated railways (e.g. CN or CP) and provincially-based “public passenger service providers” such as Metrolinx, whose operations are not normally subject to CTA jurisdiction. City staff has been advised that this complaint will be the first time that the CTA has dealt with an issue respecting a public passenger service provider. The stages of the CTA process may be summarized as follows:

1. Collaborative measures undertaken by the parties themselves to try to resolve the issue.
2. Facilitation and mediation by the CTA to attempt to resolve the issue.

3. Filing of a formal complaint with the CTA where collaboration or mediation has not been successful.

Role of the Municipality: Where the CTA receives a complaint, it will ensure that the local municipality is informed of the complaint and will seek comments from the municipality. There is therefore a recognized role for the municipality in the complaints process. Legal Services staff has been advised by the CTA that the City of Toronto can participate in this proceeding. It appears that the City shall be required to submit its comments by mid to late August 2009.

Factors Considered by the CTA: In determining whether a railway company has caused only such noise or vibration as is “reasonable” under the *Act*, the CTA will weigh and consider a number of elements, which may be generally summarized as follows:

- the railway company's operational requirements and service obligations to its customers;
- the nature/use of the affected area;
- the characteristics and magnitude of the noise or vibration;
- the impact of the noise or vibration disturbance on the persons affected;
- the relevant standards to assess the significance of the effects of noise and vibration levels; and
- available mitigation methods and any efforts made to reduce the impact of the noise or vibration.

It should be noted that the CTA is prepared to consider municipal standards or guidelines in its deliberations but does not consider itself to be bound by municipal by-laws in reaching a decision.

In the current case, while Metrolinx has indicated that it is operating in compliance with Municipal Code Chapter 591, Noise, it has also not conceded that it is bound by municipal noise regulations.

The Confidential Attachment 1 to this report contains further discussion for the information of Council of the legal issues to be considered by the CTA and the City's jurisdiction in respect of federal railway operations and the activities of Metrolinx.

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SIGNATURE

Anna Kinastowski, City Solicitor

ATTACHMENTS

Confidential Attachment 1 – Metrolinx Rail-to-Rail Diamond Grade Separation Project – Formal Noise/Vibration Complaint Process and Legal Issues

Attachment 2 – Complaint (dated June 9, 2009) from the West Toronto Diamond Residents Group to the Canadian Transportation Agency