



**STAFF REPORT
ACTION REQUIRED
with Confidential Attachment**

**245-255 College Street, and 39 & 40 Glasgow Street –
Rezoning Application, Settlement Discussions &
Settlement Privilege at the OMB**

Date:	June 11, 2013
To:	City Council
From:	City Solicitor
Wards:	Ward 20
Reason for Confidential Information:	This report contains advice or communications that are subject to solicitor-client privilege. This report is about litigation or potential litigation that affects the City or one of its agencies, boards, and commissions.
Reference Number:	10 239490 STE 20 OZ

SUMMARY

At its meeting of May 14, 2013, Toronto and East York Community Council requested that the City Solicitor report to City Council on "the legal issues surrounding amendments being made during a mediation where the information cannot be shared in public".

The request arose out of an in camera discussion of confidential information pertaining to agenda item TE24.16, a Request for Direction Report with Confidential Attachment regarding an Ontario Municipal Board appeal and associated mediation for a rezoning application for a 24-storey academic residence at 245-251 College Street and 39 & 40 Glasgow Street.

The purpose of this report is to respond to the request of Toronto and East York Community Council.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council receive this report and the Confidential Information attached for information.
2. Given that the Confidential Information contains legal advice and opinion that is subject to solicitor-client privilege and information regarding pending litigation, it should remain confidential and should not be made public.

Financial Impact

The recommendations of this report will have no financial impact beyond what has already been approved in the current year's budget.

DECISION HISTORY

The applicant appealed their application for a 24-storey academic residence to the Ontario Municipal Board (the "OMB" or "Board") on March 12, 2012 on the basis of Council's failure to enact the requested amendment within the timelines prescribed by the *Planning Act*.

A Request for Direction Report (May 18, 2012) and a Supplementary Report from City Planning and Toronto Building (June 30, 2012) were considered by City Council on July 11, 12 and 13, 2012 and the recommendations of staff were adopted (<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2012.TE17.15>).

An OMB mediation resulted in proposed changes to the proposal that were presented to City staff on a without prejudice basis in April, 2013. A joint Request for Direction Report from the City Solicitor and Chief Planner and Executive Director, City Planning (May 10, 2013) and attached Confidential Information was considered by Toronto and East York Community Council and discussed in camera at its meeting on May 14, 2013

(<http://www.toronto.ca/legdocs/mmis/2013/te/bgrd/backgroundfile-58338.pdf>).

That report and the recommendations of Toronto and East York Community Council will be before City Council at its meeting of June 11 and 12, 2013.

At the end of May, 2013, the applicant filed further revised plans with the OMB and the other parties. These are discussed in more detail in a joint Supplementary Request for Direction Report (June, 2013) that will also be before City Council at its meeting of June 11 and 12, 2013.

ISSUE BACKGROUND

245 & 251 College Street - OMB Process

Pre-hearing conferences were held in August and November of 2012. A Procedural Order was issued identifying the parties and the issues and 15 days commencing March 18, 2013 were set aside for a hearing.

In addition to the City and the applicant, a group of interested residents and residents' associations including the Grange Community Association, the Harbord Village Residents Corporation, The Huron-Sussex Residents Organization, Jenny Friedland and Julie Lam sought and were granted party status as a group (the "Resident Party"). A number of other interested persons sought and were granted participant status.

The City filed witness statements for 3 witnesses, including a planner, an urban designer, and a transportation planner in mid-February, 2013. Through its counsel, the Resident Party filed eight witness statements, including one from the local Ward Councillor.

Prior to the commencement of the hearing, the applicant requested an OMB mediation session. Participating in mediation was consistent with staff's instructions from Council, which were to oppose the application in its current form but to continue discussions concerning appropriate heights and massing and appropriate benefits to be secured through Section 37.

On consent of the parties, including the City and Resident Party, four days were set aside at the end of March for mediation. The hearing was postponed to July 2, 2013. Notice of the postponement was provided to all parties and participants on March 11, 2013.

In advance of the mediation, all parties as well as the local Ward Councillor's office confirmed their understanding that the mediation was between the parties only and that the details of all proceedings throughout the mediation would be confidential and without prejudice. The details of the mediation are discussed in greater detail in the attached Confidential Information.

It is not uncommon for OMB appeals to be the subject of ongoing discussions and negotiation. Increasingly, the OMB is encouraging mediation to assist in narrowing or resolving issues prior to a hearing. Negotiation often results in changes to a proposal from what was originally submitted.

Mediation and settlement discussions are subject to settlement-privilege, which protects information arising out of settlement discussions as confidential and without prejudice. Because information pertaining to mediation is protected by settlement privilege, City staff and City Councillors are not at liberty to discuss it publicly.

General Principles of Mediation & Settlement Privilege

The Law Society's Rules of Professional Conduct require all lawyers in the province of Ontario to encourage their clients to consider mediation to settle disputes whenever possible. The City often participates in mediation at the OMB to settle or narrow disputes, frequently with great success.

The purpose of mediation is to encourage the timely resolution of disputes and to resolve or narrow disputes outside of the more public, protracted, expensive, and uncertain context of litigation. Mediation is voluntary, confidential and non-binding. It encourages collaboration and negotiation between parties and involves the intervention of a neutral third-party to assist in resolving disputes. Some or all parties to a dispute may choose to participate in mediation, but because it is voluntary, not all parties have to participate. It is not uncommon for mediation to involve "breakout" sessions or "caucuses" with a mediator and one or more parties to the exclusion of others in order to foster frank discussion and so that the mediator can better understand the parties' respective positions.

The parties themselves, with the assistance of a mediator, determine the outcome and consequences of the issues. They have full and final control over the resolution of their disputes because the process is non-binding unless a consensus is reached. When the City participates in mediation, City staff report to City Council on the outcome of the mediation in order to seek direction. Unless City Council endorses whatever solution has been suggested through mediation, it is not binding on the City. There is no prejudice to the City or to the other parties when no consensus is reached, as whatever is discussed in mediation cannot be used against a party at a hearing or trial.

Any information or communication disclosed in the course of mediation is protected by settlement privilege and is confidential and without prejudice. Settlement privilege arises from the fundamental principle that there is an overriding public interest in favour of settlement and the encouragement of parties to negotiate freely, without fear of repercussion should the negotiations fail. There is a broad public policy to encourage settlement discussions, and to protect any admissions made within the context of such discussions. Settlement privilege is taken very seriously at the OMB, and has been said to be fundamental to the fair and efficient functioning of the Board.

A cornerstone of mediation rests in its confidential nature. Confidentiality is fundamental to the effectiveness of mediation as it encourages open dialogue and protects what is said in mediation from being raised later should the dispute ever go to a hearing or to trial. The confidential nature of mediation allows the mediator to gather information necessary to identify potential solutions to a dispute or to provide advice to the parties. As the mediator is a neutral third-party, they have no interest in the dispute. Should the dispute escalate to a hearing or trial, the mediator may not be called upon to give evidence (except in narrow circumstances such as disputes regarding costs).

MEDIATION AT THE OMB

OMB Rules of Practice and Procedure

The OMB strongly encourages mediation and other forms of settlement negotiation prior to hearings. Mediation is defined in the OMB Rules of Practice and Procedure (the "OMB Rules") as: "the intervention into a disputed matter or matters before the Board by a Board Member to facilitate negotiations among the parties and assist them in developing a mutually acceptable settlement, all of which is conducted on a confidential basis".

OMB Rules 66-69, attached, provide that mediation can be convened for all or two or more willing parties; that the Board mediator may make use of any appropriate dispute resolution techniques to help the parties reach a resolution; that a Board Member who conducts a mediation may not preside at a hearing of the same issues without the consent of all of the parties; and the confidential nature of the proceedings.

Code of Conduct for Ontario Municipal Board Mediators

The main objectives of the Code of Conduct for OMB Mediators' are to provide guiding principles for mediators' conduct and to promote confidence in mediation as a process for resolving disputes at the OMB.

The Code of Conduct confirms the voluntary, non-binding and confidential nature of OMB mediations, as well as the impartial role of the mediator. It provides that a mediator may, if requested and in confidence, offer a view of the strengths and/or weaknesses of a particular party's case. It contemplates that mediators may hold private sessions such as breakout meetings or caucuses with one or more parties, provided that they discuss the nature of such sessions prior to commencing them.

SUMMARY AND CONCLUSION

Mediation and settlement discussions in general are an important part of the OMB process, and often provide the City an opportunity to resolve disputes to the satisfaction and advantage of the City without recourse to a full contested hearing.

Settlement privilege protects information regarding without prejudice changes to a proposal arising from mediation or settlement discussions. City Council is provided an opportunity to give direction on without prejudice proposals. The City has an opportunity to make a case either in support of or in opposition to a proposal that has been revised through mediation at a hearing, so there is no prejudice to the City arising from participation in mediation where no consensus is reached.

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SIGNATURE

Anna Kinastowski, City Solicitor

ATTACHMENTS

Attachment 1 – Excerpts of OMB Rules on Mediation

Attachment 2 – Confidential Information

Attachment 1 – EXCERPTS OF OMB RULES ON MEDIATION

From:

<http://www.omb.gov.on.ca/stellent/groups/public/@abcs/@www/@omb/documents/webasset/ec059424.pdf>

“mediation” means the intervention into a disputed matter or matters before the Board by a Board Member to facilitate negotiations among the parties and assist them in developing a mutually acceptable settlement, all of which is conducted on a confidential basis;

MEDIATION

66. Mediation A party or parties may request the Board to conduct a mediation of any issue raised in a proceeding. Prior to the Board granting this request, the Chair or a Vice-Chair designated by the Chair will conduct a mediation assessment of the proceeding to determine whether the issue or proceeding is suitable for mediation. If the Chair or designated Vice-Chair determines that mediation should proceed, then the Board will convene a mediation, with the participation of all or two or more of the parties, should they provide their consent to each other and the Board. The Board shall set the date of the mediation and direct how notice of the mediation will be given.

67. Procedure at a Mediation If a mediation request is granted, the Board will appoint a mediator who is a Member of the Board, and the mediator may make use of any appropriate dispute resolution techniques to help the parties involved in the mediation enter into a voluntary resolution of the issues in dispute.

68. Member to Preside at Hearing Event Only with Parties’ Consent A Board Member who conducts a mediation in which one or more of the issues have not been resolved may not preside at any hearing event of those unresolved issues unless all of the parties consent and the Board Member agrees.

69. Mediation or Settlement Discussions Confidential The details of proceedings during a mediation are confidential. Any information or documents provided or exchanged during the mediation and any suggestion for resolution of the issues or offer to settle made during a mediation shall remain confidential and cannot be disclosed in evidence in the same or other proceeding, nor be placed on the Board file. A Board Member’s notes of mediation shall remain confidential and shall not be released to any person or admitted into evidence in any proceeding. A Board Member that participates in mediation is not competent or compellable in any proceeding to give evidence or produce documents regarding the mediation discussions.