

Legal Comments on Lake Ontario Waterkeeper's Submission

Date:	March 20, 2014
To:	City Council
From:	City Solicitor
Wards:	20, 28
Reference Number:	

SUMMARY

At its December 3, 2013 meeting, the TEYCC Subcommittee to Review Billy Bishop Airport Consultant Reports requested "the City Solicitor to read and review the Lake Ontario Waterkeeper Legal Brief (December 3, 2013) and submit a report directly to City Council on December 16, 2013, on the issues raised in this Brief."

The City Solicitor and the Legal Services Division have read and reviewed the submission – originally entitled *Submission from Lake Ontario Waterkeeper in the matter of the proposed Billy Bishop Toronto City Airport Expansion* and now in the deputation record as Item EX 38.1.123 -- and offer the observations below on the legal issues raised.

Financial Impact

There is no financial impact beyond what already has been approved in the current year's budget.

DECISION HISTORY

At its September 10-13, 2013 meeting, the Toronto and East York Community Council ("TEYCC") decided to establish a sub-committee "to review the reports by the consultants retained to review the proposed Billy Bishop (Island) Airport expansion insofar as the reports pertain to the issues that fall under the jurisdiction of the Toronto and East York Community Council, including but not limited to planning, transportation, impact on local parks, schools and community centres."

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.TE26.116>

At its December 3, 2013 meeting, the Subcommittee to Review Billy Bishop Airport Consultant Reports requested that "the City Solicitor to read and review the Lake Ontario Waterkeeper Legal Brief (December 3, 2013) and submit a report directly to City Council on December 16, 2013, on the issues raised in this Brief."

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.TY2.1>

At its December 5, 2013 meeting, the Executive Committee deferred Item 36.7 ("Request to Amend the Tripartite Agreement for Billy Bishop Toronto City Airport") until the earlier of a special meeting of Executive Committee or the February 4, 2014 meeting of Executive Committee, thereby deferring this report to the February 18-19, 2014 meeting of Council.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.EX36.7>

At its February 4, 2014 meeting, the Executive Committee deferred Item 38.1 ("Request to Amend the Tripartite Agreement for Billy Bishop Toronto City Airport") until a special meeting of Executive Committee on March 25, 2014, thereby deferring this report to the April 1-2, 2014 meeting of Council.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2014.EX38.1>

ISSUE BACKGROUND

Council's Executive Committee is currently considering whether to recommend that Council amend the Tripartite Agreement to remove the ban on jet service and extend the runways to accommodate such service (together, the "Proposed Changes"). The Tripartite Agreement is a legal agreement entered into on June 30, 1983, among the City of Toronto, Toronto Port Authority ("TPA"), and Government of Canada (represented by Transport Canada). It governs operations at the Billy Bishop Toronto City Airport ("BBTCA").

The *Submission from Lake Ontario Waterkeeper in the matter of the proposed Billy Bishop Toronto City Airport Expansion* (the "Submission") -- which was provided to the TEYCC Subcommittee to Review Billy Bishop Airport at its December 3, 2013 meeting and subsequently to Executive Committee at its December 5, 2013 meeting -- recommends that the Executive Committee defer the BBTCA matter until various policy considerations are made and regulatory steps occur. Below are the key legal issues from the Submission and the requested response from the City Solicitor.

COMMENTS

1. Great Lakes Water Quality Agreement and Ontario Great Lakes Protection Act

Part I of the Submission claims that the Proposed Changes at BBTCA may conflict with recent federal and provincial developments regarding the future of Lake Ontario water quality. Those developments include the 2012 renewal of the Great Lakes Agreement

Between Canada and the United States of America on Great Lakes Water Quality (“GLWQA”), the proposed Ontario Great Lakes Protection Act (“OGLPA”), and related action plans and strategies. The Submission indicates that Council should do its part to uphold the purposes, principles, and approaches of the GLWQA and OGLPA in deciding whether to amend the Tripartite Agreement to allow the Proposed Changes.

The analysis is largely accurate. However, the City has no legal obligations under the GLWQA. TPA and Transport Canada – the two other signatories to the Tripartite Agreement – are the entities required to comply. Although the OGLPA may eventually impose obligations on the City, the Province has not yet enacted it.

2. Toronto Official Plan's Environmentally Significant Areas

The Submission then discusses the City's Official Plan policies regarding Environmentally Significant Areas ("ESAs") and the Province's Areas of Natural and Scientific Interest ("ANSI") in the vicinity of BBTCA. The section addresses the nature of the ESAs and ANSIs, as well as related commentary from the City's consultant study conducted by CH2M Hill on potential impacts to the aquatic and terrestrial environment. The section recommends that Council consider whether the Proposed Changes would adversely affect either ESAs or ANSIs. The Submission adds that if the answer is affirmative, then Council must not amend the Tripartite Agreement to allow the Proposed Changes.

The giving of advice with respect to whether a development proposal is in conformity with the City's Official Plan is normally the role of City Planning. Given that City staff have not yet received a copy of TPA's final proposal for the Proposed Changes, it would be difficult at this time for City Planning to offer a concrete opinion respecting compliance with the City's Official Plan specific to this matter. Council's decision about whether to amend the Tripartite Agreement to allow for the Proposed Changes would be adopted through the confirmatory by-law enacted by Council at the end of its meeting. The Planning Act requires by-laws passed by Council to be for purposes in conformity with the Official Plan. Therefore, before deciding whether to amend the Tripartite Agreement, Council will need the advice of City Planning on whether the Proposed Changes conform with the Official Plan.

To that end, in consultation with the Legal Services Division, City staff have asked the TPA to provide the City with its final proposal for the Proposed Changes and its updated Airport Master Plan, as well as the related planning rationale, for City staff to consider as part of its forthcoming Bathurst-Quay precinct planning exercise. City Planning would then review the proposal, Master Plan, and this information for the purpose of advising City Council.

3. Compatibility with Waterfront Revitalization and Recreational Uses

The Submission then discusses whether the Proposed Changes are compatible with the waterfront revitalization currently underway and with recreational uses on the waterfront.

The November staff report before the Executive Committee refers to the City's Official Plan Site Area Specific Policy 194 ("SASP 194") which, among other things, states that revision to the Tripartite Agreement "may be undertaken, provided that the City is satisfied that improvements to airport facilities and operations can be made without adverse impacts on the surrounding residential and recreational environment."

As noted above with respect to the ESAs and the ANSIs, once the TPA's final proposal for the Proposed Changes is provided to the City, City Planning would review the specific proposal for conformity with the City's Official Plan. The review would include consideration of SASP 194 for the purpose of advising City Council on whether the proposed amendment to the Tripartite Agreement conforms with the Official Plan.

4. Environmental Assessment

Part II of the Submission begins with points about transparency and fairness and with commentary on the *Canadian Environmental Assessment Act 2012* ("CEAA 2012") that requires some clarification. Again, given that City staff have not yet received a copy of the TPA's final proposal for the Proposed Changes, the City Solicitor cannot offer concrete advice regarding application of and compliance with environmental assessment requirements specific to this matter.

However, a general review of the CEAA 2012 appears to indicate that the environmental assessment process applies only to a list of federally designated projects and that nothing on the current list seems to pertain to the Proposed Changes as presented to the City to date. Nevertheless, Section 14(2) of the CEAA 2012 does appear to provide the federal Minister of the Environment with discretion to "designate a physical activity that is not prescribed [such as the Proposed Changes] . . . if, in the Minister's opinion, either the carrying out of the physical activity may cause adverse environmental effects or public concerns related to those affects may warrant the designation." Additionally, separate and apart from the Minister ordering an environmental assessment, Section 67 of the CEAA 2012 prohibits a project on federal lands unless the federal authority (in this case, the TPA) determines that the project is not likely to cause significant adverse environmental effects. If TPA cannot make that determination, TPA may request the Governor in Council (*i.e.* Cabinet) to decide whether the significant environmental effects are justified in order to allow the project to proceed.

In light of these parameters, in consultation with the Legal Services Division, City staff requested that TPA complete an environmental assessment to the City's satisfaction regardless of whether and how CEAA 2012 applies. On February 27, 2014, TPA provided an environmental assessment proposal that City staff is now reviewing.

5. Permits

The Submission ends with a discussion about the federal permits that the Navigable Waters Protection Act 2012, the Fisheries Act, the Species At Risk Act, and the Migratory Birds Act may require for the Proposed Changes to occur. The discussion is

largely accurate with respect to the permitting requirements themselves but inaccurately implies that little is in place to ensure that the TPA complies with these permitting requirements. On the contrary, Section 16 of the current Tripartite Agreement requires the TPA to comply with all applicable laws, including any of the aforementioned federal permitting requirements. Only once City staff receives a copy of TPA's final proposal for the Proposed Changes can an assessment, in consultation with the City Solicitor, be undertaken to determine such compliance.

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SIGNATURE

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