

Review of Mediation and Settlement in Planning Process

Date: March 11, 2022

To: Planning and Housing Committee

From: City Solicitor

Ward: All

SUMMARY

Planning and Housing Committee requested that the City Solicitor report on the negotiation process for development applications which have been appealed to the Ontario Land Tribunal ("OLT"). This report provides that information, and an analysis of the obligation on City Staff and City Council to maintain confidentiality in the negotiation process once litigation has begun.

Mediation is an important part of the OLT process, and often provides the City an opportunity to resolve disputes to the satisfaction and advantage of the City without recourse to a full contested hearing. There is little downside in participating in mediation, given the potential for resolution and the fact that if no consensus is reached, there is no prejudice to the City in having tried to resolve the matter, as whatever is communicated in mediation cannot be used against a party at a hearing.

There are opportunities for public participation in OLT mediation, which interested members of the public can, and should be encouraged to, avail themselves of.

RECOMMENDATIONS

The City Solicitor recommends that:

1. Planning and Housing Committee receive this report for information.

FINANCIAL IMPACT

The City Solicitor confirms that there are no financial implications resulting from the recommendations included in this report in the current budget year, or in future years.

DECISION HISTORY

At its meeting of November 25, 2021, Planning and Housing Committee adopted "Review of Mediation and Settlement on Planning Process" directing the City Solicitor, in consultation with the Chief Planner and the City Clerk to report in the first quarter of 2022 on the negotiation process for development applications which have been appealed to the Ontario Land Tribunal. The direction is available using the following link:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2021.PH29.19>

COMMENTS

The Role of Public Consultation in the Planning Process

The Planning Act sets out a process for landowners to make applications to the City to facilitate development on their lands. Notice to the public, and in particular to those who live and work near lands that are proposed to be developed, is a key part of the legislative process. Notice ensures that consultation takes place with those who are interested in, and most likely to be impacted by, any decision of City Council on the development proposal. Application materials and related documents are made available to the public. At the City of Toronto, community consultation happens as early in the process as possible with the provision of a Preliminary Report to Community Councils by City Planning and the holding of a community meeting in addition to the statutory meeting requirements set out in the Planning Act.

The City encourages community consultation even before an application is made, but once the application is filed with the City and deemed complete, the legislation only provides the City with ninety (90) days to make a decision on a zoning by-law amendment and one hundred and twenty (120) days to make a decision on an official plan amendment. If City Council has not made a decision on a zoning by-law or official plan amendment application, on the ninety-first (91st) or one hundred and twenty-first day (121st) day, respectively, the applicant can appeal to the OLT effectively taking the decision-making authority away from City Council. At this point in time, the process becomes an adversarial legal proceeding between the applicant/appellant and the City, with the OLT as decision-maker. Public consultation is not a traditional part of litigation, as lawyers must be able to provide advice and get instructions in a privileged and confidential environment. Moreover, City lawyers do not take direction on how to represent the City from the public or an individual City Councillor, but rather from City Council as a whole, which is their client.

Members of the public can participate in the litigation as either a party or a participant in the hearing at the OLT. Through the appeal process, members of the public may seek to play a role in mediation, if it is held.

General Principles of Mediation and Settlement Privilege

Mediation

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. Mediation can be successful even if all the parties to a dispute do not participate or reach resolution.

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. 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 the solution that has been suggested through mediation, it is not binding on the City.

Benefits of Mediation and Settlement Privilege

Some of the benefits of mediation include that the parties may be able to preserve relationships with each other; there is often a good chance of success in finding a mediated solution; since there is no winner or loser, the parties can control the mediation process and take ownership of the outcome; and mediation is typically less costly than litigation.

There are many examples to support the view that a mediated settlement results in a better solution in most situations, than a solution that may be imposed by an adjudicator at the conclusion of litigation, in which one party "wins" and the other "loses."

Settlement Privilege or the Without Prejudice Rule

Parties to negotiation must be able speak freely so that any concession offered during mediation is not later used against them in litigation, if negotiations fail and they proceed to a contested hearing. In the absence of such protection, few

parties would participate in settlement negotiations. Any information disclosed in the course of mediation is, therefore, protected by settlement privilege and is confidential and without prejudice. Courts have shielded communications, whether written or oral, made with a view to reconciliation or settlement, from disclosure.

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, to protect any admissions made within the context of such discussions, without fear of repercussion should the negotiations fail.

Settlement privilege is the cornerstone of settlement discussions including mediation. Confidentiality is fundamental to the effectiveness of settlement discussions including mediation as it encourages open dialogue. The confidential nature of mediation allows the mediator to gather information necessary to identify potential solutions to a dispute or to provide assistance 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, the mediator may not be called upon to give evidence (except in narrow circumstances such as disputes regarding costs) or to adjudicate the matter.

Mediation at the OLT

The City participates in mediation either through a private mediator or, more often, at the OLT to settle or narrow disputes with respect to *Planning Act* applications. Frequently, these negotiations have had great success.

OLT Rules of Practice and Procedure

The OLT strongly encourages mediation and other forms of settlement negotiation prior to hearings. Mediation is defined in the OLT Rules of Practice and Procedure (the "**OLT Rules**") as: "the intervention into a disputed matter or matters before the Tribunal by a Tribunal Member, or alternatively, a Mediator approved by both the Chair and the Ministry of the Attorney General, to facilitate discussion and negotiations among the parties and assist them in developing a mutually acceptable settlement of the dispute, all of which is conducted on a confidential basis."

OLT Rule 18, provides that mediation directed and convened by the Tribunal shall include the municipality whose decision or non-decision is the subject of the appeal and the appellant(s) as determined by the Tribunal. In appropriate circumstances, a person who is not a party may participate in a mediation with the permission of the Tribunal and the consent of the mediating parties, subject to terms established by the Tribunal for doing so.

Mediation Practice Directions

The OLT has developed a set of practice directions for mediation. These directions provide, in essence, that mediation is intended to be a creative and flexible process; that mediators will be chosen based on merit and experience with the subject matter; that mediations are designed to maximize efficiency and minimize costs; that OLT mediators have the sole discretion to determine whether the attendance of any person, including an elected official, is conducive to the wellness of a mediation session and will or will not be permitted; and that breaches of confidentiality can be sanctioned.

Settlement privilege is taken very seriously at the OLT, and has been said to be fundamental to the fair and efficient functioning of the Tribunal. Parties who have agreed to mediate with each other must execute a mediation agreement obligating them to maintain confidentiality, and confirming the inadmissibility in evidence, during litigation, of any mediation materials or communications disclosed during mediation. Costs may be awarded against a party who breaches the confidentiality of mediation.

City Staff's Professional Obligations to Maintain Confidentiality in the Mediation Process

Lawyers

Lawyers have an independent ethical obligation of confidentiality toward their clients, which goes beyond the constitutionally-protected right to solicitor-client privilege. There are seventy-four uses of the word "confidential" in the Law Society of Ontario's Rules of Professional Conduct (the "**LSO Rules**"), with the heart of the rule found at 3-3-1:

A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless (a) expressly or impliedly authorized by the client; (b) required by law or by order of a tribunal of competent jurisdiction to do so; (c) required to provide the information to the Law Society; or (d) otherwise permitted.

This rule applies to information disclosed over the course of mediation and any legal advice provided to City Council.

Planners

The Canadian Institute of Planners imposes on Registered Professional Planners ethical confidentiality obligations, as set out in the Canadian Institute of Planners Code of Professional Conduct and Statement of Values:

Members shall

1.2 provide full, clear and accurate information on planning matters to decision-makers and members of the public, while recognizing the employer or client's right to confidentiality and the importance of timely reporting; [and]

2.4 respect the client or employer right to confidentiality of information gathered through a professional relationship, unless such right conflicts with other aspects of [the] Code;

In addition, Members of the Ontario Professional Planners Institute shall:

1.2 provide full, clear and accurate information on planning matters to decision makers and members of the public, while recognizing both the client's right to confidentiality and the importance of timely recommendations; [and]

2.6 respect the client or employer right to confidentiality of information gathered through a professional relationship.

All City Employees

Finally, in the specific context of the City, the Toronto Public Service By-law, §192-16 provides that:

(A) A City or Agency employee may not, during the term of his or her employment or any time thereafter, directly or indirectly use or disclose any confidential information obtained by him or her during the course of his or her employment with the City or Agency to another person or entity unless the employee is required by law, or authorized by the City or Agency.

(B) The obligation to maintain confidentiality, except as required or permitted by law or by the City or an Agency, continues after the employee leaves the public service.

The cumulative result of these ethical obligations is that all City staff who participate in the settlement discussions including the mediation of an appeal to the OLT must maintain any information or materials disclosed during that mediation, and any advice provided to City Council about that mediation confidential, unless expressly permitted to disclose such information by City Council. The consent of the applicant/appellant to disclose information provided to the City on a without prejudice and confidential basis may also be required.

A Lawyer's Obligation to Their Client to Encourage Settlement of Disputes

In addition to lawyers' confidentiality obligations, the LSO Rules require all lawyers in the province of Ontario to encourage their clients to consider mediation to settle disputes whenever possible.

The City Solicitor's "client" as that term is defined in the LSO Rules, is City Council. The City Solicitor's client is not any individual City Councillor, any member of the public or incorporated association of residents, or even City staff.

The LSO Rules provide that "a lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings [emphasis added]" (Rule 3.2.4).

Although a lawyer's role is to resolutely advocate for the client, good advocacy can be achieved by finding a negotiated resolution. In order to accomplish this objective through mediation, lawyers are expected to take a co-operative, mutual problem-solving approach rather than an adversarial stance. This co-operative and creative approach lends itself particularly well to Planning Act matters, which often involve multiple parties each with their own interests, and which occur in a multi-faceted policy-led context (rather than, for example, a dispute between two parties related to a personal injury or the payment of liquidated damages pursuant to a contract, which disputes tend to be more positional and personal).

Implementation of the Obligation to Encourage Settlement of Disputes

The City Solicitor's obligation to encourage her client to settle disputed Planning Act applications is implemented by way of Request for Direction reports to City Council, from the City Solicitor, in consultation with City Planning staff, in respect of settlement offers made to the City. Given the City's governance and organizational structure, the City Solicitor must seek instructions directly from her client, City Council, in this way.

Settlement offers can be provided to the City on either a "without prejudice" basis, or on a "with prejudice" basis. Whether an appellant elects to make an offer "without prejudice" or "with prejudice" is entirely within the appellant's discretion.

In the case of a "without prejudice" settlement offer, the contents of the settlement offer are only revealed upon the acceptance by City Council of the settlement offer, and only with the consent of the applicant/appellant. City staff are constrained by their confidentiality obligations in terms of the information that can be provided in the public portion of a Request for Direction report on a "without prejudice" settlement offer.

In case of a "with prejudice" settlement offer, the content of the settlement offer is available for public review on the publication of the City Council meeting agenda at which the settlement offer will be considered. In this case, staff can be more descriptive of the settlement offer in the public portion of the Request for Direction report than they can be in the case of a "without prejudice" settlement offer. City Councillors are also at liberty to review a "with prejudice" offer with the local community prior to the City Council meeting at which it will be considered, without disclosing the confidential advice and recommendations of the Request for Direction report.

Mindful of the City Solicitor's obligation to encourage her client to resolve disputes, and based on the professional advice provided to the City Solicitor by City Planning and other staff, along with the City Solicitor's own assessment of the case, the City Solicitor will present advice and recommendations to City Council for consideration on the settlement offer received. Whether the settlement offer is "with prejudice" or "without prejudice," the *advice* of the City Solicitor with respect to the appeal is, and remains, confidential, unless otherwise directed by City Council. In most cases, however, the City Solicitor's *recommendations* are published by the City Clerk on acceptance of a settlement offer, whether it is "with prejudice" or "without prejudice." There are circumstances in which the publication of those recommendations may prejudice the City's position in the litigation, and in which immediate transparency is simply not appropriate. In those cases the City Solicitor will recommend to City Council that the confidential instructions to staff remain confidential at the discretion of the City Solicitor.

Accountability and Transparency in Municipal Decision-Making

Section 131 of the *City of Toronto Act, 2006* ("**COTA**") defines the role of City Council to include "to represent the public and to consider the well-being and interests of the City;" and "to ensure the accountability and transparency of the operations of the City, including the activities of the senior management of the City."

Section 190 of COTA requires City Council to conduct its business at meetings open to the public, except in limited circumstances. Subsection 190(2) of COTA provides that a meeting or part of a meeting may be closed to the public if the subject matter being considered is, among other matters:

- Litigation or potential litigation, including matters before administrative tribunals, affecting the City or local board;
- Advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

Reading Sections 131 and 190 of COTA together allows for interpretation of the meanings of "transparency" and "accountability" in the municipal context, despite those terms not having been defined in the Act. This interpretive approach is supported by the 2007 decision of the Supreme Court of Canada in *London (City) v. RSJ Holdings Inc.*, in which the Court had the opportunity to interpret the open meeting requirements of Section 239 of the *Municipal Act, 2001* (which are the same as the open meeting requirements of Section 190 of the *City of Toronto Act, 2006*) in relation to a *Planning Act* matter.

In its decision, the Court documented the basis for the open meeting requirements of municipal legislation in Ontario. The Court recited the following, at paragraphs 18 and 19:

Prior to 1995, whether a meeting was open to the public or not generally depended not on the subject matter under consideration, but on the type of meeting being held. In Ontario, as well as under various provincial statutes, regular council meetings were generally open to the public while committee and other meetings were closed and could only be opened at the discretion of council (M. R. O'Connor, *Open Local Government 2: How crucial legislative changes impact the way municipalities do business in Canada* (2004), at p. 25). It is particularly noteworthy that one recurring problem mentioned in the 1984 Ontario Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information was that "some municipal councils employ lengthy, in-camera special and committee meetings to discuss matters under debate and then ratify their decision in full council in a few minutes, with minimal discussion" (p. 2). See also, the report of the Ontario Commission on Freedom of Information and Individual Privacy ("Williams Commission"), *Public Government for Private People* (1980). In the hope of thereby fostering democratic values, and responding to the public's demand for more accountable municipal government, these reports recommended compulsory open meetings of municipal councils and committees, subject to narrow exceptions.

These recommendations were acted upon by the Government of Ontario in the early 1990s (Ontario, Ministry of Municipal Affairs, *Open Local Government* (1992), at pp. 2-3 and 31) and Bill 163 (the *Planning and Municipal Statute Law Amendment Act*, 1994, S.O. 1994, c. 23) adopted the open meeting requirement that is now contained in s. 239 of the *Municipal Act, 2001*. The open meeting requirement was intended to increase public confidence in the integrity of local government, by ensuring the open and transparent exercise of municipal power (Legislative Assembly of Ontario, *Official Report of Debates* (Hansard), No. 162, November 28, 1994, at p. 7978 (Pat Hayes)).

[emphasis added]

Based on the legislative framework consisting of the *Planning Act* and the COTA, assisted by the foregoing interpretive jurisprudence, this report operates on the basis of the following meanings of "accountability" and "transparency":

"Accountability" means the principle that the municipality will be responsible to its stakeholders for decisions made and policies implemented, as well as its actions or inactions.

"Transparency" means the principle that the municipality actively encourages and fosters stakeholder participation and openness in its decision-making processes. It means that the municipality's decision making process is open and clear to the public.

The obligations of City Council to engage in accountable and transparent decision-making may be viewed as being at odds with the City Solicitor's obligation to encourage City Council, to voluntarily engage in a confidential mediation process, and City staff's obligation to maintain settlement privilege. As set out above, though, there are some matters for which the legislature has allowed City Council to operate within a sphere of privacy, in meetings that are closed to the public. The Supreme Court affirmed this in the *London (City) v. RSJ Holdings* decision. For present purposes in particular, once a *Planning Act* matter has been appealed to the OLT (which is part of the process through which an OLT-led mediation would be initiated), the City becomes a party to litigation and City Council may consider City staff advice and communications about that litigation in a non-transparent manner, pursuant to COTA. To the extent that advice or communications provided to City Council reflect mediation discussions, City Council, in fact, is bound not to breach settlement privilege. The OLT may visit cost consequences on a party to a mediation who breaches settlement privilege, including the City.

It is worth noting that, in considering a Request for Direction report regarding a Planning Act application that has been appealed to the OLT, City Council is not making a *decision* to approve or refuse that application. The process by and authority under which City Council makes *decisions* on Planning Act applications are set out in the Planning Act and the Official Plan, and include public consultation and open statutory meetings, both of which encourage stakeholder engagement and transparency in decision-making.

Decision-making authority on a Planning Act application is, as set out above, transferred to the OLT immediately on the filing of a Notice of Appeal that complies with all legislative requirements and the Tribunal's Rules. In these circumstances, the outcome of City Council's consideration of a Request for Direction Report is *instructions* to City staff in respect of the conduct of the litigation. This outcome is distinguishable, pursuant to Subsection 190(2) of COTA, in the degree of openness and transparency permitted to be afforded to

that consideration, from a *decision* made pursuant to the *Planning Act* on a development application.

Role of City Councillor

During the course of negotiations, the local councillor will often be consulted by city staff on a confidential basis. The councillor can provide important insight into the issues and assist with reaching a consensus. Any information shared in this context must be kept confidential. If the mediator and parties agree there may be some instances where the councillor can seek a broader consultation with the community. The City Solicitor may be able to assist in this regard, and in fact, has in some situations as set out below.

Without Prejudice Public Consultation in Specific Circumstances

Despite the confidentiality of the mediation process, in some cases the City Solicitor has, with the consent of the mediator and the other parties to a mediation process, arranged for public, without prejudice, community consultation and information meetings with respect to revised development proposals arrived at through mediation. These meetings give members of the public an opportunity to understand revised proposals prior to their consideration by City Council and the OLT, while preserving the "without prejudice" nature of the mediation process. These meetings also allow City Councillors to understand any remaining community concerns with a revised development proposal, and to take them into account when Council is providing confidential instructions to staff for the OLT litigation, thereby fostering stakeholder participation and responsibility to stakeholders.

In addition to consent from the mediator and the parties, the key to the success of creative approaches, like this one, is time. First, community information meetings take time to arrange, and second, in order for the feedback received to be considered in a meaningful way, it must be given well prior to the City Council meeting at which a settlement offer will be considered, particularly if the expectation is that City staff will report to City Council on that feedback.

Even in the case of settlement proposals that are not subject to public consultation as above, it is incumbent on appellants to provide any settlement offer to the City Solicitor well in advance of the City Clerk's agenda closing for a given meeting, so that the City Solicitor can thoughtfully consult with City Planning staff and other colleagues, and prepare a report that includes the City Solicitor's best advice. Having reports available in time for City Council agenda closing also allows City Council the opportunity to review the advice provided, seek any necessary clarification of staff, and give thoughtful consideration to the recommendations prior to voting.

Public Involvement in OLT Appeals

On the whole, given the confidential framework in which City staff are required to operate when mediating, it is incumbent on stakeholders, who wish to be kept apprised of mediation discussions in respect of *Planning Act* appeals, to involve themselves in the OLT proceedings in a manner that would allow for the meaningful sharing of information with them. Stakeholders may avail themselves of either Party or Participant Status. The roles and obligations of a Party in an OLT proceeding are set out in OLT Rule 8, and include full participation in the proceeding including:

- Identifying issues raised in a notice of appeal for the approval of the Tribunal;
- Bringing or responding to any motion in the proceedings;
- Receiving copies of all documents and supporting information exchanged, relied upon or filed in connection with any hearing event conducted in the proceeding;
- Presenting opening and closing submissions at the hearing;
- Presenting and examining witnesses and cross-examining witnesses not of like interest;
- Claiming costs or being subject to a costs award when ordered by the Tribunal; and
- Requesting a review of the Tribunal's decision or order.

Where the Tribunal convenes mediation, as set out earlier in this report, the municipality or approval authority whose decision or non-decision is the subject of the appeal, and the appellant(s) shall participate in mediation. It is generally understood that other Parties in the proceeding (if any) will attend mediation also, to narrow or resolve their issues with a Planning Act proposal.

The role of a Participant is set out in OLT Rule 7.7 as follows: "a person who wishes to participate in a proceeding as a participant, shall file a written participant statement that set out their position on the appeal and issues of the proceeding, together with an explanation of their reasons in support of their position. A participant may only make submissions to the Tribunal in writing unless otherwise provided for by an Act or regulation." A Participant may not request that the Tribunal initiate mediation. However, by way of OLT Rule 18.3, "in appropriate circumstances, a person who is not a party may participate in a mediation with the permission of the Tribunal and the consent of the mediating parties, subject to terms established by the Tribunal for doing so." As such, a Participant stakeholder may request permission to attend mediation. Doing so could help to ensure that the Participant's interests are expressed to the mediator and the Parties. Doing so could also allow the Participant to engage in the process shaping any changes to the proposed development.

Members of the public who may be impacted by a development proposal should be encouraged to seek to participate in the process even after a matter has been appealed to the OLT. Recent changes to the OLT rules have limited the role of Participants to submission of a written statement. Members of the public should get involved as early as possible in the process and stay as engaged as possible. It is recommended that members of the public seek independent legal advice regarding their rights and role in the OLT process as the City Solicitor cannot represent the legal interests of anyone other than her client, City Council.

Conclusion

Mediation and settlement discussions in general are an important part of the OLT 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. There is little downside in participating in mediation, given the potential for resolution. Additionally, there is little 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. City Council always has the choice to not accept a recommended settlement offer coming out of mediation.

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 through the consideration of confidential advice, information and recommendations. City Council is also sometimes provided the opportunity to give direction on with prejudice modifications to a proposal arising from mediation or settlement discussions, and in these cases a greater degree of transparency and openness about those modifications may be possible.

In both cases, the City has an opportunity, at a hearing, to make a case either in support of or in opposition to a proposal that has been revised through mediation, so there is no prejudice to the City arising from participation in mediation where no consensus is reached.

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SIGNATURE

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