

## **Review of Mediation and Settlement in Planning Process**

**Date:** May 19, 2022

**To:** Planning and Housing Committee

**From:** City Solicitor

**Ward:** All

### **SUMMARY**

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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**"). The City Solicitor provided an analysis of the obligation on City Staff and City Council to maintain confidentiality in the negotiation process once litigation has begun in a report to Planning and Housing Committee dated March 11, 2022. Planning and Housing Committee referred the item to the City Solicitor and the Chief Planner and Executive Director, City Planning, to report back to the May 31, 2022 meeting of the Planning and Housing Committee with further examination and to offer advice on any policy, regulation or legislative changes which would improve the process in terms of Council's desire to consult with the public and Council's authority to manage the development review process.

The Chief Planner and Executive Director, City Planning and the City Clerk have been consulted in the preparation of this report.

### **RECOMMENDATIONS**

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The City Solicitor recommends that:

1. City Council direct the City Solicitor in consultation with the Chief Planner and Executive Director, City Planning create an internal protocol for providing periodic councillor briefings throughout the Ontario Land Tribunals Process.
2. City Council direct the City Solicitor and Chief Planner and Executive Director, City Planning to report back on the resources required to establish a Ward Councillor Ontario Land Tribunal liaison to direct the efficient flow of information about Ontario Land Tribunal appeals.

3. City Council direct the Chief Planner and Executive Director, City Planning in consultation with the City Solicitor to advise City Council when an application may be appropriate for dispute resolution in the event of an appeal and that it would be appropriate to invoke one or more of subsections 17(26.1) and (37.4), 22(8.3), 34(20.3) and 34(11.0.0.3) of the Planning Act.
4. City Council request the Province to amend the Ontario Land Tribunal Act and/or Rules of Practice of Procedure of the Ontario Land Tribunal to allow new requests for party status at settlement hearings, notwithstanding a failure to participate in pre-hearing events, and to provide that previous grants of participant status by the Tribunal be without prejudice to the right of the participant to upgrade their status to party status in the event of a settlement between the City and the appellants.
5. City Council request that the Ontario Land Tribunal issue a Practice Direction to require that the hearing of an appeal that has been resolved between the applicant and the City occur no earlier than one month after City Council has voted on it. The Practice Direction could include an obligation on the applicant to give notice that a settlement hearing will be taking place, and that the municipality's issues have been resolved.
6. City Council request that the Province re-enact the *Local Planning Appeal Support Centre Act, 2017* or equivalent legislation to create a provincially funded support centre to establish and administer a cost-effective and efficient system for providing support services to eligible persons respecting matters governed by the Planning Act that are under the jurisdiction of the Ontario Land Tribunal.
7. City Council direct the City Solicitor and Chief Planner and Executive Director, City Planning and City Clerk to report back on the increase in resources required to implement any of the recommendations in this report and as result of changes to the Planning Act made through Bill 109.

## **FINANCIAL IMPACT**

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

## **DECISION HISTORY**

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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>

At its meeting of March 25, 2022, Planning and Housing Committee considered "Review of Mediation and Settlement in Planning Process" and referred the item to the City Solicitor and the Chief Planner and Executive Director, City Planning without making a decision. The referral included direction to further examine and offer any advice on policy, regulation or legislative changes which would improve the process in terms of Council's desire to consult with the public and Council's authority to manage the development review process. The direction is available using the following link:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2022.PH32.5>

At its meeting of May 11 and 12, 2022, City Council considered and adopted a motion titled "Protecting Community Input in the Planning Process" in which City Council requested the Province of Ontario to amend the Planning Act or Ontario Land Tribunal Act to require any applicant who appeals a planning application for lack of decision to hold a community consultation meeting with City Planning and the local City Councillor, at the applicant's expense, prior to the first Case Management Conference at the Ontario Land Tribunal, to ensure that members of the public are aware of the details of the development in order to consider whether they wish to participate in the Ontario Land Tribunal proceedings. The motion is available using the following link:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2022.MM43.13>

## **COMMENTS**

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For the purposes of this Report, staff have assumed that the members of the public with whom City Council wish to consult about a mediated settlement of an OLT appeal are unincorporated, unrepresented members of the public, who would typically not seek party status in an OLT proceeding, but rather participant status. Staff also assume that this report will be read in conjunction with the matters listed in the Decision History section of this report.

On this basis, the City Solicitor and the Chief Planner and Executive Director, City Planning offer the following suggestions, which are grouped thematically:

## **Staff to Provide Periodic Councillor Briefings throughout the OLT Process**

City Council could direct the City Solicitor and the Chief Planner and Executive Director, City Planning, to develop one or more protocols for legal and planning staff to keep the Ward Councillor's office apprised of, if interested, the progress of the appeal process, including the scheduling of Case Management Conferences and hearings, and/or applicant's or staff's desire to mediate. In keeping the Ward Councillor's office apprised, the Ward Councillor should be advised as to City staff's opinions about the application, and whether anything that has occurred has caused or will cause City staff to change their opinions from any earlier publicly expressed opinions about the application or related matter(s).

In order to facilitate these conversations between staff and the Ward Councillor, and/or the Ward Councillor and their constituents, staff could develop a standardized "decision tree" that shows potential process outcomes, and potential recommended courses of action and opportunities for public engagement for each branch of the decision tree.

City Council may wish to consider funding a Ward Councillor liaison to direct the efficient flow of information about OLT appeals between Ward Councillors, Legal Services staff, City Planning staff, and the staff of any other City Division implicated in a given OLT appeal. In staff's view, having staff dedicated to this task will reduce the risk of miscommunication, improve transparency, and allow the staff who are providing professional advice and services to City Council on a Planning Act application to focus on the provision of that advice and those services.

## **City Council May Delay Forwarding an Appeal to the OLT, for the Purposes of Engaging in Alternative Dispute Resolution**

Since 2015, in the event of an appeal to the OLT of a publicly- or privately-initiated Official Plan or Zoning By-law Amendment, City Council has had the authority, pursuant to Subsections 17(26.1) and (37.4), 22(8.3), 34(20.3) and 34(11.0.0.3) of the Planning Act to delay the forwarding of the municipal record (which includes the Notice of Appeal) to the OLT, for the purposes of engaging in mediation, conciliation or other dispute resolution techniques to attempt to resolve the dispute. In each case, the period of time during which the City Clerk must forward the municipal record to the OLT is extended from 15 to 75 days, which allows for a two-month window during which the City and the appellants may use alternative dispute resolution to resolve the appeals. If City Council chooses to invoke any of these authorities, it must give notice of its intention to use dispute resolution techniques to all the appellants, and it shall give an invitation to participate in the dispute resolution process to (i) as many of the appellants as City Council considers appropriate; (ii) the applicant, if there is an applicant who is not an appellant; and (iii) any other persons or public bodies that

City Council considers appropriate. In each case, participation in alternative dispute resolution by the invitees is voluntary.

In invoking these authorities, and in choosing not to forward the appeals to the OLT for 75 days, in staff's view it would not be appropriate for the City to avail itself of Tribunal-led mediation. If City Council wishes to explore this option in greater detail, it is staff's view that a dispute resolution service would need to be created, funded and staffed by the City, or that the City would need to avail itself of private mediation services, at the City's cost.

### **Applicants to Allow Sufficient Time for Consideration of Settlement Offers**

City Council, individual City Councillors, and City staff should insist that applicants meet internal reporting deadlines to meet City Clerk's agenda closing for any given City Council meeting. The City Solicitor can insert a required resolution date in mediation briefs to attempt to ensure that there is sufficient time for consideration of any settlement offer and for the provision of thoughtful and comprehensive staff advice to City Council. During the time between agenda publication and a City Council meeting, City Council can review, and potentially consult on a settlement offer. If the settlement offer is made with prejudice, its content will be published on publication of the agenda. If the settlement offer is made without prejudice, the consent of the parties to the negotiations that led to the settlement offer would be required in order for a Councillor to consult with the community about the settlement offer.

City Staff could administratively change the name of the Request for Direction with Confidential Attachment Report to "Appeal Report." The Appeal Report could include a standard section for public education which explains potential next steps. With the applicant's consent, City staff could also automate the circulation of with prejudice settlement offers through IBMS. This way, if an offer is made with prejudice, the Appeal Report can direct the public to the AIC, where they can review the with prejudice settlement offer and any associated materials.

In staff's experience, part of the reason for the rush to prepare settlement offers and reports on those settlement offers, is that City Council meets, at most, monthly. In the development industry, where timing is often critical to financing and securing the construction labour trades to build an approved project, and rescheduling previously scheduled OLT hearing dates can be difficult, sometimes it is essential that a settlement offer be considered by City Council before a given date. Having more City Council meetings to which staff can report on settlements could be one option to take some of the timing pressure out of the process.

## **Councillor Community Consultation Meetings**

Some suggestions about Councillor Community Consultation Meetings were provided in the City Solicitor's March 11, 2022 report.

To supplement those suggestions, staff also suggest that if there is time (staff recommend at least 20 days) between an applicant and City staff coming to terms on the settlement of an OLT appeal, which they intend to recommend to City Council for endorsement, on the one hand, and the City Council meeting at which a settlement will be considered, on the other hand; a Ward Councillor could organize a community meeting, or City staff could post a presentation with an associated comment form to summarize the high points of the proposed settlement (provided that the applicant, the parties to the mediation, and the OLT consent) and receive feedback on it. The feedback through community consultation using either of these methods could assist City Council in the decision-making process. This protocol could be waived.

## **Disseminate More and Better Information about the OLT Process and Settlement Hearings**

Section 17 of the Ontario Land Tribunal Act (the "**OLTA**") provides that a person who is not a party to an OLT proceeding may make submissions to the Tribunal with respect to the proceeding in writing only. The Rules of Practice and Procedure for the Ontario Land Tribunal (the "**Rules**") implement this legislative requirement by:

- Defining a participant as "a person who is not a party to a proceeding and [who] is only permitted to make or file a written statement to the Tribunal upon such terms as the Tribunal may determine in respect of the proceeding;
- Providing in Rule 7.7 that "a person who wishes to participate in a proceeding as a participant, shall file a written participant statement that sets out their position on the appeal and issues of the proceeding, together with an explanation of the 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;

The Rules also provide, however, that "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."

These Sections of the OLTA and the Rules could be specifically pointed out to the public through resources on the City's website explaining the OLT process. These resources could include a link to this report and the other reports listed in

the Decision History section of this report, providing plain language explanations of the ways in which the public can participate in the resolution or litigation of an OLT appeal.

The OLT could be requested to publish hearing documents on its website, make them available to the public, and to post them within a certain period of time prior to a settlement hearing.

### **Request Province to Reinstate Appeal Support Centre**

In 2017 through Bill 139, the Province created a Local Planning Appeal Support Centre to establish and administer a cost-effective and efficient system for providing support services to eligible persons respecting matters governed by the Planning Act that were under the jurisdiction of the Tribunal. The Centre was not an agent of the Crown nor a Crown agency. It was independent from, but accountable to, the Government of Ontario.

The reinstatement of this type of support centre could greatly assist members of the public with understanding Tribunal processes and notices under the Planning Act. It could also provide direction to resources available to assist with participation in the Ontario Land Tribunal hearing or mediation process.

### **Potential OLT Practice Directions or Rule Changes**

Current practice with respect to the giving of notice of an OLT proceeding is to direct the appellant to give the prescribed notice of the first Case Management Conference in respect of an appeal, at which interested persons are entitled to attend and request their desired status, and the Tribunal typically directs at the first Case Management Conference that no further notice will be given.

City Council could request that the OLT issue a Practice Direction to require that the hearing of an appeal that has been resolved between the applicant and the City occur no earlier than one month after City Council has voted on it. The Practice Direction could include an obligation on the appellant to give notice that a settlement hearing will be taking place, and that the municipality's issues have been resolved. Such notice could be given to all parties and participants, and/or to all persons within a certain radius of the property, which notice would include a description of the settlement.

City Council could also request any necessary accompanying rule or practice changes to allow new requests for party status at settlement hearings, notwithstanding a failure to participate in pre-hearing events, and to provide that previous grants of participant status by the Tribunal be without prejudice to the right of the participant to upgrade their status to party status in the event of a settlement between the City and the appellant, which the participant wishes to contest.

## **Bill 109, the *More Homes for Everyone Act, 2022***

City staff are continuing to review Bill 109 and its implications on the way in which the City Planning Division will process Planning Act applications. It seems apparent, on the face of the legislation, that there could be a greater number of appeals for non-decision or refusal. Both of these outcomes lead to the observation that the City will likely be engaged in more litigation and alternative dispute resolution than it has been previously. City Council will likely need to consider whether the City Planning and Legal Services Divisions are adequately resourced to process Planning Act applications as contemplated by Bills 109, including litigating them or otherwise resolving them, with the level of service City Council deserves in making important city-building decisions.

### **CONTACT**

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Laura K. Bisset, Solicitor, Planning & Administrative Tribunal Law; Tel: (416) 392-8782; Email: [laura.bisset@toronto.ca](mailto:laura.bisset@toronto.ca)

Kelly Matsumoto, Deputy Director, Planning & Administrative Tribunal Law; Tel: (416) 392-8042; Email: [kelly.matsumoto@toronto.ca](mailto:kelly.matsumoto@toronto.ca)

Gregg Lintern, Chief Planner and Executive Director, City Planning; Tel: (416) 392-8772; Email: [gregg.lintern@toronto.ca](mailto:gregg.lintern@toronto.ca)

### **SIGNATURE**

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Wendy Walberg  
City Solicitor