

March 13, 2012



City Council Committee Report

To: Mayor & Council

Fr: Matt Meston, Planning Assistant

Re: Ontario Municipal Board cost recovery

Recommendation:

- That all planning applications be modified to include a statement that outlines the fee, makes reference to this policy and place for the applicants to sign indicating that they are aware of and accept this policy.
- That the Council of the City of Kenora approves a cost recovery strategy associated with appeals to the Ontario Municipal Board dependent on the review of this report and recommendation by the Municipal Solicitor; and that the City of Kenora applications made under the Planning Act, and therefore subject to an appeal to the Ontario Municipal Board, be amended to include an undertaking by the applicant (owner to pay all fees associated with such appeal to the OMB.
- That the tariff of fees by-law be amended to indicate that the fees associated with appeals to the Ontario Municipal Board are in a cost recovery basis.

Background:

The Ontario Planning Act delegates the City of Kenora approval authority for Official Plan Amendments, Zoning By-Law Amendments, Minor Variances, Plans of Subdivision, Consents to sever and Condominiums. The City of Kenora averages approximately two (2) OMB appeals per every five years.

The Planning Act does not have a framework that deals with a City's right to require applicants to supplement costs incurred relating to OMB hearings. The Ontario Municipal Board however does have a policy for recovery of costs under certain parameters.

Many Municipalities in Ontario, have instituted policies that require applicants to pay for OMB fees incurred by the City related to OMB costs under the principle

that those who submit development applications (and who ultimately benefit) should be responsible for paying professional costs related to OMB hearing, and not the tax payers. As well with third party appeals the developer is the one being appealed not the City, therefore the City should not have to bear the expenses of third party appeals.

Appeals to the Ontario Municipal Board occur in the following scenarios:

-Where Council or the Planning Advisory Committee denies an application and the applicant appeals to the OMB

-Where Council or the Planning Advisory Committee approves an application with conditions and the applicant appeals one or more of the conditions

-Council approves an application and a third party appeals the decision to the Ontario Municipal Board. A third party would be a person, agency, interest group or corporation other than the applicant.

-Where the City has failed to render a decision on an application within the required time period as stipulated under the Planning Act. This scenario does not occur often, although the City of Kitchener recently did have an example of this occurring.

The extent of the municipality's involvement with the OMB hearing could be limited based on whether policy issues or other non-site specific issues are likely to be raised before the Board.

It is important to differentiate between the nature of appeals that proceed to the Ontario Municipal Board. Those appeals that are of a site-specific nature should be treated differently than an appeal of City policy or of a major issue, such as an appeal of the land division policies in the Official Plan. For this reason, it is recommended that Council set a cost recovery/limiting policy that differentiates between site-specific and policy/major issue Ontario Municipal Board Hearings. The recommended policy is set out below.

Site Specific Third Party Appeals

In instances where third parties have appealed an approved decision of Council or the Committee, the municipality and the applicant shall share a solicitor of the municipality's choosing. Should the applicant not wish to share a solicitor, a municipal solicitor shall still represent the municipality at the hearing. In this instance, the municipal solicitor will take a non-participatory role in the hearing and will appear only to ensure that the contents of the City's planning documents and the various limitations involved are maintained.

In instances where the municipality and applicant share a solicitor, the municipality shall contribute \$1,000 towards the legal fees. All legal fees exceeding \$1,000 and other expenses shall be the responsibility of the applicant. Upon receipt of the notice of hearing, the applicant will be required to deposit \$4,000 with the municipality. The planning application forms will be amended to include a clause whereby the applicant agrees to pay all expenses beyond the first \$1,000 of legal expenses. The \$1,000 legal fee threshold is the expense the municipality could reasonably expect to be charged for a non-participatory role before the Board.

Policy or Major Issue Appeals – Third Party

Where there is an appeal of an approved decision of Council or the PAC that could potentially have an impact on City policies or major issues, the municipality and the applicant shall share a solicitor of the municipality's choosing. Should the applicant not wish to share a solicitor, a municipal solicitor shall still represent the municipality at the hearing. In this instance, the municipal solicitor will take a participatory role in the hearing. The applicant shall still be required to contribute towards the municipality's legal defense. The planning application forms will be amended to include a clause whereby the applicant agrees to pay a deposit of \$10,000 towards the City's legal/consulting fees.

In instances where the municipality and applicant share a solicitor, the municipality will fund 50% of the total expenses with an upset limit of \$5,000. The applicant will be responsible for expenses above and beyond this amount.

Appeal Launched By Applicant

In the case where an applicant appeals on the grounds that Council or the PAC failed to act upon an application, or refused to approve the application, it is recommended that the City attend before the Board on all zoning and minor variance matters. In the event that legal counsel requires the assistance of a planner, engineer, or other officials, and in the event that other consultants or evidence such as traffic studies, market studies, etc. are required from outside consultants, Section 8.9 of the Official Plan indicates that "Depending on the nature of the proposed development and planning application, the City may require the following studies or additional information to deem applications complete and to properly evaluate a development application. Any such studies, or peer reviews thereof, shall be at the expense of the applicant/proponent.

The estimated cost for the City of Kenora for a one day OMB hearing is approximately \$10 000 for all legal and planning services. The City of Kenora

may choose not to attend a hearing if the matter is appealed by a third party. When a third party has appealed to the Ontario Municipal Board, the City generally does not attend these hearings unless subpoenaed.

The City may choose to waive this if in consultation with the Municipal Solicitor, it is determined that a broader public interest warrants the City's attendance at the OMB hearing. An example would be that a condition of approval, included order to protect a neighbour or the Municipal interest, may be appealed. If the City did not appear at the hearing, the condition could be changed or removed.

There are two scenarios for appeals which should be considered:

- 1) Site specific issues
- 2) Policy issues which could impact the basis of either the Official Plan or Zoning By-Law

It is for this reason that the policy for cost recovery should also differentiate between scenarios.

EXAMPLES & RESEACH FROM OTHER CITIES:

<p>Township of Malahide (Located in Elgin Country near London, Ontario)</p>	<p>The Township of Malahide has a policy relating to Ontario Municipal Board fees incurred by the Township of Malahide. For Official Plan amendments and Zone changes the applicant must sign an undertaking that in addition to the \$2500 deposit required for the application, an additional \$10 000 deposit must be submitted to the Township of Malahide in the event that an OMB hearing is required. The actual costs of the hearing will be calculated and 50% of the costs will be deducted from the \$10 000 deposit. As well, any remaining balance will be refunded to the applicant.</p> <p>http://malahide.ca/files/Photos/2012%20-%20APPLICATION%20-%20OPA.pdf</p> <p>http://malahide.ca/files/Photos/2012%20-%20APPLICATION%20-%20Zoning%20%282%29.pdf</p>
<p>City of Ottawa</p>	<p>The City of Ottawa as part of its development application process that for all planning applications that go to the Ontario Municipal Board the applicant agrees to sign an undertaking to pay all legal costs incurred by the City of</p>

	<p>Ottawa. Maximum \$10 000 legal limit for major amendments and \$3000 for minor amendments.</p> <p>http://ottawa.ca/residents/planning/dev_review_process/fees/index_en.html#3</p> <p>http://www.greatersudbury.ca/agendas/index.cfm?pg=agenda&action=navigator&lang=en&id=384&itemid=4984</p>
City of Kingston	<p>The City of Kingston has as part of its development approvals application form/process which includes zone change amendments, official plan amendments, site plan control, removal of holding provisions, site plan modification, park lot control and plans of condominium. When filing an application for development approvals the applicant agrees to reimburse the City of Kingston for all fees and expenses incurred by the City to process the application and any fees and expenses related to the Ontario Municipal Board or any other related body/tribunal. The applicant also agrees to deposit with the City such monies as per the City's Tariff of Fees By-Law as amended to defend appeals before the Ontario Municipal Board brought forth by parties other than the applicant or the City (3rd party).</p> <p>http://www.cityofkingston.ca/pdf/planning/DevelopmentApplicationForm.pdf</p> <p>http://www.greatersudbury.ca/agendas/index.cfm?pg=agenda&action=navigator&lang=en&id=384&itemid=4984</p> <p>http://www.cityofkingston.ca/business/development/app-fees.asp</p>
Town of Ajax	<p>The Town of Ajax as per By-Law 97-2011 requires that when the Town of Ajax becomes involved in an appeal to the Ontario Municipal Board, and the Town is in support of the application, the applicant is required to pay Town costs in terms of time, expenses, arbitration, mediation etc.</p> <p>http://www.ajax.ca/en/doingbusinessinajax/resources/PD_PLN_D_PlanningDevelopmentServiceFeesfor2012.pdf</p> <p>http://www.ajax.ca/en/doingbusinessinajax/resources/applicationtoamendthezoningby-law.pdf</p>

<p>City of Thunder Bay</p>	<p>Thunder Bay has a policy for planning applications that on top of the application fee, the applicant must pay any legal fees incurred by the City of Thunder Bay for any Ontario Municipal Board hearings. A deposit of \$2500 is required after an appeal is submitted to the Ontario Municipal Board.</p> <p>http://www.thunderbay.ca/Assets/_thunderbayassets/docs/planning/Planning+Fee+Schedule.pdf</p> <p>http://www.greatersudbury.ca/agendas/index.cfm?pg=agenda&action=navigator&lang=en&id=384&itemid=4984</p>
<p>Sudbury</p>	<p>The City of Sudbury has an OMB user fees agreement for third party appeals, where the applicant must pay a fee of \$6000.00/day to the City of Sudbury.</p> <p>http://www.greatersudbury.ca/agendas/index.cfm?pg=agenda&action=navigator&lang=en&id=384&itemid=4984</p>

Budget:

Legal fees to review a proposed undertaking would be approximately a \$500.00 from the planning operating budget.

Communication Plan/Notice By-law Requirements:

City portal (updated applications forms), Municipal Solicitor and Council Agenda.

Appendix A



Here's what you need to know about recovering your hearing costs

If you believe that another party involved in your matter acted **unreasonably, frivolously or in bad faith**, you may ask the OMB to order that party to pay some or all of your expenses or costs. It is unusual for the Board to order an award of costs against another party. Unlike the Courts, costs awards are not standard. Before the Board can consider an award, it must make sure that:

1. You are a party in the matter;
2. You ask for compensation or an award of costs;
3. The party being asked to pay appealed incorrectly or acted improperly;
4. The party being asked to pay is given a chance to respond.

Some examples of improper activities include:

- Missing a hearing event;
- Not co-operating during a hearing;
- Changing a position without notice;
- Being unprepared for a hearing;
- Not complying with an OMB directive;
- Causing unnecessary delays;
- Not presenting evidence;
- Presenting false or confusing evidence;
- Continuing to deal with inappropriate issues;
- Not making efforts to combine similar submissions.

How do I recover my hearing costs?

Step 1: Ask the Board for an award of costs **before** the hearing ends or **within 10 days** after the written decision is issued.

Step 2: In your written submission to the Board, you must include the name of the party you are seeking costs from, the reasons for your request and the estimated amount.

Step 3: Follow the directions of the Board. The Board may ask you to:

1. Appear in person; OR
2. File a written submission.

Step 4: Prepare your written submission or notice of motion. You must include:

- The reasons for your request;
- The amount requested;
- An estimate of the extra preparation or hearing time caused by the misconduct;
- Copies of supporting invoices or a sworn statement (an affidavit) verifying the expenses; and
- A sworn statement verifying that the expenses were necessary.

Step 5: The Board will inform you of its decision

What expenses can I include in my request for costs?

The OMB may order that you receive payment for your expenses from preparing for and attending a hearing. These expenses may include lawyers' preparation and hearing time and, consultant and witness fees.

The OMB will generally require documentation to verify these expenses were incurred.

For expropriation issues, costs are awarded only as provided under the Expropriations Act. The Board may refer the amount of costs to be decided by an Assessment Officer of the *Superior Court of Justice*.

Where can I get more information?

For complete details on recovering hearing costs, refer to the OMB's *Rules of Practice and Procedure* (Rules 99-107). They are available at www.omb.gov.on.ca, or by calling (416) 212-6349 or toll free 1-866-448-2248.

Please Note

The information contained in this information sheet is not intended as a substitute for legal or other advice, and in providing this information, the Ontario Municipal Board (OMB) assumes no responsibility for any errors or omissions in this information sheet, and shall not be liable for any reliance placed on the information in this information sheet. Additional information, including the OMB's *Rules of Practice and Procedure*, is available at www.omb.gov.on.ca, or by calling (416) 212-6349 or toll free 1-866-448-2248.

 <p>Ontario</p>	<p>The Environment and Land Tribunals Ontario (ELTO) includes the Assessment Review Board, Board of Negotiation, Conservation Review Board, Environmental Review Tribunal, Ontario Municipal Board, Niagara Escarpment Hearing Office and the Office of Consolidated Hearings. The Tribunals operate under specific legislative requirements and share resources and best practices. The Ontario Municipal Board hears appeals and applications on a wide range of municipal and land-related matters including official plans, zoning by-laws, subdivision plans, consents and minor variances, land compensation, development charges, ward boundaries, and aggregate resources. For more information contact us at:</p> <p>Environment and Land Tribunals Ontario 655 Bay Street, Suite 1500, Toronto, ON M5G 1E5 Telephone: (416) 212-6349 or toll free: 1-866-448-2248 Website: www.elto.gov.on.ca</p>
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