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Communication
COUNCIL: Dec 13/16
CW (w) rpt. No. 45 Item 1

**DATE:** DECEMBER 13, 2016

**TO:** MAYOR AND MEMBERS OF COUNCIL

**FROM:** CLAUDIA STORTO, DEPUTY CITY MANAGER, LEGAL & HUMAN RESOURCES  
JOHN MACKENZIE, DEPUTY CITY MANAGER, PLANNING AND GROWTH  
MANAGEMENT

**RE:** ITEM NO. 1, REPORT NO.45 , COMMITTEE OF THE WHOLE (WORKING SESSION),  
DECEMBER 7, 2016  
ONTARIO MUNICIPAL BOARD REVIEW

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#### Recommendation

It is recommended that the attached Resolution, together with this communication and any additional comments members of Council may wish to provide, constitute the City of Vaughan's submission in response to the Provincial consultation on the Ontario Municipal Board (OMB) review.

#### Background

At the December 7, 2016 Committee of the Whole (Working Session) meeting, the Committee deferred this report to Council for further information from staff. The following is provided in response to the comments received at the Working Session meeting.

#### Context

The City of Vaughan receives multiple OMB appeals annually and most recently, has engaged in ongoing appeals of its Official Plan arising from the Growth Plan review. The City received 164 appeals of the Vaughan Official Plan 2010, which was adopted in September 2010, and has spent approximately \$2.5 million over the past five years in order to defend the Plan and related Secondary Plans, with the majority of efforts focused on mediation rather than formal hearings. This includes costs for consultants and external lawyers. It does not reflect the cost of existing staff resources, which have been strained by the magnitude of the appeals. Multiple departments have been impacted as a result of their involvement, including the Policy Planning Department, Development Planning Department, Urban Design Department, Development Engineering and Infrastructure Planning Department, Parks Development Department, Development Finance Department, Real Estate Department, Economic Development Department and the Legal Services Department. To date, approximately 96 appeals remain outstanding. The *Planning Act* appeals process and OMB practices have resulted in a significant drain on the City's resources. Unfortunately, this is not a unique circumstance in the Province.

The Provincial review of the OMB is long overdue and welcomed by the City of Vaughan. Vaughan Council members have been at the forefront of this matter, participating in the Municipal Summit on OMB Reform in May, 2016 and attending Provincial town hall meetings as part of the Provincial consultation. The City of Vaughan considers the reform of the OMB to be a matter that raises serious administrative and jurisdictional concerns and is of the view that substantial changes are required in order to improve the current situation.

#### Basic Principles To Be Considered in the OMB Review

While there are a number of considerations to be addressed in this review, the basic principles which are the foundation of Vaughan's perspective on the matter are as follows:

1. The OMB and its decisions should reflect the existing mature level of planning being done at the municipal level.
2. Local planning decisions must be predominant.

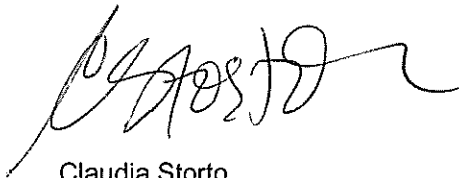
3. The public should have an opportunity to participate in OMB matters in a substantial way.
4. Appeals to an Official Plan resulting from a municipal comprehensive review that is approved by a local municipality, regional municipality and/or the Province should be prohibited, particularly in light of the extensive public consultation involved in the process.
5. Mediation is key and must involve the public in a more meaningful way.

### Conclusion

There is support by both Vaughan staff and Council for the changes being proposed through the Provincial review of the OMB. It is believed that substantial change is needed, beyond what is being proposed through the public consultation, particularly to reflect the complex processes occurring at the local level and the significant public input which occurs in developing an official plan as a result of a municipal comprehensive review. The public input into the planning process at the local level should be mirrored through the appeal process at the OMB, ensuring that the community can remain involved and informed.

Attached to this communication as Schedule 1 is a proposed Council resolution which reflects the consolidated comments of Vaughan Council and staff, representing the municipality's submission in response to the Provincial consultation on the OMB review. It is recommended that this resolution be submitted to the Province, together with this communication and any additional comments members of Council may wish to provide.

Respectfully submitted,



Claudia Storto  
Deputy City Manager,  
Legal & Human Resources



John MacKenzie  
Deputy City Manager,  
Planning and Growth Management

Attachment 1: Proposed Council Resolution

c.c. Daniel Kostopoulos, City Manager  
Jeffrey Abrams, City Clerk

**RESOLUTION**

**Whereas** the City of Vaughan, as a sophisticated urban municipality, provides a comprehensive process, utilizing highly skilled staff, external experts and input from the public to consider and approve a variety of land uses under the Planning Act of Ontario; and

**Whereas** the City of Vaughan utilizes significant external resources and funds in order to defend its Official Plan that was endorsed by the Region and the Province before the Ontario Municipal Board (OMB), recently calculated to be approximately \$2.5 million; and

**Whereas** the current planning environment in Ontario has resulted in a process increasingly dominated by the powers of the OMB rather than the comprehensive local municipal planning procedures; and

**Whereas** Vaughan City Council has serious administrative and jurisdictional concerns related to the role and function of the OMB; and

**Whereas** the Province of Ontario is currently undertaking a review of the OMB and seeking input from all stakeholders, including municipalities; and

**Whereas** Vaughan Council members have been actively engaged in the broad discussions surrounding OMB reform, including participation in a Municipal Summit on OMB reform and attendance at the Provincial town hall meetings; and

**Whereas** substantial change to the role and functioning of the OMB is required, particularly with respect to the engagement of members of the local community in planning matters, both before an appeal and throughout the appeal process; and

**Whereas** the OMB and its decisions should reflect the existing mature level of planning being done at the municipal level; and

**Whereas** the OMB review has been based upon five themes for discussion; and

**Whereas** the Council of the City of Vaughan has considered the matter within those five themes; and

**Whereas** there is support by both Vaughan staff and Council for the changes being proposed through the Provincial review of the OMB; and

**Whereas** it is believed that substantial change is needed, beyond what is being proposed through the public consultation, particularly to reflect the complex processes occurring at the local level and the significant public input which occurs in developing an official plan as a result of a municipal comprehensive review; and

**Whereas** it should be explicitly recognized that local planning decisions must be predominant; and

**Whereas** the public should have an opportunity to participate in OMB matters in a substantial way; and

**Whereas** the public input into the planning process at the local level should be mirrored through the appeal process at the OMB, ensuring that the community can remain involved and informed; and

**Whereas** mediation is key and must involve the public in a more meaningful way; and

**Whereas** Schedule '1' to this resolution is a consolidation of Vaughan staff's and Council's comments for submission to the Province in response to the OMB review;

***Now therefore be it resolved that*** Vaughan City Council request that the Government of Ontario, in its review of the OMB, give serious consideration to the significant administrative, financial and capacity jurisdictional concerns being raised by municipalities; and

***Be it further resolved that*** the City Clerk be directed to submit this resolution, along with Schedule "1", for the Province of Ontario's consideration in the course of its review of the Ontario Municipal Board.

**Attachments**

Schedule 1

**OMB Review  
City of Vaughan Submissions  
December 13, 2016**

**THEME 1: OMB'S JURISDICTION AND POWERS**

**A. Protecting public interests for the future and bringing transit to more people**

The revisions to the Planning Act already go some distance in addressing this theme in regard to limitations on appeals. Further articulation of the areas to be protected from appeal are also supported. These areas should be clearly identified to ensure that they are not subject to appeal. Therefore, the relevant enabling legislation or regulations should be clear on what is or is not subject to appeal. In general, the primary areas of exemption should relate to conformity with Provincial Plans and Policies. If a policy is deemed appropriate or necessary to achieving an objective of a Provincial Plan or Policy it should be exempted from appeal. This would need to be implemented through actions by the approval authority that would flow down to the local municipalities. i.e. the Regional Plans approved by the Province would identify the unappealable sections of the Regional Plan. In making decisions on the Local Plans and amendments, the Regional Municipalities would identify which sections are unappealable based on the Regional Plans. The actions of the approval authority should be exempt from OMB or court challenge in making the decision. However, in making the decision, the approval authority should provide an opportunity for submissions from interested parties, prior to making the decision on the proposed exemptions.

In defining the exemptions, one principle should be firmly entrenched. Anything that involves a systemic change to an Official Plan, such as a land budget, an urban boundary or the definition of an intensification area, should be left to a future Municipal Comprehensive Review.

In particular:

- appeals to an Official Plan resulting from a municipal comprehensive review that is approved by a local municipality, regional municipality and/or the Province should be prohibited, particularly in light of the extensive public consultation involved in the process
- OMB decisions should be consistent with the decisions of municipalities
- the quality of decisions being made at the local level are complex and interactive and should not be influenced by what the OMB "might do"
- it is acknowledged that there is a role for an appeal process however it is in the form of a significantly different body with different powers to reflect the current sophisticated planning regime being implemented by local municipalities
- certain matters should not be within the OMB's jurisdiction, including ward boundary decisions, interim control by-laws
- placeholder appeals by landowners who do not have specific plans for their lands should not be permitted
- Committee of Adjustment appeals should not be permitted to proceed to the OMB; alternative avenues of appeal should be considered first (local or regional appeal body, Council adjudication)

**B. Giving communities a stronger voice**

Prohibiting appeals of a municipal refusal to amend a new secondary plan for two years is a good measure; and combined with prohibition on certain appeals would add to the stability of the Plan; however, Councils should be allowed to make minor housekeeping amendments, should a defect be found in a Plan.

Prohibiting appeals of Interim Control By-laws is a supportable measure, as it diverts municipal resources away from conducting the study to fighting the appeal. Often it takes close to a year to have the appeal dealt with by the OMB, so the appeal rights are often of limited benefit. If an appeal is to be retained, it should only be on the renewal of the ICB for a second year.

Third party appeals on site plans should not be permitted to the OMB; limiting appeals to the actual changes to the Plan or by-law is warranted and pre-existing policies/standards that are not subject to amendment should be exempt from appeal.

Situations where significant information arises at an OMB proceeding indicates a fundamental flaw in the process. Municipalities and landowners go through a long process of pre-application consultation and review before matters get to Council for a final decision. If such information has not emerged by this time, the matter is fundamentally compromised. The system should be designed to hear only appeals on the basis of the information that the original approval authority had before it. For historic or existing appeals filed under the existing legal framework the OMB should strive to provide additional notice and opportunities for public input. Such communication efforts are helpful, particularly if a development application is significantly altered during the course of an OMB procedure.

### **C. De novo hearings**

The use of "de novo" hearings should be ended in all instances where the approval authority has made a decision. The concept is antithetical to a system that relies on local government processes and decision-making, where a local municipality amends its plan, which is approved by a senior approval authority (i.e. a Region), which has the right to modify the adopted plan. Under this system, the current "appeal" is actually an application for a re-hearing or potentially a mediation process. It is troubling that the municipality is given 180 days to make a decision on an Official Plan, while the Ontario Municipal Board is given unlimited time to deal with the appeal, which can exceed a year and be an on-going financial drain on the municipality. If "appeals" arise, they should be based on the policies adopted by the Local Council and approved by the Region (for Official Plans), based on the information the Council(s) had before them. As such, the concept should be eliminated altogether, or there should be a higher barrier to entry. This could involve making a motion to the Board for leave to proceed with a hearing "de novo".

The criteria identified above for the alternatives are worth considering and should be assessed further. The test of a municipal decision should be whether it was reasonable and maintained the intent of the Provincial and Regional Plans.

The procedural matters should also be considered as well, as these are often time consuming and the cause of much delay. Efficiency of process should be an objective. The appeal should be confined to the Council's decision; the appeal should be heard on the basis of the information the Council had before (to maintain the integrity of the system); and it should be adjudicated only on the basis of the supporting documents and a written submission and argument by the respective counsel. It should also be backed by a defined period for mediation to provide a deadline to better focus the parties.

### **D. Transition and use of new planning rules**

This needs to be carefully considered. The second perspective (requiring planning decisions to be based on the planning documents that were in place when the process was started) would normally be preferred. There may be processes that have continued for years, based on older approved municipal plans, that could be effectively terminated by a new Provincial Policy or Plan. This could lead to years of work being wasted and proponents (including municipal Secondary Plans) being required to start over to address the new requirements. The counter argument is that an application may have been dormant for years, with "grandfather" status that might be reactivated, based on the old policies. Such instances should also be avoided.

Like the municipalities, the OMB should have clear direction on the transition provisions for the Provincial Plans and Policies. An alternative would be to allow for existing applications and processes, already underway, be allowed to continue to the point of approval by the municipal approval authority, provided that the decision is reached within a specified timeframe, e.g. 3-years. Time-limiting the transitioned matters would serve to provide greater certainty in the process.

## **THEME 2: CITIZEN PARTICIPATION AND LOCAL PERSPECTIVE**

### **A. The role of the Citizen Liaison Office**

There would be benefit in expanding the Citizen Liaison Office and use it as a teaching tool, to ensure that potential appellants understand the role of the various levels of policy that shape planning decisions. This may serve to give the public a more realistic understanding of what they may accomplish as a result of an appeal.

Having in-house planners and lawyers to advise the public would be of some assistance. However, the potential demand on the service might be overwhelming unless it is well targeted. The information would have to be based on procedure and not on the merits of the appeal so as to avoid a perception of bias. The provision of training materials would be important to this service, which could include a website with various types of information including webinars and even a mock hearing to familiarize the public with the procedural aspects of a hearing and the role of the individual parties.

Making materials on on-going hearings and mediations more readily available to the public in an easily understood format would allow for greater inclusion and participation of the public. Responsibility, for the availability of this information would be an appropriate role for a Citizen's Liaison Office.

### **B. Funding tools to enable citizens to retain their own planning experts and/or lawyers**

City staff regularly encounter a high level of public cynicism over the role the public plays in the planning process. The general feeling of the public is that they are being ignored and that the consultation is futile and that they are wasting their time. It is very difficult for staff to convey the idea that the municipality is obligated to fulfill certain requirements that are set out in Provincial plans and policies, which ultimately have to be reflected in the Regional and City Official Plans.

The public concerns most often relate to density and intensification (which are mandated at the Provincial and Regional levels), current traffic conditions, and the traffic impacts of new development. There is also skepticism over the positive impacts of transit on reducing or moderating traffic impacts.

Many of the issues that are of great public concern may ultimately be deemed to be beyond appeal as a result of this process. As such, it is unlikely that the Province would be inclined to fund opposition to its policies. Therefore, eligibility criteria would have to be carefully considered and be based on the broader public interest, if financial support was to be provided to public appellants. In addition, any funding sources should not result in financial implications for the municipalities, which are already burdened by the high cost of responding to OMB appeals.

In addition:

- Vaughan is supportive of provincial funding being provided for the public
- criteria and the process for accessing provincial funding need to be established
- intervenor funding should be considered to facilitate public access to the OMB

- an expert resources strategy should be developed, offering legal and planning support to the public
- the Citizen Liaison Office needs to be properly resourced
- the Province should better define community interest in order to determine who can speak on behalf of that interest – clarity is sought on this
- public education is important and should be emphasized
- independent legal advice should be offered to assist community groups/members involved in settlements
- a minimum set amount of time for expert consultations may be considered

### **THEME 3: CLEAR AND PREDICTABLE DECISION-MAKING**

#### **A. Qualifications for OMB adjudicators**

The City has no concerns with the qualifications of the current OMB members. However, Board members' skills and expertise should reflect the fact that land use planning processes are informed by a variety of disciplines. The OMB would benefit from members who have a range of experience in these matters and have a deep understanding of the issues at hand. At this time, the City's main concern relates to the availability of members to conduct hearings and mediations. Board membership should be increased to meet demand. This would also introduce an opportunity to explore the addition of a more diverse range of expertise among the Board members.

#### **B. Multi-member panels**

Multi-member panels are supported for complex cases only. The additional cost and time added to have multi-member panels adjudicate all hearings would not be beneficial. Criteria for identifying hearings requiring multi-member panels should be set out to provide clarity and predictability. Criteria may include cases with issues involving a variety of specialized experts (environmental, transportation, noise, market or economic, etc.) or cases that involve multiple parties, increasing the number of issues to be adjudicated (such as a Regional or Municipal Official Plan). In assigning members to complex multi-disciplinary hearings, the assigned member(s) should have experience and expertise commensurate with the need to arrive at fair, impartial and sound technical decisions.

In addition:

- Vaughan is supportive of more expert panel members which should also include those with community perspective
- Vaughan is supportive of more resources being allocated to the OMB, including appropriate remuneration for OMB members in order to attract the most qualified adjudicators

### **THEME 4: MODERN PROCEDURES AND FASTER DECISIONS**

#### **A. Improving the OMB's hearing procedures and practices**

The City supports active adjudication, particularly in cases where there are unrepresented parties or participants or significant community interest. A more involved hearing panel could assist the public in better understanding the process and the evidence presented at hearings.

#### **B. Timelines for scheduling hearings and issuing decisions**

Many of the above-noted actions, such as increasing the number of OMB members and reducing the matters that can be appealed should improve the OMB's ability to meet existing timelines.



While flexibility in the presentation of evidence may be worthy of consideration, predictability is important for all parties in preparing their cases. Each party needs to be clear on the case they are required to meet in advance of a hearing to ensure fairness. Any additional flexibility should be balanced against the need for predictability and fairness.

Written hearings should be introduced, where appropriate, to address matters that would largely be dependent on documentary evidence. Written hearings may be best utilized for matters involving legal interpretation issues.

In addition:

- timing issues need to be addressed as appeals currently take too long to be resolved
- a substantive change in timelines is needed
- deadlines for hearing appeals should be emphasized
- site visits by OMB adjudicators should be mandatory

## **THEME 5: ALTERNATIVE DISPUTE RESOLUTION AND FEWER HEARINGS**

### **A. Using mediation to resolve disputes**

The City of Vaughan has used mediation successfully for many OMB appeals. This has included site specific appeals and multi-party Official Plan and Secondary Plan appeals. While mediation can lengthen the process in complex cases, it also results in an outcome that all parties are more satisfied with, while reducing the risk of an unknown outcome and the adversarial nature of OMB hearings. It also increases the dialogue between the parties at the table and promotes the ability to identify creative solutions that may be more suitable in the circumstances. It could be improved if the mediation process is time limited and should also be subject to agreed upon deadlines.

The City strongly supports promoting increased use of mediation with the addition of the necessary resources to meet the current caseload at the OMB. Often, during lengthy and complex mediations, months can go by before another formal mediation session can be scheduled. This can slow momentum where progress is being made on certain issues. An increase in the number of trained mediators on the OMB roster is supported.

In the alternative, it may be worthwhile devoting OMB members solely to the hearing activities and having a roster of trained mediators that could be brought in to facilitate an agreed upon mediation process. Since the number of Board members will always be limited, this would broaden the opportunity for guided settlement negotiations. Also, it would ensure that momentum can be maintained with more consistent availability of mediators.

The City supports the canvassing of parties early on in the appeal process to identify cases that may benefit from mediation. It does not support mandatory mediation which can only serve to lengthen the process in cases where hearings are necessary to resolve disputes that the parties have been unable or unwilling to narrow or resolve on their own. This is particularly relevant in situations where a municipality applies the Bill 73 provision permitting mediation prior to sending an appeal to the OMB. Subsequently requiring mediation at the OMB would be duplicative and inefficient.

Where parties agree to participate in mediation it should be on the basis that:

- The mediator should have the authority to require all parties who have agreed to participate in mediation attend all mediation sessions where their attendance is deemed necessary. Failure to participate in mediation sessions once it has commenced should result in specific consequences, such as a costs award where the failure to attend is deemed to be frivolous or without merit;
- One of the products of the mediation should be a scoping of the issues in the event that a full settlement cannot be achieved and the matter must proceed to a hearing;

- There is consistent availability of the mediator to maintain the momentum of the mediation process;
- Mediation timelines should recognize the need and process involved for municipalities to seek direction.

In addition:

- all parties/participants should be allowed to participate in mediation
- encourage parties involved in successful mediations to share the outcome with all parties and participants in advance of hearing start dates

## **B. Strengthening case management**

The City also supports strengthened case management, including the requirement that issues be scoped early in the process and using pre-hearing conferences to identify issues that can be resolved in advance of subsequent hearing events. This could be akin to the courts' pre-trial or settlement conference process.

### **Additional Comments**

A Clear Process Model Must be Developed:

A clear process model must be provided to guide the appeal processes. Therefore, any draft amendments to the Act or Regulations governing the operations of the Ontario Municipal Board must be supported by information illustrating how the resulting system is intended to function. Without such information, it will be difficult to provide comments on the proposed changes to statutes and regulations. This will allow the participants to provide better quality input into the finalization of the legislation.