

COMMITTEE OF THE WHOLE DECEMBER 1, 2009

EXTERNAL LEGAL COSTS

Recommendation

The Commissioner of Legal Services/City Solicitor and the Director of Legal Services recommend that this report be received for information.

Contribution to Sustainability

Not applicable

Economic Impact

There is no economic impact as a result of this report.

Communications Plan

Not applicable

Purpose

This report is provided pursuant to Council direction.

Background - Analysis and Options

On May 26, 2009, Council resolved that staff provide a comprehensive report on all legal costs by category from the beginning of this term of Council to present, including how such costs originated plus anticipated costs of unsettled cases based on best estimates.

The City's Legal Services Department comprises a team of a Director and four lawyers, reporting to the Commissioner of Legal and Administrative Services/City Solicitor, with expertise in a variety of areas including municipal law, planning and development law, litigation including prosecutions, Ontario Municipal Board matters, real estate law, construction law, and labour and employment law. The Legal Services Department advises and represents the City and Council, all internal Departments as well as the Vaughan Public Libraries and The City of Vaughan Non-Profit Housing Corporation on all aspects of the City's and the Libraries' mandates.

It is the goal of Legal Services to provide timely, accurate, relevant and strategic legal services on corporate objectives, legislative compliance, strategic initiatives, general administrative and operational issues and risk management, using best efforts to ensure that the corporation complies with applicable laws. Objectives of the Legal Services Department include:

- Meet the needs of Council and staff for timely, accurate, effective and strategic legal advice;
- Protect, advocate for and advance the legal interests of the municipal corporation;
- Provide efficient and cost effective representation of the corporation before the various levels of courts and administrative tribunals;
- Prepare, negotiate, and review contracts and agreements, by-laws and other documents effectively to protect the municipality's interests;
- Oversee the delivery of services under the Provincial Offences Act, and prosecutorial functions; and
- Advise on interpretation and implementation of legislative amendments which impact corporate policy, operations and agreements.

There are a number of demand drivers for legal services including but not limited to: the size and nature of the municipality (single, upper or lower tier), the introduction of new legislation, the downloading of services, new initiatives such as major infrastructure projects, and public-private partnerships, Task Forces and committees, new by-laws and amendments/updates to by-laws, the expiry of Collective Agreements and the associated need for collective bargaining and negotiations, official plan review, land acquisition projects, Ontario Municipal Board matters, and litigation including civil claims, by-law challenges, and contractual disputes. These demand drivers determine the nature and scope of the internal and external legal expertise required to support the municipality, with more specialized levels of legal expertise generally required for significantly complex matters.

This demand is also driven by a variety of factors over which the municipality has either little control or limited influence. These factors include societal trends such as an increased reliance on courts to resolve disputes, the broad application of the Charter of Rights and Freedoms and the Human Rights Code by the judiciary, and the increased number of tribunal and judicial recourse mechanisms to review municipal conduct and decisions. In the majority of litigation cases, the City is the defendant and therefore has little opportunity to control the demand for legal services as it must defend the application of laws and regulations, by-laws, and policies. Also, in matters where newer legislation has not had court interpretation, judicial guidance is not available.

The lawyers in the City's Legal Services Department are strategically aligned to support key service areas: Planning and Development, Ontario Municipal Board appeals, Litigation, Real Estate, By-laws and Enforcement, Employment and Labour. The lawyers are members of the Municipal Law Departments Association of Ontario (MLDAO), comprised of in-house lawyers from upper tier, single tier and lower tier municipalities across the province. Vaughan is participating along with York Region, Ottawa, Hamilton, Brampton, Caledon, Mississauga, Sudbury, London and Kingston in a Sub-Group of the MLDAO to monitor Performance Management in Legal Services. The Vaughan Staff complement of City Solicitor, Director and four lawyers has remained unchanged for many years, despite the continued high growth of the municipality and the corporation over the last 10 years. Presently, the municipal corporation employs approximately 1500 people, including full-time, part-time, contract and seasonal employees.

On occasion, the City requires the assistance from external legal counsel to compliment the internal team either due to resource constraints or the need for particular expertise. External counsel may be required to work alongside City legal staff or assume carriage of entire matters.

In 2008, Council approved staff's recommendation to solicit proposals for the provision of legal services in accordance with specified Terms of Reference. A Request for Proposals was issued inviting law firms to submit proposals for a range of legal services in areas such as municipal finance, tax and assessment, environmental law, information and technology law, expropriations law, planning law, general civil litigation, general municipal law, and employment and labour law. Council approved the recommended list of up to five law firms for each area of law for the Counsel List. The Request for Proposals does not guarantee any work, but achieves fixed and/or reduced rates from listed firms, as well as other complimentary services such as training .

Categories

Council requested legal costs by category, and those categories, including how costs originate in those categories are set out below from January 2006 to August 31, 2009. The categories are Ontario Municipal Board, Employment and Labour, Litigation and Municipal Matters. External legal costs include fees, disbursements, and taxes.

Ontario Municipal Board Matters

The costs in this category originate through the retainer of external counsel to have carriage of or assist in-house counsel with Hearings. *The Planning Act* provides for appeals regarding various matters including official plan amendment and zoning by-law amendment applications, draft plan of subdivision, condominium, and site plan applications, and interim control by-laws, disputes regarding cash-in-lieu of parkland dedication or fees pursuant to a Tariff of Fees, and Committee of Adjustment variances, severances and permissions. Appeals may be made pursuant to the *Heritage Act* for heritage matters and the Development Charges Act for matters under that Act. There are various other provincial statutes which provide for appeal to the OMB regarding matters within those Act, for example the Conservation Review Board and Assessment Review Board.

Appeals may be made by landowners seeking development approvals which have either been refused by Council, or where Council has not made a decision and the *Planning Act* provides for an appeal after various periods have passed, for example, 120 days in the case of a zoning by-law amendment application. Appeals may also be filed by individuals and public bodies, and may also be filed against City-initiated official plan amendments, zoning by-laws and heritage districts by individuals, landowners and public bodies. Appeals that result in hearings scheduled for up to 10 days are generally handled by in-house counsel unless there are scheduling conflicts (where two hearings are scheduled at the same time).

In October 2002, Council retained a consulting team to conduct the Steeles Corridor-Jane to Keele-Secondary Plan Study which resulted in the adoption of OPA 620 in June 2006 and approval by the Region in October 2006 to facilitate the Spadina Subway Extension. The City had correctly anticipated the direction of Provincial policy and the provincial Places to Grow Plan, 2006, which supports development of more compact communities at transit-supportive densities, requiring urban form in conjunction with intensification efforts, to be coordinated with transit services and infrastructure. One of the main objectives of OPA 620 is to provide a high level of support for public transit service by locating the highest densities in close proximity to the subway station on the planned Spadina Subway Extension.

The Regional Municipality of York approved the Region-wide Transportation Master Plan, which identified Yonge Street and Highway 7 as the two priority corridors for investment in higher order transit infrastructure. As a result, in 2002 the City undertook the Highway 7 Land Use Study, and in 2007 undertook the Yonge Street Area Study in order to identify opportunities to intensify development to support higher order transit initiatives. The studies culminated in the adoption of Official Plan Amendments 660, 661, 662, 663, 664, and 669 which identified appropriate heights and densities for sites along both corridors. The City also adopted OPA 633 which implemented the Kleinberg Core Area Policy Review and recently amended the Thornhill-Vaughan Heritage District Plan in 2007 and approved the Kleinberg Heritage District Plan in 2003.

Most of the significant OMB hearings over the past term have been related to these major planning projects. It is important to defend all of these significant planning documents when appeals are filed with the Ontario Municipal Board in order to ensure the implementation of the City's Vaughan Vision 2020 objectives, including support for transit initiatives, appropriate high density development, heritage preservation, and protection of the public interest.

Private official plan amendment and other applications have been filed by landowners over the past few years in these areas. In these cases, the applicants have appealed the City's Official Plan Amendments and consolidated these appeals with appeals of their own private official plan, zoning and site plan, and in some cases heritage permit applications, resulting in hearings on multiple matters at the same time. This results in scheduling of longer, more complicated hearings with numerous prehearings, motions, and experts meetings. The Board issues Procedural Orders requiring exchange of documents and witness statements well in advance of

the Hearing. The issues are complex and require a variety of expert witnesses and extensive preparation. While not all matters proceed to a hearing due to settlement, substantial time is still required well in advance of the Hearing date, and as well as for any mediation, settlement negotiation, finalization of planning documents and presentation of evidence to the OMB in support of any settlement reached, as the OMB retains the final approval of any matter once an appeal is filed. These matters usually extend over a period of two years depending on the number of parties and participants, the number of Prehearings and motions, or Mediations, the length of the Hearings, and Board availability. Since 2006 there have been significant, lengthy OMB matters, which are ongoing and are nearing completion, where City OP's have been upheld and approved, and private, OPA and Zoning have been approved as modified, with site plan applications yet to come to Council.

Disbursements in these matters include the costs of preparing document books for all parties, witnesses, and the Board, as well as the costs of couriers for service of documents, preparation of exhibits, legal database searches, faxes, mileage and taxes.

The costs per year in this category are :

2006 - \$ 13,973.40
2007 - \$ 379,156.66
2008 - \$ 345,427.79
2009 - \$ 318,086.25

Employment and Labour

Costs in this category originate through the retainer of external counsel to provide advice and representation on a variety of matters, where specialized expertise is required or where matters are time-sensitive and complex. External counsel assist with ensuring compliance for the corporation's 1500 unionized and non-unionized employees with various provincial statutes including the *Employment Standards Act*, *Labour Relations Act*, *Occupational Health and Safety Act*, *Pay Equity Act*, *Human Rights Code*, *Fire Prevention and Protection Act*, and the *Workplace Safety and Insurance Act*. Specialized advice is also required in the area of collective bargaining and negotiations with the City's six collective bargaining units, and accommodation and disability management matters. There are six Collective Agreements and this category includes administration of these collective agreements, handling grievance and Arbitration hearings for matters that arise under the various Agreements, and interest arbitration. This category also includes any human rights complaints, or wrongful dismissal or other litigation matters arising from an employment relationship up to and including appearances before Tribunals and Courts. This category may also include handling appeals to the Workplace Safety Insurance Board (WSIB).

The costs per year in this category are:

2006 - \$ 150,070.74
2007 - \$ 206,617.53
2008 - \$ 231,481.92
2009 - \$ 153,716.65

Litigation

Costs in this category originate through the retainer of external counsel to provide specialized advice regarding litigation. Litigation can originate from a myriad of causes of action, linked to many legislative requirements and types of fact situations. Municipal liability for roads and sidewalks and winter maintenance issues, environmental regulation and spill response, municipal property and occupiers' liability for publicly owned facilities such as recreational facilities, recreational trails, and other lands, are areas of significant litigation in all municipalities. Charter

claims are rising against municipalities as a result of continuing expansion of municipal powers and broadening of municipal jurisdiction generally which places municipal authority under greater scrutiny. In areas of rapid development, claims against the builder and new home warranty program (Tarion) commonly include claims alleging negligent building inspection. Municipalities are regularly sued for flood damages and sewer backups. Municipalities can also be defendants in class actions.

Claims for damages which are covered by the City's insurance policy and are responded to by the City's insurer are generally for property damage or personal injury arising from motor vehicle collisions which occur on City streets, trip/slip and falls on sidewalks or other City property, and property damage from flooding, and sewer backups. Claims for amounts under the City's deductible are handled by in-house lawyers, and those for amounts over the deductible amount are handled by the insurer's counsel.

Over the past term litigation matters generally arose in the areas of construction contracts and tendering, construction liens, environmental matters, real estate, collections, general breach of contract, and challenges to by-laws. In-house counsel handle these files except where specialized advice is required, matters are voluminous or there are time constraints and scheduling conflicts which may occur as a result of case management. Small Claims Court matters which are currently limited to \$10,000.00, typically include property damage, personal injury and negligence claims and are handled by in-house lawyers. The City has an obligation to defend to protect the interests of the municipality. Costs of litigation and cost-benefit of settlement are two of a number of considerations in litigation strategy.

The costs per year in this category are:

2006 - \$ 56,957.72
2007 - \$ 53,411.84
2008 - \$ 116,822.02
2009 - \$ 41,318.12

Litigation arising out of Municipal Elections (Recount and Compliance Audit matters)

Costs in this litigation category originate through the retainer of external counsel to provide expert advice regarding municipal election related matters pursuant to the *Municipal Elections Act* which provincial legislation obligates the municipal corporation to deal with. The City has experienced litigation in the area of municipal elections over the last three years. In addition to providing expert advice and court representation on the applications for recount and controverted election, expert advice was also required on various aspects of the municipal election finance compliance audit applications. Advice and court representation is ongoing regarding litigation arising from Council's decisions to proceed with audits and prosecutions. An independent prosecutor has been retained and these matters are continuing.

The costs per year in this category are:

2006 - \$ 40,493.29
2007 - \$ 346,029.70
2008 - \$ 296,036.73
2009 - \$ 287,482.13

Municipal Matters

Costs in this category originate with retainer of legal counsel to provide specialized legal advice on a variety of general municipal matters. Since 2006, the main areas of expertise required were environmental matters, development charges, expropriations, public inquiries, copyright, and facilitating a hospital in Vaughan.

Costs are as follows:

2006 - \$ 58,368.48

2007 - \$ 37,367.40

2008 - \$ 41,258.38

2009 - \$ 56,152.00

Ongoing Matters

Council also requested anticipated costs of unsettled matters based on best estimates. In order to protect the City's interest in ongoing litigation matters, a confidential memo has been provided to Council.

Relationship to Vaughan Vision 2020/Strategic Plan

This report is consistent with the priorities set by Council in the Vaughan Vision 2020, particularly Planning and Managing Growth & Economic Vitality; Enhancing Productivity, Cost Effectiveness & Innovation; and Leading and Promoting Environmental Sustainability.

Regional Implications

None

Conclusion

The City of Vaughan is a lower tier municipality with a population which has rapidly expanded over the last 10 years to reach approximately 260,000 persons. As any municipality grows, and given all the legislative changes in the municipal, planning and development areas over the last few years, the nature, complexity, and volume of matters required to be dealt with by local governments has increased. These factors increase the demand for legal services. Retaining external legal counsel on an as-needed basis and controlling the cost through measures such as assistance by in-house counsel and the Request for Proposals for legal services are some of the ways that the Legal Services Department manages the growing demand for legal services for the municipal corporation. As Vaughan continues to grow, staff will continue to ensure that costs for legal services are well managed and reasonable.

Attachments

None

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