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TO: GENERAL COMMITTEE


SUBJECT: FUNDING FOR POTENTIAL LEGAL COSTS ASSOCIATED WITH GROWTH MANAGEMENT

WARD: ALL

PREPARED BY AND KEY CONTACT: R. CARLSON, LAWYER, EXTENSION #4410

SUBMITTED BY: I. PETERS, DIRECTOR OF LEGAL SERVICES 

GENERAL MANAGER APPROVAL: R. FORWARD, MBA, M.Sc., P. Eng., GENERAL MANAGER OF COMMUNITY AND CORPORATE SERVICES 

CHIEF ADMINISTRATIVE OFFICER APPROVAL: C. LADD, CHIEF ADMINISTRATIVE OFFICER 

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### RECOMMENDED MOTION

1. That an additional \$250,000 be allocated to the Innisfil Annexation GL Account 01-14-2005 and funded from the Tax Rate Stabilization Reserve (13-04-0461) to:
  - a) Respond to potential appeals to the Ontario Municipal Board of the Official Plan amendments related to approval of the Hewitt's Secondary Plan and the Salem Secondary Plan, as well as to the General Amendments proposed to the Official Plan as a result of the Municipal Comprehensive Review, that may arise in 2014;
  - b) Respond to potential challenges to the proposed amendments to the Development Charges By-law that may arise in 2014; and
  - c) Respond to potential challenges to the proposed amendments to the Fees and Charges By-law that may arise in 2014.

### PURPOSE & BACKGROUND

#### Report Overview

2. This Staff Report is further to and to be read in conjunction with Staff Reports IGM002-14 and IGM003-14. Specifically, the purpose of this Staff Report is to inform Council of potential appeals that could arise from the proposed Official Plan amendments and request that the Legal Services Department be granted funding for these appeals.

### ANALYSIS

#### *Ontario Municipal Board Appeal of Official Plan Amendments*

3. Staff are in the process of recommending to Council, pursuant to Staff Report, that the City of Barrie's Official Plan be amended by way of approval of the Hewitt's Secondary Plan and the Salem Road Secondary Plan, as well as by way of General Amendments proposed to the Official Plan resulting from the Municipal Comprehensive Review.

4. The Planning Act provides that the following have a right to appeal the amendments within 20 days of giving notice: 1. a person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to Council; and 2. The Minister of Municipal Affairs and Housing. This appeal is to the Ontario Municipal Board.

*Ontario Municipal Board Appeal of Amendments to the Development Charges By-law*

5. Staff are in the process of recommending to Council that the Development Charges By-law be amended to facilitate development not only in the areas covered by the Secondary Plans, but for lands in the balance of the municipality.
6. A Development Charges By-law can be appealed by any person to the Ontario Municipal Board within 40 days of the passing of the by-law. The Ontario Municipal Board may repeal or amend the by-law, or may dismiss the appeals. The Ontario Municipal Board may repeal or amend the by-law if it finds that the charges set out in the by-law do not reflect compliance with the Development Charges Act provisions respecting calculation of development charges.
7. If only portions of the Development Charges By-law are amended, only those portions that are amended are open to appeal; the balance of a by-law that has not been amended is not subject to appeal.
8. Additionally, a person required to pay a development charge may complain to Council that:
  - a) a development charge was incorrectly determined;
  - b) whether a credit is available to be used against the development charge, or the amount of the credit or the service with respect to which the credit was given, was incorrectly determined; or
  - c) there was an error in the application of the development charge by-law.

This complaint may be made within 90 days of the date the development charge is payable. A complainant may appeal Council's decision to the Ontario Municipal Board within 40 days of Council's decision. Alternatively, if Council does not make a decision within 60 days of the complaint, the complainant may appeal the lack of decision to the Ontario Municipal Board.

*Ontario Municipal Board Appeal of Amendments to the Fees and Charges By-law*

9. The City of Barrie's Fees and Charges By-law authorizes the City of Barrie to charge for services rendered to the public. Staff are in the process of recommending to Council that the Fees and Charges By-law be amended to facilitate development not only in the areas covered by the Secondary Plans, but for lands in the balance of the municipality. Those portions of the by-law that are amended are subject to appeal. The balance of the by-law (that portion which has not been amended) is not subject to appeal.
10. The approval of or amendment to a Fees and Charges By-law cannot be appealed to the Ontario Municipal Board on the grounds that the fees are unfair or unjust. The fees and charges can be quashed by the Ontario Superior Court of Justice on application to quash for illegality. This is a difficult test to meet and requires bad faith on the part of the municipality, or for the municipality to exceed its authority set out in the Municipal Act, 2001 when instituting a fee/charge. The application must be brought within one year of the passing of the by-law.

*Ontario Municipal Board Appeal of a Front Ending Agreement*

11. In order to construct infrastructure (roads, water and sewer) in the lands covered by the two Secondary Plans, the City of Barrie will enter into Front Ending Agreements with the landowners. Such agreements are authorized by the Development Charges Act when a municipality has a Development Charges By-law in force and effect that supports the agreement. The purpose of

such an agreement is to provide that landowners who develop their lands first will pay the entirety or a majority of the costs necessary to provide infrastructure to their lands and to neighbouring lands that will not develop until a later time. When the neighbouring lands develop, according to the agreement the municipality will attempt to recover costs from those landowners as a condition of development (i.e. as a draft plan of subdivision condition).

12. A person may contest the imposition of the Front Ending Agreement to the Ontario Municipal Board. This appeal is to be taken within 40 days of notification of the Agreement.
13. Staff are in the process of negotiating a Memorandum of Understanding with the largest landowners subject to the Secondary Plans. This Memorandum will set out a common understanding as to the fees and charges that will be imposed on development, as well as the extent of front ending obligations that the various landowners will be subject to. The Memorandum is not legally binding. However, it will reduce the likelihood of appeal from the landowners that have participated in the process of drafting the Memorandum.

*Costs and Timing of the Potential Appeals*

14. If appeals are brought to the Ontario Municipal Board, the City of Barrie may need to retain external experts, including: lawyers; land use planners; and land use economists. The extent to which external experts will be required will be dependent upon the number of appeals launched, the complexity of the appeals launched and the timing of the appeals. In other words, if several complex appeals are launched so that they are active at the same time, it is very likely that internal resources will not be able to respond to the appeals and external services will be sought. Total external costs are difficult if not impossible to determine, as the number, complexity and timing of the (future, potential) appeals is unknown and unknowable.
15. The timing of the appeals will depend on the timing of the amendments to the Official Plan (by way of Secondary Plan being adopted by Council), amendments to the Fees and Charges By-law, amendments to the Development Charges By-law and the execution of the Front Ending Agreement.
16. The appeal periods noted above will run from the date the amendments and agreements are in place. It is unknown at this time when the amendments and agreements will be in effect. Since that is the case, it is unknown when the appeal period is.

*Lame Duck Council*

17. Being that this is an election year, there is a possibility that Council can be "lame duck" as of Nomination Day (September). A lame duck Council is one in which there is not the necessary quorum to make certain decisions, including decisions to spend amounts of \$50,000 or greater. A lame duck Council occurs when less than 75% of outgoing Council members may hold seats in the incoming Council. Whether or not a Council will be lame duck is only known on Nomination Day; this cannot be known in advance.
18. Therefore, the funds requested now will prevent Legal Services from being unable to fund appeals that arise during the Lame Duck period.
19. The Legislative and Court Services Department is drafting a report with a recommendation to delegate specific decision-making authority to the CAO during the lame duck period (as was done in 2010), which would allow direction on appeals to be provided during this period.

**ENVIRONMENTAL MATTERS**

20. There are no environmental matters related to the recommendation.

**ALTERNATIVES**

21. The following alternatives are available for consideration by General Committee:

**Alternative #1**

General Committee could maintain the existing funding in the Annexation GL Account 01-14-2005.

This alternative is not recommended as it does not allow for the City to adequately respond to the possibility of growth-related litigation during a possible lame duck period.

**Alternative #2**

General Committee could alter the proposed recommendation by reducing the additional funds to be added to the Annexation GL Account 01-14-2005.

This alternative is not recommended as the potential costs to be faced by the City are unknown. \$250,000 is a conservative estimate to enable Staff to adequately respond to the possibility of growth-related litigation during a possible lame duck period.

**FINANCIAL**

22. No provisions have been made to date for cost of litigation relating to the growth management plan. Funding for master plans, studies and development of secondary plans associated with the development of growth management plans in the amount of \$3.1 million previously approved by Council have been funded from the Tax Rate Stabilization Reserve. As such, it is recommended that the funding source for the cost of litigation also be funded from the Tax Rate Stabilization Reserve.
23. Cost relating to master plans, studies, development of the secondary plans, appeals of the Official Plan amendments and Fees and Charges By-law are recoverable from development charges, however, appeals to the Development Charges By-Law are not. Any costs recovered through development charges will be used to replenish the Tax Rate Stabilization Reserve.
24. Because of the uncertainty as to the number, type and complexity of appeals that may arise in 2014, \$250,000 is a highly speculative number. Further, the proportion of appeals that may be funded from development charges versus that proportion of appeals that may not be funded from development charges is also highly speculative. However, the Legal Services Department roughly estimates that 75% of costs related to appeals may be funded from development charges and 25% of costs related to appeals may not be. In other words, \$187,500 may be funded from development charges and \$62,500 may not be recoverable in this manner.
25. Costs related to growth management litigation for 2015 and onwards will likely be a further \$750,000. In 2015, when Council is out of the lame duck period and should the need arise, the Legal Services Department may request further funding to cover costs not recoverable through development charges (estimated at \$187,500). The remaining costs (\$562,500) will be incorporated into the upcoming phase II Development Charges update.
26. Including costs incurred to date and costs as per this motion, the anticipated final costs of the growth management program will be \$4.1 million.

**LINKAGE TO 2010-2014 COUNCIL STRATEGIC PLAN**

27. The recommendation(s) included in this Staff Report support the following goals identified in the 2010-2014 City Council Strategic Plan:
  - Manage Growth and Protect the Environment
  - Strengthen Barrie's Financial Condition