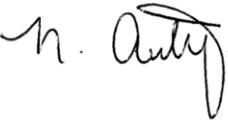




CITY OF HAMILTON
PUBLIC WORKS DEPARTMENT
Hamilton Water Division
and

CORPORATE SERVICES DEPARTMENT
Legal and Risk Management Services Division

PUBLICLY RELEASED AT THE DECEMBER 16, 2020 COUNCIL MEETING

TO:	Chair and Members Planning Committee
COMMITTEE DATE:	December 8, 2020
SUBJECT/REPORT NO:	Use of Tertiary Septic Systems in Hamilton and Update re: Local Planning Appeal Tribunal Case No. PL170858 (PW20082/LS20032) (Wards 9, 10, 11, 12, 13 and 15)
WARD(S) AFFECTED:	Wards 9, 10, 11, 12, 13 and 15
PREPARED BY:	Bert Posedowski, Manager, WWW Systems Planning x3199 Mike Christie, Project Mgr-Source Protection Planning x6194 Stephen Chisholm, Solicitor x3663
SUBMITTED BY: SIGNATURE:	Mark Bainbridge Director, Water and Wastewater Planning and Capital Public Works Department 
SUBMITTED BY: SIGNATURE:	Nicole Auty City Solicitor Legal and Risk Management Services 

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This Report PW20082/LS20032 is Confidential and its discussion in closed session is subject to the following requirement(s) of the City of Hamilton's Procedural By-law and the *Ontario Municipal Act, 2001*:

- **Litigation or potential litigation, including matters before administrative tribunals, affecting the City;**
- **Advice that is subject to solicitor - client privilege, including communications necessary for that purpose; and**

OUR Vision: To be the best place to raise a child and age successfully.

OUR Mission: To provide high quality cost conscious public services that contribute to a healthy, safe and prosperous community, in a sustainable manner.

OUR Culture: Collective Ownership, Steadfast Integrity, Courageous Change, Sensational Service, Engaged Empowered Employees.

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- **A position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.**

RECOMMENDATION(S)

- (a) That staff be directed to review and report back to Committee no later than June 2021, on proposals, if any, for the establishment of City policies or by-laws for the regulation, monitoring and enforcement of tertiary septic systems for residential developments;
- (b) That the Mayor be directed, on behalf of City Council, to forward correspondence substantially similar to that attached as Appendix “A” to Report PW20082/LS20032 to the Ministry of Agriculture, Food and Rural Affairs, the Ministry of the Environment, Conservation and Parks and the Ministry of Municipal Affairs and Housing requesting the legislative amendments necessary to appropriately regulate, monitor and enforce the appropriate construction, use and maintenance of tertiary septic systems in the Province of Ontario and that support for this initiative be sought from other Ontario municipalities;
- (c) [To remain confidential]; and
- (d) That Report PW20082/LS20032 including the Recommendations therein and Appendix “A” thereto be released to the public, except for Recommendation (c) and Appendix “B” attached to Report PW20082/LS20032 which shall remain confidential.

EXECUTIVE SUMMARY

As this report contains solicitor-client advice, seeks direction on current litigation and outlines the City’s negotiation position and objectives, it’s appropriate that this report be discussed in closed session.

This report is prompted by 2417985 Ontario Inc. and 2417972 Ontario Inc.’s successful appeal to the Local Planning Appeal Tribunal (LPAT) of a non-decision of an application to amend the Rural Hamilton Official Plan and Zoning By-law and a Plan of Subdivision to permit the development of a 20-lot residential subdivision at 34 11th Concession Rd. E. and 1800 Highway 6, Freelon.

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Subsequent to a five (5) day hearing, on August 29, 2019, LPAT Member Blair S. Taylor granted the appeal and approved the proposed development utilizing municipal water supply and private tertiary septic systems on lots smaller than the City of Hamilton's stated minimum lot size.

The City's position at the hearing was that: (a) there is not current firm capacity in the Freelon Water Supply System to support the proposed development; and (b) the tertiary septic system proposed to be used by the appellants – a nitrate-reducing system – is not recognized in, and therefore not enforceable, under the *Ontario Building Code*.

The City subsequently filed a request for a further review of Member Taylor's decision which was denied. To preserve the City's rights, City staff has now filed a Notice of Motion for Leave to Appeal to the Divisional Court and seeks further direction with respect to that appeal.

Staff believe that this adverse decision has implications for residential development in rural areas across the City, both with respect to its impacts on municipal water supply systems and, perhaps more significantly, on the use of 'alternative' tertiary treatment systems. Staff, therefore, believe it appropriate to conduct a comprehensive review of the use of tertiary septic systems with a view to proposing policies and bylaws for the appropriate construction, use and maintenance of systems while also bringing the issue to the attention of the provincial government and requesting appropriate regulation.

Alternatives for Consideration – See Page 6

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: Staff have paid a \$300.00 filing fee for the Request for Review. Filing fees are also payable to the Divisional Court on the filing of the Notice of Motion. Should the Divisional Court proceeding continue through to a decision, the City could recover a percentage of its legal fees if the appeal is successful but would similarly face potential exposure for payment of a portion of the landowners' legal fees if the City's appeal is unsuccessful.

Staffing: N/A

Legal: As outlined in Appendix "B" to Report PW20082/LS20032

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HISTORICAL BACKGROUND

2417985 Ontario Inc. and 2417972 Ontario Inc. filed a Rural Hamilton Official Plan (RHOP) (RHOPA-14-001) and Zoning By-law Amendment (ZBA) (ZAR-15-002) application, together filed a proposed draft plan of subdivision with the City in November 2014 seeking permission to develop a 20 lot residential development on the land known municipally as 34 11th Concession Rd. E and 1800 Highway 6 in Freelon. The application was deemed complete in December 2014. In July 2017, the landowners appealed to the Tribunal as the City failed to make a decision within the statutory time frame.

City staff were not supportive of the application primarily on the following bases: 1. that the developer proposed the use of tertiary private on-site sewage treatment systems in an effort to obtain approval for lot sizes smaller than the minimum lot sizes set out in the RHOP; and, 2. that the Freelon Drinking Water System does not currently provide firm capacity under the Ministry of the Environment's "Design Guidelines for Drinking Water Systems" for new development in the area.

The concerns raised by staff in respect of the tertiary treatment systems relates to their operation and monitoring. The proposed systems are nitrate-reducing, in that they operate to reduce nitrate levels in the effluent. Nitrate is a key pollutant from sewage disposal systems that increases the risk to groundwater quality and public health. Nitrate-reducing technologies are not specifically approved and accounted for under the *Ontario Building Code*, which makes monitoring and enforcement of proper functioning of these systems problematic.

At the hearing, the Tribunal accepted evidence provided by the landowners' consultant that the proposed systems will achieve required drinking water standards at the property boundaries and that the *Ontario Building Code* contains general enforcement provisions (albeit perhaps not specific to this type of treatment system) that would require a system owner to maintain the system and would permit the City to inspect the system as required. Additionally, the Tribunal appeared to place some weight on the appellants' expressed willingness to enter into private maintenance agreements with notification requirements to the City in the event of the termination of the agreement.

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The approval of tertiary treatment systems as a basis for the approval of ‘undersized’ lots (i.e. lots smaller than the minimum sustainable lot size in the RHOP) is significant for proposed developments in all rural areas across the City. Staff have significant concerns regarding both the demonstrated effectiveness of these systems and the ability of the City to test, monitor or enforce their effective operation in perpetuity.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

As outlined in this Report.

RELEVANT CONSULTATION

Relevant consultation included the Planning Division, Hamilton Water Division, Growth Management Division, Building Division and Legal Services Division.

ANALYSIS AND RATIONALE FOR RECOMMENDATION(S)

The use of tertiary systems such as those proposed by this landowner is not supported by City staff for reasons primarily related to the lack of regulatory framework around monitoring and enforcement.

Contaminants that may enter groundwater from septic systems include nitrate, bacteria, viruses, detergents, and household cleaners. Based on data available to Hamilton Water, the proposed nitrate-reducing systems often initially perform adequately but can quickly decline in performance, even with regular, comprehensive maintenance. Hamilton Water has concerns that if nitrate-reducing technologies become widely accepted to justify undersized lots in the rural area, the risks of poor septic system performance would lead to degraded groundwater quality for private well owners and increase acute and chronic health risks to these residents. The City’s lack of effective enforcement powers under the *Ontario Building Code* only increases that risk.

Another limitation staff have identified relates to Planning approvals in that, if these advanced systems are proposed to justify a development on an undersized lot, any landowner who later decides to replace an “advanced” nitrate reducing septic system with a conventional system could then easily exceed the capacity of the lot to absorb the effluent. The City would not have any ability to prevent this if the new system met *Ontario Building Code* requirements for a conventional system. This would result in increased public health and water quality risks. Collectively, a specific septic system

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technology cannot be tied to a property in perpetuity. The best approach to reduce these risks is to ensure, at the planning application stage, that the proposed lot can accommodate all septic system pollution within its property limits, regardless of the proposed technology.

If these nitrate-reducing systems become more widespread and their performance is allowed to degrade due to insufficient oversight/enforcement (particularly in a rural settlement area), Hamilton Water has significant concerns that groundwater quality could be degraded enough to warrant a provincial order from the Ministry of Environment, Conservation and Parks to build new municipal water infrastructure to safely provide a rural community with a sustainable water supply. Ratepayers would bear the costs to plan, design, construct, operate and maintain this new infrastructure.

Hamilton Water has municipal well systems in Freelon and Lynden that were created as a result of water quality and public health impacts associated with septic systems on undersized lots. Like other municipal well systems in Carlisle and Greensville, these municipal well systems represent the highest per capita cost to deliver municipal water throughout the City.

'Alternative' treatment systems with monitoring requirements outside of those set forth in the *Building Code* create staffing and resource issues for the City (as the City does not have a system in place to account for the monitoring of these types of systems) in addition to the enforcement concerns set forth above. Consultation with Building Division staff is ongoing to ascertain if an appropriate plan for monitoring and enforcement can be developed. However, initial consultations with Building Division that the City has no current authority to create municipal bylaws that incorporate requirements that go further than those outline in the *Ontario Building Code*.

Staff, therefore, believe it appropriate to conduct a comprehensive review of the use of tertiary septic systems with a view to proposing policies and bylaws for their effective regulation while also bringing the issue to the attention of the provincial government and requesting appropriate regulation.

ALTERNATIVES FOR CONSIDERATION

Council may elect to allow developments to proceed using tertiary treatment systems, for nitrate reduction, and the City assumes the risk that these systems may fail to perform as intended and ultimately become a source of contamination to the City's groundwater system. Due to this risk, staff do not recommend this alternative.

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ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN

Our People and Performance

Hamiltonians have a high level of trust and confidence in their City government.

APPENDICES AND SCHEDULES ATTACHED

Appendix “A” to Report PW20082/LS20032 – Draft Correspondence from City of Hamilton to various provincial Ministries re: Tertiary Septic Systems

Appendix “B” to Report PW20082/LS20032 – Confidential Update re: LPAT Case No. PL170858