




Hamilton

INFORMATION REPORT

TO:	Mayor and Members General Issues Committee
COMMITTEE DATE:	March 22, 2023
SUBJECT/REPORT NO:	Comprehensive Legal Services Report 2020 - 2022 (LS23002) (City Wide)
WARD(S) AFFECTED:	City Wide
PREPARED BY:	Lisa Shields (905) 546-2424 Ext. 4636
SUBMITTED BY:	Lisa Shields, City Solicitor Legal and Risk Management Services Corporate Services
SIGNATURE:	

COUNCIL DIRECTION

Not applicable.

INFORMATION

The City's Legal and Risk Management Services Division (LRMS) provides a full range of legal, risk management and prosecution services to the City. Our legal subject matter expertise includes municipal law, planning and development law, litigation, real estate law, public health law, administrative law, privacy law, procurement law, construction law, and corporate and commercial law. The Legal and Risk Management Services Division advises and represents the City and Council, as well as City departments and agencies. LRMS consists of two sections: the Dispute Resolution section and the Commercial Development and Policy section.

LRMS Works to Control the City's Legal Costs

Although there will occasionally be a need to retain outside legal counsel to provide specific expertise or handle sudden surges in demand experienced by the client departments due to large projects, Legal and Risk Management Services has developed capacity to handle the majority of the City's legal work in-house. The goal is

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

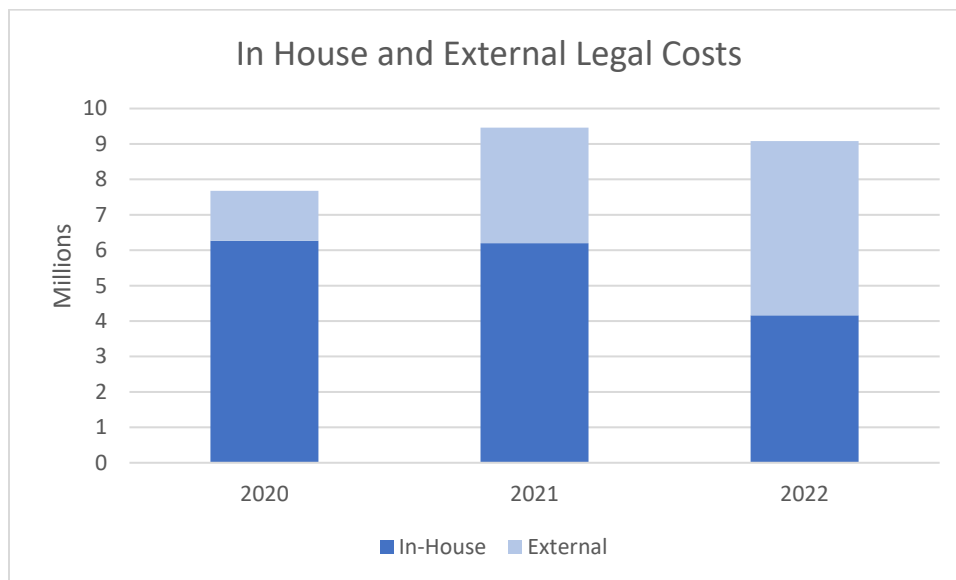
OUR Mission: To provide high quality cost conscious public services that contribute to a healthy, safe and prosperous community, in a sustainable manner.

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

to continue to develop this capacity and range of expertise over time which helps control overall legal costs to the City.

External legal costs include matters associated with Waterfront development, the Red Hill Valley Parkway Inquiry and Environmental Regulatory litigation matters.

The following chart shows the internal and outside legal costs for 2020-2022:



Dispute Resolution Section

The Dispute Resolution Section provides a range of legal services, primarily in civil and administrative litigation and related negotiations, mediations and court proceedings to advance and defend the City’s interests. Staff provide advice to limit the City’s claims exposure and take actions to defend against claims or bring claims in diverse areas, including but not limited to:

- civil and administrative litigation;
- personal injury and property damage defence;
- contract, debt and damage recovery;
- tribunal matters related to workplace safety insurance claims; and
- human rights.

It is also common for Dispute Resolution staff to work with counterparts in Legal Services’ Commercial, Development and Policy Section and assist the Division’s client groups on overlapping issues. Dispute Resolution staff frequently provide advice and guidance in both litigation and a variety of non-litigation matters to the full range of City departments based on staff’s legal and municipal expertise. Included is legal support for

prosecutions under the *Provincial Offences Act*, various airport matters, and the application of by-laws and statutes involved in City operations.

Dispute Resolution staff are the primary legal support for Risk Management Services in its management of claims and exposures, including claims which have not reached the point of legal action. The focus of Dispute Resolution in all areas is to provide quality advice for City decision makers and assist in limiting the expense, time and other City resources involved in litigation where Dispute Resolution staff provide representation for the City in courts and tribunals.

Disputes and litigation can originate through many circumstances, linked to legislative requirements, operations and varied situations involving the City. The main sources of litigation in all Municipalities, which are referred to Dispute Resolution from Risk Management Services are:

- Municipal liability for roads, sidewalks and their winter maintenance, municipal water/wastewater, water infrastructure,
- Transit and City vehicle use,
- police liability, and
- occupiers' liability for publicly owned properties and facilities.

Litigation also arises in the context of City contracts, construction projects, construction liens, human rights, workplace safety, and debt collections. The City engages in other administrative litigation to carry out its statutory duties and to protect municipal rights in administrative proceedings, and in responding to challenges to the use of City authority or its consequences.

Exceptions to Dispute Resolution involvement are:

- Litigation assumed by the City's various insurers under terms of insurance policies;
- Tribunal matters, including those before the Ontario Land Tribunal and Assessment Review Board, which are handled by Staff in the Commercial, Development and Policy section; and
- Labour and employment disputes which are handled by the Human Resources Department.

Litigation Activity in the Dispute Resolution Section 2020 through 2022

Through the years 2020 to 2022 Dispute Resolution staff resolved 334 litigation matters, which represents an average of 111 matters annually. There have been notable drops in claims received during parts of the pandemic. The year 2022 was more typical of activity where staff were involved in forty-six days of trials and hearings, twenty-one settlement conferences and pre-trials, eleven mediations and one-hundred and three days of examinations for discovery. The resolutions of claims were primarily in civil

litigation before the courts where legal proceedings are started by claims and applications.

Litigation is most often resolved through agreement arrived at in negotiations or mediations, but also may be completed through trials, hearings, appeals and summary judgment motions. Upcoming trial dates often encourage settlement discussions, however the pandemic significantly affected court operations from mid-March 2020 onward.

The City is a defendant in approximately 96% of its civil litigation matters where it is facing claims from others for various matters, mainly personal injury and property damage. The City paid approximately \$10.4M in awards and settlements. This amount represents approximately 2.4% of the monetary value of the \$442M in claims involved in the matters resolved. See table below for annual details.

The City was the plaintiff in 4% of its civil matters where it is the City making claims for recovery of debts or on property losses. Claims initiated by the City included recovery of debts under bankruptcy/insolvency proceedings or other debt collection, and damage claims to City property. On claims made by and debts owed to the City, Dispute Resolution staff assisted in collection or awards of \$8.4M to the City including legal costs over 2020-2022. Some of those awards of damages and costs involve the City receiving payments over time and a few requiring the City to pursue debt enforcement. Funds recovered are returned to departments whose operations are involved in the proceedings, which can be re-applied to specific operations or projects.

Please note that the metrics provided in this report for the Dispute Resolution section differ from the metrics for Risk Management Services. The claims handled by Dispute Resolution also include contractual disputes, debt recovery and administrative litigation, which are outside insurable interests handled by Risk Management Services.

	2020	2021	2022	3-Year Total	Yearly Average
Claims faced	\$ 89,666,913	\$ 115,082,392	\$ 237,307,156	\$ 442,056,461	\$ 147,352,154
Settlements paid	\$ 3,009,051	\$ 4,064,438	\$ 3,391,380	\$ 10,464,869	\$ 3,488,290
% paid	3.4%	3.5%	1.4%		2.4%
Claimed by City	\$ 2,963,045	\$ 5,438,815	\$ 1,543,000	\$ 9,944,860	\$ 3,314,953
Recovered	\$ 2,741,399	\$ 4,902,689	\$ 828,005	\$ 8,472,092	\$ 2,824,031
% recovered	92.5%	90.1%	53.7%		78.8%
Costs awarded	\$ 106,000	\$ 50	\$ 42,600	\$ 148,650	\$ 49,550

The outcome of any litigation matter is fact dependant, so results will vary from claim to claim. Negotiated settlement achieves certainty of results without the risks and costs involved in taking a matter to trial or hearing, thereby avoiding the potential risk that a

court or tribunal may make findings different from facts relied upon by the City. Many claims do not proceed to a trial as the City is able to resolve litigation with little or no financial contribution based on the lack of liability or the indemnities that are included in many City contracts.

Between 2020-2022, approximately 44% of all claims against the City were resolved without any City payment. Dispute Resolution staff also seek to shorten litigation and limit resources involved, more frequently through motions for summary judgement as the usefulness of these motions have expanded over time.

With limited court activity in the pandemic, Legal staff were able to complete examinations for discovery on parties involved in claims to develop facts necessary, to discuss settlement or prepare for trials, participate in mediations and pre-trials or settlement conferences. Many of these activities occurred virtually which also had positive impacts on the City's costs.

Legal staff as part of its efforts at continuous improvement, provide advice and feedback on the outcomes and issues involved in the litigation to avoid future claims arising from the same issues.

Provincial Offences Act (POA) Prosecution Activity

The City's prosecution team is involved primarily in meeting obligations under a Memorandum of Understanding ('MOU') with the Province which covers the prosecution of Part I matters under the Provincial Offences Act. Prosecutors conduct meetings with the public as part of the Early Resolution process and prepare for and conduct trials of charges in a variety of provincial offences and municipal by-law matters.

The bulk of *Provincial Offences Act* ('POA') charges, more than 90% of the total charges, are ticketable offences under the *Highway Traffic Act* or other provincial statutes where fines do not exceed \$1,000. While numerous by-law charges are possible under the City's by-laws, much of the enforcement activity is initiated in the Administrative Penalty processes which does not bring charges before the court. The MOU results in fine-payment revenues coming to the City, and the work of prosecutors supports the conclusion of charges which are disputed.

In addition to the *Highway Traffic Act* and related provincial statutes, charges also arise under other status, including but not limited to:

- The *Building Code Act*,
- The *Fire Protection and Prevention Act*,
- The *Health Promotion and Protection Act*,
- The *Smoke Free Ontario Act*,
- The *Emergency Management and Civil Protection Act*, the *Re-Opening Ontario Act*, and

- Various municipal by-laws.

Enforcement staff will use charges where necessary to seek higher fines for specific and general deterrence or health, safety or other serious offences.

The work of prosecutors supports continuous improvement, consistency and time efficiencies within the POA court system, and for enforcement agencies and officers including City enforcement units and Police Services. The prosecution team provides feedback to enforcement agencies on charges to help them understand court needs and decisions, also with the aim of improving enforcement outcomes. Prosecutors provide periodic training and information supports to other City staff or non-staff agencies to apply consistency in enforcement and up to date information.

In addition to court attendances, the prosecution team is involved in extensive public contact and services with witnesses, victims, outside enforcement agencies (mainly police services) and persons accused of provincial offences at public counters and through organized meetings such as the Early Resolution process.

The pandemic resulted in multiple and lengthy court closures starting in March 2020 and with significant impacts in 2021 on trial courts. The court system was adapted to allow virtual processes, which helped add to the volume of cases dealt with. In 2020 there were approximately 7,700 such Early Resolution or court events, in 2021 there were approximately 9,800, and in 2022 the total was 12,900. Each meeting or appearance requires advance preparation and extensive knowledge of court procedures, law and statutes, which is aided by support from the Deputy City Solicitor in Dispute Resolution and through annual training with prosecutors across Ontario.

Staff assist in the continuous operation of three full-time trial courts and one part-time court booked for longer trials, plus Early Resolution meetings, appeals, and related office duties that include review of municipal charges. Effective management of limited court resources helps the City meet its obligations and maintain POA revenues provided under the Memorandum of Understanding with the Province.

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The following table shows the volume and disposition of POA charges and related Municipal Prosecution activity in 2020 through 2022.

	2020	2021	2022
Charges			
Charges from All Enforcement Agencies	86,736	86,780	86,357
Police Charges	49,131	51,895	46,836
Red Light Camera	19,222	17,653	19,131
Automated Speed Enforcement	16,058	7,160	16,292
Dispositions			
Trial Requests	1,051	1,448	2,874
Early Resolution	9,764	7,915	13,201
Disclosure Requests	1,450	1,166	1,904
Summons to Witness	227	28	250
Application for Adjournment	108	5	59
Corporate / Business Name Searches	73	116	5
Charter Motions (Including 11(b))	8	1	30
Training Events	1	1	0
Court Events	18,947	60,906	60,525
Average Court Appearances to Disposition	3.2	2.5	3.3

Fine Revenue (Gross)	\$10.6M	\$12.5M	\$13.3M
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The trends in prosecutions 2020-2022 were driven by the Provincial Offence Courts' response to the pandemic. No in-person trials were scheduled after March 17, 2020 due to public safety measures enacted due to COVID-19 court closures. Similarly, Early Resolution meetings were suspended from March 17, 2020 to September 7, 2020. As a result, courts dealing with Provincial Offence matters generally did not operate from mid-March 2020 to mid-September 2020, and afterwards on a very limited basis for several months. The pandemic also saw trial requests decrease substantially in 2020 and 2021. Legislation provided numerous time extensions that made it unnecessary to immediately request trials. The volume of POA charges issued has remained relatively constant through the pandemic, leaving the POA court system with potential capacity issues.

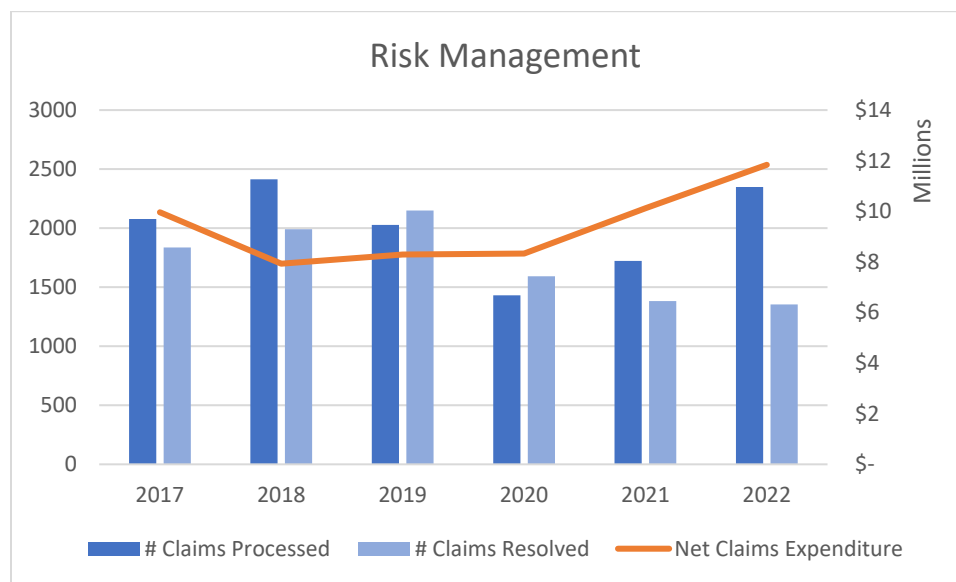
Legislation eventually allowed virtual and electronic processes that have seen trial and Early Resolution numbers increase in 2022. In 2021, the POA court implemented a virtual court platform using Zoom to support remote proceedings and trials. Virtual Early Resolution meetings commenced on September 1, 2021 and virtual trials commenced on September 15, 2021. The Court resumed scheduling in-person trials starting

September 2022 and resumed scheduling in-person Early Resolution meetings starting October 2022. While in-person court activity has resumed the prior legislative changes still allow virtual options for accused and some witnesses.

Risk Management Services

Risk Management Services staff procure and manage direct insurance coverages for City operations and assets and assist in claims and recoveries under those policies of insurance. In addition, staff assist in determining appropriate insurance and indemnity from third parties for City procurements and contracts, and arrange for application of indemnities and insurance to claims arising out of these third party contracts.

In 2020 incoming claims were somewhat reduced due to limited operations in some City services and properties, and this allowed staff to work on prior years' claims. In 2021, claims counts began to increase again in response to City facilities opening and services resuming. In 2022, claims incurred by the City rose significantly, making the second highest claims count within the past 5 years. In part this can be attributed to a significant spike in claims related to vehicle damage as a result of potholes on City roadways. Risk Management received in excess of 500 of such pothole-related claims.



With the volume of public claims, it is necessary to apply consistent and defensible standards for decisions involved in payment and denials. Consistency is found in common law and statutory analysis of municipal liability for loss and damages. Using a standard negligence approach ensures that the City does not make payments without a legal obligation to do so. This approach assists in withstanding scrutiny where staff decisions face independent review or court challenge. The approach to compensate claimants based on legal obligation is the fairest claims handling method to the tax base

as a whole. It serves to limit public frustration and confusion by providing a clear basis and framework for claims handling.

The function of procuring and managing the insurance program is performed annually by Risk Management Services. As reported to Council in Reports LS22036 & LS22036(a), the Municipal Liability and Property Insurance coverages were renewed for the 2023 policy term. As an update for Committee, subsequent to Report LS22036(a), staff were able to renew the one remaining policy, being the City's cyber insurance. The Cyber policy was renewed with a 3.2% premium increase and necessary changes imposed by the insurer for cyber coverage.

Commercial / Development / Policy Section ("CDP")

Legal Services' other major practice group, the Commercial / Development / Policy (CDP) Section, provides broad and diverse core legal services to support day-to-day operations as well as City priorities in such areas as planning and development, real estate transactions, economic development initiatives, water and wastewater, waste management, roads, public works and infrastructure, facilities, energy, affordable housing, fire, long term care, emergency response services, transit and transportation, clerks, finance and taxation. Staff in this section also provide legal support and advice to the Healthy and Safe Communities Department and Public Health Services with regard to the implementation of various programs and projects including independent initiatives and those in collaboration with agencies such as local school boards, universities, colleges and not-for-profit organizations.

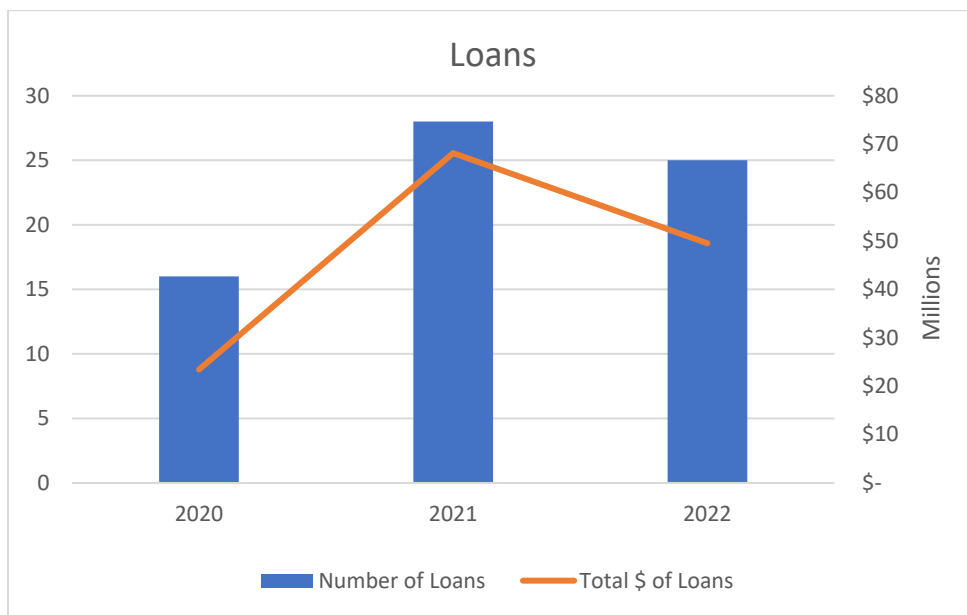
This section advises, negotiates and drafts a wide variety of agreements related to public-private partnerships, third party agreements, commercial and industrial re-development ventures, purchasing and procurement, environmental issues, construction contracts, and hiring agreements, among other matters. In 2022, CDP added tax assessment work to the section with attendances before the Assessment Review Board to mitigate against tax losses due to reassessments.

CDP staff have been engaged in a variety of significant City initiatives including the Pier 8 Waterfront Development, the L3 Wescam HQ development and the 2019 DC Bylaw as well as issues related to Niagara Peninsula Conservation Authority board membership, City Hall Forecourt demonstrations, developments at the Hamilton International Airport and new provincial legislation affecting the *Construction Act*, the *Planning Act* and the *Development Charges Act*.

Procurement represents a significant body of work which the CDP Section supports through drafting, interpretations, advice and legal opinions. Such services occur at various stages of the procurement process as well as when disputes arise after the contract is in place.

CDP lawyers handle and respond to construction liens that are generally registered by dissatisfied sub-contractors against City lands as security for payments on construction-related contracts. Most construction liens are resolved without the City having to become actively involved in court proceedings, at which point such matters are transferred to Dispute Resolution staff.

In addition, CDP staff provide services for most other contractual matters involving the City, including the negotiation and drafting of IT software/hardware agreements, data sharing agreements and revenue generating agreements. The CDP section provides similar services for loan agreements arising out of various City loan and grant programs relating to urban renewal, affordable housing (Investment in Affordable Housing “IAH”) and development charges. While the value of such agreements is set out in the following chart, it does not take into consideration other factors surrounding these matters including due diligence requests, postponement or amendment agreements:



CDP staff draft, interpret and advise on City by-laws including their administration and enforcement. These by-laws are related to a wide array of City operations and include such diverse issues as fees and charges, lobbyist registry, property standards, licensing, development charges, sale of land and sewer use.

The diverse needs of the Planning and Economic Development Department Section are supported by CDP on a variety of real estate transactions including acquisitions of property for such projects as community centres, road construction and repair, municipal redevelopment of surplus properties and public-private partnerships. They

are also involved in the sale or disposal of surplus City properties. In addition, this section negotiates and drafts easements, encroachments, covenants, leases, offers to lease and similar agreements and facilitates the expropriation of properties as directed by Council.

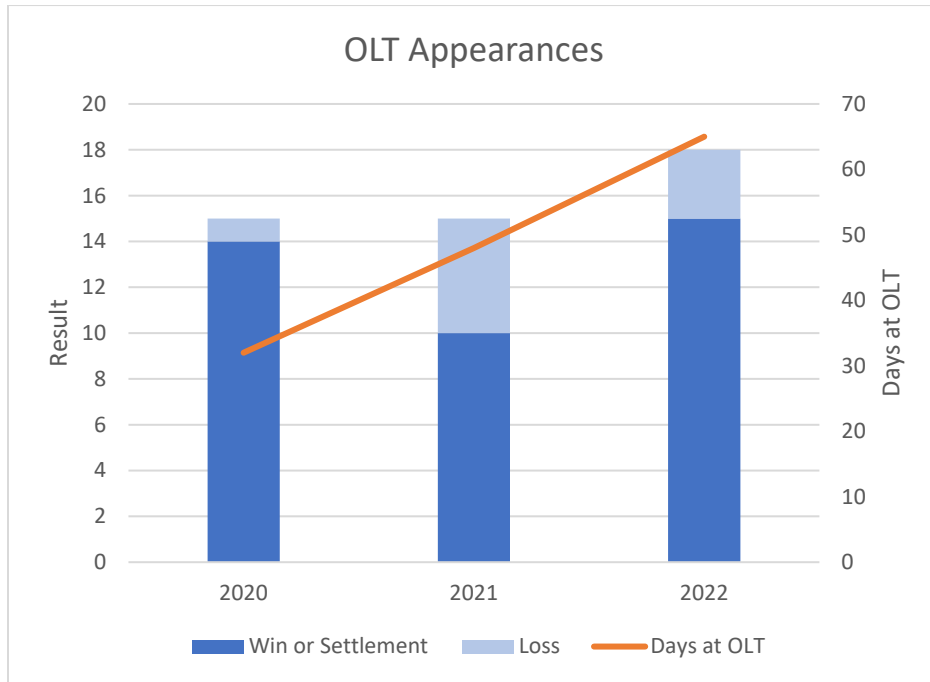
Real Estate			
	2020	2021	2022
Acquisitions	28	19	9
Total Purchase Price	\$12,166,271	\$15,321,736	\$8,738,681
Disposition	20	18	17
Total Sale Price	\$12,068,721	\$5,976,411	\$23,913,334
Tax Sales	0	0	2
Active Expropriations	5	3	2
Encroachment / Patio Agreements	45	39	56
Subdivision Matters	12	10	20
Condominium Matters	31	14	40

Additional support for the Planning and Economic Development Department is through the interpretation of the legislation, by-laws, and a wide variety of planning-related matters including official plan and zoning documents, draft plans of subdivision and condominium, site plan applications, disputes involving cash-in-lieu of parkland, development charges and other fees and tariffs.

CDP Lawyers represent the City before the Ontario Land Tribunals (the OLT) or other tribunals and courts including contested development applications, zoning by-law and official plan appeals, committee of adjustment application appeals, expropriations, and any other land-use related disputes. Appeals may be made by landowners seeking development approvals which have been refused by Council or where Council has not made any decision within the prescribed time provided under the *Planning Act*. Appeals may also be filed by individuals and public bodies and heritage districts.

These matters frequently extend over a period of many months involving the extensive preparation of witnesses, mediations and pre-hearings and negotiations, in advance of presentation of evidence and arguments at the OLT or other tribunals.

CDP lawyers continued to be involved in a number of important planning and development-related matters in 2022 with an increased number of hearing days at the OLT, which is forecasted to increase significantly in 2023.



Tax assessment work was added to CDP in 2022. Thirty-three tax assessment appeals were filed with a total estimated potential municipal property tax loss of \$9.8 M. The results from the appeals are as follows:

- 6 appeals resulted in a municipal tax loss being settled totalling \$808,000;
- 1 appeal resulted in a municipal tax increase being settled in the amount of \$5,000;
- 26 appeals resulted in no municipal tax loss
- Total external costs incurred totaled \$109k
- Net of the external costs, \$8.9M (or 91%) of the total estimated potential municipal tax loss was mitigated

APPENDICES AND SCHEDULES ATTACHED

None.