

INFORMATION REPORT

TO: Chair and Members Planning Committee	WARD(S) AFFECTED: CITY WIDE
COMMITTEE DATE: September 7, 2011	
SUBJECT/REPORT NO: Legal Services - Outside Counsel Fees for Ontario Municipal Board Hearings (LS11010)	
SUBMITTED BY: Peter A. Barkwell Legal Services Division	PREPARED BY: Don Fisher (905) 546-2424 Ext 6149
SIGNATURE:	

Council Direction: n/a

Planning Committee at its meeting of January 18, 2011, directed as follows:

“That Legal staff report back to Committee on what the City spent on outside legal counsel for OMB Hearings in 2010, and what they intend to spend in 2011, on hearings for which outside counsel has been hired for ongoing OMB cases.”

Information:

The total amount spent on outside counsel for OMB hearings in 2010 was \$287,520.33. Of this, \$251,684.00 was funded out of the Legal Services budget allocation for this purpose and the balance (\$35,836.33) directly from client department budgets.

For 2011, the total spend to date is \$343,574.55, of which \$269,317.12 has been funded by Legal Services and \$74,257.43 from client departments.

These numbers represent a significant spike from previous years. There are 2 primary reasons for this.

1. A Senior Solicitor whose practice consisted almost exclusively of dealing with OMB matters on behalf of the City moved from the Legal Services Division to the City Manager’s Office in mid-2010. This solicitor had carriage of a number of significant

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OMB files that were on-going at the time. We were not able to fill this position with a person of comparable skill and experience until March of 2011. During that period, the Division had only 1 Senior Solicitor to handle complex OMB matters in addition to providing on-going support and advice to the Economic Development and Planning Department generally. The Division also had available a junior solicitor who had been hired on contract to provide policy and research support specifically for the Rural and Urban OP approval processes. Notwithstanding this, and a complete lack of experience in tribunal matters, this solicitor was pressed into service and took on a number of OMB and Niagara Escarpment Commission appeals with great success. In June, 2010, there were 61 OMB files open. Since then, we have opened an additional 39 OMB files.

2. Most of the outside legal spend for OMB hearings has been associated with relatively few matters, including Setting Sail, the AEGD lands, St. Mary's quarry application and appeals, 2009 Development Charges appeals, West Hamilton Innovation District appeals, the Emerald and Burris minor variance appeals, the Chedoke Browlands and various Waterdown North subdivision appeals. Many of these matters had been carried along for some years prior but all came to the stage where Board action was required in the last half of 2010, or very early in 2011, at just the time when the Legal Services Division was experiencing the resource issue set out above. Also, many of these matters are very significant to the City and require the full attention of a skilled and experienced solicitor. For these reasons, and given the complex nature of these matters and the need to act quickly as they were all "heating up" at the same time, the assistance of reputable outside counsel was sought. The interests of the City have been, and continue to be, well-served by these counsel in these matters but, as can be seen by the numbers, such assistance comes at considerable expense. Typically, the hourly rate paid to outside counsel is between 2.5 and 3.5 times more than the comparable hourly cost of using in-house resources.

At the same time as these matters were progressing before the Board, Legal Services staff were handling all the other OMB matters which arose during this period. In particular, we maintained our commitment to maintain carriage of everything arising from the adoption of the Comprehensive Zoning By-law, the Rural Official Plan and the Urban Official Plan. Obviously, these are matters of the highest corporate significance. As noted above, the staffing issue was finally addressed in March of 2011. As a result, no new OMB file has been outsourced since then, with the exception of the Emerald and Burris minor variance appeals. In those cases, the decision to retain outside counsel was a joint decision involving Legal Services, the City Manager's Office and the Ward Councillor.

Looking ahead, we expect a number of the matters currently being handled by outside counsel to be resolved in 2011. Others, such as St. Mary's and the AEGD, will continue well into 2012, and perhaps beyond. We have noted and commented to Council in the past, and do so again here, that the number of OMB hearings on applications of all types seems to be increasing. Together with Planning staff, we need to understand the reasons for this trend and investigate and implement strategies and changes in the whole approvals process with a view to arresting or even reversing it. Given the current staffing level in Legal Services, however, we do not foresee an imminent need to

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engage outside counsel for upcoming OMB hearings in the near to medium term. We continue to believe that the spike in outside counsel expenditures experienced in 2010-2011 has been an aberration from our previous norm caused by a “perfect storm” of staff turnover and corporately significant matters all coming before the Board at roughly the same time.

A possible exception to this could be the just-received appeals of the 2011 Development Charges By-laws. As noted above, we have outside counsel acting for the City in respect of the appeals to the 2009 DC by-laws. We expect these appeals to be consolidated with the 2011 appeals since many of the appellants and issues are the same. In that case, a strong argument can be made for retaining the same counsel for all these appeals rather than splitting them off or turning them all over to someone new to the file. This decision has not yet been made and, in any event, the matters are unlikely to come before the Board until 2012.