

CITY COUNCIL AGENDA



DATE March 14, 2011 – 7 p.m. – Room 112

Please turn off or place on non-audible all cell phones, PDAs, Blackberrys and pagers during the meeting.

Disclosure of Pecuniary Interest

Appeal Hearing Process Training

The City Solicitor will provide training on the appeal hearing process.

ADJOURNMENT

Council as a Tribunal under the Development Charges Act

When Council, or a delegated Committee, is exercising a power conferred under a statute, such as the *Development Charges Act*, to hold a hearing and make a decision regarding the legal rights, powers, privileges, immunities, duties or liabilities of any person or the eligibility of any person to receive a benefit or license, they are considered a Tribunal and must follow certain rules.

Legislative Framework:

- *Statutory Powers and Procedures Act* (the “SPPA”) – See attached Schedule “A” for an outline of the relevant provisions. To view the entire Act, please go to http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90s22_e.htm
- *Development Charges Act* – See Schedule “B” for the relevant sections of the Act. To view the entire Act, please go to http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_97d27_e.htm

Role of Council:

- Not an advocate for the resident/ratepayer
- Must be impartial
- Must make an objective determination of the issue following a hearing in which it receives evidence from all parties
- During the hearing, the principles of fairness and the proper administration of justice must be followed

Conduct of the Hearing:

Prior to the Hearing:

- ✿ The clerk provides notice of the hearing to all parties.
- ✿ The parties may make written submissions to Council prior to the hearing and will also be given an opportunity to provide oral and documentary evidence at the hearing.

Procedural Issues:

- ✿ A proper record of the hearing must be kept, capable of producing either a transcript or minutes.
- ✿ A member of Council is appointed as Chair of the hearing. The Chair has the authority to make rulings or give directions regarding the procedure during the hearing.
- ✿ A lawyer from Legal Services will provide advice to Council regarding procedural and evidentiary issues during the hearing.

The Hearing:

- ✿ At the commencement of the hearing, the parties will identify themselves for the record.

- The parties may give an opening statement, either at the beginning of the hearing or prior to presenting the evidence.
- The complainant's case will generally be heard first, then the responding party, and finally the complainant will have the right to present reply evidence.
- All information submitted by the parties must be admissible in accordance with the rules of evidence and section 15 of the Statutory Powers and Procedures Act. See Schedule C for an outline of the general rules of evidence.
- Each party has the right to examine and re-examine its own witnesses and cross-examine the witnesses of the opposing party.
- Witnesses do not have to give evidence under oath or affirmation, however Council may require that evidence before it be given under oath or affirmation.
- The parties may also submit documentary evidence.
- All documents that are admitted into evidence must be made exhibits and will form part of the record of the hearing.
- Council members may ask a witness questions, for clarification only, after the examination of the witness by the parties and before the witness is excused. This is NOT an opportunity for Council members to conduct their own cross-examination of the witness.
- The parties will make submissions after all the evidence has been provided. During submissions, Council members may ask questions of the party for the purpose of clarifying the party's position, not for the purpose of eliciting additional evidence.

The Decision:

- Council is required to make a decision to either dismiss the complaint or rectify any incorrect determination or error that was the subject of the complaint (s.20(6) of the *Development Act*).
- Council must consider all the evidence in the context of the legislative scheme and the bylaw.
- Council members may confer amongst themselves *in camera* prior to making a decision. A decision may be reserved if Council requires more time to consider the evidence or prepare its decision.
- The decision must be supported by a majority of the members of Council who participated in the hearing.
- The decision and the reasons must be in writing, although it may also be delivered orally by the Chair at the end of the hearing.

After the Decision:

- The Clerk mails the decision to the complainant within 20 days of the decision being made.
- The Complainant has 40 days from the date of the decision to appeal the decision to the Ontario Municipal Board.

OTHER THINGS COUNCIL NEEDS TO KNOW:

Conflict of Interest:

- 📖 *Municipal Conflict of Interest Act* applies
- 📖 Common law conflict of interest rules apply
- 📖 Must be no apprehension of bias or prejudice on the issue by Council members

OTHER INTERESTING INFORMATION:

- 📖 Council has the ability to delegate the hearings of various matters to Committees (under Section 23.5 of the *Municipal Act, 2001* and under other particular statutes). Council is authorized to delegate either the hearing portion of the matter alone or the decision-making portion alone, or both. If only the hearing portion is delegated, the Committee conducts the hearing and provides a report to Council summarizing the evidence and the arguments presented at the hearing and making a recommendation regarding disposition of the matter. When the matter is considered by Council, no new evidence may be called, nor may Council members require any of the participants at the hearing to clarify their positions. If Council requires further evidence or clarification of any fact, the matter would be referred back to the Committee to reopen the hearing for that purpose.
- 📖 In Guelph, Council has delegated the holding of a hearing for business licensing appeals to the Corporate Administration, Finance & Emergency Services Committee. The details of the appeal process are set out in the Business Licensing By-law.

Schedule "A"

Statutory Powers Procedure Act

NOTE: other legislation or City By-laws may apply to the proceeding and may provide for procedures that must be followed in addition to the provisions of the Act

Section No. & Provision	Description
6. Notice	<p>Reasonable notice of the hearing must be given to the parties, stating the time, place and purpose of the hearing and the statutory authority under which the hearing is to be held and include a caution that if the party does not attend, the hearing may proceed in his absence and he will not be entitled to any further notice of the proceedings.</p> <p>Notice of the hearing can be given by way of public advertisement or other means where the tribunal determines that it is impracticable to send notices to all of the parties individually (s. 24) (because of the number of parties, for example).</p> <p>(NOTE: the Development Charges Act and the Business Licensing By-law also contain minimum notice requirements that must be followed)</p>
8. Particulars	<p>If the good character, propriety of conduct or competence of any party is in issue, that party is entitled to be given, prior to the hearing, reasonable information regarding allegations made (refer also to Appendix "B").</p>
9. Conduct of Proceedings	<p>The hearing must be open to the public, unless it involves:</p> <ul style="list-style-type: none">• matters of public security; or• intimate financial, personal or other matters of such a nature that, having regard to the circumstances, the desirability of avoiding disclosure outweighs the desirability of adhering to the principle that hearings be open to the public <p>The tribunal has power to maintain order at the hearing. The tribunal may make orders or give directions as it considers necessary to maintain order and, if a person disobeys, may call upon the assistance of a peace officer to enforce the order or direction.</p>

10. Representation	A party may be represented at the hearing by counsel or anyone as agent or may act on his own behalf, subject to subsection 23(3), which gives the tribunal the authority to remove an incompetent representative (other than a person licensed under the <i>Law Society Act</i>).
10.1. Examination/ Cross-Examination	A party may call and examine witnesses, present evidence and make submissions. A party may also conduct such cross-examinations as are reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding. Subsection 23(2) provides that the Committee may reasonably limit further examination or cross-examination of a witness in appropriate circumstances.
11–14. Witnesses	Witnesses have the right to have a representative present to advise them of their rights, but the representative can take no other part in the hearing unless the tribunal allows them to do so. Witnesses are protected against self-incrimination. The tribunal has the right to summons witnesses, if appropriate, and there are consequences to the witness for failure to attend or testify before the tribunal when summoned.
15. Evidence	Any oral testimony, document or other thing that is relevant, and not privileged or inadmissible by statute, is admissible before the tribunal. The tribunal may exclude anything unduly repetitious. There is no requirement that a witness swear an oath prior to giving a statement. However, the tribunal may require evidence before it to be given under oath or affirmation (s. 22). The basic common law rules of evidence apply.
16. Judicial Notice	Judicial notice is the recognition of some matters that are so obvious that they do not require formal proof. For example, beer may be intoxicating, etc. A tribunal may take notice of facts that can be judicially noticed.
16.2. Timelines	Tribunals must establish guidelines setting out the usual time frame for completing proceedings and any procedural steps that form part of the proceedings.
17-18. Decisions and Orders	Decisions and orders must be written. Upon request of a party, written <i>reasons</i> for the decision must be given. A copy of the decision (including reasons, if applicable) must be sent to the parties by mail, email or fax. A decision requiring the payment of money must set out the principal sum, and if interest is payable, the rate of

	<p>interest and date from which it is to be calculated.</p> <p>The decision (including reasons, if applicable) can be sent by way of public advertisement or other means where the tribunal determines that it is impracticable to send the decision to all of the parties individually (s. 24) (because of the number of parties, for example).</p> <p>NOTE: the Business Licensing By-law contains provisions regarding the notice of decision/recommendation and requires that written reasons for decision be provided. The Development Charges By-law requires that the notice of decision be mailed not later than 20 days after the decision is made</p>
20. Record-keeping	<p>The tribunal which conducted the hearing must compile a record of the proceedings, which must include:</p> <ul style="list-style-type: none"> • a copy of the appeal or complaint • the notice of hearing • any interim orders made by the Committee • all written/documentary evidence filed with the Committee • transcript of evidence (if any) or minutes taken of the hearing • decision or recommendation of the tribunal (and the reasons, where reasons have been given)
21. Adjournments	<p>The tribunal may adjourn the hearing:</p> <ul style="list-style-type: none"> • on its own motion; or • upon the request of any party if the tribunal is satisfied that it is required to permit an adequate hearing to be held
25. Procedure and Practices	<p>A tribunal has the power to determine its own procedures and practices and may:</p> <ul style="list-style-type: none"> • make orders with respect to the procedures and practices that apply in any particular proceeding; and • make Rules governing the practice and procedure before it <p>The Act specifically states that Rules may be made governing certain items, including the following:</p> <ul style="list-style-type: none"> • to allow a hearing to be held electronically (s. 5.2) or in writing (s. 5.1) (otherwise, the hearing shall be held orally) • to allow the tribunal to review all or part of its own decision • to allow the tribunal not to commence a proceeding in certain circumstances or to dismiss a proceeding without a hearing (sections 4.5 and 4.6)

	<ul style="list-style-type: none">• directing the parties to participate in alternative dispute resolution (s. 4.8)• directing the parties to participate in a pre-hearing conference (s. 5.3) (subject to any other Act or regulation that applies to the proceeding)• requiring disclosure (such as exchange of documents, witness statements, etc.) (s. 5.4)• costs (s. 17.1)• providing alternate methods of delivering a copy of the decision (s. 18)
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Schedule "B"

Development Charges Act, 1997

S.O. 1997, CHAPTER 27

COMPLAINTS ABOUT DEVELOPMENT CHARGES

Complaint to council of municipality

20. (1) A person required to pay a development charge, or the person's agent, may complain to the council of the municipality imposing the development charge that,

- (a) the amount of the 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. 1997, c. 27, s. 20 (1).

Time limit

(2) A complaint may not be made under subsection (1) later than 90 days after the day the development charge, or any part of it, is payable. 1997, c. 27, s. 20 (2).

Form of complaint

(3) The complaint must be in writing, must state the complainant's name, the address where notice can be given to the complainant and the reasons for the complaint. 1997, c. 27, s. 20 (3).

Hearing

(4) The council shall hold a hearing into the complaint and shall give the complainant an opportunity to make representations at the hearing. 1997, c. 27, s. 20 (4).

Notice of hearing

(5) The clerk of the municipality shall mail a notice of the hearing to the complainant at least 14 days before the hearing. 1997, c. 27, s. 20 (5).

Council's powers

(6) After hearing the evidence and submissions of the complainant, the council may dismiss the complaint or rectify any incorrect determination or error that was the subject of the complaint. 1997, c. 27, s. 20 (6).

Notice of decision and time for appeal

21. (1) The clerk of the municipality shall mail to the complainant a notice of the council's decision, and of the last day for appealing the decision, which shall be the day that is 40 days after the day the decision is made. 1997, c. 27, s. 21 (1).

Requirements of notice

(2) The notice required under this section must be mailed not later than 20 days after the day the council's decision is made. 1997, c. 27, s. 21 (2).

Appeal of council's decision

22. (1) A complainant may appeal the decision of the council of the municipality to the Ontario Municipal Board by filing with the clerk of the municipality, on or before the last day for appealing the decision, a notice of appeal setting out the reasons for the appeal. 1997, c. 27, s. 22 (1).

Additional ground

(2) A complainant may also appeal to the Ontario Municipal Board if the council of the municipality does not deal with the complaint within 60 days after the complaint is made by filing with the clerk of the municipality a notice of appeal. 1997, c. 27, s. 22 (2).

Clerk's duties on appeal

23. (1) If a notice of appeal under subsection 22 (1) is filed with the clerk of the municipality on or before the last day for appealing a decision, the clerk shall compile a record that includes,

- (a) a copy of the development charge by-law certified by the clerk;
- (b) the original or a true copy of the complaint and all written submissions and material received in support of the complaint;
- (c) a copy of the council's decision certified by the clerk; and
- (d) an affidavit or declaration certifying that notice of the council's decision and of the last day for appealing it was given in accordance with this Act. 1997, c. 27, s. 23 (1).

Same

(2) If a notice of appeal under subsection 22 (2) is filed with the clerk of the municipality, the clerk shall compile a record that includes,

- (a) a copy of the development charge by-law certified by the clerk; and
- (b) the original or a true copy of the complaint and all written submissions and material received in support of the complaint. 1997, c. 27, s. 23 (2).

Same

(3) The clerk shall forward a copy of the notice of appeal and the record to the secretary of the Ontario Municipal Board within 30 days after the notice is received and shall provide such other information and material that the Board may require in respect of the appeal. 1997, c. 27, s. 23 (3).

OMB hearing of appeal

24. (1) The Ontario Municipal Board shall hold a hearing to deal with any notice of appeal relating to a complaint forwarded by the clerk of a municipality. 1997, c. 27, s. 24 (1).

Parties

(2) The parties to the appeal are the appellant and the municipality. 1997, c. 27, s. 24 (2).

Notice to parties

(3) The Ontario Municipal Board shall give notice of the hearing to the parties. 1997, c. 27, s. 24 (3).

Powers of OMB

(4) After the hearing, the Ontario Municipal Board may do anything that could have been done by the council of the municipality under subsection 20 (6). 1997, c. 27, s. 24 (4).

Dismissal without hearing

(5) Despite subsection (1), the Ontario Municipal Board may, where it is of the opinion that the complaint set out in the notice of appeal is insufficient, dismiss the appeal without holding a full hearing after notifying the appellant and giving the appellant an opportunity to make representations as to the merits of the appeal. 1997, c. 27, s. 24 (5).

Refund if development charge reduced

25. (1) If a development charge that has already been paid is reduced by the council of a municipality under section 20 or by the Ontario Municipal Board under section 24, the municipality shall immediately refund the overpayment. 1997, c. 27, s. 25 (1).

Interest

(2) The municipality shall pay interest on an amount it refunds at a rate not less than the prescribed minimum interest rate from the time the amount was paid to the municipality to the time it is refunded. 1997, c. 27, s. 25 (2).

Schedule "C"

Evidence

The proceedings are governed by the Ontario *Evidence Act*, which can be found at

http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e23_e.htm

TYPES OF EVIDENCE

1. **Oral Testimony**: This is the most common form of evidence that tribunals will encounter.
2. **Documentary Evidence**: Documentary evidence is the presentation of "writings proving some fact", introduced as evidence through a witness during his testimony. Examples are certificates, business records, bank records, and so on. This does not include an affidavit or any other written statement by a person who is not present at the hearing.
3. **Demonstrative Evidence**: Photographs, diagrams or maps, known as "demonstrative evidence", are often very helpful. The tribunal should be satisfied that drawings accurately represent the scene or subject matter. Photographs, drawings or maps should be of assistance in understanding the evidence.

Overview of the Rules of Evidence:

Type of Evidence	Issue	Rules
Oral Testimony	Examination of Witnesses	<ul style="list-style-type: none">• When a witness is examined in chief (by the person who asked the witness to testify), the examiner must not "lead". This means asking a question which suggests an answer. For example, the questioner may say, "What colour was it?" but may not say, "Was it green?"
		<ul style="list-style-type: none">• On cross-examination (questions by the opposing party), the examiner may suggest answers
		<ul style="list-style-type: none">• After cross-examination, the first questioner is entitled to "re-examine" the witness, but the questions on re-examination are restricted solely to matters that were raised in cross-examination
		<ul style="list-style-type: none">• Following the parties' examinations, The tribunal may ask questions of a witness for clarification of an issue
	Competence of a witness	<ul style="list-style-type: none">• All witnesses are presumed competent to give evidence unless their competence is challenged due to age or disability or other reason.
	Compelling a witness (summons)	<ul style="list-style-type: none">• A witness is "compellable" when he or she can be forced to give evidence under a "summons". Exceptions are specifically provided for in law.

		Examples of exceptions would be spousal privilege and solicitor-client privilege.
	Use of notes by a witness	<ul style="list-style-type: none"> • A witness may refer to notes made by the witness at the time of an event to refresh his memory of the event, with consent of The tribunal.
Documentary Evidence	Copies of Documents	<ul style="list-style-type: none"> • The original document should be produced unless it is impossible or impractical • A copy of a document or thing can be admitted as evidence if the tribunal is satisfied that it is authentic (s. 15.(4) of the SPPA)
	Notice	<ul style="list-style-type: none"> • A person wishing to admit a document into evidence must provide evidence satisfactory to The tribunal identifying the document and proving its relevance. An opposing party has a right to object to a document being submitted into evidence, requiring The tribunal to make a ruling on the admissibility of the document. • Some types of documentary evidence require that the party give notice to the opposing party prior to the hearing that it intends to introduce these documents. Examples include business records and expert reports. • In the absence of any rules made by the tribunal, there is no requirement that either party provide disclosure of documents to the other party in advance of the hearing. At the hearing, a party must allow the other party an opportunity to review any documents the party intends to introduce into evidence
Demonstrative Evidence	Admissibility	<ul style="list-style-type: none"> • Photographs should not be admitted into evidence unless the person who took the photographs provides evidence regarding the date they were taken and what they depict.

GENERAL RULES OF EVIDENCE

Relevance:

Only evidence that is relevant to the matters in issue should be admitted. In determining relevance, it must be determined what assistance, if anything, this particular piece of evidence is going to provide in determining the matters in issue.

Admissibility:

Section 15 of the SSPA provides that any oral testimony, document or other thing that is relevant to the subject matter of the proceeding, and not privileged or inadmissible by statute, is admissible before the

tribunal and that the tribunal may exclude anything unduly repetitious. Evidence that would not be admissible in a court may be admitted by the tribunal except if the evidence would be inadmissible due to any privilege under the law of evidence or pursuant to the provisions of a statute.

“Hearsay evidence” is defined generally to mean evidence of a statement made to a witness by a person who is not called as a witness which is submitted to establish the truth of what is contained in the statement. Hearsay evidence may be admitted into evidence by The tribunal, however the weight that is given to this evidence should be carefully considered. Hearsay evidence is considered unreliable due to the lack of opportunity to cross-examine the person allegedly making the statement and the inability to determine if the person making the statement is speaking the truth.

Similarly, the weight to be given written statements should generally be carefully considered unless the author of the statement is called as a witness to identify the document and be questioned regarding its contents.

The tribunal has the right to summons a person to give evidence at the hearing or produce documents if The tribunal considers it necessary to properly decide the matter in issue.

Proof - Direct vs. Circumstantial

There are two types of proof: direct evidence and circumstantial evidence. Direct evidence is simply evidence that *directly* proves a fact in issue. An example of direct evidence would be an eye witness to an event. Circumstantial evidence is evidence surrounding circumstances from which an *inference* may be drawn that a certain fact occurred. Circumstantial evidence is admissible, but before it is relied upon, the tribunal should be satisfied that only one logical inference can be drawn from such evidence.

Character Evidence

Section 8 of the Act provides that, where the good character, propriety of conduct or competence of a party is an issue, evidence relating to these allegations may be accepted, however, the tribunal must ensure that the person in question has been provided with reasonable information about the allegations, *prior to the hearing*.

Opinion Evidence

A witness is generally not allowed to give his or her opinion about a fact in issue, unless the matter calls for his special skill or knowledge and it can be clearly established that the opinion has a proper basis. A person may be qualified by the tribunal as an “expert” in a particular area to provide opinion evidence to the tribunal regarding a matter in issue.

Assessing Credibility

One of the most difficult issues facing a tribunal dealing with contradictory evidence is determining who is telling the truth, particularly where a fact is in dispute between two persons. The tribunal is permitted to establish credibility, preferring the evidence of one individual over another.