

STAFF REPORT: Planning & Building Services Department



REPORT TO: Planning & Building Committee
MEETING DATE: August 3, 2011
REPORT NO.: PL.11.78
SUBJECT: Short Term Accommodation
PREPARED BY: David Finbow, Director,
Planning & Building Services

A. Recommendations

THAT Council provide direction to Staff with respect to proceeding with a detailed financial analysis, including required staffing and infrastructure, related to zoning by-law enforcement of short term accommodation uses as well as a possible licencing regime of short term accommodation uses pursuant to the *Municipal Act*.

B. Background

Council at its meeting of July 11, 2011 adopted the following recommendations of the Planning & Building Committee:

THAT Council receive Staff Report PL.11.71, "Ontario Municipal Board Decision/Order of the Board – Short Term Accommodation"; and,

THAT Council direct Staff to report back to the August 3, 2011 Planning & Building Committee on the status of the Ontario Municipal Board Decision/Order of the Board; and,

THAT Council recognize the current Municipal By-law Enforcement Service Levels as outlined in this Report; and,

THAT, upon confirmation of no review/appeals of the Ontario Municipal Board Decision/Order of the Board, Council endorse in principle proactive enforcement of the Town's Zoning By-laws related to Short Term Accommodation uses upon the necessary staffing and other resources being available; and,

THAT, upon confirmation of no review/appeals of the Ontario Municipal Board Decision/Order of the Board, that Staff report back to the August 3, 2011 Planning & Building Committee on the financial implications, including sources of funding, related to the resources required for the enforcement and licencing of short term accommodation uses.

Status of Ontario Municipal Board Order

On July 8, 2011 the Town's solicitor, Aird & Berlis LLP, advised that they had been served by the solicitor representing Sheldon Rosen and The Lodges at Blue Mountain Corporation with a notice seeking leave to appeal against the Ontario Municipal Board (OMB) Order due to an alleged error(s) in law made by the OMB. A copy of the Notice of Motion for Leave to Appeal is attached hereto as Appendix "A". It is Town Staff's understanding that the Moving Parties have 30 days to file the necessary documents to perfect the Notice of Motion and that the Town has 15 days post this to respond. Following this, the matter will be scheduled to be heard in the Superior Court of Justice.

With respect to the status of the OMB Order and the related Interim Control By-laws, Official Plan Amendment and Zoning By-laws, the Town's solicitor has advised that they are in full force and effect at this time.

Enforcement

As noted in previous Staff Reports, the nature/scope of zoning by-law enforcement of short term accommodation uses must be resolved by Town Council. Over the past number of years, By-law Services has been compiling information/files related to short term accommodation uses either through public complaints and/or notices, Ontario Provincial Police referrals or cursory internet, newspaper or other source reviews. Due to current By-law Services service levels and lack of staffing capacity, investigations of these files has been limited.

Licensing

With respect to licensing, Part IV of the *Municipal Act* indicates the following:

Powers re licences

151. (1) Without limiting sections 9, 10 and 11, a municipality may provide for a system of licences with respect to a business and may,

- (a) prohibit the carrying on or engaging in the business without a licence;
- (b) refuse to grant a licence or to revoke or suspend a licence;
- (c) impose conditions as a requirement of obtaining, continuing to hold or renewing a licence;
- (d) impose special conditions on a business in a class that have not been imposed on all of the businesses in that class in order to obtain, continue to hold or renew a licence;
- (e) impose conditions, including special conditions, as a requirement of continuing to hold a licence at any time during the term of the licence;

- (f) license, regulate or govern real and personal property used for the business and the persons carrying it on or engaged in it; and
- (g) require a person, subject to such conditions as the municipality considers appropriate, to pay an administrative penalty if the municipality is satisfied that the person has failed to comply with any part of a system of licences established by the municipality. 2006, c. 32, Sched. A, s. 82.

As noted in Staff Report SRB.08.55, considered by Town Council on October 6, 2008, the purpose of a short term accommodation licencing by-law would include, but not be limited to, the following:

- Ensuring that the health and safety of the users of such short term accommodation uses are addressed by way of ensuring that the building meets minimum building and fire code regulations;
- Ensuring that a minimum level of consumer protection is provided by way of ensuring the building meets minimum property standards and that essentials such as plumbing/water, heat, and on-site parking are adequately provided for;
- Ensuring that short term accommodation uses do not create a nuisance (public disturbance, noise, garbage/debris) to the adjoining neighbour or neighbourhood or surrounding lands; and,
- Ensuring that zoning regulations are met.

Financial Implications

Costs

As noted in previous reports to Council on this matter, by-law enforcement for the most part provides for “discretionary services”. There are few pieces of legislation that a municipality must enforce. Council at its meeting of July 11, 2011 recognized the current Municipal By-law Enforcement Service Levels. Given this, Town staff proceeded to review the needs for meaningful enforcement of the Town’s Zoning By-laws related to short term accommodation uses. In this regard, Town staff continues to be of the opinion that this equates to a minimum of 1.5 staff positions along with the necessary supporting infrastructure (work stations, office equipment, appropriate licencing software, vehicles, etc.).

With respect to these staff positions, the Director, Planning & Building Services, inquired of the Town’s other Department Heads of possible “excess capacity” that may exist within the Corporation to support meaningful enforcement of the Town’s Zoning By-laws related to short term accommodation uses with no such “excess capacity” being identified.

With regard to a detailed financial analysis, same has not been completed in conjunction with Financial & Information Technology Services staff at this time due to other municipal priorities and/or vacation but Planning & Building Services staff offer the following summary of potential costs:

1 Zoning By-law Investigator @ Job Rate (Wages & Benefits @ 25%)	\$87,500
0.5 Administrative Support @ Job Rate (Wages & Benefits @ 25%)	\$27,500
Work Station, Office Equipment, Desktop Computer, Vehicle x 1	\$35,000
Licencing Software	\$10,000
On-going Operational Costs	\$15,000
(Office Supplies, Communications, Vehicle Expenses, Software Licencing, Training, etc.)	
Overhead (payroll, heat, hydro, etc.)	\$ 5,000
 Year 1 Costs	 \$180,000

Fees

Part XII of the Municipal Act authorizes a municipality to impose fees or charges on persons,

By-laws re: fees and charges

391. (1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to impose fees or charges on persons,

- (a) for services or activities provided or done by or on behalf of it;
- (b) for costs payable by it for services or activities provided or done by or on behalf of any other municipality or any local board; and
- (c) for the use of its property including property under its control. 2006, c. 32, Sched. A, s. 163 (1).

Costs related to administration, etc.

(3) The costs included in a fee or charge may include costs incurred by the municipality or local board related to administration, enforcement and the establishment, acquisition and replacement of capital assets. 2006, c. 32, Sched. A, s. 163 (3).

Fees for mandatory services, etc.

(4) A fee or charge may be imposed whether or not it is mandatory for the municipality or local board imposing the fee or charge to provide or do the service or activity, pay the costs or allow the use of its property. 2006, c. 32, Sched. A, s. 163 (3).

As noted above, the *Municipal Act* authorizes a fee or charge that may include costs incurred by the municipality related to the administration, enforcement and the establishment and replacement of capital costs. On this basis, and over time, a licencing system could potentially provide off-setting fees to enforcement.

Summary

Given the multitude of priorities within the Planning & Building Services Department, and in light of the Notice of Motion for Leave to Appeal, Town staff require direction on the priority of moving forward with proactive enforcement of short term accommodation uses and the development of a financial model for the necessary infrastructure required for meaningful zoning by-law enforcement of short term accommodation uses.

C. The Blue Mountains' Strategic Plan

"Managing growth to ensure the ongoing health and prosperity of the community."

"Providing a strong, well managed municipal government."

D. Financial Impact

To be determined

E. Addendums

A. Notice of Motion for Leave to Appeal

Respectfully submitted by:

David Finbow
Director, Planning & Building Services

A.

Court File No.:

**ONTARIO SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

BETWEEN:

SHELDON ROSEN and THE LODGES AT BLUE MOUNTAIN CORPORATION

Moving Parties

-and-

CORPORATION OF THE TOWN OF BLUE MOUNTAINS

Respondents

**NOTICE OF MOTION FOR LEAVE TO APPEAL
(Pursuant to Rule 61.03 of the *Rules of Civil Procedure* and
Section 96 of the *Ontario Municipal Board Act*)**

THE MOVING PARTIES, Sheldon Rosen and The Lodges at Blue Mountain Corporation, will make a motion to the Court on a date to be fixed by the Registrar, at Brampton (A. Grenville & William Davis) Courthouse, City of Brampton, 7755 Hurontario Street, Brampton, Ontario.

The motion is to be heard orally.

THE MOTION IS FOR:

1 An order granting Sheldon Rosen and the Lodges of Blue Mountain Corporation ("Appellants") leave to appeal from the decision of the Ontario Municipal Board ("Board"), dated June 22, 2011, which denied the Appellants' appeal of the following by-laws the Corporation of the Town of Blue Mountains ("Town"): By-laws 2008-12 and 2008-67, Interim Control By-laws ("ICB") passed under s.38 of the *Planning Act*; Amendment No. 11 to the Town Official Plan ("O.P.A") passed under s. 21 of the *Planning Act*; and By-laws 2009-03, 2009-04 and 2009-05,

(Zoning By-law amendments) passed under s. 34 of the *Planning Act* (collectively the "Planning Documents").

2. An order extending the time for service and filing of this notice of motion.
3. Such further and other relief as counsel may request and this Court deems just.

THE GROUNDS FOR THE MOTION ARE:

4. The Town, located in the County of Grey ("County"), is a four seasons recreation and resort destination, with more than 730,000 visitors a year. Of the 5,619 residential dwellings in the Town, only 2,939 are permanently occupied. Of the remaining 2,680 residential dwellings, many are rented to the vacationing public ("visitors" as described by the Board) for short term accommodation.

5. The Appellants manage approximately 65 of these dwellings for their owners. The Appellants also directly own approximately 15 residential units in the Town, 14 approximately of which are rented for short term accommodation.

6. On October 13, 2007, the Town held a statutory public meeting under the *Planning Act* regarding proposed amendments to the Town Official Plan and zoning by-laws to prohibit short term accommodation on lands zoned residential in the Town.

7. Four months later, on February 4, 2008, the Town passed ICB No. 2008-12 (ICB) prohibiting, on all lands zoned residential, for a period of six months, the use of any land, building or structure for short term accommodation. Council also authorized a study of the issue of short term accommodation in the Town.

8. On April 7, 2008, the Town released a "Short Term Accommodation Study." Two months later on July 7, 2008, the Town extended the ICB period to a total of two years.

9. On January 12, 2009, the Town adopted the Official Plan and zoning by-law amendments. The purpose of these amendments was to prohibit the use of certain residential units for short term accommodation. Although the definitions changed short term accommodation ultimately was defined as the renting of a non-owner occupied residence for a period of less than 30 days.

10. The Planning Documents were appealed to the Board which denied the appeals. The Board's decision to deny the appeals was the result of the following errors of law:

(A) The Board erred in law by denying procedural fairness:

- (1) Shortly prior to the commencement of the Board hearing, the Town council held an *in camera* session wherein it approved significant amendments to the Planning Documents before the Board, without prior notice to the public, or the Appellants, although a number of pre-hearing conferences had taken place before the Board, and although a procedural order setting out: (a) the issues at the hearing, (b) the witnesses to be called; and (c) the dates upon which witness statements had to be provided prior to the commencement of the hearing had been issued by the Board based on un-amended Planning Documents.
- (2) Immediately before the hearing the Town provided the Appellants with the Planning Documents as amended in the *in camera* session of council. At the commencement of the hearing the Appellants' brought a motion to exclude the *in camera* amendments from the proceeding. The Board ruled that the motion was premature as the Town had not yet introduced the amendments at the hearing.
- (3) Subsequently, the Town did not introduced the *in camera* amendments at the hearing rather Blue Mountain Resorts Limited and Intrawest ULC, ("BMR"), a party to the proceeding with an identity of interest in common with the Town,

introduced amendments to the Planning Documents which were very similar to the *in camera* amendments drafted by the Town, with the Town's support. The Board admitted and approved the *in camera* amendments without changing the procedural order or rehearing the Appellants objection to the introduction of the *in camera* amendments.

- (4) A second motion by the Appellants to produce information which formed the basis and rationale of further amendments, including the minutes of the *in-camera* council meeting and a witness to answer questions regarding non-legal advice at that *in camera* meeting was also denied.
- (5) The Board's admission and approval of the proposed amendments represents a denial of the Appellant's right to procedural fairness in that (i) the case the Appellants were required to meet changed significantly at the end of the hearing without sufficient notice for the Appellants to adequately prepare a response, (ii) the Appellants did not receive adequate documentary discovery to probe the rationale behind the amendments and is the rationale of the original amendment. The effective result was to allow the Town to shield evidence which might have been detrimental to the Town's case from disclosure.
- (6) The Board was required to hold a "hearing" with respect to the Planning Documents which requires full procedural fairness of the Appellant, including the right to proper notice and full disclosure of the case to be met. The Board denied the Appellants such fairness.

(B) The Board erred in law by not applying the *Planning Act* requirements for a public meeting respecting Official Plan amendments:

- (1) The significant amendments to the Planning Documents that were ultimately introduced through BMR were proposed and approved at an *in camera* meeting.
- (2) No planning reports or rationale for these amendments was made public, prior to the hearing and no notice was given in accordance with any of the methods prescribed under the *Planning Act* and the Board denied the Appellant's motion to make this information public.
- (3) Persons affected by these amendments were not given notice or a fair opportunity to be heard, contrary to the requirements of the *Planning Act*, including ss. 17(15), 17(19), 17(19.1) , 21(1), 22(1), 22(4), 34(18) and .the regulations passed pursuant to the *Planning Act*, including O.Reg. 543/06 ss.2 and 10 and O.Reg 545/06 ss. 6(9).
- (4) The Board in approving these amendments erred in law by permitting the public process for Official Plan amendments required by the *Planning Act* to be circumvented through the use of *in camera* council sessions to approve the amendments and a third party proxy to introduce the amendments.
- (5) The Board exceeded its jurisdiction by approving the O.P.A which amended the Town's Official Plan when the Board had only jurisdiction to modify it.
- (6) Had the public been given proper notice of the amendments other interested persons may have joined the proceedings in support of the Appellants, or may have influenced the council's decision to the benefit of the Appellants.

(C) The Board erred in law by failing to properly interpret and apply ss. 3(5), and 24 of the *Planning Act*:

- (1) Section 3(5) of the *Planning Act* requires that the Town council and Board decision be consistent with the Provincial Policy Statement ("PPS"). The interpretation of the PPS and consistency is a matter of law.
- (2) No evaluation was produced by the Town to determine whether the Planning Documents are consistent with PPS policies regarding tourism, including policies 1.1 and 1.7.1, or indeed the determine whether that the impacts on tourism of the Planning Documents were not considered by the Town.
- (3) The lack of evidence to address consistency with these policies, leads to the necessary inference that in finding that the Planning Documents were consistent with the PPS, the Board either fundamentally misconstrued the meaning of consistency under s. 3(5) of the *Planning Act* and did not give proper weight to the requirement of consistency or misconstrued the onus to demonstrate consistency.
- (4) Therefore, the Board erred in law in finding the Planning Documents are consistent with the PPS.
- (5) In addition, Section 24 of the *Planning Act* prohibits the passing of a by-law including a zoning by-law and a by-law approving a O.P.A. which does not conform with a existing Official Plan. Interpretation of Official Plans and conformity therewith. is a matter of law.
- (6) No reliable or substantive evidence was provided to demonstrate the conformity of the Planning Documents with the County Official Plan, and in particular in particular Official Plan policies 1.1, 1.4.5, 1.4.6, 1.5.1, 1.5.4 and 2.5.2.

- (7) No reliable and substantive evidence was provided to demonstrate the conformity of the Planning Documents with the Town Official Plan, and in particular Official Plan policies .2, 1.3.3, 2.3, 2.5, 3.15 (1), 3.15(6), 3.17, 3.17(2) and 3.2.1.
- (8) The lack of evidence to address conformity with these policies, leads to the necessary inference that in finding that the Planning Documents conform with the County and Town Official Plans, the Board either fundamentally misconstrued the meaning of the word conform in s. 24 of the *Planning Act* and did not give proper weight to the requirement of conformity or misconstrued the onus to demonstrate conformity
- (9) The Board therefore erred in law in finding that the Planning Documents were in conformity with the County and Town Official Plans.

(D) The Board erred in law in interpreting the purpose and effect of the Planning Documents:

- (1) The Board held that the purpose and effect of the Planning Documents is not related to "people zoning" or "the users" of land. Yet the Board also held that the purpose of the Planning Documents was to address a growing tension between its permanent residents and its "visitors" – a purpose which is based on the users of the land, rather than land uses.
- (2) In arriving at its determination that the Planning Documents do not represent people zoning, the Board erred in interpreting the nature of short term accommodation. The Board interpreted short term accommodation of 30 days or less as a commercial land use, while accommodation for longer periods qualified as a residential use; although short term accommodation is no different in any substantive way from a 31 day residential use, when there was no evidence of

any commercial activity in short term accommodation units; and when long term accommodation can be used for "commercial" purposes i.e. rented for income, used as a basis for financing.

- (3) Further, the Town witnesses and town staff admitted that municipal by-laws existed which addressed the permanent residents' complaints regarding noise, parking and garbage, and that these issues were operational in nature and thus related to the users of the land, and were due to inadequate enforcement of the by-laws.
- (4) In addition, the Town is in the process of preparing a licensing regime for short term accommodation under the *Municipal Act*, S.O. 2001 c. 25 ("Municipal Act").
- (5) The existence of *Municipal Act* by-laws that would address residents' concerns but for inadequate enforcement, combined with a licensing regime for short term accommodation, and the failure to regulate the providers of short term accommodation rather prohibit the users through a zoning by-law indicate that the real purpose of Planning Documents is to address the behaviour of the users of the short term accommodation by banning them from certain areas of the Town – in short, people zoning. This issue is properly addressed through the *Municipal Act*, and lies beyond the scope of municipal powers under the *Planning Act*.

(E) The Board erred in law in interpreting and applying s. 38 of the *Planning Act*:

- (1) The board erred in law in concluding that the requirements for passing an ICB under s.38 of the *Planning Act* were met and in particular the requirement that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas thereof.

- (2) There was no study of issues relating to the problems of visitor residential use vs. permanent residential uses, the use of licensing instead of zoning as a regulatory tool, the effects on tourism of proposed Official Plan and zoning amendments, or a comparison between residential uses of less than 30 days in comparison to those of more than 30 days. In fact, no substantive study of land use policies was conducted by the Town and there is no substantive evidence that "breathing space" was required for the Town to reconsider its land use policies through the study.
- (3) Despite the lack of study, the Board found the study requirement was met by a Town report which was a land use study in form only. In finding that this report met the requirements of s.38 of the *Planning Act*, it is a necessary inference that the Board interpreted s.38 requirements as formal rather than substantive. The interpretation of s.38 requirements as formal rather than substantive is an error of law. The Board also erred in law not finding the onus on the Town to demonstrate that a breathing space and study are necessary.

(F) The Board erred in law in interpreting and applying the *Human Rights Code*

- (1) The Board erred in law in finding that the Planning Documents do not discriminate on the basis of place of origin, contrary to ss. 2, 9 11(1) and 47 of the *Human Rights Code*, R.S.O. 1990 c. H.19 as amended ("*Human Rights Code*") despite the Board's own statement that the purpose of the Planning Documents is to address the resident's concern about visitors (i.e.; persons with a different place of origin).
- (2) The Board erred in law in finding that differential treatment of transient and permanent residents of the Town does not violate ss. 2, 9 11(1) and 47 of the *Human Rights Code* as the *Assessment Act*, R.S.O. 1990 c. A.31 and the

Residential Tenancies Act, S.O. 2006 c. 17, distinguish between transient and permanent residents.

- (3) The Board erred in law in finding that the Human Rights Code does not apply to short term accommodation on the basis that the purpose of the Human Rights Code is to protect access to affordable residential housing and short term accommodation is not residential housing.

Importance of This Matter

11. The matters to be addressed in the appeal, if leave is granted by the Divisional Court, are of importance to the people of Ontario for the following reasons:

- (1) Whether the principles of procedural fairness require sufficient notice of changes to the Planning Documents that are the subject of the Board hearing to allow parties to (i) know the case they have to meet and (ii) marshal and adduce the evidence necessary to address the changes is of importance to all future Board hearings and to other administrative matters.
- (2) Whether a municipality in a Board hearing may use an *in camera* session to alter the very Planning Documents under consideration in the hearing so as to shield from scrutiny the purpose of the amendments is a matter of importance to: future Board hearings; to the preservation of the integrity of the municipal planning process; and to ensuring the public interest in planning decisions.
- (3) Whether significant changes to a proposed amendment to an Official Plan or zoning by-law at a Board hearing require a public meeting is of importance to the preservation of the public process set out in the *Planning Act*.
- (4) The interpretation of "consistent with" and "conform with" under ss. 3(5), and 24 of the *Planning Act*, and the onus to demonstrate are that by-laws and

consistency with the Provincial Policy Statement and conformity with Official Plan are matters of importance to all planning decisions.

- (5) Whether the *Human Rights Code* applies to planning decisions and whether planning decisions that are contrary to the *Human Rights Code* are invalid is a matter of importance to all planning decisions and to human rights in the province.

12. The Appellants plead and rely on the following statutory provisions:

- (1) *Planning Act*, in particular ss. 3(5), 24, 27, 17(5), (19), (19.1), 21(1), 22(4), 24 & 34(18); O.Reg. 543/06 ss.2 and 10; O.Reg 545/06 ss. 6(9).
- (2) *Human Rights Code*, and in particular ss. 2, 9, 11(1) & 47.
- (3) *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, s. 96(1).
- (4) *Courts of Justice Act*, R.S.O 1990, c. 43 s. 134(1) and the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, Rules 3.02 and 61.03.

13. Such further and other grounds as counsel may request and this Court deems just.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

14. The record of the Ontario Municipal Board proceeding; and

15. Such further and other evidence as counsel may submit and this Honourable Court deems just to admit.

Dated the 7th day of July, 2011

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SHELDON ROSEN and the Lodges at Blue Mountain Corporation
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-and- THE TOWN OF BLUE MOUNTAINS et al.
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NOTICE OF MOTION FOR LEAVE TO APPEAL

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