3. INTERVENOR STATUS - CITY OF TORONTO'S APPEAL OF THE ONTARIO MUNICIPAL BOARD DECISION RE:TORONTO OFFICIAL PLAN AMENDMENT NO. 2 - CONVERSION OF RENTAL HOUSING TO CONDOMINIUM

COMMITTEE RECOMMENDATION

That Council direct staff to seek intervenor status to support the City of Toronto's appeal of the Ontario Municipal Board decision on the City of Toronto Official Plan policies regarding the conversion of rental housing units to condominium tenure.

DOCUMENTATION

1. Planning and Development Approvals Commissioner's and Acting Regional Solicitor's joint report dated 26 Oct 99 is immediately attached.

2. An Extract of Draft Minute, 9 Nov 99, follows the report and includes a record of the vote.

REGION OF OTTAWA-CARLETON | REPORT
RÉGION D'OTTAWA-CARLETON | RAPPORT

Our File/N/Réf. (23) 41-98-0064
Your File/V/Réf.

DATE 26 October 1999

TO/DEST. Co-ordinator
Planning and Environment Committee

FROM/EXP. Planning and Development Approvals Commissioner
Acting Regional Solicitor

SUBJECT/OBJET **INTERVENOR STATUS**
CITY OF TORONTO'S APPEAL OF THE ONTARIO MUNICIPAL BOARD DECISION RE.
TORONTO OFFICIAL PLAN AMENDMENT NO. 2
CONVERSION OF RENTAL HOUSING TO CONDOMINUM

DEPARTMENTAL RECOMMENDATION

That the Planning and Environment Committee recommend that Council direct staff to seek intervenor status to support the City of Toronto's appeal of the Ontario Municipal Board decision on the City of Toronto Official Plan policies regarding the conversion of rental housing units to condominium tenure.

BACKGROUND

In April 1999, the City of Toronto adopted Official Plan Amendment No. 2 which established policies regarding the conversion of rental housing to condominium. The Amendment was initiated to harmonize the policies of the seven former municipalities and to address changes in Provincial legislation.

The amendment was appealed to the OMB. In September 1999, the Board ordered that OPA 2 is illegal and invalid and therefore was not approved. The City of Toronto is seeking leave to appeal the OMB's decision to the Superior Court of Justice Divisional Court. The City is also seeking the support of other municipalities. Hamilton participated in the original Board hearing and will be joining the City of Toronto at the Divisional Court.

The OMB's decision has implications on the Region of Ottawa-Carleton's ability to implement Regional Official Plan policy 3.3.2 9 on rental conversion. The decision negates the authority of a municipality to adopt new policies on rental conversion and raises questions about the legality of existing conversion policies in approved official plans.

DISCUSSION

Since 1976, Regional Council has applied a policy limiting the conversion of rental units to condominium tenure, in order to protect the existing stock of affordable housing. The policy has prohibited rental conversion unless the vacancy rate was at least 3%. This policy was included in the 1988 Regional Official Plan.

Under the former *Rental Housing Protection Act* (1989) the conversion of rental housing to other forms of tenure was subject to the approval of the area municipalities. The *Tenant Protection Act* (1997) which repealed the *Rental Housing Protection Act*, eliminated the need to obtain municipal consent for a conversion. However, staff from the Ministry of Municipal Affairs and Housing assured Regional staff that the new legislation did not prevent municipalities from adopting policies pursuant to *The Planning Act* limiting the conversion of rental housing. The new Regional Official Plan carried forward the old policy of prohibiting conversions if the vacancy rate was less than 3% as well as adding some new provisions. The Ministry of Municipal Affairs and Housing approved the Official Plan (including this policy) in October 1997. Subsequently, the City of Ottawa appealed the policy to the Board. The Board approved the attached policy 3.3.2.9, subject to minor modifications agreed in mediation with the City of Ottawa in 1999. However, no one challenged the policy on the basis that it was challenged in Toronto.

In the Toronto case, it was argued that it is implicit with the repeal of the *Rental Housing Protection Act* that municipalities could no longer regulate the conversion of rental housing. Toronto's OPA 2 proposed to regulate conversion by authority of the *Planning Act*, which is also the basis of Ottawa-Carleton's policy. The conversion of rental housing to condominium or freehold tenure gives rise to the ability to grant or withhold approval and to impose conditions under the *Planning Act*, section 51. The City of Toronto and Regional staff are of the view that this authority includes the ability to refuse approval if the vacancy rate is not at a certain level.

Housing affordability is a serious problem for many households in Ottawa-Carleton. In 1996, 41% of rental households were spending more than 30% of their income for housing. A large portion of the existing rental housing stock constitutes an important supply of affordable units. The construction of new rental housing is almost non-existent. No new social housing is being built and in 1998, private rental completions totalled 20 units. Roughly 1,700 rental units were converted to condominium or freehold tenure between mid-1996 and 1998 when vacancy rates exceeded 3%. Rental vacancy rates are now below the 3% "balanced market" target. Therefore, it is important for the Region to maintain its ability to implement its conversion policy.

RULES PERTAINING TO SEEKING INTERVENOR STATUS

The rules of Court provide that a person or organisation may request intervenor status if that person has an interest in the matter being considered, if that person may be adversely affected by a judgement in the legal action or if there are common questions of law or fact between the person seeking intervenor status and those who are already parties to the proceeding. While the decision to grant intervenor status is a discretionary one, an applicant for such status need only meet one

of the three above tests in order to be able to apply. It is the opinion of staff that the policies in the Regional Official Plan are sufficiently similar to those in Toronto's Official Plan Amendment No. 2 that the Region can likely show that each of these three principles for being granted intervenor status apply.

FINANCIAL IMPLICATIONS

There could be a cost related to the legal representation of the Region of Ottawa-Carleton at the Superior Court of Justice (Divisional Court). While the Region would be represented by staff from the Legal Department, in the event the appeal was dismissed by the Court, it is possible that costs could be awarded against the Region. However, the responsibility to pay any such award of costs would be shared by all those in support of the appeal.

CONSULTATION

There was an extensive consultation process leading to the approval of the Regional Official Plan policy 3.3.2.9.

CONCLUSION

Since 1976, Regional Council has applied a policy limiting the conversion of rental units to condominium tenure, in order to protect the existing stock of affordable housing. The OMB decision regarding the City of Toronto's OPA 2 raises questions about the validity of Council's policy on rental conversion. In order to safeguard Council's authority to adopt policies to protect a diminishing rental stock, Committee and Council are asked to direct staff to seek intervenor status to support the City of Toronto's appeal.

Approved by
N. Tunnacliffe, MCIP, RPP
Planning and Development Approvals Commissioner

Approved by
E. Johnston
Acting Regional Solicitor

Attach. (1)

ANNEX A

Rental Conversion

9. Permit the conversion of rental housing to condominiums and equity co-ops and other forms of tenure provided that: 1) the vacancy rate for the Ottawa CMA exceeds 3 percent and 2) the rental prices of the units to be converted are above the average rental prices as reported yearly for the Ottawa CMA by CMHC's *Rental Market Survey* for each unit and bedroom type. However, a heritage building designated under parts IV or V of the *Ontario Heritage Act* may be exempted from this policy at the discretion of the local municipality. In the event that rental housing is converted to other forms of tenure, Council shall consider entering into an agreement with the proponent to sell the units at or below the affordable ownership price established annually by RMOC as per policy 4 above, or alternatively, shall support local municipalities who seek such agreements. (OMB Modification, March 5, 1999).

Extract of Draft Minute
Planning and Environment Committee
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- Planning and Development Approvals Commissioner's
and Acting Regional Solicitor's joint report dated 26 Oct 99

Marni Cappe, Policy Planning Branch Head, advised that Catherine Boucher who had wanted to speak to this item had to leave but noted she was in support of the staff report.

Ms. Cappe advised the staff report is requesting Committee and Council's approval to seek intervenor status to support the City of Toronto's appeal of an Ontario Municipal Board (OMB) decision of September 1999 which effectively struck down their Official Plan policies on condominium conversion. The policies proposed by the City of Toronto were similar to the ones in the Region's Official Plan. That is, the conversion of rental property to condominiums is limited to when the vacancy rate exceeds 3% (as well as other criteria related to affordability of the units that has to be met). In the interest of ensuring the Region can continue to exercise its authority to limit conversion of rental property, staff would like to support Toronto in their bid to appeal the OMB decision

Councillor van den Ham asked if the policies in the Region's Official Plan were effectively null and void or does the Region run the risk of them being null and void by attending Toronto's appeal. Tim Marc, Manager, Planning and Environment Law advised that while decisions of the Ontario Municipal Board are not binding on another municipality, when a matter goes in front of Divisional Court, different factors apply. While strictly speaking, a decision of the Divisional Court adverse to the City of Toronto would not void the Region's policies, Mr. Marc stated he truly believed it would become almost impossible to enforce them in light of such an adverse decision. The policies are similar enough that if the Region wants to defend them, staff should be in front of the Divisional Court making their case along with the City of Toronto and the Regional Municipality of Hamilton Wentworth, which is also going to be supporting the City of Toronto.

Chair Hunter pointed out the Region's policies have already been before the Board and have been confirmed. Mr. Marc agreed they were in front of the Board (were in fact appealed to the Municipal Board by the City of Ottawa) but were not challenged on this point. The decision in the case of Toronto's Official Plan Amendment No. 2, was that the repeal of the Rental Housing Protection Act made such policies unenforceable. He felt if Divisional Court confirmed that position, any case where the Region tries to enforce those policies, would result in an appeal to the Board and he felt the Board would follow Divisional Court. Mr. Marc went on to say he felt the Toronto case would gain from the Region's presence as these policies were in place, when the Rental Housing Protection

Act was in place. He said when the policies were put in the 1988 Plan, one of the reasons outlined for that was in case Rental Housing Protection Act might be repealed. Mr. Marc pointed out Toronto did not yet have leave to appeal, that will be heard in December. He anticipated if the leave to appeal is granted, the appeal would take place sometime in the late spring, 2000.

Chair Hunter asked if the Region's participation would not run the risk of "opening a can of worms" in Ottawa-Carleton. Mr. Marc advised he had already had a solicitor for a developer ask him about what the Region was going to do. He said the Region could not avoid an adverse decision at Divisional Court by not being there and indeed, the Region's presence will assist the City of Toronto in avoiding an adverse decision.

Chair Hunter stated the solution to this problem, which is obviously an oversight in the legislation and has to be corrected by legislation. Mr. Marc agreed it was both. He said a very clear solution would be for the Province to expressly allow for it but in the absence of the Province taking such action, we are left with the avenue of proceeding to the Courts.

Mr. Marc confirmed at Councillor Munter's request that essentially, if Toronto loses, the impact will affect the Region because if the Region tries to enforce these policies and a developer fights it, there will be a legal precedent in place already. Councillor Munter stated it was clear the consequences were quite serious.

Stan Wilder, Senior Housing Policy Planner, City of Ottawa, advised two Councillors at the City of Ottawa had expressed an interest to move a motion to have the City be an intervenor in this appeal. The City's legal counsel has spoken with these two councillors and in turn Mr. Marc, and has indicated that it would be appropriate, rather than to duplicate efforts, if the Region were to appear as well on behalf of the City of Ottawa. He indicated costs would be paid for by the City.

Mr. Wilder advised a motion had been drafted which would be introduced following a decision by Regional Council. Should Regional Council choose to be an intervenor, then the motion would ask that the Region appear on behalf of the City. If the Region chooses not to participate in the appeal, the motion by the two Councillors will read that the City seek intervenor status on its own.

Councillor Legendre referred to page 19 of the staff report and noted the Tenant Protection Act of 1997 eliminated the need to obtain municipal consent, so developers do not need the Region's permission for this conversion. However, the next line says it does not prevent municipalities from adopting policies. He asked for staff comment.

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Ms. Cappe stated the preparation of the Official Plan and housing policies, coincided with the Province drafting the new legislation called the Tenant Protection Act. She said when staff were commenting on the draft legislation, they specifically sought confirmation that the new legislation would not take away the municipalities authority to adopt policies in their Official Plans (as the Region had been doing since 1976). As well, when the policies for the Official Plan were drafted, staff asked the Ministry to review them. Ms. Cappe stated unfortunately, staff have notes from phone conversations which said the Region could continue with the Official Plan policies but nothing in writing form the Ministry. She said there was press release that came out with the new Tenant Protection Act, which said in someone's opinion at the Ministry, that this legislation did not take away a municipality's authority to adopt Official Plan policies. However, Ms. Cappe said she had been advised that legally, this has no weight . She said staff proceeded in good faith, when they received advice from the Ministry that the Region's policies were sustainable.

In response to further questions from Councillor Legendre, Mr. Marc advised a person would have to go to an approval body for either a consent to sever or a condominium and that is the process by which these policies would be applied. He said that was the process by which they applied before the Rental Housing Protection Act was in force and in his opinion, there is nothing in the Tenant Protection Act which expressly says that you cannot go back to that.

Councillor Legendre questioned why the Committee was not told of this in 1997 when the Official Plan was being discussed. Ms. Cappe stated that to the best of staff's knowledge based on the advice they received from the Ministry, they acted in good faith and understood it not to be a problem.

Councillor Stewart asked how much staff anticipated the appeal would cost. Mr. Marc replied if the appeal is successful, it would cost the Region approximately $1,000 to $2,000 in disbursements (hopefully shared with the City of Ottawa) plus his time. If the appeal is lost, he expected the costs that would be awarded against all the parties would be in the vicinity of $30,000 to $40,000 or approximately $10,000 each (split between Toronto, Hamilton-Wentworth, Ottawa-Carleton and possibly City of Ottawa). Councillor Stewart asked if any of the other Regions would be joining the appeal. Mr. Marc replied this matter was raised at the Regional Solicitors Group (representing all of the Regions) meeting in October and for the most part, this is a problem for the larger municipalities. The other municipalities were to discuss the matter with their Planners to see if they too should seek intervenor status and to date, no one has said they will.

Lois K. Smith expressed her support for the staff position. Miss Smith referred to page 20 of the Agenda and noted the last sentence of the first paragraph appeared to have words missing. She suggested the sentence should read " that each of these three principles can

be met…" Mr. Marc agreed with Miss Smith and undertook to make the corrections prior to Council.

Miss Smith acknowledged the risks associated with such an appeal, however, she felt the risk of taking part in the appeal was less than the risk of losing because it would be done on behalf of people who are helpless to protect themselves. She urged the Committee to support the staff recommendation.

Chair Hunter questioned who had appealed the City of Toronto Official Plan amendment. Mr. Marc advised there were two or three developers who had challenged City of Toronto Official Plan Amendment 2. Chair Hunter then noted the worst risk at this time would be for the three or four municipalities to have to pay the costs of the two or three developers. He asked if it would be possible for other developers to ask for intervenor status as well and if so would the municipalities run the risk of having to pay their legal costs as well. He said if this were to happen, the matter should be brought back before Committee. Mr. Marc undertook to bring the matter back to Committee for direction, if it appears that the potential liability for costs will increase significantly.

On the issue of liability of costs, Councillor Legendre stated he would have thought that the cost sharing would be proportionate to the populations of the various intervenors, as the impact is proportional. He suggested this could be negotiated between the parties prior to the hearing. Mr. Marc advised that this was not the case but undertook to discuss this with the City of Toronto.

The Committee then considered the staff recommendation.

That the Planning and Environment Committee recommend that Council direct staff to seek intervenor status to support the City of Toronto's appeal of the Ontario Municipal Board decision on the City of Toronto Official Plan policies regarding the conversion of rental housing units to condominium tenure.

CARRIED
(R. van den Ham dissented)