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CHALLENGE TO MINIMUM MAINTENANCE STANDARDS DEFENCE

The Transportation Services Committee recommends the adoption of the recommendation contained in the following report dated September 1, 2010, from the Commissioner of Transportation Services and Commissioner of Finance.

1. RECOMMENDATION

It is recommended that this report be received for information.

2. PURPOSE

This report is to inform Council of the Region's involvement in a recent court challenge to the Minimum Maintenance Standards for Municipal Highways ("MMS") emanating from a December 2004 incident on a York Regional road.

3. BACKGROUND

The Minimum Maintenance Standards for Municipal Highways are a Regulation under the *Municipal Act* that provide a due diligence defence to municipalities when personal injury actions allege inadequate road maintenance.

Striking down the Minimum Maintenance Standards for Municipal Highways would have a significant impact on every municipality in Ontario. This regulation provides the cornerstone of defence for municipalities when faced with negligence claims arising from motor vehicle accidents on municipal roadways.

A motor vehicle collision occurred in December 2004 in the late afternoon. The plaintiff was southbound on Dufferin Street, north of Kirby Sideroad in the City of Vaughan, when the driver lost control of the vehicle while cresting the top of a hill. The driver crossed the centreline of the road and struck a vehicle travelling north on Dufferin Street. As a result of the impact, the driver of the second vehicle was transported to hospital with serious injuries and his 10 year old son died.

No charges related to the collision were laid by York Regional Police

There were no charges laid as a result of the collision and the police report confirms there were no witnesses to the collision. It is alleged in the subsequent lawsuit from the plaintiff the collision occurred as a result of slippery road conditions and that these road conditions were preventable. The allegations against the Region include its failure to

properly maintain the roadway in question and failure to plow the snow and treat the ice on the roadway. (The family that was struck by the plaintiff launched a suit as a result of the accident, however they did not continue against York Region.)

Both parties are well represented

The plaintiff's action is represented by Boland, Howe, personal injury law firm located in Aurora.

The Region's defence is being handled by Christine Fotopoulos of Borden, Ladner Gervais as directed by Policy, Risk and Treasury staff under the Region's insurance program who, in turn, is directed by the Transportation Department with support and input from the Legal Services Division of the Corporate Services Department. In its defence, among other things, the Region is claiming it complied with the Minimum Maintenance Standards for Municipal Highways. Since 2002, this has been the industry's practice for all Ontario municipalities.

In 2009, the Region was served with notice to allow the plaintiff to amend the claim to ask the Court for a declaration that the Minimum Maintenance Standards for Municipal Highways are null and void on the basis that the Minister of Transportation did not have jurisdiction and authority to enact these standards. The Region opposed this request and the motion was heard in February of 2010.

The Court ordered that this matter proceed by way of separate Application made under Rule 14 of the Rules of Civil Procedure. This matter has been set down for November 10, 2010 and will include as Respondents, York Region, and the Minister of Transportation (represented by the Attorney General) with the Ontario Good Roads Association (OGRA) added as interveners.

4. ANALYSIS AND OPTIONS

The interests of the Region are well protected by:

- Ms. Christine Fotopoulos of Borden Ladner Gervais LLP acting directly on the Region's behalf.
- Mr. Murray Davison of PM Law who acts on behalf of the Ontario Good Roads Association.
- Counsel for the Ministry of the Attorney General.

It should be noted that Mr. Davison was one of the architects of the Minimum Maintenance Standards for Municipal Highways as a member of the original drafting committee and the committee responsible for the latest amendments passed earlier this year (February). Mr. Davison has served as external legal counsel protecting the Region's interests on numerous insurance claims in the past.

5. FINANCIAL IMPLICATIONS

The Minimum Maintenance Standards for Municipal Highways as a “due diligence” defence for claims involving roads and sidewalks has been used successfully by York Region and many municipalities across Ontario.

Should this Application to have the regulation declared *ultra vires* be successful, it would render the MMS void and would put into question the reliance on these standards since they were created in 2002. Furthermore, it may introduce legal limitations on future reliance on these standards and may significantly alter what may constitute a common reasonable standard of care for winter maintenance for Ontario municipalities. This would mean that service levels for road maintenance would need to be reviewed and debated for every annual budget. This could have significant financial implications, both legal, and operating for York Region, as well as for all other Ontario municipalities.

6. LOCAL MUNICIPAL IMPACT

There is no municipal impact of this report.

Given that the local municipal impact would be similar to that mentioned above, Ontario Good Roads Association has asked the Region as well as its other members to contribute to the legal costs of its intervention in this matter.

Several of the local municipalities in York Region have already contributed to the MMS Litigation Fund, including the Towns of Georgina, East Gwillimbury, Newmarket and the Township of King.

The Region has declined to contribute as it is already funding a significant portion to the defence of the Minimum Maintenance Standards for Municipal Highways through its direct involvement in this case.

To date, the Association of Municipalities of Ontario (AMO) has not been directly involved in this challenge to the Minimum Maintenance Standards defence. However, AMO staff have confirmed they are monitoring the current litigation closely as it may have implications for municipalities across Ontario.

It should be expected, regardless of the outcome, that this case will be appealed given its potential importance.

7. CONCLUSION

The principle of reliance on Ontario's Minimum Maintenance Standards for Municipal Highways being challenged by the plaintiff in this case, if not defended, could be struck down by the courts. Such a result could introduce degree(s) of financial hardship for all Ontario municipalities. Staff believe reliance on these standards is a vital principle which should be vigorously defended.

The Senior Management Group has reviewed this report.