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| TO: | CHAIR AND MEMBERS CORPORATE SERVICES COMMITTEE MEETING ON SEPTEMBER 24, 2019 |
| FROM: | BARRY CARD MANAGING DIRECTOR CORPORATE SERVICES AND CITY SOLICITOR AND MANAGER III, RISK MANAGEMENT DIVISION |
| SUBJECT: | RESPONSE TO THE MINISTRY OF THE ATTORNEY GENERAL JOINT AND SEVERAL LIABILITY REFORM CONSULTATION |

RECOMMENDATION

That, on the recommendation of the Managing Director Corporate Services and City Solicitor and the Manager III, Risk Management Division, with the concurrence of the City Clerk, the Civic Administration BE DIRECTED to submit a response to the Ministry of the Attorney General regarding Joint and Several Liability Reform as summarized in Appendix "B" attached to the report dated September 24, 2019, entitled "Response to the Ministry of the Attorney General Joint and Several Liability Reform.

PREVIOUS REPORTS PERTINENT TO THIS MATTER

None.

BACKGROUND

During the 2019 annual Rural Ontario Municipalities Association (ROMA) conference, Premier Ford announced that the Ontario government would be undertaking consultation on reforming joint and several liability. Following the announcement, on July 12, 2019, Attorney General Doug Downey sent the attached letter (Appendix "A") to the province's municipalities regarding the consultation, seeking input from municipalities with respect to this matter.

The period to submit comments ends September 27, 2019 with the Attorney General welcoming delegations and written submissions to magpolicy@ontario.ca.

The purpose of this report is to advise Municipal Council of the recommended response to the request and to seek direction to submit the response to the Ministry of the Attorney General for consideration by the September 27, 2019 deadline.

What is the Province Reviewing?

The Province is reviewing the merits of eliminating or amending legislation regarding Joint & Several Liability (JSL). JSL is often referred to as the 1% percent rule, where a defendant only needs to be 1% liable in order to contribute to a settlement. JSL is a legal process that allows courts to apportion damages against a defendant that are greater than the degree to which they are liable.

Ontario municipalities are assumed to have substantial financial resources and thereby are unfairly targeted in civil suits. This has caused insurance and claim costs to municipalities to significantly increase impacting the municipalities' budget, which may result in the need to reduce other municipal services.

The first phase of the review is to hear from municipalities about their experiences in respect to insurance, claims and possible solutions related to JSL.

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Our Reference #: M-2019-3638

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Dear Head of Council,

Further to the Premier's announcement at the 2019 ROMA conference, I am writing to invite you to participate in the government's consultations regarding joint and several liability, insurance costs, and the 'liability chill' affecting the delivery of everyday public services.

In order to make this consultation process as effective as possible, the government needs to hear directly from you about your municipality's experiences. It is impossible to canvass possible solutions without understanding the actual problems faced by municipalities.

This will be an evidence-led consultation and policy development process. The first phase of the process will involve collecting background technical information. I therefore ask that you have your municipal officials respond in writing to the general questions noted below. We will also be establishing a Technical Table of provincial and municipal elected officials, building on AMO's existing Working Group, to make sure that we are all on the same page around the issues and evidence that need to be addressed.

Given the importance of hearing your experiences, there is no predetermined format or questionnaire for this consultation. We don't want to inadvertently limit you. We would ask, though, that your officials consider and address three broad questions so that there is some comparability among the responses.

First, please describe the nature of the problem as you see it. What are the problems that you need addressed to benefit your municipality. Is it increasing premiums? Rising deductibles? Being unfairly named in lawsuits? Being held to unreasonably strict standards (e.g., regarding road design or maintenance)? Feeling that you cannot offer certain services because of the liability risk? A general sense of unfairness that municipal taxpayers pay more than their fair share (e.g., because individuals are under-insured or were behaving irresponsibly)? Please have your officials describe all the specific problems that are directly affecting your municipality.

Second, please indicate what evidence leads you to your view of the problem. Without limiting the types of evidence you may wish to discuss, I have attached to this letter a list of potentially relevant facts and evidence that your officials may wish to address.

Finally, given your view of the problem and the supporting evidence, what solutions do you propose? In formulating your proposals, please keep in mind the need to ensure that catastrophically injured persons are fairly compensated and that costs are not simply transferred to the publicly funded health care system.

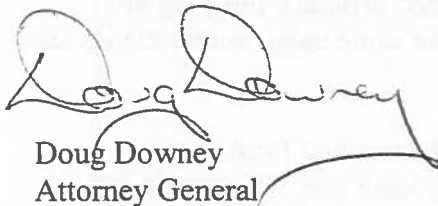
I will provide an update on the consultation process at AMO in August. I will also meet with interested delegations.

The second phase of the municipal consultation process will involve formal discussions in early Fall among elected officials about the evidence and the potential policy solutions. Once there is a provincial and municipal understanding on the key issues, the government will engage with other interested stakeholders.

The Ministry of the Attorney General has established a dedicated email address to receive the background technical information from your officials. Please have your officials respond by Friday, September 27, 2019 to magpolicy@ontario.ca. For further information, please have your officials reach out to MAG at the email address noted above.

Our goal must be meaningful and lasting reform. I encourage you to share your experiences on this important subject.

Sincerely,



Doug Downey
Attorney General

APPENDIX “B”

**CITY OF LONDON SUMMARY OF RESPONSE
JOINT AND SEVERAL LIABILITY REFORM**

| <u>Public Consultation Guide Question</u> | <u>City Response</u> |
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| <p>1. Describe the nature of the problem as you see it.</p> | <p>Historically, liability premiums have been the greatest annual expense by policy type and continue to lead the way with regard to insurance expense. Large deductibles are now carried by the City and are required in order to manage premium costs. This approach provides a level of cost certainty to the City on an individual claim basis, but has the effect of transferring the risk of most claims to the municipality.</p> <p>The City’s Claim expenses have substantially increased over the years from an annual expense of approximately one million to more than three million dollars. This expense represents the costs within the City’s Self Insured Retention (deductible).</p> |
| <p>2. What supporting evidence do you have in view of the problem</p> | <p>The rationale for the current JSL system is to ensure plaintiffs are not left without compensation when the at-fault party is either not insured or has inadequate insurance to cover the loss. This system imposes disproportionate liability on parties such as London who have no choice but to arrange insurance policies with large limits. The result is that municipalities are often the target of litigation because they are perceived as having “deep pockets”. The City has settled many claims that were influenced by the risk associated with JSL.</p> <p>For example we have experienced claims involving road design /maintenance, sidewalks and building inspections, whereby we believe the allegations of City negligence were meritless.</p> <p>Further evidence to support reform of JSL includes an adverse decision received by the City of London that clearly reflects the challenges that all municipalities are exposed to under JSL.</p> <p><i>Mortimer vs. Cameron (1994), 17 O.R. (3d) 1 (Ont. C.A.);</i> Summary: “Mortimer and Cameron, both "mildly intoxicated", were "horsing around" at a party. They both fell through an exterior wall of an enclosed exterior landing and fell 10 feet to the street. Mortimer suffered injuries rendering him a quadriplegic. Mortimer sued Cameron in negligence. He sued the tenant of the apartment where the party was held and added the co-tenant as a third party. He sued the building owner, claiming the exterior wall was unsafe. He sued the City for failing to enforce its building bylaw respecting construction of the enclosed stairway and for negligently inspecting it. A number of Mortimer's relatives joined as plaintiffs to claim under the Family Law Act.</p> |

| <u>Public Consultation Guide</u> <u>Question</u> | <u>City Response</u> |
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| | <p>The trial judge found the City and the building owner jointly and severally liable. Liability was apportioned 80% to the City and 20% to the building owner. The actions and cross-claims against all other parties were dismissed. The court assessed \$4,705,052 damages (including the Family Law Act claims) plus \$770,209 in prejudgment interest. The City and building owner appealed both liability and damages. Mortimer cross-appealed the damage award.</p> <p>The Ontario Court of Appeal affirmed that both the City and the building owner were negligent. The court reapportioned liability 60% to the building owner and 40% to the City. The court made minor adjustments to the damage award, but otherwise dismissed the appeals and cross-appeals.”</p> <p>As a result the City ended up paying far more than the 40% share of liability because the other co-defendant had insurance limits of \$1,000,000. In effect the municipality paid to make up for insurance that another at-fault party chose not to have.</p> |
| <p>3. What solutions do you propose</p> | <ol style="list-style-type: none"> 1. Elimination: This solution would see the elimination of Joint and Several Liability by legislative means. <p>As an alternative to eliminating JSL:</p> <ol style="list-style-type: none"> 2. Damage Caps: This solution would see JSL be capped in respect to certain types of damages. The economic loss and future care cost heads of damage often impose a financial exposure disproportionate to what may be considered reasonable. Capping these types of damage with a ceiling value for the purpose of JSL would allow municipalities and their insurers to better assess the potential exposure. 3. Insurance Premiums: Under Financial Services Commission (FSCO) rules, the minimum Third Party Liability coverage for automobile insurance in Ontario is \$200,000. This solution would see increasing the limits for automobile coverage in the Province of Ontario. This would ensure that parties involved in serious vehicle accidents have reasonable coverage for most losses. Failing to do this often results in claims against municipalities to “make up the shortfall”. 4. Threshold JSL: Municipalities are affected by claims whereby they are brought into an action with the expectation of being a contributing party to a settlement, yet their exposure to liability is little or nil, but with the expectation of being a contributing party in the settlement. This solution would see a revised system with a liability threshold which would create fair and valuable relief to municipalities, such as when in which JSL is only applied to matters where a defendant’s liability is greater than an established threshold. Any assessment below the threshold would be applied on a proportionate basis. |