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Date: November 5, 2017

To: Mayor and Council

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RE: Posthumus v Ontario, Tribunal Hearing, Case No.: 16-110

Report No.: CS-2017-021

AIM

To provide Council with information related to the pre-hearing conference that is scheduled for Thursday, November 23, 2017 in the matter between the Ministry of the Environment and Climate Change ("MOECC") and Matthew Posthumus and the option of the Town of Kingsville, as an interested party, to request some level of participation in the hearing.

BACKGROUND

The MOECC issued an order to Mr. Posthumus to submit an application for an environmental compliance approval for all air discharges and to perform various work at the site. This order was subsequently appealed and a pre-hearing conference is scheduled for Thursday, November 23, 2017 at 10:00 a.m., in Council Chambers at the Municipal Office.

The Town received notice of the pre-hearing as it was identified as someone who owns land near the property in question, or as someone who may be interested in the proceeding.

DISCUSSION

The purpose of a Pre-hearing Conference is two-fold: i) to allow submissions from groups who wish participate in the hearing in some manner, discussed more fully below, and ii) to deal with pre-hearing matters such as preliminary issues, pre-hearing procedures, hearing dates etc.

With respect to participation in the hearing, the Town has 2 options: i) do nothing and observe the proceeding, or ii) request to participate on some level. Should the Town wish to participate, there are three (3) different participation options: Party Status, Participant Status and Presenter Status. Each comes with its own set of rights and responsibilities. Attached as Schedule “A” are sections 62 through 71 of the Tribunal’s Rules of Practice and Practice Directions, which outline the rights and responsibilities of each status.

Should the Town wish to participate as a Party to the hearing, the Town would have the same rights and responsibilities as the appellants and respondent. The Town could give evidence, make motions, cross-examine witnesses etc. This is the most comprehensive form of participation in the hearing. The Town would need to secure a legal representative for the hearing, attend all dates associated with the hearing, and would be required to provide documentary disclosure to the other parties. Additionally, if the Town were added as a party it may claim or be liable for costs.

To be added as a party, the Town would need to establish that:

- i. Its interests are directly and substantially affected by the Hearing or result,
- ii. It has a genuine interest in the subject matter of the proceeding, and
- iii. It is likely to make a relevant contribution to the Tribunal’s understanding of the issues.

Participants are permitted to participate in all or part of the hearing on such conditions as the Tribunal considers appropriate. If the Town were a Participant, it may be permitted to give evidence, be cross-examined, make submissions and receive documents that are exchanged by the parties to the hearing. However, Participants are not permitted to: cross-examine witnesses, make motions, call witnesses etc. Further, a Participant cannot claim, nor be liable for costs.

In deciding whether to allow a person to be a Participant in the hearing, the Tribunal considers whether the person’s connection to the issues in dispute are more remote than that of a Party.

Similar to Participant Status, a Presenter can be added on such conditions as the Tribunal considers appropriate. A Presenter is permitted to give evidence at a pre-arranged time, be questioned by the parties, provide a statement to supplement oral testimony and receive a copy of documents exchanged by the parties that are relevant to its interests. A Presenter cannot claim costs, nor can it be liable for costs.

In deciding whether to allow a person to be a Presenter in the hearing, the Tribunal considers whether the person’s connection to the issues in dispute are more remote than that of a Party or Participant.

Over the years, the Town has received numerous complaints from surrounding residents about the odours emanating from the ATI facility. Unfortunately, the Town has no jurisdiction to resolve the odour concerns and refers them to the MOECC for action.¹

¹ The Town’s jurisdiction over the ATI Facility extends only as far as Site Plan Control. At the time of the current site plan approval there was no requirement for an ECA which is the only provision in a Site Plan Agreement that could regulate the odour issue. However, the ECA still would have required enforcement through MOECC and would not have given the Town the direct ability to address the odour issue.

Since the subject of the appeal is related to an order for environmental compliance approval for all air discharges and work at the site, it may be in the Town's interest to participate in some manner. Participation in the hearing may be the mechanism in which the concerns identified by residents and the enforcement issues experienced by the Town are communicated to the Tribunal and all parties involved.

If the Town wishes to participate in the hearing on any level identified above, it must notify the Case Coordinator by 5:00pm on Thursday, November 16, 2017.

Administration recommends that the Town seek participation in the hearing as a Participant, or a Presenter.

LINK TO STRATEGIC PLAN

No direct link to the strategic plan.

FINANCIAL CONSIDERATIONS

There are currently no direct financial costs associated with participating in the hearing. However, there are indirect costs such as staff time that will be required to prepare a request to the Tribunal and if participation is permitted, additional staff time will be required to prepare the requisite material and attend the hearing.

Based on the recommended participation status, it is not expected that outside legal costs will be incurred. It is not recommended that the Town seek Party Status and therefore, legal representation at the hearing is not necessary.

CONSULTATIONS

CAO
Manager of Planning Services

RECOMMENDATION

That Council authorize Administration to further investigate participating in the Environmental Land Tribunal Hearing (Case No: 16-110) involving Matthew Posthumus and the Ministry of Environment and Climate Change as either a Participant or Presenter and to provide the requisite notification to the Case Coordinator of same.

Jennifer Astrologo

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Director of Corporate Services/Clerk

Peggy Van Mierlo-West

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Chief Administrative Officer