

Report PDR-PCD-22-14

To: Chair Wright and Members of the Planning and Community Development Committee
From: Randy Scherzer, Director of Planning
Meeting Date: June 17, 2014
Subject: **First Nations/Six Nations - Land Claims and Consultation Protocol**
Status: Recommendation adopted by Committee as presented per Resolution PCD75-14; Endorsed by County Council July 8, 2014 per Resolution CC90-14;

Recommendation(s)

WHEREAS Council directed staff at the May 6, 2014 Council meeting to prepare a report regarding the request from the Six Nations of the Grand River to support their pursuit for provincial and federal support to resolve outstanding matters related to land claim disputes;

AND WHEREAS there are many outstanding First Nations land claim disputes throughout the Province of Ontario, including the land claims of the Saugeen Ojibway Nation and the Six Nations of the Grand River within Grey County;

AND WHEREAS the unresolved land claim disputes provides uncertainty for developers and can lead to potential delays in the processing of development applications;

AND WHEREAS a Supreme Court of Canada Decision indicates that the duty to consult and accommodate with Aboriginal communities rests with the Crown;

NOW THEREFORE BE IT RESOLVED THAT Report PDR-PCD-22-14 be received;

AND THAT it be recommended that the Warden write a letter to the Federal and Provincial Government encouraging them to engage in

consultation with the leaders of the Saugeen Ojibway Nation and the Six Nations of the Grand River to work towards a resolution of the outstanding land claim issues and to provide support and guidance on matters related to the duty to consult;

AND FURTHER THAT staff be directed in the interim to continue to have discussions with Saugeen Ojibway Nation, the Six Nations of the Grand River, and Metis to develop consultation protocols in order to establish a process and mechanism to ensure appropriate and adequate consultation with Aboriginal communities.

Background

On May 6, 2014, County Council directed staff to prepare a report regarding the consideration for supporting the Six Nations of the Grand River (Six Nations) in their pursuit for provincial and federal support to resolve outstanding matters related to land claim disputes. There are many outstanding First Nations land disputes throughout the Province of Ontario most of which are currently before the courts. The County of Grey is involved in the Saugeen Ojibway Nation (SON) land claim dispute that is currently before the courts.

In 2004, the Supreme Court of Canada provided a decision related to the Haida Nation and Taku River cases indicating that the Crown has a duty to consult Aboriginal people before making a decision that may infringe upon unproven Aboriginal rights (e.g. unresolved land claim disputes). The Supreme Court of Canada decision also notes that there may be the potential need to accommodate which is discovered through the consultation process, and where accommodation is required, the Aboriginal interest must be balanced with other potential interests. The duty to accommodate is often required when the consequences of a decision will adversely affect a First Nation claim (i.e. aboriginal interests or treaty rights) in a significant manner and steps may be required to prevent irreparable harm or to minimize the impacts. This could include revising the original proposal prior to a decision being made, implementing mitigation or monitoring measures, or potentially providing compensation for the impacts. Aboriginal interests and treaty rights can include matters dealing with land claims but can also include other interests beyond just the claimed land under dispute (e.g. impacts to fishing rights, archaeological interests, medicinal plants, etc.). It should be noted that Aboriginal people as outlined in the Supreme Court of Canada Decision includes First Nations, Metis and Inuit peoples.

County staff have been aware of this Supreme Court ruling for a number of years now, and have been circulating all County Planning applications to the SON, the Metis Nation of Ontario (MNO), and the Historic Saugeen Metis (HSM) for their comment and input. To date, the County has not circulated proposed development applications to the Six Nations, however based on the information provided by the Six Nations at the Warden's Forum, staff will add Six Nations to the circulation list for any new planning applications that are proposed within the Haldimand Tract. It should be noted that based on the *Planning Act* and the associated Regulations, municipalities are not required to circulate First Nations or Metis peoples unless the application is within one kilometre of a reserve, or unless a municipality has received a written request for circulation on such an application. On a number of occasions both the SON and the MNO have indicated that they wish to be circulated on such applications, but that in their opinion the circulation of notices and documents does not constitute 'consultation' as per their interpretation of the 'duty to consult'.

The SON also provided comments on the County's Five Year Review (OPA 80), which resulted in the Province changing policies as part of their approval. Within OPA 80 the County requires consultation with First Nations and Metis peoples for official plan amendments and plans of subdivision / condominium. OPA 80 also notes that the County will develop a consultation protocol with the First Nations and Metis. It should be noted that the County does not currently have a consultation protocol with any First Nations or Metis groups. The County Official Plan also does not define 'consultation' in this context.

The Supreme Court of Canada Decision is clear that the duty to consult and to accommodate rests with the Crown. The question as to whether or not the duty to consult extends to municipalities was tested in a British Columbia (BC) Court decision in 2013 known as the Neskonlith case. The Court decided that the duty to consult and accommodate does not include municipalities as the duty rests with the Crown. The County Solicitor agrees that Grey County would not be considered the Crown for private development applications and nor does it possess the jurisdiction, expertise or resources to make determinations with respect to native land claim issues.

The Provincial Policy Statement (PPS) was recently updated by the Province which includes some policies regarding aboriginal communities. In Part IV: Vision of Ontario's Land Use Planning System the PPS states that the Province recognizes the importance of consulting with Aboriginal

communities on planning matters that may affect their rights and interests. Section 1.2.2 of the PPS states that planning authorities are encouraged to coordinate planning matters with Aboriginal communities. Section 2.6.5 states that planning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources. Section 4.3 states that the PPS shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982.

It is unclear what the Province is expecting of municipalities when making decisions that are consistent with the above noted policies. Staff are interpreting these policies to indicate that municipalities are encouraged to consult aboriginal communities as part of the planning process and ensuring that the conservation of cultural heritage and archaeological resources considers the interests of Aboriginal communities. With respect to Section 4.3, this will be difficult for municipalities to implement as municipalities do not possess the jurisdiction, expertise, or resources to make determinations with respect to Aboriginal treaty rights.

The uncertainty regarding the duty to consult and accommodate has resulted in delays in the processing of planning applications. At the time of pre-consultation, proponents are encouraged to consult with Aboriginal communities. Proponents have consulted with Aboriginal communities, including the SON, and SON has requested that some proponents enter into an agreement with SON which is provided to the developer by SON. Following receipt of these agreements, developers have expressed concerns to County staff with respect to the draft agreements. One such development was Official Plan Amendment 113 (OPA 113) which proposed a mineral aggregate operation in the Municipality of West Grey. Upon receiving concerns from the proponent, County staff liaised with SON staff to get further clarification on the draft agreement. County staff also sought general advice from the Province on this matter, and discussed it with the Ministry of Municipal Affairs and Housing (MMAH) and the Ministry of Aboriginal Affairs. Both Provincial ministries encouraged County staff to facilitate another meeting between the SON and the proponent to further discuss the matter. County staff were not able to facilitate any further meetings between the two groups and the proponent indicated that they would “refrain from further meetings with SON” and requested that County staff provide their recommendation to the County Planning Committee.

Part of the uncertainty with respect to the duty to consult and accommodate are the obligations, if any, for municipalities. Over the past few years, support regarding the consultation of Aboriginal communities from the Crown has been limited. It would be beneficial for the County to have the Federal Governments and Provincial Governments provide municipalities with support and guidance regarding this matter. Some of the issues and delays regarding proposed development also revolve around the unresolved land claim disputes that are before the courts. Therefore it would also be beneficial for the Crown to enter into discussions with Aboriginal communities to work towards a resolution of the outstanding land claim issues.

County staff recognize the importance of continuing to strengthen and develop good relations with Aboriginal communities. County staff have had discussions in the past with the SON staff in order to try to develop a consultation protocol as identified in the County Official Plan and the Corporate Operating Plan. The purpose of a consultation protocol is to establish a process and mechanism to ensure appropriate and adequate consultation occurs with Aboriginal communities regarding County Planning and County Projects. County Projects could include various studies undertaken by the County and could also include infrastructure projects such as transportation related projects.

It is County staffs understanding that a notification agreement has been in place in parts of the Haldimand Tract area since 1996 which is known as the Grand River Notification Agreement (GRNA). The GRNA is required to be renewed every 5 years by the Parties, and during the last renewal period the Federal Government was not moving forward with the signing of the GRNA. The other parties recognized the importance of having the GRNA in place and therefore revised the GRNA by removing the Federal Government as a party to the Agreement and all the other parties signed the Agreement (see link below to a Haldimand County staff report which includes a copy of the revised GRNA signed by the parties). The following parties have signed on to the latest GRNA: Six Nations of the Grand River, Mississaugas of the New Credit, City of Brantford, County of Brant, Haldimand County, Grand River Conservation Authority and the Province of Ontario.

According to a document entitled “Background to the Grand River Notification Agreement” prepared by the Indian and Northern Affairs Canada dated October 3, 1998 (link below), “the Six Nations were concerned about activities within municipal boundaries affecting lands subject to a claim or

whose status remained legally undetermined”. The document notes that “from a municipal perspective, uncertainty arising from the unsettled claims, and protests and demonstrations by members of the Six Nations, were seen as impeding economic development and hampering municipal public works construction”. The document notes that “in general, a lack of communication prevailed, so that municipalities did not inform First Nations of their activities, and vice versa” and noted that “neither party clearly understood the legal framework and constraints within which the other functioned”. Therefore, the parties entered into the GRNA to “notify each other about any contemplated action that might have significant effect on the physical environment”.

Given all the above, staff are recommending that Council support a letter to be prepared by the Warden to be sent to the Provincial and Federal Governments encouraging them to engage in consultation with the Saugeen Ojibway Nation and Six Nations of the Grand River leaders to work towards a resolution of the outstanding land claim issues as well as provide further guidance or direction on matters related to the duty to consult. Until these matters have been resolved, it is recommended that staff continue to have further discussions with Aboriginal communities (including SON, Six Nations of the Grand River, and Metis communities) to try to establish consultation/notification protocols. Staff will bring forward a more detailed report in the next few months regarding consultation/notification protocols.

Financial / Staffing / Legal / Information Technology Considerations

The uncertainty with respect to the duty to consult and accommodate with Aboriginal Communities as well as the unresolved land claim disputes have the potential to delay the approval of planning applications and to potentially impede economic development. It is recommended that Council encourage the Provincial and Federal Governments to enter into discussions with Aboriginal communities in an attempt to resolve the land claim disputes. In the interim, it is recommended that Council direct staff to further explore the option of entering into consultation/notification protocols in order to develop a process for notifying and consulting Aboriginal communities regarding County Planning matters and County Projects (i.e. studies undertaken by the County, infrastructure projects, etc.). These discussions will consume a portion of existing staff time. There also may be further legal costs to review draft protocols. Should the discussions with Aboriginal communities prove

successful, final draft protocols would then be presented to Council for consideration.

Link to Strategic Goals / Priorities

The County Official Plan notes that the County will develop a consultation protocol with the First Nations and Metis. The Corporate Operating Plan also identifies that the County is to pursue a general engagement protocol with First Nations with a timeframe for completion targeted for Q4/2015. Action Item 4.7 of the Corporate Strategic Plan indicates that the County should work cooperatively with our neighbours on issues of mutual interest, in support of advancing collective aspirations. Therefore it is important to work with Aboriginal communities to develop a communication process to share information and to notify Aboriginal communities of any action being contemplated by the County that may have an impact on their rights and interests.

Attachments

[Haldimand County Staff Report - Grand River Notification Agreement](#)

[Background to the Grand River Notification Agreement - Indian and Northern Affairs Canada - October 3, 1998](#)

Respectfully submitted by,

Randy Scherzer
Director of Planning