LEGAL OPINION

Cash in Lieu of 5%

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How does one calculate the amount of cash to be paid in lieu of parkland? This is a simple question . . . and it deserves a simple answer.

Now right at the beginning you can see that my intentions are honourable . . . keep it simple! I will just crack out a few paragraphs, tie it all together with a blue ribbon, and hand it out on a silver platter.

Well . . . it is not quite that easy to get it on the platter. There are a number of cases on the subject and they just do not blend together like cream and sugar. Let me see if we can sort out the problems under the following headings:

1. Where is the authority to take 5%?
2. Is it always 5%? (Or should it be less?)
3. 5% (or less) of what area?
4. The critical date — March 15, 1977.
5. Cash formulae for your consideration.

WHERE IS THE AUTHORITY TO TAKE 5%?

There are three major areas where parkland requirements rise to the surface. The first is in subdivisions; the second on severances; and the third on condominium proposals. Let us review these.

Subdivisions. When the Minister approves a draft plan of subdivision, he attaches to it certain Minister's conditions. The usual condition relating to parkland reads as follows:

> That the owner convey up to 5% of the land included in the Plan to the municipality for park purposes under section 33 (5) (a) of *The Planning Act.*

If the Minister authorizes the municipality to take cash in lieu of parkland, he then adds an additional sentence to the above paragraph which reads as follows:

> Alternatively, the municipality may accept cash in lieu of all or a portion of the conveyance and, under Section (33) (8) of the Planning Act, the municipality is authorized to do so.

If your municipality wants cash in lieu of parkland, then ask the Minister to add this provision to the draft approval.

Severances. The committee of adjustment, or if you wish the land division committee, in granting a severance has the same powers to impose conditions as the Minister does in giving draft plan approval of subdivisions.

Consequently the committee in granting a severance can require the developer to give a maximum of 5% parkland. Since the 5% is calculated on the area of the land being severed, (not on the land being retained)[1] you can quickly see the possibility that the 5% park area could be a little sliver of land not large enough to grow a bushel of potatoes. I will come back to this in a moment.

Condominiums. In condominiums the Minister also issues draft plan conditions which may include a parkland provision.

IS IT ALWAYS 5%? (OR SHOULD IT BE LESS?)

Most municipalities take a maximum of 5% of **all** the land in the subdivision for park purposes.

The Ontario Municipal Board (O.M.B.) has stated in a number of cases, that it is a **maximum** of 5%. The size of the parkland to be conveyed can vary from 0% to a maximum of 5% — depending on the circumstances. For example, if the lands for the proposed park were the subject of a previous plan of subdivision, where parkland was dedicated, then the parkland to be granted on the new subdivision may well be less than 5% or even 0%. This is one type of extenuating circumstances which could apply.

5% (OR LESS) OF WHAT AREA?

The 5% (or less) is to be calculated on the **total** area of the subdivision. For calculation purposes the O.M.B. may take into account a smaller area and apply a formula but the result is expressed in terms of the total area.

Let me give you an example. In the **Przekop** case in Guelph[2] the subdivision had 7 lots and a Block A. On lot 7 and Block A were substantial residential buildings which had been there for many, many years. These 2 areas alone comprised more than one-half of the lands in the subdivision and this was especially noted by the Board. The Board acknowledged that the development of the 6 remaining lots would add pressure to the existing park facilities but stated that the purchasers of these lots would be facing a park deficiency caused by earlier and present inhabitants who are not now contributing to any fund to relieve that deficiency.

In the Board's mind these facts justified a reduction in the 5% figure. In their final calculations they set the levy for park purposes at $200 a lot for Lots 1 to 6 only — total $1,200 for the whole subdivision. (The decision does not mention the dollar amount requested by the City.)

THE CRITICAL DATE — MARCH 15, 1977

On this date the law radically changed. It came about in the case of **Frey vs. the Regional Municipality of Peel Land Division Committee.**[3] Let us take a look at the "before" and "after" situation to that date.

Before March 15, 1977. Prior to this date, the O.M.B. decisions established the point that if the Minister authorized the municipality to take cash in lieu of parkland, it was a power to **accept** not the power to **demand** the cash.

To put it another way, the developer held the trump card. He could decide whether he would give the 5% land or pay the cash in lieu thereof. The municipality had to stand by and await his decision. When reading O.M.B. decisions[4] prior to this date, you will find this interpretation being applied.

After March 15, 1977. The Supreme Court of Ontario in the **Frey** case changed this all about.

This case concerned a severance. Before giving the decision, the O.M.B. had trouble with the problem as to whether the land division committee could **demand** a 5% cash payment. Obviously 5% parkland — a small strip of land — would be of no use in connection with the municipality's park requirements. It was simply too small to be practical.

The O.M.B. was urged to hold that the applicant should be **required** to pay cash in lieu thereof. The Board did not know whether or not they had this power so they stated a case to the Court saying in effect, "can we really do this?"

In the Supreme Court, Mr. Justice Weatherston made this statement which changed the law. It has become a classic and is quoted in case, after case, after case.

> "It is the opinion of this Court that in

cases where ss (5) (a) is not appropriate,[5] the land division committee, nevertheless, has the general power under the opening words of that section to impose as a condition of severance that a *levy* be imposed for park purposes."

The opening words of that subsection to which His Lordship referred, read as follows:

33 (5) "The Minister may impose such conditions to the approval of a plan of subdivision as in his opinion are advisable and . . ."

So that is it!

Now let us stop the music for a moment. What Mr. Justice Weatherston did was to take a "liberal interpretation" of this section of the Act. In effect he said — look, I know the Act does not specifically say in section 33(5) (a) that you can **demand** cash in lieu of parkland, but look at it this way. Surely the legislature intended that if the 5% land area was not practical, the municipality should be able to demand cash in lieu!

Since March 15, 1977 you will find that the O.M.B. decisions have taken note of the **Frey** case and have stated that municipalities may now **demand** cash as opposed to just **requesting** it.

CASH FORMULAS FOR YOUR CONSIDERATION

Now let us get down to it — cash in lieu of 5% parkland — how is it calculated?

First let me set the record straight. There is no golden rule to cling to. There are O.M.B. decisions which appear to go in opposite directions. This indicates that the subject is just as difficult for the Board as it is for you and me.

Let me give you several alternatives for consideration.

Alternative 1. The 5% should be equal to 5% of the value of the fully serviced subdivision.

There is a very logical reason for taking this approach. If you take 5% of the land you are getting an area of land which is fully serviced. If you subsequently sell it, you are selling a fully serviced lot.

Logic says that if you are going to take cash in lieu of the fully serviced lot, then you might as well have the cash equal to the value of the serviced lot.

This is what section 33 (8) appears to say. Let us look at it.

The Minister may authorize, in lieu of the conveyance for park purposes required under subsection 5, the acceptance by the municipality of money to *the value of such land required to be conveyed.*

Recently the O.M.B. in the case of **Emmitt vs. the City of Brampton**[6] (a condominium application) — stated:

Cash in lieu of parkland dedication is to be accepted at 5% of the gross area calculating the value on a fully serviced lot basis.

This appears to support the argument that cash should be equal to 5% of the fair market value of fully serviced land.

Alternative 2. The 5% value is to be based on the "raw value" of the land.

This is the opposite end of the scale and is the one most frequently advocated by subdividers and who can blame them. It is the least expensive.

The first problem is to decide "raw land value". Is it the raw land value "before" the application for draft plan approval or the value "after" draft plan approval has been granted? It makes quite a difference! The rule of thumb is that raw land value increases a minimum of two to three times once draft approval has been issued by the Minister. Many a land developer takes his profit and runs at this stage.

There is O.M.B. authority for calculating the 5% on the "raw land value" but I am having a dickens of a time trying to decide if the Board was referring to "before" or "after" draft approval. It is the case of **Re Sandwich South Planning Area O.P.A. 9**[7]. This was an official plan referral by the Minister to the Board and it related to lands in a township situated close to the City of Windsor.

The official plan contained a policy statement that lands for the purpose of dedication or cash in lieu thereof would be valued at a fair market value as if they were fully serviced and subdivided into individual lots available for sale. (Now that is shooting straight from the hip!)

The Board was of the opinion that this would result in an excessive burden which in turn might be reflected in the future market value of the homes to be built. The Board amended this policy to state that the valuation should take place, either:

(a) at the time immediately prior to the approval of the subdivision by the Minister, (does this refer to draft approval or final registered plan for approval?); or

(b) at the time immediately prior to the passing of an enabling by-law authorizing the development, whichever comes first; however, it was not to include the value of the services installed or to be installed.

Paragraph (a) still has me guessing as to whether it is raw land value "before" or "after" draft approval. However, the second alternative speaks of the passing of an enabling by-law — which surely must be the zoning by-law of the subdivision — and this is passed after draft approval but prior to the Minister's final approval for registration of the plan.

It would therefore appear, that the formula suggested by this panel of the Board is referring to raw land value "after" draft approval. Time will tell.

Alternative 3. Fair market value less servicing costs. This is what you might call a "middle of the road" approach to the problem. It is used by a number of municipalities. It does not calculate the value of the land as "raw land" or as "fully serviced land" but somewhere in between. In effect it is an attempt to value the land as "raw land value" after draft plan approval but before municipal services are installed.

Generally this is how it works. You estimate the total market value of the lots in the subdivision after they are serviced. You deduct from this value, the estimated cost of constructing the required municipal services such as sewer, water, roads, curbs, drainage, etc. You then take 5% of the resulting total as cash in lieu.

A sample calculation might go something like this:

Number of lots in the subdivision	20
Total market value of lots after services completed (20 x $20,000.00)	$4000,000.00
Cost of municipal services, i.e. sewer, water, roads, storm drainages, etc.	$160,000.00
Residual value	$240,000.00
5% thereof	$12,000.00

A comparison of the relative figures might show something like this:

(a) 5% by the above calculations	$12,000.00
(b) if you take 5% in land (a serviced lot)	$20,000.00
(c) if you take 5% of value of land prior to draft plan approval	$5,000.00

So as Walter Cronkite might say "and that's the way it is."

In the case of rural subdivisions, this "middle of the road" formula may not work too well. I say this for two reasons. First, the principal municipal service to be constructed is probably the internal road, and when you deduct this cost from the total market value of the sub-

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division, the resulting figure may be quite high. Secondly, the need for a park area is probably much less in a rural area than it is in an urban area and so less relevant to the subdivision. In such cases you might wish to fall back on the "raw land value" after draft approval and I can only wish you luck on your figures. Mind you, if you are going to talk sheer economics, it is still better for a municipality to take a fully serviced lot and sell it later.

So there it is. These are the trends. I think we got most of it on the silver platter but I am not too sure about the blue ribbon! ●

1 Cimas Construction Ltd. v. Borough of Scarborough 10 O.M.B.R. 306.

2 Re Przekop Subdivision and City of Guelph, October 2, 1979, 10 O.M.B.R. 175.

3 Re Frey and Regional Municipality of Peel Land Division Committee 1977 2 M.P.L.R. 52.

4 For an example of the older cases see Stobbe v. Regional Municipality of Waterloo, January 24, 1977 6 O.M.B.R. 352, and also Re Steel Co. of Canada Ltd. and City of Nanticoke December 22, 1976 6 O.M.B.R. 278.

5 In this statement His Lordship is referring to Section 33 (5) (a) of The Planning Act which permits the Minister to impose a condition that not exceeding 5% of the land included in the plan be conveyed to the municipality for park purposes.

6 Emmitt Developments Ltd. v. City of Brampton February 4, 1980 O.M.B.R. 276.

7 Re Sandwich South Planning Area Official Plan Amendment 9, September 26, 1979 10 O.M.B.R. 229.