



**STAFF REPORT
ACTION REQUIRED**

**Metrolinx Rail-to-Rail Diamond Grade Separation Project
– Noise/Vibration Complaint Proceeding – Metrolinx
Appeal**

Date:	January 19, 2010
To:	City Council
From:	City Solicitor
Wards:	11, 13, 14, 17 and 18
Reference Number:	

SUMMARY

This report provides an update respecting the status of the proceeding on the noise/vibration complaint made by the West Toronto Diamond Community Group (“WTDCG”) to the Canadian Transportation Agency (“CTA”) in respect of the West Toronto Diamond grade separation project being undertaken by Metrolinx, operating as GO Transit.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council ratify the actions of the City Solicitor in responding to the application by Metrolinx, operating as GO Transit , to the Federal Court of Appeal for a stay and appeal of Decision No. 507-R-2009 of the Canadian Transportation Agency with respect to the complaint made by the West Toronto Diamond Community Group concerning the noise and vibration caused by the rail-to-rail West Toronto Diamond grade separation project currently being undertaken by Metrolinx, and authorize the City Solicitor to oppose the application.

Financial Impact

The recommendations in this report have no financial impact beyond what has already been approved in the current year's budget.

DECISION HISTORY

At its meeting of August 5 and 6, 2009, City Council considered Item CC38.20 <http://www.toronto.ca/legdocs/mmis/2009/cc/bgrd/backgroundfile-22617.pdf>, a report dated July 27, 2009 from the City Solicitor respecting the noise complaint process and related legal issues. Council authorized the City Solicitor to prepare submissions for the proceeding before the Canadian Transportation Agency (“CTA”) to consider the complaint made by the West Toronto Diamond Community Group with respect to the noise and vibration caused by the rail-to-rail West Toronto Diamond grade separation project currently being undertaken by Metrolinx (formerly GO Transit). In addition, City Council further authorized the City Solicitor to participate fully before the Canadian Transportation Agency to the full extent permitted by the Canadian Transportation Agency.

ISSUE BACKGROUND

As a result of the direction from Council, Legal staff, with the assistance of staff from Municipal Licensing and Standards (i.e. noise control) has participated in and made submissions to the CTA in support of the WTDCG. After consideration of all submissions, the CTA issued an initial decision No. LET-R-151-2009 (October 8, 2009) ruling that Metrolinx had, in undertaking the project, breached its obligation under section 95.1 of the *Canada Transportation Act* to cause only such noise and vibration as is reasonable. In making this ruling, the CTA noted the prolonged exposure of the local citizens to the noise and vibration in this case and the failure by Metrolinx to implement sufficient mitigative measures at the outset. As a result, the CTA ordered a number of proposed measures, including significant noise mitigation measures, and allowed Metrolinx a further 14 days to “show cause” why the proposed measures should not be implemented. After further submissions from Metrolinx, the City and the residents, the CTA issued final decision No. 507-R-2009 (December 7, 2009) and a final order imposing the measures as proposed in the initial decision, with some amendments. A copy of the final decision is on file with the City Clerk.

COMMENTS

Metrolinx has served the City and the WTDCG with an Application (dated January 6, 2009) seeking leave to appeal the decision to the Federal Court of Appeal. In addition, the Application requests that the Court order a stay of the decision pending the outcome of the appeal. After hearing arguments from the parties, a Federal Court judge, on January 18, 2010, granted Metrolinx an interim stay of the order until January 28, 2010. As of the date of Council’s consideration of this report, Legal staff will have participated in cross-examination on the affidavits submitted by Metrolinx in support of its Application. Consistent with Council’s previous direction, Legal staff intend to also make submissions opposing the Application for leave to appeal and for a stay. The residents have now also retained their own legal counsel who has participated in cross-examinations and will make legal submissions on their behalf.

In order to be successful in obtaining leave to appeal, Metrolinx will be required to show that the CTA committed an error of law or jurisdiction in its decision. In its Leave Application Metrolinx argues that it was not given a fair opportunity to correct or contradict certain evidence of the WTDCG and the City. As well they argue that the CTA made certain legal errors, including allegedly requiring Metrolinx to demonstrate that it was impossible to remediate the noise. All parties made numerous lengthy submissions before the CTA made its order.

Metrolinx has indicated that if it is forced to implement the various noise mitigation measures as set out in the decision, this will result in a delay in completion of the piling. In its affidavit Metrolinx asserts that the delay would be "at least a year", although in cross examination they indicated it could be as little as five months. They also allege that completion of the entire project would be delayed by "at least another two years." Metrolinx states that the project is necessary to proceed with a future airport rail link and added commuter services. Metrolinx has also alleged that the additional measures shall result in an increase in the cost of the project of between \$13 million and \$23 million in total, and that these costs will mount at \$50,000.00 per day. The WTDCG has been clear in its submissions that an additional delay in the completion of the project is acceptable to the residents provided that adequate noise mitigation measures are in place. The CTA, in its orders, conducted an exhaustive review of the evidence and indicated that it was balancing the rights of the local residents with those of Metrolinx in coming to its conclusions. Among other things, the agency was of the opinion that Metrolinx should have planned for appropriate mitigative measures by building the associated costs into its budget. In its October "show cause" order, the CTA noted that the speed with which the project can be completed should not be the determinative factor in the method of construction given the nature of the noise and vibration caused by the project and the impact on the community.

In order to insulate the City from a possible costs claim on the appeal, agreement with Metrolinx has been secured providing that Metrolinx and the City shall not seek the costs of the appeal against each other.

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SIGNATURE

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