

Stopping the Demolition to Protect Ontario's Heritage at the Dominion Foundry Buildings - 153-185 Eastern Avenue

Date: February 1, 2021

To: City Council

From: City Solicitor and, Chief Planner and Executive Director, City Planning

Wards: Ward 13/All

REASON FOR CONFIDENTIAL INFORMATION

This report is about litigation or potential litigation that affects the City.

This report contains advice or communications that are subject to solicitor-client privilege.

SUMMARY

The Province of Ontario owns a Provincial Heritage Property at 153-185 Eastern Avenue in Toronto that is known as the Dominion Foundry Complex (the "Property"). There are four heritage buildings at that Property that were used in the production of railway equipment, rolling stock, foundry and machinery supplies. A map and photographs of the Property are provided in Appendix 1 to this report.

The Province, through several Ministries, has obligations under the Ontario Heritage Act (the "Heritage Act") and a subdivision agreement registered on title of the Property (the "Subdivision Agreement") that must be complied with before carrying out demolition.

The demolition of heritage attributes began at least by January 18, 2021 and continued that week despite the City of Toronto's repeated demand of the Province to stop.

On January 21, 2021, the St. Lawrence Neighbourhood Association commenced a court application seeking court orders that would stop the demolition of the buildings on the Property. The next day, the Province advised that they would temporarily pause the demolition until Wednesday, January 27, 2021. That temporary pause was ultimately extended to Friday, January 30, 2021.

A motion seeking an interim prohibition on any further demolition was heard in the Divisional Court of Ontario on Wednesday, January 27, 2021. Justice Corbett delivered his decision on Friday, January 29, 2021 granting an order of prohibition to prevent destruction or alteration of any heritage features of the heritage buildings pending final determination of the application or other court order. The full court application is scheduled to be heard by a panel of three judges of the Divisional Court on February 26, 2021. The hearing will be streamed by Youtube.

RECOMMENDATIONS

The City Solicitor and the Chief Planner and Executive Director, City Planning, recommend that:

1. City Council delete recommendation 3 in PH20.8.
2. City Council adopt the confidential instructions to staff in Confidential Attachment 1.
3. City Council authorize the release of City Council's confidential instructions in the discretion of the City Solicitor and direct that all remaining confidential information contained in Confidential Attachment 1 remain confidential in its entirety, as it contains advice which is subject to solicitor-client privilege.

FINANCIAL IMPACT

The financial impact is set out in the Confidential Attachment.

DECISION HISTORY

On January 19, 2021, Planning and Housing Committee considered PH20.8, Stopping the Demolition to Protect Ontario's Heritage at the Dominion Foundry Buildings (<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2021.PH20.8>) and recommended that:

1. City Council request the Premier of Ontario, the Minister of Municipal Affairs and Housing, the Minister of Heritage, Sport, Tourism and Culture Industries and the Minister of Infrastructure to immediately halt any demolition or construction work at 153-185 Eastern Avenue for a minimum of 30 days and to provide the following for the City to comment on and review:
 - a. Cultural Heritage Evaluation;
 - b. Archaeological Assessment;
 - c. Heritage Impact Assessment;
 - d. Strategic Conservation Plan;

- e. Environmental Site Assessment; and
- f. Any other studies done with relation to 153-185 Eastern Avenue.

2. City Council request the Premier of Ontario, the Minister of Municipal Affairs and Housing, the Minister of Heritage, Sport, Tourism and Culture Industries and the Minister of Infrastructure to immediately engage and consult with residents about the future of 153-185 Eastern Avenue.

3. Planning and Housing Committee also requested the Chief Planner and Executive Director, City Planning, the Senior Manager, Heritage Preservation Services, the General Manager, Transportation Services and the City Solicitor to report to the February 2, 2021 meeting of City Council with the information and recommendations on:

- a. a review by City staff and third party review as may be necessary, of the studies referred to in the letter of January 19, 2021 to the Chief Planner from the Assistant Deputy Minister, Housing Division, Ministry of Municipal Affairs and Housing and confirmation from the Province that demolition will cease until such reviews have been completed;

- b. who the identified development proponent is for 153-185 Eastern Ave; the number of affordable and market housing units being proposed; and any draft concept/development plans that were used to help prepare the Minister's Zoning Order (O. Reg 595/20) that was issued on October 22, 2020, and whether pre-consultation meetings between the development proponent and the City may commence immediately, and if necessary, additional meetings be held with the local Councillor and/or the local community;

- c. Historic agreements and restrictive covenants between the Province, City, Toronto Region Conservation Authority and any others on properties at 153-185 Eastern Avenue;

- d. Requirements under the Standards and Guidelines for Conservation of Provincial Heritage Properties (2010) or other relevant municipal, provincial or federal policies that would discourage or prevent the demolition of the listed heritage properties at 153-185 Eastern Avenue;

- e. Revoking the right of way permit that was issued by Transportation Services to facilitate any future demolition on the site;

- f. Site conditions, including potential asbestos and soil contamination, species-at-risk and trees on-site; and

- g. Any actions the City could take to halt or delay the demolition of the buildings at 153-185 Eastern Avenue.

4. In the event that the Chief Planner and Executive Director, City Planning is unable to report on the studies referred to in the letter of January 19, 2021 to the Chief Planner from the Assistant Deputy Minister, Housing Division, Ministry of Municipal Affairs and

Housing and confirm that the Province will cease demolition until reviews of such studies have been completed, City Council direct the City Solicitor and appropriate City Staff to seek an immediate injunction on any work to demolish the buildings located at 153-185 Eastern Avenue until such time that a Strategic Conservation Plan and required public engagement can be undertaken, and until any other obligations that the Province may be required to fulfill by law or contract have been fulfilled.

5. City Council immediately send a copy of this item to the Premier of Ontario, the Minister of Municipal Affairs and Housing, the Minister of Heritage, Sport, Tourism and Culture Industries and the Minister of Infrastructure.

COMMENTS

This section provides the public commentary of staff with section headings to identify where the information and recommendation requested by Planning and Housing Committee are provided in relation to items 3. a) to g) of PH20.8. This commentary is presented in narrative format so those items, 3. a) to g), are not presented in the order they were requested.

Property Background

The Property contains four heritage buildings originally constructed in 1912 (169 Eastern Avenue), 1925 (171 Eastern Avenue), ca. 1935 (185 Eastern Avenue) and in the 1950s (153 Eastern Avenue), on land originally owned by the Canadian Northern Railway (later, the Canadian National Railways). The Dominion Wheel and Foundries Company is first recorded as a tenant on the property in 1913, and occupied the property until the late 1950s to produce railway equipment, rolling stock, foundry and machinery supplies.

In 2004, the City of Toronto exercised its right under s. 27 of the Heritage Act and added the Property to the City of Toronto's Heritage Register.

In a 2006 report prepared for the Province, Unterman McPhail Associates found that the heritage buildings at the Property were "historically and architecturally significant as a good example of an industrial enclave in the area adjoining the lower Don River." That report also found that the buildings held local significance.

Pursuant to the Ministry of Heritage, Sport, Tourism and Culture Industries' Standards and Guidelines for Conservation of Provincial Heritage Properties (the "Standards and Guidelines"), the Property was determined to be a Provincial Heritage Property. The Property continues to be a Provincial Heritage Property subject to the obligations on the Province and relevant ministries imposed by the Heritage Act regarding Provincial Heritage Property. The Heritage Act (ss. 25.2(6)) requires the Crown in right of Ontario, Ministries and prescribed public bodies to comply with the Standards and Guidelines.

3. b) The MZO and Information about Potential Development

The Property was subject to one of three Minister's Zoning Orders issued for Toronto property in 2020 ("MZOs"). The MZO (O. Reg 595/20) issued on the Property permits up to three buildings, one of which can be an apartment building with a maximum height of 141 metres, with no specified unit count, and a maximum gross floor area of 75,038.40 square metres (of which 74810.45 square metres may be residential). The MZO is silent on matters of heritage and affordable housing.

Despite the passing of the MZO, the Province has not submitted any formal development applications to the City of Toronto in relation to a potential development at the Property. There is no application for site plan or condominium approval.

Formal development plans have not been shared nor has any information been shared as to the potential development proponent. As such, no pre-consultation meetings have taken place.

3. c) Historic Agreements and Restrictive Covenants

A summary of the agreements, easements and restrictive covenants registered on title to the Property are set out in Appendix "2" to this report. The Property is part of the West Don Lands and are Blocks 17 (185 Eastern) and 26 (153 Eastern) on the Plan of Subdivision (Plan 66M-2488) which was registered on September 9, 2011 by the Province. Blocks 17 and 26 continue to be owned by Her Majesty the Queen in Right of Ontario as Represented by the Minister of Infrastructure (the "Province"). The agreements, restrictive covenants and easement registered on title to the Property set out provisions relating to the development of those lands, including the construction of municipal infrastructure and flood control, and the mitigation of noise and vibration from Metrolinx's facilities, as well as mitigation measures arising from the environmental state of the lands. The Subdivision Agreement entered into between the Province and the City in 2011 is the only instrument on title to the Property that contains provisions relating to heritage. Sections 41 and 42 of Schedule B-1 to the Subdivision Agreement are set out in Appendix "3" to this report. Section 41 deals with the submission to the City of heritage conservation guidelines for the properties listed on the City of Toronto's Heritage Inventory. Section 42 requires the owner to provide, prior to any work that could alter heritage attributes, building permit drawings or alteration drawings and additionally, a Heritage Impact Assessment, if it is determined that the heritage attributes may be affected by the planned alterations, to the satisfaction of the Manager, Heritage Preservation Services (now the Senior Manager, Heritage Planning). A Heritage Impact Assessment was not provided to the City prior to the Province commencing demolition of the buildings on the site.

Mobilization

A demolition contractor for the Province, QM Environmental applied for a temporary permit to occupy the street in and around the Property to facilitate demolition works. Chapter 743 of the Municipal Code sets out a process for making an application and provision of a permit. Occupation Permit No. 88028401 (issued on January 12, 2021), as replaced by Permit No. 88028402, for 153 Eastern Ave at Rolling Mills Rd to St. Lawrence St. was issued to QM Environmental by the City of Toronto, Transportation Services (the "Permit").

3.e) Revoking Right of Way Permit

The issues with the Province's compliance with the Heritage Act and Subdivision Agreement came to the attention of the General Manager of Transportation Services after the Permit was issued. Transportation Services does not review construction or demolition related to a request for a temporary street occupancy permit to ensure it complies with the Building Code Act, 1992 or the Heritage Act. Generally, that would be covered under the building permit process overseen by the Chief Building Official. However, the Province was not required to obtain a permit under the Building Code Act, 1992 for this work so there was no mechanism for alerting the General Manager of Transportation Services of the Province's failure to comply with the Heritage Act.

The General Manager of Transportation Services, by way of letter dated January 27, 2021, notified the Permit Applicant (QM Environmental) as well as the Province, that there has been non-compliance with the Permit's terms (non-compliance with the law, that being the Heritage Act) and advising and putting them on notice of the non-compliance and the General Manager of Transportation Services' right to cancel the Permit if the non-compliance is not addressed immediately. In this letter, the General Manager further advised that if the Permit is cancelled, the Permit Applicant would no longer have permission to occupy the City of Toronto's right-of-way.

Demolition Crews On Site

On Wednesday, January 13, 2021, citizen reports started to come in that there was activity at the Property. There were reports that a demolition contractor crew was on site. On Friday, January 15, 2021, Toronto Building staff attended at the Property and observed workers making preparations to demolish the buildings (removing old paints and chemicals from the buildings, site screening etc.). No demolition was observed at that time.

On Saturday, January 16, 2021, the Chief Planner and Executive Director, City Planning, City of Toronto, wrote to Joshua Paul, Assistant Deputy Minister, Housing Division, Ministry of Municipal Affairs and Housing, setting out the City's concerns at the prospect of imminent demolition at the Property, requesting that this activity not be initiated and redevelopment of the Property be reconsidered in light of its heritage value, and the Provincial shortfalls under the Standards and Guidelines.

Province's Obligations Under the Heritage Act and Subdivision Agreement

At least by January 18, 2021, demolition of one of the buildings at the Property commenced.

Subdivision Agreement

The Subdivision Agreement required the Province to submit alteration drawings and a Heritage Impact Assessment to the satisfaction of the Senior Manager, Heritage Planning prior to undertaking any work that could alter the heritage attributes at the Property. The Province did not give the City any such documents until January 20, 2021. City staff immediately reviewed the documents once the Province submitted them, but as detailed further below, there were many issues and deficiencies with the documents. The heritage impact assessment that was submitted does not follow the Province's own guidance and requirements for such assessments.

The Subdivision Agreement does not preclude the demolition of heritage attributes but it does require a proper process to be followed, which has not happened.

Heritage Act

The Heritage Act requires the Province to comply with the Standards and Guidelines. The Standards and Guidelines do not guarantee that demolition of heritage buildings will not occur but they do set out a process that must be followed if demolition is being considered. The Standards and Guidelines, among other things, require the Province to do all of the following things that they have not done:

- complete a heritage impact assessment that conforms to the 2017 Ministry of Heritage, Sport, Tourism and Culture Industries Info Bulletin on Heritage Impact Assessments (among other things, there was no public consultation);
- having considered all other alternatives, consider removal or demolition as a last resort, subject to public engagement, using best efforts to mitigate loss of cultural heritage value (F.4);
- made provisions for effective protection of heritage attributes when granting leases, licences, rights, or operating agreements affecting provincial heritage property (F.3); and,
- demonstrate best efforts to ensure the ongoing, legally binding protection of the Property's cultural heritage value in any sale or other disposal agreement (F.2).

3 a) and 3 d) - Review of documents provided by the Province and the requirements under the Standards and Guidelines that discourage or prevent the demolition of the provincial heritage property

The table below gives an overview summary of key requirements of the Standards and Guidelines that discourage or prevent the demolition of provincial heritage property and
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identifies the corresponding results of City staff's review of the heritage impact assessment and related documentation that the Province provided to the City after it commenced demolition at the Property.

<i>Standards and Guidelines and HIA for Provincial Heritage Properties requirements</i>	<i>Submitted Heritage Impact Assessment and Policy Deficiencies</i>
Independent Study	Not demonstrated
Prepared by a qualified person(s)	Not demonstrated
Statement of Cultural Heritage Value (SCHV)	Outdated and not based on Ontario Regulation 9.06 criteria
HIA based on current SCHV	Heritage Impact Assessment based on outdated/deficient statement of cultural heritage value
Strategic Conservation Plan (SCP)	Not submitted
Description and review of potential impacts	Deficient due to lack of Strategic Conservation Plan
Description and review of conservation alternatives	Deficient due to lack of Strategic Conservation Plan
Description and review of mitigation measures	Deficient due to lack of Strategic Conservation Plan, clarity and supporting documentation
Description of mitigation measures	Deficient due to lack of Strategic Conservation Plan, clarity and supporting documentation
Consider relevant findings of any archaeological assessment(s) and other technical studies	Archaeological assessment not provided
Views of interested persons or communities	Not demonstrated to date
Municipal engagement	Not demonstrated prior to initiation of demolition, and insufficient documentation provided
F.2 for Provincial Heritage Properties - best efforts	Not demonstrated

On January 19, 2021, following up on the Chief Planner's letter of January 16, the City Solicitor's office communicated with the Province stating that any and all demolition or other work that could alter the heritage attributes for the Property must cease while the Province had not met their obligations under the law and in contract. The demolition continued.

Court Application

On January 21, 2021, the St. Lawrence Neighbourhood Association commenced a court application seeking court orders that would stop the demolition of the buildings on the Property. The City of Toronto was named as a respondent. Since the subject matter was urgent and there could be irreparable harm if there was no interim relief before the application could be heard on its merits, an urgent motion date of Wednesday, January 27, 2021 was set for a hearing on whether the demolition would be prohibited on a temporary basis.

The next day, the Province advised that they would temporarily pause the demolition until the Wednesday, January 27, 2021 motion date. That temporary pause was ultimately extended to Friday, January 30, 2021, the date that the motion judge indicated that he would issue his decision on whether there would be a temporary prohibition of the demolition.

An urgent motion was heard in the Divisional Court of Ontario on Wednesday, January 27, 2021 and Justice Corbett delivered his decision on Friday, January 29, 2021. Justice Corbett granted a temporary prohibition to prevent destruction or alteration of any heritage features of the heritage buildings pending final determination of the application or other court order. Justice Corbett's decision is provided in Appendix 4 to this report.

The full court application is scheduled to be heard by a panel of three judges of the Divisional Court on February 26, 2021. The application is not about whether demolition of the buildings may ultimately be approved. It is about whether the Province had done what it must before undertaking any demolition. The hearing will be streamed by Youtube.

Current Site Conditions - 3. f)

Staff have not had an opportunity to fully review the information available that is related to environmental contamination at the Property. We can provide preliminary comments as follows: a certificate of requirement under the Environmental Protection Act has been registered on title of the Property; a certificate of property use and associated record of site condition have been prepared and registered in the Environmental Site Registry; and, there are corresponding risk management measures that must be followed at the Property.

The Province, in the motion before Justice Corbett, indicated that asbestos remediation was in process at the Property. The current status of the remediation is not known to City staff.

Demolition of a portion of one of the four buildings was underway when the Province first agreed to stop demolition activities. The other three buildings do not appear to have had any significant demolition undertaken at this time.

A recent Environmental Registry of Ontario posting was issued on January 4, 2021 that indicated that Infrastructure Ontario was granted a permit under clause 17(2)(c) of the Endangered Species Act, 2007. The permit authorizes Infrastructure Ontario to conduct site alterations of four warehouses buildings in order to build affordable housing. The permit includes conditions that require Infrastructure Ontario to undertake measures to minimize adverse effects to the species (3 types of bat species) and achieve overall benefit to the species within a reasonable timeframe.

Actions the City Could Take [3. g)]

The comments related to this request of the Planning and Housing Committee contain advice and communications that are subject to Solicitor and Client Privilege and Litigation Privilege. That confidential information and advice are provided in Confidential Attachment 1 to this report.

CONTACT

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SIGNATURE

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ATTACHMENTS

Appendix 1 - Map and photographs

Appendix 2 - List of historic agreements on title

Appendix 3 - Excerpt of Subdivision Agreement

Appendix 4 - January 29, 2021 decision of Justice Corbett

Confidential Attachment 1 - Advice of City Solicitor