

33 Yorkville Avenue – Pedestrian Tunnel

Date: September 17, 2020
To: Toronto and East York Community Council
From: Director, Transportation Services, Permits and Enforcement
Wards: Ward 11 – University-Rosedale

SUMMARY

This staff report is about a matter which Community Council has delegated authority from City Council to make a final decision.

The current owner of 33 Yorkville Avenue, 33 Yorkville Residences Inc., is planning to construct a 68-storey mixed-use development and a 42 storey residential condo at 33 Yorkville Avenue and 50 Cumberland Street with approximately 1079 residential dwellings, retail on the ground and 2nd floor, above a six level below grade Toronto Parking Authority commercial parking garage. As a part of this proposed development, the owner submitted an application which proposes to re-construct a portion of an existing below grade tunnel at 33 Yorkville Avenue beneath Cumberland Street which connects to the property at 2 Bloor Street West. The portion of the tunnel to be re-constructed was formerly located on the owner's lands, but the owner was required to convey to the City a 3.05 metre road widening along the Cumberland Street frontage of the subject site. As a result of the road widening, the portion of the tunnel to be re-constructed is now located under the public highway.

The purpose of this report is to seek Community Council authorization to enter into an encroachment agreement with the owner to permit the portion of the tunnel now located under Cumberland Street to be re-constructed and to remain within the public highway.

RECOMMENDATIONS

The Director, Transportation Services, Permits and Enforcement recommends that:

1. Toronto and East York Community Council authorize the City to enter into an encroachment agreement (the "Agreement") with the owner, including the subsequent owner, of 33 Yorkville Avenue (the "Owner") for the purpose of permitting the Owner to re-construct, maintain, repair and operate a publicly accessible underground pedestrian tunnel located approximately 82 metres west of Bay Street, connecting 33 Yorkville Avenue to the existing tunnel connected to 2 Bloor Street West (the "Encroachment" or "Tunnel"), substantially on the major terms and conditions set out below, and including such other terms and

conditions as deemed appropriate by the General Manager of Transportation Services (the "GM"), and in a form satisfactory to the City Solicitor:

- a. the Owner shall, at its own expense, design, re-construct, repair and maintain the Encroachment in a state of good repair, to the satisfaction of the GM, and shall assume full and sole responsibility for the condition, operation, repair, replacement, maintenance and management of the Encroachment, at no expense to the City;
- b. the design and re-construction of the Encroachment shall comply with the Canadian Highway Bridge Design Code (CAN/CSA), including without limitation for highway loading purposes, including allowance for impact factors, as same may be amended, superseded or replaced from time to time;
- c. the Owner shall obtain all Public Utility Coordinating Committee clearances and/or sign-offs from the public utility companies and satisfy any requirements they may have;
- d. the Owner shall obtain approval and all necessary permits for the re-construction of the Encroachment from the Toronto Building Division, if required;
- e. prior to commencement of construction, a street work permit shall be obtained by the Owner in accordance with Article III of Chapter 743, Streets and Sidewalks, City of Toronto Municipal Code;
- f. the Owner shall submit and adhere to an accepted Traffic Management Plan, Construction Management Plan, Construction Schedule letter and Traffic Assessment Study outlining the proposed Tunnel re-construction/installation and advise on the impacts within the public right-of-way in the area of the proposal Encroachment, which content shall be to the satisfaction of the GM, prior to the issuance of a Construction Permit;
- g. the Owner shall provide reasonable notification to the owner of 2 Bloor Street West prior to commencing work on the Tunnel, and shall work collaboratively with the owner of 2 Bloor Street West to complete the physical linkage of the Tunnel to the existing tunnel connecting to 2 Bloor Street West;
- h. the Owner shall pay (i) an annual licence fee in the amount of \$8,641.00 plus applicable HST, and (ii) any applicable real property taxes eligible. The licence fee shall increase annually by an amount equivalent to the percentage increase in the Consumer Price Index (all items – Toronto), and shall further be recalculated every ten (10) years based on the applicable fee of the City for private tunnel encroachments, as prescribed under Chapter 441, Fees and Charges, Appendix C – Schedule 2, Transportation Services, of the City's Municipal Code, as amended or replaced;

- i. the Owner agrees that the pedestrian Tunnel shall remain publicly accessible throughout the term of the Agreement;
- j. the City shall maintain the right to place or affix pipes, cables, wires, poles and other infrastructure within/to, over or under the Encroachment;
- k. the City shall not be responsible for repairing or replacing the Encroachment damaged as a result of street repairs, construction or other municipal activities on the public right-of-way;
- l. the City shall be released from and against all actions, suits, claims or demands and from all loss, costs, damages and expenses that may result from the permission granted, which release shall be in a form and content satisfactory to the City Solicitor;
- m. the Owner shall indemnify the City from and against all actions, suits, claims or demands and from all loss, costs, damages and expenses that may result or arise from the permission granted, any matter related to the Encroachment, and any failure of the Owner to comply with the Agreement, which indemnity shall be in a form and content satisfactory to the City Solicitor;
- n. the Owner shall provide and maintain public liability and property damage insurance with an insurer satisfactory to the GM for the lifetime of the Agreement in a form as approved by the Chief Financial Officer, including a cross-liability /severability of interest clause, a provision that the insurance is primary before the insurance of the City, and a 30 day prior notice of cancelation/renewal clause, and in the amount not less than \$10 million or such greater amount as the Chief Financial Officer may require;
- o. the Owner shall provide and maintain an irrevocable letter of credit, in an amount of \$207,800.00 to be retained by the City, for the duration of reconstruction of the pedestrian Tunnel within the Cumberland Street right-of-way, to secure against any damage to the City right-of-way and to guarantee that the work within the public right-of-way is completed to the City's satisfaction, including the restoration of the public right-of-way, to the satisfaction of the GM. Prior to the release of the letter of credit the Owner will be required to provide a construction sign-off letter stamped and signed by the structural engineering firm that designed the Tunnel which states that the Tunnel is safe and ready to be opened to pedestrian traffic, along with two sets of as-built drawings;
- p. the Owner shall provide as-built drawings within 60 days of completing the construction of the Encroachment to Survey and Mapping, Attention: Utility Mapping Supervisor, Engineering Design, 275 Merton Street, 1st Floor, Toronto, Ontario M4S 1A7, as well as to Transportation Services, Right of Way Management, Construction Activities, 55 John Street, 17th Floor, Metro Hall, Toronto, Ontario M5V 3C6;
- q. the Owner shall submit a reference plan for the Tunnel which includes the area of the Tunnel in m2, upon completion of the Tunnel;

- r. the Owner will be responsible for the restoration of the road pavement, including adjacent sidewalks and boulevards, if necessary, to the satisfaction of the GM, upon completion of the installation of the Tunnel;
- s. the Owner shall not make or permit any additions or modifications to the Encroachment beyond what is permitted under the terms of the Agreement without the City's consent, which may be unduly delayed or arbitrarily withheld;
- t. the term of the Agreement shall expire on the earlier of: (i) the removal or abandonment of the Tunnel, (ii) the date of demolition of either of the buildings located at 33 Yorkville Avenue and 2 Bloor Street West (the "Buildings"), where such Building(s) is or are not being re-constructed; (iii) if deemed necessary for municipal purposes as determined by the GM, acting reasonably, upon receiving not less than 180 days' notice in writing from the GM, or (iv) in the event that the GM determines there is an emergency that presents a danger to the public health or safety, upon such notice as the GM determines appropriate in the circumstances, if any;
- u. at the expiration or earlier termination of the Agreement, at the City's sole discretion, the City may require the Owner to alter, demolish and/or remove the Encroachment at the Owner's sole cost and expense, to the satisfaction of the GM, and after the removal of the Encroachment, the Owner shall restore the street pursuant to Article VIII of Chapter 743, Streets and Sidewalks, City of Toronto Municipal Code;
- v. the Owner agrees that the City shall have the right of entry onto the lands and building located 33 Yorkville Avenue and on the Encroachment, to acquire access to the Encroachment for the purposes of inspection, repair, or removal of the Encroachment or performing any other activity permitted by the City under the Agreement, on terms acceptable to the GM;
- w. the Agreement shall include rights and remedies acceptable to the GM, including the right, but not the obligation, of the City to remedy any failure of the Owner to comply with the Agreement, and the costs incurred by the City in enforcing the Agreement shall be payable by the Owner;
- x. shall require the Owner to adhere to applicable federal, provincial or municipal laws, by-laws, policies including the City of Toronto Municipal Code and Transportation Services' standard process for acquisition of encroachment agreements;
- y. the provisions of Appendix A of Toronto Municipal Code Chapter 743, Streets and Sidewalks, Use of, attached as Appendix "C" to this report, shall be substantially incorporated into the Agreement to the satisfaction of the GM;
- z. the Agreement shall be registered on title to the Owner's property and other affected properties deemed necessary by the City Solicitor, at the

expense of the Owner, with appropriate title opinions provided to the satisfaction of the City Solicitor as may be required by the City Solicitor;

- aa. the Owner shall pay all cost associated with the preparation of the Agreement and the registration of the Agreement on title; and
 - bb. the Owner shall accept such additional terms and conditions as the GM or the City Solicitor may deem necessary in the interest of the City.
2. Toronto and East York Community Council direct the GM to extend the Agreement to the new owner of 33 Yorkville Avenue, in the event of sale or transfer of the property at 33 Yorkville Avenue, subject to the prior approval of the GM, and provided in all cases the transferee or assignee enters into an assumption agreement with the City to assume the obligations under the Agreement, in form satisfactory to the City.

FINANCIAL IMPACT

The Owner will be responsible for the entire costs for the re-construction of the Tunnel, as well as its maintenance, repair and operation.

The Owner shall pay an annual licence fee of \$8,641.00 annually, which shall increase annually by an amount equivalent to the percentage increase in the Consumer Price Index (all items – Toronto), and shall be subject to recalculation every 10 years.

The Chief Financial Officer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

At its meeting on August 25, 26, 27 and 28, 2014, City Council approved applications to amend the Official Plan and Zoning By-law to permit two linked mix use towers of 62 storeys on Yorkville Avenue and of 40 storeys on Cumberland Street.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2014.TE34.32>

At its meeting on September 30, October 1 and 2, 2015, City Council approved amendments to Item TE34.32, including amongst other matters, that the applicant convey a road widening of 3.05 metres along the Cumberland Street frontage of the lands as a community benefit to the City.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2015.MM9.52>

COMMENTS

An application has been received from 33 Yorkville Residences Inc. to reconstruct a portion of a tunnel underneath Cumberland Street connecting 33 Yorkville Avenue and 2 Bloor Street West.

In accordance with the Site Plan Control Application No. 16 1555457 STE 27 SA and Section 3 of Appendix 1 of By-law No. 1050-2015, the Owner was required to convey to the City a 3.05 metre wide strip of land to the full extent of the development site, abutting the north limit of Cumberland Street. As such, the portion of the existing tunnel to be reconstructed, which was formerly within an area which was private property, is now located on City-owned lands, dedicated as the City's public right-of-way. The tunnel will span only 3.05m under the public right-of-way of Cumberland Street, running north and south, connected to an existing tunnel which extends to 2 Bloor Street West. The tunnel is located approx. 82 m west of Bay Street and is a minimum of 2.6 m beneath the existing grade. The tunnel is shown on the site plan A-1.01 (plans 1 and 2) and the cross section drawing A-2.01, copies are attached as Appendix "A" and Appendix "B", respectively.

The portion of the tunnel in the City's right-of-way will be reconstructed to meet AODA requirements.

After construction is finalized the re-constructed tunnel will connect to the existing tunnel connecting 33 Yorkville Avenue to 2 Bloor Street West (Cumberland Terrace), and will allow pedestrian access to the TTC and the Path network, along with access to the Toronto Parking Authority parking garage. This connection is vital to the operation of the Toronto Parking Authority's parking garage.

As there may also be potential impacts to existing utility infrastructure which are currently unknown, it will be the Owner's responsibility to undergo a public utility review with a view of obtaining clearances from the affected utility agencies and satisfying their requirements prior to the issuance of a construction permit authorizing work within the public right-of-way.

An encroachment agreement between the City and the Owner is required in order to permit the re-construction of the pedestrian tunnel within the City's right-of-way, as well as to set out the Owner's responsibilities for the maintenance, repair and operation of the Tunnel.

The construction and maintenance of the Encroachment cannot be considered under the criteria set out in Chapter 743, Streets and Sidewalks, City of Toronto Municipal Code. As such, Transportation Services is required to report on this application to Community Council.

On March 30, 2020, the Ontario Superior Court issued an order appointing a Court ordered receiver pursuant to the *Bankruptcy and Insolvency Act*, placing the Owner under receivership. If this application is approved by Community Council, Staff will work with the Court appointed receiver to finalize the encroachment agreement, which will be executed by the Court ordered receiver, on behalf of the Owner.

Transportation Services has reviewed the application and determined that reconstruction of the existing tunnel does not impact the public right-of-way in a negative manner and therefore recommends approval of the application. The Owner is required to satisfy all conditions of approval set out in the recommendations of this report and must comply with Transportation Services procedures for granting approval of tunnels.

CONTACT

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Permits and Enforcement
Transportation Services,
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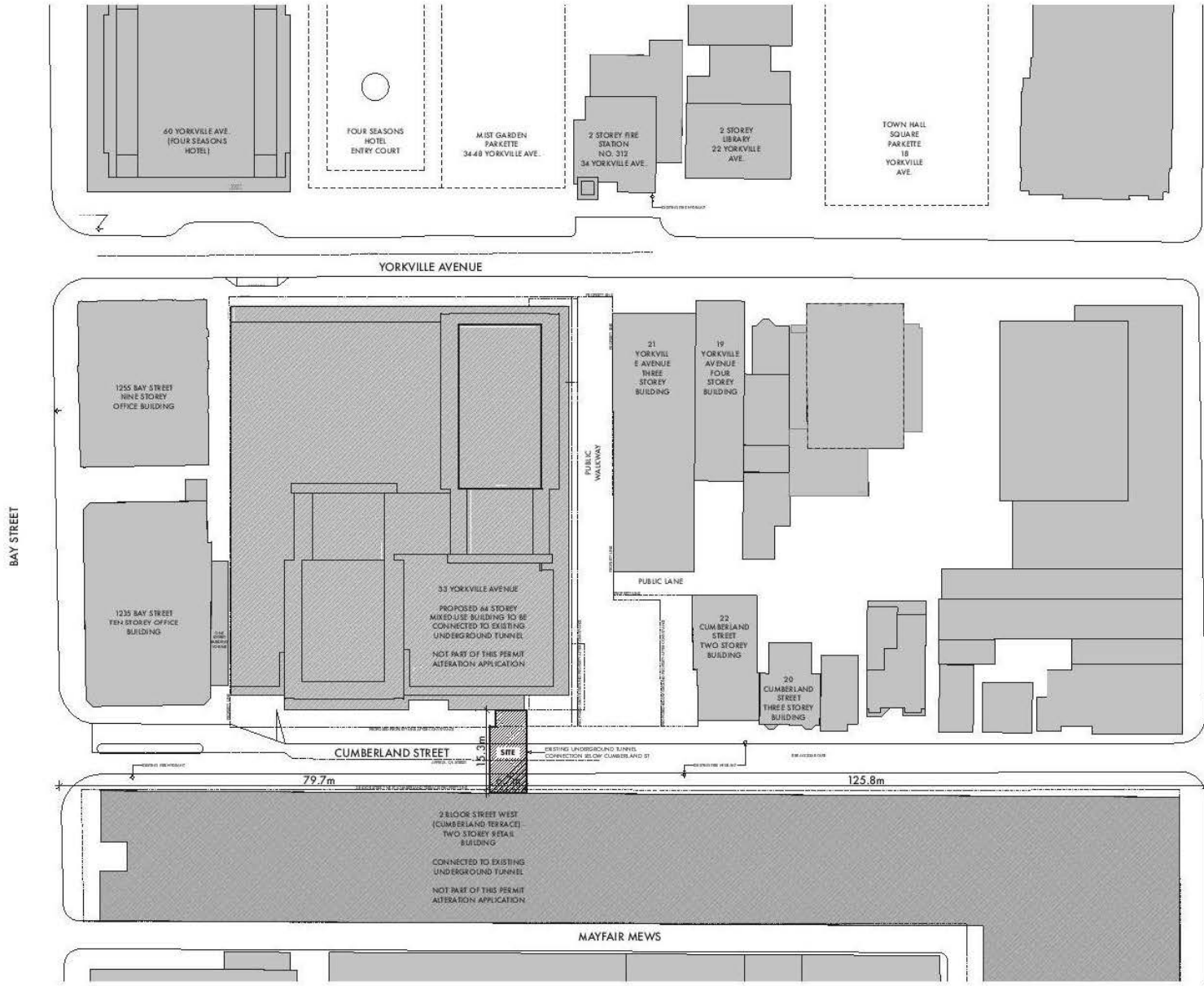
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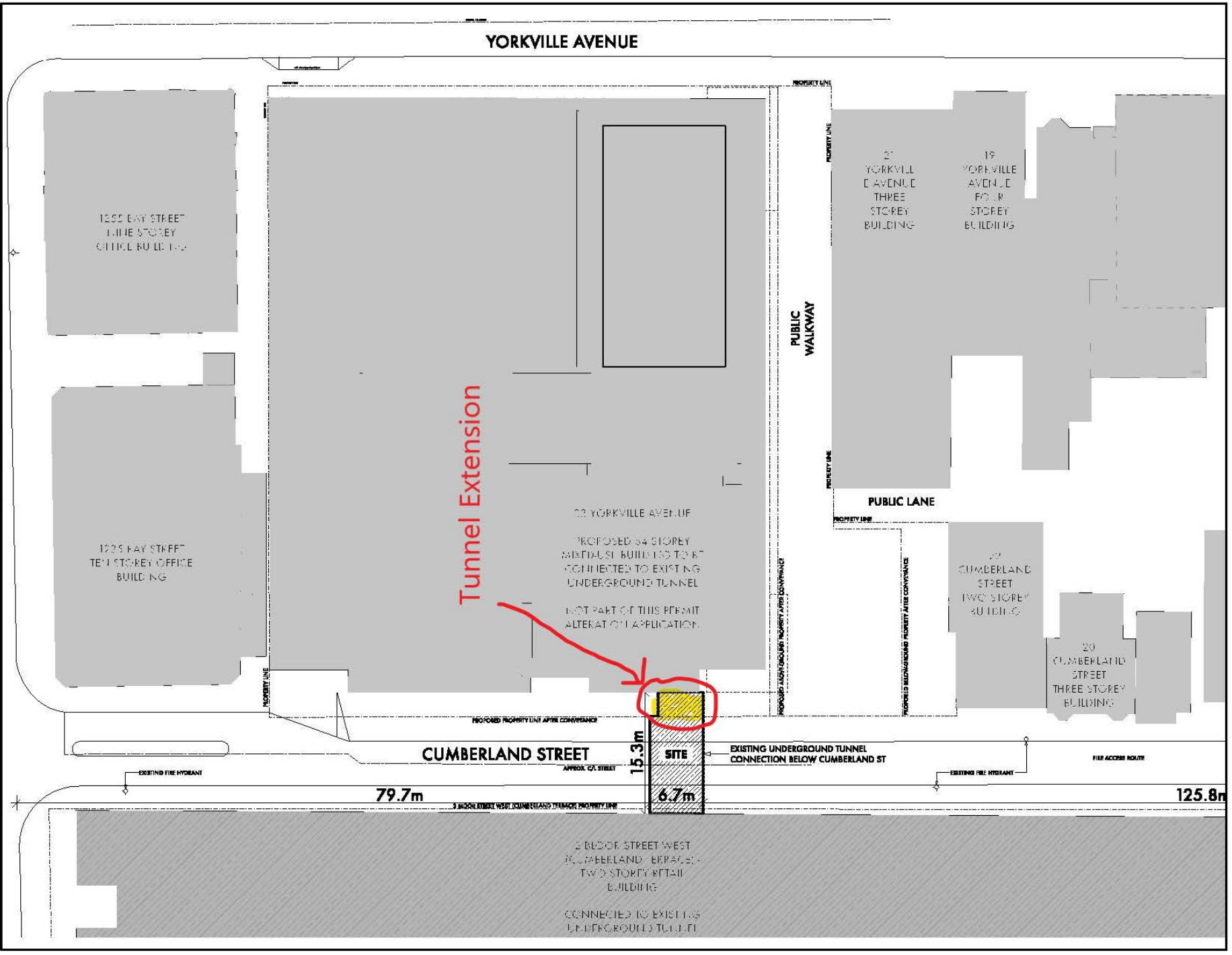
Dave Twaddle, Director,
Permits and Enforcement
Transportation Services

ATTACHMENTS

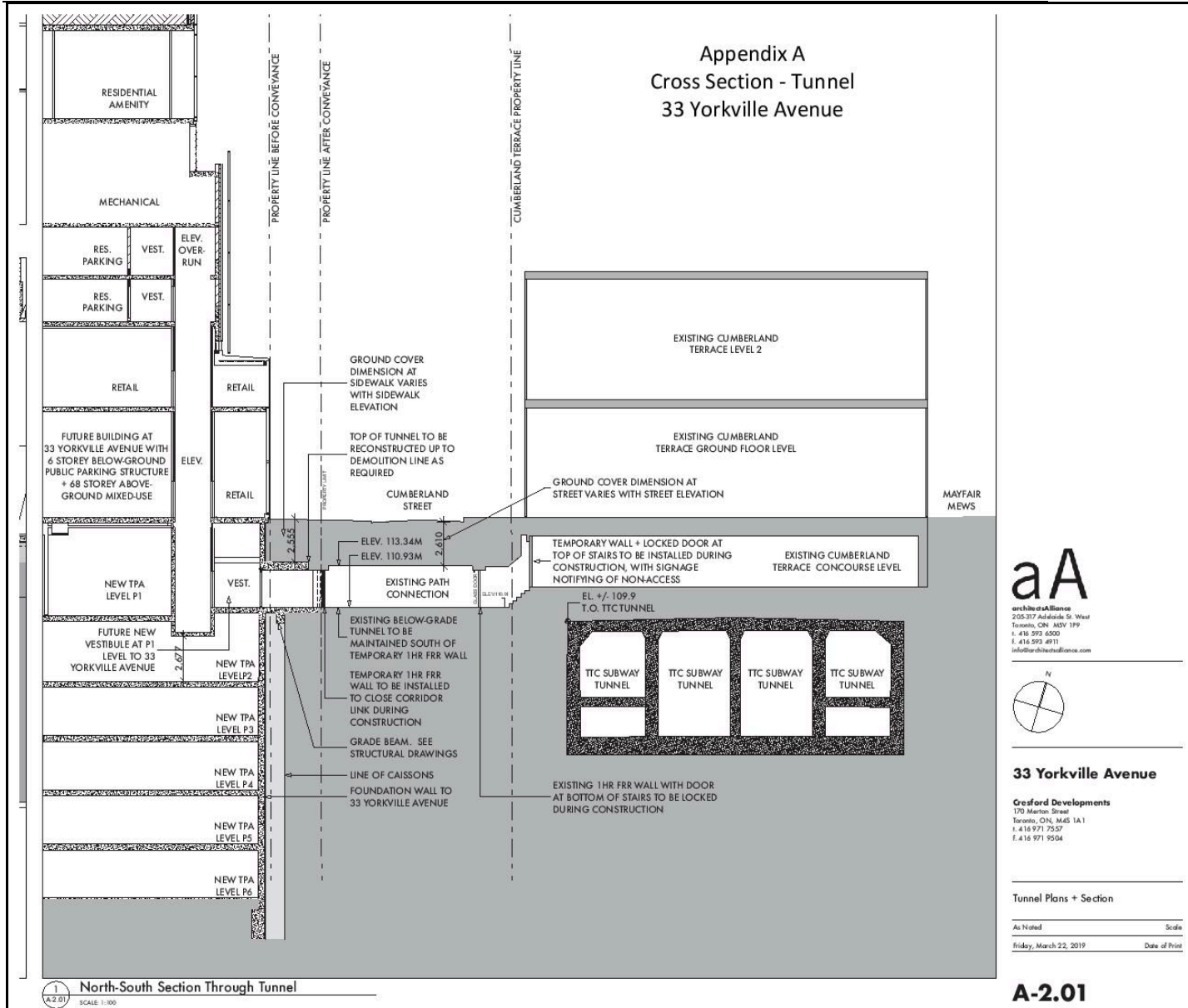
Appendix 'A' – Site Plans 1 and 2
Appendix 'B' – Cross Section Drawing
Appendix 'C' – Appendix A of Toronto Municipal Code Chapter 743, Streets and
Sidewalks, Use of

Appendix 'A' – Site Plan 1





Appendix 'B' – Cross Section Drawing



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Tunnel Plans + Section
As Noted Scale
Friday, March 22, 2019 Date of Print

A-2.01

APPENDIX 'A'

1. All street work shall conform to all applicable federal, provincial and municipal statutes, laws and by-laws and other applicable legal requirements.
2. All street work shall conform to City of Toronto construction standards and specifications, and shall be conducted and completed to the satisfaction of the General Manager of Transportation Services.
3. All street work shall be performed in a manner that safeguards and protects all other equipment, facilities and improvements of any kind (“improvements”) present in, on, over, under, across, or along the street and the environment.
4. The property owner shall take whatever steps are necessary to ensure the protection of the public.
5. The property owner shall not unduly interfere with the use of the street for free passage by the public.
6. The property owner shall make all necessary arrangements with traffic, police and fire authorities for the placing of barricades, notices, warning lights and signs and that all such barricades, notices, warning lights and signs shall conform with applicable law.
7. No street work shall block or impair the entrance to any premises abutting the work location unless the property owner has obtained and filed with the application for the permit the consent in writing of the owner and occupant of such premises.
8. All street work shall be conducted in a manner so as to maintain access for emergency vehicles.
9. The street work shall be completed without delay.
10. The permit shall not authorize occupying a larger portion of the street or extend for a longer period of time than may be necessary in the opinion of the General Manager of Transportation Services, having due regard to the property owner’s needs and the safety and convenience of the public.
11. After completing any street work, the property owner shall restore and/or leave the street in substantially the same condition in which it was before such street work was undertaken by the property owner, free from nuisance and to the satisfaction of the General Manager of Transportation Services. If the property owner fails to repair and restore any street to the satisfaction of the General Manager of Transportation Services within 48 hours of being notified by the City, the City may undertake such repairs and charge all costs owing to the property owner, and may draw on any financial security or deposits submitted by the property owner.
12. The property owner shall maintain the equipment in good and proper repair and in a condition satisfactory to the General Manager of Transportation Services.
13. Should the General Manager of Transportation Services deem it necessary for the equipment to be removed or altered in an emergency, including repairs or maintenance to equipment owned or operated by the City or any agency, board or commission of the City, the General Manager of Transportation Services, without notice to the property owner, may

Appendix 'C' – Appendix A Cont'd

- alter or remove, or cause to be altered or removed, the equipment and, subject to the requirements of any applicable law or existing agreement, the cost of such alteration or removal of the equipment shall be borne by the property owner.
14. Should the General Manager of Transportation Services deem it necessary for the equipment to be removed or altered for any municipal purpose, including installation or alteration of new or existing plant by any agency, board or commission, the General Manager of Transportation Services may upon three months notice in writing to the property owner, alter or remove, or cause to be altered or removed, the equipment or such portions of same not already altered or removed by the property owner, and subject to the requirements of any applicable law or existing agreement, the cost of such alteration or removal of the equipment shall be borne by the property owner.
 15. If the City requires that any street work be stopped, the property owner shall cease such street work following notice to the property owner provided by the General Manager of Transportation Services.
 16. The property owner shall be at all times responsible for all aspects of the street work, including the cost of such street work.
 17. The property owner shall notify the City promptly of any damage caused by the property owner in connection with its street work.
 18. The City has made no representations or warranties as to the state of repair of the streets or the suitability of the streets for any business, activity or purpose whatsoever, and the property owner hereby agrees to take the streets on an "as is" basis for the purpose of the carrying out of the property owner's street work and the City is not responsible, either directly or indirectly, for any damage to property or injury to a person, including death, arising from the escape, discharge or release of any hazardous substance from its streets.
 19. The property owner shall conform and shall be responsible for the conformance by its officers, employees, agents, contractors and invitees to all health and safety laws including any regulations requiring installation of safety devices or appliances, and any applicable traffic laws or regulations (collectively "safety rules"). If in the opinion of the City the likelihood of harm to persons or property appears imminent, the City may suspend street work performed by or on behalf of the property owner where there appears to be a lack of compliance with the safety rules, or because conditions of danger exist that would likely result in injury to any person or property. Such suspension shall continue until the lack of compliance or danger is eliminated.
 20. For the purpose of this provision, "hazardous substance" means any hazardous substance and includes, but is not limited to, radioactive substances, petroleum products and byproducts, industrial wastes, contaminants, pollutants, dangerous substances, and toxic substances, as defined in or pursuant to any law, ordinance, rule, regulation, by-law or code, whether federal, provincial or municipal. The property owner agrees to assume all environmental liability relating to its work in, on, over, under, across, or along the streets, including but not limited to any liability for clean-up of any hazardous substance in, on, under, along, across and around streets that result from:

Appendix 'C' – Appendix A Cont'd

- a. The operations of the property owner in, on, over, under, along, across or around the streets; or,
 - b. Any products or goods brought in, on, over, under, along, across or around the streets by the property owner, or by any other person with the express or implied consent of the property owner.
21. The property owner shall in writing, prior to any permit being granted by the General Manager of Transportation Services, indemnify and save harmless the City, its elected and appointed officials, officers, employees, directors and agents from and against all actions, claims, executions, demands, damages, liabilities, liens, costs, expenses direct or indirect (including reasonable legal fees and disbursements), and losses whatsoever incurred by the City, its elected and appointed officials, officers, employees, directors and agents in connection with the issuing of the permit, the conduct of the property owner's street work or the use of property owner's equipment, including claims in respect of property damage or personal injury, including death, and will pay to the City and to each such official, servant or agent on demand any loss, costs, damages and expenses, including legal fees and disbursements, that may be sustained, incurred or paid by the City or by any of its officers, servants and agents in consequence of any such action, claim, lien, execution or demand, including any monies paid or payable by the City or any of its officials, officers, servants or agents in settlement or discharge or on account thereof, provided that on default of such payment all loss, costs, damages and expenses and all such monies so paid or payable may be deducted from any security held by the City on account of the permit of the street work.
22. The City shall not be liable in any way for indirect or consequential losses or damages, or damages for pure economic loss, howsoever caused or contributed to, in connection with the property owner's street work.
23. The property owner shall, at their own expense and to the satisfaction of the General Manager of Transportation Services, procure and carry, or cause to be procured and carried and paid for, full workers compensation coverage for itself and all workers, employees, and others engaged in or upon any street work.
24. The property owner shall deliver, when required by the General Manager of Transportation Services, a performance bond or letter of credit in a form satisfactory to the City Treasurer and in an amount which is satisfactory to the General Manager of Transportation Services to ensure proper compliance with Municipal Code Chapter 743 of the City of Toronto.
25. The property owner shall at all times during the term of the permit and subsequent to the completion of the street work provide an accurate and timely in-house "locate" service or be a member of a "locate" service, in which case the property owner shall advise the General Manager of Transportation Services of its membership in such a service. Should the property owner fail to comply with this provision, the City shall not be required to make any special effort to determine or confirm the location of the equipment. The property owner shall, at the request of the City or any third party, provide or cause to be provided accurate on-site locates within 14 consecutive days of receiving a request for such information.

Appendix 'C' – Appendix A Cont'd

26. The property owner shall respond within 14 consecutive days to any request from the City for a mark-up of municipal infrastructure design drawings showing the location of any portion of the equipment located in, on, under, over, across, or along the streets shown on the plans, and shall provide such accurate and detailed information as may be required by the General Manager of Transportation Services.
27. The property owner will, at its sole cost and expense, maintain the equipment according to the drawings or subsequent "as built" drawings and in a state of good order, condition and repair, to the full satisfaction of the General Manager of Transportation Services, acting reasonably.