

## **Update Concerning Appeal of Tribunal Decision Regarding Application for Consent by Canadian National Railway and Toronto Terminals Railway**

Date: July 7, 2021  
To: City Council  
From: City Solicitor  
Wards: Ward 10 – Spadina-Fort York

### **REASON FOR CONFIDENTIAL INFORMATION**

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This report is about litigation or potential litigation that affects the City or one of its agencies or corporations.

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

### **SUMMARY**

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The City brought a motion for leave to appeal a decision of the Local Planning Appeal Tribunal (the "Tribunal") approving an application by Canadian National Railway ("CN") and Toronto Terminals Railway ("TTR") made pursuant to section 53 of the *Planning Act* for certain airspace over the rail corridor between Spadina Avenue and Blue Jays Way at 18D York Street subject to certain conditions.

The Divisional Court granted the City leave to appeal on January 18, 2021.

This report provides information on recent developments concerning the lands at issue and the status of the appeal.

## **RECOMMENDATIONS**

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The City Solicitor recommends that:

1. City Council direct that the legal advice and information contained in Confidential Attachment 1 to the report dated (July 7, 2021) from the City Solicitor remain confidential at the discretion of the City Solicitor, as it contains advice and information that is subject to solicitor-client privilege.

## **FINANCIAL IMPACT**

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The financial implications are set out in Confidential Attachment 1.

## **DECISION HISTORY**

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At its meeting of December 16, 2020, City Council adopted CC 27.4 "Canadian National Railway and Toronto Terminals Railway Application for Consent Appeal Tribunal Decision. The City Council decision can be found at:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2020.CC27.4>.

## **COMMENTS**

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On March 13, 2019, CN & TTR applied for consent to sever the property at 18D York Street into two properties with respect to air rights. The application was appealed for non-decision (the "Consent Appeal") and consolidated with outstanding Tribunals appeals by CRAFT Acquisitions Corporation and PITS Developments Inc. concerning the lands at issue in the Consent Appeal.

Prior to the hearing of the Consent Appeal, the City reached an agreement with CN & TTR concerning the granting of the Consent on agreed conditions, save and except one condition regarding easements to be granted by CN & TTR for the maintenance of the Spadina Avenue and Blue Jays Way bridges over the rail corridor and associated municipal infrastructure. Although CN & TTR did not oppose the requirement to convey the proposed easements, the parties did not agree on wording concerning potential future modifications to the easements.

The dispute concerning the wording of the conditions was argued before the Tribunal and on October 16, 2020, the Tribunal issued its decision regarding the severance. The Tribunal adopted the wording for the easement condition as proposed by CN & TTR (the "Tribunal's Decision").

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On October 30, 2020 the City brought a motion to the Divisional Court seeking leave to appeal the Tribunal's Decision.

The Divisional Court heard arguments by the City and by CN and TTR on January 14, 2021 and on January 18, 2021 the Divisional Court granted leave to appeal the Tribunal's Decision to the City (the "City's Appeal").

The hearing of the appeal was scheduled by the Court to occur on June 25, 2021. This date was set after counsel for CN and TTR indicated there was urgency in scheduling the matter as the appeal was delaying the sale of the parcel at issue.

On June 16, 2021, approximately one week before the hearing of the appeal, the City was advised that Metrolinx acquired the subject parcel from CN & TTR and completed the conveyance to CRAFT Kingsmen Rail Corp. ("CRAFT"). The City was provided the deed evidencing the transfer to CRAFT for consideration of \$3,012,500 dated June 15, 2021.

In the absence of the acquisition and conveyance by Metrolinx, CN and TTR required the Consent of the City to sever the parcel they intended to convey to CRAFT pursuant to section 53 of the *Planning Act*. CN and TTR had appealed to the Tribunal to obtain the required Consent as permitted by the *Planning Act*.

As a provincial entity, Metrolinx is exempt from the requirement to obtain Consent under section 53 of the *Planning Act* and accordingly, Metrolinx was able to convey all of the parcel at issue in the City's appeal to CRAFT without the need to fulfill any of the conditions to the Consent, including the conveyance of the required public safety and maintenance easements at the Spadina Avenue and Blue Jays Way bridges over the rail corridor.

The City Solicitor has received correspondence from CRAFT indicating that as part of the conveyance from Metrolinx, CRAFT undertook to grant certain easements with respect to the Spadina and Blue Jays Way bridges, including the required public safety and maintenance easements at issue in the City's Appeal; however, CRAFT's undertaking to do so was on the same terms granted by the Tribunal's Decision which the City has appealed.

On June 21, 2021 the hearing of the appeal before the Divisional Court was adjourned to allow time for the review of this new information.

The attached Confidential Attachment 1 from the City Solicitor provides information and legal advice with respect to these developments and the status of the City's Appeal.

## CONTACT

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Report for action with confidential attachment – Update Concerning Appeal of Tribunal Decision  
Regarding Application for Consent by Canadian National Railway and Toronto Terminals Railway

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## **SIGNATURE**

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Wendy Walberg  
City Solicitor

## **ATTACHMENTS**

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Confidential Attachment 1 – Confidential Information