

401 Yonge Street - Alterations to Designated Heritage Property and Authority to Enter into Heritage Easement Agreement

Date: September 6, 2023

To: The Toronto Preservation Board and City Council

From: City Solicitor

Wards: Ward 13 - Toronto Centre

REASON FOR CONFIDENTIAL INFORMATION

This report contains advice or communications that are subject to solicitor-client privilege. This report contains information regarding litigation or potential litigation.

SUMMARY

The owner appealed its Zoning By-law Amendment application to the Ontario Land Tribunal ("OLT") on November 21, 2022. Previous to that appeal, the applicant was made a party to the appeal of the Official Plan Amendment application appeal for the lands municipally known 409-415 Yonge Street, 9 and 17 McGill Street (the "OPA Appeal") on June 28, 2022.

During its meeting of March 29, 30, and 31, 2023, City Council accepted a settlement offer in respect of the OPA Appeal subject to various conditions pursuant to the adoption of Item CC5.22. One such condition was the owner withdraw the appeal of its own zoning by-law amendment application. City Council also directed the Chief Planner and Executive Director, City Planning Division, subject to the withdrawal of the zoning by-law amendment application, to bring forward a draft zoning by-law amendment to implement the development proposal described in the settlement offer.

A further condition of City Council's acceptance of the settlement offer was the owner of 399-405 Yonge Street was to file and seek approval of an application under Section 33 of the Ontario Heritage Act to request the alteration of the heritage property municipally known as 401 Yonge Street on terms and timing such that the alteration application would proceed to the same meeting of City Council at which City Council would consider the draft zoning by-law amendment.

The focus of this report is the owner's application under Section 33 of the Ontario Heritage Act requesting City Council's consent to alterations to 401 Yonge Street. A separate report from Community Planning staff will be prepared and brought forward to City Council in respect of a draft zoning by-law amendment for the purpose of a statutory meeting under section 34 of the Planning Act during its meeting of October 11, 12, and 13, 2023. This report and Community Planning's report will be considered together by City Council at that time.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council adopt the confidential recommendations contained in Confidential Attachment 1 to the report (September 1, 2023) from the City Solicitor;
2. City Council authorize the public release of the recommendations in Confidential Attachment 1 if adopted by City Council, with the remainder of the Confidential Attachment 1 to remain confidential as it contains advice which is subject to solicitor-client privilege.

FINANCIAL IMPACT

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

DECISION HISTORY

Designation of the Property

The property at 401 Yonge Street was designated under Part IV, Section 29 of the Ontario Heritage Act. City Council stated its intention to designate the properties during its meeting of March 29, 30, and 31, 2023 and proceeded to pass City of Toronto By-law 452-2023 designating the property on May 15, 2023.

<https://secure.toronto.ca/council/agenda-item.do?item=2023.PH2.15>

Related Development Applications

On July 21, 2022, the owner of the neighbouring lands municipally known as 409-415 Yonge Street, 9 and 17 McGill Street appealed its request to amend the City's Official Plan (the "OPA Appeal") to the Ontario Land Tribunal (the "OLT") due to City Council's failure to make a decision on the application within the time prescribed by the Planning Act. The owner of 399-405 Yonge Street, which incorporates the site that is the subject of this report, was made a party to the OPA Appeal by the OLT pursuant to an oral order made on June 28, 2022.

An application to amend the applicable zoning by-laws for the lands municipally known as 399-405 Yonge Street was deemed complete by the Chief Planner and Executive Director, City Planning on August 22, 2022. The rezoning application sought permission for a 75-storey (240.8 metres not including mechanical penthouse) mixed-use building with 191.84 square metres of commercial space and 828 residential units within 399-405 Yonge Street.

On November 21, 2022 the owner appealed its Zoning By-law Amendment application to the Ontario Land Tribunal (the "OLT") due to City Council's failure to make a decision on the application within the time prescribed by the Planning Act. City Council directed the City Solicitor and staff to appear at the OLT in opposition to the appeal. City Council's decision can be found here:

<https://secure.toronto.ca/council/agenda-item.do?item=2023.TE2.14>

During its meeting of December 14 and 15, 2022, City Council considered a report in respect of the OPA Appeal from the City Solicitor (December 6, 2022) and its decision can be found here:

<https://secure.toronto.ca/council/agenda-item.do?item=2023.CC2.12>

During its meeting of March 29, 30, and 31, 2023, City Council accepted a settlement offer in respect of the OPA Appeal. City Council's decision on the settlement offer for the OPA Appeal can be found here:

<https://secure.toronto.ca/council/agenda-item.do?item=2023.CC5.22>

The settlement offer on the OPA Appeal resulted in an OLT order issued on June 10, 2023 which amended the City's Official Plan to add Site and Area Specific Policy 678 for the lands municipally known as 409-415 Yonge Street, 9 and 17 McGill Street, 399-405 Yonge (which includes the designated property that is the subject of this report), and 20 Gerrard Street East. City of Toronto By-law 793-2023 (OLT) can be found here:

<https://www.toronto.ca/legdocs/bylaws/2023/law0793.pdf>

BACKGROUND

Heritage Planning Policy Framework

The Planning Act

The Planning Act guides development in the Province of Ontario. It states that municipalities must have regard for matters of provincial interest. Section 2(d) specifically refers to "the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest" and 2(r) "to a built form that is well designed and provides for a sense of place."

The Provincial Policy Statement (2020)

The Provincial Policy Statement (2020) (the "PPS") provides policy direction province-wide on land use planning and development to promote strong communities, a strong economy, and a clean and healthy environment. It includes policies on key issues that affect communities, such as:

- the efficient use and management of land and infrastructure
- ensuring the sufficient provision of housing to meet changing needs including affordable housing
- ensuring opportunities for job creation
- ensuring the appropriate transportation, water, sewer and other infrastructure is available to accommodate current and future needs
- protecting people, property and community resources by directing development away from natural or human-made hazards, and
- conservation of cultural heritage and archaeology

The provincial policy-led planning system recognizes and addresses the complex inter-relationships among environmental, economic and social factors in land use planning. The PPS supports a comprehensive, integrated and long-term approach to planning, and recognizes linkages among policy areas.

The PPS is issued under Section 3 of the Planning Act and all decisions of Council in respect of the exercise of any authority that affects a planning matter shall be consistent with the PPS. Comments, submissions or advice affecting a planning matter that are provided by Council shall also be consistent with the PPS.

The PPS recognizes and acknowledges the Official Plan as an important document for implementing the policies within the PPS. Policy 4.6 of the PPS states that, "The official plan is the most important vehicle for implementation of this Provincial Policy Statement. Comprehensive, integrated and long-term planning is best achieved through official plans."

Policy 2.6.1 of the PPS directs that "Significant built heritage resources and significant cultural heritage landscapes shall be conserved." Properties included on the City's Heritage Register are considered to be significant in this context. "Conserved" is defined in the PPS as "the identification, protection, management and use of built heritage resources in a manner that ensures their cultural heritage value or interest is retained under the Ontario Heritage Act."

Policy 2.6.3 states that "Planning authorities shall not permit development and site alteration on adjacent lands to protected heritage property except where the proposed development and site alteration has been evaluated and it has been demonstrated that the heritage attributes of the protected heritage property will be conserved."

All decisions of Council in respect of the exercise of any authority that affects a planning matter shall be consistent with the PPS and shall conform with Provincial Plans. All comments, submissions or advice affecting a planning matter that are provided by Council shall also be consistent with the PPS and conform with Provincial Plans.

Provincial Plans are intended to be read in their entirety and relevant policies are to be applied to each situation.

A Place to Grow: Growth Plan for the Greater Golden Horseshoe (2020)

A Place to Grow: Growth Plan for the Greater Golden Horseshoe (2020) (the "Growth Plan (2020)") came into effect on May 16, 2019 and was amended through an Order in Council that came into effect on August 28, 2020. The Growth Plan (2020) continues to provide a strategic framework for managing growth and environmental protection in the Greater Golden Horseshoe region, of which the City forms an integral part.

The Growth Plan (2020) builds upon the policy foundation provided by the PPS and provides more specific land use planning policies to address issues facing the GGH region. The policies of the Growth Plan (2020) take precedence over the policies of the PPS to the extent of any conflict, except where the relevant legislation provides otherwise.

In accordance with Section 3 of the Planning Act all decisions of Council in respect of the exercise of any authority that affects a planning matter shall conform with the Growth Plan. Comments, submissions or advice affecting a planning matter that are provided by Council shall also conform with the Growth Plan.

Policy 4.2.7.1 of the Growth Plan states that "Cultural Heritage Resources will be conserved in order to foster a sense of place and benefit communities, particularly in strategic growth areas."

Toronto Official Plan

This application has been reviewed against the policies of the City of Toronto Official Plan. The Plan provides the policy framework for heritage conservation in the City. The following Official Plan policies apply to the proposed alterations:

3.1.6.4: "Properties on the Heritage Register will be conserved and maintained consistent with the Standards and Guidelines for the Conservation of Historic Places in Canada, as revised from time to time and adopted by Council."

3.1.6.5: "Proposed alterations, development, and/or public works on or adjacent to, a property on the Heritage Register will ensure that the integrity of the heritage property's cultural heritage value and attributes will be retained, prior to work commencing on the property and to the satisfaction of the City."

3.1.6.6: "The adaptive re-use of properties on the Heritage Register is encouraged for new uses permitted in the applicable Official Plan land use designation, consistent with the "Standards and Guidelines for the Conservation of Historic Places in Canada."

3.1.6.26: "New construction on, or adjacent to, a property on the Heritage Register will be designed to conserve the cultural heritage values, attributes and character of that property and to mitigate visual and physical impact on it."

3.1.6.27: "Where it is supported by the cultural heritage values and attributes of a property on the Heritage Register, the conservation of whole or substantial portions of buildings, structures and landscapes on those properties is desirable and encouraged. The retention of façades alone is discouraged."

The City of Toronto Official Plan can be found here:

<https://www.toronto.ca/city-government/planning-development/official-plan-guidelines/official-plan/>

Standards and Guidelines

The Parks Canada Standards and Guidelines for the Conservation of Historic Places in Canada (the "Standards and Guidelines") is the official document guiding planning, stewardship and the conservation approach for all listed and designated heritage resources within the City of Toronto. The General Standards (1-9), the Standards for Rehabilitation (10-12), and the Standards for Restoration (13-14) apply to this project.

The Standards and Guidelines can be accessed here:

<http://www.historicplaces.ca/media/18072/81468-parks-s+g-eng-web2.pdf>

COMMENTS

The Designated Property

The designated property is located on the east side of Yonge Street north of the corner of Yonge Street and Gerrard Street East. The property contains the Joseph Bickerstaff Block originally constructed in 1873 and designed by architect William Stewart (1832-1907) who practiced in Toronto and later became a prolific architect in Hamilton.

In 1974, City of Toronto Council listed the property on the City of Toronto's Heritage Register. The property has contributed to Yonge Street's historic character for 150 years.

In 2014, the building was removed from the site and replaced with a new structure behind the original Italianate style façade. As a part of this process, the Italianate style façade of the original building was rehabilitated in situ in 2014. The property was not designated under the Ontario Heritage Act by the City at that time.

On March 13, 2023 the owner submitted a "without prejudice" settlement offer to the City with respect to 399-405 Yonge Street which incorporates the designated property. The settlement offer included revised Architectural Plans and Drawings prepared by Teeple Architects dated March 12, 2023, among other documents (the "**Settlement Offer**"). A covering letter from Sherman Brown Barristers and Solicitors, dated March 13, 2023, setting out the Settlement Offer was attached to the City Solicitor's report (March 13, 2023) in Item CC5.22 as Confidential Appendix A and the architectural plans are attached as Confidential Appendix B.

City Council accepted the Settlement Offer at its meeting of March 29, 30, and 31, 2023. Confidential Appendix A and Confidential Appendix B to the City Solicitor's report (March 13, 2023) in Item CC5.22 have been publicly released.

The Settlement Offer is for a development proposal for the site that would remove the existing building but reinstate the Italianate style façade of the original building on the site with a tower-built form behind and above the façade. The tower stepback above the Italianate style façade is approximately 3 metres to the ninth-storey of the tower. At the ninth storey, the tower will project back towards Yonge Street for a 0 metre setback up to the top of the development.

Pursuant to its acceptance of the Settlement Offer, City Council directed Community Planning staff to prepare and bring forward a draft zoning by-law amendment for the development proposal as described in the Settlement Offer for the purpose of a statutory meeting under Section 34 of the Planning Act.

A further term of City Council's acceptance of the Settlement Offer was the owner would apply for and seek the approval of an application under Section 33 of the Ontario Heritage Act requesting City Council's consent to alter the heritage property municipally known as 401 Yonge Street in order for the alteration application and Community Planning's draft zoning by-law amendment to be considered by City Council at the same meeting.

Adjacent Heritage Context

Immediately east of the site is a significant heritage property at 20 Gerrard Street East, known as Willard Hall, which is designated under Part IV of the Ontario Heritage Act by By-law 1990-0080, passed by City Council on January 29, 1990.

To the south and across Gerrard Street East is a significant heritage property at 385-391 Yonge Street, designated under Part IV of the Ontario Heritage Act by By-law 800-2019 on June 7, 2019.

To the south-west across Yonge and Gerrard Streets is a significant heritage property at 380 Yong Street, designated under Part IV of the Ontario Heritage Act by By-law 85-76 on March 17, 1976.

Alteration Proposal

The application proposes to construct a 75-storey tower on the development site at 399-405 Yonge Street with a new base building partially located within 401 Yonge Street. As a part of the development, the west-facing façade will be retained in situ and incorporated into the base of the new development.

The City Solicitor requires further instructions. This report contains advice or communications that are subject to solicitor-client privilege. Confidential Attachment 1 to this report contains confidential advice and it should be considered by Council *in camera*.

CONTACT

Mark Piel, Deputy Director, Planning & Administrative Tribunal Law; Tel: (416) 392-2124; Fax: (416) 397-5624; Email: Mark.Piel@toronto.ca

SIGNATURE

Wendy Walberg
City Solicitor

ATTACHMENTS

Confidential Attachment 1 - Confidential Information