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Mayor Fred Eisenberger and Council
Delivered by email: clerk@hamilton.ca

A year ago or so the City suffered serious reputational damage as a building permit granted for a home in Dundas was revoked, the home demolished, and significant damages paid to the property owner. Clearly there were issues with the approval process.

I fear the seeds are being planted for another similar situation with a Planning Committee decision Council will be asked to ratify.

As the mayor, can I ask you to take a careful look at this before it gets to Council and seek city legal input if necessary? It is a complex matter and thus this is long, but I hope I can explain why this is very important.

The matter is Heritage Application HP2021-033, the move of a heritage designated building, Phillip House, from 398 Wilson Street, Ancaster to the back corner of a lot owned by the developer. The motion passed 4 to 3 at Planning Committee.

Summary:

Section 34, Ontario Heritage Act governs removal or demolition of a heritage designated property. In summary this requires:

- That Council seek the opinion of the Heritage Committee
- That Council not delegate its authority to approve or deny the application
- That Council render a Decision within 90 days of acknowledging receipt of an application otherwise the application is deemed Approved

In the motion that will be before Council from the Planning Committee:

1. Council will not consider the opinion of the Heritage Committee
2. Council is delegating its authority to approve or deny the application.
3. The Decision Council will consider from the Planning Committee is not a Decision in any sense of the word and thus the 90 day automatic approval may be the result or an appeal to OLT.

Discussion

1. Opinion of the Heritage Committee: In the City committee structure the Municipal Heritage Committee reports to the Planning Committee. The Ontario Heritage Act sets out a specific process for demolitions and removals of designated structures in Section 34.

That process gives no role to the Planning Committee in this decision. “((4.2) The council, after consultation with its municipal heritage committee, if one is established, and within the time period determined under subsection (4.3).....”)

It certainly does not appear to provide Planning, which is composed of a minority of the total Council, with the ability to frustrate the recommendation of the Heritage Committee and send to Council an approval to issue a Permit contrary to the Committee recommendation.

As it stands Council will **not** debate the advice of the Heritage Committee as set out in the Heritage Act.

They will debate a convoluted motion conjured up in the Planning Committee that does the opposite of what the Heritage Committee recommended.

Note: Many of the conditions originated in an option put forward by staff in PED21196. With all due respect to staff (and that respect is considerable as evidenced in their assessment of the matter) I suggest that option 2 is not a process in alignment with the Heritage Act.

The Heritage Permit Review Committee and the Municipal Heritage Committee were of like mind: this application should be **Denied** as it is premature and documentation filed does not support the request.

I believe the Heritage Committee Decision and ONLY that decision is what should come forward to Council to assist in their decision.

- 2. Council Delegation of Authority:** I believe this motion absolutely delegates approval or denial of the application to staff contrary to the Ontario Heritage Act. To illustrate I set out only one of the 19 conditions in PED21196 that require staff to be satisfied (four others are in Appendix A):

“That a signed letter from a Professional Engineer with experience in historic stone structures confirming the feasibility of relocation on the site be submitted to the satisfaction of the Director of Planning and Chief Planner”;

The Committee was told several times the Heritage Permit is approved but staff would be able to decide if that decision stood or not:

- by Councillor Ferguson “there are a lot of gates the applicant has to go through in order to get approval eventually”.
- by Jason Thorne who told the Committee “If the conditions are cleared to staff satisfaction the permit would be granted”.
- By Steve Robichaud who was clear “If they do not satisfy those conditions in the 2 year period the Heritage Permit automatically lapses and the applicant will have to start the process all over again”

The wording of at least 5 of the conditions seem clear Council is delegating the decision to staff on whether the permit is really approved or will ultimately be denied.

“To the satisfaction of the Director of Planning and Chief Planner” leaves no doubt in my mind who has the power ensure the permit is granted or not. Council is delegating its authority contrary to the Heritage Act.

The Heritage Act does allow approvals with conditions, but these are not conditions in the usual sense that an applicant can complete and clear them. The applicant can partially satisfy a condition by commissioning a report, but the ultimate impact of that report will be decided by staff in their

sole discretion. These are decisions that will be analyzed and considered and gives staff authority to reverse the granting of the Heritage Permit if they are not satisfied with the professional advice.

This approach is a minefield for disputes, and legal actions and an appeal to the OLT.

The reports set out in the Planning motion will not likely come back with a clear yes or no recommendation. Staff will likely be left to assess the risks of a move or the justification of the need to remove the building.



This photo illustrates what the engineers and professional qualified movers will start with. I expect their recommendation will need parsing and consideration of the risk of moving the heritage asset on the part of staff.

As an aside, is it wise for Council to put staff in the position of having to be the ultimate decision maker with matters that require analysis and opinion and direct interaction with the applicant?

This process leaves staff open to pressure from the applicant, has no process to handle disputes, and moves critical determinations that will impact the streetscape and the preservation of an important heritage asset behind closed doors. This is the opposite of the process set out in the Heritage Act where decisions are made in public meetings. This is an abdication of the public interest.

- 3. Approval by Council Within 90 days (Deadline November 4, 2021):** What Council is being asked to ratify is NOT approval or denial. It is a non-decision. It is some twilight zone that if staff is satisfied with all the reports it is an approval, but if one of the reports raises red flags it is not. The timing of approval or not is sometime before July 31, 2023.

Staff said several times in the Planning Meeting the motion is approval of issuance of a Heritage Permit, but how can that be if the conditions are in effect? The only other possibility is that the conditions are meaningless due to the 90 day limit and the applicant really does have approval despite all the words.

Surely it is in Council's interests to comply fully with the Heritage Act, to make a clear decision to be absolutely certain the 90 day approval does not result, to make a decision based on the full set of data, and be clear and unequivocal in its decision on an application that has the potential negative impact on a designated heritage property this one has.

Appeal to the OLT: Under the Ontario Heritage Act 34.1 (1) an applicant can appeal to the Ontario Land Tribunal if the Decision contains terms and conditions. The OLT has broad discretion including the ability to instruct Council to issue the Heritage Permit without conditions.

If Council passes the Planning motion I suggest the applicant has little downside in an OLT appeal. There seem to be many grounds, and the worst that could happen is the Council motion would stand. Further, when the process is set out to OLT, it is not a good look for the City in my view.

For what reason would Council subject the City to the expense of an OLT hearing and the risk that a Heritage Permit would be issued without conditions? It makes no sense when there is a simple way to handle this that does not disadvantage the developer, protects Council, and the public interest.

Development Issues Raised: This application deals solely with preservation of a heritage asset. For some reason development of the larger site got mixed into the discussion and could have affected some Planning Committee members views. That was and is inappropriate. If the application is part of a more fulsome application for development, which is in my view how this should be handled, of course the larger picture would be a consideration.

The Path Forward: There is no downside or damage to the developer if this motion is DENIED. There would be no delay to the re-development of the larger site. There does not seem to be much urgency. The Formal Consultation was 2 years ago and there has been no further submissions that would move development of the entire site forward. The motion gives 2 years to do the work asked, so Council can DENY this application as staff and the heritage committee recommend and ask that a future complete application be filed with ALL of the items required. That same 2 year period could be used to do the work that the terms and conditions in the motion outline but for a new application. No harm.

The applicant can then file a complete report with all professional reports included and the Heritage Committee and Council can make an informed decision that is clear and based on facts and is decided in public.

Staff would, of course parse any reports provided and make recommendations to Council, but Council would make the Decision as the Heritage Act requires.

Thank you for consideration of my views on this matter.

A handwritten signature in black ink that reads "Jim MacLeod". The signature is written in a cursive, flowing style.

Jim MacLeod

Appendix A

Five Conditions in motion that require staff approval

- That a full Building Condition Assessment by a qualified professional Structural Engineer with experience in heritage buildings be prepared to the satisfaction of the Director of Planning and Chief Planner;
- That a signed letter from a Professional Engineer with experience in historic stone structures confirming the feasibility of relocation on the site be submitted to the satisfaction of the Director of Planning and Chief Planner;
- That a signed letter from an experienced building moving company with experience in relocating historic stone buildings be submitted to the satisfaction of the Director of Planning and Chief Planner;
- That a full Phase II ESA for the entirety of the site be submitted to the satisfaction of the Director of Planning and Chief Planner;
- That a revised Cultural Heritage Impact Assessment, assessing the proposal against required criteria and a new Statement of Cultural Heritage Value and Interest be submitted to the satisfaction and approval of the Director of Planning and Chief Planner

Appendix B

Background Information

Staff Conclusions from PED 21196

(3) Conclusions:

Based on the above review, and the information provided to date, Staff are not supportive of the request to relocate the Marr House to 15 Lorne Avenue as requested through the Heritage Permit. The proposal is not in keeping with the intent of the designation By-law. The submitted documentation does not adequately assess the impact or potential impacts of the relocation on the heritage resource against the required criteria set out by the Province of Ontario and the City of Hamilton. Given the significance of the building's presence on the Wilson Street streetscape and the applicable Official Plan and Secondary Plan policies, staff are unable to adequately assess the proposal without a wholesome understanding of the implications it may have on the cultural heritage value of the building, or on the surrounding community, the streetscape and the future of the entirety of the site that would normally be done as part of an application for Official Plan Amendment and rezoning.

From a technical perspective, the proposal to relocate a 180-year old random rubble stone structure is complex. Staff are of the opinion that the supporting documentation submitted does not adequately assess the proposal nor provide sufficient justification that the relocation is feasible and/or the most appropriate option. A report assessing the building's current structural stability or technical details on the process to stabilize, lift and relocate the building by qualified personnel (structural engineer and building moving company) was not submitted. Only a high-level overview of the level of contamination was provided. As a result of the limited time frames associated with a Heritage Permit application, peer reviews on the submitted documentation were not conducted to confirm the accuracy or explore alternative options. The proposed relocation could result in impacts to the integrity of the heritage resource, and as such, more extensive supporting documentation should be provided and assessed by qualified experts.

A proposal of this nature requires review, consultation and consideration from other internal departments and external agencies in various fields of expertise. Given the complexities with this proposal, as well as other concerns and requirements previously provided by various departments and agencies during the initial Formal Consultation application in 2019, an application of this magnitude should be reviewed in its entirety through formal *Planning Act* applications in conjunction with the Heritage Permit application.

Staff have reviewed the documentation submitted with the application and have concluded there is insufficient evidence to support the relocation of the building as proposed. Staff recommend that Council deem the application to be premature and deny the application pursuant to subsection 34(2)(a)(ii)

