

SULLIVAN | MAHONEY LLP
LAWYERS

November 9, 2023

Via Email: amanda@armstrongplan.ca

Please reply to St. Catharines Office
SARA J. PREMI
(905) 688-8039 (Direct Line)
sjpremi@sullivanmahoney.com

Ms. Amanda Kosloski
Armstrong Planning
1600 Steeles Ave. W., Suite 318
Vaughan, ON L4K 4M2

Dear Ms. Kosloski:

**Re: 84 York Boulevard / 89 Park Street North, Hamilton
Heritage Easement and Protection of Attributes**

This correspondence is in response to your request for us to review the above noted matter in terms of opportunities to protect and conserve identified cultural heritage attributes.

We believe that there is a path forward for the owner and the City to work together to protect attributes which are worthy of salvage and commemoration, and in doing so, meet both the public interest in heritage conservation while recognizing the realities surrounding the condition of the building on this site.

Background

The facts as we understand them are as follows:

1. 84 York Boulevard / 89 Park Street North ("**Subject Lands**"), which is a property within the Built Boundary of the City of Hamilton ("**City**") in the downtown core, contains a building known as the Philpott Memorial Church ("**Church Building**");
2. The Subject Lands have been listed on the City's Municipal Heritage Register under section 27 of the *Ontario Heritage Act* ("**Act**");
3. The Church Building is in a state of disrepair and cannot meet its congregation's needs. As such, the church is relocating to a new building within the City late next year;
4. An evaluation of the Church Building has determined that its brick is significantly deteriorated. The report indicates that there is essentially no fix to the level of deterioration. The exterior mortar is delaminating and must be removed, the underlaying bricks are in a condition such that they cannot act as a exterior building envelope. I understand that even if the mortar were to be removed and the bricks covered with another exterior material, the issues would persist and the bricks would continue to degrade. As such, there is no good

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solution in respect of retention of the building. We further understand that a structural condition analysis has concluded that the Church Building should be demolished; and

5. The owner of the Subject Lands, HC EC 89 Park LP (Empire Communities and Hamilton Coliseum Place) (“**Owner**”), has also commissioned a Cultural Heritage Impact Assessment (“**CHIA**”) by MHBC dated October 2023 in respect of a proposed redevelopment of the Subject Lands, which considers several options such as retention, partial retention and removal of the Church Building and construction of a mixed-use building.

The Recommendations of the CHIA

The CHIA considered the following:

1. Whether or not the Subject Lands are of cultural heritage value or interest; and
2. Whether or not the proposed development will have adverse impacts to heritage resources on the Subject Lands and lands adjacent thereto.

The evaluation under O. Reg. 9/06 has determined that the Church Building meets three (3) criteria for designation under the Act:

1. That the Church Building is a rare, unique, representative or early example of the style, type, expression, material or construction method; and
2. That it has a direct association with a theme, event, belief, person, activity, organization, or institution that is significant.
3. Demonstrates or reflects the work or ideas of an architect, artist, builder, designer, or theorist who is significant to the community.

We further understand that the CHIA has determined that the appropriate approach to heritage conservation is through commemoration as well as the salvage and reuse of building components, given that the condition of the building is such that relocation of the building or leaving it as is would lead to long term deterioration. Retention of the building and integration with a development is also not a feasible option.

The CHIA identified heritage attributes. However, it specified as follows:

“Not all identified heritage attributes would be salvageable given the application of the cement-based mortar. Many of the heritage attributes are located on the façades where the cement-based mortar has been applied and it has been concluded by technical experts that the underlying brick is compromised. The retention of these heritage attributes is therefore not possible given the inability of removing the cement-based mortar without damaging the brick.”

The CHIA identified the following attributes as being in good condition and appropriate for salvage and commemoration:

1. All ionic columns along the Park Street North façade.
2. The wood double doors within the portico along the Park Street North façade;
3. All stained-glass windows;

4. The date stone on the Park Street North façade of the 1906 portion of the building; and
5. The Lunette window within the frontispiece gate along the Park Street North facade

The CHIA also suggested that where possible, reasonable efforts be made to salvage other elements of the Church Building such as brick that remains in good condition and interior hardware (such as door handles, light fixtures, pews, etc.), as part of commemoration or made available to other parties who specialize in historic restoration.

In addition to salvage and re-use of specific heritage attributes, the CHIA also recommends Commemoration and Interpretation, as is set out in section 9.0:

"9.0 – Commemoration and Interpretation"

Commemoration of the Church is recommended to be included in the proposed redevelopment. The purpose of the commemoration is to acknowledge the history of the property and the contribution that Peter Philpott and his Christian Workers Church had on the community. Commemoration can take many forms, such as an interpretive plaque or a display containing collections and archival information.

The preliminary commemoration plan includes a display that is to include a text overview of the property history with historic photographs/plans and potential building materials that could be salvaged, such as the original brick used to construct the Church and the date of construction block. In addition to a commemorative feature, reasonable efforts will be made to retain key heritage attributes of the building that will be integrated into the new development. An example of this retention and integration is illustrated in section 6.1, figure 13. The retained features of the building can be protected through a heritage conservation easement between the property owner and the City which would establish conditions for maintaining and preserving the heritage attributes.

Vehicles to Ensure Heritage Protection and Conservation Measures are Carried Out

Notwithstanding that the CHIA has concluded that the Subject Lands meet the test for designation under O. Reg 9/06, proceeding with designation given the condition of the Church Building is not, in our opinion, a viable or practical option. Were the Subject Lands to be designated under the Act, the Owner could then apply for a demolition permit under section 34 of the Act on the basis of building condition. The decision of Council can be appealed to the OLT, and in our view, at the end of the day, a demolition permit would be granted.

As opposed to going the designation route, the City could work collaboratively with the Owner to ensure that heritage attributes associated with the Subject Lands are conserved in accordance with the CHIA. However, given that the property is not *designated*, the City has no obvious vehicle to protect the identified attributes of interest.

We believe we can offer a solution - having been recently involved in a similar circumstance in another municipality.

The City can ensure heritage conservation consistent with the CHIA by imposing conditions through the site plan process. We understand that a site plan application has not yet been submitted or approved and as such, conditions protecting attributes cannot be imposed via a site plan agreement at this time.

The solution is to use a Heritage Easement Agreement to bridge the time to approval of the site plan and imposition of the requisition conditions via that vehicle.

Section 37 of the Act provides as follows:

37 (1) Despite subsection 36 (1), after consultation with its municipal heritage committee, if one is established, the council of a municipality may pass by-laws providing for the entering into of easements or covenants with owners of real property or interests in real property, for the conservation of property of cultural heritage value or interest. 2002, c. 18, Sched. F, s. 2 (19).

(2) Any easement or covenant entered into by a council of a municipality may be registered, against the real property affected, in the proper land registry office. R.S.O. 1990, c. O.18, s. 37 (2).

(3) Where an easement or covenant is registered against real property under subsection (2), such easement or covenant shall run with the real property and the council of the municipality may enforce such easement or covenant, whether positive or negative in nature, against the owner or any subsequent owners of the real property, and the council of the municipality may enforce such easement or covenant even where it owns no other land which would be accommodated or benefited by such easement or covenant. R.S.O. 1990, c. O.18, s. 37 (3).

(4) Any easement or covenant entered into by the council of a municipality under subsection (2) may be assigned to any person and such easement or covenant shall continue to run with the real property and the assignee may enforce the easement or covenant as if it were the council of the municipality and it owned no other land which would be accommodated or benefited by such easement or covenant. R.S.O. 1990, c. O.18, s. 37 (4).

(5) Where there is a conflict between an easement or covenant entered into by a council of a municipality under subsection (1) and section 33 or 34, the easement or covenant shall prevail. R.S.O. 1990, c. O.18, s. 37 (5).

In our view, the provisions of the Act with respect to a voluntary heritage easement meet the interest of the City in protecting the heritage value attributes of the Subject Lands while recognizing that designation is not appropriate given the condition of the Church Building. In these circumstances, a heritage easement agreement could be scoped to address the salvage, storage and reuse of heritage attributes and elements within any new development and align with the CHIA.

A Documentation and Salvage Report would provide guidance on both the salvage and storage of attributes to be protected.

The City could then register the agreement on title of the Subject Lands to ensure its applicability to any future owners. Once the recommendations of the CHIA are then implemented in a future site plan agreement, the heritage easement agreement would become null and void and could be removed from title.

We are attaching the precedent Heritage Easement Agreement entered into with the Town of Niagara-on-the-Lake in very similar circumstances which we reference above.

If we can be of any further assistance, please do not hesitate to contact me.

Yours very truly,

Sullivan Mahoney LLP

Per:

A handwritten signature in black ink, appearing to be 'Sara J. Premi', written over a horizontal line.

Sara J. Premi

SJP:bj
encls.

HERITAGE EASEMENT AGREEMENT

BETWEEN:

CORP.

the "Owner")

(hereinafter referred to as

and

THE CORPORATION OF THE TOWN OF

NIAGARA-ON-THE-LAKE

(hereinafter referred to as

the "Town")

WHEREAS:

is the registered owner of the lands and premises municipally known as , Niagara-on-the-Lake which is legally described as (the "Property");

In accordance with Section 37(1) of the *Ontario Heritage Act*, R.S.O. 1990, c.O.18 the Town is entitled to enter into agreements, covenants and easements with owners of real property for the conservation, protection and preservation of heritage in Ontario; Sections 37(2) and 37(3) of the *Ontario Heritage Act* provide that such covenants and easements entered into by the Town, when registered in the Land Registry Office against the real property affected by them, shall run with the real property and may, whether positive or negative in nature, be enforced by the Town or its assignee against the owner or any subsequent owners of the real property even where the Town owns no other land which would be accommodated or benefited by such covenants and easements;

The Owner and the Town desire to conserve certain heritage resources at the Property as set out in this Agreement and the Schedules thereto;

The Owner is entering into this Agreement voluntarily and in good faith to ensure the preservation and protection of the heritage resources identified herein;

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the sum of ONE DOLLAR (\$1.00) of the lawful money of Canada now paid by the Town to the Owner (the receipt and sufficiency of which is hereby acknowledged) and in further consideration of the mutual covenants and restrictions hereinafter set forth, the Owner and the Town mutually agree to abide by the following covenants, easements and restrictions which shall run with the Property in accordance with the terms set out herein.

RECITALS AND SCHEDULES

1.1 The recitals are true and accurate.

1.2 The Schedule forms part of this Agreement.

1.3 This Agreement shall be binding upon the Property until such time as the Site Plan Agreement for the development of the Property is registered on title, at which time this Agreement shall be released by the Town and the easement removed from title.

ITEMS OF HERITAGE VALUE OR INTEREST

2.1 The Owner and the Town agree that the approach to heritage conservation and items of heritage value or interest at the Property which are to be conserved and used for commemoration on the Property have been identified through the Heritage Impact Assessment prepared by Stantec dated June 23, 2023 (the "HIA") and within the Commemoration Plan prepared by Stantec dated June 23, 2023 (the "Commemoration Plan") (collectively referred to as the "Stantec Reports") and through the development review process for the Property.

- 2.2 The items of heritage value or interest on the Property which are to be salvaged and conserved are set out in Schedule "A" to this Agreement.
- 2.3 The Owner and the Town acknowledge and agree that the Commemoration Plan will be subject to further review as part of the Site Plan approval process for the Property, which may result in changes to the Commemoration Plan.
- 2.4 The Owner agrees to implement the proposed commemorative approaches for the items of heritage value or interest identified in the Stantec Reports in Schedule "A", subject to any amendments which may be agreed to by the Town and the Owner during the Site Plan approval process acting cooperatively and in good faith, as part of the implementation of the Site Plan for the Property..
- 2.5 The Owner agrees that that any of the items of heritage value or interest as set out in Schedule "A" that are not reused within any new development will be donated to the Town.

USE OF PROPERTY

- 3.1 The Owner expressly reserves for themselves, their representatives, administrators, successors and assigns the right to continue to use the Property for all purposes not inconsistent with this Agreement and in accordance with the approved zoning.
- 3.2 The Town acknowledges that the Owner may remove the items of heritage value or interest from the Property identified in Schedule "A" and safely store them off-site, and advise the Town of the location off-site, or may store them on site and away from construction activities, until such time as the Commemoration Plan is implemented as part of the Site Plan Agreement.
- 3.3 The Town further acknowledges that a demolition permit will be released on October 1, 2023 and that the Owner intends to demolish the former school building on the Property once the items of heritage value have been removed or provision has been made for their preservation *in-situ*.

CONSERVATION PRINCIPLES

- 4.1 It is the purpose of this Agreement to ensure that the items of heritage value or interest at the Property as identified in Schedule "A" will be conserved in perpetuity as part of the heritage conservation objectives of the Town. To achieve this purpose the Owner agrees with the Town that these items shall be retained and conserved by the Owner and safely stored in accordance with the recommendations within the Documentation and Salvage report prepared by Stantec (dated August 2, 2023), as well as recognized heritage conservation principles and practices so that no change shall be made to these items which will adversely affect the heritage value or interest thereof.
- 4.2 The Owner agrees that in carrying out its responsibilities under this Agreement that it shall, where applicable, be guided by and apply recognized heritage conservation principles, practices and legislation.
- 4.3 The Town shall be entitled to inspect the items of heritage value or interest at the location where they are stored by the Owner upon provision of 72 hours prior written notice to the Owner or its legal representative. Where the Town, acting reasonably, determines that these items have been damaged in storage or are at risk of damage, the Town shall provide written notice to the Owner outlining the areas of concern and the Owner shall take all necessary steps to remedy the damage or to prevent it from occurring.
- 4.4 The Owner shall notify the Town within five (5) days of any damage to the items of heritage value or interest being discovered and the Owner agrees to repair any damaged items in accordance with plans approved by the Town. The Owner agrees that it shall within thirty days of the damage being discovered submit a plan to the Town setting out the proposed repairs for the approval of the Director of Community and Development Services.

NOTICE

- 5.1 Notices to the Parties shall be delivered by mail or by email to the addresses set out below:

The Corporation of the Town of Niagara-on-the-Lake

1593 Four Mile Creek Road

PO

Box

100,

Virgil, ON L0S

1T0

Attention: Director of Community and Development Services

Email: [REDACTED]

[REDACTED]

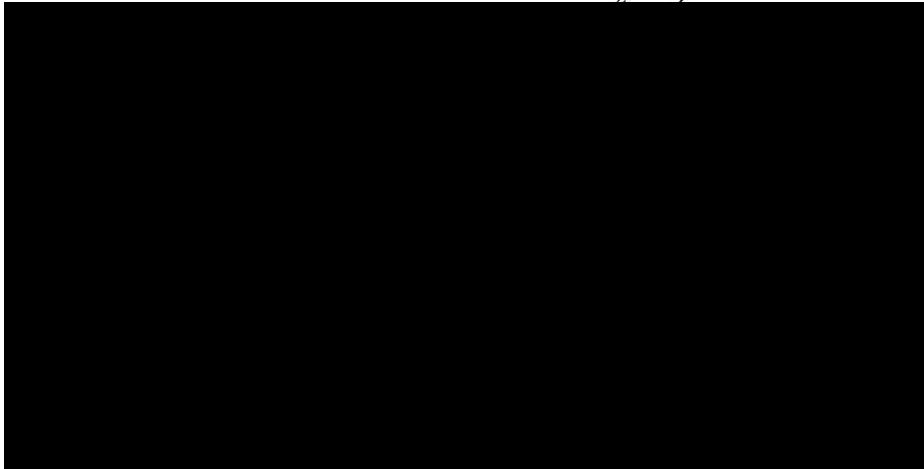
[REDACTED]

[REDACTED]

[REDACTED]

- 5.2 The Town and the Owner agree to notify the other immediately, in writing, of any changes to the addresses or email addresses set out above.

IN WITNESS WHEREOF the parties hereto have executed this Agreement this 5th day of October 2023.



SCHEDULE "A"

Items of heritage value or interest to be salvaged and conserved:

1. Two bas-relief panels by John B. Shawe (from 1948 school building)
2. Stone incised oak tree panel (from 1976 school addition)
3. Parliament Oak School sign (from 1948 school building)
4. Some Buff Bricks (from 1948 school building)
5. 'Parliament Oak' stone tree marker
6. Castellani Sculpture
7. 1948 Time Capsule and 1947 Cornerstone
8. Town Boundary Stone #13
9. Mature red oak #28

Note: The Reference Numbers in items 8 and 9 and the items listed above are as identified in the Heritage Impact Assessment prepared by Stantec dated June 23, 2023.