



Town of Newmarket
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Update on the Clock Tower Settlement Staff Report to Council

Report Number: 2019-46

Department(s): Legal and Procurement Services

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Meeting Date: April 29, 2019

Recommendations

1. That the report entitled Update on the Clock Tower Settlement dated April 29, 2019 be received for information.

Executive Summary (use if report is longer than 5 pages)

In accordance with the Minutes of Settlement between the Town and Main Street Clock Inc. (“**MSCI**”), MSCI has recently applied for funding through the Community Improvement Plan (“**CIP**”) Incentive Program. MSCI has also begun some work on the MSCI Lands (defined below) and has publicly announced its intention to put the MSCI Lands (defined below) up for sale.

This report puts each of these developments into context and provides some more information about what exactly is contemplated for these properties.

The work that is planned, which may be partially funded by the CIP Incentive Program as long as the projects qualify, will revitalize the facades of the buildings and bring the interiors up to building code standards. The resulting enhancement to the appearance of these properties will be a positive change for the entire downtown area, which is in the best interest of all residents.

The potential sale of the MSCI Lands will be occurring after the majority of the Town’s main objectives from the settlement have already been achieved, including the withdrawal of the two costly OMB Appeals and one Court Application, and the transfers of land within market square. Staff will work with MSCI to ensure there is clarity around

the transfer of any remaining benefits and obligations in the Minutes of Settlement to successor land owner(s).

Purpose

The purpose of this report is to provide an update on recent developments related to the properties owned by MSCI (178-194 Main Street South) and explain what each of these developments mean for the Town.

Background

MSCI purchased the property municipally known as (i) 178 and 180 Main Street South on March 1, 2011 (the “**Clock Tower**”), and (ii) the properties municipally known as 184, 186, 188, 190, 192 and 194 Main Street South on September 9, 2013 (the “**Main Street Buildings**”), and collectively with the Clock Tower, the “**MSCI Lands**”).

The Ontario Municipal Board (“OMB”) Appeals

In September 2013, MSCI submitted an application for zoning by-law amendment to the Town to amend the existing Historic Downtown Urban Centre Zone on the MSCI lands to permit a six storey mixed use development.

The Town passed By-law 2013-51 (the “**Heritage District By-law**”) to implement the Heritage Conservation District for Lower Main Street South on October 21, 2013. MSCI appealed the application of the Heritage District By-law to the MSCI Lands (the “**Heritage Appeal**”).

The Town received a re-submission of the MSCI application for zoning by-law amendment on February 2, 2016 (the “**2016 Re-Submission**”). The re-submission contemplated a seven storey mixed use building and included revised drawings and updated studies.

The Town formally denied MSCI’s application for zoning by-law amendment on December 5, 2016. MSCI appealed the Town’s decision to the Ontario Municipal Board (the “**Zoning Appeal**”).

By order of the Ontario Municipal Board, the Heritage Appeal and the Zoning Appeal (collectively, the “**OMB Appeals**”) were consolidated on May 11, 2017, with both scheduled to be heard in a three week hearing commencing on August 7, 2018.

The Land Exchange Agreement

On October 14, 2003, the Town and the former owner of 184, 186, 188, 190, 192 and 194 Main Street South, entered into a Land Exchange Agreement (the “**2003 Land**

Exchange Agreement"). The 2003 Land Exchange Agreement was important to the Town as it was an agreement to clean up some complicated title issues in market square, and exchange certain lands which would result in the Town owning lands more suitable for public use and the circulation of vehicles in the area.

By Notice of Application dated June 14, 2017, the Town brought an application to the Ontario Superior Court of Justice seeking a declaration that the 2003 Land Exchange Agreement was binding on MSCI as successor in title to the party that entered into the 2003 Land Exchange Agreement (the "**Court Application**"). MSCI opposed the relief in the Court Application.

Settlement Discussions

The Town and MSCI resolved their differences and agreed to settle both the Court Application and the OMB Appeals. The terms of settlement are set out in the Minutes of Settlement dated May 2, 2018 (the "**Minutes of Settlement**"), which are available on the Town's website at:

[https://www.newmarket.ca/LivingHere/Documents/Executed%20Minutes%20with%20Schedules%20\(2\).pdf](https://www.newmarket.ca/LivingHere/Documents/Executed%20Minutes%20with%20Schedules%20(2).pdf)

Recent Developments

Recently, a few things have occurred related to the MSCI Lands:

- 1) MSCI has confirmed that it will be listing the MSCI Lands for sale;
- 2) MSCI submitted an application to the NDDC Committee on March 29, 2019 for the Community Improvement Plan ("**CIP**") Incentive Program funding contemplated in the Minutes of Settlement; and
- 3) Construction activity has started on the MSCI Lands.

This report will address what each of the above developments means for the Town.

Discussion

(1) MSCI's Intention to Sell the MSCI Lands

The Town's Main Objectives from the Settlement Have Already Been Achieved

At the time that the Town entered into settlement negotiations with MSCI, the Town and MSCI were involved in two OMB Appeals and one Court Application. The Town was exposed to the possibility that:

- i. the MSCI Lands would not be included within the Town's Historic Downtown Urban Centre Zone;
- ii. the MSCI proposal for a seven storey mixed use building would be approved by the OMB. This was particularly a concern given the OMB's ability to review all appeals *de novo* without any deference to Council opinion; and
- iii. the 2003 Land Exchange Agreement would not be upheld.

The Minutes of Settlement resulted in the withdrawal of both OMB Appeals. This means that the MSCI Lands are now within the Town's Historic Downtown Urban Centre Zone. If the land is sold to new owners, they will be buying with notice of the Historic District, and, any appeal would now go to the LPAT, which provides significantly more deference to local Council opinion.

The settlement of the two OMB Appeals and the Court Application also avoided a scheduled three week long OMB hearing, which was estimated to cost the Town several hundred thousand dollars in fees between external legal counsel and experts (in addition to staff time).

Finally, the settlement also required that the 2003 Land Exchange Agreement be honoured and the contemplated transfers have now all taken place, bringing certainty to the land in market square, and a more ideal arrangement for the Town owned parcels.

The Transfer of the Benefits and Obligations in the Minutes of Settlement to Future Owner(s)

Section 45 of the Minutes of Settlement provides that the terms of settlement are binding upon successors and assigns of the parties. If all of the MSCI Lands are transferred to one new owner, then the benefits and obligations will also transfer to that new owner.

What is more complicated is the possibility that MSCI will apply for and be granted consent to sever the MSCI Lands into multiple parcels for sale to potentially multiple new owners. If severances are applied for and approved, staff will work with MSCI to prepare a first amendment to the Minutes of Settlement, which will make it clear exactly which benefits and obligations transfer to which new owners. Staff will report back to Council to seek approval to execute the first amendment to the Minutes of Settlement, if such an amendment becomes necessary.

(2) MSCI's Application for Funding from the CIP Incentive Program

The Town's Commitment to Provide Access to the CIP Incentive Program

As part of the settlement, both parties agreed to honour all terms of the 2003 Land Exchange Agreement. This was consistent with recognizing that the 2003 Land Exchange Agreement was binding on both parties, which was the Town's position in the Court Application. The only two commitments from the 2003 Land Exchange Agreement which remained outstanding (in addition to the land exchanges) were that:

- a) The Town will make every effort to expedite consideration of applications for permits and/or approvals; and
- b) The Town will provide priority access to the Newmarket Downtown Development Committee (the “**NDDC**”) incentive program provided that the project qualifies and meets program criteria to the extent funds are still available in the year of application, and, if not available, provide priority access the following year provided the project proceeds.

The above language in (a) and (b) is quoted from the 2003 Land Exchange Agreement. Reference to honouring these two original commitments is in Section 10 of the Minutes of Settlement.

As part of the settlement negotiations, MSCl requested two refinements to the above second commitment from the 2003 Land Exchange Agreement:

1. That a specific amount be linked to the potential grant funding available. An upset limit of \$100,000 was therefore agreed upon; and
2. That the Town set aside the \$100,000 for MSCl’s exclusive use in a reserve fund for five years. This means that the funding for MSCl would not detract from the available budget for other applications made in the same year.

These two refinements are reflected in Sections 21(d) and 31 of the Minutes of Settlement.

Is it fair for MSCl to still access the CIP Incentive Program given that the MSCl Lands may be sold?

There are a few important points to remember which put the Town’s commitment to provide access to the CIP Incentive Program funding into context:

1. The Minutes of Settlement do not prohibit MSCl from selling the MSCl Lands and MSCl’s decision to sell does not relieve the Town of its stated commitments. If the Town was to refuse to honour its commitment in both the 2003 Land Exchange Agreement and in the Minutes of Settlement, MSCl could bring an action to enforce either of these agreements against the Town. This would mean more litigation at the cost of Newmarket taxpayers.
2. The renovations proposed are consistent with Town objectives as well as those of MSCl because the enhancement of these buildings contributes to the overall revitalization of a key area of downtown Newmarket, which is in the interest of all residents.
3. The façade improvements will be done in consultation with the Town’s heritage expert and the MSCl heritage expert, and will follow the regular process required by legislation.

4. The CIP Incentive Program requires documented private investment in addition to the public investment. This means that:
 - a. MSCI must submit receipts showing its own expenditure of funds prior to being eligible for access to Town grant money;
 - b. The grant money is not a full reimbursement of all of MSCI's costs. Rather, as documented in Section 31 of the Minutes of Settlement, MSCI is only eligible for reimbursement of 50% of their costs up to a program maximum for each address; and
 - c. While the program requires a minimum of 50% investment on the part of the private sector, given that there is an upset limit on the total amount of funding available, it is much more common to see the private sector put in up to four times the amount received in funding. Based on the plans submitted by MSCI, their level of investment appears to be consistent with that historical practice.
5. MSCI would be able to apply for funds through the CIP Incentive Program even outside of the Minutes of Settlement (and might actually be entitled to even more than \$100,000).

What is the CIP Incentive Program funding going to be used for?

In accordance with Section 31 of the Minutes of Settlement, MSCI has applied for CIP Incentive Program Funding through (i) the Façade Improvement and Restoration Program, and (ii) the Interior Renovation and Improvement Program. More information on exactly what is proposed follows in the next section.

As also noted in Section 31 of the Minutes of Settlement, in order to be eligible for funding the projects must qualify under the terms of the CIP Incentive Program and the regular process must be followed.

(3) Construction Activity on the MSCI Lands

The New Development Concept

As part of the settlement, MSCI agreed not to pursue the proposed development that was presented in the 2016 Re-Submission or the revised development concept "Plan B" that was presented at the OMB Pre-Hearing Conference held on May 3, 2017.

MSCI agreed to instead redevelop the MSCI Lands within the existing Official Plan land use permissions and zoning for the properties and the redevelopment was to be contained entirely within the existing building envelopes and structure, with certain

exceptions, all of which were at MSCI's sole option and discretion (the "**New Development Concept**").

While MSCI did originally express publicly that it intended to bring forward an exciting new proposal for the MSCI Lands, the Minutes of Settlement do not obligate MSCI to go that far. The definition above is what was agreed to as the legal commitment on MSCI's part. MSCI has now submitted certain plans (described in greater detail below) and those plans do fit the above definition in that they are (i) within the existing Official Plan land use permissions and zoning for the properties, and (ii) the redevelopment will be contained entirely within the existing building envelopes and structure.

It was the Town's goal for the development to stay within land use permissions and zoning and within the building envelope and structure, and that is all happening. More than that, the proposed construction is going to beautify and enhance the facades on the buildings, and bring the interiors up to *Building Code* standards which will ensure these heritage buildings are preserved. This is a positive step forward. There is no demolition or loss of heritage features (interior or exterior) within the submitted plans.

What has MSCI proposed for the exterior of the buildings on the MSCI Lands?

The Town has received an application for Heritage Permit for façade restoration on 184 to 194 Main Street South. Using appropriate conservation principles, the facades of the three buildings will be rehabilitated and restored. The conservation proposal is currently under review by the Lower Main Street South Heritage Conservation District Advisory Group. A summary of the buildings and proposed works can be found on the Town's website at:

<https://www.newmarket.ca/LivingHere/Pages/Planning%20and%20development/Planning%20Applications/Current%20Applications/Clocktower-Application.aspx>

A Building Permit application for the exterior facades was received by the Town on March 29, 2019 and is currently waiting on comments from Heritage Newmarket prior to approval.

What has MSCI proposed for the interior of the buildings on the MSCI Lands?

180 Main Street South (former residence and post office building)

The MSCI proposal is for routine maintenance that does not require a Building Permit. The maintenance will include replacing some flood damaged drywall, fixing the HVAC and replacing the roof.

184/186 – 188-192 Main Street South

Building permit applications were received on March 22, 2019 for interior restoration work which includes removing and replacing drywall, carpet/flooring, repairing subfloors

and capping plumbing. The intent is to create an open shell space for future tenant fit-outs. Building permits for this interior work were issued on April 3, 2019.

Conclusion

MSCI and the Town are both committed to honouring the terms of the Minutes of Settlement, and to also following all other regular processes with respect to the applications for funding, heritage permits, building permits, or otherwise.

The work that is planned will revitalize the facades of the buildings on the MSCI Lands and will bring the interiors up to building code standards. The resulting enhancement to the appearance of these properties will be a positive change for the entire downtown area, which is in the best interest of all residents.

The potential sale of the MSCI Lands will be occurring after the majority of the Town's main objectives from the settlement have already been achieved. If all of the MSCI Lands are sold to one successor land owner, then any remaining benefits and obligations in the Minutes of Settlement will pass to that successor land owner. If MSCI applies for and is granted consent to sever the MSCI Lands into multiple parcels, staff will work with MSCI to ensure there is clarity around which benefits and obligations in the Minutes of Settlement pass to which successor land owner(s), and will report back to Council on those discussions.

Business Plan and Strategic Plan Linkages

The Clock Tower settlement supports the following strategic objectives of the Town:

Well-Equipped and Managed: negotiating a positive resolution to litigation involving the Town

Well Balanced: encouraging heritage preservation

Well Respected: honouring our past, while planning for our future

The use of the CIP Incentive Program Funding to revitalize the buildings on the MSCI Lands also supports Council's new strategic priorities, which highlight the continued success of the downtown as an important initiative.

Consultation

The Senior Leadership Team, Planning and Building Services, and Economic Development were all consulted in the development of this report.

Human Resource Considerations

None.

Budget Impact

There is no budget impact associated with this report. The funding described above related to the CIP Incentive Program has already been set aside into a reserve for MSCI in accordance with the Minutes of Settlement.

Attachments

None.

Approval

Esther Armchuk, Commissioner of Corporate Services

Peter Noehammer, Commissioner of Development and Infrastructure Services

Ian McDougall, Commissioner of Community Services

Karen Reynar, Director of Legal and Procurement Services

Rick Nethery, Director of Planning and Building Services

Contact

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