Minute No. 625
Report - Standing Policy Committee on Property and Development – September 4, 2007

Item No. 2 Heritage Conservation Easement Agreements
File G-3

COUNCIL DECISION:

Council concurred in the recommendation of the Standing Policy Committee on Property and Development and adopted the following:

1. That the Historical Buildings Committee and the Winnipeg Public Service (Planning, Property and Development Department) be authorized to consult with individuals from the real estate development industry, Canada Revenue Agency and property appraisers to establish the viability of a program of heritage easements as income tax credits.

2. That the Province of Manitoba be requested to legislatively allow heritage designations to be registered at the Winnipeg Land Titles Office inasmuch as currently all heritage designations in Manitoba except for those by the City of Winnipeg are required under The Heritage Resources Act to be filed and the City of Winnipeg can already undertake heritage covenants under the Province of Manitoba's Heritage Resources Act.

3. That the Proper Officers of the City be authorized to do all things necessary to implement the intent of the foregoing.

Report - Standing Policy Committee on Property and Development – September 4, 2007

DECISION MAKING HISTORY:

Moved by Councillor Swandel,

That the recommendation of the Standing Policy Committee on Property and Development be adopted by consent.

Carried

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On September 19, 2007, the Executive Policy Committee concurred in the recommendations of the Standing Policy Committee on Property and Development and the Historical Buildings Committee and submitted the matter to Council.

STANDING COMMITTEE RECOMMENDATION:

On September 4, 2007, the Standing Policy Committee on Property and Development concurred in the recommendation of the Historical Buildings Committee and submitted the matter to the Executive Policy Committee and Council.

HISTORICAL BUILDINGS COMMITTEE RECOMMENDATION:

On August 1, 2007, the Historical Buildings Committee recommended that Council:

1. Authorize the Historical Buildings Committee and the Civil Service of the Planning, Property and Development Department to consult with individuals from the real estate development industry, Revenue Canada and property appraisers to establish the viability of a program of heritage easements as income tax credits; and

2. Request the Province of Manitoba legislatively to allow heritage designations to be registered at the Winnipeg Land Titles Office. Currently all heritage designations in Manitoba except for those by the City of Winnipeg are required under The Heritage Resources Act to be filed. The City of Winnipeg can already undertake heritage covenants under the Province of Manitoba's Heritage Resources Act.

Report - Standing Policy Committee on Property and Development – September 4, 2007

DECISION MAKING HISTORY (continued):

STANDING COMMITTEE:

On May 22, 2007, the Standing Policy Committee on Property and Development concurred in the administrative recommendation that the Historical Buildings Committee be encouraged to further examine the use of Heritage Conservation Easement Agreements as a tool for protecting and preserving historic buildings where appropriate and feasible and directed the Historical Buildings Committee to provide a further report for the meeting of the Committee scheduled for September 4, 2007.

THE CITY OF WINNIPEG

COUNCILLORS' OFFICE

CIVIC CENTRE • 510 MAIN STREET • WINNIPEG • MANITOBA • R3B 1B9

JENNY GERBASI
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FORT ROUGE-EAST FORT GARRY WARD
City-Centre Community Committee

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August 1, 2007

Chairperson and Members
Standing Policy Committee on Property and Development

Re: Heritage Conservation Heritage Agreements

On behalf of the members of the Historical Buildings Committee I am writing to express the Committee's sincere appreciation for the ongoing dialogue and referral of heritage matters for review and comment. The members of the Committee volunteer their time away from their business and government practices to provide professional and unbiased advice as part of their civic duty.

The Committee reviewed the report of the Civil Service that was referred from your Committee on May 22, 2007 and concurs with the report.

The Historical Buildings Committee recommends that Council:

1. Authorize the Historical Buildings Committee and the Civil Service of the Planning, Property and Development Department to consult with individuals from the real estate development industry, Revenue Canada and property appraisers to establish the viability of a program of heritage easements as income tax credits; and

2. Request the Province of Manitoba legislatively to allow heritage designations to be registered at the Winnipeg Land Titles Office. Currently all heritage designations in Manitoba except for those by the City of Winnipeg are required under The Heritage Resources Act to be filed. The City of Winnipeg can already undertake heritage covenants under the Province of Manitoba's Heritage Resources Act.

J Gerbasi

Councillor Jenny Gerbasi, Chairperson
Historical Buildings Committee
cc: Giles Bugaliskis

RE: HERITAGE CONSERVATION EASEMENT AGREEMENTS

FOR SUBMISSION TO: Standing Policy Committee on Property and Development

ORIGINAL REPORT SIGNED BY: Acting Director of Planning, Property and Development

REPORT DATE: March 23, 2007

RECOMMENDATION: That the City staff and the Historical Buildings Committee be encouraged to further examine the use of Heritage Conservation Easement Agreements as a tool for protecting and preserving historic buildings where appropriate and feasible.

Report Summary

Key Issues:

- A submission to the SPC on PD, on January 9, 2007 suggested the use of Heritage Conservation Easement Agreements as a method to protect heritage buildings.
- Many of the protections proposed under Heritage Conservation Easement Agreements are already achieved under the current Historical Buildings By-law, and tax credit programs.
- Additional advantages available under the Easement Agreements may be possible in some cases but will need to be weighed against potential additional costs where new incentive programs may be required.
- Other issues raised in the submission regarding uncertainty and transparency in the current process of listing and designating buildings are being addressed under proposed changes to the Historical Buildings By-law to be brought forward in the spring.

Implications of the Recommendation(s):

General Implications

( ) None

( ) For the organization overall and/or for other departments

(X) For the community and/or organizations external to the City

( ) Involves a multi-year contract

Comment(s): City staff and the Historic Building Committee are being encouraged to further examine the use Heritage Conservation Easement

Agreements when appropriate. This may require co-operation from Winnipeg Land Titles Office and/or changes to provincial legislation.

Policy Implications

(x) No

( ) Yes

Comment(s):

Regulatory Implications

(x) None

( ) Eliminates or reduces regulatory impact

( ) Proposes regulatory impact

Comment(s): A heritage easement would be an additional tool to protect, preserve and restore historic buildings.

Environmental Implications

(x) No

( ) Yes

Comment(s):

Human Resources Implications

(x) No

( ) Yes

Comment(s):

Financial Implications

(x) Within approved current and/or capital budget

( ) Current and/or capital budget adjustment required

Comment(s):

Report

REASON FOR THE REPORT:
The Standing Policy Committee on Property and Development directed the Administration to review and report back, within ninety (90) days, on the use of Heritage Conservation Easement Agreements by the City of Winnipeg to preserve the integrity of a historic building, site, object or landscape as outlined in the communication from Hart Mallin dated January 9, 2007.

HISTORY:
On January 9, 2007 the Standing Policy Committee on Property and Development considered a request from the owner of 38 Albert Street to demolish an existing property that was on the **Inventory of Buildings** under the terms of the Historical Buildings Bylaw No.1474/77. The owner wished to redevelop the site into a surface parking lot with a curb cut to enable an adjacent property owner to convert his vacant building into a boutique hotel with an outdoor patio.

Hart Mallin appeared in delegation at this meeting to discuss the broader issues of Heritage Building designation and preservation citing examples and other tools used in other jurisdictions such as Heritage Conservation Easement Agreements.

The City of Winnipeg passed its original Historical Buildings Bylaw in February 1977 with a number of amendments over the following 30 years.

DISCUSSION:

Background
Heritage conservation programs in municipalities in Canada are all based on the same fundamental principles. An **Inventory** of potential heritage properties is established, based on community input. Placement on the Inventory merely ensures that the building is not demolished without further review. A public process is established to debate the demolition applications for buildings on the Inventory and a political body then determines whether to allow the demolition or to designate the building as historic (to **List)**, i.e. to protect from demolition and ensure that all future modifications are appropriate, based on established heritage design principles.

In Winnipeg enabling provincial legislation through the City of Winnipeg Charter provides that:

Section 156: Council may pass bylaws respecting

(a) the establishment and maintenance of a list of buildings that council considers to be of special architectural or historical interest;
(b) the establishment of criteria and procedures to determine
    (i) which buildings should be added to the list, and
    (ii) which buildings should be deleted from the list; and
(c) limits and conditions on construction and occupancy in respect of buildings on the list.

Only the building or structure is protected, not the site or land surrounding it.

In Winnipeg, when Council declares a building historic it is included on the **Buildings Conservation List**, which is Schedule A on the Historical Buildings Bylaw No.1474/77. The purpose of designation is to promote the retention of heritage features.

It is important to note that listing a building merely protects it from demolition and inappropriate modifications. It does not provide for measures to preserve and restore heritage buildings. However, the Heritage Conservation Tax Credit Program and other government programs provide financial incentives to property owners to upgrade or undertake measures to stabilize and rehabilitate an existing property into a new use.

As a result of these incentive programs, most of the references to City Council related to heritage structures are initiated by a building owner's request for a structure to be designated in order that the owner, or a long term tenant is eligible for financial incentives in respect of the building.

Current Situation

In Winnipeg, heritage buildings that are designated are placed on the Buildings Conservation List. As noted, in many cases, this is done by agreement with the owner. However, there is no legal requirement for an agreement with the property owner. Legal agreements to preserve, maintain or restore a heritage building are only required as part of an incentive program such as the Heritage Conservation Tax Credit Program.

An agreement of this sort is with the current owner and does not bind or benefit future owners. That is, a new owner does not automatically inherit the remaining term of the tax credit but is also not obligated to fulfill maintenance requirements. A new agreement is required if the new owner wishes to benefit from the remaining term of any tax credit program that applies to the building.

Designation prevents demolition, and regulates new additions and alterations to the exterior and listed elements. As long as a building remains on the **Buildings Conservation List**, additions, alterations or demolition cannot proceed without either a Certificate of Suitability or de-listing. Landscaping and other aspects of the property that are not connected to the building are not protected. Even if a property is designated, there is no long-term protection for the site.

ISSUES RAISED

1. Heritage Conservation Easements

In the presentation, it was suggested that the City consider another option in its toolkit for heritage conservation, namely a heritage conservation easement agreement. Typically, these would take the form of an agreement between the building owner and the government (i.e. the City) by which the owner promises to preserve all or aspects of the building in exchange for a benefit. The City would use a "carrot" rather than a "stick" to encourage property owners to voluntarily enter into agreements with the City for the preservation of historically significant buildings.

Benefits of Heritage Conservation Easements

The submission mentions three benefits to owners – a grant or tax credit from the City (e.g. a heritage tax credit), a reduction in real property tax liability and a federal income tax receipt.

The first two benefits mentioned as being conferred on an owner under a heritage easement are already available under Winnipeg's existing system. Heritage tax credits are provided only to buildings already designated under the Historical Buildings By-law, so the idea of being able to obtain a heritage tax credit only in exchange for a commitment to protect the heritage value of a building is already embedded in Winnipeg's Heritage Conservation Tax Credit By-law. Moreover, to the extent that a heritage designation depreciates the value of a property, this will be reflected in the assessed value of the property for tax purposes.

The third benefit, the owner getting a federal income tax receipt, is a novel idea. City staff have had preliminary discussions with the Canada Revenue Agency (CRA), who have indicated their willingness to consider the eligibility of easements as income tax credits.

CRA staff suggest that an easement, as an interest in real property, could be considered a “gift” to the municipality as long as it binds future owners (i.e. is a perpetual easement), as per the requirements for ecological gifts. However, as this

also constitutes a disposition of property for the owner, the owner would have to also claim a capital gain (individual) or an income received from the disposition of property (corporation). Depending on the owner's situation the income tax credit or deduction could offset that capital gain. The easement gift may be exempt from capital gains however, if it is Certified Cultural Property designated by the Minister of Canadian Heritage. This would still entail different tax implications for the donor.

CRA staff advise that, in order to qualify as a gift to the municipality, the easement agreement would have to be voluntary; if this were a legislative requirement then it could not qualify as a gift. Also, there are implications when other advantages are offered to the owner in exchange for their gift (e.g. where it is a condition of a change in zoning which gives the owner permission to develop or where there is a municipal tax credit). If the value of those advantages exceeds 80% of the value of the gift, the gift could be nullified for tax purposes. The value of the income tax receipt for the gift would be determined by the fair market value of the gift minus the fair market value of the advantage. The amount of the capital gain would still be based on the fair market value of the gift alone that reduces the impact of the deduction.

The mechanism for the valuation of the "gift" would need to be developed and would require real estate appraisal expertise. If the City were interested in pursuing this further, the CRA would be able to review draft program legislation and provide a more official ruling on the eligibility of easements as income tax credits.

Registration of Heritage Conservation Easements at WLTO

It was also presented that heritage easements be registered at the Winnipeg Land Titles Office (WLTO). This would have two presumptive effects: it would make the heritage conservation easement binding on future owners and it would warn future owners of the heritage designation.

City staff have investigated this suggestion and can provide the following information:

1. While preliminary indications from the WLTO are that the WLTO would likely accept heritage conservation easements for registration against title, some doubt remains about whether registration is possible under the current legislative framework.

2. Even if they are registered at WLTO, this does not mean that a heritage conservation easement by itself (i.e. in the absence of a by-law designation) would necessarily bind future owners to the commitments made by the current owner in the agreement. In order for its binding effect to be certain, the Province would have to amend *The Real Property Act*.

3. The benefits of binding future owners and warning them of the heritage designation through registration at WLTO may not be as significant as suggested. First, whether they know about the fact that a building has been given a heritage designation in the By-law or not, future owners are already bound by the designation. Moreover, as part of due diligence, prospective purchasers can inform themselves of the heritage status of the building they are interested in purchasing. They can do so by checking the list of designated buildings attached as a Schedule to the By-law and the list of buildings on the Inventory on the Historical Buildings Committee's website before making the purchase.

4. Registering agreements at WLTO would result in a fee of $40.

5. If it is considered important to advise future owners about heritage designations made under the Historical Buildings By-law by registering them at WLTO, the Province should be asked to authorize this by amending the Real Property Act to permit such registrations of designations under the By-law. This would put designations made under the By-law on the same footing as heritage designations made under the Provincial Heritage Resources Act.

Conclusion

The current combination of a conservation By-law and a financial incentive program provides almost all of the benefits that could be provided by heritage conservation easement agreements. The current Historical Buildings By-law obliges owners to comply with regulations protecting "buildings, erections or structures deemed to be of special architectural or historical interest" while allowing the owner to retain rights of ownership. The By-law already gives the City "the responsibility to prevent present and future owners from making changes to the historical resource that could compromise its historical integrity". In addition, through the Heritage Conservation Tax Credit Program, the City provides financial support for restoration and upgrading of historic buildings.

The two benefits that a heritage easement would provide that are not realized under the current system, as outlined in the submission, are the ability to inform future property owners about the heritage designation by registering the easement at WLTO and the ability to assist the property owner to access federal tax benefits.

The ability to register at WLTO is of limited significance from the City's perspective. As noted above, the obligation to preserve heritage assets already binds future owners, whether or not the owner is advised by a notice on title at the WLTO. In addition, the City provides information about the heritage status of a building to prospective owners by making lists of all categories of designated buildings publicly available.

The ability to use federal tax benefits as an incentive for owners is a more significant benefit, at least in some situations. This possibility should be further explored and utilized whenever it makes sense to do so.

There should be general agreement for the use of “carrots” (the use of incentives to encourage voluntary designations) whenever possible and less reliance on the “stick” (By-law heritage designations over the objections of owners). His suggestion that, in some cases, it may be possible for the City to assist the owner to obtain an income tax receipt is welcome. It should be noted that City staff and the Historical Buildings Committee already work collaboratively with owners whenever possible. In fact, as noted above, the majority of By-law heritage designations are made with the owner’s consent and at the owner’s instigation.

2. Inventory of Buildings

Under the Historical Buildings By-law, buildings can be added to the Inventory - a move that has an impact on the property rights of the owner - without input from or even notification of the owner. Placement on the Inventory does not significantly restrict the owner's options in respect of the building in most situations. However, it does mean that a building may not be demolished until a further review of the heritage qualities of the building takes place. At the very least, this could delay a demolition by several months. Moreover, during this review, the building could be designated as a heritage building in which case further restrictions on the building would be imposed.

In comments to the Committee, it was pointed out that placement on the Inventory can create uncertainty for current and future owners and has a negative impact on development decision-making. This is a legitimate concern. Once a building is placed on the Inventory, there is currently no way for an owner to find out how likely it is that a building will be listed and what specific restrictions will be imposed on the building until and unless the owner volunteers to have it designated or applies to have it demolished. This can lead to hesitation or negative choices in making development decisions.

Fortunately, both of these problems will be remedied in the proposed new Historical Buildings By-law. In that By-law, the Inventory will be abolished in favour of a "nominated" status. The proposed process of "nominating" buildings will be much more rigorous than it was to place a building on the Inventory under the previous system.

NEXT STEPS

The Planning, Property and Development Department plans to propose a new Historical Buildings By-law this spring that will address many of the concerns that the submission points out regarding certainty, transparency and public accountability. This would include public notices, providing notice for properties nominated as heritage and confirming the status of all properties currently on the Inventory of Buildings.

It is recommended that this report and submission presented to the SPC on P &D be referred to the Historical Buildings Committee and that City staff and the Committee be encouraged to utilize Heritage Conservation Easement Agreements whenever feasible to protect and preserve historical buildings.

Financial Impact Statement Date: March 23, 2007

Project Name:

HERITAGE CONSERVATION EASEMENT AGREEMENTS

COMMENTS:

The recommendation contained in this report is that City staff and the Historical Buildings Committee be encouraged to consider the use of Heritage Conservation Easement Agreements as a tool for protecting and preserving historic buildings where appropriate and feasible. There are no financial implications associated with this recommendation.

"Original Signed By"
Mike McGinn, CA
Manager of Finance

IN PREPARING THIS REPORT THERE WAS:

Internal Consultation With and Concurrence By:
Corporate Services, Legal Services Division

External Consultation With:
Not Applicable

THIS REPORT SUBMITTED BY:

Department: Planning, Property and Development
Division: Planning and Land Use
Prepared by: Giles Bugailiskis
PPD File No.

Hart Mallin

January 9, 2007

I present today to the Standing Committee in support of finding a reasonable solution to the question at hand, to allow for the demolition of all or part of the buildings in question, subject to the requirement of a satisfactory undertaking for the redevelopment of the St. Charles Hotel. The provenance of the existing structures is not so compelling as to avoid any change or demolition. If some elements of significance can be maintained as functional structures that should be the primary goal of this enquiry. However, if the preservation of the functionally obsolete structures means the hotel project will be compromised, adequate recording of the structures, if not already completed, should be undertaken at public expense. If an economic benefit can be derived from the reuse of the existing buildings or part of them, that cost should be to the developer. The larger issue of general compensation for market value lost due to historical designation should also be of interest to the Committee.

Whether a building is restricted by its Heritage Designation or subject to the usual constraints of zoning rules is a question that should be answered and recorded on title. Variances should be subject to strong conventions and the City should have more ability to ensure the proper maintenance of important heritage buildings is performed. After the fact powers such as those presumed under the Derelict Buildings by-law do little to preserve the integrity of heritage structures. Property owners who voluntarily submit their buildings for designation as heritage sites should be compensated if it is clear that by doing so they have diminished the market value of the property. Compensation should be equal for properties designated by rule of law.

Heritage Tax Credits for the improvement of designated buildings should be continued as a means to encourage improvements to the building stock and its resulting increased economic viability.

The combination of adequate compensation for loss of value and incentives for approved improvements is the way towards increased collaboration between the private and public sectors. Heritage Preservation should be a natural value of corporate ethics, not a source of antagonism and undue economic burden. A move to greater transparency through the use of Heritage Easements could open a dialogue with many private owners and encourage better practices of conservation and adaptive reuse of heritage structures.

- The rules for heritage designation must be transparent and easily identified
- Owners should have an opportunity to benefit from their 'donation' of property rights. Often, when a building receives heritage designation its market value decreases. The amount of that decrease can be appraised and allowed as a charitable donation.

- Inventoried buildings should be either designated or removed from the list. At a prescribed age a review of the provenance of a building should completed by a public body.
- Heritage Easements can protect community assets in perpetuity and give adequate notice to purchasers and neighbouring properties of restrictions on title.

The Private sector must be a willing collaborator in order to maintain a constant regime of heritage conservation. Buildings that are unproductive are rarely, properly maintained. Chronically vacant structures are usually allowed to decline relative to their productivity. In order to ensure adequate repair and maintenance of heritage buildings we need to ensure the ongoing productive use of those edifices in order to create a reason to keep them in good repair.

The greatest deterrent to development is not economic constraints. The market generally maintains a balance between need and production. What keeps things from happening in Winnipeg is Political Risk. If one cannot forecast what will be allowed to be demolished, built or in what form rehabilitated, planning is confused and inordinate amounts of time are wasted. Certainty is a very attractive element in real estate development. In order to have both the private and public sectors invested in Heritage preservation the rules must be identifiable. At present the particular Heritage Designation of a building cannot be recorded on title at the Winnipeg Land Titles Office (WLTO). While 200-300 are designated as Heritage with varying Class distinctions of 1-3, another 700+ are currently inventoried and therefore do not have defined heritage determination. Winnipeg needs to offer greater certainty than what is possible from its current method.

An Heritage Easement Agreement is another tool used to ensure a building's preservation and to control demolition. It is an agreement that is entered into between the property owner and the City and registered on title. An Heritage Easement Agreement identifies elements of a building which are to be retained in perpetuity and may also set out permitted alterations and development.

In his recent visit to Toronto Anthony Tung, author of Preserving the World's Great Cities commented that the uncertainty around heritage preservation guarantees that the battles are never won. He recommended that our first priority should be, as he put it, to GET A LAW. By that he meant the law must be strengthened to be able to stop demolition of important buildings and allow for certainty in planning for use and adaptive reuse of others.

Without any doubt, governments which possess the power of expropriation or the funds to purchase properties, are able to use those means to control the destiny of special buildings or sites to a very great degree.

These means may be useful in isolated instances or difficult cases, but they are hardly adequate to the challenges supplied by entire districts of strong heritage values. Even in special cases, it may be argued that expropriation causes more resentment than the effort is worth. Equivalent control may be achieved, at less cost, by placing a legal covenant on title, restricting change within certain agreed circumstances.

Such covenants (or easements) confer rights in a property to the holder. They are often required by governments (at any level) in return for grants or funds made available to

significant private property. Equally, of course, covenants may be donated by owners without financial reward if they are so motivated. An heritage easement may require present owners to seek permission for future transactions or changes which might affect that part of a property benefiting from such investment.

The implementation of Heritage Easements could be simultaneous with the completion of cataloging and classifying of all inventoried, but not designated structures. Rather than imposing rules after the fact without a way to compensate owners for the diminished value, Heritage Easements allow the City to assess the value of the rights relinquished by the easement and issue tax receipts for such donations.

Heritage Ohio uses Heritage Easements per the following excerpt from its webpage:

WHAT IS AN HISTORIC CONSERVATION EASEMENT?
A historic conservation easement is a legal tool used to preserve the integrity of a historic building, site, object, or landscape. The legal structure of the easement allows the owner to retain rights of ownership, while giving Heritage Ohio the responsibility to prevent present and future owners from making changes to the historic resource that could compromise its historic integrity. A legal agreement is filed in the deeds office of the courthouse in the county where the property is located, and the easement becomes part of the deed record, binding in perpetuity.

WHAT PROPERTIES ARE ELIGIBLE?
An owner of any property listed on the National Register of Historic Places, located in a certified local historic district, or eligible for the National Register of Historic Places, is eligible to receive a tax deduction when donating a historic conservation easement. An easement can be donated before, during, or after rehabilitation of a historic building; however, the timing of an easement donation may have substantial tax consequences and should be reviewed by an accountant or tax lawyer with knowledge in easement procedures.

HOW MUCH IS THE TAX DEDUCTION WORTH?
The value of the historic conservation easement, the deductible amount, is determined by a specialized appraisal performed on your property. However, this value may increase depending upon the level of restrictions, whether the interior of the building is included in the easement, and whether future development potential is lost as a result of the easement. Exterior or interior easements can allow change of use and configuration changes as long as they are in accordance with the Secretary of Interior's Standards for Historic Preservation.

BENEFITS OF AN HISTORIC CONSERVATION EASEMENT
- The ability to treat the value of the easement donation as a charitable contribution
- Typically, a decrease in real estate tax liability
- Permanent protection of a historic resource from inappropriate changes or alterations
- Written and photographic documentation of the property, archived at Heritage Ohio.

Ontario uses Heritage Easements as does Manitoba in the form of Habitat Heritage Corporation easements under the Heritage Resources Act.