Conduct of Council and Staff in Relation to 797 Victoria Road North

1. Council Contravened the Heritage Act

In passing a resolution removing the Shortreed farmhouse, 797 Victoria St. N., from the Municipal Register of Cultural Heritage Properties (the Register), Council purported to exercise a statutory authority provided by s.27 of the *Heritage Act*. In doing so, Council failed to consult the City's municipal heritage committee (Heritage Guelph), which is a mandatory requirement of s 27(4) of the *Heritage Act*. That, in my submission, represents more than a mere procedural misstep, rather it represents a fundamental failure to satisfy a mandatory substantive requirement of the legislation. The City of Guelph is a creature of statute and Council must abide by provincial legislation. There is a strong argument that Council's failure to consult Heritage Guelph nullifies the validity of the resolution passed by Council removing the Shortreed farmhouse from the Register. It follows that Council's additional resolutions, including the resolution approving the demolition of the farmhouse, are not lawful orders.

The Mayor called an emergency meeting of council on Sept. 30 to "reconsider" the resolutions passed by Council three days earlier. Before Council moved *in camera*, Councillor Caron put on the record that the issue involved a requirement in the *Heritage Act* and that Council was "legislatively required to reopen this". The Mayor agreed "that is the crux of the matter", but said there were impacts and risks to the Corporation to be considered. Council declined to reconsider the resolutions. It may be that Council's initial failure to consult Heritage Guelph was inadvertent, but by September 30th Council was aware that it had contravened s. 27 (4) of the *Heritage Act* and yet failed to act to remedy its unlawful conduct and did so again on October 6th.

The Ontario legislature has made it clear that the *Heritage Act* occupies a special status within the Province's legislation by declaring, in s. 68 (3): **Where there is a conflict between this Act or the regulations and any other Act or regulation, this Act or the regulations shall prevail.** The substantial penalties available for contravening the *Heritage Act* are another measure of its significance.

The role of City staff in failing to consult Heritage Guelph and failing to alert Council of the *Heritage Act* breach is even more puzzling. The City's Chief Administrative Officer advised *Guelph Today* (Oct 1) that the failure to consult with Heritage Guelph was not intentional. That may be, but it is clear that the City had corporate knowledge of the correct procedure.

As it happened, I contacted the City's Senior Heritage Planner on Sept. 27 with respect to another farmhouse that is suffering demolition by neglect, the Matthews farmhouse, at 895 York Rd. (old Reformatory lands). At the time, I had no idea that the matter of the Shortreed farmhouse was before council. The Senior Heritage Planner responded to my inquiry the next day, Sept. 28, advising me that: "If a Heritage Register Review application for the building is to be taken to Council, Heritage Guelph would be asked to provide their comments and these would be included in the related staff report."

The Senior Heritage Planner reports to the Manager, Policy Planning and Urban Design, who authored the Terms of Reference for Heritage Guelph. Those Terms of Reference state: "The

Ontario Heritage Act requires City Council to consult with their established municipal heritage committee [Heritage Guelph] on: . . . Applications to remove or demolish properties of cultural heritage value or interest."

In addition, the City's website includes a page that deals specifically with the *Municipal Register of Cultural Heritage Properties* with a link that takes you to the City's *Municipal Register Review Process Guidelines*. Both the text and the flow chart included in the *Guidelines* make it clear that any application to remove a property from the Register will be considered by Heritage Guelph: "Where the request is for removal, City staff will advise you when Heritage Guelph will review your request. You are encouraged to attend the Heritage Guelph meeting and present the rationale for the request."

The Manager, Policy Planning and Urban Design, co-authored the Closed Staff Report that was provided to City Council on September 27th and yet that Report contains no reference to the mandatory requirement to consult Heritage Guelph in s. 27 (4) of the *Heritage Act*.

I assume that part of the City Solicitor's remit is to ensure that actions taken by City Council are lawful. If so, one would have expected the City Solicitor's Office to have reviewed the *Heritage Act* to confirm that Council had authority to remove a property from the Register. Had that occurred, one would expect that the City Solicitor would have advised council, on September 27th, that voting to remove 797 Victoria Road North from the Registry without consulting Heritage Guelph would contravene s. 27 (4) of the *Heritage Act*.

And one more thing, the staff report describes the property owner, the Grand River Conservation Authority, as exercising "reasonable due diligence" in relation to the property. The Executive Summary goes further and asserts: "The property owner has exhausted all measures to secure the property . . .". I find it hard to understand how an owner of a heritage property who allows it to degrade to the point where the demolition of the building is required, can be described as exercising "reasonable due diligence" and having "exhausted all measures to secure the property". This is a property owner who had no further use for the property and so boarded it up, disconnected all services and let nature take its course. Surely, rather than "reasonable due diligence" that is the definition of "demolition by neglect". I would think that Heritage Guelph, if consulted, could have advised staff as to how basic 20th Century security measures, such as intrusion alarms (battery operated), masonry infill in accessible windows, fire rated doors and removal of vegetation and more frequent security patrols, could have mitigated the arson concerns and how reasonable property standard bylaws and their enforcement would have ensured the survival of this heritage building.

I submit that the resolutions passed by Council in relation to 797 Victoria Road North, on September 27th, were unlawful in that they contravene s. 27 (4) of the *Heritage Act* and fail to recognize the *Heritage Act* "shall prevail" where it conflicts with other Provincial legislation. The action of Council provided a template for any property owner who wishes to practice demolition by neglect in relation to a heritage building.

I ask that the City provide any authorities it may have to support the position that the resolutions passed by Council, on September 27 in relation to the demolition of the Shortreed farmhouse,

797 Victoria Road North, were lawful despite the contravention of s. 27 (4) of the *Heritage Act*. Barring that, 797 Victoria Road North, should be restored to the Municipal Register of Cultural Heritage Properties. Obviously, that would not prevent Council from removing the property from the Register, but it should do so in compliance with the law.

The CAO assured Council that there would be an investigation into why s. 27 (4) of the *Heritage Act* was contravened. The results of that investigation should be made public, subject to any human resources considerations. In particular, I ask that the City advise the public regarding the steps it is taking to ensure compliance with all provisions of the *Heritage Act*.

2. No Authority for Closed Session to Discuss "Security of Property"

Almost all of the Council debate in relation to 797 Victoria Road North on September 27th and September 30thoccurred in closed session. Similarly, the staff report(s) in relation to 797 Victoria Road North was not attached to the Agenda for either of these sessions. The stated rationale for moving into closed session was two-fold: security of property and solicitor client privilege.

I take no issue with Council moving into closed session for the purpose of preserving solicitor client privilege. That is clearly authorized by s. 239 (2) (g) of the *Municipal Act*. Any legal advice offered in the staff report could easily have been redacted in the "public" version of the report and a short closed session of Council could lawfully have been held, if there was need for Council to discuss the legal advice.

The security of property rationale for withholding the staff Report and moving the Council discussion into closed session is another matter entirely. As you confirmed during our telephone conversation last week, it was the security of the property of the Grand River Conservation authority, the house located at 797 Victoria Road North, that was at stake. This is consistent with the Mayor's remarks on September 30th [18:23] explaining that the issue discussed in closed session involved the security of a property that was in the City, but was not owned by the City. I submit that Council had no authority to hold a closed session or withhold the bulk of the staff Report based on concerns regarding the property of the Grand River Conservation Authority.

It is trite to say that the City if Guelph is a creature of statute and its procedures must comply with the provisions of the *Municipal Act* and any other relevant provincial legislation. The Ontario Ombudsman has determined:

> *Section 239(2)(a) of the Municipal Act, 2001 allows a municipality or local board to discuss "the security of property of the municipality or local board" in closed session. The Act does not define "security" for the purposes of this exception. The Ombudsman has found that in order for the exception to apply, the property must be*

> *owned by the municipality and council must discuss measures to prevent loss or damage to that property.*[*239(2)(a) Security of the property - Ontario Ombudsman*]

The *Municipal Act* s. 239 (2) (a) provides that a meeting of Council may be closed to the public if the subject matter being considered is the security of the property of the municipality or local board. As I asserted during our discussion last week, the Grand River Conservation Authority does not meet the definition of a "local board" for the purposes of s. 239 (2) (a) of the *Municipal Act*. The definition of "local board" in s. 1(1) of the *Act* specifically excludes conservation authorities. You quite correctly pointed out that the definition of "local board" is modified throughout the *Act* in relation to certain parts or sections. Indeed, s. 238 (1) modifies the definition of a "local board" in relation to s. 239 by removing police services boards and public library boards from the definition. Clearly, the provisions of s. 238 (1) do not oust or replace the general definition of "local board" in S. 1, rather it refines the definition by excluding two additional types of boards. Critically, s. 238 (1) does nothing to insert conservation authorities into the definition of local board for the purposes of s. 239. Accordingly, Council had no authority to move into closed session to discuss the security of the property located at 797 Victoria Road North.

If the Council debate regarding 797 Victoria Road North demolition of the Shortreed farmhouse had occurred in a public forum, the result may well have been different. Similarly, if the Council debate regarding reconsidering its earlier decision had occurred in a public forum, that result may well have been different. At the very least, the public would have some understanding as to why Council concluded that it was not necessary to remedy its breach s. 27 (4) of the *Heritage Act.*

I am prepared to submit a Closed Meeting Request Form asking that the closed meetings on September 27th and 30thbe investigated, but I would be pleased to consider any argument you might have that would justify the "security of property" rationale for the closed meetings. Barring that, I would ask that the City Clerk's office advise Council that the use of s. 239 (2) (a) of the Municipal Act to justify the closed meetings was erroneous and asking that Council pass a resolution stating how it intends to deal with this error, as it would be required to do, if a similar finding was made by an investigator (see s. 239.2 (12) of the *Municipal Act*).

An edited version of the Staff Report for the September 27th meeting has been disclosed. I ask that any recordings of the closed session on September 27th or September 30th be released to the public, subject to the redaction of any parts for which solicitor/client privilege is claimed. I ask that the Minutes for the closed sessions on September 27th and September 30th be disclosed, subject to the redaction of any parts for which solicitor/client privilege is claimed. If there are any other closed staff reports relevant to 797 Victoria Road North that were submitted for the Council meetings on September 27th, September 30th or October 6th, I ask that they also be disclosed, again, subject to the redaction of any parts for which solicitor/client privilege is claimed.

3. Motions Must Be in Writing Prior to Vote

In his preamble during the October 6th special sitting of Guelph Council, the Mayor said that he had called the emergency meeting because a "procedural issue" had been brought to his attention. When asked by the person delegating whether there was a specific motion that council would be considering, the Mayor stated that the "procedural matter" would be either confirming what happened at last Thursday's Council meeting or not.

The City Clerk then explained that his role as Clerk is to record the proceedings of Council and that they are based on the rulings of the chair. He explained [19:43] that the in-meeting template was never and is never intended to form the official record of Council's decision and deliberations. Rather, it is intended as a tool to support Council's deliberations. He bases the Minutes on the whole encapsulation and the rulings of the Chair at a meeting as the final record of what occurred at that meeting.

The City Clerk's assertion that the written version of a motion is not intended to be the official version of Council's decision is, I submit, in conflict with the City's Procedural By-law [4.10, c)], which requires that:

> *"When a Councillor moves a motion or an amendment to a motion that is not included as part of the agenda package, that Councillor shall provide a copy of the motion to the mayor or chair prior to the vote being taken."*

It is clear that the Procedural By-law requires a Councilor to provide a written copy of the motion they are moving to the mayor. The Clerk describes the practice of Councilors "filling out little pieces of Paper" to add a bit of levity to the discussion, when he is actually describing Councilors complying with the Procedural By-law.

Surely, the requirement that motions be in writing is designed to avoid confusion as to Council's will, either when the vote is taken or when the resolution is minuted. By necessary implication, the written version of the motion is the "official" version. Otherwise, the Procedural By-law requirement that motion be submitted in writing would make no sense.

The City Clerk's revelation that he bases Council Minutes on "the whole encapsulation and rulings of the chair" would appear to be in conflict with the provision of s. 228(1) of the *Municipal Act* which defines the clerk's duty, *inter alia*, "to record, without note or comment, all resolutions, decisions and other proceedings of the council." The addition of the words "without note or comment" suggest that the role of the clerk is that of a scribe, not an interpreter and stand in sharp contrast to the City Clerk's understanding of his duty.

I ask that the City Clerk's office provide whatever authority it has identified in support of the Clerk's position that motions need not be in writing and that the written version of the motion is not the official version of Council's decision. Barring that, in my submission the City Clerk

should apologize for providing inaccurate information to Council on October 6th and the Clerk's Office should remind Council that its Procedural By-law requires that motions be in writing prior to the vote being taken.