

To: **The City Council of the City of Hamilton**

October 4, 2016

Re: LEGAL OPINION ON MOTIONS WITH RESPECT TO THE LRT

Introduction

The City Solicitor, retained me to provide advice with respect to two proposed motions relating to the Hamilton Light Rail Transit Project, which the Province of Ontario, in May 2015, announced it would fund in the City of Hamilton.

The following is a paraphrase from the "Executive Summary" portion of the Report, dated August 10, 2015, from the City Manager to the General Issues Committee, entitled: "Fostering the Light Rail Transit (LRT) Project (CM15014) (City Wide)":

The Provincial transportation agency, Metrolinx, the lead agency for the project, expects, with support from Infrastructure Ontario, to begin the procurement process in 2017, with construction commencing in 2019. In order to ensure that the City is able to meet tight deadlines for the project, a separate project office in the Planning and Economic Development Department dedicated to co-ordinating efforts with Metrolinx and engaging the broader community, will be necessary.

That August 2015 report anticipated that a Memorandum of Agreement (MOA) would be developed between Metrolinx and the City to scope out expectations such as costs, design, maintenance, operation, revenue-sharing, citizen engagement and approvals. As mentioned below, such a MOA was approved by Council and entered into by the City with Metrolinx, in a document dated March 8, 2016, as was a Real Estate Services Protocol, dated September 16, 2016.

The documentation in the possession of the City, including reports, minutes of meetings, correspondence and formal documents, relating to the LRT project, are numerous, and while I have not had the opportunity to review in detail all of the history of the City's decision-making to date, the City Solicitor, and Mr. Boodhoo, Solicitor, seconded to the City's Light Rail Transit Office, have certainly provided me with information sufficient to provide a legal opinion as to whether and how it would be in order for the Council to receive and vote upon the following proposed motions:

"to reaffirm acceptance of the money from the Province for the LRT."

"asking for a referendum on the LRT during the 2018 election".

Discussion of the Issues and Relevant Procedural Provisions

In her email to me of yesterday, the City Solicitor set out a summary chronology of some of the actions taken to date by the Council, including the decisions and execution of implementing documents referred to above, and reference to information on the City's website.

As demonstrated by the documents, and the language of the second motion quoted above, (to "reaffirm" acceptance of the money from the Province), it appears to be acknowledged that such latter decision has already been made by the Council, and that the City has already taken substantial action in pursuance of the LRT Project.

The issue which the City Solicitor has requested me to address, involves the provisions of the City's Procedure By-law No. 14-333 involving "reconsideration" by the Council of decisions previously made by it during its current term of office.

To summarize those provisions (ss. **3.11(18) and (21)(c)**):

3.11 (18) Motion to Reconsider

- (a) At any regular Council Meeting, after a matter has been decided by the Council...a Member of Council who voted in the majority may present a Notice of Motion to reconsider the matter...**
- (b) A motion to reconsider a decided matter shall require the approval of at least two-thirds of Council present.**

(21) The following motions are not debatable

(c) a motion to suspend the rules

The Rules do not address issues relating to "motions to affirm" or "reaffirm", or the "holding of a referendum", the latter presumably involving the putting of a question on the ballot at the regular election, next to be held in 2018.

Among the relevant factors to be taken into account in addressing the procedural issues raised, are the following consequences of decisions already made:

- Council decision-making arising from the Report of August 10, 2015, referred to above, includes the implementation of a City LRT Office, the hiring of staff and contracting for services, and similar actions taken by Metrolinx;
- the adoption and execution by the Council and the City corporation, respectively, of the MOA and the Real Estate Protocol referred to above with Metrolinx relating to the LRT;
- the City has bound itself to the provisions and obligations to which it has committed in the Real Estate Protocol.

-a decision by Council which could have the result of delaying the project for two years, until the holding of a "referendum", would cause financial harm, particularly in view of the contracts of employment and services already entered into, and in the context of actions taken by the City, Metrolinx and others in reliance upon decisions already made by the Council;

Analysis

(1) With respect to the "Motion to reaffirm":

A motion to reaffirm, or affirm, would appear, on its face, to involve simply another vote on the same issue during the same term of Council. However, it raises the issue of what is the purpose or need for the Council to consider again an issue which it has already decided, and what, if any, might be the consequences of the motion's loss in that vote.

The provisions for reconsideration in the Procedure By-law appear to be intended to apply in the context of the raising by one or more Members, or others, of questions respecting the merits of a decision already made, dealing with changed conditions, or addressing doubt cast on the validity, wisdom or propriety of previous Council decisions.

Here, a motion to affirm is particularly problematical, in view of the fact that the City, and Metrolinx, have already implemented previous authorities in entering into the MOA and Real Estate Protocol, and taking other actions, based on the previous Council decisions, which appear to have been valid and are not suggested to have been otherwise.

Although, as mentioned above, the Procedure By-law does not address a "motion to affirm", I conclude that it would be inconsistent with the By-law's intent, which is to provide for the orderly and principled administration of the government of the City, for the Council to now embark upon debate and voting on a matter which does not need to be addressed at this time, which could cause Council and public confusion, and, if unsuccessful, still could not have the effect of changing or invalidating lawful actions already taken by the City corporation in consequence of previous decisions made by Council. Ordinarily, motions for proposed Council actions are prospective in nature, and do not properly raise questions with respect to previous decisions made and implemented.

I would also conclude that, if the Council does purport to address the motion to affirm, in view of the possible impact of a negative vote, it would have to do so on the basis of a properly-moved reconsideration motion, which would require the approval of at least two-thirds of Council present.

Such a motion, if it is to be further considered, should be very specific in terms of the precise actions and commitments purported to be affirmed, and not simply refer to "acceptance of the money from the Province for the LRT".

In view of the long and complicated history of the City's dealing with the many and varied aspects of the LRT project, and actions taken on its behalf, as well as the impact of the project on

Metrolinx and others who have taken action in reliance upon previous decisions, and upon whose interests, a decision not of affirm could have a detrimental impact, I would strongly advise the Council not to proceed with consideration of, or voting upon, this motion.

(2) With respect to the motion “asking for a referendum on the LRT”

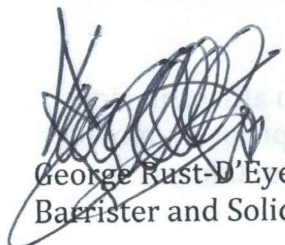
This proposed motion would appear to involve most or all of the problems raised above with respect to the first one, with the added apparent impact that presumably no further action would be taken by or on behalf of the City with respect to the LRT for a period of almost two years.

It is, once again, not clear precisely what is meant by “a referendum on the LRT”, presumably putting a question, in some form, on the municipal ballot, but the vote on which would not necessarily be binding on Council, and could not legally, in any event, purport to overturn, decisions and commitments already adopted by the City, and obligations with which it is legally required to comply.

The Council, and its predecessor Councils, have been elected to make decisions with respect to major municipal issues, and this Council has done so with respect to undertaking the development of the LRT to date, and, at least in the circumstances of the proposed motions, it would not be appropriate to suspend or cancel consideration and planning of the project without thorough consideration and legal advice with respect to the implications of doing so. Further, given that result of a referendum on the LRT in 2018 could be to suspend planning and implementation of the LRT project currently underway, the motion to introduce such referendum effectively constitutes a reconsideration of decisions made in this term of Council to move forward on the LRT project.

In any event, for the purposes of addressing the procedural issue which I have been asked to discuss, I believe that a ‘reconsideration motion”, and a two-thirds vote, would also be required in order for the Council to address the second proposed motion as well, on the grounds upon which I have made a similar conclusion with respect to the first proposed motion.

I trust that this opinion letter will be of assistance to City . I will be pleased to provide whatever further assistance which may be required by the City.



George Rust-D'Eye,
Barrister and Solicitor