CONFIDENTIAL LEGAL OPINION

TO: The Hintonburg Community Association

FROM: Stéphane Émard-Chabot

DATE: June 3rd, 2019

RE: Various Questions Regarding Magee House

The partial collapse of Magee House on July 24, 2018 has generated a number of concerns for residents and businesses of the Hintonburg area. In response to the Hintonburg Community Association's questions set out in an email from Ash Deathe date May 7, 2019, I am pleased to provide the following opinion setting out the current state of the law and options for the Board's consideration. I have taken the liberty of rewording the questions posed in order to better reflect the legal principles at play.

Issue 1 – Does a municipality have the legal authority to expropriate a property designated under the Ontario Heritage Act (the OHA) to save it from demolition by neglect? If so, is there a precedent in Ontario where a municipality has exercised its authority in this way?

Section 36 of the OHA grants municipal councils the authority to acquire rights in individual properties designated under Part IV of the Act (an identical authority is granted for properties in heritage districts designated under Part V). Council's authority can be exercised either by agreement with the property owner – through the purchase or the lease of a designated property under subsection 36(1) – or without the owner's consent, through expropriation under subsection 36(2):

> **Expropriating by-law**
>
> (2) Subject to the *Expropriations Act*, the council of every municipality may pass by-laws providing for the expropriation of any property designated under this Part and required for the purposes of this Part and may sell, lease or otherwise dispose of the property, when no longer so required, upon such terms and conditions as the council considers necessary for the purposes of this Part.

Although it is difficult to ascertain with certainty, it does not appear that municipalities have made extensive use of their expropriation powers to preserve heritage buildings. In Ottawa, there are only a handful of examples and these few cases arose at a time when municipal councils did not have the authority to reject outright an application to demolish a heritage building.

Indeed, prior to 2005, even when an application to demolish had been denied by a municipal council, the denial was only valid for a 180-day period. Once this period expired, the owner obtained an automatic and absolute right to demolish. Municipalities essentially had a 6-

month window to decide whether or not to expropriate the property, otherwise the owner could proceed with demolition. Since 2005, however, a council's rejection of a demolition application under the OHA (if upheld through the appeal process) is permanent. The systematic need to consider expropriation in order to save a designated building has essentially disappeared, and the political appetite to expropriate seems to have faded with it (see, for example, the cases of Somerset House or Our Lady School).

Not surprisingly, there are very few reported judicial decisions on the matter of expropriation of heritage structures. Where the matter does come up as part of the court's deliberations, it is only a tangential matter addressed indirectly by the court.

The apparent lack of political will to use the provision, and the fact that there has been little judicial consideration of the issue, does not alter the broad language of 36(2) and a municipality's ability to expropriate in order to preserve its built heritage.

Under general principles of expropriation law, the expropriating authority must cite a valid purpose in order to begin the expropriation process. Subsection 36(2) of the OHA is intended to provide that legitimate purpose. As long as the municipality deems that the expropriation is "required for the purposes" of Part IV or V of the OHA, it can proceed. The "purpose" of the OHA was specifically considered by the Court of Appeal for Ontario in a different context but it is relevant in interpreting a municipality's expropriation powers:

> It should be said at the opening that the object and purpose of the *Ontario Heritage Act, 1974* (Ont.), c. 122, is clear. It is to preserve and conserve for the citizens of this country, inter alia, properties of historical and architectural importance. The Act is a remedial one and should be given a fair and liberal interpretation to achieve those public purposes which I have recited.[1]

As a result, a municipal council has the ability to expropriate for the purposes of preserving and conserving properties of historical and architectural importance. In this case, given the demonstrated inability of the owner (for lack of financial resources or otherwise) to care for Magee House, I am of the opinion that the City of Ottawa would have the right to expropriate the property in order to preserve what remains of the structure. The only precondition to proceeding with an expropriation is the political will to do so.

The Association also asked whether there were precedents in Ontario that could be identified. I have conducted a search of legal databases. As indicated above, very little was identified as a result. Almost all the cases centre on the heritage designation process. General internet searches using various search engines also produced very little by way of relevant results. Without undertaking extensive research of individual municipalities, it will not be possible to point to specific illustrations. Furthermore, this process would not change the legal analysis provided to you.

---

[1] *St. Peter's Evangelical Lutheran Church v Ottawa*, 1980 CanLII 70 (ON CA). Although the decision was overturned on appeal before the Supreme Court of Canada, the Supreme Court supported the Court of Appeal's interpretation of the purpose of the OHA: *St. Peter's Evangelical Lutheran Church v Ottawa*, [1982] 2 SCR 616, 1982 CanLII 60 (SCC)

Issue 2 – What other options does the city have—for example can they make the repairs themselves and put a lien on the building?

The City of Ottawa has two complementary sets of rules at its disposal to address physical issues at Magee House: the provincial *Building Code Act* (BCA) and its own *Property Standards Bylaw* (PSB). In fact, the PSB is an optional layer of regulation that is explicitly permitted by the BCA. Ottawa has therefore exercised its discretion and adopted a PSB. There is some inevitable overlap between the two sets of rules but, regarding substance, the BCA addresses more severe structural issues while the PSB sets out a number of specific, more detailed maintenance standards.

With respect to the City's ability to undertake work and recover the costs through a lien on the property – potentially leading to a forced sale over time if it remains unpaid, the BCA and the PSB both provide for this remedy.

A key difference between the BCA and the PSB is how the rules are administered. The local PSB is enforced by municipal inspectors while the BCA requires the appointment of a Chief Building Officer who carries significant responsibility with respect to the structural integrity of buildings.

Orders issued under the PSB can only be appealed by the property owner or the resident. However, Orders issued under the BCA can be appealed to the Court by any "aggrieved party" under section 25 of the Act. This concept is loosely defined and is meant to provide an opportunity for members of the public that are affected negatively by a decision of the Chief Building Officer to challenge a decision in Court within 20 days of the Order.

This right of appeal of an "aggrieved party" could be of interest to the HCA as this section could give the Association the opportunity to challenge the decision to issue a demolition permit under the BCA without prior Council approval. A demolition permit must conform with all applicable statutes, including the OHA. Theoretically, a permit could therefore not be issued without Council permission – either authorizing the demolition under the OHA or rescinding the Part IV designated status.

The 2017 case of *Valastro v City of London* is interesting in that a private citizen used section 25 of the BCA to challenge the demolition of heritage buildings in the context of a redevelopment approved by municipal council. The Court ultimately sided with the municipality because the council had expressly opted not to designate the buildings, thereby conforming with the BCA requirements. However, it does illustrate the potential of this avenue.

Although this final point was not raised in your questions, you should note that, as long as the Chief Building Officer and the City acted in good faith, they cannot be held liable should "demolition by neglect" be the final result for Magee House.

Issue 3 – How might the HCA (and possibly the BIA, or other appropriate individual) pursue legal action against the owner of The Magee House or the City to reinstate access to the sidewalk and/or force repairs? What considerations should be taken into account?

a) The Law of Nuisance

The first possible legal recourse against the owner of Magee House or the City for the ongoing sidewalk closure would be under the principle of "nuisance". Nuisance is divided into two distinct categories – private and public – each with its own legal test.

Private nuisance occurs when a property owner undertakes activities that cause physical injury to another person's land or substantially interfere with the use or enjoyment of that land. This typically occurs when an activity produces dust, noise, water contamination, etc. The concept of private nuisance was examined thoroughly by the Court of Appeal for Ontario in 2011 in *Smith v Inco Limited*. In that case, the Court quoted an earlier decision defining private nuisance as follows:

> A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

The Court made it quite clear that in a complex society such as ours, there has to be a certain amount of compromise:

> [39] People do not live in splendid isolation from one another. One person's lawful and reasonable use of his or her property may indirectly harm the property of another or interfere with that person's ability to fully use and enjoy his or her property. The common law of nuisance developed as a means by which those competing interests could be addressed, and one given legal priority over the other. Under the common law of nuisance, sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in the larger community. Sometimes, however, the party causing the adverse effect can be compelled, even if his or her conduct is lawful and reasonable, to desist from engaging in that conduct and to compensate the other party for any harm caused to that person's property. In essence, the common law of nuisance decided which party's interest must give way. That determination is made by asking whether in all the circumstances the harm caused or the interference done to one person's property by the other person's use of his or her property is unreasonable.

Public nuisance, for its part, occurs when an activity interferes with the public's interest at large, but particularly affects a member of the public. There is no specific injury to a person's land – simply a particularly strong effect on a given member of the public as a result of the activity. As stated by the Supreme Court of Canada in 1999 in *Ryan v Victoria (City)*:

> 52 The doctrine of public nuisance appears as a poorly understood area of the law. "A public nuisance has been defined as any activity which unreasonably interferes with

> the public's interest in questions of health, safety, morality, comfort or convenience": see Klar, supra, at p. 525. Essentially, "[t]he conduct complained of must amount to . . . an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference": See G. H. L. Fridman, The Law of Torts in Canada, vol. I (1989), at p. 168. An individual may bring a private action in public nuisance by pleading and proving special damage. See, e.g., Chessie v. J. D. Irving Ltd. (1982), 1982 CanLII 2918 (NB CA), 22 C.C.L.T. 89 (N.B.C.A.). Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway. See ibid., at p. 94.
>
> 53 Whether or not a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighbourhood.

The Magee House context is unique and the application of these principles is not entirely straightforward. Under the concept of *private nuisance*, only property owners who have suffered a substantial and unreasonable injury to their land or to the enjoyment of their land would be able to bring a lawsuit on the basis of a private nuisance.[2] The HCA or the BIA as organisations could not make this claim – it would have to be individual property or business owners. If the lawsuit were filed against the owner of Magee House, the plaintiffs would have to establish that the collapse of Magee House was an "activity" and not an unfortunate accident. Lastly, the fact that the collapse itself is not the cause of any damages but the resulting closure of the sidewalk means that there is an intervening factor between the cause and the effect, something not typically present in nuisance.

An action in *private nuisance* against the City would first have to establish that the City's activity, its decision to close the sidewalk, was unreasonable. Under the circumstances, this would be a steep uphill battle. In addition, municipalities enjoy certain defences to nuisance claims that make the case even harder to establish.

Under the *public nuisance* framework, the fact that the closure was required to ensure public safety also creates a significant legal hurdle to establishing liability on the part of the City, and it would be difficult to tie the collapse itself to the nuisance – as in the case of private nuisance.

b) The Law of Negligence

The other legal avenue open to those who have suffered losses would be a claim in negligence. To establish this claim plaintiffs must demonstrate that:

i. The owner of Magee House owed them a "duty of care", that the link between the plaintiffs and the owner (proximity; foreseeability of harm) was such that the owner had an obligation to take steps to protect their interests.

[2] The Supreme Court of Canada confirmed this basic approach in *Antrim Truck Centre Ltd. v Ontario (Transportation)*, [2013] 1 SCR 594, 2013 SCC 13 (CanLII)

ii. The owner failed in this obligation – that he did not act as a reasonable property owner would have.
iii. That the losses incurred by the plaintiffs resulted from the owner's negligence and that these losses were foreseeable.

Without access to more evidence, it is difficult to assess the likelihood of success of a negligence claim. However, at first glance, the case is slightly easier to make than the claim for nuisance. The test for negligence is more practical – more based on "common sense" – and if the owner had any suspicions (or should have had suspicions) that the building was structurally compromised, and took no remedial measures, there would be a good chance of establishing fault.

c) Practical Considerations

When considering launching any potential lawsuit, the law itself is not the only factor to consider. Practical considerations must also to be taken into account. The first is the fact that the case does not fall neatly into any established framework, be it nuisance or negligence. Arguments can certainly be made on both fronts, but the onus is on the plaintiff to establish all elements of the case. Of particular concern is proving the amount of damages to be recovered. Business losses are notoriously difficult to quantify and open to challenge by the defendants as any number of factors can influence an individual business' performance: local competition, construction and other disruptions, weather conditions, online reviews, etc. Preparing a solid case requires expert evidence which is an expensive proposition.

A second concern is the fact that the solvency of the owner of Magee House is not entirely clear. The ability to recover damages, should the plaintiffs win is also a key factor. There is simply no point in undertaking this process simply to obtain a symbolic victory with no reasonable prospect of recovering the costs involved and the damages awarded. The City is a much more attractive defendant but establishing a claim in nuisance would be difficult.

Lastly, the investment involved to undertake a lawsuit of this nature – both in financial and in human terms – is not insignificant. Going to trial on a case like this will likely take at least two years and the legal fees alone (with an experienced trial litigator) would top $100,000. Are the losses significant enough to warrant the investment in time, energy and money? More information on this point would be required to make a full assessment but, at first glance, this is doubtful.