

December 20, 2017

Delivered by email

The Honourable Mr. Chris Ballard, MPP
Minister of the Environment and Climate Change
11th Floor, Ferguson Block
77 Wellesley Street West
Toronto, ON M7A 2T5

Dear Mr. Minister:

**Re: Second Application by David Stearn For Reconsideration of the Environmental Assessment Act of the John Street Corridor Improvements – Municipal Class Environmental Assessment, significant new circumstances and new information making reconsideration appropriate
Your File: ENV1283MC-2017-1902**

We are the lawyers for Mr. David Stearn, the applicant in the above referenced matter.

We have received your letter of November 30, 2017.

Please consider this letter a second Application for Reconsideration to the Minister of the Environment and Climate Change of the approval of the John Street Corridor Improvements Municipal Class Environmental Assessment (“Project”) in December of 2012 to either require a reconsideration of the John Street Corridor Improvements Municipal Class Environmental Assessment (“MCEA”) or to refer the application for reconsideration to the Environmental Review Tribunal for a hearing.

The basis for this second request for reconsideration is two- fold:

- The Minister has the Jurisdiction to consider the Request for Reconsideration of David Stearn under section 11.4 of the Environmental Assessment Act to reconsider the 2012 Approval of John Street Corridor Improvements Municipal Class Environmental Assessment (“Project”)
- The Minister has an inherent jurisdiction to reconsider the 2012 Approval of John Street Corridor Improvements Municipal Class Environmental Assessment (“Project”)

Minister’s Statutory and Inherent Jurisdiction to consider the Request for Reconsideration of David Stearn

Section 11.4 of the *Environmental Assessment Act* provides the following:¹

Reconsideration of decisions

11.4 (1) If there is a change in circumstances or new information concerning an application and if the Minister considers it appropriate to do so, he or she may reconsider an approval given by the Minister or the Tribunal to proceed with an undertaking.

The Ministry's November 30, 2017 response to our office states:

Section 11.4 does not apply to a Minister's decision on a Part II Order request. Section 11.4 only allows the Minister to reconsider an approval given on an application for an environmental assessment (commonly known as an individual environmental assessment) submitted under section 5 of the EAA. Section 11.4 does not apply to a project commencing under a Class Environmental Assessment (Class EA). For a project proceeding under a Class EA, there is no application submitted and no approval given by the Minister.

We are of the view this statement is incorrect in law.

Section 13 of the EAA provides, in part:

Approval for class of undertakings

13 (1) A person may apply to the Minister to approve a class environmental assessment with respect to a class of undertakings.

...

Prohibition

(3) No person shall proceed with an undertaking with respect to which an approved class environmental assessment applies,

(a) unless the person does so in accordance with the class environmental assessment; or

(b) unless the Minister gives his or her approval to proceed under section 9 or the Tribunal gives its approval under section 9.1.

A City of Toronto staff report indicates that the Class EA would be subject to approval by the Ministry of the Environment.²

¹ R.S.O. 1990, c. E.18 ["EEA"].

² See Council Briefing, Transition to 2010-2014 Term, Item 3.9 (undated), online: https://www1.toronto.ca/city_of_toronto/city_managers_office/civic_engagement/council_briefings/files/pdf/1-3-19.pdf

Section 15 of the EAA falls under Part II.1 of the Act, which deals with “Class Environmental Assessments”. Section 15 clearly provides that section 11.4 applies with necessary modifications with respect to a class environmental assessment.³

Even if section 11.4 were found not to apply in this specific instance, the Minister likely has inherent jurisdiction to reconsider decisions that are made pursuant to the EAA. This is especially in light of the new evidence presented (i.e. the October, 2016 bicycle counts).

We submit that express statutory authorization is not required to vest the Minister with jurisdiction to reconsider decisions made pursuant to the EAA. Furthermore, there is nothing in the Act to indicate that the Minister’s determination of a request for reconsideration is to be final or conclusive.

The grounds for the request for reconsideration under either basis are as follows:

A. Denial of Natural Justice

1. The Minister denied Mr. Stearn natural justice by seeking submissions from the City of Toronto on Mr. Stearn’s original request for reconsideration of February 27, 2017 and not providing notice to Mr. Stearn of the request for submissions from the City by the Minister.

2. The Minister denied Mr. Stearn natural justice by receiving submissions from the City of Toronto on July 31, 2017 concerning Mr. Stearn’s original request for reconsideration and not providing Mr. Stearn an opportunity to respond to the City submissions prior to deciding to refuse the request for reconsideration of February 27, 2017.

A copy of the February 27, 2017 Request for Reconsideration to the Minister was served on the City solicitor for the City of Toronto and on the General Manager of Transportation Services for the City of Toronto by the solicitors for David Stearn.

On several occasions after filing the February 27, 2017 Request for Reconsideration David Stearn’s legal counsel called the offices of the Minister and made inquiries about what process the Minister would use to make his decision on the reconsideration request but received no response to those enquiries.

³ EEA, s. 15:

Application of Part II

15 Sections 6.2 to 11.4 and 12.1 apply with necessary modifications with respect to a class environmental assessment.

Our office wrote to the Minister of Environment on July 13, 2017, more than 2 weeks before the Minister received the written submissions of the City of Toronto of July 28, 2017, and requested the Minister do the following, *inter alia*:

- (a) Provide an explanation of the Ministry's decision-making process in this matter, including the criteria the Minister will use in deciding the substance of the application or referring the matter to the Environmental Review Tribunal;
- (b) Provide David Stearn with City of Toronto's responding submissions or correspondence to the Minister; and
- (c) Establish a meeting with the Minister, Mr. Stearn and his legal counsel to discuss the reconsideration request providing the same opportunity afforded to the proponent the City of Toronto.

The Minister never provided a substantive response to our firm's July 13, 2017 letter, until the letter from the Minister refusing the request for reconsideration dated November 30, 2017.

The Minister breached his duty to act fairly and failed, neglected and or refused to provide the most basic procedural fairness to David Stearn in his request for reconsideration.

B. The Minister misapprehended and ignored the circumstances under which the City of Toronto proceeded with the John Street undertaking and completed its detailed design.

David Stearns request for reconsideration was made to the Minister on February 27, 2017 with full notice to the City of Toronto.

In the media specifically on March 24, 2017 <http://www.cbc.ca/listen/shows/metro-morning/segment/12088778> the City of Toronto would have been made aware that if it proceeded with work and expense on the undertaking it did so at its own risk.

It is submitted that the City must establish to the Minister that it did not recklessly proceed with the work on the undertaking in full knowledge of the February 27, 2017 reconsideration request and the consequences of a successful reconsideration request.

David Stearn is only seeking a reconsideration of the John Street 2012 approval in respect of the portion of John Street between Adelaide Street West and Stephanie Street based on quantitative measurements of a change in the modal share on John Street. Further, the City's work for a majority of the undertaking between Front Street West and Adelaide Street West would be completely unaffected by the reconsideration request.

C. The City has failed to meet with, or even contact the Applicant David Stearn as promised in the City letter to the Minister of July 31, 2017

The Minister cites in its refusal of the reconsideration request of February 27, 2017 that the City undertook in its letter of July 28, 2017 to meet with Mr. Stearn to discuss the Project.

As at the date of this correspondence notwithstanding the passage of 6 months from the City's letter of July 28 and the Minister's admonishment to the City to honour its commitments to meet with Mr. Stearn no contact of any kind has been received from the City by Mr. Stearn or his solicitor.

D. The grounds for reconsideration outlined in the letters to the Minister from David Stearn's Counsel dated February 27, 2017 and July 13, 2017.

For the reasons stated above, the Minister has, and had, the jurisdiction to reconsider the Project and must consider the matters raised in the within correspondence and in the earlier reconsideration request of February 27, 2017 as expanded by our correspondence of July 13, 2017.

Further, Mr. Stearn is entitled to a measure of procedural fairness to review and address the submissions of the City of Toronto, in particular, its flawed logic and choice to ignore quantitative data demonstrating a significant increase in bicycle mode share on John Street since 2012.

Please acknowledge receipt of these reconsideration requests in writing.

Please advise in writing of the Ministry's decision-making process in this matter, including the criteria the Minister will use in deciding the substance of the application or referring the matter to the Environmental Review Tribunal.

Finally, please confirm in writing that you will provide copies of any submissions received by the City of Toronto, or other interested parties, in response to these reconsideration requests.

We are copying the City of Toronto Legal Department and Transportation Department and are requesting the simple courtesy of being copied on any future communications concerning this matter to the Minister or Ministerial staff.

Yours very truly,

ERIC K. GILLESPIE
PROFESSIONAL CORPORATION

Per:



Ian Flett

C: Brian Haley, City Solicitor by email
Barbara Gray, General Manager, Transportation Services by email
Joe Cressy, Ward 20 Councillor by email
Ward 20 Cycle Toronto Advocacy Group
York Quay Neighbourhood Association
Alpha School Parent Council
Toronto Island Public School Parent Council
Toronto Island Community Association
St Lawrence Neighbourhood Association
Palmerston Area Residents Association
Client