

TO:	CHAIR AND MEMBERS FINANCE AND ADMINISTRATIVE SERVICES COMMITTEE MEETING ON MARCH 26, 2012
FROM:	MARTIN HAYWARD CITY TREASURER, CHIEF FINANCIAL OFFICER
SUBJECT:	SHAMROCK SUBDIVISION – POSSIBLE AGREEMENT WITH PROPERTY OWNER
RECOMMENDATION	

That, on the recommendation of the City Treasurer the Civic Administration take the following actions with respect to property located on the south side of Exeter Road, west of Wellington Road, consisting of an area of 17 hectares subdivided into 34 roll numbers, known as Shamrock Subdivision (Plan 33M-272), and 595 Exeter Road, which currently has two (2) existing commercial buildings located on the premises:

- (a) **NOT PROCEED** with a third tax sale or vest the subject lands after any such tax sale at this time; and
- (b) **EXECUTE** an agreement substantially in the form attached as Appendix A to this report and to the satisfaction of the City Solicitor

PREVIOUS REPORTS PERTINENT TO THIS MATTER
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Board of Control – December 9, 2009 – Request for Expressions of Interest for Properties That Did Not Sell At a Municipal Tax Sale

Finance and Administration Committee – November 16, 2011 – Failed Tax Sale – Shamrock Subdivision

BACKGROUND

Recommended Resolution of Tax Arrears and Future Development of the Shamrock Subdivision

On November 21, 2011 the Committee of the Whole meeting in camera resolved as follows:

“That, on the recommendation of the Managing Director-Corporate Assets and the Director of Planning on the advice of the Manager – Realty Services, with the concurrence of the City Solicitor and the Manager of Revenue and Taxation, the Civic Administration BE DIRECTED to take the following actions with respect to property located on the south side of Exeter Road, west of Wellington Road, consisting of an area of 17 hectares subdivided into 36 lots, known as Shamrock Subdivision (Plan 33 M-272) and 595 Exeter Road, which currently has two (2) existing commercial buildings located on the premises:

- (a) Not vest the subject lands; and

- (b) Enter into negotiations with the existing property owner to remediate the lands with consideration of the outstanding taxes being offset against the cost of the site remediation.”

As directed in the above resolution, City Staff entered in discussions with the current property owner. Based on those discussions, City Staff have prepared a legal agreement for Council's final approval with the following components:

1/ The owner of the property must remediate the site excluding roll number 060.580.32.00 (595 Exeter Road) at his own cost and obtain a written acknowledgement in accordance with paragraph 168.4(3.1)(3) of the *Environmental Protection Act* for the rest of the site indicating that a record of site condition has been filed and the owner must provide proof of such filing to the City.

2/ The owner must build a control wall at his own cost at the back of roll number 060.580.32.00 (595 Exeter Road) at the boundary line to prevent infiltration of contaminants to the rest of site in accordance with requirements as specified by the City Engineer.

3/ The owner must remove all debris at his own cost from the site surface in accordance with the requirements of City By-laws.

4/ When the owner has completed items # 1, #2, and #3 above the City will write off the property taxes outstanding on the property referred to in #1 (excluding roll # 060.580.32.00) in accordance with the provisions of section 354 of the *Municipal Act, 2001* as of the date of filing of a Record of Site Condition (Taxes would accrue in accordance with the *Municipal Act, 2001* subsequent to the date of the filing of the record of site condition. On February 1st 2012 tax arrears on the land referred to in item #1 above totalled \$3,933,691.36. The tax arrears on roll number 060.580.32.00 totalled \$1,657,113.33.)

As described under the tax sales section later in this report the City has attempted to sell the subject property three times – twice as tax sales in accordance with the *Municipal Act, 2001* and once in accordance with council approved procedures for properties that do not sell at a tax sale. Because of potential environmental liability the City has been unable to sell the properties to third parties and has also concluded that the site should not be vested in the City's name. It therefore appears that that the land will sit undeveloped indefinitely unless the City is prepared to enter into an agreement as described above with the current property owner.

The current owner has indicated that he believes he will be able to remediate the above described land and file a record of site condition and will do so at his cost if the City will remove the existing accumulated taxes and penalties on the parcels. The filing of the Record of Site Condition would indicate that all environmental issues have been addressed to the satisfaction of the Ministry of the Environment and would permit the land to be developed to generate taxation revenue into the future. Under the recommended agreement taxes would be written off in accordance with the *Municipal Act, 2001* only if and when proof of the filing of a record of site condition is provided and the other requirements listed above are fully complied with.

Section 354 of the *Municipal Act, 2001* only permits the write-off of property taxes by municipal councils in certain specific, restricted circumstances. Subsection 354(3) requires property to have been through an unsuccessful tax sale under Part XI of the *Municipal Act, 2001* prior to a tax write-off. As has been indicated the subject properties have been through two such sales.

The property owner does not believe it will be possible for him to register a record of site condition on roll number 060.580.632.00 (595 Exeter Road), and therefore that parcel has been excluded from the agreement proposed in this report. The property owner has been advised that if and when the rest of the site has a record of site condition filed and the rest of the above proposed agreement have been complied with then Civic Administration would be prepared to discuss the status of roll number 060.5580.632.00 and potentially make further

recommendations to Council with respect to that parcel. In the meantime, however, the City would reserve the right to take any actions permitted by legislation for the recovery of taxes with respect to the roll number at the site excluded from this proposed agreement.

Any tax write-off recommended in this report will have no impact on City expenditures or the City's annual budget. The municipal portion of the outstanding property taxes at this site has already been expensed in the City's financial statements in the Allowance for Uncollectible taxes in past years.

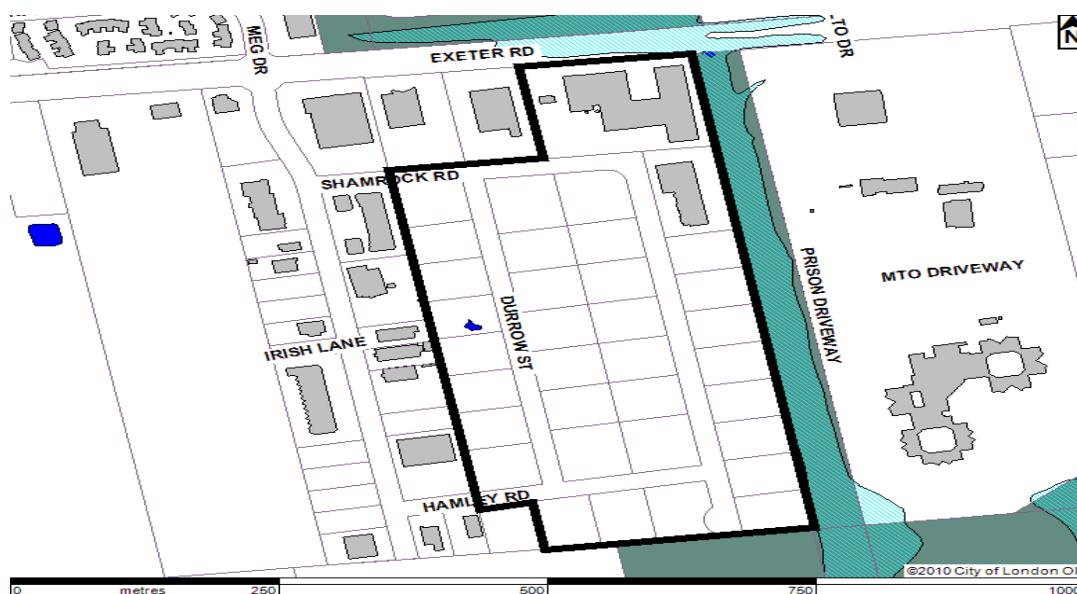
The site consists of 34 separately assessed lots as shown in the property description section of this report. The lot to be excluded from this agreement is the most north easterly lot at the site. As indicated in the diagram in Description of Property section of this report that lot includes buildings.

General

The subject properties consist of 17 hectares of vacant industrial zoned lands with substantial debris and ground contamination as a result of years of illegal dumping. The property has been through two tax sales and the failed tax sale process conducted by the City of London. No interest has been received due to the cost of remediation which is estimated to exceed the market value of the lands. The balance of this report provides history and results of various assessments to determine the extent of the contamination.

Description of Property

The subject property is located on the south side of Exeter Road, west of Wellington Road. The lands consist of an area of 17 hectares subdivided into 36 lots known as Shamrock Subdivision (Plan 33M-272) and 595 Exeter Road which currently has two (2) existing commercial buildings located on the premises.



Historical Planning Information

An application for a Zoning By-law Amendment and Draft Plan of Subdivision Approval for the plan of industrial subdivision was received by the City of London in 1978. A report was presented to Planning Committee in March of 1979 recommending that the draft plan of

subdivision and Zoning By-law amendment be approved. Subsequently, the Zoning By-law amendment was approved by the Ontario Municipal Board on October 12, 1979.

An industrial plan of subdivision, for 56 industrial lots and 15 road widening and reserve blocks, was Draft Approved by the Minister of Municipal Affairs on August 23, 1979, subject to 16 Conditions of Draft Approval. Special Provisions for the Subdivision Agreement were approved by Council on April 17, 1990 and the subdivision agreement was registered in the Land Registry Office on July 5, 1990 as Instrument Number 212726. Schedule "E" of the agreement notes that the City holds cash security in the amount of \$108,743 against this plan of subdivision, none of which has been expended.

The subdivision agreement was amended in August 1991 to reflect updated municipal requirements and this revised agreement was registered in the Land Registry Office on September 27, 1991 as Instrument Number 248048.

Plan 33M-272, showing 37 industrial blocks, was registered in the Land Registry Office on September 27, 1991. Block 40 (widening block along Exeter Road) was dedicated to the Crown and the local streets within the plan were dedicated to the City on the face of the plan.

One industrial block at the southwest corner of the subdivision (21 Hamley Road / Block 9 Plan 33M-272) was sold by the City to an adjacent property owner through a previous tax sale conducted on September 15, 2005. The balance of lands within the subdivision, with the exception of the public roads, continue to be owned by Samuel John Shirley.

The roads within the subdivision have not been assumed by the City. Significant deterioration has occurred to the services that were previously installed and there are numerous outstanding servicing requirements that would have to be addressed prior to assumption.

Given the passage of time and the deterioration of the services, assumption of the subdivision is very unlikely.

Zoning

The subject lands which face Exeter Road are zoned Restricted Service Commercial 1 and 3 and the remaining lands are currently zoned Light Industrial 6 and 7.

The Restrictive Service Commercial zone provides for and regulates a range of moderate intensity commercial uses, and trade service uses, which may require significant amounts of land for outdoor storage or building space and a location on major streets.

The Light Industrial zone provides for and regulates a range of industrial and associated secondary uses. In addition to the uses permitted in the LI-1 Zone variation, an expanded range of industrial and complementary uses may be permitted, at appropriate locations, through other zone variations.

Tax Sales

The City has only one method of disposing of properties with substantial tax arrears in accordance with Part XI of the *Municipal Act, 2001*. Part XI permits the City to offer properties for sale at a tax sale without assuming ownership at a minimum price equal to the accumulated taxes and costs.

Where there are no bids for a property at a tax sale conducted under Part XI the City proceeds as set out in Council Policy 26(4) (attached as Schedule A) and in accordance with Part XI of the *Municipal Act, 2001*. Council Policy 26(4) permits City staff to conduct an Expression of Interest to identify individuals or corporations who may be interested in the property. Subject to Council's approval the City can then vest property and transfer or sell at a lower price, or even a nil price. Where property has significant environmental problems, the implications of joining the chain of ownership must be considered.

In accordance with Part XI of the *Municipal Act, 2001* a municipality has two (2) years following a failed tax sale to investigate and complete its due diligence process to determine whether there is any interest in vesting the property.

The subject properties have been offered for disposal as part of a tax sale conducted by the City in accordance with the provisions of Part XI of the *Municipal Act, 2001* on two occasions. The first tax sale was conducted on September 15th 2005. The second sale was conducted on September 30th 2008. Part XI of the *Municipal Act, 2001* requires that the minimum amount that a municipality can accept for any parcel of land must be the accumulated tax arrears and any costs associated with the sale.

The City received no bids for any of the subject parcels at either tax sale. It is speculated that the reason no bids were received was a result of the lands containing significant environmental concerns along with the large amount of accumulated taxes and costs associated with the properties which far exceed the market value of the lands.

In March of 2010, the City issued a Request for Expressions of Interest in accordance with the established policy on properties that do not sell at a tax sale and as recommended in a report to Board of Control on December 9th 2009.

The City received two submissions from the following Corporations:

1. St. Pierre Construction (2000) INC. (a company under the control of Samuel John Shirley)
2. Associated Brownfields Inc. and Baiocco Development Corporation.

Based on past experience, qualifications and resources, the City of London Tax Sale Committee opted to meet with Associated Brownfields Inc. and Baiocco Development Corp. to further review their submission.

In July of 2010, upon further due diligence review of the existing site conditions, Associated Brownfields and Baiocco Development Corporation notified the committee that it would not be pursuing the acquisition of the subject property.

Currently, the tax sale process has been re-initiated and re-registration has begun.

Environmental Assessment

In accordance with City Policy 26(4) following a failed tax sale, Phase 1 and Phase 2 environmental site assessments have been performed on the subject property to determine the level of contamination.

Soil investigations have determined several areas of low level contamination of pesticides, xylene and certain heavy metals are present in soil samples and other areas have revealed no contamination is present. There was no evidence that these contaminants are migrating off site now or in the future. Also present on the site is a significant amount of various construction materials which have been and continue to be dumped on the subject lands.

The property owner has been charged with failing to clear land of refuse contrary to the Clearing of Land by-law PW -9. The matter was before the courts on Monday October 25, 2010 and a trial date was set for March 1, 2011. As a result, the property owner was fined \$1,000 and found guilty. Approximately 30% of the property is covered in debris. Complaints regarding the condition of the property from surrounding commercial property neighbors continue to be received.

There continues to be dumping of household and construction material in the area. In addition, much of the area contains debris associated with the subject property owner's demolition firm. Municipal Law Enforcement Services has in the past employed surveillance cameras , however

given the size of the subject property, no charges were laid due to lack of compelling evidence. In order to promote continued investment in the area by surrounding businesses the entire property should be cleared of debris. The cost of this undertaking would be at least \$100,000 if performed by a third party contractor. This cost would be far less if performed by the property owner's demolition firm.

Based on technical studies performed by Golder Associates, it has been concluded that six lots located at the most southern portion of the subdivision have no contamination present.

Land Value vs Site Remediation Costs

The amount of tax arrears as of October 7, 2010 is listed as \$5,085,814.26. All the tax arrears which have accumulated at this site have already been recorded as an expense in previous years in the City's accounts and are included in the allowance for uncollectable taxes at year ends.

The Municipal Property Assessment Corporation (MPAC) has estimated a value for assessment purposes of \$1,787,600 for the subject lands. This value takes into consideration a downward adjustment from market value as a result of the contamination and lack of servicing issues. Should the environmental contamination issues be addressed and the lot servicing be completed an estimated range of \$75,000 to \$100,000 per lot could be realized over a period of several years. It should be noted that this projected revenue would still fall short of recouping costs associated with the site remediation cost.

The Environmental Site Assessments that the City has obtained indicate that there are potentially significant cleanup costs associated with the subject properties. The preliminary costs provided by the consultant for "worst case" scenario ranges between \$11 - \$21 million dollars. The remediation costs could be significantly lower depending on the land use of the property.

Liability Implications of Municipal "Road Ownership"

Sections 26(5) and 28(2) of the *Municipal Act, 2001* S.O. 2001, C.25, as amended, collectively establish that all road allowances on a registered plan of subdivision are considered highways. Accordingly the proposed roads on the plan of subdivision in question are highways, and therefore the City as the registered owner of the highways on the plan would continue to attract liability for any future dumping or pollutants that are added to the lands.

Should a third party, for instance the Provincial Ministry of the Environment, choose to issue an order to the City of London to clean either all or a portion of the pollutants which may reside on the property, the City could avail itself of the appeal process available through the Environmental Review Tribunal. At such a hearing, it would certainly be preferable to have a court order indicating that the highways were closed. An argument could then be made that the City at most had a theoretical right to the land underneath the proposed highways, but because they were never built, this right was not exercised, and the City at no point had care or control over the lands in question.

Potential Liability of Vesting Contaminated Properties

In order to transfer a property to an interested party following a failed tax sale, the municipality must "vest" or take legal title to the property for some period of time and becoming the "Owner" of a contaminated site can have significant implications for the municipality.

The *Environmental Protection Act* R.S.O. 1990 c. E. 19, as amended, gives the Minister of the Environment broad powers to issue control and clean-up orders in respect to properties that are the source of contamination. These orders can be issued against:

- The owner or previous owners of a property that is the source of a contaminant;
- Persons who are or were in occupation of a property that is the source of a contaminant;

- Persons who have or had charge, management or control of a property that is the source of a contaminant.

Accordingly, vesting a contaminated site in the name of the municipality, even briefly, exposes the municipality to the costs associated with any control or clean-up order issued by the Minister in connection with the property. In most cases, previous owners or occupants of the property will not be available to take responsibility for historic contamination on the site. The municipality should proceed cautiously when considering vesting a contaminated site.

Litigation Options to Force Clean-up

In the event that there exists at least one identified pollutant upon the lands, the *Environmental Protection Act* R.S.O. 1990, c. E.19, as amended, allows for the Ministry of the Environment to issue remedial orders and orders regarding preventive measures to address pollutants. Similarly, Section 100(1) allows a municipality to “do everything practicable to prevent, eliminate and ameliorate any adverse effects and to restore the natural environment.”

Thereafter a municipality can issue an order, pursuant to Section 100.1(1) of the EPA to either the owner of the pollutant or the person having control of the pollutant (which can be interpreted as the property owner – which might arguably include the municipality to the extent that the municipality owns the proposed roads). In the event that such an order is disputed, the dispute is heard by the Environmental Review Tribunal, a specialized administrative body.

Alternatively, the City could consider bringing a civil action against the current owner of the lands under the torts of nuisance, trespass, injurious affection or interference with the enjoyment of land so as to receive compensation, or perhaps specific performance so as to require the defendant to clean-up at least a portion of the lands. There would be a number of risks to such a scenario, including the fact that the City would have to acknowledge ownership of the highways and the existence of pollutants. As a practical matter the potential defendant may not have sufficient resources to cover whatever award is received, which would not help the City avoid paying for site remediation.

Regardless of whether the City initiated a clean-up and then issued an order to pay pursuant to the EPA, or alternatively litigated the issue in Superior Court, there remains no surety that any order could be enforced so as to result in the payment of monies. Suffice to say, if the Defendant has insufficient resources, there will be no way to recoup the costs associated with site remediation.

Given the extent of the contamination on this site and the risks associated with becoming the “Owner” of the property, the City Solicitor’s Office does NOT recommend that this property be vested by the City of London.

Current Status

The subject properties were re-registered for tax sale on December 17, 2010. One year after that date the City could proceed with a third attempted tax sale of the properties. After a failed tax sale the City has two years to investigate the property further and decide whether or not to vest the properties.

Failed Tax Sale Committee Members

This report was prepared with the assistance of David G. Munteer, Solicitor II, Mike Turner, Deputy City Treasurer, Gregg Barrett, Manager III, Land Use Planning Policy, Michael Losee, Manager Solid Waste, John Freeman, Manager of Purchasing and Supply, Jim Logan, Division Manager Taxation and Revenue, Orest Katolyk, Manager By-law Enforcement and Tony Van Rossum, Environmental Services Engineer.

PREPARED BY:	CONCURRED BY:
JIM LOGAN DIVISION MANAGER – TAXATION & REVENUE	MIKE TURNER DEPUTY CITY TREASURER
RECOMMENDED BY:	
MARTIN HAYWARD CITY TREASURER, CHIEF FINANCIAL OFFICER	

Attach.

cc: J. Fleming
J. Barber
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M. Losee
W. Abbott
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T. Van Rossum
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Schedule A

26(4) Procedures on the Treatment of Properties That Do Not Sell at Municipal Tax Sales

- 1) After a failed tax sale, circulate the property to internal departments and external agencies in accordance with City Policy for the sale of City owned properties in order to determine if they have any interest in the property should the City vest the property; (If there is internal or agency interest in a property this interest will be presented to the Finance and Administration Committee and Council for a decision as to whether or not to take ownership for the department or agency after conducting a Phase 1 and Phase 2 ESA as considered appropriate).
- 2) Conduct a Phase 1 Environmental Site Assessment (ESA).
- 3) Conduct a Phase 2 Environmental Site Assessment where appropriate as indicated by the Phase 1 ESA.
- 4) Report to the Finance and Administration Committee and if there is no internal department or external agency interest in the property, market the property by issuing a Request for Proposal which shall include an evaluation criteria with weighted scoring and a draft Agreement of Purchase and Sale.
- 5) Evaluate the submissions received from the Request for Proposal and prepare a recommendation report for the Finance and Administration Committee for the Proponent with the highest technical combined score for the property acquisition.
- 6) Vest property and convey to purchaser after approval of sale agreement by the Finance Administration Committee and Council.
- 7) Apply the proceeds of the sale against the tax arrears, deem any remaining tax arrears uncollectible and write off the remaining tax arrears upon registration of the notice of vesting of the property by the City.

NOTES:

- A) Clauses in a form satisfactory to the City Solicitor will be included in the Agreement of Purchase and Sale to clarify that the property is being sold by the City on an as is, where is basis and that the purchaser acknowledges that the City has regulatory liability limitation from MOE orders under the EPA for the time that it owns the property (for up to five (5) years).
- B) Where encumbrances of the Federal or Provincial governments or their agencies exist City staff will attempt to negotiate a resolution of the interest as part of or prior to Step 4.
- C) Where it is determined that a property has no environmental risks or liabilities or where the estimated market value will exceed the estimated costs of clean up, City staff may vest the property at any time and follow standard procedures for the designation and sale of surplus City land.
- D) Where it is determined that environmental risks or liabilities are so severe with respect to a property that the City should not vest a property even for the purposes of immediate transfer then a recommendation to take no action with respect to the property will be provided to Council by staff.