

2023-12-08



VALIDATION OF TITLE (CONSENT) APPLICATION  
COMMENTS TO THE COMMITTEE OF ADJUSTMENT  
PANEL 2

PLANNING, REAL ESTATE AND ECONOMIC DEVELOPMENT DEPARTMENT

Site Address: 138 Acacia Avenue  
Legal Description: Part of Lots 5, 6, 7 & 8, Registered Plan 4M-46  
File No.: D08-01-23/T-0005  
Report Date: December 8, 2023  
Hearing Date: December 12, 2023  
Planner: Cass Schlauzero  
Official Plan Designation: Inner Urban Transect, Neighbourhood  
Zoning: R1C[1260]

DEPARTMENT COMMENTS

The Planning, Real Estate and Economic Development Department **recommends refusal of** the application.

DISCUSSION AND RATIONALE

Section 57 (1) of the *Planning Act*, R.S.O. 1990, c.P.13, as amended, permits a committee of adjustment to issue a certificate of validation with respect to land that was previously conveyed and subsequently found to be in contravention of the current *Act* or a predecessor of it. At its hearing on November 14, 2023, the Committee of Adjustment adjourned the subject application to allow Legal Services staff the opportunity to review the application package and provide a subsequent legal opinion with respect to the purported prior contravention of the *Act*.

The subject property, along with 136 Acacia Avenue, were subject to a previous application seeking consent from the Committee for a lot line adjustment. Staff recommended refusal of the application on the grounds that there was not sufficient evidence to demonstrate that 136 and 138 Acacia had not merged on title and were indeed separate parcels of land. At its hearing on May 17, 2023, the Committee adjourned the application sine die.

Planning Services and Legal Services staff reviewed the subject application package and the research findings prepared by staff for the prior consent application, as they relate to the history of the creation and transfer of associated parcels of land.

136 and 138 Acacia Avenue are comprised of parts of lots 5 through 8 on Plan 4M-46

(see Figure 1), which was registered in December 1914. The Plan shows this area of Rockcliffe Park as being comprised of largely rectangular lots, generally with 36 to 50 feet of frontage, with most being 90 feet deep.

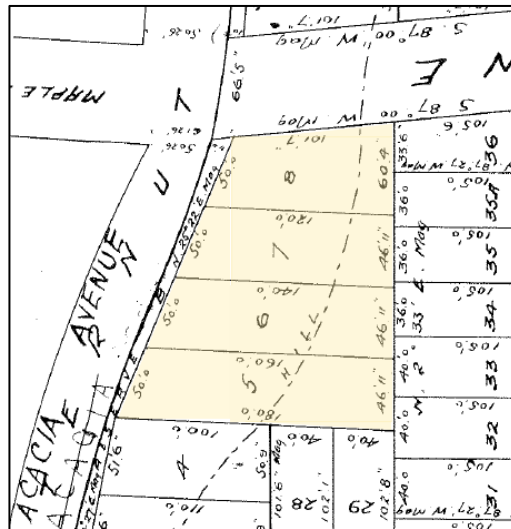


Fig. 1: Lots 5 - 8 on Plan 4M-46, registered in 1914.

An easement for the Ottawa Electric Railway (OER) over several lots on Plan 4M-46, including parts of lots 5 through 8, was registered as Parcel 1787 in December 1937. Registration of the easement did not have the effect of severing the parcel from any abutting lands or creating a conveyable parcel of land. In June and August 1944, parts of lots 5 through 8 were removed from Parcel 1787 and re-entered to the Parcel Register as Parcels 2317 and 2345, respectively. This method of parcel creation appears to pre-date any provincial planning legislation and therefore staff deem it to have had no impact on validity of title. The eastern and northern limits of these parcels abutted the OER easement lands (see Figure 2).

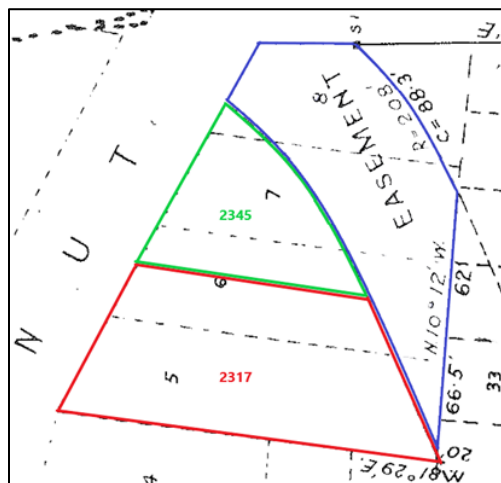


Fig. 2: Approximate configuration of Parcels 2317 and 2345 overlaid onto Plan 4M-80 (registered 1947).

Plan 4M-80 was registered in June 1947 and was comprised of large estate lots that generally represent the current lot configuration of Rockcliffe Park along Maple Lane, Maple Place, Juliana Road, Beechwood Avenue, and portions of Wood Avenue and Roxborough Avenue. The lots along Acacia Avenue were excluded from Plan M-80 and subsequent development along this road largely reflected the previous Plan 4M-46.

Parcel 2733 (138 Acacia Avenue) was registered as a conveyable parcel of land in August 1947 and transferred to Acacia Realty Ltd. The parcel's irregular shape reflects its creation from the remnant parcels of lots 5 through 8 on Plan 4M-46 still subject to the OER easement and excluded from Parcels 2317, 2345 and Plan 4M-80 (see Figure 3).

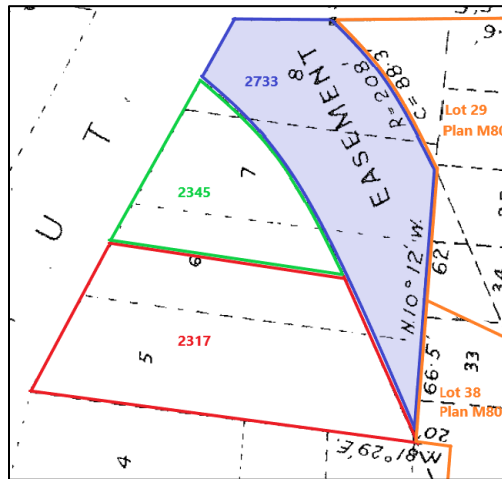


Fig. 3: Parcel 2733 (later 138 Acacia Avenue) abutting Parcels 2345, 2317, and Lots 29 & 38, Plan 4M-80.

Parcel 2733 and Lot 38 on Plan M80 were acquired by Ethelwynne Kemp via a single transfer in July 1948. Because Parcel 2733 was not a whole lot on a plan of subdivision and had never been subject to a previous severance from another parcel, it merged on title with Lot 38. The new parcel was registered as Parcel 3008 (see Figure 4).

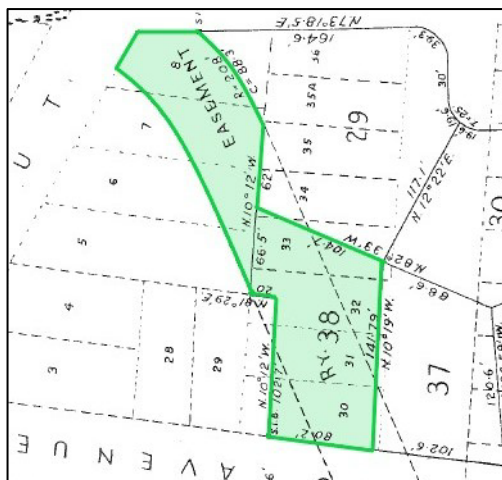


Fig. 4: Parcel 3008, comprised of former Parcel 2733 and Lot 38, Plan 4M-80.

In March 1955 a portion of Parcel 2317, corresponding with parts of Lots 5 and 6 on Plan M-46, was released. The remainder of said parcel, together with all of Parcel 2345, were re-entered into the Registry into Parcel 4511, now 136 Acacia Avenue. These actions also pre-dated any provincial planning legislation and staff deem it to have had no impact on validity of title to 136 Acacia Avenue. The OER easement over most of Parcel 3008 was released in June 1959. In July 1961, E. Kemp conveyed a portion of Parcel 3008, corresponding with the former Parcel 2733 and subsequently registered as Parcel 6089, to Gordon Crean. Parcel 6089 would later be addressed as 138 Acacia Avenue. E. Kemp retained ownership of Lot 38 on Plan M80.

The acquisition of Parcel 6089 by G. Crean, who also owned the abutting Parcel 4511, marked the beginning of 136 and 138 Acacia Avenue existing under common ownership (see Figure 5). The parcels have since been conveyed together to several subsequent owners, with no evidence that either parcel existed or was intended to exist independently of the other as of the 1961 transfer.



Fig. 5: Parcels 4511 (March 30, 1955) and 6089 (July 13, 1961). Parcels 4511 and 6089 reflect the configuration of 136 and 138 Acacia Avenue from July 13, 1961 to present.

At the time part of Parcel 3008 was conveyed from E. Kemp to G. Crean, s.26 (1) and (2) of the *Planning Act*, R.S.O 1960, addressed conveyance of land and part-lot control within an area of subdivision control:

*26. (1) The council of a municipality may by by-law designate any area within the municipality as an area of subdivision control, and thereafter no person shall convey land in the area by way of a deed or transfer on any sale, or enter into an agreement of sale and purchase of land in the area, or enter into any agreement that has the effect of granting the use of or right in land in the area directly or by entitlement to renewal for a period of twenty-one years or more, unless the land is described in accordance with and is within a registered plan of subdivision, and the council may, in the by-law, designate a registered plan of subdivision or part*

*thereof which shall be deemed not to be a registered plan of subdivision for the purposes of this subsection.*

*(2) The by-law may provide that where land is,*

*(a) within a registered plan of subdivision; or*

*(b) within a registered plan of subdivision, or a part thereof, designated in the by-law,*

*no person shall convey a part of any lot or block of the land by way of a deed or transfer on any sale, or enter into an agreement of sale and purchase of a part of any lot or block of the land, or enter into any agreement that has the effect of granting the use of or right in a part of any lot or block of the land directly or by entitlement to renewal for a period of twenty-one years or more; and when the by-law contains any such provision, no person shall contravene the provision.*

Assuming that Rockcliffe Park was subject to subdivision control at the time, given the previous registration of two plans of subdivision in the village (M46 and M80), s.26 (1) through (3) would have applied to and thereby prohibited the conveyance of Parcel 6089 from E. Kemp to G. Crean.

Exceptions to the above were subsequently outlined in s. 26 (3):

*(3) Nothing in subsection 1 or 2 prohibits any conveyance or agreement respecting land,*

*(a) if the land is ten acres or more in area and the remnant, if any, remaining in the grantor is also ten acres or more; or*

*(b) if the land is the whole part remaining to the grantor of one parcel described in a registered conveyance to him; or*

*(c) if the consent,*

*i. of the planning board of the planning area in which the land lies, or*

*ii. where the land lies in more than one planning area, of the planning board designated by the Minister from time to time, or*

*iii. where there is no planning board, of the Minister,*

*is given to the conveyance or agreement.*

No evidence was found that consent had been given to E. Kemp to convey a portion of Parcel 3008 to G. Crean; therefore, the exception under s. 26 (3)(c) could not apply. Further, because E. Kemp had acquired both Parcel 2733 and Lot 38 on Plan M80 via a single transfer, with those lands registered and described as one parcel (3008), she did not benefit from the exception under s. 26 (3)(c)—she did not retain a “whole part...of one parcel” previously conveyed to her after the transfer of Parcel 6089 was complete.

Based on the above, staff have determined that the conveyance of Parcel 6089, now addressed as 138 Acacia Avenue, was completed in contravention of s.26 (2) of the *Planning Act* R.S.O. 1960 and that Validation of Title is required to correct the contravention.

Section 57 (6) of the current *Planning Act* stipulates that a validation of title shall not be issued unless the land in question conforms to the criteria that apply to the granting of consents under s. 51 (24), given that approval has the effect of allowing a conveyance of land or creation of a new parcel of land. The criteria include but are not limited to regard to whether the application conforms with an official plan, and to the proposed lot shape and dimensions.

Section 11 of the Official Plan defers to the Zoning By-law (ZBL) to aid in implementation of the policies in the Plan. As such, compliance with the Zoning By-law is to be considered when evaluating a plan of subdivision, consent, or validation of title. At approximately 13.3 metres wide, per the definition of **lot width** under Section 54 – Definitions of the ZBL, the lot does not comply with the minimum required lot width of 24.5 metres for lots in the R1C subzone, per Section 156, Table 156A of the ZBL.

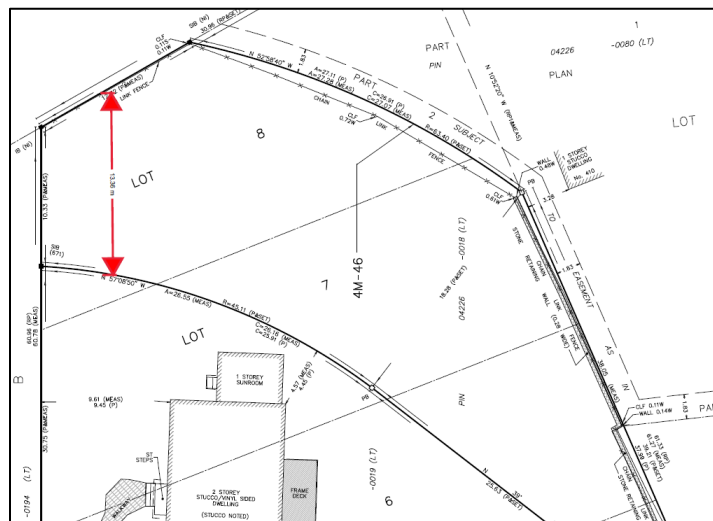


Fig. 6: approximate lot width of 13.36 metres (in red) of 138 Acacia Avenue

Typically, when an application for consent for severance proposes to create a severed and/or retained parcel that does not comply with applicable ZBL provisions related to lot width and/or area, a concurrent minor variance application is filed to regularize the deficiencies. Approval of the consent is conditional upon approval of the related minor variances.

S. 57 (5) of the *Planning Act* permits conditions of approval to be imposed on a validation of title application. However, a condition of approval requiring an approved minor variance for a reduce lot width could not be imposed on the subject application given that the applicant cannot not apply for a minor variance for the subject property until a validation certificate is issued and ownership of the property is legalized. Conversely, the

validation certificate could not be issued until the non-complying lot width is regularized by way of an approved minor variance.

Based on the above non-conformity with the minimum lot width requirement under the ZBL, and the inability for the lot width to be regularized via a minor variance, staff are not satisfied that the application for validation of title satisfies the criteria under s. 51(24) of the *Act* as it relates to having regard for the Official Plan and with respect to lot size and dimensions, and thereby **recommend refusal** of the application.

### **ADDITIONAL COMMENTS**

#### **The following legal opinion was provided by Garrett Schromm, Associate Legal Counsel to the City Manager's Office:**

The applicant seeks a certificate of validation of title for lands municipally known as 138 Acacia Avenue. It is argued that the conveyance from Kemp to Crean of 138 Acacia was ineffective because it failed to comply with s. 26 (2) of the *Planning Act* in the Revised Statutes of Ontario 1960, which prohibits conveyance of a part of any lot or block of land within a plan of subdivision. This prohibition only applies where the municipality has enacted a subdivision control by-law that contains the said prohibition against part-lot conveyances. The applicant has not provided evidence that such a by-law existed in 1960 in the former municipality; however, it is reasonable to assume that such a by-law existed given that subdivision plans were approved for this area before and after the 1961 date in question.

The 1960 *Planning Act*, at subsection 26 (3), provides an exemption to the aforementioned prohibition (see previous excerpt). There is no evidence that the 1961 conveyance of Parcel 6089 (138 Acacia Avenue) from Kemp to Crean was done with a consent, so the exception under s. 26 (3)(c) does not apply.

I considered whether the exemption in 26 (3)(b) applies, i.e. whether this was a conveyance of land that was the same as one parcel described in the registered conveyance by which Kemp obtained title. Here, Kemp received all of what is now 138 Acacia Avenue from the previous owner in 1948, but she received it in one transfer (Instrument 29392) together with Lot 38 on Plan M80. The wording of the legislation speaks to "one parcel described in a registered conveyance".

I would regard the entirety of Parcel 3008, the lands described in Instrument 29392, to be "one parcel" and accordingly it is my opinion that she was not entitled to rely on the exception under s. 26 (3)(b) to convey the 138 Acacia Avenue lands without also conveying Lot 38, Plan M80.

Accordingly, none of these exceptions apply and it is probable that the applicant is correct that there was a contravention of the *Planning Act*, R.S.O 1960, as a result of the 1961 transfer from Kemp to Crean. This is the contravention that the applicant is seeking to retroactively validate.

On this basis, good title for 138 Acacia Avenue never transferred to Crean, and 138 Acacia Avenue never merged with 136 Acacia Avenue. Notwithstanding that the parcel register for 138 Acacia Avenue, after 1961, showed Crean and his successors in title as the owner of that parcel, it in fact (legally) remained in the ownership of Ms. Kemp and, following her death, passed to her estate. For the purposes of the Rockcliffe Park Heritage Conservation District Plan, 138 Acacia Avenue was never an “existing larger lot with a Grade I building”.

If Committee approves the validation certificate sought, it will create a right to continue to deal with 138 Acacia Avenue as an independent parcel regardless of the ownership of 136 Acacia Avenue (i.e. “once a validation, always a validation”).

The application for validation of title must be considered against the same test as for a consent to sever (per s. 57 (6) of the current *Planning Act*) and a Committee may approve the validation subject to conditions (per s. 57 (5) of the *Act*).

As noted above, the proposed 138 Acacia Avenue lot does not comply with current Zoning By-law provisions related to minimum lot width requirements for a lot in the R1C subzone. The application is to be considered based on current Official Plan conformity and, subsequently, compliance with the current Zoning By-law, and not based on the policy documents in place at the time of the contravention.

If this were an ordinary severance application, the Committee might condition an approval with a requirement to obtain a minor variance to bring the proposed lot into zoning compliance. However, since the applicant does not have good title to the subject property, they cannot properly apply for a minor variance for that parcel, or for a lot line adjustment to the parcel (in order to obtain zoning conformity), until the validation certificate has been issued and their title to 138 Acacia Avenue has been confirmed. However, since the condition to obtain a minor variance or lot line adjustment would be a pre-condition to be cleared before issuing the validation certificate, they could not obtain a validation certificate on this basis.

It will be open to the Committee to refuse the validation application with respect to 138 Acacia, based on the recommendation of Planning staff. **However, if the Committee is inclined to approve the application, the Committee could choose to approve it subject to a condition requiring that the 138 Acacia lands not be conveyed separately from the 136 Acacia lands.**

This effectively corrects title and merges these two parcels by ensuring that future ownership over the parcels will be undivided. Further, the resulting larger lot would be in compliance with the Zoning By-law. While the applicant could later apply to sever this larger lot, it is likely that any such severance would contravene the Heritage Conservation District Plan policy related to preservation of large lots with Grade I buildings given that it would legally be one lot, together with 136 Acacia and its associated Grade I building. By extension, a proposal to sever the lot would contravene the Official Plan, and thereby not satisfy the criteria for severance under s. 51 (24) of the *Planning Act*.



The applicant appears to be seeking an “order” authorizing the committee to consider a concurrent lot line adjustment:

“We are seeking an Order from the Committee of Adjustment pursuant to Sections 57 (8) and (9) of the Planning Act as follows:

That 138 Acacia Avenue Parcel 6089, be deemed to be a separate conveyable property under the Planning Act for the purposes of bringing an application to the Committee in order to obtain Consent under s.53 of the Act to realign the property boundary separating 138 Acacia Avenue from 136 Acacia Avenue to regularize the shape of the respective lots.”

The Committee does not have authority to issue such an order (s. 57 (8) and (9), referred to by the applicant, is referring to a Minister’s order, which is not applicable here).

### **Infrastructure Engineering**

138 Acacia Avenue was the subject of a consent application in early 2023, whereby the applicant proposed an adjustment to the lot line shared by 136 Acacia Avenue. At its hearing on February 1, 2023 the Committee requested that the applicant provide a geotechnical report for staff review prior to the March 15 hearing. The report was received on March 6 and subsequently reviewed by Engineering staff, who concurred with the report’s conclusion that the that the severed parcel is considered developable from a geotechnical standpoint.

Given that the criteria for evaluating a validation of title application and consent application are the same, engineering staff recommend that the Committee impose a condition requiring submission of a geotechnical report.

### **Transportation Engineering**

Any private approach must be at least 6.0 metres from an intersection and 0.3 metres from the adjacent property line to comply with the Private Approach By-Law.

### **Forestry**

Future development on the subject property is likely to have impacts on private and/or jointly owned trees. Policy 4.8.2 of the Official Plan states that Planning and development decisions, including Committee of Adjustment decisions, shall have regard for short-term, long-term, and cumulative impacts on the urban forest at the neighborhood and urban-wide scale. The design and locations of any future building, driveway, servicing, and grading should be determined based on the least impact to existing trees on and adjacent to the development site, particularly any trees fully owned by or jointly-owned with 410 Maple Lane, and City-owned trees in the right-of way along Maple Lane.

### **CONDITIONS**

If approved, the Planning, Real Estate and Economic Development Department requests that the Committee of Adjustment impose the following condition(s) on the application:

1. That the Owner(s) file with the Secretary-Treasurer of the Committee of Adjustment the following:

- a) A copy of a Reference Plan and/or legal description of the subject lands and the deed or Instrument conveying the subject lands to the respective owners of the abutting property to the south:

Part of Lots 5, 6, 7 & 8, Registered Plan M-46, being all of PIN 04226-0018 (138 Acacia Avenue), to Part of Lots 5, 6, 7 & 8, Registered Plan M-46, being all of PIN 04226-0019 (136 Acacia Avenue)

so that no new lot is being created, in accordance with paragraph (b) below;

- b) A Certificate of Official attached to the deed/transfer required by paragraph (a) above containing the following endorsement:

“The lands to be conveyed are for the purpose of a lot addition only to the abutting lands owned by Stephen Norton and Emily Jamieson described as PIN 04226-0019 being Parts of Lots 5, 6, 7 & 8 on Plan M-46, not for the creation of a new lot, and any subsequent transfer, charge or other transaction involving the lands to be conveyed shall be subject to compliance with Section 50 (3) or Section 50 (5) of the Planning Act, as applicable. Neither the lands to be conveyed nor the abutting lands are to be transferred, charged or otherwise re-conveyed in the future without the other parcel unless a consent is obtained.

“The Owner shall cause the lands to be conveyed to be consolidated on title with the abutting lands and for this condition to be entered on the parcel register for the consolidated parcel as a restriction.”;

- c) An Undertaking from a solicitor authorized to practice law in the Province of Ontario, and in good standing with the Law Society of Upper Canada, as follows:

“In consideration of, and notwithstanding the issuance of the Certificate under Section 57 of the Planning Act in respect to the subject Application for Certificate of Validation of Title, I undertake on behalf of the Owner, within 30 days of the registration on title of the transfer document containing the endorsement set out in the Certificate of Official issued by the Committee of Adjustment, to file an Application to Consolidate Parcels including the conveyed land

(PIN 04226-0018) and the abutting land (PIN 04226-0019). This PIN consolidation is intended to reinforce the Planning Act stipulation in the condition outlined above that both parcels have merged on Title and cannot be conveyed separately in the future. I further undertake to forward a copy of the registered Application to Consolidate Parcels and a copy of the Consolidated Parcel abstract page(s) to the Committee office within 21 days of the registration of the Application to Consolidate Parcels”.

- d) Where the parcel consolidation stipulated in paragraph (b) and the solicitor’s Undertaking in paragraph (c) above cannot be reasonably completed because the parcels of land to be merged have different estate qualifiers, an Application to Annex Restrictive Covenant under Section 118 of the Land Titles Act must be registered on the Title of both the conveyed lands and on the abutting parcel that is to be merged.

The Covenant, which is to be to the satisfaction of the Secretary-Treasurer of the Committee, shall advise all future purchasers that the parcels must be dealt with together and not separately, and contain wording set out below or similar wording acceptable to the Secretary-Treasurer of the Committee:

“These lands have been merged and may not be dealt with separately, without applying for a Consent of the Committee of Adjustment”.

In lieu of the Undertaking provided in paragraph (c), a replacement Undertaking by the solicitor must be filed undertaking on behalf of the Owner to register the Restrictive Covenant on both property Titles within 30 days of the registration of the transfer document containing the endorsement of the Certificate of Official issued by the Committee of Adjustment for this application and to file a copy of the registered Restrictive Covenant with the Committee within 21 days of the registration of the document.

2. That the Owner(s) provide plans, drawings or reports as may be required to demonstrate, to the satisfaction of the Manager, Right-of-Way, Heritage, and Urban Design Department, or his/her designate, that a private approach that conforms with the Private Approach By-law (2003-447) can reasonably be established on the subject property, to be confirmed in writing from the Department to the Committee.
3. That the Owner(s) provide evidence to the satisfaction of both the Chief Building Official and Development Review Manager of the Central Branch within the Planning, Real Estate and Economic Development Department, or designates, that 136 and 138 Acacia Avenue each have their own independent water, sanitary and storm connection as appropriate, and that these services do not

cross the shared lot line and are connected directly to City infrastructure. Further, the Owner(s) shall comply to 7.1.5.4(1) of the Ontario Building Code, O. Reg. 332/12 as amended. If necessary, a plumbing permit shall be obtained from Building Code Services for any required alterations.

In the case of a vacant parcel being created, the Owner(s) shall provide evidence (servicing plan), to the satisfaction of the Development Review Manager of the Central Branch within the Planning, Real Estate and Economic Development Department, or his/her designate, to be confirmed in writing from the Department to the Committee, that the parcel has access to sufficient services with adequate capacity.

4. That the Owner(s) enter into a Joint Use, Maintenance and Common Elements Agreement, at the expense of the Owner(s), setting forth the obligations between the Owner(s) and the proposed future owners.

The Joint Use, Maintenance and Common Elements Agreement shall set forth the joint use and maintenance of all common elements including, but not limited to, the common party walls, the common storm laterals, common structural elements such as roof, footings, soffits, foundations, common areas, common driveways and common landscaping, common retaining wall.

The Owner(s) shall ensure that the Agreement is binding upon all the unit owners and successors in title and shall be to the satisfaction of the Development Review Manager of the Central Branch within the Planning, Real Estate and Economic Development Department, or his/her designate. The Committee requires written confirmation that the Agreement is satisfactory to the Development Review Manager of the Central Branch within the Planning, Real Estate and Economic Development Department, or his/her designate, and is satisfactory to City Legal Services, as well as a copy of the Agreement and written confirmation from City Legal Services that it has been registered on title.

5. That the Owner(s) enter into an Agreement with the City, at the expense of the Owner(s), which is to be registered on the Title of the property, to address the following covenant/notice that shall run with the land and bind future owners on subsequent transfers:

“The lot is located adjacent to lands with slope stability concerns. Additional engineering and slope stability measures may be required prior to issuance of Building Permits for development on the lot.”

The Committee requires a copy of the Agreement and written confirmation from City Legal Services that it has been registered on title.

6. That the Owner(s) provide a Geotechnical Report prepared by a Professional Geotechnical Engineer licensed in the Province of Ontario, that is satisfactory to both the Development Review Manager of the Central Branch within the Planning, Real Estate and Economic Development Department, or his/her designate, and to

the Rideau Valley Conservation Authority, to be confirmed in writing from the PREDD and the Authority to the Committee, demonstrating the following:

- a) That the subject property is or can be made suitable for residential purposes (slope stability, erosion protection, and building limits adjacent to slopes)

The Geotechnical Report shall, as a minimum, determine the limit of organic soils present on the severed parcel and provide recommendations for construction methods based on the soil types encountered.

7. That the Owner(s) enter into a Development Agreement with the City, at the expense of the Owner(s) and to the satisfaction of the Development Review Manager of the Central Branch within the Planning, Real Estate and Economic Development Department, or his/her designate, to require that an asphalt overlay will be installed, at the Owner(s) expense, on Acacia Avenue and Maple Lane, fronting the subject lands, over the entire public driving surface area within the limits of the overlay, if an approved Site Servicing Plan shows three or more cuts within the pavement surface. The overlay must be carried out to the satisfaction of the Development Review Manager of the Central Branch within the Planning, Real Estate and Economic Development Department, or his/her designate. The Committee requires a copy of the Agreement and written confirmation from City Legal Services that it has been registered on title.

If the Development Review Manager of the Central Branch within the Planning, Real Estate and Economic Development Department, or his/her designate determines that a Development Agreement requiring an asphalt overlay is no longer necessary, this condition shall be deemed as fulfilled.

8. That the Owner(s) provide, to the satisfaction of the General Manager of the Central Branch within the Planning, Real Estate and Economic Development Department, or his/her designate, a site plan with tree locations overlaid, indicating the as-of-right locations of permitted structures including a dwelling and associated projections, and existing retaining walls. The Owner(s) shall further demonstrate that as-of-right development on the subject parcel will have minimal impact to protected trees and tree cover.



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