SUBJECT: City of Hamilton By-law 05-336 Right to Enter By-law for Property Maintenance - Address of Letter from Ivicon Construction Referral from Council Meeting of December 14, 2005 (PED06040/LS06002) (Ward 2)

RECOMMENDATION:

That Report PED06040/LS06002 be received for information and that the by-law be retained in its present form.

EXECUTIVE SUMMARY:

As a result of adoption of By-law 05-336, a letter was received from Ivicon Construction Company Ltd. advising of the company's dissatisfaction with the by-law and asking that Council quash the by-law and replace same. This letter was received by Council at its
meeting of December 14, 2005 who referred it to the General Manager of Planning and Economic Development and the City Solicitor for a report to the Planning and Economic Development Committee.

After review of the letter, it is the opinion of staff that the by-law in question is fair and offers both an opportunity for access to the one property owner while containing safeguards for the owner of the property where access will occur.

It is not recommended that the City become an arbiter in such situations as that is a function of the courts. The by-law offers direction, based on the Ontario Municipal Act, for the courts to consider when such issues are placed before them. We make this comment as there is no explicit authorization in the legislation for the municipality to arbitrate access issues. The by-law is enacted to further the public interest objective of maintaining buildings in good condition and to offer guidance to property owners to work out access to the satisfaction to both parties.

**BACKGROUND:**

The by-law in question was enacted for the downtown area of the City of Hamilton as an implementing measure to the recently-adopted zoning by-law for the downtown. Since the zoning by-law provides for zero lot line development and since this is a characteristic of the current built form, such a property access by-law has merit. The by-law provides parties dealing with maintenance access issues guidance how to implement access and it has its basis in the Ontario Municipal Act.

The by-law is in the public interest from the perspective that it is designed to allow for maintenance access only of buildings. It confers no rights relative to encroachments or new construction. The by-law simply allows access where access otherwise is unavailable. With the concerns related to property standards within the downtown and now with the intensification direction from the Provincial government, the by-law is valid and should be maintained.

The issue of the City becoming the arbiter in such situations has been raised but we note that there is no explicit authorization in the legislation for such action. We would point out that in communication with both parties, Legal Services has received conflicting information. Even if the City was to arbitrate the access issue, one of the parties could still refer the matter for a court to adjudicate the matter. The benefit of such a by-law is that it offers to the courts elements to consider relative to maintenance access which are based on the enabling legislation in the Ontario Municipal Act.

**ANALYSIS/RATIONALE:**

Maintenance of private property is an important component to the City’s efforts in renewing the downtown. Where maintenance access to such buildings is only available via adjacent properties, such a by-law gives direction to the party seeking access and
provides a level of protection to the property owner from whom access is sought. In our view, the by-law is of benefit to both property owners.

This by-law is enacted pursuant to the provisions of the Ontario Municipal Act and we are aware that such a by-law has been enacted as part of the City of Toronto Municipal Code. Discussions with City of Toronto staff indicated that they were not aware of any problems arising from such a by-law.

We are not aware of challenges to the Toronto by-law but we would point out that the benefit of such a by-law gives guidance to the courts where such matters are disputed and referred to a court for resolution.

Such a by-law is in the public interest, it furthers the City’s renewal objectives and offers benefits to both parties involved in maintenance access issues. Moreover, the by-law can be used to guide the courts where such disputes are referred to them for resolution.

ALTERNATIVES FOR CONSIDERATION:

The alternative is to repeal the by-law, but such an action is not recommended as such an action would not further the City’s efforts for renewal of the downtown. Further, repeal of the by-law is not recommended especially since such access issues may arise more frequently as the provincial policy direction is to encourage intensification.

Another alternative is to have the City arbitrate such access issues, but this would involve increase to the staff complement and would involve the city in court challenges, once the city had rendered a ruling. However, there is no explicit authorization in the Municipal Act for such arbitration and consequently, this course of action is not recommended.

FINANCIAL/STAFFING/LEGAL IMPLICATIONS:

Financial: Not applicable

Staffing: Not applicable

Legal: There is no explicit authority in the enabling legislation for the City to take an active role in arbitrating these kinds of disputes. The by-law, as written, serves to protect the interests of both parties should the matter go before a Court while advancing the public policy objectives of the city.

The Building and Licensing Division confirms that there are no outstanding orders on the property.
Appendix “A” to Report PED06040/LS06002 speaks to the openings in the wall and the Building Code Act.

**POLICIES AFFECTING PROPOSAL:**

N/A

**RELEVANT CONSULTATION:**

Consultation with the Director of Buildings and the City Solicitor.

**CITY STRATEGIC COMMITMENT:**

By evaluating the “Triple Bottom Line”, (community, environment, economic implications) we can make choices that create value across all three bottom lines, moving us closer to our vision for a sustainable community, and Provincial interests.

- **Community Well-Being is enhanced.** ☑ Yes ☐ No
- **Partnerships are promoted.**
- **Environmental Well-Being is enhanced.** ☑ Yes ☐ No
- **Human health and safety are protected.**
- **Economic Well-Being is enhanced.** ☑ Yes ☐ No
- **Infrastructure and compact, mixed use development minimize land consumption and servicing costs.**

**Does the option you are recommending create value across all three bottom lines?**

☑ Yes ☐ No

**Do the options you are recommending make Hamilton a City of choice for high performance public servants?**

☐ Yes ☑ No

RMM:jcs

Attach. (1)
Further to the discussion of December 5th, 2005 between John Spolnik and Tony Ivic (Ivicon Construction Co. Ltd.), the owner of the property adjacent 11 Rebecca on the west side (76 James Street North) and the correspondence received at that time, the following outlines this departments comments with regards to the proposed openings on the West Building Face of the existing building at 11 Rebecca Street.

There are three types of openings proposed on this building face and these include new windows, flush type metal exhaust wall box with grilles and 3’ diameter hot water heater vent terminals.

The new windows were permitted under permit as they would be protected with the required closures required within a wall required to have a 2 hr fire resistance rating. Documentation was provided by the Architect on window shutters approved by the BCC which act as closures providing the required fire protection rating as outlined in Article 3.1.8.4. of the OBC.

The exhaust openings were also permitted under permit as the proposed size of the openings were smaller than the size permitted by sentence 9.10.14.1.(2) of the OBC. This relief was adopted within this Part 3 building, as is common practise, as the intent of the relief provided for in Part 9 buildings mirrors the situation within this Part 3 building.

Finally, the 3” water heater vents were permitted as the sizes once again fall within the limits outlined in the above noted OBC sentence. The vent terminals themselves terminate slightly beyond the building face and possibly beyond the property line and as such may require an encroachment agreement between the adjoining land owners, however this type of agreement is a civil matter for which the City does not have any jurisdiction.

Rob Stumpo
BUILDING ENGINEER