

**Amendment of Section 37 Agreement
Omni South Phase II
115, 117 and 119 Omni Drive
Scarborough City Centre**

(City Council on November 23, 24 and 25, 1999, adopted this Clause, without amendment.)

The Scarborough Community Council recommends that the City Solicitor be directed to amend the Section 37 Agreement to provide for a Performance Bond to secure the Section 37 obligations.

Recorded Vote:

Yeas: Councillors Berardinetti, Cho, Duguid, Kelly, Moeser, Shaw, Soknacki, Tzekas -8

Nays: Councillors Altobello, Ashton, Balkissoon -3

Decided in the affirmative by a majority of 5.

Motion by Councillor Ashton:

Resolved that Scarborough Community Council recommend to City Council that the report (October 18, 1999) from the City Solicitor be received, thereby ensuring that the original Section 37 Agreement remains in effect:

Recorded Vote:

Yeas: Councillors Altobello, Ashton, Balkissoon -3

Nays: Councillors Berardinetti, Cho, Duguid, Kelly, Moeser, Shaw, Soknacki, Tzekas -8

Decided in the negative by a majority of 5.

The Scarborough Community Council submits the following report (October 18, 1999) from the City Solicitor:

Purpose:

To request Council direction as to whether to amend the Section 37 Agreement in accordance with the developer's request with respect to the above-noted development to allow for the posting of a Performance Bond whereas the existing agreement requires that a Letter of Credit be provided prior to issuance of the building permit.

Financial Implications and Impact Statement:

Performance Bonds do not provide the same level of security as Letters of Credit or cash. In the past, the City has had greater difficulty in drawing on Performance Bonds. Should the City

make a claim against a Performance Bond, and the claim is successfully challenged by the issuing surety company, the City may experience a shortfall in the amount of the discrepancy.

The Chief Financial Officer and Treasurer has reviewed this report and concurs with the financial impact statement.

Recommendations:

It is recommended that Council provide direction as to whether the Section 37 Agreement should be amended in accordance with the developer's request.

Background:

The Developer, Tridel (Omni South Inc.) is now proceeding with Phase II of the development known as Omni South, located on the north side of Ellesmere Road and bounded by McCowan on the east and Brimley on the west. The Section 37 Agreement, as previously amended, requires securities in the form of certified cheque or Letter of Credit to be posted prior to the issuance of a building permit to guarantee completion of landscaping obligations for Phase II. The Developer has requested that the Agreement be amended to provide for the posting of a Performance Bond at the time of issuance of a building permit

Comments:

A Letter of Credit is a document issued by a financial institution confirming that the City can cash it on presenting to the bank certain documents stipulated in the Letter of Credit. Letters of Credit can be issued from a variety of financial institutions including banks, loan and trust companies and credit unions. Letters of Credit issued from Schedule 1 and Schedule 2 banks under the federal *Bank Act* are usually the best form of security for the City and as such, it has been general practice that the City only accept Letters of Credit from Schedule 1 and Schedule 2 banks.

As long as the issuing bank is presented with the required draft and the documents set out in the Letter of Credit, it generally must pay the beneficiary regardless of any alleged dispute between the developer and the beneficiary as to whether or not there was proper performance or completion of the underlying contract. Letters of Credit are a secure and accessible type of financial guarantee with minimal amount of risk to the City.

In comparison, Performance Bonds are bonds issued by surety (insurance) companies. Performance Bonds are used to guarantee that a contractor will fully perform a contract and guarantees against breach of contract. Proceeds of the bond are used to complete a contract or compensate for loss in the event of non-performance. Performance bonds are usually backed by security put up by the developer such as mortgages or cashable bonds. In most cases, surety companies will accept a wider range of security than the chartered banks.

The City is moving away from accepting Performance Bonds as security for development obligations primarily because of the difficulty experienced in drawing on them. In the event a claim against a performance bond is made by the City, the surety company usually has a right to

dispute the amount of the claim and make inquiries on the claim. These disputes often go to litigation, which not only delays the receipt of funds to complete the required works, but also creates an additional administrative and legal burden on the City and exposes the City to financial risk should the claim be successfully challenged.

Letters of Credit are easily and quickly drawn upon, provide greater financial assurance than Performance Bonds, and are therefore the financial guarantee of choice.

Conclusions:

In the event of developer default, a Performance Bond provides less financial security to the City than a Letter of Credit. Letters of Credit are more easily and quickly drawn upon without inquiry from the issuing bank, provided that the proper demand documents are presented. Claims made against Performance Bonds may be disputed by the issuing surety company, possibly leading to a lengthy litigation process, delaying the receipt of funds. It is, therefore, recommended that a Performance Bond not be accepted as security for the landscaping obligations for Phase II.

Nevertheless, should Council elect to accept a Performance Bond as security for the Developer's obligations with respect to Phase II of the Omni development, the City Solicitor will make the necessary amendments to the Section 37 Agreement.

Contact:

Anna Kinastowski
Director, Planning & Development Law
Tel: 416-392-0080
Fax: 416-397-4420