



**STAFF REPORT
ACTION REQUIRED**

Sony Centre – Further Amendments to the Umbrella Agreement

Date:	July 16, 2008
To:	City Council
From:	Deputy City Manager and Chief Financial Officer
Ward:	28
Reference Number:	P:\2008\Internal Services\SP\cc08007SP (AFS #8112)

SUMMARY

As there is now only a limited likelihood of realizing the fundraising objectives for the CityCentre cultural project, the Board of Directors of the Sony Centre for the Performing Arts (“SC”) has proposed that a new development option be explored for the strata area at the base of the proposed residential condominium tower.

Currently, the Umbrella Agreement calls for a commercial development to be built in this strata area in the event that the CityCentre project is not constructed. However, the Board has expressed an interest in constructing a public plaza in this space instead of a commercial development. The developer, Castlepoint Realty Partners Limited (“Castlepoint”) is willing to entertain such a proposal.

In order to facilitate the preparation and assessment of an alternative development plan, further amendments must be made to the Umbrella Agreement. These amendments create the conditions that will allow for the overall transaction to close even though uncertainty will still exist as to the exact nature of what will be constructed at the base of the proposed condominium tower. The amendments also increase the likelihood that the overall transaction will close by Sept. 30, 2008, allowing the receipt of \$18.5 million (\$15 million for the residential component and \$3.5 million for the commercial component) from Castlepoint, and allowing the renovations to the existing theatre to begin so that these renovations can be completed before the opening of the 2009 theatre season.

Staff will be reporting back in the fall on the implications of proceeding with a public plaza on the strata land currently designated for the commercial component.

Staff have examined the legal and financial implications of the proposed amendments and recommend their adoption by Council.

RECOMMENDATIONS

The Deputy City Manager and Chief Financial Officer recommends that:

1. Council approve the amendments to the Umbrella Agreement outlined in Appendix 'A', to provide for a change in the Board's Business Plan, so that a public plaza development can be considered, in place of the CityCentre cultural project or a commercial development in the strata area at the base of the proposed residential condominium tower, and other amendments as outlined in Appendix 'A';
2. Council direct that the Deputy City Manager and Chief Financial Officer in consultation with the Chief Executive Officer of the Sony Centre for the Performing Arts report back to the Executive Committee in the fall of 2008 on their assessment of the proposed public plaza development option for the Sony Centre redevelopment.

Financial Impact

The current Umbrella Agreement provides for a closing date 45 days after planning approvals are in full force and effect. This could potentially take many months.

The proposed amendments to the Umbrella Agreement will result in the transaction closing by Sept. 30, 2008 as long as there have not been any appeals of the planning approvals for the project. This would substantially improve the likelihood of the SC receiving the up-front payment of \$18.5 million from Castlepoint and commencing the renovation of the existing theatre in time to complete these renovations before the start of the 2009 theatre season.

SC staff have estimated that the theatre would face additional costs of up to \$3 million if the renovations are not completed before the beginning of the 2009 theatre season.

The proposed amendments also result in Castlepoint providing \$1 million in funding towards the cost of the public plaza, should Council elect to have the plaza constructed in lieu of the commercial component. Staff will report back in the fall of 2008 on the full financial implications arising from the potential creation of a public plaza on the strata land currently designated for the commercial component.

DECISION HISTORY

At its meeting of September 28, 29 and 30, 2005, Council considered Clause No. 1 of Report No. 8 of the Policy and Finance Committee regarding the updated Business Plan for the SC and the detailed redevelopment proposal from Castlepoint.

Council directed that the City and the Board of Directors of the Sony Centre (the “Board”) pursue the Board’s preferred Business Plan option, which contemplated construction of the CityCentre and the sale of a portion of the SC site for a proposed condominium tower, in order to help fund the cost of constructing CityCentre. Council further directed that the parties consider a default option wherein Castlepoint would build the CityCentre space (the “Commercial Component”) and enter into a long-term lease with the City to use it for commercial purposes, if the Board is unable to raise funds necessary to build CityCentre by a predetermined date.

At its meeting of July, 25, 26 & 27, 2006, Council adopted Clause No. 59 of Report No. 6 of the Policy and Finance Committee, which outlined the terms reached on an Umbrella Agreement with Castlepoint. These terms were essentially the same as those originally set out in the Board’s preferred Business Plan option.

The Board of Directors of the Sony Centre for the Performing Arts, at its meeting on June 18, 2008, during consideration of a verbal report from the Chief Executive Officer providing an update on redevelopment activities of the Sony Centre, adopted the following motion:

“That, in light of the fact that Option A of the Umbrella Agreement may not proceed, the Board endorse the exploration of not having the developer build the commercial/cultural component of the existing design (Option B) with a view instead of enhancing the preservation of the current theatre and its historic designation by creating a public realm plaza to exist north of the condominium core and to enclose the existing terrace area to create additional floor space for the theatre.”

The Executive Committee on June 26, 2008:

1. submitted this matter to Council without recommendation; and
2. directed that in view of the timing issues involved respecting the Sony Centre for the Performing Arts redevelopment activities, the Deputy City Manager and Chief Financial Officer and the City Solicitor be requested to report directly to Council for its meeting scheduled to be held on July 15, 2008, on the implications of the Board’s endorsement of exploring an alternative to the developer building the commercial/cultural component, for Council consideration.

ISSUE BACKGROUND

A core component of the Board's Business Plan for the SC has been the creation of the CityCentre cultural project. This cultural facility was intended to be built in the podium structure at the base of the condominium tower.

However, the Umbrella Agreement includes a provision for a fallback scenario if the remaining revenues necessary to construct the CityCentre project are not secured by September 15, 2008. Under this fallback scenario, the strata portion corresponding to the podium structure would instead be leased on a long-term basis to Castlepoint and developed for commercial use.

According to SC staff, there is now only a limited likelihood of securing the necessary additional funds by Sept 15th. However, instead of implementing the fallback scenario outlined in the existing Umbrella Agreement, the SC Board and staff have expressed an interest in seeking an alternative scenario that will result in a greater positive contribution to the overall site.

The alternative scenario favoured by SC staff and the SC Board is to construct a public plaza in the strata area in which the commercial development would have otherwise been constructed. SC staff have suggested that a public plaza built in this space would result in an attractive outdoor area that can be used by the theatre to host various types of events similar to those that have been profitably hosted in the past on the theatre's west side terrace.

This option will also create the potential for an enhanced residential development. Through the elimination of the commercial component, Castlepoint can potentially take advantage of additional site density for the residential condominium tower. Castlepoint can also potentially take advantage of greater sale prices for the lower units as these will have unobstructed northwards view of a public square if the commercial component is not constructed.

COMMENTS

The Need for Amendments to the Umbrella Agreement

Discussions have taken place between SC staff, Castlepoint and the project architect (Studio Daniel Libeskind) regarding the public plaza option, and preliminary design work has been carried out. However, the cost of constructing the plaza, the plaza's impact on the potential value of the residential development, and other potential impacts have not yet been determined.

Once these impacts have been assessed, negotiations can commence between SC staff, City staff and Castlepoint regarding potentially revised financial terms for the

development transaction. It is anticipated that staff can report back to Council in the fall with the outcome of this further analysis and negotiation.

However, in the mean time, there is an urgent need to commence the renovation work on the existing theatre. According to SC staff, the renovations must begin by no later than Sept. 30, 2008 in order to complete this work and reopen the theatre before the 2009 theatre season begins. According to SC staff, a failure to complete the theatre renovations in time will result in up to \$3 million in additional costs as a result of having to delay the reopening for up to two rather than only one theatrical season.

In order for the renovations to commence, SC staff must be certain that the overall transaction with Castlepoint will be completed and that the up-front payments from Castlepoint (a total of \$18.5 million for both the residential and commercial components) will be received.

Before Castlepoint can complete the transaction, it must secure financing for the residential component of the project. Castlepoint has indicated that they cannot secure financing, given the uncertain status of the commercial component, because of cross-default provisions in the existing Umbrella Agreement. These cross-default provisions terminate Castlepoint's lease of the residential component in the event that Castlepoint defaults under the provisions of the commercial component lease.

According to Castlepoint, a potential lender cannot, at this time, assess the risk of a default under the commercial component lease as the status of this strata area will be undetermined if it is decided to further explore the public plaza option before committing to a particular development option

Therefore, SC staff and Castlepoint have proposed a number of amendments to the Umbrella Agreement in order to address this issue. These proposed amendments are presented in detail in Appendix 'A'.

Amongst these proposed amendments, the most important are:

1. the suspension of the cross-default provisions in the Agreement until after the substantial completion of the residential component and
2. the extension of the commencement of construction of the commercial component (if it is decided by Council to still construct the commercial component) to the earlier of:
 - The Substantial Completion of the Residential Component and period of three months having expired from the date of registration of the condominium on the Residential Component
 - 48 months from the Closing Date (the "Outside Date")

As a result of these two amendments, the lender providing financing for the residential component would no longer face any risk related to the cross-default provisions as the construction loan would have been repaid by the date of condominium registration. Therefore, construction financing can be put in place allowing construction to commence.

There would then be a period of time in which demolition of the north-west corner of the existing building will occur and work will commence on the subsurface portion of the overall project. According to Castlepoint, this work will occur in exactly the same manner regardless of which option is ultimately chosen for the commercial component strata area. Therefore, analysis and negotiation of an alternative option can continue until the fall of 2008 without having any impact on Castlepoint's initial construction activities.

Implications of Proposed Amendments

With the proposed amendments to the Umbrella Agreement in place, the City would lose the ability to trigger a default of the residential component lease in the event that Castlepoint defaults on any of the principal conditions attached to the lease of the commercial component.

These original cross-default provisions gave the City considerable leverage to ensure that all of the conditions related to the commercial component were met as the residential component has considerably more value to Castlepoint than the commercial component.

However, under the proposed amendments, Castlepoint would still be required to make an up-front payment of \$3.5 million upon the closing of the transaction in return for the long-term lease of the commercial component strata area. If it is ultimately decided to construct the public plaza rather than the commercial component, a negotiated settlement taking into account the sale of residential density and other factors will be submitted to Council for its consideration. Castlepoint has, as one of the proposed amendments to the Umbrella Agreement, already committed to provide \$1 million in funding towards the suspension of the cross-default provisions in the agreement.

If, however, it is decided by Council to still construct the commercial component, one of the proposed new amendments to the Umbrella Agreement would make the full \$3.5 million available to the City as liquidated damages. This means that if Castlepoint fails to commence construction of the commercial component, the City would terminate the commercial component lease *and* retain the full \$3.5 million payment from Castlepoint. Previously, the City could only retain this money to the extent it could demonstrate damages resulting from a failure to commence the commercial component construction on time.

SC staff have indicated that they are satisfied that a delay in the construction period for the commercial component would not, in any case, be likely to result in a major financial impact on the operations of the existing theatre. According to SC staff, existing

provisions in Umbrella Agreement control Castlepoint's construction operations in such a way that this construction will not result in adverse impacts on the operation of the existing theatre.

The change in the security available with respect to the commercial component must be weighed against the greater certainty achieved with respect to the timing of the renovation of the existing theatre. Under the terms of the existing Umbrella Agreement, the closing of the transaction does not have to occur until 45 days after the development approval condition, which includes site plan approval, has been satisfied. Site plan conditions have not yet been formally articulated by Planning staff. The process of reaching an agreement between planning staff and the developer on a satisfactory site plan can typically require a substantial period of time.

Under the proposed amendments, the transaction will close on or before Sept. 30, 2008 as long as the site plan control conditions articulated by Planning staff are not extraordinary and as long as no appeals of the zoning by-law have been lodged with the Ontario Municipal Board. A closing on or before Sept. 30, 2008 would result in the SC receiving the up-front payment of \$18.5 million from Castlepoint in time to commence renovations so that these renovations are completed before the 2009 theatre season begins.

Therefore, the proposed amendments to the Umbrella Agreement appear to provide the best way of facilitating the examination of the public plaza option and the securing of potential funding for the public plaza option, while avoiding delay-related costs to the existing theatre.

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SIGNATURE

Joseph P. Pennachetti
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ATTACHMENTS:

Appendix 'A' – Proposed amendments to the umbrella agreement

APPENDIX A – PROPOSED AMENDMENTS TO THE UMBRELLA AGREEMENT

Capitalized words set out below have the meaning as defined in the Umbrella Agreement.

1. The Closing Date shall take place on or about August 15, 2008, and in any event no later than September 30, 2008.
2. The existing provisions of the Umbrella Agreement provide that the Closing Date is subject to a condition in favour of Castlepoint that the “Development Approval Condition” (as defined in the Umbrella Agreement) shall have been satisfied and Closing would then take place 45 days thereafter. The definition of Development Approval includes obtaining of all necessary Planning Approvals, the obtaining of Site Plan Approval without Extraordinary Conditions and the appeal period having expired.

The Umbrella Agreement shall be amended as follows:

- (a) the condition of closing in favour of Castlepoint respecting the obtaining of Development Approval shall be reduced in scope as it relates to the obtaining of Site Plan Approval. Rather than Site Plan Approval having to be obtained in its entirety, the requirement shall be that City Staff shall have provided Castlepoint with the requisite site plan conditions, which conditions shall not be “Extraordinary Conditions” (as presently defined in the Umbrella Agreement); and
 - (b) the 45 day period following the obtaining of Development Approval in favour of Castlepoint shall be reduced to the extent necessary in order to comply with the time requirements for the Closing Date (as amended in paragraph 1 above).
3. Castlepoint shall have until August 15th, 2008 to obtain its lender’s approval to the provisions contained in paragraph 2 above, or to waive the provisions of section 3, failing which all of the amendments to the Umbrella Agreement contemplated in this Schedule “A” shall be terminated and the Umbrella Agreement as existing prior to these amendments shall continue in force.
4. The Lease Payment of \$3,500,000 payable for the Commercial Component shall be paid in trust to the City (or to a trustee nominated by the City).
5. The Umbrella Agreement shall be amended to provide that the City and Castlepoint shall, without legal obligation, explore the possibility of not proceeding with Option B (in the event that the City does not elect Option A) and creating a public realm plaza to exist on the westerly side of the existing theatre north of the Residential Component. The matters to be considered will include, without limitation, the nature of the public realm plaza and the enclosed area beneath the plaza, financial arrangements between the City and Castlepoint in connection with the creation of the public realm plaza and the potential increased density available to be included for sale in the Residential Component (the “Increased Density Consideration”).
6. Council shall be entitled to make an election as to the preferred Option (Public Component, Commercial Component or public realm plaza) on or before December 31, 2008.

7. Should Council of the City decide to proceed with the Commercial Component (that is, Option B), the Required Construction Commencement Date with respect to the Commercial Component may be delayed by Castlepoint until the earlier of:
 - (a) the Substantial Completion of the Residential Component and a period of three months having expired from the date of registration of the condominium on the Residential Component; and
 - (b) 48 months from the Closing Date,(the “Outside Date”).

In addition, the “cross default” provisions contained in the Umbrella Agreement providing that a default under the Commercial Component shall be deemed to be a default under the Residential Component Lease, shall be suspended until the Outside Date.

The entitlement to the benefit to Castlepoint of the provisions contained in this paragraph 6 shall be conditional on Castlepoint completing the transaction in accordance with the new closing date provided in paragraph 1 above.

8. In consideration of the permitted potential delay of the commencement of construction of the Commercial Component and the suspension of the cross-default provisions, both as provided in paragraph 7, Castlepoint shall pay the sum of \$1,000,000 to the City on account of the construction of the public realm plaza if Council shall elect to proceed with the public realm plaza option (the “Public Plaza Payment”). For clarity, the Public Plaza Payment shall be in addition to any Increased Density Consideration.
9. In the event that Council of the City shall elect to proceed with the Commercial Component (“Option B”), the City shall thereupon be entitled to retain the sum of \$3,500,000 payable on closing.
10. If the Council of the City shall elect to proceed with the Public Component (“Option A”) or shall elect to proceed with the creation of a public realm plaza, the \$3,500,000 held in trust, together with interest earned thereon, shall be returned to Castlepoint.
11. If Council elects to proceed with the Commercial Component, but Castlepoint defaults in its obligation to Commence Construction of the Commercial Component by the Required Construction Commencement Date, Castlepoint shall forfeit the \$3,500,000 as liquidated damages (without the City having to establish proof of damages).