



**STAFF REPORT
ACTION REQUIRED**
with Confidential Attachment

**Sony Centre - Amendments to Umbrella Agreement and
Potential Extension of Bridge Loan**

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| Date: | August 4, 2009 |
| To: | City Council |
| From: | The Deputy City Manager and Chief Financial Officer |
| Wards: | 28 |
| Reason for Confidential Information: | This report is about a proposed or pending acquisition or disposition of land by the City or one of its agencies, boards, and commissions. |
| Reference Number: | P:\2009\Internal Services\SP\CC09009SP (AFS#10301) |

SUMMARY

This report has the following objectives:

- To provide an assessment of the proposed amendments to the Umbrella Agreement for the proposed development transaction.
- To respond to direction from the Executive Committee that the Deputy City Manager and Chief Financial Officer report directly to Council on the recommendations submitted in the Confidential May 21, 2009 report from the Board of Directors and Chief Executive Officer of the Sony Centre.
- To update the names of the reserve funds utilized by the Sony Centre for the Performing Arts (“the Sony Centre”).

RECOMMENDATIONS

The Deputy City Manager and Chief Financial Officer recommends that Council:

1. Approve amendments to the Umbrella Agreement consistent with the terms established in the attached Term Sheet of Material Changes.
2. Approve the renaming of the reserve funds used by the Sony Centre to reflect the change in the theatre's name so that:
 - a. The Hummingbird Centre Stabilization Reserve is changed to the Sony Centre Stabilization Reserve.
 - b. The Hummingbird Donation Reserve is changed to the Sony Centre Donation Reserve.
3. Approve the recommendations in the Confidential Attachment to this report.
4. Direct that Municipal Code Chapter 227 (Reserves and Reserve Funds) be amended to give effect to the foregoing and that leave be granted for the introduction of any necessary bills in Council to give effect thereto.
5. Direct that the Confidential Attachment remain confidential until the earlier of the closing of the proposed development transaction with Ferncastle Inc. or August 17, 2009.

Financial Impact of Public Recommendations

If the amendments successfully result in the closing of the transaction, Ferncastle Inc. ("Ferncastle") will provide the following contributions to the City:

- The balance of the \$19 million purchase price for the strata land (The City has already received a \$1.5 million deposit) payable on closing.
- \$1 million towards the Sony Centre's own renovation costs payable on closing.
- \$5.0 million of a total contribution of \$7.5 million that will offset the cost to the Sony Centre of relocating mechanical and electrical systems from the west side of the theatre (where the proposed condominium tower will be built) to the east side of the theatre, payable on closing. The remainder \$2.5 million will be secured by way of a first mortgage and letter of credit.
- \$1 million that will offset the cost of constructing a public plaza on the west side of the existing theatre and north of the proposed condominium tower, secured by a first mortgage and letter of credit.
- \$1 million to be held in trust as security for the substantial completion of the proposed condominium tower, secured by a first mortgage and letter of credit.

In addition, in January, 2010, the Sony Centre will also receive the first \$250,000 instalment of a \$1 million payment addressing delays in the closing of the transaction. A further \$500,000 will be received in March, 2010 and the final \$250,000 will be received

on April 1, 2010. This amount may be recovered if Sony operates above a break-even over a three year period.

Altogether, \$30.5 million will have been contributed on account of this transaction. Of this amount, \$21 million will be available to repay the outstanding balance on the bridge loan from the City and to fund the renovation of the existing theatre. The outstanding balance on the bridge loan from the City reflects expenditures already made in preparation for the proposed renovation and redevelopment.

The balance of \$9.5 million will be available for:

- the relocation of mechanical and electrical systems from the west side of the theatre (where the proposed condominium tower will be built) to the east side of the theatre;
- the construction of a public plaza on the west side of the existing theatre and north of the proposed condominium tower; and
- security for the substantial completion of the proposed condominium tower

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 Sony Centre and the detailed redevelopment proposal from Castlepoint Realty Partners Ltd (“Castlepoint”).

Council directed that the City and the Board of Directors of the Sony Centre pursue the Board’s preferred Business Plan option, which contemplated the sale of a portion of the Sony Centre site for a proposed condominium tower.

At its meeting of December 1-3, 2008, Council directed staff to make amendments to the Sony Centre’s short-term borrowing facility to address capital funding issues resulting from the delayed closing of the proposed development transaction with Castlepoint. The maximum borrowing amount for this facility was raised to \$5 million and any amounts outstanding were to be repaid by January 31, 2009.

The closing of the transaction has since been further delayed. At its meeting of April 29 and 30, 2009, Council approved an extension of the loan repayment date to June 30, 2009.

ISSUE BACKGROUND

Sony Centre staff have negotiated further amendments to the Umbrella Agreement in order to reach a final agreement with Castlepoint. These amended terms make reference to Ferncastle as the purchasing party as Castlepoint has sold 50% of its interest in the project to Fernbrook Homes (Front St.) Ltd. and together Castlepoint and Fernbrook have

appointed Ferncastle Inc. as their nominee and trustee through an Assignment, Assumption and Consent Agreement.

A number of the proposed amendments address concerns raised by Ferncastle's lenders. The first of these involves the timing for the transfer of title for the strata lands. According to the terms previously approved by Council, Ferncastle was to receive the title once the lender had advanced \$2.5 million in construction financing and various forms of security have been provided to the City by Ferncastle. However, Ferncastle has indicated that their lenders now require that the title be transferred immediately upon closing.

In order to continue to protect the City's interests following an earlier transfer of title, restrictive covenants will be placed on title that will:

- Enforce Ferncastle's compliance with the approved plans for the condominium tower.
- Enforce conditions required to be satisfied by Ferncastle prior to being able to commence construction of the tower.
- Limit Ferncastle's ability to transfer the ownership of the strata lands.

In the event that there is a default and the institutional lender having CMHC insurance takes over the project, Ferncastle's lenders have indicated that they cannot accept an obligation to carry out the replacement of the demolished theatre components should there be a loan default by Ferncastle. In order to protect the City/Sony Centre from incurring any additional costs in the replacement of demolished theatre components in such a scenario, the proposed amendments outline a new approach towards the funding of the initial construction of the proposed redevelopment.

Under this approach:

- As a condition to the commencement of construction, Ferncastle must provide security and/or payments to the City to secure the completion of obligations with respect to the replacement of the demolished theatre components and the structure within the condominium tower necessary to complete the replacement of the theatre components (collectively, the "Improvements"), so that if Ferncastle defaults, the City may step in to complete the Improvements.
- The security for the Improvements must be in a form and amount acceptable to the City, acting reasonably. The security shall include, without limitation, a joint and several completion guarantee from the four individual principals of Ferncastle.
- The security for the Improvements will also include a fixed price construction contract with Ferncastle's general contractor, Dominus, which will be assignable to the City in the event of a Ferncastle default.

- The completion guarantee by the four individual principals of Ferncastle will include an obligation to provide such funds as is necessary to complete the Improvements, including the amounts payable under the construction contract, as well as any cost overruns.
- Ferncastle's lenders have also required that if they take over the project, they will not be bound by the restrictive covenants dealing with the development project. The lenders will nevertheless, be bound by provisions under the Planning Act, should they take over the project and desire to change any prior City approvals, such as requiring an amendment to the approved site plan for the project.
- If there is a lender to Ferncastle that is not an institutional lender having CMHC insurance, the restrictive covenants referred to above shall continue to apply with respect to such lender. In addition, the restrictive covenants are also contained in the Umbrella Agreement and shall continue to apply to Ferncastle regardless.

In addition to satisfying the requirements of the project lenders, the proposed amendments also provide Ferncastle with increased flexibility with respect to the timing of project commencement. Previously, the Umbrella agreement set an outside date for commencement but this is eliminated as part of the proposed amendments. However, the proposed agreement still requires Ferncastle to provide a year's notice of commencement if commencement does not occur in 2009. Also, commencement will have to occur in the period of July to September of whichever year commencement occurs. Sony Centre staff have indicated that these restrictions along with other restrictions set out in the Construction Procedures Agreement with Ferncastle will prevent Ferncastle's construction activities from resulting in a material impact on the theatre's operations.

Finally, in return for these amendments, and to address a delay in the closing of the proposed transaction, Ferncastle has agreed to make a \$1 million investment in Sony Centre programming. This amount would be provided in stages throughout early 2010. If the theatre operates at above break-even during a three year period, Castlepoint will be able to clawback this contribution. Sony Centre staff do not currently anticipate that the theatre's operations during this period will result in a profit.

Ferncastle has executed the attached term sheet, which will entail amendments to the Umbrella Agreement as well as the other principal documents required for the transaction to close. The amended term sheet states that the closing date shall be unconditional and occur no later than August 14, 2009 provided that Council approval shall have been obtained at least five days prior to the closing date.

COMMENTS

As discussed above, safeguards will be incorporated in the revised Umbrella Agreement to protect the City/Sony Centre from any financial impact arising from the amendments requested by Ferncastle's lender. Sony Centre staff have also indicated that amendments

related to the timing of construction commencement by Ferncastle will not result in any operational or financial impact on the theatre.

Therefore, City Finance staff do not anticipate any material incremental financial impact on the City/Sony Centre arising from the amendments requested by Ferncastle or Ferncastle's lender.

It is also anticipated that the \$1 million investment by Castlepoint in Sony Centre programming will allow the theatre to offset additional costs that have been incurred as a result of the theatre being closed for a longer than anticipated period because of the delay in the closing of the proposed transaction.

CONTACT

Joe Farag
Tel: 416-392-8108
Fax: 416-397-4465
jfarag@toronto.ca

Eric Arm
Tel: 416-397-4479
Fax: 416-397-4465
EARM@toronto.ca

SIGNATURE

Cam Weldon
Deputy City Manager and
Chief Financial Officer

ATTACHMENTS

Attachment 1: Term Sheet of Material Changes

Attachment 2: Confidential Attachment: Sony Centre – Potential Extension of Bridge Loan

TERM SHEET OF MATERIAL CHANGES

The following are material changes proposed to the Umbrella Agreement from those previously approved in various Council Resolutions.

1. The Closing Date shall be unconditional and shall occur not later than August 14, 2009, provided that Council approval shall have been obtained at least 5 Business Days prior to the Closing Date.
2. A transfer of title will be delivered on Closing, whether or not Construction Financing has been obtained or an advance made under Construction Financing.
3. If the transfer of title cannot be provided on Closing as a result of the strata reference plan not having been registered, Closing shall nevertheless occur on the Closing Date and the transfer of title delivered by the City following Closing, upon the registration of the strata reference plan. In the discretion of the City, Closing may occur in escrow pending registration of the strata reference plan.
4. Transfer of title will be subject to certain Restrictive Covenants, as well as an agreement restricting transfer of title to enforce the Restrictive Covenants. The Restrictive Covenants deal with certain restrictions contained in the Umbrella Agreement, such as building in accordance with plans and specifications which have been approved.
5. Amounts payable on Closing shall include:
 - (a) The balance of the purchase price;
 - (b) \$1,000,000 on account of the Sony Centre Necessary Renovations Contributions;
 - (c) \$5,000,000 on account of improvements to be made by Sony Centre to the east of the theatre and referred to in the Umbrella Agreement as "the East Side Solution";

The total amount payable on account of the East Side Solution is \$7,500,000 and the remaining \$2,500,000 is payable in accordance with paragraph 6 below;
 - (d) Such other amounts representing mutual reimbursement of certain expenses as set forth in the Umbrella Agreement.
6.
 - (a) The remaining \$2,500,000 payable on account of the East Side Solution is payable on the substantial completion of the improvements to be made by Sony Centre in connection with the East Side Solution (the "\$2,500,000 Balance").
 - (b) Payment by Ferncastle of the \$2,500,000 Balance shall reduce the Security LC referred to in paragraph 8 below.

7. (a) On Commencement of Remediation (which will occur prior to Commencement of Construction) a letter of credit will be provided by Ferncastle to the City as security for the obligation to restore the Theatre and surrounding site if necessary (the "Remediation LC").
- (b) The amount of the Remediation LC shall be the amount that would be required to restore the Theatre and surrounding site if necessary, as determined by Altus Helyar.
8. (a) On the earlier of the date of Commencement of Construction and October 31, 2009 (the "Outside Date"), Ferncastle shall deliver a letter of credit to the City in the amount of \$4,500,000 less the amount of the Remediation LC (the "Security LC").
- (b) The Security LC shall be security for:
 - (i) payment of the \$2,500,000 Balance;
 - (ii) \$1,000,000 on account of the payment for the Public Plaza contribution (referred to in paragraph 10 below); and
 - (iii) \$1,000,000 as security for the Substantial Completion of the Private Component.
9. At anytime Ferncastle shall have the right to replace the Remediation LC and/or the Security LC with equivalent cash security deposited with BLG.
10. Since the Security LC will not be delivered until the Outside Date, as security therefor, on Closing, Ferncastle shall give back a mortgage to the City in the amount of \$4,500,000 (the "Mortgage"). The Mortgage shall mature on the earlier of the Outside Date and the date of delivery of the Security LC in favour of the City. The Mortgage shall bear no interest until October 25, 2009 and thereafter, bears interest at 8% per annum.
11. Ferncastle shall pay the sum of \$1,000,000 on account of the improvement of the Public Plaza. \$250,000 shall be payable on the Outside Date and the balance shall be payable upon the completion of construction of the Project Related Renovations and the Private Component to grade. The Security LC shall be reduced by amounts paid on account of the Public Plaza, as aforesaid.
12. In addition, Castlepoint Realty Partners will make payments totalling \$1,000,000 to the Sony Centre commencing in January 2010 to even Sony Centre's lost revenues due to the delay in the reopening of the Centre, which sum may be recovered if the Sony Centre operates above break-even over a three year period.
13. There shall be no obligation on Ferncastle to commence construction within any specified time period following Closing, although, if construction does not commence in the calendar year 2009 there is a requirement of one year's advance notice to start construction in 2011 or a later year in the periods of July to September of any such year.

In addition, there shall be no right of Sony Centre to acquire parking rights within a future development at 5 – 7 The Esplanade being developed by Ferncastle.


14. As a condition to the Commencement of Construction, Ferncastle must provide security and/or payments to the City to secure the completion of obligations with respect to the Project Related Renovations and structure within the Private Component as is necessary to complete the PRR (the “Related Structure”), so that if Ferncastle defaults, the City may step in to complete the Project Related Renovations and the Related Structure. The security shall be put in place for the completion of the PRR in a form and amount acceptable to the City, acting reasonably and shall include, without limitation, a fixed price construction contract between Ferncastle and the construction contractor to Ferncastle (“Dominus”) which contract will by its terms be assignable to the City in the event of a Ferncastle default and shall also include a joint and several completion guarantee from the four individual principals of Ferncastle to the City.
15.
 - (a) As a prerequisite to the closing of the financing construction and registration of Project Lender’s security against title to the Private Lands, an agreement will be entered into amongst the City, Ferncastle and the Project Lender (the “Step-In Agreement”) dealing primarily with the inter-relationship of the rights and obligations of the City under the Umbrella Agreement and the rights and obligations of the lender under its security in the event of a default by Ferncastle.
 - (b) If the Project Lender is an institutional first mortgagee providing financing pursuant to a CMHC certificate of undertaking to insure (a “Institutional CMHC Lender”):
 - (i) if the Project Lender “steps-in”, it will not be obligated to assume the obligation to construct the Project Related Renovations and the Private Component, but will instead have an election as to whether it will construct these elements;
 - (ii) the Restrictive Covenants shall be released and discharged from the title to the private lands on the closing of the construction financing and registration of Project Lender’s security against title to the Private Lands. Should the Project Lender not proceed bona fide with the construction financing, Ferncastle shall arrange for the Project Lender’s security to be discharged and the Restrictive Covenant shall be re-registered.
 - (c) If the Project Lender is not an Institutional CMHC Lender, the provisions referred to in subparagraph (b) above shall not be applicable and the Step-In Agreement with such Project Lender shall contain provisions similar to those generally prevailing in “step-in agreements” in Ontario for similar projects and circumstances.
 - (d) Regardless of whether or not the Project Lender is a Institutional CMHC Lender, in the event that the Project Lender does not Step-In or elects not to construct, the

City will have the right to construct the Project Related Renovations and Related Structure as set out in paragraph 14 above.

16. Sony Centre shall have no obligation to contribute to costs incurred by Ferncastle related to environmental conditions respecting the Project Related Renovations or the Private Component.
17. On Closing, the parties will enter into a Mutual Easements and Shared Facilities Agreement which will provide, amongst other matters, for the allocation of expenses relating to Shared Facilities between the parties in proportion to the gross floor area of the Private Component to the gross floor area of the Project Related Renovations.
18. On Closing, the parties will enter into a Construction Procedures Agreement providing for licences from each party to the other with respect to the construction requirements of each of the parties.

AGREED on July 31, 2009.

FERNCASTLE (FRONT STREET) INC.

By: 

Alfredo Romano