

**Attachment 1 – Confidential Information – made public on
December 4, 2009**

**Agreement with the Toronto Port Authority on current
litigation and other matters**

Date:	November 23, 2009
To:	City Council
From:	City Solicitor and City Manager

CONFIDENTIAL RECOMMENDATIONS

The City Solicitor and City Manager recommend that:

1. City Council authorize an agreement with the TPA regarding the settlement of the 2008 Action and the purchase of approximately 18 acres at the Ashbridges Bay site which agreement will contain the following substantive provisions;
 - (i) the TPA will transfer the 18 acre parcel to the City or to such transferee as the City may direct for nominal consideration;
 - (ii) the City will pay to the TPA the amounts owed under the 2003 Settlement Agreement;
 - (iii) the City will pay to the TPA Harbour Users Fees from 2000 at a reduced rate as set out in this report;
 - (iv) the TPA will pay to the City payments in lieu of taxes (“PILT”) in an amount set out in this report, as determined by its Board based upon the Federal Dispute Advisory Panel decision, without prejudice to the City pursuing its judicial review application in the Federal Court;
 - (v) the City and the TPA will work cooperatively to resolve dock wall issues;
 - (vi) the City will work with the TPA to correct certain outstanding land title issues regarding the Ashbridges Bay lands and equally share in the costs of same, the City’s portion not to exceed \$10,000.00;

- (vii) the City will write off any outstanding taxes on 0 Bremner Boulevard and acknowledge the TPA is not the owner of these lands.
- 2. The City Manager invite officials of the Province of Ontario, Government of Canada and Waterfront Toronto to work with City and TPA officials to develop and implement a shared strategy for the repair, maintenance and operation of dock walls and breakwaters and other matters related to the water's edge in Toronto's central waterfront;
- 3. The City Treasurer write off the taxes on 0 Bremner Boulevard as uncollectible pursuant to Section 319 of the *City of Toronto Act, 2006*; and
- 4. The City Solicitor and other City staff be authorized to take all necessary and appropriate steps, together with such revisions as are satisfactory to the City Manager, in a form satisfactory to the City Solicitor, to implement the above recommendations.

CONFIDENTIAL INFORMATION

Summary

As set out in the public version of this report, the purpose is to seek City Council's authority to enter into an agreement with the Toronto Port Authority (the "TPA") to settle certain disputes that are the subject of litigation between the City and the TPA and to secure approximately 18 acres of land on the Ashbridges Bay site for TTC purposes.

FINANCIAL IMPACT

Table 1 below compares the financial impact of the proposed settlement versus a status quo situation.

Table 1 - Comparison of Financial Impact Under Status Quo Versus Proposed Agreement		
Outstanding Issue	Status Quo	Proposed Agreement
Payments in Lieu of Taxes for Port Authority Properties	\$73,749 has been paid by TPA for 1999-2009 period	TPA to pay \$6.42 million for 1999-2009 period but City may still pursue judicial review application to potentially realize higher amount
2003 Settlement Payments	TPA has claimed \$11.7 million plus interest and legal fees - City Solicitor has advised this claim will likely be successful	City will pay \$11.7 million but will be able to use TPA's \$6.42 million PILT payments to offset this amount in calculating interest
Harbour User Fees	TPA has claimed over \$3 million in outstanding fees for 2000-2009 period	City will pay \$380,559 for 2000-2009 period but will be able to use TPA's \$6.42 million PILT payments to offset this amount in calculating interest

As indicated in the Table above, the TPA has, to this date, only paid \$73,749 towards the Payments in Lieu of Taxes billed by the City for the 2000-2009 period. The City Solicitor has advised that the TPA will be able to obtain a judgement against the City for the \$11.7 million in payments due under the 2003 Settlement Agreement along with interest and legal costs if this action proceeds. The 2008 Action initiated by the TPA also seeks a payment in excess of \$3 million for the Harbour User Fees charged by the Port Authority for the 2000-2008 period for use of the harbour by the City's ferries.

Under the proposed settlement agreement, the TPA will make a \$6.42 million payment towards the outstanding 2000-2009 Payments in Lieu of Taxes. This payment amount is generally based on the valuation methodology applied by the Federal Dispute Advisory Panel (“DAP”) in arriving at its December, 2008 decision. However, the proposed Settlement Agreement allows the City to pursue its judicial review application of the DAP decision in the Federal Court.

The terms of the proposed agreement call for payment by the City of the \$11.7 million in outstanding settlement payments. However, the Port Authority's \$6.42 million PILT payments will be offset against this amount when calculating the outstanding interest (as shown in more detail in the Table in Appendix I attached hereto).

Also, under the terms of the proposed agreement, the Port Authority will revise the basis for applying Harbour User Fees to the City's ferries so that the total fees charged for the 2000-2009 period will only be \$380,559. As with the 2003 Settlement Payments, the Port Authority's \$6.42 million PILT payment amount will be offset against this amount when calculating the outstanding interest. The 2003 Settlement Payments in the sum of \$11.7 million which were withheld, was funded annually through the Capital Budget and this amount is currently held in Balance Sheet Account 215210. The Harbour User Fees will be funded from an account to be determined by the Chief Financial Officer in consultation with the General Manager of the Parks, Recreation and Forestry Division. The monies to correct Land Title issues will be provided by the TTC. Interest expense owing to the TPA will be funded from PILT revenue. In summary, there is no net budgetary impact arising from this proposed agreement.

Moreover, the proposed agreement will allow the City to secure a potential site for TTC purposes for nominal consideration.

The Deputy City Manager and Chief Financial Officer has reviewed this report and agrees with the financial impact information.

COMMENTS:

As a result of the commencement of the 2008 Action and the request by the TTC to secure a portion of the Ashbridges Bay site, City staff have had discussions with the TPA with a view to entering into an agreement to settle the 2008 Action and to arrange for the purchase of a portion of the Ashbridge's Bay site.

Ashbridge's Bay Site

On May 28, 2009, the Toronto Transit Commission considered a report that identified potential sites for consideration of the TTC's LRV facility. One of these sites is the southeast corner of Lakeshore Boulevard and Leslie Street north of the Ashbridge's Bay Water Treatment facility. This site is approximately 18 acres and is owned by the TPA. The TTC has requested that the City secure this portion of the Ashbridge's Bay site for potential use by the TTC.

The TPA has cooperated with the City in negotiations regarding securing the site. The TPA has agreed as part of this comprehensive agreement that it will transfer the site to the City or to such transferee as the City may direct for nominal consideration. The site will be transferred on an as is where is basis and the City and/or the TTC will be responsible for addressing any environmental issues on the site on a risk assessed basis. The TTC advises that this site has financial and operational advantages. The final decision on where to locate the LRV facility will be made by the TTC at a later date.

2008 Action

2003 Settlement Agreement

Confidential attachment on Agreement with Toronto Port Authority on current litigation and other matters

As noted in the public report, the City has withheld certain payments under the 2003 Settlement Agreement from the TPA. It is the City Solicitor's opinion that these payments are owed to the TPA and that the City cannot legally withhold the payments on the basis of setting them off against payments in lieu of taxes. It is the City Solicitor's opinion that the TPA will obtain judgement on its claim plus interest and legal costs if this action proceeds.

Harbour User Fees

As set out in the public report, part of the 2008 Action concerns invoices issued to the City for Harbour User Fees. The TPA has the legal authority to charge users of the harbour under the *Canada Marine Act*. For some time, the City has argued that it should not be paying more than the rate being charged to commercial tour boat operators. As part of this comprehensive settlement agreement, the TPA has agreed to reduce the harbour user fees charged to the City to the same amount charged to commercial tour boat operators. This amount is currently at the rate of \$10.00 per passenger capacity of the boat in issue. This is a favourable result for the City and will effectively reduce the annual harbour user fees from a sum in the range of \$400,000.00 to approximately \$35,750.00. This will also settle this issue that is part of the 2008 Action.

Payments in Lieu of Taxes

The proposed agreement identifies that the City and the TPA will work together to resolve outstanding tax and pilt issues. The agreement also provides that the TPA will make a payment to the City for Pilts in the sum of \$6,419,086.00 for the taxation years 1999-2009. The TPA's payment is based upon the decision of the Dispute Advisory Panel. The agreement is without prejudice to the City's application for judicial review of the DAP decision dated December, 2008 and the decisions of the TPA Board of Directors relating thereto made on February 10, 2009 and April 21, 2009.

By way of background, at its meeting of February 23-25, 2009, City Council adopted the staff recommendations to pursue a judicial review application in the Federal Court of the DAP's decision respecting four properties owned by the TPA. The City Solicitor and staff from Revenue Services are pursuing that judicial review application in the Federal Court which is expected to be heard in the Spring of 2010. As a result, the City is not conceding anything under this proposed agreement and will get the benefit of receiving the PILTS that the TPA has agreed to pay.

0 Bremner Boulevard

The Toronto Harbour Commission ("THC") took title to the lands which are known municipally as 0 Bremner Boulevard N/S from the City in 1912. The lands were subject to a perpetual lease to Canadian Pacific. Around 1996, the THC provided the City with signed deeds to transfer the Property to the City to be used for a roadway. The deeds

were held in escrow pending completion of various matters. In 1997, the Property was subleased to the Metropolitan Toronto Convention Centre.

The Toronto Port Authority was created in 1999. Since taxation year 2000, the Municipal Property Assessment Corporation (“MPAC”) has returned 0 Bremner with the THC as the assessed owner and with the TPA’s mailing address. For taxation years 2000 to 2003 MPAC returned the property as taxable in the commercial class. This is clearly an error. For taxation years 2004 to 2009 MPAC returned the property as PILTable. This resulted in the City sending tax and PILT bills to the TPA since 2000. In 2004 the TPA brought to the City’s attention the fact that, in its view, the TPA was not responsible for the taxes on 0 Bremner, the Property was not “gazetted” i.e. transferred to the TPA when it was created in 1999. The TPA takes the same view respecting the PILTs requested by the City since 2004. The unpaid taxes for the 2000 to 2003 taxation years are \$1,283,189.36. The unpaid PILTs for the 2004 to 2009 are \$192,996.53.

Revenue and Legal Services are recommending that City Council agree to write-off these unpaid taxes and PILTs as uncollectible pursuant to Section 319 of the *City of Toronto Act, 2006*. The TPA never owned the Property for the years that MPAC returned 0 Bremner on the assessment roll. Further, the assessment itself was incorrect because the Property is a roadway which is non-assessable. In fact, the Property is now part of the Simcoe Street extension underpass and was transferred to the City on August 13, 2009.

Dockwall Issues

Creating a vibrant waterfront that is socially, economically and environmentally sustainable is a shared priority of the three orders of government. Critical to success is improving the public realm, increasing public access to the water’s edge and providing the infrastructure needed for tourism and other businesses dependent on water access.

This requires that publicly-owned dock wall and break waters be in a state of good repair. Ownership of these assets is fragmented among the three governments and their agencies. A preliminary investigation indicates that areas requiring immediate attention impact all governments. Returning existing infrastructure to a state of good repair is required prior to public realm improvements being implemented. In addition to addressing state of good repair, issues regarding the ongoing maintenance and operation of these assets must be addressed.

Officials of the City and the Toronto Port Authority have agreed to embark on a process to resolve issues in those areas of the waterfront within their jurisdiction. The proposed agreement expressly provides that the City and the TPA will work together in an on-going co-operative endeavour to review and attempt to resolve dock wall issues. A coordinated dock wall / breakwater program involving the three orders of government, their agencies and the tri-government Waterfront Toronto is recommended.

To this end, staff recommends that the City manager invite officials of the Province of Ontario, Government of Canada and Waterfront Toronto to work with City and TPA

officials to develop and implement a shared strategy for the repair, maintenance and on-going operation of dock walls and breakwaters.

Title Issues

Work is required to correct various historical title and registration issues. The City and TPA will work co-operatively on a cost shared basis to resolve such issues.

CONCLUSION

For the reasons set out herein, the City Solicitor and City Manager recommend that City Council approve the recommendations in this confidential attachment.

Appendix 1 - Table of Interest and Payment Calculations

CALCULATION OF NET BALANCE OWING TO TORONTO PORT AUTHORITY AS OF DEC. 1, 2009
CONFIDENTIAL AND WITHOUT PREJUDICE - NOV 20, 2009 - made public on December 4, 2009

	Starting Balance	# of Days	Interest	PILTS	Capital Payments	HUF	Ending Balance	Prime Rate + 2%
July 30, 1999	-	-	-	213,789	-	-	213,789	
July 30, 2000	213,789	366	-	374,036	-	(38,253)	549,573	8.50%
July 30, 2001	549,573	365	-	444,797	-	(38,253)	956,117	9.50%
July 30, 2002	956,117	365	-	550,437	-	(38,253)	1,468,302	5.75%
July 30, 2003	1,468,302	365	-	564,466	-	(38,253)	1,994,515	6.50%
July 30, 2004	1,994,515	366	-	561,352	-	(38,253)	2,517,615	6.50%
July 30, 2005	2,517,615	365	-	544,498	-	(38,253)	3,023,860	6.25%
January 1, 2006	3,023,860	155	-	-	(1,500,000)	-	1,523,860	6.50%
July 1, 2006	1,523,860	181	-	-	(1,500,000)	(38,074)	(14,214)	7.50%
July 15, 2006	(14,214)	14	(43)	-	(1,000,000)	-	(1,014,257)	8.00%
July 30, 2006	(1,014,257)	15	(3,275)	568,939	-	-	(448,592)	8.00%
January 1, 2007	(448,592)	155	(15,195)	-	(1,500,000)	-	(1,963,787)	8.00%
July 1, 2007	(1,963,787)	181	(77,893)	-	(1,500,000)	(37,895)	(3,579,575)	8.00%
July 30, 2007	(3,579,575)	29	(22,379)	734,308	-	-	(2,867,646)	8.00%
January 1, 2008	(2,867,646)	155	(100,158)	-	(1,500,000)	-	(4,467,804)	8.25%
July 1, 2008	(4,467,804)	182	(150,368)	-	(1,500,000)	(37,538)	(6,155,710)	6.75%
July 30, 2008	(6,155,710)	29	(32,554)	931,232	-	-	(5,257,032)	6.75%
December 31, 2008	(5,257,032)	154	(132,774)	-	-	-	(5,389,806)	6.00%
January 1, 2009	(5,389,806)	1	(729)	-	(850,000)	-	(6,240,536)	5.00%
July 1, 2009	(6,240,536)	181	(131,510)	-	(850,000)	(37,538)	(7,259,583)	4.25%
July 30, 2009	(7,259,583)	29	(24,297)	931,232	-	-	(6,352,648)	4.25%
September 30, 2009	(6,352,648)	62	(45,543)	-	-	-	(6,398,191)	4.25%
December 1, 2009	(6,398,191)	62	(45,869)	-	-	-	(6,444,061)	4.25%
Totals:		3,777	(782,588)	6,419,086	(11,700,000)	(380,559)		

Notes/Assumptions:

1. A negative balance is an amount owed to the TPA
2. PILTS are assumed to have been payable on July 30th each year
3. Interest (at Prime + 2%), with semi-annual compounding, has been applied only to overall negative balances (amounts owed to the TPA)
4. The 2009 PILT payment is an estimate based on the 2008 figure
5. The City has an obligation to make \$1.7 million annual capital payments to the TPA in 2010, 2011, & 2012
6. The City also has an obligation to provide \$3 million/year operating payments to the TPA in 2010, 2011 & 2012
 - however, the TPA's rental revenues for certain properties rented from TEDCO will be netted from the operating payments
 - in 2010, it is estimated that the net operating payment to the TPA will be approx. \$2.1 million