



**STAFF REPORT
ACTION REQUIRED
with Confidential Attachment**

Federal PILT Dispute Advisory Panel Decision – Toronto Port Authority properties

Date:	February 17, 2009
To:	City Council
From:	City Solicitor and Acting Treasurer
Wards:	All wards
Reason for Confidential Information:	This report is about litigation or potential litigation that affects the City.
Reference Number:	

SUMMARY

This report advises on the decision from the federal Payments in lieu of taxes (PILTs) Disputes Advisory Panel (“DAP”) respecting four properties owned by the Toronto Port Authority (“TPA”). The DAP Decision deals with the valuation of the TPA’s properties for the purposes of calculating PILTs. This report also seeks instructions on whether to pursue a judicial review of the DAP Decision.

RECOMMENDATIONS

The City Solicitor and the Acting Treasurer recommends that:

1. Council adopt the recommendations contained in Confidential Attachment 1;
2. The Confidential Attachment remain confidential as it contains information subject to solicitor/client and litigation privilege; and,
3. The appropriate City staff be authorized and directed to take the necessary action to give effect thereto.

Financial Impact

Details regarding the financial impact resulting from the recommendations are set out in the Confidential Attachment 1.

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

DECISION HISTORY

At its meeting of December 14 and 16, 2005, City Council considered consolidated clause in Policy and Finance Committee Report 9, from the Treasurer entitled –“Update on Status of Discussions with Toronto Port Authority Concerning Payments in Lieu of Taxes. In its consideration of this report, City Council, amongst other things, directed that the City apply to the Federal Dispute Advisory Panel regarding the dispute over the TPA PILTs. To view this report on line, please follow the hyperlink:

<http://www.toronto.ca/legdocs/2005/agendas/council/cc051205/pofcl034b.pdf>

ISSUE BACKGROUND

Legislative Scheme

Port authorities like the TPA are created by Letters Patent pursuant to section 8 of the *Canada Marine Act* 1998, c. 10 (“CMA”). The TPA’s Letters Patent were effective as of June 8, 1999.

The purpose of the federal *Payments in Lieu of Taxes Act* R.S., 1985, c. M-13 (“the *PILTs Act*”) “is to provide for the fair and equitable administration of payments in lieu of taxes”. Under the *PILTs Act*, the City is a “taxing authority” and the TPA is a Schedule III crown corporation.

The *Crown Corporation Payments Regulations* SOR 81/1030 (“the Regulation”) govern the PILTs to be made by the TPA to the City. Section 2 of the Regulation defines “corporation property value”:

"corporation property value" means the value that a corporation would consider to be attributable by an assessment authority to its corporation property, without regard to any mineral rights or any ornamental, decorative or non-functional features thereof, as the basis for computing the amount of any real property tax that would be applicable to that property if it were taxable property [emphasis added].

A PILT made pursuant to the Regulation is to be made without condition and on the basis of a formula set out in section 7 which states, in part:

[...] a payment made by a corporation in lieu of a real property tax for a taxation year shall be not less than the product of

- (a) the corporation effective rate in the taxation year applicable to the corporation property in respect of which the payment may be made; and

(b) the corporation property value in the taxation year of that corporation property. [emphasis added]

Part of the mandate of the Dispute Advisory Panel is to deal with disputes regarding property values.

DAP Hearing

Consistent with City Council’s direction, the City applied to the DAP on April 13, 2006 for a review of 42 properties of which 17 are water lots. In the period between the application and the February 2008 hearing, the parties made progress on several issues between them, including agreement on which TPA properties (“the Subject Properties”) and tax years would be put before the DAP. The City reserved its rights to bring other properties forward for a hearing, if necessary.

The issue before the DAP was the appropriate corporation property values (“values”) of the Subject Properties for the purposes of calculating PILT amounts.

The Subject Properties before the DAP were:

Subject Properties	Assessment Roll Numbers	Tax Years
1. 80 Cherry Street (Marine Terminal)	1904 071 030 00250	2004, 2005, 2006, 2007
2. Polson Slip water lot	1904 071 050 01000	same
3. Unwin Avenue s/s (Outer Harbour Marina)	1904 061 990 00520	same
4. Toronto City Centre Airport	1904 061 600 00300	same

The parties chose one waterlot as a test case to present to the DAP with a view that any decision would assist the parties in resolving the value of other waterlots.

The DAP hearing was held February 25, 26, 27 and 28, 2008. At the hearing the City presented evidence from an expert witness who had previously worked for MPAC and who was an accredited appraiser (AACI, P.app. designation). The TPA presented evidence from its Chief Financial Officer and a representative of Public Works Canada who was involved in the federal PILT Program.

It was the City’s position at the hearing that:

- (i) The values for the Subject Properties should be determined in accordance with the governing principles in the Ontario *Assessment Act* which provides that real property should be valued at its current value (i.e. the amount of money the fee simple, if unencumbered, would realize if sold at arm’s length by a willing seller to a willing buyer);

- (ii) The values of the Subject Properties should be the values that the assessment authority (MPAC) in Ontario would attribute to each of the properties if they were taxable; and,
- (iii) The various Subject Properties' existing use is their highest and best use (taking into account the municipal zoning).

It was the TPA's position at the hearing that:

- (i) The value of the Subject Properties must reflect that they are impacted by federal use restrictions imposed by the *Canada Marine Act* and the Letters Patent issued to the Port Authority;
- (ii) The values of industrial lands along the Toronto waterfront cannot be used as comparators to the Subject Properties since they are affected by speculative redevelopment value;
- (iii) As some of the Subject Properties are income producing, they should be valued based on the income method using actual income data from the TPA;
- (iv) For the Toronto City Centre Airport ("TCCA") property a PILT should be paid to the City based upon the number of commercial passengers using the airport.

COMMENTS

The DAP Decision was communicated to the parties by letter dated January 5, 2009. Each of the properties is addressed, recommending a valuation method and values for three of the four Subject Properties. Generally, the DAP favoured the position put forward by the TPA rather than the City's position.

The Toronto City Centre Airport (TCCA)

The DAP failed to provide a value for the TCCA. The DAP adopted the TPA position that the PILT amount for the TCCA should be calculated based on section 45(1) of Ontario Regulation 282/98 enacted pursuant to the *Assessment Act*. This regulation applies to four federally designated airport authorities in Ontario and requires each to calculate their annual payment in lieu of taxes by multiplying the passenger total by the amount set forth in the section. For example, the Greater Toronto Airports Authority pays \$.94029. For the TCCA, the DAP came up with a rate of \$.80 per passenger for the 2004 year onward.

The TPA advised the DAP that it had applied to the province to have Ontario Regulation 282/98 apply to the TCCA. No evidence of the application was put before the DAP.

The City's expert used the Cost Approach for the TCCA's value. The land values were derived from land sales compiled on a MPAC land table which were then tested with comparable sales

that the City's expert found. Adjustments were made to the sale values of these properties. The value of the buildings at the TCCA were derived using the Automated Costing System (ACS) developed by MPAC. The City's expert placed a value on the TCCA of approximately \$40 million. This is just for the portion of the TCCA that is PILTable. A portion of the TCCA is returned by MPAC on the roll as taxable.

The PILT amount requested by the City for the four years under consideration totalled \$9,597,381. The amount calculated based on a per passenger rate, will vary per year and is estimated to be \$280,000 for 2007. Estimates are not available at this time for the other years.

Polson Slip (Waterlot)

The City's value for the waterlot was based on a method of taking a percentage of the upland value surrounding the waterlot. This resulted in a value of approximately \$357,000 for 2004. The DAP partially relied on this approach but in its own words "arbitrarily" chose a different percentage and value for this waterlot. In addition, the DAP's final value for the waterlot was made by taking into account a "pollution factor" of 50% which is unexplained in the Decision and for which no evidence was put before the DAP. The DAP's value for the waterlot is \$150,000 for 2004.

The TPA's proposed value for the waterlot was \$49,528 although the DAP incorrectly reported that the TPA's proposed value was a nominal sum of \$1,000.

The PILT amount requested by the City for the four years under consideration totalled \$44,888 while the amount calculated based on the DAP value is \$19,139.

Unwin Avenue s/s (Outer Harbour Marina)

The Outer Harbour Marina ("OHM") is comprised of land and waterlots. The TPA operates a marina with 636 slips. The City's expert determined a value of the land and waterlots at the OHM based upon land sales compiled on a MPAC land table which were then tested with comparable sales that the City's expert found. The City's value for 2004 was approximately \$12,661,000. The TPA's value was based on the actual income from this property. The TPA's value was \$965,000 for 2004.

The DAP rejected both parties' proposed values for the OHM although it did agree that the OHM should be valued using the income approach. The DAP value was \$1,261,000 for 2004.

The PILT amount requested by the City for the four years under consideration totalled \$1,331,069 while the amount calculated based on the DAP value is \$205,623.

80 Cherry Street (Marine Terminal)

This is the property where the TPA carries out its port activities. The Marine Terminal has two terminals for port cargo and storage. The International Marine Passenger Terminal was also built on this site. The parties agreed that the Cost Approach was the appropriate valuation

method for the Marine Terminal at 80 Cherry Street. The DAP, however, rejected the City's and the TPA's proposed values.

The City's expert valued the Marine Terminal lands using the same sales information he relied on for the other properties. Similarly, the City's expert relied on MPAC's ACS to value the buildings. The City's expert determined a value for 2004 of \$15,435,000. This is just for the portion of the Marine Terminal that is PILTable. A portion of the Marine Terminal is returned by MPAC on the roll as taxable. The TPA's proposed value for 2004 was \$6,382,000.

The DAP rejected the TPA's position on land values because the TPA's valuator used MPAC land tables for the Portlands in the City of Hamilton. The DAP accepted the City's criticism of the TPA's choice of Hamilton land values.

In reaching a conclusion the DAP deducts an economic obsolescence factor that appears to be based on the evidence from the TPA that the Marine Terminal business is functioning "at between 25 to 30 percent below capacity". The DAP value for 2004 was \$8,394,000.

The PILT amount requested by the City for the four years under consideration totalled \$2,698,658 while the amount calculated based on the DAP value is approximately \$1.8 million.

Judicial Review Application

The City Solicitor has made an application to the federal court to judicially review the DAP's Decision. The application is pursuant to section 18.1 of the *Federal Courts Act* R.S., 1985, c. F-7 and was issued on February 4, 2009 to adhere to statutory deadlines and preserve the City's rights.

CONTACT

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SIGNATURE

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ATTACHMENTS

1. Confidential Attachment 1