

## **West Don Lands Phase 1 Securities & Indemnities**

<b>Date:</b>	May 18, 2009
<b>To:</b>	Executive Committee
<b>From:</b>	Deputy City Manager Richard Butts
<b>Wards:</b>	Ward 28 Toronto Centre-Rosedale
<b>Reference Number:</b>	P:\\2009\\ClusterB\\wf\\ec09004

### **SUMMARY**

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This report is provided to finalize matters related to the West Don lands Phase 1 Plan of Subdivision. Within this context, it addresses how financial securities and indemnity requirements are being addressed, recognizing that this land is provincially-owned and undergoing renewal as part of the tri-government waterfront revitalization initiative.

Waterfront Toronto (WT) and the other orders of government have asked the City to modify its usual security requirements (120% of the estimated costs of municipal infrastructure work to be completed) because of the special circumstances relating to waterfront renewal. This report recommends that the City accept financial security provisions from WT in an amount that is not less than 20% of the estimated annual costs for constructing and installing all municipal infrastructure, including parks and public spaces. Security requirements will be confirmed annually and on a rolling basis as part of the five-year Financial planning process for waterfront renewal and will remain on file for the duration of the construction and warranty period to address emergency and repair requirements should they arise.

The City and the Province have jointly addressed indemnity requirements to protect the City from future environmental, flood protection land form, and subdivision agreement liabilities related to West Don Lands land transfers to the City for roads, services and parks. It is recommended that the City enter into an Indemnification Agreement with the Province of Ontario, containing all indemnity requirements imposed by the City as outlined in the conditions of draft plan of subdivision approval for Phase 1 West Don Lands.

## **RECOMMENDATIONS**

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### **It is recommended that City Council:**

- (1) Authorize the Deputy City Manager whose responsibilities include Waterfront Revitalization to enter into a West Don Lands Security Fund Agreement with Waterfront Toronto, that provides securities for West Don Lands municipal infrastructure, at a rate of 20% of the estimated cost of new municipal infrastructure and parks, in accordance with the terms as outlined in this report and to the satisfaction of the City Solicitor;
- (2) Authorize the Deputy City Manager whose responsibilities include Waterfront Revitalization to enter into an Indemnification Agreement with the Province of Ontario, containing all indemnity requirements imposed by the City as outlined in the conditions of draft plan of subdivision approval for Phase 1 West Don Lands and to the satisfaction of the City Solicitor;
- (3) Direct the appropriate City officials be authorized and directed to take the necessary action to give effect thereto.

### **Implementation Points**

If Council approves the recommendations included in this report, City staff will execute the Indemnity Agreement between the City and the Province. This agreement will protect the City from future environmental, flood protection land form, and subdivision agreement liabilities related to West Don Lands lands that are to be transferred to the City for roads, services and parks.

City staff will also finalize and execute the Security Agreement between WT and the City to establish the Security Fund. Security amounts would be calculated annually on a rolling basis and will be no less than 20% of the estimated annual costs for constructing and installing all municipal infrastructure, including parks and public spaces. Securities would remain in effect through the warranty period.

While initial contributions to the Security Fund would come from WT earned revenues and City and Provincial contributions to WT for waterfront revitalization, the onus will be on WT in future years to fund letters of credit or obtain securities from third parties. Provincial and Federal approval is first required to enable WT to borrow funds or mortgage assets. Council approval for these powers was provided in 2008.

The Security Fund would initially cover the Phase 1 Plan of Subdivision. It is intended that future phases of West Don Lands and East Bayfront development will be included.

Funding contributions will be held in an interest bearing joint account between the City and WT. There will be a rolling balance in the Fund, based upon those projects that are

under construction and those projects that are complete but which remain under warranty to the City.

The City would be able draw on the Security Fund during construction and applicable warranty periods and in emergency situations to complete work, repair deficiencies and address any other problems that may arise. WT, its representatives, or other project proponents would continue to pay all normal damage deposits, application fees, maintenance fees, start-up deposits and review charges to the City.

## **Financial Impact**

There are no immediate financial implications resulting from approval of recommendations contained in this report. The City's share of costs associated with revitalizing the West Don Lands is included in the Council approved Five Year Financial Plan/Ten Year Forecast (2008-2017) for waterfront revitalization, approved by Council in October 2008 and is subject to the annual capital budget process. Included in the current plan is a provision for City and Provincial contributions to West Don Lands and East Bayfront securities of \$28 million until the end of 2011. Of this amount, \$8.6 million is to be funded by the City, and has been included in the "Financial Securities" sub-project of the 2009 Capital Budget for waterfront revitalization approved by Council in December 2008.

Financial impact must be considered both from the perspective of the City as the holder of cash or letters of credit as security for proper completion and performance of municipal works constructed in the waterfront, and as one of the three government partners in waterfront renewal.

The risk of defaults on waterfront projects is reduced significantly given the project oversight provided through financial contribution agreements between WT and the three governments, the public mandate of WT, the fact that several projects will be underway at any given time each contributing 20% of their total value to the Security Fund thus ensuring a substantial "pool" of resources to address any problems, and the confirmed public sector funding for construction of these projects through existing agreements.

The amount of security that WT will be required to provide if the City applies its standard requirement for 120% of project costs is prohibitively high, given WT's primary source of funding for these projects is the government investment in waterfront renewal. The cost to the governments of supporting securities at this level outweigh the benefit of these securities.

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

## **DECISION HISTORY**

At its meeting of June 2006, Council adopted, as amended, the Planning and Transportation Committee report entitled “Final Report – Application for Draft Plan of Subdivision Approval, Application of Zoning By-law Amendment and Lifting the “h” 05 166169 STE 28 OZ, West Don Lands”.

<http://www.toronto.ca/legdocs/2006/agendas/council/cc060627/plt4rpt/cl002.pdf>

The report included a set of draft conditions of approval for inclusion in a subdivision agreement. This included a standard requirement that the landowner, primarily the Province of Ontario, provide the City with a letter of credit having a value equal to 120% of the estimated cost of new municipal infrastructure and parks, unless alternative means of providing such security by the owner is approved by Council. Staff were requested to report back on the issue of financial securities for WT projects.

## **ISSUE BACKGROUND**

The subdivision plan and zoning amendment for West Don Lands Phase 1 were considered by Planning and Transportation Committee on June 1 2006 and endorsed by Council at its meeting of June 26-28, 2006.

### Financial Securities

The City requires financial security from developers and others constructing municipal infrastructure under subdivision, site plan and other agreements with the City, and under road access, park access and other permits from the City. The financial security is normally in the form of a letter of credit provided by the developer’s bank. If the municipal infrastructure works are not completed to the City’s satisfaction, the City may draw on the letter of credit and use the funds to complete the work or correct deficiencies.

The City’s standard policy is to require a letter of credit in the amount of 120% of the costs of constructing the new municipal infrastructure (such as water distribution systems, storm and sanitary sewers, storm water management facilities, streets, parks, grading, signage, etc.). The letter of credit is reduced to 20% once the work has been completed to the City’s satisfaction, and the City holds the remaining 20% for the two year infrastructure warranty period. Once the warranty period ends and any deficiencies have been addressed, the letter of credit is returned to the developer. The City takes similar financial security for work undertaken by developers or others within City parks or road allowances under permits from the City.

To date the City has not required WT to provide financial security for its smaller stand-alone public space projects within parks or road allowances. The City has, however, required WT and its representatives to comply with other standard requirements such as providing infrastructure warranties and paying damage deposits, application fees and other charges. In addition, the role of the Province in the West Don Lands development

established the need for an appropriate type of approach to ensure securities would be available to address deficiencies or other issues related to infrastructure completion. Due to restrictions in the Financial Administration Act and the Consolidated Revenue Fund, the Province cannot issue letters of credit.

### Indemnity

City and provincial staff identified the need to address indemnity provisions to protect the City from future environmental, flood protection land form and subdivision agreement liabilities related to the West Don Lands land that are to be transferred to the City for roads, services and parks. Staff have developed an approach which consolidates all indemnities required by the City, whether in the conditions of draft plan approval or in the City's Standard Subdivision Agreement.

## **COMMENTS**

### Security Requirements and Security Fund

As WT advances project implementation, the City needs to address the appropriateness of its requirements for financial securities relating to infrastructure work to be carried out by WT or its project proponents. WT and the other orders of government have asked the City to modify its usual security requirements from 120% of the estimated costs of municipal infrastructure work to 20% because of the special financial circumstances relating to the waterfront renewal.

The Planning Act authorizes the City to require such securities in order to protect it against unforeseen costs related to:

- construction of municipal infrastructure required to service the new subdivision is initiated by the landowner but not completed;
- construction of new municipal infrastructure is completed but faults or deficiencies that arise during the warranty period are not remedied by the landowner.

This report recommends that the City accept financial security provisions from WT of not less than 20 % of the estimated annual costs for constructing and installing all municipal infrastructure, including parks and public spaces. Security requirements will be confirmed annually and on a rolling basis as part of the five-year planning process for waterfront renewal and will remain on file for the duration of the construction and warranty period to address emergency and repair requirements should they arise. It is also recommended that these security requirements be held in a Security Fund to be secured through an agreement between the City and WT, to the satisfaction of the City Solicitor.

The Security Fund is a joint approach that includes funding from the City and the Province through their contributions to waterfront renewal, supplemented by financing or revenue contributions by WT or securities obtained from its contractors. At this time WT does not have the ability to borrow funds or to issue letters of credit. The three

governments negotiated a governance package early in 2008 that was approved by Council in March 2008. This package will, among other things, permit WT to borrow funds and thereby establish letters of credit. The provincial and federal governments are currently working through their approval processes.

Security funds contributions will be held in an interest bearing account. The City would be able draw on the account during construction and applicable warranty periods, and either hold that money or use it to complete work, repair deficiencies and address any other problems that may arise. WT, its representatives, or other project proponents would continue to pay all normal damage deposits, application fees, maintenance fees, start-up deposits and review charges to the City.

WT has proposed a Security Fund agreement to implement the Fund. City staff, the Province and WT have considered and addressed a number of aspects related to this proposed agreement. Coverage of all WT projects that are being delivered in West Don Lands by Ontario Realty Corporation, including the redesign of Bayview and River Streets and relocation of the Low Level Interceptor, will be included in the Fund with funds provided through the waterfront Long Term Funding Plan. Replenishing the Fund after a draw by the City for emergency or other purposes will be dealt with in a manner consistent with the Standard Subdivision Agreement.

### Indemnity

City and provincial staff have developed a joint agreement which consolidates all indemnities required by the City, whether in the conditions of draft plan approval or in the City's Standard Subdivision Agreement. The City will be assuming the ownership, operation and maintenance of the parks, roads and services constructed by WT. Through the agreement the Province provides indemnification to the City for specific claims: environmental, flood protection land form, and Subdivision Agreement.

The Environmental Indemnity covers all losses, costs, damages and expenses related to hazardous substances present in or on the City Phase 1 Lands prior to the date of their conveyance to the City or TRCA and hazardous substances present in or on the City Phase 1 Lands resulting from migration from lands owned by the Province onto or into the City Phase 1 Lands after they have been conveyed to the City.

The Flood Protection Landform (FPL) Indemnity covers all losses, costs and expenses related to: property damage, personal injury or loss of life due to flooding which occurs prior to the date of completion of the FPL; unreasonable delay in the commercial development of the Phase 1 West Don Lands resulting from delay in the completion of the FPL; and property damage requiring repair or replacement of any works or equipment in the Don River Park arising from the failure of, or a defect in, the FPL during the five year period after the date of its completion.

The Subdivision Agreement Indemnity provides various indemnities that are required under the City's Standard Subdivision Agreement, including those related to: the owner's

obligations for winter maintenance and the collection of household solid waste and recyclable materials; services constructed by or on behalf of the Province; the construction of a sales pavilion and/or model homes; claims under the Construction Lien Act relating to the construction of the Services; and entrance by the City onto lands within the Phase 1 to complete services prior to conveyance to the City.

City staff are requesting authority to execute the Indemnification Agreement as described above, in a form satisfactory to the City Solicitor.

### Conclusion

The reduction in financial securities requirements from 120% to 20% of construction costs, and the establishment of a security fund to address financial securities for new waterfront infrastructure, reflect the unique nature of waterfront renewal as a tri-government project with significant public investment and, as a result, reduced financial risk. The completion of a comprehensive indemnity agreement with the Province protects the City from future environmental, flood protection land form and subdivision agreement liabilities related to the West Don Lands land transfers to the City for roads, services and parks.

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## **SIGNATURE**

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