

Election of Condominium Units as Payment of Outstanding Balance for Sale of Closed Lane at the Rear of 585 Queen Street West

Date:	January 22, 2010
To:	Government Management Committee
From:	Chief Corporate Officer and General Manager, Economic Development & Culture
Wards:	Trinity-Spadina - Ward 20
Reference Number:	P:\2010\Internal Services\F&re\Gm10013F&re – (AFS 10681)

SUMMARY

In 2008, RioCan PS Inc. purchased a closed lane at the rear of 585 Queen Street West from the City for \$1,000,000.00, of which \$700,000.00 has been paid to the City to date. The purpose of this report is: (a) to obtain approval for the City to elect to receive payment of the outstanding balance of \$300,000.00 by the conveyance to the City of two store front condominium units, which are valued at \$300,000.00, rather than by certified cheque; (b) to obtain approval for the City to enter into a Below-Market Rent Lease Agreement with the Toronto Cultural Advisory Corporation for the use of the condominium units; and (c) to obtain approval for the City to enter into an agreement with the Toronto Cultural Advisory Corporation governing TAC's mandate to operate the condominium units for artistic purposes.

RECOMMENDATIONS

The Chief Corporate Officer and the General Manager of Economic Development, Culture & Tourism recommend that:

1. City Council elect to receive the outstanding balance of \$300,000.00 owed to the City by RioCan PS Inc. ("RioCan") for the sale of the lane at the rear of 585 Queen Street West (the "Lane") by the conveyance to the City of two store front condominium units (the "Condo Units") in the development to be constructed on the site, valued at \$300,000.00, rather than by payment to the City

of \$300,000.00 by certified cheque, and that the Condo Units be placed under the operation and management of the General Manager of Economic Development, Culture & Tourism.

2. City Council authorize and direct the City Solicitor to execute and deliver notice to RioCan of the City's election in Recommendation 1.
3. City Council exempt the outstanding balance owing for the sale of the Lane from the policy governing Proceeds from Sale of Surplus City-Owned Real Property, which provides that the net proceeds from the sale of real property is, subject to certain exceptions, to be deposited in the Land Acquisition Reserve Fund.
4. City Council appoint the Director of Real Estate Services to represent the City's interests in the affairs and business of the condominium corporation and delegate to the Director of Real Estate Services, or his or her designate, authority to raise matters of interest or concern to the City, attend owners' meetings, including the annual general meeting and any additional meetings that may be called, and vote on behalf of the City on any matters which require or permit a vote of the owners.
5. City Council authorize the City to enter into a Below-Market Rent Lease Agreement with the Toronto Cultural Advisory Corporation ("TAC"), for a five year term, with an option to renew for one five year term, substantially on the terms set out in attached Appendix A and such other terms as the Chief Corporate Officer, or his or her designate, may deem acceptable, and in a form satisfactory to the City Solicitor.
6. City Council authorize the Chief Corporate Officer to administer and manage the Lease Agreement with TAC, including the provision of any consents, approvals, notices and notices of termination, provided that the Chief Corporate Officer may, at any time, refer consideration of such matters (including their content) to City Council for its determination and direction.
7. City Council exempt the leasing of the Condo Units to TAC from the policy governing the Provision of City-Owned Space to Community Organizations at Below-Market Rent, which provides that space made available for community use at below-market rent through the City's surplus property disposal process is to be allocated through a Request for Proposal process.
8. City Council authorize the City to enter into an agreement with TAC on terms satisfactory to the Deputy City Manager and Chief Financial Officer and the General Manager of Economic Development, Culture & Tourism, and in a form satisfactory to the City Solicitor, to govern TAC's mandate to operate the Condo Units for cultural/artistic purposes.

Financial Impact

If City Council approves Recommendation 1, the City will acquire ownership of two storefront condominium units, valued at \$300,000, when construction of the development at Queen and Portland has been completed (estimated in mid-2011) rather than receive payment by certified cheque of the outstanding balance of \$300,000 owing to the City for the sale of the Lane and, therefore, will forego these proceeds from being taken into the Land Acquisition Reserve Fund as per Council policy. At the time of the conveyance, the City will be required to return the letter of credit (the "Letter of Credit") in the amount of \$400,000.00 that RioCan delivered to the City pursuant to the terms of the agreement under section 45 of the *Planning Act* between RioCan and the City (the "Section 45 Agreement") as security for the payment of the outstanding balance. If RioCan fails for any reason whatsoever to convey the Condo Units to the City by November 20, 2011, the City will be entitled to draw down on the Letter of Credit in its entirety and to retain the proceeds thereof in satisfaction of RioCan's obligation to convey the Condo Units to the City. RioCan is required to pay, on behalf of the City, all land transfer tax which is payable in connection with the conveyance of the Condo Units to the City.

This report also recommends a nominal sum lease of the Condo Units to TAC, who will sublease the Condo Units to grant recipients, at full cost recovery, to further their cultural activities. The Lease to TAC will require it to take responsibility for all ongoing operating and capital costs, including condominium maintenance fees which are estimated to total \$117.64 per month during the first year (subject to inflation going forward), as well as other costs, leasehold improvements and property taxes. TAC has submitted a business case supporting its plan to sublet these spaces to eligible grant recipients and to recover all ongoing costs. The Lease Agreement with TAC and the agreement to govern TAC's mandate with respect to the Condo Units would be separate from the City's existing agreement with the TAC for the administration of arts and culture grants.

Initial essential leasehold improvements, estimated by TAC to cost \$63,274, will be necessary to prepare the Condo Units for occupancy and will be the responsibility of TAC under the Lease Agreement. However, the business case submitted by TAC contemplates the City providing a grant of up to \$75,000 to cover the cost of the initial leasehold improvements. A Section 37 cash contribution to support the development of non-profit arts and cultural spaces was negotiated as part of a rezoning application in Ward 20 that was recently approved by City Council and could be applied to fund the leasehold improvements in the Condo Units. As these Section 37 funds have not yet been received by the City, however, no specific allocation or budget for their provision as a grant to TAC can be made at this time. It is anticipated that this Section 37 funding or another source for the \$75,000 will be available by the time the City acquires the Condo Units in 2011. A report to Council may be required to allocate the funds once such funds are received by the City.

Should the Below-Market Rent Lease Agreement with TAC be terminated for any reason, the City has the right, under the Section 45 Agreement, to require RioCan to buy back the Condo Units at a purchase price of \$300,000 multiplied by the corresponding TREB Index. This provision, which extends for 15 years following the date the City takes ownership, minimizes the risk to the City of accepting the Condo Units and will allow disposition at market value. During the same fifteen year period, RioCan will have a right of first refusal to purchase the Condo Units from the City in the event that the City receives a bona fide offer to purchase from a third party which the City is prepared to accept, at the same price and on the same terms as contained in the third party's offer. It is this buy-back clause that makes it acceptable for the City to acquire the Condo Units, as ongoing ownership of condominium units by the City under any other terms represents an inappropriate financial risk.

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

DECISION HISTORY

In accordance with the City's Real Estate Disposal By-law, No. 814-2007, the Lane was declared surplus on May 20, 2008 (DAF No. 2008-069), with the intended manner of disposal to be by inviting an offer to purchase the lane from the abutting owner at 585 Queen Street West, being RioCan.

The permanent closure of the Lane as a public highway was authorized by Item TE17.62, as adopted by City Council at its meeting held on July 15, 16 and 17, 2008. The sale of the Lane was authorized by Item GM16.13, as adopted by City Council at its meeting held on July 15, 16, and 17, 2008 and on October 30, 2008, City Council enacted By-law No. 116-2008, permanently closing the Lane.

At the meeting of City Council on August 5 and 6, 2009, the City Manager requested that Government Management Committee Item GM24.23, entitled "Election of Payment of the Outstanding Balance for Sale of the Closed Lane at the Rear of 585 Queen Street West", be removed from the Government Management Committee agenda and be brought forward to City Council for consideration. At its meeting held on August 5 and 6, 2009, City Council deferred Item GM24.23 (now identified as Item CC40.1) to its next regular meeting on September 30, 2009.

At its meeting held on September 30 and October 1, 2009, City Council referred Item CC40.1 to the Chief Corporate Officer and the General Manager of Economic Development, Culture & Tourism to further consider whether the City should elect to receive the outstanding balance of \$300,000.00 owed to the City from the sale of the Lane by certified cheque or by the conveyance of the Condo Units. City Council also requested the Chief Corporate Officer and the General Manager of Economic Development, Culture & Tourism to invite the TAC to submit a business plan that would allow TAC to program the Condo Units as creative incubators and which in turn would not have any ongoing operational or long-term financial impact on the City. City Council further requested staff to report back to the Government Management Committee no later

than its January 2010 scheduled meeting with the results of their review of TAC's business plan and the parameters of an agreement between the City and TAC for the operation of the Condo Units as creative incubators.

ISSUE BACKGROUND

On January 23, 2008, the Committee of Adjustment approved a minor variance application from RioCan, permitting it to redevelop the existing parking lot at 585 Queen Street West, 156 Portland Street and 580 Richmond Street West with a seven-storey mixed-use building, with retail on the three lower levels and residential condominiums on the four levels above.

The minor variance approval was subject to a number of conditions, including the requirement that RioCan enter into an agreement with the City pursuant to section 45 of the *Planning Act* to secure matters identified by the Ward Councillor, which included the conveyance of the Condo Units by RioCan to the City as part of the sale transaction for the Lane.

On July 23, 2008, the City and RioCan entered into the Agreement of Purchase and Sale, whereby RioCan agreed to purchase the Lane for \$1,000,000.00, with \$700,000.00 to be paid on closing and the outstanding balance of \$300,000.00 to be paid, at the election of the City, either by certified cheque or by the conveyance of the Condo Units, to be secured in the Section 45 Agreement. The City originally had one year from July 23, 2008 to make its election. With RioCan's consent, however, this one year period has been extended until two weeks following the Council meeting in February, 2010.

On September 7, 2008, the City and RioCan entered into the Section 45 Agreement, which required RioCan to deliver a Letter of Credit to the City in the amount of \$400,000.00 to secure RioCan's obligations with respect to the balance owing to the City.

The sale of the Lane was completed on November 20, 2008, at which time the City received \$700,000.00 and the Letter of Credit from RioCan.

COMMENTS

Staff of Real Estate Services and Economic Development, Culture & Tourism have considered the options available to the City and have determined that the City should elect to receive the balance owing for the Lane by accepting a conveyance of the Condo Units, which have been valued by Real Estate Services staff at \$300,000.00.

Exemption from the Proceeds Policy

At its meeting on June 18, 19, and 20, 2002, Council adopted a report entitled "Policy Governing Land Transactions Among City Agencies, Boards, Commissions and Departments and Proceeds from Sale of Surplus City-Owned Property" (the "Proceeds Policy"), which provides that the proceeds of sale of City real estate be held in the Land Acquisition Reserve, rather than be directed to other initiatives. However, given that there is a shortage of affordable space for use by artists in the area and TAC has put forth a proposal to program the Condo Units as artist/gallery spaces, City staff recommend that

City Council take the opportunity to acquire the Condo Units for program purposes and that Council exempt the outstanding balance owing from the sale of the Lane from the Proceeds Policy.

Community consultations in Ward 20 regarding the RioCan development at Queen and Portland indicated strong community support for accommodating arts use in the development and animating the Richmond Street façade. TAC has indicated that it is interested in leasing the Condo Units from the City under a Below-Market Rent Lease for gallery and/or creative studio purposes and has submitted a business case for this proposal, which is discussed in further detail below. The Condo Units are in a suitable location for TAC to start up a neighbourhood artist's gallery and/or studio, given that they are only half a block away from TAC's office at 141 Bathurst Street.

Legal Implications of Condominium Ownership

There are numerous legal issues associated with condominium ownership. The decision-making body of the condominium corporation is a Board of Directors elected by the unit owners, whose decisions could have financial and/or legal implications that bind the City. In the case of the subject condominium corporation, the condominium is to consist of 90 residential units on the third to seventh floors of the building (together with related below-grade parking units and locker units) and two ground floor retail units, being the Condo Units to be acquired by the City. If City staff were to seek election to the Board of Directors to try to protect the City's interests as the only non-residential unit owner in the building, this could result in a potential conflict of interest for staff, as the best interests of the condominium corporation might not be the same as the best interests of the City.

In order to protect the City's interests as much as possible, it is recommended that Council appoint the Director of Real Estate Services to represent the City's interests in the affairs and business of the condominium corporation and delegate to the Director of Real Estate Services, or his or her designate, authority to raise any matters of interest or concern to the City with the condominium corporation, attend owners' meetings, including the annual general meeting and any additional meetings that may be called, and vote on behalf of the City on any matters which require or permit a vote of the owners. Matters requiring a vote of the owners include such things as the election or removal of members of the board of directors, the election or removal of auditors, proposed substantial alterations or improvements to the common elements and proposed amendments to the condominium declaration (such as to change the proportion of common expenses attributable to each condominium unit).

Pursuant to the Section 45 Agreement, if the City elects to take the Condo Units, the City will have the option, for a period of fifteen years following the date the City takes ownership of the Condo Units, to put the Condo Units back to RioCan if the City decides it no longer wishes to own them. The risk to the City, therefore, is minimized. It should also be noted that during the same fifteen year period, RioCan will have a right of first refusal to purchase the Condo Units from the City in the event that the City receives a

bona fide offer to purchase from a third party which the City is prepared to accept, at the same price and on the same terms as contained in the third party's offer.

TAC Business Case

TAC's Board of Directors has submitted a business case which is based on the following assumptions:

- (1) TAC will lease the Condo Units from the City for \$1.00 per year;
- (2) TAC will sublease the Condo Units for gallery and creative studio use, on a cost recovery basis (i.e. to recover condominium maintenance fees, utilities, taxes, insurance, maintenance) to artists and arts organizations who have received TAC grants within the previous three years and who are selected through an RFP process;
- (3) TAC will be responsible for the necessary leasehold improvements to finish the Condo Units;
- (4) TAC will receive funding of up to \$75,000.00 from the City to cover the cost of the essential initial leasehold improvements, which the Ward Councillor has committed to provide from Section 37 funds received in Ward 20.

Staff from Real Estate Services, Economic Development, Culture & Tourism and Financial Planning have reviewed TAC's business case and have found it to be reasonable, except that there are currently no Section 37 funds available in Ward 20 to allocate to TAC at this time. Accordingly, there is currently a shortfall of up to \$75,000.00 in TAC's business case. However, a Section 37 cash contribution to provide capital improvements to non-profit arts and cultural facilities in Ward 20 was recently negotiated as part of the proposed development approved by Council at 56 Blue Jays Way and could be applied to fund the leasehold improvements in the Condo Units. Such benefits, once paid to the City, could be allocated by Council to TAC to support the initial leasehold improvements to these Condo Units.

Following completion of the initial leasehold improvements, TAC's business case does not require the City to provide it with any ongoing capital or operating funds. Rather, TAC will fund the costs through affordable rents charged to subtenants.

Below-Market Rent Lease to TAC

In accordance with the City's Below-Market Rent Policy, staff of Economic Development, Culture & Tourism conducted a review of both TAC's eligibility and its business plan and have determined that TAC qualifies for a traditional Below-Market Rent lease. Accordingly, it is recommended that the City enter into a Below-Market Rent Lease Agreement with TAC substantially on the terms set out in Appendix A and such other terms as the Chief Corporate Officer may deem acceptable and that Council exempt the Condo Units from the policy governing the Provision of City-Owned Space to Community Organizations at Below-Market Rent through a Request for Proposal Process. The opportunity cost of entering into this Below-Market Rent Lease is estimated to be \$192,000, which represents the net market value that could be realized if the Condo Units were leased for a five year term plus a five year renewal term at market rates.

TAC Agreement

Since 1974, TAC has served as an independent, arm's length advisory body to the City on artistic and cultural matters, including the allocation of City cultural grants to artist applicants and organizations. In April 2007, the City and TAC renewed their existing agreement for a further five year term. This agreement specifies the role, responsibilities and reporting obligations of TAC, including its obligations to administer and disburse City grant funds. The agreement specifically states that the grant monies allocated by the City shall be used solely for the purpose of development and funding of arts and culture in the City of Toronto through peer reviewed grants and that such monies shall not be used for any other purpose, other than for administrative costs to support this purpose.

Therefore, if TAC is to take on a new role related to the operation of the Condo Units for artistic purposes, it is necessary that the City and TAC enter into a separate agreement which sets out TAC's role and responsibilities in this regard, separate and apart from its grant administration responsibilities under the existing agreement. Accordingly, it is recommended that the City enter into an agreement with TAC on terms satisfactory to the Deputy City Manager and Chief Financial Officer and the General Manager of Economic Development, Culture & Tourism, and in a form satisfactory to the City Solicitor.

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SIGNATURE

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ATTACHMENTS

Appendix "A" - Major Terms and Conditions of Below-Market Rent Lease Agreement
Appendix "B" - Site Map