

## **Provincial Development Projects – Implications of Not Requiring Indemnities, Letters of Credit or Deposits on Provincial Projects**

<b>Date:</b>	June 2, 2010
<b>To:</b>	Planning and Growth Management Committee
<b>From:</b>	City Solicitor
<b>Wards:</b>	<b>All Wards</b>
<b>Reference Number:</b>	

### **SUMMARY**

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At its meeting of February 22 and 23, 2010, City Council adopted a Planning report recommending approval of an application by the Province for Draft Plan of Subdivision Approval for lands at 1201 Wilson Avenue ("Provincial Campus"). In adopting the report, Council directed the City Solicitor, in consultation with the Chief Planner and Executive Director City Planning, the Executive Director of Technical Services, and other appropriate staff, to report to the Planning and Growth Management Committee on the City-wide implications of Ontario Realty Corporation (ORC) advising the City that ORC and Infrastructure Ontario will not be able to provide indemnities, letters of credit or deposits on any Provincial projects. This report responds to that direction.

### **RECOMMENDATIONS**

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The City Solicitor is recommending that given the Province's advisement that it will not be providing indemnities or financial security for Provincial projects in the City of Toronto being undertaken by the Province, Ontario Realty Corporation or Infrastructure Ontario, the City apply the following policies to any subdivision agreements, site plan agreements or other agreements required to facilitate proposed Provincial projects:

1. all development is to be constructed and new infrastructure and relocated infrastructure is to be installed in accordance with all City standards and specifications;

2. no provisions will be included requiring indemnification of the City or financial security in the form of letters of credit or cash deposits;
3. enhanced insurance provisions, especially in respect of civil liability for third party bodily injury and property damage arising from construction of the project and installation of infrastructure, will be provided to the satisfaction of the Manager of Insurance and Risk Management; and
4. for subdivision approvals, future public roads may be shown as blocks on the Draft Plan of Subdivision, and such blocks may not to be conveyed to and/or assumed by the City until such time as they are constructed, inspected, accepted and the two year maintenance period has expired.

### **Financial Impact**

These recommendations will have no financial impact beyond what has already been approved in this year's budget.

### **DECISION HISTORY**

At its meeting of February 22 and 23, 2010, City Council adopted a planning report (NY31.23) recommending approval of an application by the Province for Draft Plan of Subdivision Approval for lands at 1201 Wilson Avenue ("Provincial Campus"). In adopting the report, Council adopted the following Recommendation 2:

- "2. Directed the City Solicitor, in consultation with the Chief Planner and Executive Director City Planning, the Executive Director of Technical Services, and other appropriate staff, to report to the Planning and Growth Management Committee on the City-wide implications of Ontario Realty Corporation (ORC) advising the City that ORC and Infrastructure Ontario will not be able to provide indemnities, letters of credit or deposits on any Provincial projects."

### **ISSUE BACKGROUND**

During the review of the Draft Plan of Subdivision application for the "Provincial Campus" at Keele Street and Highway 401, ORC sent a letter dated October 6, 2009 to Tom Keefe, Director of Community Planning, North York District. After making specific comments regarding the subdivision application, ORC advised as follows with respect to all future Provincial projects:

"Finally, on a related matter, we wish to confirm that ORC has been advised by the government that, in respect to the subdivision or site plan agreement or any other agreement with the City arising from this project and any other Provincial project, ORC and Infrastructure Ontario will not be able, on behalf of the Province, to provide indemnities, letters of credit or deposits."

As an example, ORC has recently confirmed that it will not be providing indemnities, financial securities, letters of credit or deposits for the pending approval of the Phase Two subdivision for the West Don Lands redevelopment.

## **COMMENTS**

### **1. Indemnification and Financial Security**

The City's standard Subdivision Agreement and Municipal Infrastructure Agreement require a developer to indemnify the City against claims for injury and property damage arising from the work carried out by the developer, to provide financial security for the construction of municipal services and facilities by way of letters of credit and deposits, and to carry insurance coverage.

#### **Province unable to indemnify**

The City has been advised that neither ORC nor Infrastructure Ontario will provide the City's standard indemnity requirements or financial security to secure the construction of municipal infrastructure or provision of other required items for any Provincial project. An indemnity is a contingent liability, which it cannot assume without provincial government approval under the *Financial Administration Act*. ORC advises that such approval will not be sought. ORC has cited other projects in Ontario where they have provided no indemnity to the municipality; our understanding is that these projects largely consisted of construction on existing lots and the connection to existing services, and not the creation of new roads and water and sewer infrastructure for conveyance to the municipality at a later date.

ORC has advised that it is willing to provide enhanced insurance coverage. They have also reminded the City that the provincial government and ORC are not bound by the *Planning Act*, *Building Code Act* and *Development Charges Act*.

#### **Importance of duty to indemnify**

An indemnification provision is quite different from financial security or insurance. The purpose of indemnities is to create a contractual relationship between the City and a developer, whereby the owner agrees to be responsible for claims against the City arising from the work performed as part of the subdivision development. This creates a contractual basis for liability on the part of the owner, in addition to any duties that may be owed to the City by virtue of tort law. This is a standard requirement of the City of Toronto, and most other municipalities in Ontario, which all rely heavily on agreements to protect themselves from liability arising from the development of lands within their municipality, including liabilities for land which may ultimately be conveyed to them (eg. public roads). In essence, an indemnity is the owner's covenant to protect the City from any claims arising from the development of lands, except for negligent actions on the part of the City itself. The City does not have to prove fault or negligence of the developer;

instead, it relies on the indemnity to protect itself from claims arising from development projects for which it has little involvement or responsibility.

The indemnities in the City's standard Subdivision Agreement, Municipal Infrastructure Agreement and other development agreements provide a long term commitment that the City will be indemnified and held harmless from loss or claims in connection with work done by the owner. Without an indemnity, the City would need to become directly involved in defending itself against a claim by a third party and would need to claim over against the developer.

The City will be assuming an additional level of financial risk if it agrees with the Province not to require its standard indemnity provisions. In essence, this is not a legal issue but a corporate financial decision in determining how much additional risk the City is prepared to accept, given the Province's legal relationship to the City. After consultation with the Manager of Insurance and Risk Management, City staff are recommending that the City not impose its standard indemnification requirements for Provincial development projects on provincially owned or privately owned lands.

## **2. Financial Security and Insurance**

A letter of credit provides financial security, usually to fund remedial work by the City to remedy a default on the developer's part to fulfil its contractual obligations. For a private sector development, a letter of credit (or cash deposit) is advantageous in two ways: first, as protection against financial failure of the developer and second, to have funds in the City's hands, rather than the developer's, if a dispute occurs.

When dealing with a development where the Province is the proponent, it is appropriate and reasonable to significantly reduce, and perhaps even eliminate, the City's standard requirements for financial security (letters of credit and cash deposits). This recognizes that the City should not be concerned with the financial ability of the Province to meet its contractual obligations under a development agreement. It also means that, in the event of a problem with the actual construction of services, the City would not be in a position to simply draw on a letter of credit, but would instead have to rely on contract law to force the Province to repair any deficiencies.

Insurance is a very different instrument, and is not equivalent to the protection granted under an indemnity. The main purpose of insurance is to ensure that where there is a successful claim by the City, there will be sufficient monies to pay the claim. As an example, for the Phase One, West Don Lands Subdivision, the City agreed that it would not require proof of insurance from ORC/MEI, given the Province's involvement and on the basis that the Province is self insured.

The Manager of Insurance and Risk Management advises that the City does not typically require financial securities, in the form of letters of credit or bonds, or insurance for development projects directly undertaken by other levels of government.

### **3. Proposal for Development Agreements with the Province or ORC**

It is not realistic to tell the Province or ORC to proceed with development in accordance with its exempt status under the statutes referred to above, and not require the Province to enter into any development agreements and thus have no working relationship with the City. The City cannot obtain indemnities directly from the contractors hired by the Province or ORC as there is no direct contractual relationship with them.

Eliminating the requirement that the Province provide financial security does not cause a great deal of concern, as the Province is not likely to be short of funds to complete works agreed to with the City. In the case of a dispute, there is some advantage to the City of having funds or a letter of credit in hand, but it is not an inordinate risk to forgo this where the developer is a provincial agency.

ORC has offered to provide additional insurance. While this does not replace the indemnity because it is merely a source of funds and does not create a contractual relationship to hold the City harmless, having an additional source of funds is better than the City having no protection.

For subdivision approvals, one alternative to reduce the City's risk is to not take ownership of the streets and installed infrastructure until a later date. Normally, streets vest in the City upon registration of a plan of subdivision but defects are sometimes not discovered until many years later. Delaying taking title and assuming responsibility would reduce the City's exposure in this regard.

The City Solicitor is proposing the following policy for development projects carried out by the Province or ORC:

- all development is to be constructed and new infrastructure and relocated existing infrastructure is to be installed in accordance with all City standards and specifications;
- no provisions will be included requiring indemnification of the City or financial security in the form of letters of credit or cash deposits;
- enhanced insurance provisions, especially in respect of civil liability for third party bodily injury and property damage arising from construction of the project and installation of infrastructure, will be provided to the satisfaction of the Manager of Insurance and Risk Management; and
- for subdivision approvals, future public roads may be shown as blocks on the Draft Plan of Subdivision, and such blocks may not be conveyed to and/or assumed by the City until such time as they are constructed, inspected, accepted and the two year maintenance period has expired.

This report has been prepared in consultation with the Chief Planner and Executive Director City Planning, the Executive Director of Technical Services and the Manager of Insurance and Risk Management.

## **CONTACT**

Robert Robinson  
Solicitor  
Planning and Administrative Tribunal Law  
Tel: 416-392-8367  
Fax: 416-397-5624  
E-mail: [rrobins2@toronto.ca](mailto:rrobins2@toronto.ca)

## **SIGNATURE**

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Anna Kinastowski  
City Solicitor