SC20.32.5

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November 27, 2012

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File 99999.99904

VIA E-MAIL (clerk@toronto.ca)

Marilyn Toft, Manager
Council Secretariat
City Clerk's Office
City of Toronto
12th floor, West Tower, City Hall
100 Queen Street West
Toronto, Ontario M5H 2N2

Dear Ms. Toft:

Re: Item SC20.32 – 55 Mac Frost Way – Zoning Amendment & Draft Plan of Subdivision Applications – Final Report

We act as counsel for the Morningside Heights Landowners Group Limited (the "**MHLG**"), an incorporated group of landowners who have developed residential subdivisions within the Morningside Heights Secondary Plan area of the former City of Scarborough, now in the City of Toronto (the "**City**"). On behalf of MHLG, we made oral and written submissions to Scarborough Community Council in respect of the above item when it came before Community Council on November 6, 2012. The purpose of this letter is to provide our client's written submissions for consideration by City Council when this item comes before it on November 27, 2012.

For the reasons the follow, MHLG respectfully requests that Council not approve the rezoning and draft plan of subdivision applications without amending Condition 5 of the conditions of draft plan approval in accordance with our earlier request.

Background

On November 6, 2012, Scarborough Community Council considered the Report from the Director of Community Planning dated September 14, 2012 (the "**Report**"), recommending approval of the proposed zoning and draft plan of subdivision applications by Cedar Brae Golf and Country Club ("**Cedar Brae**") at 55 Mac Frost Way. The Report recommends draft plan approval with a proposed condition respecting the cost of services (Condition #5). In our respectful submission, the condition as proposed falls short of the City's legal obligations that arise under cost sharing agreements between the City and our client and cannot be justified as fair, reasonable and appropriate in the circumstances.

Condition #5 as proposed in the Staff Report reads as follows:

> Prior to registration of the plan of subdivision, the Owner shall submit written confirmation to the City that satisfactory arrangements have been made with the Morningside Heights Land Owners Group for the proportionate construction cost for the capacity of the storm and sanitary sewers that the proposed subdivision will use within the Core services constructed for the Morningside Heights Community.

When this item came before Scarborough Community Council, Councillor Raymond Cho brought a motion to amend the conditions of draft approval by deleting Condition #5 as originally proposed, and replacing it with the following Condition #5 which was inserted in all previous applications for draft approval of plans of subdivision within the Morningside Heights community:

> Prior to registration of the plan of subdivision, the Owner shall become a party to the existing Cost Sharing Agreement with the other participating Owners within the Morningside Heights Secondary Plan who have funded and who will continue to fund the establishment of the Core Services as defined by the applicable Ontario Municipal Board orders. Final registration of the plan of subdivision shall not be permitted until the Owner has executed the said Cost Sharing Agreement and has further submitted to the City a letter from the Trustee under the Cost Sharing Agreement that states that the Owner is in good standing under the provisions of the Cost Sharing Agreement at the time of registration.

Unfortunately the motion did not carry, and Scarborough Community Council adopted the Report without the requested amendment.

Reasons for Amending Condition #5

In our respectful submission, there are two principal reasons why Condition #5 would be fair, reasonable and appropriate only if it is amended as proposed in Councillor Cho's motion:

1. Under the front-ending agreement between the City and MHLG, the City has a legal obligation to ensure that all subsequent landowners seeking to develop lands within the Morningside Heights Community contribute their fair share towards the costs of community infrastructure; and

2. draft approval by the City without amending Condition #5 would unjustly enrich Cedar Brae at MHLG's expense.

1. Subsequent Developers Should Reimburse MHLG for Front-Ending Infrastructure Costs

The first reason Condition #5 must be amended as requested is because the City has already recognized the fairness, reasonableness and appropriateness of the amended condition, both in its front-ending agreement with MHLG and on each and every previous occasion on which a draft plan of subdivision proposed by a subsequent developer within the Morningside Heights community has come before Council for approval.

In February 2002, the City entered into a front-ending agreement with the MHLG owners (554056 Ontario Limited, Mattamy (Neilson) Limited, Mattamy (Staines) Limited, Neilson-Finch Residential Developments Inc. and Trans-Gate Inc.). Pursuant to that agreement, which was entitled "Core Servicing Agreement", MHLG agreed to front-end the costs of developing the infrastructure which enabled the development of lands within the Morningside Heights Community, including the development now proposed by Cedar Brae.

In its front-ending agreement with MHLG, the City has recognized the need for subsequent developers such as Cedar Brae to reimburse MHLG for the cost of services which MHLG agreed to front-end to the benefit of those subsequent developers. In particular, the City has expressly agreed to hold final registration of any subsequent subdivision plans until the Trustee under the front-ending agreement provides the City with evidence that the applicant is in good standing under that agreement. Paragraph 21 of Schedule B to the front-ending agreement dated February 8, 2002 states as follows:

> Cost Sharing Agreement
>
> The Owners shall enter into a Cost Sharing Agreement, within [sic] the participating land owners in the Morningside Heights Secondary Plan Area, prior to final registration of any one of the **current Draft Plans of Subdivision,** deposited with the City within said community.
>
> It is mutually understood by the Owners that the City agrees to hold final Registration of **any one plan of subdivision** within the Morningside Heights Community until that Owner has executed the Cost Sharing Agreement and the Trustee has supplied the City evidence that the Owner of the property in question, is in good standing with the terms and conditions of said agreement,

> which Agreement shall be satisfactory to the City Solicitor. The Cost Sharing Agreement shall provide for the timely completion of the Core Services. [emphasis added in bold]

Within the above paragraph, there is a clear distinction in meaning between the capitalized phrase "Draft Plans of Subdivision" and the phrase "any one plan of subdivision". The preamble to Schedule B specifically lists eight current plans of subdivision after the phrase "Draft Plans of Subdivision". As a matter of common sense interpretation of a front-ending agreement and the different terms used in the agreement, it logically follows that the phrase "any one plan of subdivision" must refer to something other than merely the original eight plans of subdivision specified, who were responsible for front-ending the costs mandated by the agreement. Accordingly, by agreeing to withhold final registration of "any one plan of subdivision", the City has agreed to withhold final registration of any (i.e. all) plans of subdivision within the community, and not merely the original eight "Draft Plans of Subdivision" already contemplated at the time of the front-ending agreement in 2002.

Indeed, the approach which has been taken by the City to date in dealing with subsequent draft plans of subdivision has consistently followed that interpretation. Since 2002, the City has imposed the requested condition on twelve subsequent individual draft plans – most recently, in 2007 when the Fernbrook subdivision was draft approved as revised.

The requested condition simply requires Cedar Brae to reimburse MHLG its proportionate share of infrastructure costs – nothing more and nothing less. Cedar Brae has not shown why it should be treated any differently from the other subsequent developers who have recognized their cost-sharing obligations and have reimbursed MHLG. In our submission, it would not be fair, reasonable or appropriate for the City to allow Cedar Brae to develop its lands on terms that are more favourable to it than any other developer within the Morningside Heights community, with a corresponding detriment to those members of MHLG who front-ended the cost of services which operate to Cedar Brae's benefit.

There is no doubt that the City has the statutory authority to impose conditions of development approval requiring a subsequent developer to reimburse another landowner for a portion of the costs of servicing and infrastructure which will be utilized by the subsequent developer and operate to its benefit. In particular, the City has the authority under section 59(2) of the *Development Charges Act, 1997* to impose the proposed condition requiring subsequent developers, including Cedar Brae, to reimburse MHLG for front-ending the costs of infrastructure in the Secondary Plan area. The Ontario Municipal Board has also confirmed the

authority of municipalities to impose a requirement to reimburse other landowners for costs incurred through a front-ending agreement as a condition of development approval.[1]

2. Amendment Required to Prevent Unjust Enrichment to Cedar Brae

The second reason Condition #5 must be amended as requested is because if the City approves the development without adopting the amended condition, Cedar Brae would be unjustly enriched by a substantial amount at MHLG's expense. The consulting engineer for MHLG has estimated the amount of that enrichment to be $**721,130.**

In order to reimburse MHLG its front-ended infrastructure costs in accordance with the agreements in place, Cedar Brae is required to pay a total of $824,696 based on a Net Developable Area of 1.29 ha and Total Units of 37 units (9 Singles, 28 Townhouses). This amount is comprised of the following:

(a) Community pre-servicing (core services) = $509,529

(b) Community (community land & non-core shareable services) = $315,167

However, the existing Condition #5 as recommended in the Report would only require Cedar Brae to reimburse MHLG its proportionate share of storm and sanitary costs. The language in the current Condition 5 of draft approval would only require Cedar Brae to advise the City in writing that it has made satisfactory arrangements with MHLG for its proportionate share of the "construction cost of the capacity of the storm and sanitary sewers that the proposed subdivision will use within the CORE services constructed for the Morningside Heights Community". The storm and sanitary costs attributed to the proposed development would be $103,566 comprised of:

(a) Storm = $92,100

(b) Sanitary = $11,466

These two items would total only $103,566. That amount falls short of Cedar Brae's funding obligations pursuant to the agreements that are in place by ($824,696-$103,566) = **$721,130**, all at MHLG's expense.

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[1] See, for example, *Burger King Restaurants of Canada Inc. v. Markham (Town)* (2000), 40 O.M.B R. 63.

For these reasons, we submit it is incumbent on the City to approve Cedar Brae's applications only if it is subject to a draft approval condition whose wording tracks the language in the City's front-ending agreement – wording which the City itself has consistently implemented on all previous development applications within the Morningside Heights community, and which every previous developer has recognised and accepted as fair, reasonable and appropriate. Accordingly, MHLG respectfully requests that Council adopt the wording of Councillor Cho's motion to amend Condition #5 in the conditions of draft approval, and that it approve the plan on that basis only.

Thank you for your attention to this matter.

Yours truly,

WeirFoulds LLP

Barnet H. Kussner

BHK/tt

c: Morningside Heights Landowners Group Limited