

Indemnity Provisions in Real Estate Acquisitions from Public Entities

Date: April 20, 2018
To: Government Management Committee
From: Director, Real Estate Services
Wards: All

SUMMARY

The purpose of this report is to seek Council's approval of a strategy pertaining to the acquisition of properties from public agencies wherein an environmental indemnity is required to be given by the City. The Director of Real Estate Services, pursuant to Item GM24.7, adopted by Council of January 31 and February 1, 2018 (the "Elmcrest Report"), was directed to develop such strategy.

RECOMMENDATIONS

The Director of Real Estate Services recommends that:

1. City Council amend the existing delegated approvals and signing authorities adopted by City Council on October 2, 3 and 4, 2017, in Item EX27.12, so as to add the General Condition identified in Appendix A, and thereby authorize the grant of unqualified environmental indemnities in certain limited circumstances involving the purchase of low risk properties from a public agency.
2. City Council direct that in cases where the environmental risk exceeds the Low Risk level identified in Appendix A, and the City remains interested in acquiring the property for its intended purpose, the Director of Real Estate Services negotiate favourable terms on behalf of the City to recover the value of the identified risk, or otherwise protect the City's interest, and report back to Council to seek authority to proceed.

FINANCIAL IMPACT

There is no direct financial impact resulting from the approval of this report.

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

DECISION HISTORY

At its meeting of October 2, 3 and 4, 2017, City Council adopted Item EX27.12, City-Wide Real Estate – Delegated Authorities Framework and Transition Plan, which granted approval for the amendment of the existing delegated authorities for real estate matters.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.EX27.12>

At its meeting on January 31 and February 1, 2018, Council authorized the acquisition of the property known as 126 Elmcrest Road, Etobicoke ("126 Elmcrest") from Her Majesty the Queen in Right of Ontario as represented by the Minister of Infrastructure ("the Seller"). Although the consideration paid by the City to the Seller for 126 Elmcrest was within delegated approval limits, the Seller required that the City give the Seller an unconditional environmental indemnity in respect of 126 Elmcrest, and given the unquantifiable nature of the contingent liability posed by the indemnity, the transaction could not proceed by way of delegated authority.

The Elmcrest Report recommended that the Director of Real Estate Services, in consultation with Legal Services and Facilities Management, report back to Government Management Committee by the end of April 2018, with a proposed strategy and guidelines on transactions involving the acquisition of properties from public entities wherein an environmental indemnity was required.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2018.GM24.7>

The Director of Real Estate Services has developed a strategy pertaining to the acquisition of properties from public agencies wherein an environmental indemnity is required, and is reporting to Government Management Committee with respect to same.

COMMENTS

By requiring unqualified environmental indemnities in transactions involving the acquisition of property by the City, public entities transfer all liabilities related to the property to the City, including any that the public entity may have caused and been responsible for historically. In such instances, the City is put at an unquantifiable risk.

The Director of Real Estate Services is recommending that the authority to acquire property where an unqualified environmental indemnity is required by the public entity selling the property will be based on the findings of Phase I and II ESAs and an environmental risk analysis conducted on behalf of the City.

Lands will be classified into three categories representing high, medium and/or low risk based on the National Classification System for Contaminated Sites Guidance Document (2008), recommended by the Canadian Council of Ministers of the Environment as follows:

Category 1 – High Risk:

Available information indicates high concern based on several factors and measured impacts have been documented. All acquisition transactions involving such properties must go to Council for authority.

Category 2 – Medium Risk:

Available information indicate high potential for adverse impacts, although no threat to human health and/or environmental impacts are imminent. Typically, no direct indication of offsite contamination is evident. All acquisitions transactions involving such properties must go to Council for authority.

Category 3 – Low Risk:

No significant environmental impacts or human health threats. Typically no or minor action required. Acquisition transactions involving such authorities may proceed by delegated authority.

With the exception of Category 3 - Low Risk, the concern still remains with Category 1 - High Risk and Category 2 - Medium Risk that unqualified environmental indemnities could pose unquantifiable contingent liabilities. Therefore, the City must carefully review environmental due diligence and undertake a risk analysis to determine whether the potential liability posed by the indemnity is acceptable on a continually reported case by case basis for Category 1 and Category 2 classified sites.

In cases where the environmental risk is identified as being Category 1 or Category 2 and the City is still interested in acquiring the property for its identified purpose, the Director of Real Estate Services can negotiate favourable terms on behalf of the City to recover the value of the identified risk associated with the transaction or otherwise protect the City's interest. Any such recommended acquisitions would be subject to Council approval.

CONTACT

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SIGNATURE

David Jollimore
Director, Real Estate Services

ATTACHMENTS

Appendix A - General Condition Regarding Indemnities

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The following shall be added to the list of General Conditions identified in Appendix A of Item EX27.12, as adopted by City Council on October 2, 3 and 4, 2017.

General Condition (DD) - Where the City is transacting with a public agency, and such agency requires that an unqualified environmental indemnity be granted by the City, the authority to acquire property includes authority to grant such an indemnity, provided that the Phase I and Phase II environmental site assessments undertaken on behalf of the City have identified no significant environmental impacts or human health threats, with no, or minor action required ("Low Risk").