



**STAFF REPORT
ACTION REQUIRED**
with Confidential Attachment

**Settlement of Appeal of Official Plan Amendment No. 38,
Authorizing Section 37 Funding of Heritage
Conservation District Studies**

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| Date: | April 17, 2009 |
| To: | Planning and Growth Management Committee |
| From: | Chief Planner and Executive Director, City Planning and City Solicitor |
| Wards: | All |
| Reason for Confidential Information: | This report is about litigation or potential litigation that affects the City or one of its agencies, boards, and commissions. |
| Reference Number: | Pg090017 |

SUMMARY

This report recommends modifications to Official Plan Amendment (OPA) No. 38, which authorized the funding of Heritage Conservation District studies as an eligible community benefit under Section 37 of the Planning Act. Approval of these modifications would facilitate a settlement of the appeal to the Ontario Municipal Board (OMB) of the OPA by the Building Industry and Land Development (BILD) Association.

If Council adopts the recommended modifications as set out in confidential Attachment 1 to this report, they would be presented by the City Solicitor to the OMB to settle the appeal.

RECOMMENDATIONS

City Planning Division and the City Solicitor recommend that:

1. City Council adopt the recommendations in Confidential Attachment 1.
2. City Council authorize the public release of the confidential instructions in Attachment 1, at the end of the Council meeting.

Financial Impact

The recommendations in this report will have no financial impact. Adoption of the recommendations will very likely eliminate the need for a full hearing of these matters.

DECISION HISTORY

On October 30, 2008, City Council enacted By-law 1118-2008 to adopt Amendment No. 38 to the Official Plan for the City of Toronto with respect to authorizing funding of Heritage Conservation District studies as eligible community benefits under Section 37 of the *Planning Act*, in specific areas of the City. The authorizing Council motion, adopted at the meeting of September 24 and 25, 2008, can be viewed at the following link (see Item PG18.1): <http://www.toronto.ca/legdocs/mmis/2008/pg/reports/2008-09-10-pg18-cr.pdf>.

The three most recent staff reports from the Chief Planner and Executive Director, City Planning Division, leading up to the adoption of the Official Plan Amendment (OPA), can be viewed online as follows:

<http://www.toronto.ca/legdocs/mmis/2008/pg/bgrd/backgroundfile-15304.pdf>. (Report dated August 20, 2008)

<http://www.toronto.ca/legdocs/mmis/2008/pg/bgrd/backgroundfile-15306.pdf>. (Report dated August 21, 2008)

<http://www.toronto.ca/legdocs/mmis/2008/cc/bgrd/backgroundfile-15917.pdf>. (Report dated September 24, 2008)

These reports contain links to earlier reports and descriptions of earlier decisions.

ISSUE BACKGROUND

The OPA was appealed to the OMB by BILD by way of a letter from their solicitor dated December 3, 2008. The letter cited a number of reasons for the appeal, and has been reproduced in non-confidential Attachment 2 to this report. In discussions, BILD did not pursue all of the issues raised in the letter.

COMMENTS

Through discussions and correspondence on a “without prejudice” basis between Legal Services staff and BILD, modifications to the OPA have been agreed to, subject to approval by City Council, which would address BILD’s outstanding concerns. City Planning staff, including Heritage Preservation Services staff, have participated in internal discussions with Legal Services staff regarding the proposed modifications.

The modifications are set out in confidential Attachment 1 to this report. The modifications, if adopted, would be presented by the City Solicitor to the OMB to settle the appeal of OPA No. 38 and bring it into force.

CONTACT

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SIGNATURE

Gary Wright
Chief Planner and Executive Director
City Planning Division

Anna Kinastowski
City Solicitor

ATTACHMENTS

Confidential Attachment 1: Proposed Modifications to Official Plan Amendment No. 38

Non-Confidential Attachment 2: BILD Appeal Letter dated December 3, 2008

BILD APPEAL LETTER DATED DECEMBER 3, 2008



FRASER MILNER CASGRAIN LLP

CITY CLERK'S OFFICE
SECRETARIAT SECTION

2008 DEC -4 A 11: 08

Patrick J. Devine
Direct Line: 416.863.4515
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Matter No. 537842-1

December 3, 2008

DELIVERED

City Clerk
City of Toronto
10th Floor, West Tower, City Hall
100 Queen Street West
Toronto ON M5H 2N2

**Attention: Ms. Merle MacDonald, Administrator,
Planning and Growth Management Committee**

Dear Madam:

**Subject: Notice of Appeal with respect to City of Toronto
Proposed Official Plan Amendment No. 38
- Appeal filed on behalf of Building Industry and
Land Development Association (BILD)**

Please be advised that we represent the Building Industry and Land Development Association (BILD) with respect to this matter and, on their behalf, we hereby appeal the City of Toronto's Official Plan Amendment No. 38 (as adopted on October 30, 2008 by By-law No. 1118-2008) to the Ontario Municipal Board. The purpose and effect of Official Plan Amendment No. 38 is to authorize the funding of Heritage Conservation District Studies as an eligible community benefit under Section 37 of the *Planning Act*, R.S.O. 1990, cP.13, in specific areas of the City. A proposed development must be within or in close proximity to an area shown on the Maps attached to the Amendment in order for funding of a HCD study for that area to be an eligible community benefit.

As required by the *Planning Act*, our client has consistently made depositions to the City throughout the process leading to the adoption of proposed Official Plan Amendment No. 38. For reference purposes, enclosed please find a copy of its most recent submission which was filed with members of the Planning and Growth Management Committee and is dated September 5, 2008. This communication summarizes the concerns raised by BILD throughout the process leading to the adoption of proposed Amendment No. 38.

BILD remains opposed to Official Plan Amendment No. 38 and does not support the funding of HCDs, whether or not they are associated with a particular geographic area, as an eligible Section 37 community benefit. This Official Plan Amendment represents a clear departure from the BILD/City of Toronto settlement on the Official Plan Section 37 policies where the Ontario Municipal Board approved the principle that Section 37 benefits must have a reasonable planning relationship to the increase in the height/density of a proposed development and also that the contribution must take form of, or be a contribution towards, a capital facility. These principles are referenced in the Ontario Municipal Board Decision dated November 10, 2006 as well as in the City of Toronto Decision Document for its Council meeting of September 25, 26 and 27, 2006.

In addition to these reasons, our client has been made aware of the process by which the original draft Official Plan Amendment was amended to include reference to specifically identified geographic areas in the City. These are the areas which are shown on maps attached to the Amendment and identified as "Potential Heritage Conservation Districts". At a meeting held by BILD at which representatives of Heritage Preservation Services and City Planning staff were present, BILD was informed that the process by which the 96 areas identified on the maps as "Potential Heritage Conversation Districts" consisted of the following:

- (i) Much of the work in identifying these various potential "Districts" was done over the course of one weekend, because of the time constraints imposed upon City staff by the process;
- (ii) Much of the work was apparently done by university students, who may not have been fully qualified to provide the level of analysis necessary for an item as significant as an Official Plan Amendment; and
- (iii) Heritage Preservation Services staff took input as to suggested Heritage Conservation District areas from any resident or resident association which chose to provide information to it.

Obviously, such a process for identifying Potential Heritage Conservation Districts is fundamentally flawed. It does not constitute the necessary and proper review that is expected of a municipality in its adoption of an Official Plan Amendment. Notwithstanding the fact that the Amendment is intended to be very general in nature, another concern of BILD is that if there is a development proposal which is located either within or near to any one of the 96 areas identified on the maps as "Potential Heritage Conservation Districts", anyone who opposes such development projects will point to these maps as having some sort of legal status, since they will be part of the City's Official Plan. Given the woefully inadequate process by which these areas have been identified, this clearly does not constitute good planning.

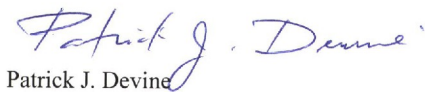
Moreover, if there happen to be other areas, which may be worthy of Heritage Conservation District status and they are not shown on these Maps, then it would be concluded that these areas are not worthy of such a designation. This would, once again, be extremely unfortunate given the very limited basis upon which the determination of Potential Heritage Conservation Districts has been made.

Accordingly, for the reasons set out in the enclosed letter from BILD dated September 5, 2008 and for the reasons set out in this letter, we hereby appeal all of proposed Official Plan Amendment No. 38 to the Ontario Municipal Board. Enclosed please find our cheque in the amount of \$125.00 payable to the Minister of Finance, Province of Ontario representing the prescribed filing fee.

Should you require anything further, please contact the writer at your earliest convenience.

Yours very truly,

FRASER MILNER CASGRAIN LLP


Patrick J. Devine

PJD/mp

Encls.

cc: Building Industry and Land Development Association (BILD)

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BUILDING A GREATER GTA
Building Industry and Land
Development Association

PG18.1.2

September 5, 2008

Councillor Norman Kelly, Chair
Members of the Planning & Growth Management Committee
City of Toronto
100 Queen Street West, Committee Room 1
Toronto, Ontario
M5H 2N2

RE: Revised Official Plan Amendment to Authorize Section 37 Funding of Heritage Conservation District Studies as an Eligible Community Benefit
PUBLIC MEETING – September 10, 2008
ITEM PG18.1 – Planning & Growth Management Committee Meeting

The Building Industry and Land Development Association (BILD) has had the opportunity to review the above-captioned proposed Official Plan Amendment and presents the following comments in association with its' Toronto Chapter as part of the statutory Public Meeting requirements.

As indicated in previous communications on this matter (see Attachments 1 through 6), BILD remains opposed to the proposed Official Plan Amendment and does not support the funding of Heritage Conservation District Studies – whether or not they are associated to a particular geographic area - as an eligible Section 37 Community Benefit.

As you are aware, BILD was an appellant to the Official Plan S.37 policies where successful negotiations resulted in a settlement being approved by the OMB. The proposed Official Plan represents a clear derogation from the OMB approved principle that Section 37 must have a reasonable planning relationship to the increase in the height and/or density of a proposed development and that the contribution must take the form of, or should be towards, a capital facility. The use of Section 37 monies to fund studies also runs contrary to their intended use as per the *Planning Act*. Both principles are reflected in the OMB approved S.37 Settlement and S.37 Implementation Guidelines.

In addition, we wish to again reiterate the points made in our correspondence of September 12, 2006, March 12th and May 3, 2007 on this matter (attached for your reference), and to reinforce that BILD concurs with staff's position (as expressed in the January 29, 2007 staff report) which does not support a proposed Official Plan Amendment to allow Heritage Conservation District Studies to become eligible community benefits for the following reasons:

- *the historical practice in Toronto in the use of S.37, pre- and post-amalgamation, has been to generally limit S.37 benefits to capital facilities;*
- *the intent of the former City of Toronto Official Plan S.37 policies was to limit benefits to capital facilities;*
- *the S.37 Implementation Framework adopted by Council in 2000 specified that S.37 benefits were to be capital facilities;*
- *other jurisdictions, such as the City of Vancouver's density incentives, limit benefits to capital facilities;*
- *the Official Plan S.37 policies adopted in 2002 limited S.37 benefits to capital facilities;*

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- *community benefits should be durable, physical assets;*
- *developers who contribute the funds are generally opposed to non-capital facilities as benefits (as are many residents' organizations);*
- *including HDC studies as eligible S.37 benefits would set an undesirable precedent for inclusion of other studies or other program/operating matters;*
- *Council's adopted policy on donations for community benefits outside the planning and procurement processes also requires such benefits to be capital facilities and maintains a consistent approach; and,*
- *HDC study financing should be provided through the City budget process."*

We trust that you will take these comments under serious consideration as this proposed Official Plan Amendment presents an unacceptable shift in policy. It is a clear derogation from the OMB approved principle that Section 37 must have a reasonable planning relationship to the increase in the height and/or density of a proposed development and that the contribution must take the form of, or should be towards, a capital facility.

Sincerely,

Paula J. Tenuta, MCIP, RPP
Director, Municipal Government Relations

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