

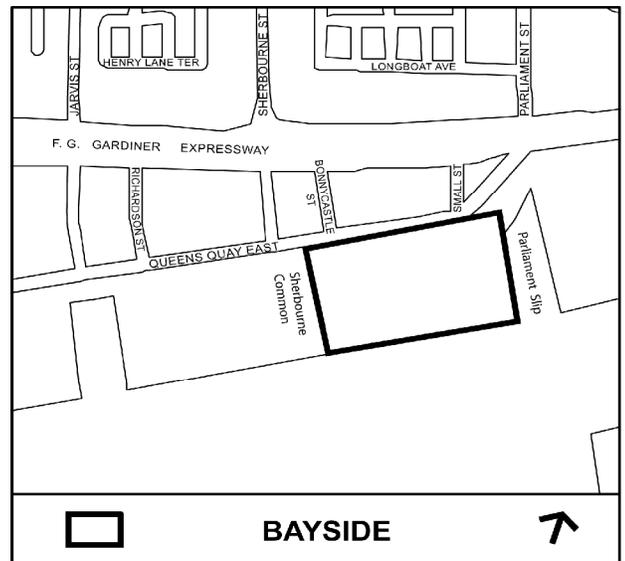
Staff Review of Waterfront Toronto’s Proposed Sale and Lease of City Lands for Waterfront Revitalization- Bayside

Date:	August 10, 2010
To:	Executive Committee
From:	Richard Butts, Deputy City Manager
Wards:	28
Reason for Confidential Information:	This report involves the security of property belonging to the City or one of its agencies, boards or commissions.
Reference Number:	P:\2010\Cluster B\wf\ec10004

SUMMARY

Toronto Waterfront Revitalization Corporation (WT), as the City’s designated revitalization lead in East Bayfront (EBF), has endorsed the sale and lease of certain City-owned lands known as Bayside to Hines Canada Management Company ULC (Hines), subject to approval of Toronto City Council. Bayside is the vacant 4.0 hectare (10.0 acre) parcel in the East Bayfront precinct bounded by Sherbourne Common, Queens Quay East, Parliament Slip and the Inner Harbour as shown on the key map. The development concept put forward by Hines is a mixed-use development consisting of approximately 185,000 m² (2.0 million sq. ft.) of market residential, affordable rental housing, commercial/office, retail, child care, community and cultural/civic uses (see Figure 1).

This report summarizes the results of City staff’s review of WT’s proposal and seeks Council authorization to enter into an “umbrella” Land



Development Agreement (LDA) and future Agreements of Purchase and Sale (APS) and Ground Leases, with Hines (Development Partner) and/or its Site Developers subject to the recommendations in this report. The major terms for each of the three prospective types of transactions in which the City will be a party appear in Attachments 1, 2 and 3 respectively.

The LDA applies to the whole of the Bayside site and sets out the parameters for all future transactions between the City and Hines or its Site Developers. The future transactions will involve either a conveyance in fee simple for the market residential blocks or a 99 year term following a 3-year construction period for the non-residential blocks. The affordable housing blocks shown in Figure 1 are not proposed to be disposed of through this report. Rather, it is proposed that the blocks be reserved for this purpose as part of the transaction and that Hines be given a first right of offer and right of first refusal should WT or the City wish to proceed with an affordable housing project. The disposition of the affordable housing blocks will be the subject of a future report to Council when a specific proposal materializes.

Terms relating to the development of the project are set out in a Project Agreement (PA) between WT, as revitalization lead with responsibility for the overall coordination of the project and infrastructure and Hines as development lead. Although the City is not a party to the PA, many of the waterfront revitalization aspirations to be delivered by WT are secured through this agreement and are addressed in this staff report. The major terms of the PA between WT and Hines appear in Attachment 4.

Notwithstanding the focus of staff's review on the details of the transaction, certain elements of the transaction have necessitated a concurrent City review of related issues. The first item concerns the proposal for access roads to the site from Queens Quay East. Under the recently-approved East Bayfront Transit Environmental Assessment, only one road access located central to the site is planned. Council's direction at the time of the EA endorsement was that any additional access points to Queens Quay East will require the approval of City Transportation and TTC, and should not result in any material delays to transit through this corridor. TTC staff do not support the introduction of a second access road. After careful review, detailed more fully in this report, City Planning and Transportation staff have advised that the introduction of a second access will have no material impact on transit service through the corridor. It is recommended that City Council authorized WT to prepare an addendum to the East Bayfront Transit EA in order to allow a second access point to Bayside from Queens Quay East.

The second item involves WT's capacity to commit to the estimated \$120 M of infrastructure, much of which is necessary to service the Bayside lands. At the present time, this infrastructure is unfunded in the Waterfront Long Term Funding Plan. Through positive discussions with the City and other government partners, WT is proposing to secure this funding through a combination of borrowing from Infrastructure Ontario (IO), reallocations within its budget, and matching Bayside infrastructure needs with its cash flow from revenues. As part of this process, WT was requested to ensure that funding for transit to service Bayside, a critical underpinning of the transaction, is

secured. In response, WT confirms that it is reviewing recommending that the government partners dedicate more direct funding, as opposed to revenues, to transit. Funding for East Bayfront transit remains intact at \$150 M. Staff recommend that funding is confirmed to the City's satisfaction.

The limitations on WT's cash flow availability have resulted in the deferral of the lake-based stormwater management tank system in East Bayfront. Under WT's funding plan, construction will now take place in 2017 and 2018. In the interim, WT will install an oil grit separator to manage stormwater quality in Bayside pending the construction of the permanent system. WT and Toronto Water are in discussion regarding this matter and the implications relating to the operations of the Sherbourne Common UV system.

As lead for waterfront revitalization, WT has been created to effectively compete in the residential and commercial marketplace, notwithstanding public ownership of the majority of the lands. In the case of those Bayside blocks designated for commercial development, the City has elected to enter into long-term ground leases. Under such circumstances, the City would typically employ its standard ground lease. However, in order to attract investment partners and tenants, some of the terms and conditions typically included in City leases are not contained in the proposed Ground Lease. Instead, the transaction provides the proponent the flexibility needed in regard to financing without City approval, and to providing security for future tenants, in order for such investors and/or tenants to invest significant funds in the premises.

The proposed transaction represents the culmination of a 2-year process which has engaged the private sector and achieves the City's and WT's objectives for Bayside. Along with the other projects underway in EBF, the Hines proposal represents a significant opportunity to realize the transformation of East Bayfront

RECOMMENDATIONS

The Deputy City Manager recommends that:

- (1) City Council endorse the concept plan attached as Figure 1 to this report which generally illustrates Hines' proposal for the development and subdivision of the Bayside Lands, which concept plan will be the subject of a subsequent plan of subdivision process. For greater certainty, Council endorsement of the concept plan is in no way intended to and does not fetter the City's planning and municipal rights and responsibilities;
- (2) Council grant authority for the City, as owner of the Bayside Lands, to enter into a Land Development Agreement with Hines (LDA) that includes the disposition of the Bayside Lands through agreements of purchase and sale (APs), ground leases (GLs), rights of first offer (ROFOs), rights of first refusal (ROFRs) and may include ancillary agreements such as license, encroachment, easement, closing or other agreements contemplated under the LDA (collectively Ancillary Agreements), substantially on the terms and

conditions set out in Attachment 1, together with such other terms and conditions as may be deemed appropriate by the Deputy City Manager whose responsibilities include Waterfront Revitalization, in consultation with the Chief Corporate Officer and in a form satisfactory to the City Solicitor, subject to Part 4 of this Report;

- (3) Council require that prior to the City entering into the LDA:
- a. Council declare surplus the Bayside Lands with the intended manner of disposal by way of a LDA, and that all steps necessary to comply with the City's real estate disposal process, as set out in Chapter 213 of the City of Toronto Municipal Code be taken prior to the City entering into the LDA;
 - b. WT and Hines having entered into the Project Agreement (PA) and WT shall have provided an undertaking to the City that WT will circulate all amendments to the PA and associated agreements and all amendments to any Development Agreements (DA) made between WT and Hines or any development partner of Hines (Site Developer), to the City for input on all matters which materially affect the City's interest as owner of the Bayside Lands;
 - c. Receipt by the City of a written undertaking from WT to monitor the performance of Hines and any Site Developer under the LDA, any APS or GL or other transaction contemplated by the LDA, to take action to enforce such performance, and to perform on behalf of the City any City obligations under such agreements, that the Chief Corporate Officer may require WT to monitor, enforce or perform from time to time, all such WT actions to be taken at no cost to the City, and provided such obligations shall not extend past the winding down of WT at which time such obligations shall revert to the City;
 - d. Receipt by the City of a legal opinion in respect of the corporate status, powers and authority of Hines to enter into and perform the obligations under the LDA and PA in form and content satisfactory to the City Solicitor;
 - e. WT shall have provided confirmation that it has completed a satisfactory due diligence review of the financial capacity of Hines and its ability to complete its obligations under the LDA and PA to the satisfaction of the Deputy City Manager whose responsibilities include Waterfront Revitalization in consultation with the Chief Corporate Officer; and
 - f. Receipt by the City of a written undertaking from WT to pay for any realty taxes arising from the LDA or Ancillary Agreements in form and content satisfactory to the City Solicitor.

- (4) Council grant authority for the City, as vendor of the City-owned Sites, currently anticipated to be the sites shown as R1; R2; R3, R4 & W1; R5; and R6, R7 & W2 on Figure 1 (collectively the Sale Sites), to enter into APSs with Hines or a Site Developer, together with any Ancillary Agreement, substantially on the terms and conditions set out in Attachment 2, together with such other terms and conditions as may be deemed appropriate by the Deputy City Manager whose responsibilities include Waterfront Revitalization, in consultation with the Chief Corporate Officer and in a form satisfactory to the City Solicitor, subject to Part 7. of this Report;
- (5) Council grant authority for the City, as lessor of the City-owned Sites currently anticipated to be the sites shown as C1 and C2 on Figure 1 (collectively the Lease Sites), to enter into GLs with Hines or a Site Developer, together with any Ancillary Agreement, substantially on the terms and conditions set out in Attachment 3, together with such other terms and conditions as may be deemed appropriate by the Deputy City Manager whose responsibilities include Waterfront Revitalization in consultation with the Chief Corporate Officer and in a form satisfactory to the City Solicitor, subject to Part 7. of this Report;
- (6) Council grant authority for the City to give Hines a ROFO and ROFR to develop one or both of the two City-owned Sites shown as A1 and A2 (with W3 as part of either A1 or A2) on Figure 1 (collectively the Affordable Housing Sites) on condition that any proposal which Hines and WT wish to propose shall be subject to Council approval, together with such other terms and conditions as may be deemed appropriate by the Deputy City Manager whose responsibilities include Waterfront Revitalization in consultation with the Chief Corporate Officer and in a form satisfactory to the City Solicitor;
- (7) Prior to the City entering into any APS, GL, the following matters be completed and provided for to the satisfaction of the Deputy City Manager whose responsibilities include Waterfront Revitalization, in consultation with the City Solicitor and other City officials as appropriate:
 - a. Draft plan approval of a plan of subdivision of the Bayside Lands;
 - b. WT and Hines or the Site Developer having entered into a DA in respect of the applicable Site substantially in the form attached to the PA;
 - c. WT shall have provided an undertaking to the City that funds received from Hines or the Site Developer under the APS or all base rent for the first 33 years of the term of the GL, as the case may be, shall be used for re-investment in the revitalization of the waterfront in accordance with Policy and Finance Committee Report 9, Clause 1, headed “Governance Structure for Toronto Waterfront Revitalization” adopted by Council at its meeting on November 30, December 1 and 2, 2004;

- d. WT shall have provided an undertaking to the City to pay, on behalf of the City, all costs and expenses payable or incurred by the City under the APS or GL including purchase price adjustments, closing adjustments, rent adjustments, interest charges, costs of surveys and reference plans, registration and closing costs and out of pocket expenses;
 - e. Receipt by the City of a legal opinion in respect of the corporate status, powers and authority of the Site Developer to enter into and perform the obligations under the APS or GL and the DA in form and content satisfactory to the City Solicitor; and
 - f. WT shall have provided confirmation that it has completed a satisfactory due diligence review of the financial capacity, corporate status, powers and authority of the Site Developer and its ability to complete its obligations under the APS or GL and DA, to the satisfaction of the Deputy City Manager whose responsibilities include Waterfront Revitalization in consultation with the Chief Corporate Officer and in a form satisfactory to the City Solicitor.
- (8) Council waive applicable City disposal and leasing policies and practices for City-owned lands including, but not limited to, the City's Housing First Policy, property transactions with single purpose companies, collection of receivables, typical City use clause for leased lands, typical assignment and subletting restrictions, signage and naming rights, and the use of non-disturbance agreements, to the extent that they are inconsistent with, or not included in the terms and conditions of the LDA or any APS or GL, in recognition of WT's role as master developer and lead negotiator of revitalization initiatives in the City's waterfront, including the Bayside Lands;
- (9) Council grant authority for the City to direct Hines and the Site Developers to pay the purchase prices under all APSs and the base rents for the first 33 years of the term of all GLs, the revenues from all Ancillary Agreements, if applicable and all other amounts payable to the City under such transactions to WT, or as WT may otherwise direct, in form and content satisfactory to the City Solicitor;
- (10) Council direct the Waterfront Project Director that the following amounts shall be recognized as part of the City's overall contribution to waterfront renewal, and be reported by WT in its quarterly funding reports submitted to the three orders of government as part of the Waterfront Renewal Accounting Protocol:
- a. the purchase price under each APS;
 - b. the base rents for the first 33 years of the term under each GL;

- c. the value of the infrastructure contribution as would apply to the Sites;
 - d. any other amounts payable by Hines or a Site Developer to the City for any Ancillary Agreements under the LDA, APS, GL, ROFO, ROFR transactions; and
 - e. the value of the parkland contribution as would apply to the Sites.
- (11) Council authorize WT to capitalize the base rent for the first 33 years of each GL subject to the proceeds being reinvested in Waterfront Revitalization;
 - (12) Council acknowledge the Section 37 infrastructure contribution required under the zoning by-law is included in the purchase price for the land and thus is not required to be paid for the Sale Sites;
 - (13) Council deem the parkland dedication substantially as shown in Figure 1, which is consistent with the EBF Precinct Plan and zoning by-law, satisfies all parkland dedication requirements for this development;
 - (14) Council authorize the Deputy City Manager whose responsibilities include Waterfront Revitalization, in consultation with the Chief Corporate Officer and City Solicitor, to negotiate the LDA, the APSs, GLs and any Ancillary Agreements contemplated under such transactions, including any amending agreements in relation to such agreements, not materially inconsistent with the major terms and conditions described in Attachments 1, 2 and 3 to this report as approved by Council;
 - (15) The Chief Corporate Officer and Deputy City Manager whose responsibilities include Waterfront Revitalization, be authorized severally to execute and deliver the LDA, all APSs, GLs and all Ancillary Agreements and documents contemplated under such documentation, on behalf of the City;
 - (16) Council grant authority to the Chief Corporate Officer or his successor/designate, in consultation with the Waterfront Project Director, to administer and manage the LDA, APSs, GLs, and all Ancillary Agreements, except to the extent such administration and management has been otherwise directed by the Chief Corporate Officer to WT to undertake, including the provision of any consents (including but not limited to consents to any subleases, assignments, financial charges of any interests in any GL or Leased Site), approvals, waivers, notices (including 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;

- (17) Subject to Part 19. of this Report, and with the written consent of WT, the City consent, solely in its capacity as land owner of the Bayside Lands, to any planning and development application by Hines or a Site Developer, except for any plan of subdivision application and except for any environmental applications, in furtherance of the development of the Bayside Lands provided Hines or the Site Developer agrees to assume all obligations including costs and liabilities under such application, provided the applicable LDA, APS or GL and DA have been executed and all requirements and obligations of Hines and the Site Developer therein are in good standing, and subject to such other terms satisfactory to the Deputy City Manager whose responsibilities include Waterfront Revitalization and in form satisfactory to the City Solicitor, or alternatively, that the City itself execute such documentation solely in its capacity as land owner;
- (18) Subject to Part 19. of this Report, the City consent to WT acting as the City's agent as owner of the Bayside Lands to sign any planning and development, infrastructure, servicing or any other applications and agreements including agreements with Toronto Hydro, Enbridge Gas or any third party utility provider, required for the development of the Bayside Lands, except for any environmental applications or agreements, provided WT agrees to assume all obligations including costs and liabilities under such documentation and subject to such other terms satisfactory to the Deputy City Manager whose responsibilities include Waterfront Revitalization and in form satisfactory to the City Solicitor, or alternatively, that the City itself execute such documentation solely in its capacity as land owner;
- (19) All actions described in this report shall be taken by or on behalf of the City in its capacity as land owner and not in its capacity as a planning authority under the *Planning Act*, the *City of Toronto Act, 2006*, or otherwise and such actions are not intended to and do not fetter the City's planning and municipal rights and responsibilities;
- (20) The Waterfront Project Director report to Executive Committee on any proposal accepted by Waterfront Toronto for the development of Affordable Housing Sites for affordable rental housing or an affordable rental housing pilot project;
- (21) Waterfront Toronto, in consultation with TTC and City staff, be authorized to prepare an addendum to the East Bayfront Transit EA in order to allow a second access point to Bayside from Queens Quay East;
- (22) The City Solicitor be authorized to complete any of the transactions contemplated under the LDA on behalf of the City, except to the extent that such obligations have been directed by the Chief Corporate Officer to WT to undertake, including amending closing dates and other dates, and amending and waiving terms and conditions, on such terms as she considers reasonable;

- (23) Prior to execution of any of the agreements contemplated herein, WT to provide confirmation to the satisfaction of the Deputy City Manager whose responsibilities include Waterfront Revitalization that:
- a. the other orders of government have approved the governance changes required to allow WT to borrow the funds required to meet its infrastructure obligations under the PA;
 - b. the required Infrastructure Ontario loan has been secured; and
 - c. funding necessary to complete the infrastructure obligations under the PA has been approved by the three orders of government through an update to the Waterfront Toronto Long-Term Funding Plan.
- (24) Prior to the City entering into the Land Development Agreement, the following matters shall be completed or provided for to the satisfaction of the Deputy City Manager whose responsibilities include Waterfront Revitalization, in consultation with the City Solicitor and other City officials as appropriate:
- a. receipt of a legal opinion from WT's lawyers with respect to the potential environmental liabilities of the City in entering into the Bayside transactions being remote;
 - b. receipt from the insurer under the Pollution and Remediation Legal Liability Policy of an amendment to the Policy to clarify the discretion to be exercised with respect to the provision of on-site coverage; and
 - c. analysis and estimation of potential remediation and risk assessment costs for the Bayside Lands, satisfactory protection regarding the completion of such work and confirmation of appropriate liability protection.
- (25) City Council authorize the public release of the confidential information in Attachment 5 upon completion of the development of the publicly-owned lands in EBF as determined by the Deputy City Manager whose responsibilities include Waterfront Revitalization; and
- (26) The appropriate City officials be authorized and directed to take the necessary action to give effect thereto.

FINANCIAL IMPACT

The sale and lease transactions proposed by WT for the future development blocks in Bayside will not result in a financial impact on the City. All of the funds required for the approval and implementation of this development are to be borne by WT or the Development Partner and its Site Developers. In order for WT to cover its obligations in the Bayside transaction agreements, it is in the process of securing a loan from Infrastructure Ontario (IO) as discussed in the Comment section of this report.

Any need for adjustments within the Waterfront Toronto Long Term Funding Plan in order for WT to fulfill its obligations related to the provision of transit, infrastructure and public realm improvements at Bayside will be addressed in the proposed 2011 Waterfront Capital Budget.

In accordance with procedure for waterfront land revenues outlined in Policy and Finance Committee Report 9, Clause 1, headed “Governance Structure for Toronto Waterfront Revitalization” adopted by Council at its meeting of November 30, December 1 and 2, 2004, the revenues derived from the sale or lease of City-owned lands in Bayside will be reinvested in waterfront revitalization through WT.

WT intends to capitalize the rental revenue from the first 33 years of any 99-year ground leases for the commercial/office components of Bayside. The rental revenue from the remainder of the said terms will flow to the City.

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

DECISION HISTORY

In September 2005, Council approved a report entitled “Implementation of a New Governance Structure for Toronto Waterfront Renewal”. The report confirmed that effective control of public lands in the Designated Waterfront Area (DWA) was to be provided to Toronto Waterfront Revitalization Corporation (now Waterfront Toronto) (WT) on an incremental basis, following business and implementation plans. The report also directed that Memoranda of Understanding (MOUs) be developed between the government partners and their agencies to, among other matters, designate WT as the revitalization lead.

<http://www.toronto.ca/legdocs/2005/agendas/council/cc050928/pof8rpt/agendain.pdf>

In January/February 2006, Council authorized the City to enter into a City/WT/TEDCO MOU (MOU) covering lands then owned by TEDCO in the EBF and Port Lands. The MOU defined the requirements for detailed business and implementation plans prior to providing WT with effective control of City or TEDCO-owned lands in the DWA. In addition, the MOU addressed a Public Land Management Protocol which provided direction on how land disposition is to be treated. Section 5.2 of the MOU indicates that the general intention is that freehold title be transferred for residential purposes, ground leasehold title where lands are to be transferred for commercial purposes and either fee simple or ground lease interest if lands are to be transferred for mixed uses, depending on the circumstances.

<http://www.toronto.ca/legdocs/2006/agendas/council/cc060131/pof1rpt/agendain.pdf>

In July 2006, Council approved WT’s Business and Implementation Plan for EBF that included a financial model; employment strategy; cultural and animation strategy; ground

floor retail strategy and project schedules. The Plan contained aggressive employment targets, a target of approximately 200,000 m² of residential development and the provision of critical hard and soft infrastructure. A Ground Floor Animation strategy to enliven the public realm was a key component of this Plan. As required by the 2006 MOU, the business plan was prepared on the basis that residential development in EBF will be outright sales in the form of fee simple title and non-residential development will be on the basis of long-term leases.

<http://www.toronto.ca/legdocs/2006/agendas/council/cc060725/pof6rpt/agendain.pdf>

ISSUE BACKGROUND

The 4.0 ha (10.0 ac) Bayside development site consists entirely of lands owned by the City (former Canpar site) transferred from the Toronto Economic Development Corporation (TEDCO) in 2008.

Bayside is the second site in the EBF to be brought to market by WT through a competitive developer proposal call process. The first transaction for Parkside to Great Gulf (Downtown Properties) Ltd. has now been concluded. The Request for Qualifications (RFO) for Bayside was issued in March, 2008 followed by a Request for Proposals (“RFP”) to a short-list of potential purchasers in October, 2008. The RFQ/RFP process was managed by an independent process facilitator and overseen by WT’s legal advisors and an independent fairness advisor. A Steering Committee established to evaluate the submissions included the City’s Waterfront Secretariat. The Committee evaluated the RFP submissions in December, 2009 and selected Hines as the preferred proponent. The WT Board of Directors endorsed the Hines proposal in March, 2010.

A staff team comprised of the Waterfront Secretariat, Legal, Real Estate, Finance and City Planning staff have reviewed the draft term sheets and supporting materials and contributed to the preparation of this report.

COMMENTS

Proponent

Hines Canada Management Company ULC (Hines or the Development Partner) is a wholly owned subsidiary of the US-based Hines organization, a large private development company. The parent corporation currently has assets over \$US 220 billion under management and has acquired or developed over 1,000 properties world-wide over the past 50 years. For the Bayside project, WT believes Hines has the vision, experience and resources to complete this large-scale project and meet the high expectations for the Bayside Lands.

Hines has retained the architectural firm Pelli Clark Pelli which has designed several landmark buildings internationally, supported by Ehrenkrantz Eckstut & Khun Architects, which has prepared waterfront development schemes in several U.S. cities.

Hines' local consultants include Adamson Associates Architects, BA Transportation Group, Lord Cultural Resources, JC Williams Retail Consulting and DTZ Barnicke Retail Brokerage.

Consistent with WT's obligations under the 2006 MOU, WT is responsible for the selection of Hines as the Preferred Proponent under the RFP. The City has not carried out any due diligence of the Hines corporate entity, its corporate capacity or powers to enter into any agreements under the Proposal, its corporate structure, its financial capacity or its reputation, and the City is relying entirely on WT to carry out that function.

Hines Proposal

The Hines proposal for Bayside anticipates approximately 185,000 m² (2.0 million sq.ft.) of development, including:

- 41,200 m² of office space
- 18,600 m² of ground floor animation including 5,000 m² of cultural/civic use
- 76,200 m² of market housing
- 8,900 m² of low end of market & market family housing
- 4,200 m² of live/work space
- 35,300 m² of affordable rental

Bayside will be developed in phases generally from west to east over an estimated 10-15 year period. The site layout is based on the Council-approved precinct plan and zoning by-law for East Bayfront.

Hines, under the direction of WT, will be responsible for the management of all construction on the site, the details of which are contained in the Project Agreement term sheet. Hines is proposing to construct the commercial/office components themselves and to partner with one or more local residential builders ("Site Developers") in the delivery of the residential sites.

WT advises that the Hines' submission meets the major objectives of WT's RFP for Bayside including a strong vision for the site, and established development partner, a mixed use community with at least 20% employment space, design excellence, sustainable development (including LEED Gold buildings), high-quality public realm, ground floor animation and a competitive financial bid.

As required in the RFP, Hines has identified lands within Bayside sufficient to provide 20% of the residential units as affordable rental housing. The lands set aside for affordable rental housing are sufficient to accommodate the affordable housing pilot project also contemplated in the RFP, whereby one of the two buildings would be developed to include 25% affordable rental units and 75% market rental units. This mix is designed to promote the integration of market and affordable units. Hines will have a Right of First Offer (ROFO) and Right of First Refusal (ROFR) to develop the affordable housing sites, but any proposal for these sites will be subject to a future Council approval.

The W sites (see Figure 1) along the water's edge promenade at the Inner Harbour will be sold in conjunction with the adjacent development sites. For the purposes of an APS, sites R3/R4/W1 and sites R6/R7/W2 will likely be treated as single sites, respectively. It is anticipated that sites A1/A2/W3 would be treated similarly as a single site when the affordable housing sites at A1 and A2 are disposed of. A building on a W site will be subject to a ground lease to the extent that market retail uses are developed independently of the adjacent residential blocks. Hines will act as development manager on behalf of the user of the W sites.

Waterfront Toronto Obligations

WT will be responsible to provide external works required to support development of Bayside and some works internal works within Bayside. The external works include hydro, sanitary sewer and water.

WT is required to use reasonable commercial efforts to ensure that sufficient public transit capacity (ie buses) is available to Bayside by July, 2013 and that Light Rail Transit (LRT) is operational by the end of 2018. Otherwise, WT is obliged to waive the requirement of Hines of developing the office parcels at C1 and C2 in advance of the balance of the residential buildings.

Development costs to be borne by WT include soil management, on-site infrastructure, Aitken Place Park, and the water's edge promenade and Queens Quay linear park at Bayside. WT assumes the parkland dedication obligation for the site.

WT has primary responsibility and oversight for environmental matters and process requirements consistent with the 2006 MOU. It will develop an environmental management plan for Bayside and will complete remediation/risk assessments and file Records of Site Condition, as discussed in the Environmental section of this report.

Business Terms

The entire Bayside site is to be disposed of with the exception of the affordable housing sites, roads, parks and other public elements which are to remain in City ownership. In accordance with the 2006 MOU, the City will sell the residential sites and lease the non-residential sites. A fee simple interest of residential sites will be transferred on an 'as is where is' basis. The non-residential sites will be leased on a long term basis (3 year construction period followed by 99 year term).

The transaction assumes that the City will enter into an "umbrella" Land Development Agreement (LDA) with Hines that sets out the basic terms and conditions for the sale and lease of the lands. Schedules to the LDA include a standard Agreement of Purchase and Sale (APS) and Ground Lease (GL). WT and Hines would enter into a Project Agreement (PA) that provides the schedule of development, respective roles and obligations, and contractual matters such as default. WT and Hines or the Site Developers would enter into Development Agreements containing specific provisions for each development

block. The major terms of the proposed LDA, APS, GL and PA are included in Attachments 1 to 4 of this report.

None of the lands can be disposed of by the City of until they are declared surplus in accordance with the City's Disposal By-law. The disposal process can be done under delegated approval process initiated by Real Estate staff. Hines does not get the right to close on any development block unless they perform on the previous block. In accordance with the City's Real Estate Disposal By-law No. 814-2007, the City-owned lands shown as R1 to R7, C1, C2 and W1 to W3 on Figure 1 will need to be declared surplus, with the intended manner of disposal to be sale for the residential parcels (R1 to R7) and long-term lease for the commercial parcels (C1, C2). As of the writing of this report, the steps necessary to comply with the City's real estate disposal process as set out in Chapter 213 of the City of Toronto Municipal Code have not been undertaken nor has notice of the proposed dispositions been given

Land payments will occur incrementally as blocks are developed rather by a single fixed upfront payment. The phased closings minimize the amount of City land transferred from the City to the Development Partner until projects are ready for construction. Hines would not have rights to close on future sites if they are in default under the PA or LDA.

Given the large scale of the project and the expectation that the development of Bayside will take between 10 and 15 years, the agreements include language that allows for some flexibility in the closing dates should market conditions change substantially from what is expected. In order to secure extensions to closing dates, Hines must provide third party evidence supporting their claim that market conditions have deteriorated and the parties will work collectively and in good faith to develop a revised schedule for closing. Subject to changes in market conditions and the flexibility outlined above, if Hines fails to close by the proposed closing date for a site, Waterfront Toronto has the option of terminating their rights to close on that site. If Hines fails to close by the proposed closing date for a second block, Waterfront Toronto has the option of terminating all future development rights.

In addition to the Up Front Payment, Hines will be required to spend substantial amounts of funds on design, marketing and approvals in order to be in a position to go to the market on each development site, thus further demonstrating a financial commitment to the project. Under the Project Agreement and site specific Development Agreements, WT will be monitoring the developer's progress with a view to ensuring that the developer performs its obligations, consistent with current market forces, and does not simply "land bank" the site. Moreover, as added protection against land banking or "flipping", it is noted that the APS will not permit Hines to assign the APS to another party without the prior consent of both the City and WT.

The financing structure proposed by WT involves the use of a registered charge (Charge) to secure the land payment from closing until the payment is made upon project completion. This structure is similar to a Vendor Take Back mortgage, which is a common industry practice. While the interest of the landowner (the City) is subordinate

to the construction financing during construction, the developer must make the land payment in order for the Charge to be released so the developer can receive its proceeds from the development. Nevertheless, there remains some risk that a deal could close and the City would not receive payment for its lands due to its subordinate financing status relative to other claims. As noted, proceeds from the sale and lease (first 33 years) of the subject lands will flow to WT for revitalization purposes.

Land Value

Payments for development blocks will occur after their development to capture a higher land value. The formula to be used by WT for calculating the purchase or lease price of City lands is based on a percentage of the revenue. The details are included in the Confidential Attachment.

Real Estate has reviewed the land value estimates provided by WT and confirmed that the City and WT will receive fair market value for the lands sold or leased under the Proposal in compliance with s. 82 of the City of Toronto Act, 2006.

Proposed Land Transactions

WT was mandated with bringing private sector investment in the form of commercial, residential and institutional development to Toronto's waterfront. Some of these investments, including most of the buildings proposed by Hines, represent significant financial commitments in the \$100 million range. Hence, WT needs to function in a similar fashion to other arm's length corporations with a similar mandate, particularly for the commercial buildings. This includes some exemptions from certain City real estate policies and practices that would effectively reduce Bayside's competitiveness in the marketplace. To that end, certain terms and conditions that would typically be included in City agreements have not been included in the form of APS and GL appended to the LDA.

Some of the terms that differ from the City's typical leases include:

(i) Use Clause

The City traditionally has a positive use obligation clause requiring the tenant to actively and continuously use the premises for the use permitted in its lease. The ground lease in this deal has a permissive use clause which could allow the building or a portion of the building to remain vacant at the discretion of the Development Partner, and therefore not earning a rental income. Under the proposed transaction structure, any vacancy would result in a reduction in the payment under the GL.

The City also typically allows for certain specific uses in its lease documents while disallowing all other potential uses. The current structure allows the lands to be used for anything that the zoning by-law permits, subject to any prohibited uses included in the lease. This provides the City as landlord with less control than it would typically have.

(ii) Assignment and Sublease

The City traditionally controls third party relationships by requiring tenants to seek consents to any and all assignments and most subleases from the tenant to a given subtenant. For Bayside leases, the City does not have the right or the obligation to provide its consent to any sublease. This again provides the City with little to no control over which entities will ultimately occupy the office and retail space that will be constructed by the Development Partner. Where a potential subtenant satisfies the transfer criteria set out in the lease, the only restriction will be that the assignees must comply with the use provisions set out in the lease document. The City will not have limited control over which entities rent space on what remains as City-owned lands, notwithstanding the City has no interest in the building.

(iii) Non Disturbance Agreement

The City would not normally enter into a Non Disturbance Agreement with a subtenant where it does not provide its consent to the subtenant's sublease. In the general marketplace, non-disturbance agreements are standard as they provide subtenants the security of tenure. Typically, however, head landlords in the real estate market provide consent to each subtenant. The proposed structure of the Bayside GL does not allow for the City as head landlord to consent, but still requires a Non Disturbance Agreement.

(iv) Signs

Lands and/or building owners typically have the ability to restrict the placement of signage by its tenants/subtenants. This is traditionally controlled through the negotiation of leases, and is often something that the land or building owner can utilize to attract tenants. The Bayside transaction has been structured so that Hines has the ability to control the naming of their buildings to the extent that the City only has the approving rights acting reasonably, so long as it abides by any sign by-laws passed by City Council in its role as regulatory authority.

All of the foregoing clauses relate to Hines ability to compete in the marketplace by allowing them to finance their project without requiring City approval as to who could provide the financing, to compete for office and retail tenants without having to come back to the City each time for permission, and to provide security for their future tenants, in order to permit such tenants to invest significant funds in their premises.

In support of the foregoing proposed approach, WT has provided the City with 3rd party documentation attesting to the commonality of these practices.

Environmental Considerations

At the time that the City entered into the MOU with WT and TEDCO, the City had no direct interest in the East Bayfront lands. Accordingly, the environmental provisions in the MOU primarily protect TEDCO. In particular, under section 8.7 of the MOU,

Waterfront Toronto is obligated to develop an approach with respect to each land transfer by TEDCO to eliminate or minimize TEDCO's liability for existing environmental conditions, with defined insurance and indemnification (the Acceptable Environmental Indemnity and Insurance) being minimum conditions. The City must be satisfied with the liability approach proposed by WT before TEDCO lands are transferred for redevelopment purposes.

Subsequent to the execution of the MOU, it was determined that having the City contribute lands directly to the redevelopment, rather than having TEDCO do so, would streamline the redevelopment process and TEDCO's East Bayfront lands, with the exception of the Corus site, were transferred to the City. As a result, the City became the beneficiary of all environmental protections related to former TEDCO lands. Also, WT arranged for Pollution and Remediation Legal Liability insurance with respect to the lands transferred to the City. Such policy provides protection for losses, remediation costs and legal defence costs for third party claims and regulatory requirements regarding environmental conditions that migrated from the subject lands (ie. off-site protection) to a maximum of \$10 M for a period of 10 years (the "Policy"). The Policy provides for coverage to be extended to conditions on the subject lands but only upon acceptance of a risk assessment by a regulatory authority and at the discretion of the insurer. Finally, also at the time of the transfer of the TEDCO lands to the City, a \$15.0 M reserve was created to address City liabilities for third party claims and regulatory requirements, to be funded by WT by the end of 2010 (the "Reserve Fund").

With regard to Bayside, there has not yet been full delineation of environmental conditions. However, investigations conducted to date by WT's environmental consultant (WESA Inc.) have identified contaminated fill material (as is typical in the waterfront area) as well as coal tar. The presence of coal tar is unique as compared with the conditions at other East Bayfront sites but is not unique for lands in the general area. Coal tar poses particular challenges where it cannot be easily and economically excavated as current Ministry of Environment ("MOE") risk assessment protocols do not provide for such material to be left in place. As such, an approach to environmental management of the Bayside lands has not yet been identified, short term capital and long term (perpetual) operating costs have yet to be determined and significant MOE involvement may be required. As per the MOU, all lands subject to the redevelopment must have a Record of Site Condition ("RSC") registered in the provincial registry (requiring Ministry approved investigation, remediation or risk assessment measures).

The unique site conditions have prompted an evaluation of the liability protection developed by WT with respect to the Bayside transaction. External legal advice has been sought to ensure the City's interests are protected as per the MOU. The transaction now contemplates the Development Partner and Site Developers accepting the Bayside Lands on an "as-is" basis. The transaction agreements include indemnification by the Development Partner and Site Developers with respect to environmental investigations and remediation which each conducts. However, the Acceptable Environmental Indemnity anticipated in the MOU (which requires indemnification with respect to all

investigation, remediation and risk assessment work) is not fully provided for as WT is to conduct the majority of environmental work but is not providing indemnification.

In light of such limitations within the current structure of the transaction, potential liability of the City as vendor (and, subsequently, former owner) for environmental conditions on and from the subject lands has been considered, with advice from external environmental counsel.

Potential Off-Site Liability

Environmental counsel has advised that potential liability with respect to historic off-site migration of contamination or off-site migration which may occur in future from those parcels of the subject lands that are to remain in the City's ownership (ie. parks and roads) are not affected by the transaction and cannot be expected to be addressed by purchasers. As such, the current exceptions to the "as-is" purchase that address such liabilities are considered appropriate. Protections available to the City with respect to such potential liability include the Policy and Reserve Fund (discussed above) as well as any environmental management approach to be taken on the subject lands (including parks and roads, which will be subject to the City's standard peer review process). All such lands are to be subject to sufficient investigation, remediation and/or risk assessment so as to permit registration of a RSC which will provide qualified liability protection from provincial orders and would meet the "standard of the day" in terms of addressing off-site migration risks. Any off-site migration from the Bayside Lands is anticipated to occur in a southerly direction, towards the Inner Harbour. While federal regulatory enforcement for migration of deleterious substances into fish habitat under the *Fisheries Act* cannot be ruled out, it is not typical for enforcement to take place in port areas with historic environmental conditions. Any lateral migration to the west would be to Sherbourne Park or to the east would be to the Parliament Slip and, as such, is not anticipated to result in third party claims.

Potential On-Site Liability

With respect to City liability for on-site contamination, the City would have the same protections discussed above with respect to the environmental management activities that result in a RSC. It is anticipated that various parcels may be excavated to bedrock such that generic MOE standards may be met while those areas being risk assessed would be considered in light of the proposed site use and would include appropriate engineering and other institutional controls (such as protective barriers and ventilation systems as well as Certificates of Property Use notifying title-holders of management requirements or site limitations). In addition, further clarification of the Policy has led to an undertaking from the insurer to prepare an amendment to clarify the discretion to be exercised with respect to the provision of on-site coverage. The \$15.0 M Reserve Fund would be available to address third party claims and regulatory requirements.

Finally, an opinion from WT's legal counsel with respect to the potential liability of the City under the proposed transaction is to be provided. Such opinion would confirm that the risk of City exposure to regulatory and third party claims as vendor and former owner is remote as RSCs are to be obtained, the sale includes "as-is" provisions and there is no privity of contract with or duty of care owed to subsequent residential or commercial owners. Notwithstanding this opinion, as the Site Developers are unlikely to be available to subsequent owners with respect to health or property damage claims, such claims may be initiated against the City and, while liability risk is remote, damages cannot currently be quantified and legal defence costs cannot be ruled out. The Policy should provide coverage for such damages and defence costs if claims are made prior to March 28, 2018 (to a limit of \$10.0 M). In future, it may be appropriate to consider renewal of such Policy. City staff are unable to confirm whether the foregoing protections are sufficient given that possible damages and costs are not quantifiable. However, staff are advised that the above protections for the City and fulfillment of the requirements contained in Recommendation No. 24 are reasonable measures for protecting the City's interests as landowner and vendor under the Bayside transaction.

Planning Considerations

The Hines development will be subject to normal City regulatory processes including plan of subdivision and site plan control approval. In accordance with the LDA, WT will act as the applicant for the plan of subdivision. Hines and its Site Developers are to comply with the EBF Zoning By-law and provide their designs for review by the WT Design Review Panel.

City Planning has conducted a preliminary review of the Hines' concept plan and has no objections, subject to further review during the formal planning approval process. Public access across the site, by means of north/south streets, east/west pedestrian connections and through-block pedestrian passages will be required. Community facilities and services including a community centre, child care facility, district energy, affordable housing, public parkland and other amenities are also to be provided. The City and WT will continue to work on an affordable housing agreement for East Bayfront where Bayside is located.

Addendum to the Transit EA

Under the recently-approved East Bayfront Transit Environmental Assessment, only one road access located central to the Bayside development is planned. Council's direction at the time of the EA endorsement was as follows:

“Council require that any future proposals for the installation of additional signals on this section of Queens Quay East be supported by an independent technical audit, completed to the satisfaction of the General Manager, Transportation Services and the Chief General Manager of the TTC, to ensure that such signals can be installed in a way that does not negatively affect streetcar operations. This includes the signals suggested for Small

Street, Bonnycastle Street and proposed “Street A” as shown in Exhibit 11 of the report (May 28, 2009) from the General Manager, Toronto Transit Commission.”

As the Bayside proposal would add a second signal at Small Street, it was necessary for WT to commission a transportation study of the proposed operations. Following consultations and review of the material produced by WT’s transportation consultants, TTC advises that it does not support the introduction of a second access driveway into the development. City Planning and Transportation staff have advised that the modelling undertaken is an appropriate tool for doing a technical audit of transit impacts and that furthermore, there is no demonstrable impact to transit travel speeds and travel time when comparing the two-signal scheme with the one-signal scheme approved in the EA and that the impact is within the range of the standard deviation on travel by TTC vehicles. Accordingly, staff are recommending that Council authorize WT to prepare an addendum to the East Bayfront Transit EA in order to allow a second access point to Bayside from Queens Quay East.

Securing Infrastructure Funding

WT’s commitment to construct the estimated \$120 M of infrastructure necessary to service the Bayside lands is unfunded in the Waterfront Five Year Budget at this time. Through discussions with the City and other government partners, WT is proposing to secure this funding through a combination of borrowing from Infrastructure Ontario (IO), reallocations within its budget and matching Bayside infrastructure needs with its cash flow from revenues. City staff recommend that prior to execution of any of the agreements contemplated in this report that WT confirm, to the City’s satisfaction, that the funding required to complete the infrastructure obligations has been secured and approved by the three orders of government.

Also, limitations on WT’s cash flow availability have resulted in the deferral of the lake-based stormwater management tank system in East Bayfront. Under WT’s funding plan, construction will now take place in 2017 and 2018. In the interim, WT will install an oil grit separator to manage storm water quality in Bayside pending the construction of the permanent system. Until the tank system is built and connected to the UV system, the development will not meet the Toronto Green Standard or the Wet Weather Flow Guidelines. WT and Toronto Water are currently in discussions regarding this matter and the implications relating to the operations of the Sherbourne Common UV system.

CONCLUSION

The proposed transaction represents the culmination of a 2-year process which has engaged the private sector and achieves the objectives set out by WT for Bayside. As the largest development attracted to the waterfront by WT, the Hines transaction provides the opportunity to implement waterfront revitalization objectives on a neighbourhood scale. Along with the other projects underway, the Hines proposal advances the WT, City and other government partners' aspirations for the transformation of EBF.

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ATTACHMENTS

Figure 1- Bayside Concept Plan

- Attachment 1 - Major Terms of Land Development Agreement
- Attachment 2- Major Terms of Agreement of Purchase and Sale
- Attachment 3- Major Terms of Ground Lease
- Attachment 4- Major Terms of Project Agreement
- Attachment 5- Confidential Information

Figure 1

Bayside Concept Plan

