



**STAFF REPORT
ACTION REQUIRED
with Confidential Attachment**

**Bank Towers Assessment Appeals – Proposed
Settlement**

Date:	November 20, 2012
To:	City Council
From:	Acting Deputy City Manager and Chief Financial Officer City Solicitor
Wards:	Ward 28 – Toronto Centre-Rosedale
Reason for Confidential Information:	This report contains advice or communications that are subject to solicitor-client privilege and pertains to litigation that affects the City.
Reference Number:	P:\2012\Internal Services\Cfo\Cc12003Cfo

SUMMARY

This report provides City Council with information about a proposed settlement resolving assessment appeals for the 2001 to 2012 tax years before the Assessment Review Board ("ARB") of the "Bank Towers" properties – Brookfield Place, Commerce Court, First Canadian Place, Royal Bank Plaza, Scotia Plaza and Toronto Dominion Centre – which are comprised of twelve "AAA" downtown office buildings.

RECOMMENDATIONS

The Acting Deputy City Manager and Chief Financial Officer and the City Solicitor recommend that:

- (1) City Council adopt the recommendations contained in Confidential Attachment 1 to this report;
- (2) City Council direct that Confidential Attachment 1 including all Appendices remain confidential as it contains advice that is subject to solicitor-client privilege and pertains to litigation. City Council authorize the public release of all or a

- portion of the confidential instructions once adopted by City Council at the discretion of the City Solicitor; and,
- (3) the appropriate City staff be authorized and directed to take the necessary action to give effect thereto.

Financial Impact

The financial impacts resulting from the recommendations made in this report are disclosed in the Confidential Attachment.

The Acting Deputy City Manager and Chief Financial Officer agrees with the financial impacts information disclosed in the Confidential Attachment.

DECISION HISTORY

At its meeting held on April 12, 13 and 14, 2005 City Council endorsed the participation of City staff in the assessment appeals of the large office / Bank Towers "Bank Towers appeals" before the Assessment Review ARB ("ARB") (re: Policy and Finance Committee Report 4, Clause 35 "Pending Assessment Appeals on Commercial Office Towers).

To view this report on line, please follow the hyperlink:

<http://www.toronto.ca/legdocs/2005/agendas/council/cc050412/pof4rpt/c1035.pdf>

At its meeting held on March 3, 4 and 5, 2008 City Council adopted a motion approving the City to seek leave to appeal to the Divisional Court from the Interim Decision of the ARB dated February 22, 2008.

To view this report on line, please follow the hyperlink:

<http://www.toronto.ca/legdocs/mmis/2008/cc/bgrd/m17.28.pdf>

ISSUE BACKGROUND

Introduction

This matter relates to the proposed settlement of assessment appeals for six (6) large office complexes in Toronto referred to as the "Bank Towers".

Table 1
Bank Tower Office Complexes

Bank Tower	Owner	Number of towers in the office complex
Brookfield Place (formerly BCE Place)	Brookfield Office Properties	3
Commerce Court	British Columbia Investment Management Corporation	1
First Canadian Place	The Manufacturers Life Insurance Company	1
Royal Bank Plaza	Oxford Properties	1
Scotia Plaza	SP 1 Nominee Inc	1
T-D Centre	Oxford Properties	5

The Bank Towers are comprised of twelve (12) buildings located in Toronto’s financial district near the intersection of Bay and King Streets. These properties are referred to in the industry as “AAA” and are some of the most valuable commercial real estate in Canada.

The Owners' assessment appeals are pursuant to section 40 of the *Assessment Act*, R.S.O. 1990, Ch. A. 31 (the "*Act*"). The tax years appealed are 2001 to 2012. The Owners take the position that the current value assessments (CVA or "current value") of the Bank Towers are too high. The Municipal Property Assessment Corporation ("MPAC") returned the current values for the Bank Towers for each of the above noted tax years. The ARB has jurisdiction over the Owners' appeals.

The hearing of the appeals for the 2001 and 2002 tax years started in 2005 (the "2001 and 2002 Appeals"). For reasons detailed below, the ARB remains seized of the matter and the hearing has not yet been completed. The remaining appeals, those for tax years 2003 to 2012, are on hold pending the outcome of the 2001 and 2002 Appeals.

The 2001 and 2002 Appeals: Initial Hearing Before the ARB

Beginning in October 2005 and continuing to early 2007, there were more than sixty (60) days of hearing in the 2001 and 2002 Appeals (the "Initial Hearing").

The parties agree that the highest and best use of the Bank Towers is as an income-producing property designed to be leased, and that the Bank Towers should be valued

using the income approach to valuation. The income approach considers market rents and an appropriate capitalization rate to estimate the current value of the subject property. Capitalization rates are determined from sales of similar properties by creating a ratio of a single year's rental income over the price paid for the property. A higher capitalization rate results in a lower value for the property.

Fundamental to the dispute between the Owners and MPAC over the current value of the Bank Towers was the Owners controversial interpretation of current value in the *Act*. Their evidence and submissions to the ARB were that the legal definition of current value meant that the Bank Towers should be valued as if they were completely vacant on the valuation date (June 30, 1999).

The City participated in the appeals in support of MPAC and retained its own valuation experts.

The Initial Hearing ended in January 2007 and the ARB reserved its decision. On February 22, 2008, the ARB issued a lengthy Interim Decision that set out its legal interpretation of current value and its application to parts of the facts and evidence. On the issue of the correct legal interpretation of current value, the ARB adopted the Owners' interpretation and valuation methodology. The ARB did not determine the current value of the Bank Towers, saying before it could do that, more leases needed to be considered to determine market rents.

Divisional Court Appeal

The City and MPAC obtained leave to appeal the ARB Interim Decision to the Divisional Court. At the Divisional Court the City and MPAC were successful in having the ARB's Interim Decision overturned. The court also ordered that the matter be returned to a new ARB panel.

The Owners received leave to appeal the decision of the Divisional Court to the Ontario Court of Appeal.

Ontario Court of Appeal

The Court of Appeal, in a unanimous decision released on October 15, 2010, also ruled in favour of the City and MPAC and as a result the Owners' appeal of the Divisional Court decision was dismissed.

To understand the Court of Appeal's decision, the following facts are important:

- (1) In 1997, the *Act* was amended, substituting "current value" for "market value";
- (2) "Current value" is defined in s.1 of the *Act*. "Current value" means, in relation to land, the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer."; and

- (3) "Market value" in the pre-1997 version of the *Act* is similar in its definition, but did not contain the words "fee simple, if unencumbered."

The Court of Appeal concluded that the purpose of the phrase "fee simple, if unencumbered" in the definition of current value as applied to income-producing rental properties like the Bank Towers meant to value them as occupied with their tenants without reference to rents at other than market rents. The Court of Appeal states:

The simple amendment instructs the assessor to ignore encumbrances such as leases that are not at market rents. Where the income approach is taken, the assessor is... to use market rents rather than actual rents. I do not agree that this minor amendment was intended to accomplish the much more radical task of instructing the assessor to assume that an income-producing property was vacant at the date of assessment.

The Court of Appeal accordingly dismissed the Bank Towers' appeal. It varied the Divisional Court decision by sending the matter back to the same ARB panel that had made the Interim Decision.

The 2001 and 2002 Appeals: Return to the ARB

When the parties went back to the ARB after the Court of Appeal decision, MPAC (with the City's support) brought a motion before the ARB seeking confirmation of MPAC's current values of the Bank Towers. MPAC and the City argued that the valuation methodology presented by the Owners and their experts at the Initial Hearing was based on what was now determined to be an erroneous interpretation of the *Act*. Accordingly, it was argued the Owners had failed to meet their onus to prove that the current value of the Bank Towers was anything other than the values that were returned by MPAC.

The City's and MPAC's motion was denied by the ARB on March 15, 2011. In its decision the ARB stated that a 7% vacancy rate was to be used and that the Court of Appeal had determined that the capitalization rate should be 8%.

The continued hearing was rescheduled for November 5, 2012. All parties agreed to adjourn the hearing in order to seek instructions on a proposed settlement which is discussed in the confidential attachment.

2012 Reassessment

For all properties in the City of Toronto, the 2013, 2014, 2015 and 2016 tax years will be based on a valuation date of January 1, 2012 ("2012 Reassessment"). MPAC provided preliminary assessment values for the bank tower properties to the City on November 13, 2012. The valuation of the Bank Towers in the 2012 Reassessment has been, and continues to be, an important consideration of the Owners, MPAC and the City.

COMMENTS

Comments on the proposed settlement are subject to solicitor-client privilege and are contained in the Confidential Attachment.

CONTACT

Casey Brendon, Director, Revenue Services, (416) 392-8065, cbrendo@toronto.ca
Angus MacKay, Lawyer, (416) 397-4019, amackay2@toronto.ca
Rodney Gill, Lawyer, (416) 392-8051, rgill@toronto.ca

SIGNATURE

Giuliana Carbone
Acting Deputy City Manager
& Chief Financial Officer

Anna Kinastowski
City Solicitor

ATTACHMENTS

Confidential Attachment 1
Appendix A - Proposed settlement for each Bank Tower tax years 2001 to 2012