NY12.50.1

**From:** Marianne Ng <mng@airdberlis.com>
**To:** "'nycc@toronto.ca'" <nycc@toronto.ca>
**Date:** 1/9/2012 11:35 am
**Subject:** FW: 0 and 1100-1150 Caledonia Road
**Attachments:** letter to Francine Adamo (NYCC).PDF

From: Marianne Ng On Behalf Of Kim Kovar
Sent: January 9, 2012 10:52 AM
To: Francine Adamo (fadamo@toronto.ca)
Cc: Tony Volpentesta (tvolpentesta@bousfields.ca); Steven Ruse (sruse@herefordshirecapital.com); Cassidy Ritz (critz@toronto.ca)
Subject: 0 and 1100-1150 Caledonia Road
Importance: High

Please see attached letter to North York Community Council.

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January 9, 2012

**BY EMAIL**

Our File #98814

North York Community Council
North York Civic Centre, Main Floor
5100 Yonge Street
Toronto, ON
M2N 5V7

**Attn: Francine Adamo, Administrator**

Dear Chair and Members of North York Community Council:

**Re: North York Community Council Meeting, January 10, 2012**
**Agenda Item NY12.50**
**Application for Official Plan Amendment and Rezoning**
**0 and 1100 – 1150 Caledonia Road**
**File Nos. 10 105227 NNY 15 OZ and 10 255341 NNY 15 0Z**

We represent the owners of the above-referenced lands. Since submission of the original application in January, 2010, our client has worked cooperatively with City staff to respond to all planning and technical issues raised. The Final Staff Report dated December 15, 2011 recommends approval of the subject applications, subject to a series of recommendations. We support the staff recommendations except in three respects. We are asking that Recommendations 2 and 4 be revised and that Recommendation 5 be deleted for the reasons which follow.

The site currently contains a mix of non-residential buildings having a total gross floor area of 30,054m$^2$. Included in that area is the former industrial operation (now substantially ceased) of Fenwick Automotive Products, and approximately 3,000m$^2$ in a multi-tenanted retail building. Our client is proposing to demolish and replace 8,526m$^2$ of existing GFA and to add an additional 1,559m$^2$ of new GFA for a total proposed GFA of 31,613m$^2$. In this manner, the owner seeks to renovate and adaptively re-use the three principal buildings on the property with a combination of office and retail uses, all as permitted by the Official Plan.

The existing M2 zoning on the site currently permits a non-residential GFA of 90,638m$^2$ with individual limits on the amount of retail and office use permitted. The total proposed GFA of 31,613m$^2$ is approximately one third of the amount permitted by the Zoning By-law today. No height or density increase is being sought and, in fact, the proposed site specific by-law will substantially reduce the permitted density on the site from 1.0 times the lot area to 0.35 times the lot area, while revising the limit on the amount of retail space within that total.

Accordingly, Recommendation 4(a) contained in the Final Staff Report dated December 15, 2011, seeking a section 37 contribution of $750,000.00, is unauthorized, unreasonable and does not conform to the City's Official Plan policies or the City's Implementation Guidelines for Section 37 (the "Guidelines"), as adopted by Council on November 19-20, 2007.

On page 21 of the Staff Report, staff state: "The Official Plan identifies that where permissions are sought for density increases beyond the **existing** [*emphasis added*] floor area, that Section 37 may be used if the overall project size exceeds 10,000m$^2$ and the added density exceeds 1,500m$^2$ (Policy 5.1.1.4)". Staff have misquoted and therefore incorrectly applied this Official Plan policy. In fact, Policy 5.1.1.4 provides as follows:

> "Except as contemplated in Policy 5, Section 37 may be used for development, excepting non-profit developments, with more than 10,000 square metres of gross floor area where the zoning by-law amendment increases the **permitted** [*emphasis added*] density by at least 1,500 square metres and/or significantly increases the permitted height.[...]"

The necessary requirement to trigger an exigible section 37 contribution is an increase to the **permitted** density, not an increase to the **existing** density. As noted above, the permitted density for the site is 90,638m$^2$ and the proposed density is significantly less than currently permitted by the Zoning By-law.

Further, on page 21 the Staff Report states: "While a significant amount of the proposed gross floor area consists of the conversion of existing floor area (21,528 m$^2$), the City may secure community benefits with respect to the added floor area (10,085m$^2$) being proposed." Once again, Staff are incorrectly suggesting that a density bonus is payable in exchange for an increase beyond existing density, as opposed to beyond permitted density. In addition, however, the floor areas are incorrect. The existing GFA on the site is 30,054m$^2$ and the proposal contemplates an increase of 1,559 m$^2$, not 10,185 m$^2$ as stated in the Report.

The situation where an applicant seeks to convert the use of permitted density, either built or unbuilt, from a permitted use to another use, is also addressed by the Official Plan and by the City's Guidelines. If we consider the proposal to convert permitted industrial floor area to retail floor area, Policy 5.1.1.3 of the Official Plan and Sections 3.5 and 3.6 of your Guidelines provide that no section 37 obligation exists.

Policy 5.1.1.3 of the Official Plan provides as follows:

> "Except as contemplated in Policy 5[.1.1.5], ...where a change of use is proposed, then the City will consider whether additional height and/or density beyond that permitted by Zoning By-law for the use is warranted **without recourse to Section 37 of the *Planning Act*** [*emphasis added*]. [...]"

Section 3.5 of the Guidelines addresses the circumstance where a change of use is proposed for existing floor area. The Guideline provides as follows:

> "3.5 The Conversion of Existing (Built) Floor Area
>
> Official Plan policy 5.1.1.3 addresses situations where a change of use is proposed. A rezoning application to convert existing (built) floor area to another use, whether or not an Official Plan Amendment is required, is considered to be a density increase for the purpose of using Section 37. **However, in such circumstances Section 37 is used only in accordance with Official Plan policy 5.1.1.5** [*emphasis added*].
>
> If the **permitted** [*emphasis added*] density is being increased beyond the conversion of existing floor area, such as in the case where additional floors are added to an existing building, the use of Section 37 is not limited to the application of policy 5.1.1.5. Community benefits may be secured with respect to the added floor area, provided the overall project size and the added density (or height) exceed the thresholds in the Official Plan (policy 5.1.1.4)."

Accordingly, where the conversion of existing floor area to another use is proposed, section 37 benefits can only be required in accordance with Policy 5.1.1.5. Policy 5.1.1.5 allows the use of section 37 to secure five specific potential benefits and no others: heritage preservation, rental housing preservation or replacement, benefits required by a Secondary Plan or Area Specific Policy, required capital facilities to support the development or a voluntary contribution agreed to by an applicant. None of those items apply in this case to permit the $750,000.00 contribution recommended by City staff. The change in use of existing built density from industrial to retail use in this case does not authorize this use of section 37.

Section 3.6 of the Guidelines addresses the circumstance where a change of use is proposed for permitted but unbuilt density. The Guideline provides as follows:

> "3.6 Change of Use of Permitted Unbuilt Density (including demolition of built density)
>
> Again, Official Plan policy 5.1.1.3 addresses situations where a change of use is proposed. A change of permitted use with respect to existing but unbuilt permitted

density is considered to be an increase in permitted density, for the purpose of using Section 37 to secure community benefits, where:
(a) the permission for the new use and/or density requires an amendment to the Official Plan and the overall project size and height/density increase thresholds in policy 5.1.1.4 are exceeded; or
(b) permitted floor area not yet constructed is subject to an existing but not yet fulfilled Section 37 agreement and is being converted to another use by way of a Zoning By-law amendment; or
(c) Section 37 is used in accordance with policy 5.1.1.5."

Criteria (a) is not met as no amendment to the Official Plan is required to permit the retail use or the associated density. Criteria (b) is not met as there is no pre-existing section 37 Agreement. And finally as noted earlier, criteria (c) does not apply as none of the potential section 37 benefits identified in Policy 5.1.1.5 are applicable to the $750,000.00 contribution recommended by staff in this case. Accordingly, converting permitted but unbuilt density from industrial use to retail use in this case does not authorize the proposed use of Section 37 either.

Even if the density were being increased, according to Policy 5.1.1.1(a) of the Official Plan capital facilities which are secured in exchange for an increase in permitted height and/or density, "must bear a reasonable planning relationship to the increase in the height and/or density of a proposed development". This requirement is echoed in Section 2.4 of the City's Guidelines. In *Toronto (City) v. Minto BYG Inc.*, [2000] O.M.B.D. No. 1102, the Board held (at para. 48) that "whether or not contributions should be authorized must be judged on the beneficial effects of such contributions to the development proposal and it lies with the municipality to demonstrate the connection between the proposal and the benefits".

More recently, in *Davenport Three Develco v. Toronto (City)* (2006), 53 O.M.B.R. 157, the Ontario Municipal Board held (at pages 181-182) that "the use of section 37 must be grounded in fair, clear, transparent, predictable, specific requirements that are set out in the official plan and are not arbitrary in their application. An applicant should know what will be expected by way of s. 37 if increases in height and density are approved." The Board will only impose the requirement of a section 37 agreement where the section 37 requirements meet the principles set out above. In our respectful submission, your staff's section 37 Recommendation 4(a) with respect to this Application fail to meet these tests.

In particular, the Staff Report draws no connection between the nature of the community benefits recommended and the proposed development. The authority granted by section 37 of the *Planning Act* to secure tangible community benefits was intended as a means to off-set any potential impact resulting from an increase in height and/or density caused by a landowner obtaining increased development rights. There is no indication in the Staff Report how the proposed GFA results in a greater potential impact than 90,638m$^2$ of non-residential space which can be built as of right today under the current zoning permissions,

or any indication that converting existing and permitted industrial floor space to retail floor space will have any adverse impact on the community. Specifically, there is no demonstrable connection between the request for upgrades to the park or the provision of a community facility or public art and the proposed adaptive reuse of these three existing buildings.

Finally, based on the supporting documentation prepared and provided to us by City staff on November 17, 2011, it is clear that the amount of the section 37 contribution being recommended was based upon an analysis of land values for six other "comparable" commercial sites. Calculating the value of community benefits on the basis of increased land value resulting from a height and/or density increase is contrary to the City's Guidelines. This approach has also been deemed by the Ontario Municipal Board as constituting an illegal tax. In *Sterling Silver Development Corp. v. Toronto (City)* (2005), 51 O.M.B.R. 403, at page 425 the Board held:

> [...] the *Planning Act* is not a revenue statute. For its part, s. 37 is neither a municipal capital gains tax, nor a tool for municipalities to sell upzoning to supplement their coffers. As a component of the *Planning Act,* its use must be governed by the principles of planning and the objectives of the Act.

In closing, in accordance with Policy 5.1.1.5 of the Official Plan, we acknowledge that section 37 benefits can be provided by mutual consent irrespective of whether the density is being increased beyond the threshold limits set out in the Official Plan. In the spirit of compromise and cooperation, if Council is willing to make one other change to the draft By-law, as described below, approves the subject Applications and enacts the By-law and Official Plan Amendment at its meeting on February 7-8, then our client will contribute $350,000 toward local park improvements, as previously offered in discussions with the local Councillor and City staff. (The previous offer of 93m$^2$ of publicly accessible community meeting space within the project is withdrawn as staff have indicated it is not desirable).

The requested amendment to the draft By-law is to revise clause (f) i to require a minimum of one retail store to have a minimum gross floor area of 2,000 m$^2$ instead of 6,000 m$^2$. We note that this is consistent with the recommendations of the applicant's Retail Market and Employment Area Impact Analysis which, as stated in the staff report, is acceptable to your Economic Development staff and has been accepted by the City's independent peer reviewer.

In order to give effect to the foregoing Community Council would need to amend Recommendation 2 to modify clauses (f) i (store size) and (z) 1) i (section 37) of the draft By-law; amend Recommendation 4(a) to eliminate the additional $400,000.00 public art, park improvement or community facility contribution (note we have no objection to Recommendation 4(b) which uses section 37 to secure certain required improvements to capital facilities including driveway realignment work and transit signal priority

improvements); and eliminate Recommendation 5 which would be superceded. (Recommendation 5 would have delayed the introduction of the Bills until after the issuance of the Notice of Approval Conditions for the related Site Plan Application and as there are no outstanding site plan issues which would impact the permissions or regulations contained in the draft Official Plan Amendment or Zoning By-law, there is no necessity for such delay.)

We thank you in advance for your consideration of this matter. We will be in attendance at the North York Community Council Meeting on January 10, 2012 when this item is considered.

Yours truly,

AIRD & BERLIS LLP

Kim M. Kovar
KMK/SJL/mn

cc: Tony Volpentesta, Bousfields Inc.
Steven Ruse
Cassidy Ritz

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