



**STAFF REPORT
ACTION REQUIRED**

Responding to Ministry of the Environment and Climate Change requirements affecting Toronto Parking Authority sale transactions

Date:	October 14, 2016
To:	Executive Committee
From:	President, Toronto Parking Authority
Wards:	Ward 21 – St. Paul’s; and Ward 27 - Toronto Centre – Rosedale
Reference Number:	TPA File No.: 5655-00; 5217-00; and 5015-00

SUMMARY

The purpose of this report is to obtain Council's authorization to proceed with a temporary conveyance / transfer of City of Toronto owned lands involving three separate sale transactions between the Toronto Parking Authority (“TPA”) and their respective purchasers to a trustee/nominee corporation for the sole purpose of obtaining a record of site condition (“RSC”) from the Ministry of the Environment and Climate Change (“MOECC”). The three TPA sale transactions affected by the RSC regulations due to the stratified interest in the subject lands include 925-935 Eglinton Avenue West (*Municipal Carpark No. 655*), 1445 Bathurst Street (*Municipal Carpark No. 216*), and 50 Cumberland Street / 37 Yorkville Avenue (*Municipal Carpark No. 15*). The RSC requirement affecting the specific development at 925-935 Eglinton Avenue West is detailed within the body of this report as the project is the most time sensitive since the purchaser expects first occupancy to commence at the end of January 2017. A similar conveyance / transfer of City of Toronto owned lands is being proposed for the other two developments in the event that discussions underway with MOECC as to the interpretation of their regulation do not result in the MOECC changing its approach.

RECOMMENDATIONS

The Toronto Parking Authority recommends that:

1. City Council authorize a conveyance of the City-owned lands within the development site at 925-935 Eglinton Avenue West to BSAR (Eglinton) Ltd. as

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- trustee for the City of Toronto for the purpose of obtaining a Record of Site Condition for the development, and a re-conveyance to the City of the same lands following issuance of the Record of Site Condition;
2. If discussions with the Ministry of Environment and Climate Change do not result in a change in approach to the interpretation of the regulations, City Council authorize similar conveyances in trust to each of 1445 Bathurst Street Ltd. and MK 37 Yorkville Inc. for completion of their respective Records of Site Condition for the developments at 1445 Bathurst Street and 50 Cumberland Street/37 Yorkville Avenue;
 3. City Council authorize entering into all documents necessary to complete the conveyances to and from the nominee corporations along with all necessary transfers and undertakings; and
 4. City Council authorize and direct the appropriate City Officials to take the necessary actions to give effect to Council's decision.

FINANCIAL IMPACT

There are no financial implications resulting from this approval.

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

DECISION HISTORY

925-935 Eglinton Avenue West (Municipal Carpark No. 655) – Ward 21 – St. Paul's

In accordance with the City's Real Estate Disposal by-law, No. 814-2007, the City-owned property at 935 Eglinton Avenue West was declared surplus on August 6, 2010 (DAF 2010-161). 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 have been complied with.

At its meeting of February 7, 2011, Council adopted Item GM1.13, approving the sale of development rights, construction of the underground public parking garage, acquisition by the City of the additional lands required for the underground parking garage, and acquisition of the additional stratified interest in the lands required for the Retail Component at 925-935 Eglinton Avenue West.

<http://www.toronto.ca/legdocs/mmis/2011/gm/bgrd/backgroundfile-35172.pdf>

1445 Bathurst Street (Municipal Carpark No. 217) – Ward 21 – St. Paul's

In accordance with the City's Real Estate Disposal by-law, No. 814-2007, the Property was declared surplus on September 29, 2011 (DAF 2011-303). 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 have been complied with.

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By DAF 2011-327 dated September 29, 2011, authority was obtained to complete the sale of development rights, construction of the underground public parking garage, acquisition by the City of the additional lands required for the underground parking garage.

By DAF 2013-103 dated August 23, 2013, authority was obtained to amend certain terms of the sale to the Purchaser.

50 Cumberland Street / 37 Yorkville Avenue (Municipal Carpark No. 15) – Ward 27 - Toronto Centre – Rosedale

In accordance with the City's Real Estate Disposal by-law, No. 814-2007, the Property was declared surplus on October 3, 2011 (DAF 2011-304). 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 have been complied with.

At its meeting of March 5, 6, and 7, 2012, Council adopted Item GM11.13, approving the purchase and sale transaction between the TPA and the Purchaser for the sale of development rights and the construction of an 800-space public parking garage. (<http://www.toronto.ca/legdocs/mmis/2012/gm/bgrd/backgroundfile-45140.pdf>)

By DAF 2015-302 dated November 12, 2015, authority was obtained to amend certain terms of the sale to the purchaser.

ISSUE SUMMARY

925-935 Eglinton Avenue West - BSAR (Eglinton) Ltd.

Under the terms of the purchase and sale agreement ("PSA") with BSAR (Eglinton) Ltd. ("BSAR"), the TPA sold to BSAR the above grade portion of the City property to be stratified (the "Upper Strata") while the City retained the below ground portion of the subject property as well as acquiring rights in the below ground portion of the stratified BSAR owned easterly neighbouring property located at 925 Eglinton West (the "Lower Strata").

Shortly after completing the PSA transaction on December 3, 2013, BSAR commenced construction of a mixed use residential building on land that included the Upper Strata and a three level parking garage on the Lower Strata lands (the "Project"). Upon completion of the Project, the first underground level of the parking garage, which would house approximately 68 parking spots, was to be retained by the City for the operation of a TPA public parking garage. The remaining Lower Strata area was to be conveyed to BSAR for purposes of servicing the parking requirements of the residential condominium to be constructed on the Upper Strata lands. The Project is currently approaching construction completion and the purchaser expects to commence first occupancy towards the end of January 2017.

Completion of the Project requires the filing of a Record of Site Condition ("RSC") in accordance with the MOECC Regulations. An RSC is required wherever lands are being converted from one use to another which is considered more environmentally-sensitive, such as the residential component of the Project. Currently, the MOECC interprets the regulations in a way that prevents the filing of RSCs for stratified properties.

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MOECC amended its regulations in 2007. The Environmental Registry posting for these 2007 amendments states:

“The proposed amendments to the *Environmental Protection Act* address the main objective of the horizontal severance prohibition, i.e., to clarify that horizontal severances may not be used to avoid responsibility to clean up contaminants.” Environmental Registry, EBR Registry Number: 010-0365

<http://www.ebr.gov.on.ca/ERS-WEB-external/displaynoticecontent.do?noticeId=MTAwMzY2&statusId=MTQ5OTUy>

Since the 2007 amendments, the MOECC has not granted an RSC for a stratified parcel.

MOECC views the current ownership of the Project lands, wherein the Upper Strata is owned by BSAR and the Lower Strata is owned by the City, as inconsistent with these regulations as recently been interpreted by the MOECC. Essentially, this interpretation mandates that when an RSC is filed in respect of stratified land, the ownership of each strata must be legally viewed as the same party as the filing party at the time of the filing or the filing will not be accepted. Obviously this is not the case with respect to the Project lands so a solution is required in order to meet the requirements of this technical reading of the regulation. Without an RSC being filed, a full building permit will not be granted by the City of Toronto and neither the Upper Strata nor the Lower Strata lands will be permitted to be occupied commensurate with construction completion.

Discussions are currently underway with City Legal, TPA counsel, and MOECC counsel as to the interpretation of the regulation. Staff have noted to MOECC counsel that the situation in these cases is markedly different from the concern expressed in the Environmental Registry above. In these cases, environmental testing has been done and the conditions under all of the strata is well understood. The MOECC concern appears to be that the wording of the regulation prevents the same set of data being used for the different strata. Staff have set out a detailed rationale as to why the City and TPA are of the view that these situations do not offend the principle or the letter of the regulation, as testing and remediation have been carried out in relation to all strata. While these discussions are underway, it is unlikely that the MOECC will provide a definitive response in the time frame necessary for these projects.

COMMENTS

Although clarifying the applicable MOECC legislation via a political process may provide an alternative option to the proposed trust conveyances, unfortunately this is not possible in light of the practicalities of the timelines in so far as Project completion is concerned. The time required for a legislative solution would result in unacceptable delays to the purchaser in terms of delivering occupancy to its residential unit purchasers who have made arrangements to move in January 2017.

Following extensive consultation between the respective counsels of both the TPA and the purchaser as well as the representatives of the MOECC, BSAR has requested that

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registered title to the Lower Strata (currently owned by the City of Toronto) be conveyed to BSAR, as trustee for the City of Toronto, an approach initially suggested by the MOECC in order to satisfy the MOECC requirements. Upon the filing of the Record of Site Condition in BSAR's name, the Lower Strata lands will be conveyed back to the City of Toronto. The aforementioned transfers of the Lower Strata lands between BSAR shall be done on a Land Transfer Tax-exempt basis because the beneficial ownership of the Lower Strata lands will not be conveyed for the purposes of complying with Record of Site Condition requirements. Counsel to the TPA and the City prefer that BSAR file the RSC as opposed to the TPA for reasons to do with liability so it would not make sense for the transfer agreements to work in the opposite direction.

Further, since the proposed trustee arrangement does not constitute a transfer of beneficial ownership, it ought not to have any tax consequences in so far as Land Transfer Tax is concerned on either party. BSAR has agreed to indemnify the City of Toronto in respect of any potential tax consequences in any event. Therefore the arrangement should not attract any financial liabilities on the City. It is the intention of both BSAR and the TPA to unwind the trust arrangement as soon as the MOE accepts the RSC filing. The planned solution as outlined within the body of this report remains subject to approval by City Council.

The projects at 1445 Bathurst Street and 50 Cumberland/37 Yorkville face the same issue. Although the site details and developers are different in each instance, the approach to stratification, construction of a public parking component, and conversion to residential uses are common to all. The project at 1445 Bathurst Street is also under construction and so the matter of the RSC is expected to arise soon. While the Cumberland/Yorkville project is not yet under construction, the sale of the development rights has closed and in fact it was the developer of that site who alerted TPA and City staff to the RSC problem. While discussions with the MOECC continue with the hope that these projects will not have to adopt a similar step of interim conveyances to a trustee, authority is being sought to proceed with such arrangements should they be necessary at the point in time when the developers are ready to apply for an RSC.

The TPA will be advising the TPA Board of Directors of the circumstances related to the MOE regulations given the current situation at the next scheduled meeting of the Board on October 20, 2016.

TPA staff informed both local area Councilors for Ward 21 and Ward 27, Joe Mihevc and Kristyn Wong-Tam respectively regarding the temporary conveyance / transfer of City of Toronto owned lands in order to satisfy MOECC RSC requirements and they are both supportive of the solution as outlined herein.

Conclusion

In order to facilitate completion of development projects negotiated by the TPA which have encountered an unexpected barrier due to the interpretation of regulations regarding requirements for RSCs, the MOECC has suggested that the stratified ownership of the affected properties be combined into a single ownership for the purpose of applying for the

RSC for the site. City and TPA staff see no workable alternative to the MOECC's suggestion for projects which are currently under way where ownership has already been stratified. In structuring future transactions, the TPA will be mindful of and address the issues raised by the stratification of ownership prior to completion.

CONTACT

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SIGNATURE

Lorne Persiko, President

ATTACHMENTS

None