

Submitted by
The City Manager
MACKENZIE
BARRISTERS

AUG. 12

Mackenzie Barristers Professional Corporation
120 Adelaide St. W., Suite 2100
Toronto, Ontario, M5H 1T1
www.mackenziebarristers.com

Gavin MacKenzie
416-304-9293
gavin@mackenziebarristers.com

To: Toronto Parking Authority Board of Directors
From: Gavin MacKenzie
Date: June 29, 2017
Re: 1111 Arrow Road

I. Introduction

You retained me, pursuant to a Board motion on October 20, 2016, to provide guidance in responding to an anticipated Auditor General's report regarding a real estate transaction in respect of a property municipally known as 1111 Arrow Road in Toronto, including but not limited to Board member conduct and responsibilities.

To fulfill this mandate, I have met with a number of Toronto Parking Authority ("TPA") staff – Lorne Persiko (President), Marie Casista (VP Real Estate, Development, and Marketing), Elizabeth Dalzell (Head of Human Resources), and Teresa Toigo (Executive Assistant and Board Secretary) – as well as all five private citizen members of the Board of Directors and one of the appointed City Councillor members, Councillor Georgio Mammoliti. Councillor John Filion declined to meet with me, notwithstanding multiple invitations to meet.

TPA staff and the other board members cooperated fully with us, and we are grateful to them both for their assistance and for their candour. We were favourably impressed with the competence and dedication of the TPA board members and staff with whom we met.

We have reviewed the numerous documents provided to us by Marie Casista, including the Auditor General's report entitled "Observations of a Land Acquisition at Finch Avenue West and Arrow Road by the Toronto Parking Authority", dated October 24, 2016; Board Meeting Minutes (May 26, July 28, September 15, October 20, and October 26, 2016 meetings); TPA staff reports (May 24, July 27, September 8, October 13, October 20, and October 25, 2016); the TPA Board's Procedural By-law, dated 1998; the City Manager's Report, dated November 7, 2016; and various email exchanges between TPA Board members and staff, among other things.

We have also reviewed the Auditor General's report titled "Observations of a Land Acquisition at Finch Avenue West and Arrow Road by the Toronto Parking Authority – Part 2", which was considered by the Board at its meeting on June 26, 2017 and made public the following day pursuant to a ruling of the Chair of the City's Audit Committee.

We attended the Board's meeting on December 16, 2016, to present our interim draft report orally. At its meeting of June 26, 2017, the Board resolved to forward the Auditor General's second report to me and to instruct me to complete my final report on this matter.

II. Executive Summary

In my opinion, having reviewed the documentation provided and interviewed the relevant TPA staff and six of the seven members of the board, TPA appears to have followed its standard process in its dealings with respect to 1111 Arrow Road (the "Property"). In particular, after being directed to complete the purchase for "fair market value" by City Council, TPA staff conducted preliminary analyses of an appropriate purchase price; sought and obtained Board approval to execute a conditional agreement of purchase and sale based on its preliminary assessments; executed an agreement of purchase and sale that was conditional on due diligence; and proceeded to complete its due diligence in a timely manner, including by obtaining formal appraisals to assess the fair market value of the Property and confirm whether the purchase price in the agreement of purchase and sale reflected fair market value. This acquisition process had been reviewed by the Auditor General ("AG") in an audit conducted in 2015 without criticism of TPA's processes, as detailed in this report.

Councillor Filion made a complaint to the AG respecting the value of the property before TPA staff had an opportunity to complete its due diligence and present it to the Board, in accordance with its standard process. A number of concerns arise out of Councillor Filion's conduct as a Board member. In particular, the basis for his complaint to the AG is unclear. He made his complaint six weeks prior to the date on which due diligence was required to be completed and the transaction finalized. At one point, Councillor Filion stated that he would "call the cops" if the acquisition went ahead at the price set out in the Conditional Agreement of Purchase and Sale. We have neither seen nor heard anything to justify such a statement. Regrettably, Councillor Filion declined to meet with us and, accordingly, we do not know on what basis he made this threat.

At the Board's meeting on December 16, Councillor Filion said that he thought refusing to meet with me was the right thing to do. He said that he went to the Auditor General because he was unable to persuade any of his fellow Board members of the validity of his concerns about the purchase of 1111 Arrow Road as directed by City Council. He did not articulate the basis for his concerns, though he volunteered that it was not because of any rivalry or disagreement between Councillor Mammoliti and himself. He said that his concerns would

become clear when the Auditor General reports. He continued to hint darkly about improprieties.

Several people we interviewed said that Councillor Filion's conduct has harmed the enviable reputation that the TPA has enjoyed in the eyes of the City.

Councillor Filion is of course entitled to vote against motions at Board meetings with which he disagrees. It is difficult not to conclude, however, that his conduct overall has been calculated to undermine the intent of City Council's direction to purchase the Property, and the good faith efforts of the Board and staff to implement this direction.

Councillor Filion's conduct interfered with the normal course of TPA's real estate acquisition process in respect of the Property. In addition, certain aspects of Councillor Filion's conduct raise concerns regarding Board member conduct and decorum. Toronto Parking Authority By-Law No. 1 requires Board members "to treat other directors and any person appearing or speaking to the Board with courtesy and respect". It also requires Board members "to not make direct demands on staff" as "members' queries or requests for staff services are to be placed directly through the President."

The Auditor General's second report depicts Councillor Filion and herself as officials whose interventions prevented the TPA from overpaying for the property. As will be apparent from this report, in my view this rather self-congratulatory conclusion is in no way justified by the facts.

Councillor Filion complained to the Auditor General on September 1, 2016, six weeks before the due diligence waive date (that is, the date on which the conditional purchase agreement was to be finalized, but before which TPA was entitled to withdraw from and renegotiate the conditional agreement, without penalty, based on the results of its due diligence), and before TPA staff completed its due diligence and presented it to the Board as required. One of the main purposes of the due diligence period was to determine whether the purchase price in the conditional agreement reflected fair market value. This would have required appraisals of both the land and the sign. The Board had a process in place as a check to ensure the purchase price reflected fair market value. TPA staff assured the Auditor General that they would have obtained the necessary appraisals during the due diligence period and would not have recommended that the purchase proceed at the price in the conditional agreement once they learned that the value that had been attributed to the sign in the conditional purchase agreement was considerably higher than its true value. The Auditor General did not interview any of the Board members other than Councillor Filion, and as a result it is perhaps unsurprising that she adopted his speculation about what would have occurred if he hadn't intervened.

The Auditor General also wrote in her report that she “did not notice evidence that TPA staff...received direct benefits by taking the approach they did.” This is a surprising and harmful comment, given that no one has suggested otherwise. The very fact that the Auditor General has stated that she did not “notice” evidence that TPA staff received “direct” benefits is damaging to the reputations of the TPA Staff involved in the matter. This comment may be explained by Councillor Filion’s threat to a TPA staff member on September 1 to “call the cops”. In my view, both Councillor Filion’s threat and the fact the Auditor General has dignified it with her own comment, are regrettable.

III. Chronology of Events

On October 15, 2015, the Auditor General, Beverley Romeo-Beehler, completed a report pursuant to an audit of TPA’s real estate activities, with a stated objective “to assess the control framework governing the real estate activities of the Toronto Parking Authority”, including “Processes and procedures to ensure transactions achieve value for money and further TPA’s mandate”. The AG concluded that “TPA was able to demonstrate that minimum selling price or maximum purchase price benchmarks were met and contracted transaction values with within appraised market value ranges”; “All joint venture sales transactions and land purchase transactions reviewed were executed within the appraised market value range for highest and best use”; and that “it is clear the City is receiving value”. The AG observed that TPA did not have a formal policy setting out the expected processes when acquiring real property, but acknowledged that the TPA Board’s Real Estate, Development, and Business Opportunities Advisory Committee had an overview of its existing practices for acquisitions of property as of November 2012. This process overview (Exhibit 1 to the AG’s report) discloses that due diligence occurs after TPA executes a purchase and sale agreement. The AG recommended that TPA formalize its policy for real property acquisitions.¹

On March 31, 2016, City Council authorized and directed TPA to acquire the 1111 Arrow Road Property “for municipal parking and ancillary uses including proposed Bike Share Toronto infrastructure, and to permit construction of a possible gateway feature for the Emery Village Business Improvement Area.” This direction further provided that “Acquisition will be on terms and conditions to be negotiated by the President, Toronto Parking Authority, at fair market value plus associated costs such as land transfer tax, title insurance and other fees, and approved by the Toronto Parking Authority Board.”

¹ The AG also made recommendations in respect of three areas the TPA could strengthen to ensure TPA and the City received maximum value: (1) enhancing existing analysis and retaining sufficient supporting documentation to evidence that the optimal amount of parking was obtained and financial returns were maximized; (2) increasing transparency by sufficiently documenting the justification or rationale for decisions, which often relied heavily on management’s professional judgment; and (3) improving coordination and collaboration with the City’s Real Estate Services Division and Build Toronto, which would promote obtaining the best value from the City’s real estate assets.

On July 27, 2016, TPA staff reported to the Board and recommended that the Board authorize TPA staff to (1) negotiate and enter into an Agreement of Purchase and Sale (“APS”) to acquire the Property for up to \$12.1 million, plus closing costs, subject to satisfactory review of the terms and conditions by the President of the TPA, as outlined in staff’s report, (2) initiate the expropriation process in the event that TPA is not successful in acquiring the property, and (3) provide initial funding of up to \$100,000 for consultant costs for work.

TPA staff based its recommendation on the preliminary information available to it. Staff had previously received a draft report from Integris Real Estate dated August 1, 2015, which had valued the land at \$7.5 million. This valuation did not factor in the value of a commercial sign located on the property. Staff reported that TPA would have the right to assume the sign license agreement, which had been executed in 2011 for a term of 15 years with a five-year renewal option, at a license fee of \$100,000 per annum escalating at 3% (meaning a fee of \$119,405 for 2017).

TPA staff subsequently engaged Altus Group (which had since purchased Integris) to formally appraise the land as part of TPA’s due diligence process. The staff report noted that its preliminary \$12.1 million valuation was based on the value of both the land and the sign on the land, and that TPA staff had “engaged an accredited real estate appraiser to value the lands and [had] contacted TPA’s outdoor sign consultant to value the sign, such that we can validate the Purchase Price”.

Staff proposed to the Board that TPA offer to acquire the land for \$12.1 million plus closing costs, with 60 days for due diligence waiver, then closing 30 days thereafter if the results of due diligence were satisfactory.

On July 28, 2016, the TPA Board passed a motion to adopt TPA staff’s recommendation. Councillor Filion was the only member of the Board who voted against this motion.

On August 19, 2016, Lorne Persiko (President) and Paul Scargall (Director and Chair of the Board’s Real Estate Committee) signed a Conditional Agreement of Purchase and Sale to purchase the property for \$12,180,000. The APS was conditional, among other things, on due diligence to be completed by October 18, 2016. If, as a result of TPA’s due diligence, it determined that the fair market value of the property was less than \$12,180,000 including the value of the sign, TPA could terminate the APS and recover its deposit. As the purchase price was \$80,000 in excess of that approved by the Board (in light of the vendor’s request for credit for the unamortized portion of the sign rent, which he indicated would cost \$80,000 after tax), TPA staff realized it would need to seek Board approval for this change when it reported back to the Board on the results of the due diligence.

On August 23, 2016, Councillor Filion requested a meeting with TPA staff to review the file on the Property, and the appraisal, if ready. He also asked various questions about details of the proposed acquisition (such as the source of certain statements, and contact information for individuals at the planning department and Metrolinx involved in the acquisition). Staff arranged a meeting for September 1st, and Marie Casista responded to his questions via email on August 26.

On August 29, 2016, Councillor Filion wrote to Lorne Persiko expressing concern that he would not receive the appraisal for the Property until two days before the Board meeting at which he “might ask the board to reopen the matter”. He also asked various questions about when the appraisal would be ready and why it was taking so much time. On August 30, Marie Casista answered each of Councillor Filion’s questions, including as follows:

3. Is it common practice to ask the board to approve a sale and then take this much time to be able to provide the basis for the sale price that was recommended to the board? Yes – we always need an appraisal as part of our due diligence to support the Purchase Price. This appraisal is never ordered until after the Board approves the purchase as we would not want to spend money if the business terms of the sale are not approved. This is all part of our due diligence which usually takes 120 days, particularly if we need Council approval for the transaction.

Ms. Casista also noted in response to Councillor Filion’s concerns that she had intended to review the appraisal at a board briefing meeting scheduled for September 13 because the appraisal was not supposed to be completed until September 9, and she was on vacation until September 12, and in any event she thought it would be easier and more effective to discuss the appraisal with all Board members at the same time. She agreed, however, to send the appraisal to all Board members as soon as it is received, and noted she had asked Altus to move the completion date forward to September 7th.

Ms. Casista met with Councillor Filion in person on September 1, 2016. Although she thought the purpose of the meeting was to discuss the TPA’s real estate acquisition processes, it appeared to her that Councillor Filion was interested only in the business case for the acquisition of the Property. Ms. Casista explained that the purchase was further to a direction from City Council to make the purchase at fair market value. Councillor Filion asked whether the acquisition was a “done deal” so long as the agreed-upon price reflected fair market value, and Ms. Casista responded “yes”, subject to the completion of due diligence. Ms. Casista reported that Councillor Filion was very upset about this, and responded that if the acquisition went ahead at the price indicated in the APS, he would “call the cops”. Ms. Casista stated that there was still due diligence to complete, and that the TPA would be completing the acquisition at a price that reflected fair market value. Councillor Filion asked her if there was

anything he could do to stop the purchase, to which she responded “no”, provided that the price reflects fair market value. Councillor Filion proceeded to ask a number of questions about the sign and about procedure and said he would get a lawyer to provide advice about procedure. Ms. Casista informed us she later learned that Councillor Filion went directly from this meeting to the AG’s office.

On September 1, 2016, the AG received a request to review TPA’s purchase of the Property. The AG later indicated to the Board that the complainant, Councillor Filion, was concerned, in part, “that nothing in the file appeared to justify the purchase of the property for \$12,100,000 – even though the Agreement of Purchase & Sale had already been signed by the President of the TPA”.

On September 8, 2016, the AG informed TPA staff that she would be providing a report for TPA’s consideration prior to the TPA’s next Board meeting on September 15. This report was ultimately completed October 24, 2016, and discussed at a special meeting on October 26, 2016.

On September 8, 2016 at 9:33am, Councillor Filion wrote to Ms. Casista stating “September 7 has come and gone and I have not received a copy of the appraisal or been given any reason why I haven’t received it. Please advise.” On September 9, Councillor Filion wrote to Ms. Casista, “Hi Marie, It is now Friday afternoon. Please advise when the electronic copy will be available.” Ms. Casista responded twelve minutes later, stating: “I have been advised that the report will be sent out by Altus at 1:30 pm this afternoon. As soon as we receive it we will distribute to all.” Ms. Casista followed through on this promise when the Altus appraisal was received that afternoon.

On September 12, 2016 at 12:22am, Councillor Filion wrote Ms. Casista to thank her for the appraisal, and asking ten questions related to clarifications he wanted about the appraisal and supporting documents. He concluded, “I trust that all of this information is readily available and can be communicated to me today.”

TPA cancelled the briefing meeting that had been scheduled for September 13 to discuss the appraisal and acquisition because they received advice they should not have a meeting of the board members that was not a formal meeting of the Board. Ms. Casista responded to Councillor Filion’s email to inform him that as the meeting had been cancelled, there would be an opportunity to address his questions at the Board’s meeting on September 15.

On September 12 at 7:58pm, Councillor Filion wrote Ms. Casista and Mr. Persiko, copying the AG, stating that he felt that TPA staff “has attempted to stifle [his] efforts to obtain the information” he needs to conduct his responsibilities as a Board member. He stated he had expressed concern about the purchase back in May 2016, but instead of addressing his

concerns staff brought forward an agreement of purchase and sale as a “last-minute added item on the July board agenda”, and that he still did not have access to “basic information”, along with an appraisal, that he believed the board should have received “BEFORE we were asked to approve a purchase”. He added that although his initial concern was that TPA was purchasing a property without proper analysis or information available to the decision makers, his concerns now extended to “the purchasing process of the TPA in general and the reasons beneath the secrecy surrounding this purchase.” Mr. Persiko responded the following day to assure Councillor Filion that staff were working concertedly to provide full and accurate responses to his questions as well as the requests of the AG. He stated that the AG would be present at the Board’s September 15 meeting to address these questions and any concerns.

At the TPA Board’s meeting on September 15, 2016, Councillor Filion moved that the TPA’s purchase of the Property be placed on hold until after the completion of the AG’s report and completion of due diligence by TPA staff and a further report to the Board, and that his motion be recorded in the public minutes of the meeting. This motion was defeated, as only Councillor Filion voted in favour. Board Chair Tziretas advised Councillor Filion and the Board that, as a point of procedure, motions connected to an in-camera report are not recorded in the public minutes. Councillor Filion challenged the Board Chair on this ruling, and the Board recessed the meeting to seek direction on this matter from the City Clerk’s office. After attempts to contact various staff in that office for advice were unsuccessful, the Chair proceeded with his initial ruling due to time constraints. Councillor Mammoliti moved to receive the AG’s report and ask that the AG report back to the Board prior to October 5, 2016, so the Board may revisit the item and consider it in conjunction with the staff’s report on due diligence. This motion carried, although Councillor Filion opposed.

The September 15 meeting was lengthy, beginning at 9:30am and ending after 3:00pm, with no lunch break. At the meeting the AG complained that TPA staff had not provided her with all information relevant to the transaction. Ms. Casista informed us that, in response to the AG’s requests of her while she was on vacation, she had provided the information she thought was relevant, but the AG stated at the meeting that she was entitled to *everything* related to the acquisition.

We were informed that when the AG had completed her report she went to leave, but Councillor Filion stated that he had several questions for Ms. Casista, and that he wanted the AG to be present to hear the answers. Councillor Filion proceed to ask about twenty questions of Ms. Casista about the acquisition, which she answered to the best of her ability. Ms. Casista and a number of the private Board members told us that this process was very uncomfortable, and akin to a cross-examination; it felt accusatory, and Councillor Filion was facing away from Ms. Casista while he asked her the questions (as staff were seated at the back of the boardroom). Councillor Filion also had numerous questions for the Board Secretary, Teresa

Toigo, many of which were procedural and some of which she was not in a position to answer. Councillor Filion's questions for Ms. Toigo questioned her work as Secretary, including what she had written in the minutes.

On September 21, 2016, Councillor Filion emailed Ms. Toigo to request the draft minutes of the September 15 meeting. She responded within ten minutes to state she was working on them and hoped to have them completed that afternoon. At 4:01pm, Councillor Filion emailed her to say he was mainly interested in the 1111 Arrow Road item, and stated: "It is now almost 4:00pm. Please tell me what time I can expect to receive the draft minutes on this one item." At 6:38pm, Ms. Toigo emailed Councillor Filion and the other members of the board to provide the draft minutes, highlighting that they were in draft form. Councillor Filion responded the following day to provide several "corrections" to the in-camera minutes, stating "I believe they are incorrect in several substantial ways". Ms. Toigo responded on September 28 to state that she appreciated there may be disagreement or misunderstanding at times with respect to the minutes as drafted; that she would be pleased to make necessary amendments as the Board directs; and as the minutes had yet to be confirmed by the Board and would be included on the October 20 meeting agenda, there would then be an opportunity for members to address any concerns.

Members of the Board and senior staff became concerned about Councillor Filion's conduct in respect of Ms. Toigo and Ms. Casista, and arranged for each to meet one-on-one with Elizabeth Dalzell, Head of Human Resources, to discuss his behaviour and its impact on them. Both Ms. Casista and Ms. Toigo were negatively affected by Councillor Filion's conduct, and felt their actions were challenged and scrutinized in a manner they had not previously encountered in their careers. Ms. Dalzell advised them that because of Councillor Filion's position, the most appropriate recourse would be to file a complaint with the City's Integrity Commissioner pursuant to the Code of Conduct for members of Council, which speaks to respect for city employees and their expertise in their positions. Ms. Dalzell was of the opinion that there were grounds for Ms. Toigo and Ms. Casista to pursue such a complaint, but both decided not to pursue the matter. Ms. Casista and Ms. Toigo were both fair in their assessment of what had happened; Ms. Toigo said that she did not believe Councillor Filion's actions were a personal attack, but rather that he was trying to advance an agenda.

On September 28, 2016, TPA sought and received an extension for the due diligence in respect of the APS to November 15, 2016.

On October 20, 2016, the TPA board passed a motion to "direct the TPA's President to seek advice from an appropriate body to provide the Board with guidance with respect to responding to the Auditor General's Report regarding this matter... including, but not limited to, Board Member conduct and responsibilities." Councillor Filion opposed this motion.

On October 24, 2016, the AG reported her findings further to the September 1 complaint to the Board. Her findings included that:

- TPA had sought two appraisals to validate that negotiated purchase price represented fair market value – one for the land, one for the license agreement for the sign
 - TPA staff had stated that their general practice is to sign a conditional APS, then conduct their due diligence which ensures that the negotiated purchase price is fair market value
 - TPA’s appraisal was done on the basis of unencumbered land, but there are encumbrances
- The AG had engaged an appraiser to confirm that the issues of “former working relationships, possible impact of encumbrances and that Integris helped to value the land in 2015, then appraised the land in 2016” did not have an impact on the land value appraised by TPA (TPA had appraised the land value at \$8,000,000, and the sign value at \$4,150,000 to \$4,550,000).
 - The AG’s expert appraised the land at \$7,750,000
 - The AG found that all the evidence “supports FMV to be approximately \$8,000,000, excluding the value of the sign license agreement...”
- The AG appraised sign value at \$1,550,000, and disagreed with the assumptions TPA relied upon to arrive at the higher value.
- The TPA Board had approved purchase at price of up to \$12,100,000 on 28 July 2016, but the Conditional APS dated 18 August 2016 included a purchase price of \$12,180,000, which exceeded Board approval

On October 25, 2016, Marie Casista completed a status report on the acquisition of the Property, in which she stated that the due diligence process was underway and was nearly complete, save for TPA staff’s review of the fair market value of the Property. She noted that “TPA has undertaken a comprehensive review of the two (2) appraisals prepared to identify fair market value”, and that based on the review to date TPA staff agreed the fair market value of the land was \$8 million. She highlighted, however, that TPA staff’s due diligence review to date did *not* support the indicated value of the sign, and instead suggested it had a fair market value of \$1.5 to \$2 million. She concluded that the combined market value of the land and sign is in the range of \$9.5 to \$10 million and, as such, “a purchase price reduction will be required if we are to proceed...”

On October 26, 2016, the Board had a special meeting further to the AG’s report. The private members of the Board indicated that they asked the AG for clarification of and support for a

number of the specific positions taken in her report, but that she declined to elaborate on these positions or provide the supporting documentation. These Board members were disappointed that the AG was not more forthcoming with information about her findings.

The Board unanimously accepted, for information only, the status report dated October 25. The Board moved further to the AG's report and to TPA staff's status report to amend its July 28 direction to substitute \$10 million for \$12.1 million (as the limit in the purchase price authority for the property), and to direct staff to report back to the Board for final approval of the APS. The motion carried, although Councillor Filion opposed.

On November 4, 2016, Marie Casista wrote to Lorne Persiko recommending that he obtain approval from the TPA Board to terminate the conditional APS dated August 19, as TPA had received legal advice that, to effect the new maximum purchase price of \$10 million, terminating and executing a new agreement was preferable to amending the APS. On November 6, through a poll of directors, the Board informally accepted this recommendation (the five private members approved, and the two Councillors did not respond), which was to be formally ratified at the Board's November 17 meeting.

On November 7, 2016, the City Manager released a report noting that the TPA had chosen to terminate the APS effective that day (one week before the due diligence waiver period ended), based on the AG's concerns. The City Manager observed that the termination did not preclude the possibility that a new offer could be made in an appropriate amount, if authorized. He recommended, however, that no further offers be made on the Property until Council considers the AG and City Manager's reports in 2017 and provides further direction.

The Board met once again on November 17, 2016. Lorne Persiko reported that the AG's report went to Council but there was no discussion on it, and that the AG would be presenting a second report at the Board's December meeting (we understand this report will likely be postponed until the new year). The Board ratified the poll that had been taken to terminate the APS.

IV. TPA board and staff comments respecting the acquisition and the acquisition process

In our meeting with the private members of the TPA Board, Paul Scargall confirmed that the structure of the APS for the Property – *i.e.*, entering into an agreement conditional on due diligence to be completed in a defined period thereafter – is not unusual for the TPA, nor for other government-related entities, in his experience. Lorne Persiko agreed, and confirmed that the due diligence that must be completed to finalize a conditional agreement includes appraisal of the property's value as well as any necessary investigations, such as environmental assessments.

Marie Casista informed us that the TPA typically enters into a conditional APS *then* conducts due diligence to ensure the negotiated price represents the fair market value of the property for several reasons, including:

- i. Because TPA competes with private purchasers on the open market, it does not always have the luxury of time to complete due diligence with respect to a market price before securing a contract to purchase the property;
- ii. Often there is not enough information available to TPA to determine the fair market value until the property is under contract because the required documents (such as leases) are provided by the vendor;
- iii. Completing due diligence in advance of entering into a contract would weaken TPA's negotiating position, as the vendor would know of TPA's earnest intention to purchase if TPA invested money in an appraisal; and
- iv. TPA often backs out of a purchase for other reasons, and it is preferable to do so prior to spending money on an appraisal.

Michael Tziretas, Chair of the Board of Directors, highlighted that the Board's July 28 authorization for staff to proceed with a conditional APS was subject to staff's report back on its due diligence, meaning the Board had a "check in place" to ensure the purchase price reflected fair market value (as confirmed by due diligence).

Mr. Persiko, who has been with TPA for 25 years, and served as VP, Real Estate and Manager, Real Estate prior to becoming president in 2013, explained the acquisition process as follows: Typically, TPA will enter into an agreement to purchase a property, conditional on (i) Board approval; (ii) City Council or its delegate's approval; and (iii) due diligence, including various investigations and confirmation of the fair market value of the property. He explained that TPA has never obtained formal appraisals before entering into an agreement of purchase and sale, and that, in fact, by obtaining the the draft appraisal from Integris in 2015, this particular acquisition involved more upfront appraisal analysis than TPA's other transactions. Mr. Persiko explained that he usually informally calls a few appraisers to see if a vendor's proposed price makes sense, then has one of those appraisers prepare a formal appraisal after TPA enters into a conditional agreement. Mr. Persiko also noted that this acquisition was different from a typical acquisition because TPA had been directed to purchase the Property by City Council, and thus (i) TPA did not prepare its usual business case for a real estate acquisition, and (ii) the APS was conditional only on Board approval and due diligence.

Mr. Persiko acknowledged that the AG had previously expressed concern about TPA's documentation and reporting, including in her October 15, 2015 audit report respecting TPA's real estate activities. He stated that TPA is a fairly lean organization, and its preliminary

analyses often include assessments based on staff's experience and judgment (for example, TPA will estimate revenues for a possible parking lot based on an informal calculation done by an experienced staff member with knowledge in the area). Mr. Persiko informed us that TPA has agreed to provide better reporting and more backup for its analysis, as requested by the AG in her 2015 report.

Nearly every individual we interviewed noted that Councillor Filion regularly shows up late to Board meetings, or leaves early, or both, such that he misses large parts of the discussions. They expressed concern that many of his questions about the acquisition and the acquisition process could have been addressed had he attended and participated in the full meetings.

V. Analysis

In her October 15, 2015 report, the AG concluded that "TPA was able to demonstrate that minimum selling price or maximum purchase price benchmarks were met and contracted transaction values with within appraised market value ranges"; "All joint venture sales transactions and land purchase transactions reviewed were executed within the appraised market value range for highest and best use"; and that "it is clear the City is receiving value". The AG acknowledged that the TPA existing practices for acquisitions of property provided that due diligence would occur *after* executing a conditional purchase and sale agreement. She did not make any recommendations about this process, except to state that TPA should formalize its policy for real property acquisitions and improve its supporting documentation to increase transparency.

In our opinion, having reviewed the documentation provided and interviewed the relevant TPA staff and six of the seven members of the board, TPA appears to have appropriately followed its standard process in its dealings with respect to 1111 Arrow Road. In particular, after being directed to complete the purchase for "fair market value" by City Council, TPA staff conducted preliminary, informal analyses of an appropriate purchase price; sought and obtained Board approval to execute a conditional APS for a purchase price no greater than \$12,100,000 (based on its preliminary assessments); executed an APS conditional on due diligence; and proceeded to complete its due diligence in a timely manner, including by obtaining formal appraisals to assess the fair market value of the Property and confirm whether the purchase price in the APS reflected fair market value. This is the process that had been reviewed by the AG in her 2015 audit, without substantive criticism.

The APS reflected a purchase price that exceeded the authority granted by the Board (it was for \$12,180,000 rather than the \$12,100,000 limit set by the Board). We are satisfied with staff's explanation of this, which included a clear understanding that they would have to seek Board approval for this price before finalizing the acquisition. Staff informed us that they intended to seek this approval when they reported on the results of the due diligence. This

never occurred, however, because the acquisition was put on hold and eventually terminated as a result of the AG's investigation and report.

Councillor Filion made his complaint to the AG on September 1, 2016, six weeks prior to the due diligence waive date, and more importantly before TPA staff had an opportunity to complete its due diligence and present it to the Board in accordance with its standard process. In light of Ms. Casista's status update dated October 25, we now know that as TPA completed its due diligence it discovered that its appraisal of the sign on the Property did not support the proposed purchase price in the APS; much like the AG's report, Ms. Casista concluded that the combined market value of the land and sign was in the range of \$9.5 to \$10 million and, as such, "a purchase price reduction will be required if we are to proceed...". Moreover, the Board was to have another opportunity to approve or reject the purchase, as staff required further Board approval if it were to proceed with the purchase at the price provided in the APS.

It is regrettable that Councillor Filion declined to meet with us, because a number of concerns arise out of his conduct as a Board member. In particular, the basis for his complaint to the AG is unclear. It seems unlikely that Councillor Filion misunderstood TPA's property acquisition process, *i.e.* that the APS was conditional on due diligence, including formal appraisals to assess fair market value.

At the Board's meeting on December 16, Councillor Filion said that he thought refusing to meet with me was the right thing to do. He said that he went to the Auditor General because he was unable to persuade any of his fellow Board members of the validity of his concerns about the purchase of 1111 Arrow Road as directed by City Council. He did not articulate the basis for his concerns, though he volunteered that it was not because of any rivalry or disagreement between Councillor Mammoliti and himself. He said that his concerns would become clear when the Auditor General reports. He continued to hint darkly about improprieties.

Directors of an organization have a fiduciary obligation to the organization, meaning that they owe a duty of utmost good faith and heightened loyalty, which compels them to act in the best interests of the organization at all times.² A director has a responsibility to investigate before making decisions and is not only entitled but encouraged to express dissent when he or she disagrees with a proposed action, including by voting against motions, where appropriate.³ Directors must act independently to promote the best interests of the

² Mark Ellis, *Fiduciary Duties in Canada* (Toronto: Carswell, 1990), loose-leaf updated 2011, p. 15-4.1 & 15-4.5, citing, *inter alia*, *Re Owen Sound Lumber Co* (1917), 33 DLR 487, *JLO Ranch Ltd v Logan* (1987), 54 Alta LR (2d) 130 (QB), as well as provincial and federal *Business Corporations Acts*.

³ Carol Hansell, *Directors and Officers in Canada: Law and Practice* (Toronto: Thomson Canada Ltd, 1999), loose-leaf updated 2016; see Chapters 1 & 9, and pp. 6-51 to 6-61.

organization through the exercise of their independent judgment, and “if this duty requires them, following careful review and consultation, to disagree with the views of management [or] other directors... then so be it.”⁴ However, directors similarly have a responsibility to act honestly and openly; to disclose all relevant information they have to the Board; to cooperate in pursuit of the best interests of the organization and of the board; not to subordinate the interests of the organization to those of their appointing patron; and to act prudently and on a reasonably informed basis.⁵ Directors should not be a disruptive force, and should not interfere with or undermine lawful actions of the Board with which they disagree if they were properly authorized.⁶

Toronto Parking Authority By-Law No. 1 requires Board members “to treat other directors and any person appearing or speaking to the Board with courtesy and respect”. It also requires Board members “to not make direct demands on staff” as “members’ queries or requests for staff services are to be placed directly through the President.”

In our opinion, based on the information we have at this time, Councillor Filion’s conduct in respect of the TPA’s proposed acquisition of the Property cannot be justified as reasonable investigation and legitimate dissent; rather, he interfered with the function of the Board and served as a disruptive force by undermining the TPA’s lawful operation. Councillor Filion is of course entitled to vote against motions with which he disagrees. It is difficult not to conclude, however, that his conduct was calculated to undermine the intent of City Council’s direction to purchase the Property at fair market value, and the good faith efforts of the Board and staff to implement this direction. Councillor Filion’s complaint to the AG interrupted the TPA’s due diligence process, which would have provided him with the information he was requesting. As a result of his conduct, the acquisition was put on hold, and may not be completed, contrary to City Council’s direction. Board members also expressed concern that Councillor Filion’s conduct has harmed the TPA’s goodwill with the City.

In addition, certain aspects of Councillor Filion’s conduct raise concerns regarding Board member decorum. In particular, we are concerned with the tone, timing, and frequency of Councillor Filion’s requests to TPA staff for information via email, Councillor Filion’s threat to “call the cops” in respect of the APS, and the appropriateness and tone of Councillor Filion’s questioning of Ms. Casista and Ms. Toigo at the TPA Board’s September meeting. Councillor Filion’s insistence that the AG remain present at the meeting to observe his questioning of Ms. Casista was a transparent attempt to influence the AG’s investigation and report.

⁴ Barry J. Reiter, *Directors’ Duties in Canada, Sixth Edition* (Toronto: LexisNexis Canada Inc., 2016) at pp. 39-40.

⁵ Reiter, *supra* at p 37-46, citing *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68; *Colborne Capital Corp v 542775 Alta Ltd*, [1999] AJ No 53 (Alta CA); and *PWA Corp v Gemini*, [1993] OJ No 723 (Gen Div), *aff’d* (1993) 15 OR (3d) 730 (CA).

⁶ See *AI Enterprises v Bram Enterprises Ltd*, 2014 SCC 12 at paras 98-104.

At least some of these concerns fall within the jurisdiction of the Integrity Commissioner appointed under the *City of Toronto Act*. The duties of the Integrity Commissioner include investigating complaints about breaches of the *Code of Conduct for Members of Council*. Under heading XII (“Conduct Respecting Staff”) the *Code* provides that Councillors should be respectful of the role of staff. It is fair to infer that this duty extends to staff of the TPA, as under the same heading the *Code* recognizes that the key requirements of the roles carried out by Councillors include participating as Council representatives on agencies, boards, and other bodies. Under heading XIV of the *Code* (“Discreditable Conduct”) members of Council have a duty to treat members of the public and staff “appropriately and without abuse, bullying, or intimidation, and to ensure that their work environment is free from discrimination and harassment”.

As mentioned at page 6 above, the possible remedy of a complaint to the Integrity Commissioner was drawn to the attention of the affected members of staff by the TPA’s Director of Human Resources. The staff members chose not to pursue a complaint with the Integrity Commissioner.

Councillor Filion declined our invitations to meet and discuss the concerns referred to above. His refusal to meet with me is another example of his attempts to frustrate the will of the Board.

The Auditor General’s second report depicts Councillor Filion and herself as officials whose interventions prevented the TPA from overpaying for the property. As will be apparent from this report, in my view this rather self-congratulatory conclusion is in no way justified by the facts.

Councillor Filion complained to the Auditor General on September 1, 2016, six weeks before the due diligence waive date and before TPA staff completed its due diligence and presented it to the Board as required. One of the main purposes of the due diligence period was to determine whether the purchase price in the conditional agreement reflected fair market value. This required formal appraisals of both the land and the sign. The Board had a process in place as a check to ensure the purchase price reflected fair market value. TPA staff assured the Auditor General that they would have obtained the necessary appraisals during the due diligence period and would not have recommended that the purchase price proceed at the price in the conditional agreement once they learned that the value attributed to the sign in the conditional agreement on the basis of a preliminary, informal agreement that was subject to change upon due diligence, was considerably higher than the sign’s true value.

The Auditor General did not interview any of the Board members other than Councillor Filion. This is very surprising in light of the seriousness of her allegations relating to TPA. It is perhaps

unsurprising, however, that having interviewed only Councillor Filion that she adopted his speculation about what would have occurred if he hadn't intervened.

The Auditor General also wrote in her report that she "did not notice evidence that TPA staff...received direct benefits by taking the approach they did." No one has suggested that anyone at TPA, whether staff or board members, has received *any* benefits by taking the approach they did. In light of this fact, this is a surprising comment. The very fact that the Auditor General has stated that she did not "notice" evidence that TPA staff received "direct" benefits is harmful to the reputations of the TPA staff involved in the matter. This comment may have derived from Councillor Filion's threat to a TPA staff member on September 1 to "call the cops". In my view, both Councillor Filion's threat and the fact the Auditor General has dignified it with her own comment, are regrettable.



Gavin Mackenzie