

DEVINE PARK LLP

PLANNING AND DEVELOPMENT LAWYERS

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Patrick J. Devine
patrick.devine@devinepark.com
D 416.645.4570

Devine Park LLP
250 Yonge St., Suite 2302
P.O. Box. 65
Toronto ON M5B 2L7

T 416.645.4584
F 416.645.4569

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DELIVERED VIA EMAIL (clerk@toronto.ca)

Mayor and Members of Council
c/o City Clerk's Department
City of Toronto
13th Floor, West Tower, City Hall
100 Queen Street West
Toronto ON M5H 2N2

**Attention: Ms. Ulli S. Watkiss,
City Clerk**

Dear Mayor Tory and Members of Council:

**RE: City Council Meeting Agenda Item No. ED31.7
- IMIT Program Application
- 160 Front Street West**

We are the solicitors for the Cadillac Fairview Corporation Limited, the owner of the lands municipally known as 160 Front Street West (the "**Site**") and the applicant with respect to an Imagination, Manufacturing, Innovation and Technology ("**IMIT**") financial incentive program application. Our client submitted the IMIT application (the "**Application**") to the City on April 20, 2018 with respect to the development of an approximately 1.3 million square foot, 46-storey office building to be constructed on the Site (the "**Subject Building**"). Following construction, the Subject Building will be home to the corporate headquarters of the Ontario Teachers' Pension Plan.

A staff report, dated July 4, 2018, from the General Manager, Economic Development and Culture (the "**Staff Report**"), along with Attachment 2 thereto, being a report prepared by Hemson Consulting Ltd., dated June 29, 2018, (the "**Hemson Report**", collectively with the Staff Report, the "**Reports**"), recommend that City Council refuse the Application. However, on July 9, 2018, the Economic Development Committee forwarded the item to City Council without recommendation. Having reviewed the Reports, we note that they rely on the erroneous application of a "but for" test that is not part of the IMIT program eligibility criteria to be applied to the Application. In fact, the Application meets all of the applicable eligibility criteria and we are not aware of any such similar IMIT application being refused by the City Council. Accordingly, we respectfully request that City Council approve the Application on the basis that the Application meets all of the IMIT program eligibility criteria.

The City has Considered Improper Eligibility Criteria

The eligibility criteria for IMIT program grants are set out in Community Improvement Plan By-law No. 1323-2012, as amended by By-law No. 466-2013 (collectively, the “**IMIT By-law**”). We acknowledge that the IMIT program has undergone a review that would eliminate the eligibility of the Subject Building. However, as confirmed by the Staff Report, the Application is being processed under the currently in-force IMIT By-law as it existed at the time the Application was made on April 20, 2018, prior to adoption by City Council of recommended amendments to the IMIT program that may be enacted at the July 2018 Council meeting. Both Reports concede that the Subject Building meets the in-force IMIT By-law eligibility criteria and the Reports set out specific IMIT By-law objectives that are achieved by the Subject Building. As noted on page 6 of the Hemson Report, the Application “meets the basic eligibility requirements” as set out in the IMIT By-law.

Our client appropriately proceeded and submitted the Application in accordance with the process and eligibility criteria set forth in the IMIT By-law. However, despite acknowledging the fact that the basic eligibility requirements had been met, in recommending refusal of the Application, the Reports rely on a “but for” test, which is not contained within the provisions of the IMIT By-law, and place undue reliance on the fact that the IMIT program is currently under review.

The “But For” Test and the IMIT Program Review

There is no “but for” test to be satisfied upon submission of an IMIT application. Rather, in enacting the IMIT By-law and the specific eligibility criteria for the Application, the City already decided that a “but for” test is presumed to have been met within the boundaries of the Community Improvement Plan that it determined. This is in fact confirmed by the current review of the IMIT program. As noted on page 2 of the Staff Report, at its April 2018 meeting, City Council adopted Item EX30.6, headed “Review of the IMIT Property Tax Incentive Program”, which recommended the elimination of office eligibility within an expanded “TOcore Financial District” boundary, on the basis that the review of the IMIT program deemed that the “but for” test is no longer met in the Financial District. In other words, the “but for” test is used to determine the boundaries of a Community Improvement Plan. Notwithstanding the suggestion that the “but for” test is no longer met within the Financial District, the Application must be considered under the currently in-force IMIT By-law as it existed at the time the Application was made, without the influence of conclusions reached during the IMIT program review.

Notwithstanding the fact that the City has acknowledged the Application should be considered under the in-force IMIT By-law, both Reports place undue reliance on the fact that the IMIT program has undergone a review that would eliminate the eligibility of the Application. On page 2 of the Staff Report, it is stated that “[s]ix of the office development applicants presented in this report are within the expanded TOcore Financial District boundaries, in which it was determined that the IMIT ‘but for’ test is not met. Accordingly, this report does not recommend IMIT grants for these developments.” The Hemson Report states on page 22 that “the City may consider that under the proposed amendments to the [IMIT By-law], this project would not be eligible for grants due to its location within the Financial district.” The fact that the IMIT program is undergoing a review is not relevant to the Application and should not have been considered in either of the Reports. Furthermore, the Hemson Report relies on an analysis of the market context that was undertaken as part of the IMIT program review to inform its improper use of a “but for” test. This current office market data is entirely irrelevant for the purposes of considering the Application.

The Application Meets all of the Eligibility Criteria

The Application meets all of the applicable eligibility criteria without exception. In making the Application, our client relied heavily upon the fact that the City has never refused an application that meets the applicable eligibility criteria. The IMIT applications of 1 York and 100 Adelaide Street West, among many others that were approved under the in-force IMIT By-law, were considered in detail by our client prior to submission of the Application and during the planning stages of the Subject Building. Likewise, Ontario Teachers' Pension Plan, in making a decision to relocate its corporate headquarters to the Subject Building, reasonably relied on the fact that every other application that met all the applicable eligibility criteria has been approved. If City Council fails to approve the Application, Ontario Teachers' Pension Plan will face significantly higher costs over the term of its lease and will as a result suffer damages.


Finally, as noted by the solicitors to other IMIT applicants, should Council refuse the Application, our client will be at a competitive disadvantage to those development projects for which IMIT grants were approved by the City using the same eligibility criteria. This is arbitrary and prejudicial to our client. Section 82 of the *City of Toronto Act, 2006*, prohibits the City from assisting any commercial enterprise through the granting of bonuses for that purpose. The IMIT program is an authorized exemption from Section 82. However, failing to apply the IMIT program eligibility criteria fairly and consistently would result in a discriminatory outcome and would put our client at an unfair competitive disadvantage.

For all of the reasons set forth above, we respectfully request that City Council approve the Application.

Should you have any questions respecting this matter, please do not hesitate to contact the undersigned.

Yours very truly,

Devine Park LLP


Patrick Devine
PJD