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Via Email: edc@toronto.ca

Economic Development Committee
City Hall, West Tower, 10th Floor
100 Queen Street West
Toronto, ON M5H 2N2

Attention: Nancy Martins, Committee Administrator

Dear Committee Members:

**Re: Item ED31.7 – IMIT Property Tax Incentive Program Applications
40 Temperance Street (the “Subject Property”)**

We are solicitors for BAC Surface Inc., the registered owner of the Subject Property and the applicant for development grants under the Imagination, Manufacturing, Innovation and Technology (“IMIT”) program, pursuant to an application filed with the City of Toronto (the “City”) on April 12, 2018 (the “IMIT Application”). Our client is proposing to redevelop the Subject Property with a 32 storey multi-tenanted office building comprised of approximately 855,000 square feet of gross floor area (“GFA”) for which site plan approval is expected to be achieved in the near future.

We have reviewed the staff recommendation report dated July 4, 2018 (the “Staff Report”) along with the attached report from Hemson Consulting Ltd. dated June 29, 2018 (the “Hemson Report”). Despite confirming that the IMIT Application meets all of the applicable eligibility criteria, both the Staff Report and the Hemson Report recommend refusal of the IMIT Application for the Subject Property on the basis that it does not satisfy a ‘but for’ test. There is nothing in the applicable Community Improvement Plan By-law No. 1323-2012, as amended by By-law No. 466-2013 (collectively, the “CIP By-law”) which provides that the IMIT Application must satisfy such a test. Accordingly, the conclusions and recommendations in both the Staff Report and the Hemson Report are fundamentally flawed and should be rejected.

The City has never refused an application which meets all of the eligibility criteria under the applicable IMIT program by-law and it would be therefore be discriminatory and illegal for the City to refuse the IMIT Application for the Subject Property. The IMIT Application meets the current eligibility requirements and should be approved by City Council.

The Applicable CIP By-law

As noted in the Staff Report, the IMIT Application for the Subject Property must be processed under the applicable in-force CIP By-law as it read in April 2018 when the IMIT Application was submitted.

We acknowledge that City staff, in accordance with direction received from City Council, have proposed to implement a new IMIT program by repealing the existing CIP By-law and replacing it with a new community improvement plan by-law pursuant to section 28 of the *Planning Act*. We understand that these amendments are not yet enacted, and will be further considered by City Council at its meeting scheduled to commence on July 23, 2018. If a new by-law is adopted by City Council, it may be subject to appeals to the Local Planning Appeal Tribunal and therefore may be further modified before it takes effect, which may not occur for some time.

Accordingly, the analysis of current office market conditions being proffered by City staff and Hemson to justify the proposed amendments to the IMIT program remains untested and is not relevant or applicable to the evaluation of this IMIT Application under the existing CIP By-law.

Eligibility Criteria in the Applicable CIP By-law

The underlying statutory authority for the financial assistance provided through the CIP By-law is subsection 28(7) of the *Planning Act*, and it expressly requires grants to be provided by the City in conformity with the provisions of the CIP. It is not appropriate or permissible for staff, or Council, to refuse an application based on secondary considerations not provided for in the CIP By-law.

The Subject Property is proposed to be developed as an office building, portions of which will be occupied by ‘Corporate Headquarters’ as defined within the CIP By-law. Accordingly, these portions of the proposed office building clearly qualify as eligible uses under the CIP By-law.

The Hemson Report reaches the same conclusion on page 6 where it notes that “each of the applications meets the basic eligibility requirements as set out in the CIP by-law”. It also illustrates how the IMIT Application satisfies all of the other IMIT program objectives and how the proposed development will provide other important benefits to the City.

Despite reaching these conclusions, which should be determinative of whether or not the IMIT Application warrants approval by City Council, the Hemson Report and the Staff Report proceed to evaluate the IMIT Application by creating and applying a site-specific ‘but for’ test that does not exist within the CIP By-law.

There is no requirement to satisfy the ‘but for’ test on a site-specific basis unless the applicant is seeking approval for development grants as either a ‘Transformative Project’ or ‘Tourism Attraction’ (as defined in the existing CIP By-law). In both of those cases, the applicant is required to produce a business plan which demonstrates “its need for financial incentives in order for the development to be economically viable”. No such eligibility requirement is imposed on applicants seeking development grants for Corporate Headquarters.

The City has never refused an application which meets all of the eligibility criteria under the applicable IMIT program by-law. Previous staff reports recommending approval of development grants underscore the fact that any ‘but for’ considerations are inherently satisfied by meeting the eligibility criteria in the existing CIP By-law.

While there are subjective aspects of the CIP By-law that apply to ‘Transformative Projects’ or ‘Tourism Attractions’, they do not apply to the IMIT Application. The IMIT Application clearly meets the applicable objective eligibility criteria, as noted in the Staff Report and Hemson Report.

Accordingly, there is no basis for the City to refuse the IMIT Application for the Subject Property.

Unfair Discrimination and Competitive Disadvantage

It would be unfair for the City to refuse this IMIT Application when every previous application that has met the eligibility criteria under the existing CIP By-law has been approved.

Investment decisions in respect of the Subject Property have proceeded under the framework of the applicable CIP By-law, informed by the City’s approval of development grants for other similarly situated projects within the Financial District. If the IMIT Application for the Subject Property is refused, it will result in a competitive disadvantage for our client.

Moreover, it would be inappropriate to deny development grants to the Subject Property while approving development grants for other projects based on arbitrary and imprecise considerations. The Hemson Report recommends approval where such grants “may be a deciding factor” but recommends refusal where such grants are “not likely to be a deciding factor”, yet these conclusions fail to exhibit any meaningful distinction between the relative merits of the applications. Given the magnitude of financial assistance at stake, the approval and refusal of grants must not be dependent upon vague principles for which no analytical guidance is provided in the CIP By-law.

The IMIT program is an authorized statutory exemption to the anti-bonusing rule which otherwise precludes the City from providing financial assistance to businesses pursuant to section 82 of the *City of Toronto Act, 2006*. As such, it must be applied fairly, consistently, transparently and without discrimination. The recommendations in the Staff Report and the Hemson Report are based on inapplicable considerations and would result in an unfair, inconsistent and discriminatory outcome.

Conclusion

For the reasons set out above, our client is requesting that the Economic Development Committee recommend approval of the IMIT Application for the Subject Property. Alternatively, we are requesting that the matter be sent back to staff with clear direction to evaluate the IMIT Application based on the appropriate eligibility criteria without applying tests or assumptions that are not contained within the existing CIP By-law.

We intend to appear at the meeting on July 9, 2018 to make an oral deputation on this matter.

Yours very truly,

GOODMANS LLP



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IDA/vw

cc: Michael Williams and Rebecca Condon, Economic Development and Culture
Herb Mah and Jonathan Fung, Brookfield Properties

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