



## **Toronto Parking Authority Governance Review & Report**

Prepared For: City of Toronto

The Honourable Frank Iacobucci, C.C., Q.C.  
Linda M. Plumptre  
Jeremy R. Opolsky

January 8, 2019

## TABLE OF CONTENTS

	<b>Page</b>
<b>1. INTRODUCTION</b> .....	<b>1</b>
<b>2. EXECUTIVE SUMMARY</b> .....	<b>1</b>
<b>3. SCOPE</b> .....	<b>5</b>
<b>3.1 Mandate</b> .....	<b>5</b>
<b>3.2 Process of the review</b> .....	<b>6</b>
<b>3.3 Limitations</b> .....	<b>6</b>
3.3.1 <i>No power to compel documents</i> .....	6
3.3.2 <i>No power to subpoena witnesses</i> .....	6
3.3.3 <i>No access to the Auditor General's documents or transcripts</i> .....	6
<b>4. CONTEXT OF TPA</b> .....	<b>7</b>
<b>4.1 Statutory origin of TPA</b> .....	<b>7</b>
<b>4.2 Structure of the Toronto Parking Authority and its Board</b> .....	<b>7</b>
<b>5. BACKGROUND</b> .....	<b>8</b>
<b>5.1 Lead up to acquisition of 1111 Arrow Road</b> .....	<b>8</b>
<b>5.2 May and July Board meetings</b> .....	<b>8</b>
<b>5.3 Arrow Road valuations</b> .....	<b>9</b>
<b>5.4 Board meeting of September 15, 2016</b> .....	<b>10</b>
<b>6. GOVERNANCE CONCLUSIONS AND RECOMMENDATIONS</b> .....	<b>10</b>
<b>6.1 Introduction</b> .....	<b>10</b>
<b>6.2 Governance framework</b> .....	<b>11</b>
6.2.1 <i>Duty of loyalty and good faith</i> .....	11
6.2.2 <i>Duty of Care</i> .....	12
<b>6.3 Role and duties of the TPA Board and its members</b> .....	<b>13</b>
6.3.1 <i>To supervise management but not to manage</i> .....	14
6.3.1.1 Management must provide all material and relevant information .....	14
6.3.1.2 Directors must ask all relevant questions.....	16
6.3.1.1 Board must ensure that management answers directors' questions.....	17
6.3.1.2 Directors must review all relevant information before making a decision .....	17
6.3.2 <i>Directors' Duties of Care and Loyalty</i> .....	19
6.3.3 <i>Respect for directors and management</i> .....	20
6.3.3.1 Dissent .....	20
6.3.3.2 Collegiality .....	21
<b>6.4 Role and duties of Chair</b> .....	<b>22</b>
6.4.1 <i>Leadership of the Board</i> .....	22
6.4.1.1 Operations and functioning of the Board .....	23
6.4.1.2 Duty to ensure that the Board can function independently of management .....	23
6.4.1.3 Duty to ensure that boundaries between management and the Board are respected .....	23
6.4.1.4 Sharing of information .....	23
6.4.2 <i>Relationship with management</i> .....	24

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
6.4.3 <i>Leadership of Board Meetings</i> .....	25
6.4.3.1 <i>Agenda setting</i> .....	25
6.4.3.2 <i>Briefing materials provided in a timely manner</i> .....	25
6.4.3.3 <i>Chairing the meeting</i> .....	26
6.4.3.4 <i>Clarity regarding decisions is reached</i> .....	27
6.4.4 <i>Responsibility for governance</i> .....	27
<b>6.5 Composition of Board</b> .....	<b>28</b>
6.5.1 <i>Nomination of directors</i> .....	28
6.5.2 <i>Nomination of the Chair</i> .....	29
6.5.3 <i>Size of the Board</i> .....	30
6.5.4 <i>Role of councillors on the Board.</i> .....	30
6.5.4.1 <i>Duty of care and diligence</i> .....	31
6.5.4.2 <i>Duty to the City</i> .....	31
6.5.4.3 <i>Duty of confidentiality</i> .....	31
<b>6.6 General governance recommendations</b> .....	<b>32</b>
6.6.1 <i>Strategic direction of the TPA</i> .....	32
6.6.2 <i>Policies</i> .....	32
6.6.3 <i>Governance Training and Education</i> .....	33
6.6.4 <i>Response to review by Auditor General</i> .....	34
6.6.5 <i>Evaluation of Board and Management</i> .....	35
6.6.5.1 <i>Evaluation of Management</i> .....	36
6.6.5.2 <i>Evaluation of the Board and the Chair</i> .....	36
<b>7. SUMMARY OF RECOMMENDATIONS</b> .....	<b>37</b>
<b>7.1 Role and Duties of Directors</b> .....	<b>37</b>
<b>7.2 Role and Duties of Chair</b> .....	<b>37</b>
<b>7.3 Nominations</b> .....	<b>38</b>
<b>7.4 Amendments of Municipal Code Chapter 179</b> .....	<b>39</b>
<b>7.5 Governance and Procedural Policy</b> .....	<b>40</b>
<b>7.6 Training</b> .....	<b>41</b>
<b>7.7 Strategic direction</b> .....	<b>41</b>
<b>7.8 Policies</b> .....	<b>42</b>
<b>7.9 Response to reviews by accountability officers</b> .....	<b>42</b>
<b>7.10 Evaluation of Management</b> .....	<b>43</b>
<b>7.11 Evaluation of the Board and Chair</b> .....	<b>43</b>

## 1. INTRODUCTION

On June 22, 2017, the Auditor General for the City of Toronto released a report entitled “*Auditor General’s Observations of a Land Acquisition at Finch Avenue West and Arrow Road by the Toronto Parking Authority - Part 2*” (the “Auditor General’s Report”). The Auditor General’s Report was made public on June 27, 2017.

The Report raised a series of concerns regarding the process undertaken by the Toronto Parking Authority (the “TPA”) in connection with its proposed acquisition of the property located at 1111 Arrow Road. The Report also raised concerns regarding the governance of TPA and the board of the TPA (the “Board”), including whether there had been appropriate oversight of management.

On July 4, 2017, City Council acknowledged that, while there had been no evidence of wrongdoing on the part of the Board or any of its individual members, an interim governance arrangement was in the interests of the City and Board. City Council placed the members of the Board on a leave of absence. In place of the Board, City Council amended the composition of the Board to be composed of three City officials appointed *ex officio*: (a) the City Manager as Chair; (b) the Chief Corporate Officer; and (c) the Deputy City Manager, Cluster A.

City Council also requested that the City Manager retain a governance expert to (i) conduct a governance review of the TPA and its Board and (ii) report on these issues to City Council. The City Manager retained Torys LLP to conduct this review and provide this report to City Council.

This report is divided into the following sections:

1. **Executive Summary:** We outline the central findings of this report and summarize our recommendations.
2. **Scope:** We outline the scope of the review undertaken.
3. **Context of TPA:** We provide a brief summary of the governance structure of the TPA.
4. **Background:** We summarize the events surrounding the 1111 Arrow Road transaction that gave rise to this Report.
5. **Governance conclusion and recommendations:** We set out our conclusions regarding the governance of the TPA, with a particular focus on issues that have arisen from our review of the 1111 Arrow Rd. transaction.
6. **Summary of Recommendations:** We outline our recommendations arising from our governance review.

## 2. EXECUTIVE SUMMARY

You have asked us to provide recommendations to improve the governance practices of the TPA. Our views are informed both by general principles of governance as well as the context of the 1111 Arrow Road transaction. This section provides a short summary of our review and our final recommendations.

In this report, we first review the role and duties of the TPA Board and its members. The Board's governance role is principally focused on the oversight of management and the administration of the TPA. In fulfilling that mandate, the directors' owe duties of care and loyalty. These duties are owed to the City itself because the TPA is a statutory agent of the City. In order for the directors to properly fulfil the roles and duties, management must provide all material and relevant information to the directors to enable the directors to ask all relevant questions, the directors must ensure that management answers those questions in a full and timely manner and the directors must review all relevant information before coming to a decision. In addition, we discuss the important roles that both respect for dissent and collegiality play on a Board. These principles are not in conflict but instead mutually reinforce each other.

We also review the role and duties of the Chair, who plays an integral role in ensuring the proper governance of the TPA. The Chair is the leader of the governance process. As the leader of the Board itself, the Chair is responsible not only for the operations and functioning of the Board, but also for ensuring that the Board functions independently of management, that appropriate boundaries exist between management and the Board, and that material information is shared amongst all Board members when received. The Chair has an active and ongoing relationship with management, generally through the President. He or she must maintain regular communication and, when appropriate, disseminate information to the Board. The Chair also must take an active leadership role of the Board meetings, which includes setting the agenda, ensuring the briefing materials are provided in a timely manner and chairing the meetings themselves. Finally, the Chair must take a continuing leadership role with respect to the governance mechanisms at the TPA. This includes leading the preparation of an up-to-date governance and procedural policy.

Through our discussion of the roles of the directors, the Chair and the Board, this Report uses the transaction at 1111 Arrow Road as an illustrative vehicle for discussion of the principles above.

This Report also makes other governance recommendations intended to improve the governance culture at the TPA. These recommendations relate to: (i) the composition of the Board; (ii) the preparation and regular review of strategic plans of the TPA; (iii) the drafting and regular review of TPA policies; (iv) the provision of appropriate governance training and education to incoming TPA directors; (v) the manner in which the TPA and its Board should respond to review by the Auditor General or other accountability officers; and (vi) the evaluation of the Board and management, by the Board, including potential *in camera* review.

On the basis of our review, we make the following recommendations:

### ***Role and Duties of Directors***

- 1) *As part of proper orientation, the TPA should provide each incoming director with reference materials outlining their duties to the TPA consistent with the explanations provided in this Report.*

### ***Role and Duties of Chair***

- 2) *The Chair, with the assistance of the Secretary, should develop a system for tracking information requests by the Board or individual directors and a procedure to ensure that the requested information is provided in a timely manner.*

- 3) *The Chair should develop a system for the sharing of material information received by the Board, or an individual director.*
- 4) *The Chair should meet with the President and Secretary in advance of each Board meeting and finalize the agenda for the next Board meeting.*
- 5) *The Clerk of the City of Toronto, or her delegate, should be appointed as Secretary to the Board.*
- 6) *The TPA should provide the Chair with reference materials outlining his or her duties to the TPA consistent with the explanations provided in this Report.*

### ***Nominations***

- 7) *City Council should, with respect of the nominations of public directors to the Board, take into account the previous governance experience of the candidates.*
- 8) *All directors should dedicate the same time and effort regardless of whether they also hold public office.*
- 9) *The Chair should be appointed by the members of the Board for a term of two years.*

### ***Amendments of Municipal Code Chapter 179***

- 10) *Municipal Code Chapter 179 should be amended to expressly set out the duties of care and loyalty of the directors of the Board, as an agent of the City of Toronto, including providing that all duties are owed to the City of Toronto.*
- 11) *Council should consider whether the General Manager of Transportation Services should continue as a member of the Board (non-voting).*

### ***Governance and Procedural Policy***

- 12) *Once an ordinarily constituted Board is appointed, the Chair should lead the process to draft a new governance and procedural policy, which should address, among other things, the following:*
  - a) *detail the governance roles and duties of directors, the Chair, the President and the TPA staff consistent with the discussion in sections 6.3 and 6.4 of this Report;*
  - b) *provide for the directors' to owe a duty of collegiality to other Board members and TPA staff;*
  - c) *provide for a robust right for directors' to dissent;*
  - d) *protect the right of directors to report to an accountability officer, provided that they do so in good faith and for a valid reason;*
  - e) *outline the directors' roles;*
  - f) *outline the process for directors to seek and receive information from management;*

- g) provide for the procedure for the approval of material transactions in a manner that is consistent with the Board's duties;*
  - h) provide for the reporting to the Board of the closing of all material transactions; and,*
  - i) set out the period in which all Board briefing materials must be provided to directors in advance of a meeting and the provision for exceptional circumstances in which late material is permitted.*
- 13) In drafting the governance and procedural policy, the Chair should seek the assistance of the office of the Clerk of the City of Toronto and discuss whether a City agency-centred policy could be drafted as a reference to other City agencies who are considering revising their governance frameworks.*

### **Training**

- 14) All incoming directors should receive substantive governance training as part of their orientation, focused on the role of a director on the board of a City agency and the relevant statutory framework.*
- 15) The Chair and the President should discuss with the office of the City Clerk consider whether this training could be offered in conjunction with other City boards agencies and administered by the office of the City Clerk.*

### **Strategic Direction**

- 16) The Board should review the strategic plan annually, including whether the policies and practices of the TPA are generally consistent with the strategic plan and whether the plan remains consistent with the needs of the TPA and City and to make revisions as necessary.*
- 17) When reviewing the strategic plan, the Board should also review the mandate of the TPA, whether the mandate is consistent with the changing landscape of the City of Toronto and whether the Board believes that the mandate should be changed; if so, the Board should make such recommendations to Council.*

### **Policies**

- 18) The Board should review the TPA's policies annually, the process of which should be set out in the governance and procedural policy.*
- 19) The office of the Clerk of the City of Toronto should consider drafting a policy handbook that could be adopted in whole or in part by City agencies, with advice from the office of the Clerk.*

### **Response to review by accountability officers**

- 20) The Board should take ownership of interacting with an accountability officer who is undertaking a review of the TPA through the relevant subcommittee, which would meet with, and make inquiries of, the accountability officer, canvas the view of management,*

*and then report out to the Board with a view on the accountability officer's ultimate recommendations.*

*21) When adopting recommendations of an accountability officer, the Board should direct management to report on implementation within a reasonable timeframe or set a deadline for management and direct reporting of the implementation of this deadline.*

### ***Evaluation of Management, the Board and the Chair***

*22) The Board should discuss with the office of the Clerk of the City of Toronto the manner in which it could implement a regular in camera review of management and the President that is consistent with the open meeting principles and its exceptions.*

*23) The Board should design an evaluation framework to evaluate the performance of (i) the Board as a whole; (ii) the committees of the Board; (iii) the Chair and (iv) the individual directors. The Chair should collect the results of the evaluation and the Board should constructively discuss the findings.*

## **3. SCOPE**

This section details our mandate, the process of the investigation, and the limitations of the inquiry.

### **3.1 Mandate**

Torlys was retained pursuant to a decision of City Council, item AU9.12, dated July 4, 2017. The resolution provided as follows:

City Council request the City Manager to retain the services of a qualified expert in board governance to review and evaluate the actions of the Toronto Parking Authority Board in this matter and report to City Council at the appropriate time.

The City Manager was also requested to report on the following questions:

- the governance and composition of the Board of the Toronto Parking Authority (the "Board") (item 5);
- whether the Board should be increased by two directors (item 11); and
- whether to update as necessary guidelines and training for Agency boards based on the findings in the report (June 22, 2017) from the Auditor General (item 13).

We have been asked by the Acting City Manager to comment on these issues.

Our mandate does not include a review of the conduct of individual members of the Board or management. In particular, we acknowledge that it is the role of the Integrity Commissioner to conduct inquiries as to whether a member of Council or a local board (including a member of the TPA Board) has contravened any applicable code of conduct. We understand that the Integrity Commissioner is undertaking an investigation with respect to the potential acquisition of 1111 Arrow Road. We also understand, from media reports, that the Ontario Provincial Police



may have begun an investigation. We therefore do not make any findings, conclusions or recommendations that may touch upon the Integrity Commissioner’s mandate with respect to the actions of individual councillors or members of the TPA Board.

### **3.2 Process of the review**

The TPA provided us with a large volume of documents in response to our requests, including copies of all documents (hard copy and electronic) produced by the TPA to the Auditor General in the course of her investigation. The City of Toronto also produced electronic copies of relevant emails to us. We thank the staff of the TPA and the City for their ongoing and diligent assistance.

In addition to our review of the relevant documents, we have interviewed numerous officers and employees of the TPA, staff of the City, former members of the Board of the TPA, including the former chair of the Board and relevant third parties.

### **3.3 Limitations**

We faced certain limitations in the conduct of our review.

#### *3.3.1 No power to compel documents*

We have no powers of subpoena to compel the production of documents. We were limited to reviewing the documents provided voluntarily by the TPA, the City of Toronto, and our interviewees. At this stage, to the best of our knowledge, our review of documents has been complete and we have no outstanding requests for documents. The staff of the City of Toronto and the TPA were cooperative in providing the requested documents in a timely manner, for which we express our gratitude. However, we are unable to represent that the production was exhaustive.

#### *3.3.2 No power to subpoena witnesses*

We have no ability to compel individuals to be interviewed. While the TPA strongly encouraged its employees, officers, and former directors to participate in the investigation, they did not all comply. The most significant non-cooperating witness was a city councillor, who we refer to as Councillor 1. Despite Councillor 1’s role as a director of the TPA at the relevant time and his corresponding obligations to the TPA, he declined to appear for an interview without having his associated legal fees paid and without receiving an advance copy of the questions to be asked. Councillor 1 played a central role in advocating for the purchase of 1111 Arrow Road, and we believe that he had information that could have been relevant to this review.

Councillor 1’s refusal to appear was unfortunate as it deprived us of access to potentially relevant information.

#### *3.3.3 No access to the Auditor General’s documents or transcripts*

We had the benefit of an informational meeting with the Auditor General. Unlike us, the Auditor General has the power to compel testimony and examine any person under oath. However, the Auditor General is also bound by a statutory duty of confidentiality to preserve secrecy with respect to all matters that come into her knowledge in the course of executing her duties. There

are limited exceptions, including information required to form part of her reports.<sup>1</sup> In conducting our investigation, we had no access to the documents collected by the Auditor General (except where provided by the TPA), the working papers of the Auditor General, or the transcripts or notes of interviews conducted by the Auditor General (or any information relating to such interviews that was not made public in the Auditor General's Report).

Given that referrals pertaining to these matters were made by City Council to the Integrity Commissioner, we have communicated with her office to the extent permitted under the *City of Toronto Act, 2006* in order to understand each of her jurisdiction and scope of inquiry.

#### **4. CONTEXT OF TPA**

##### **4.1 Statutory origin of TPA**

The TPA is a local board under the *City of Toronto Act, 2006*.

The TPA was formed on January 1, 1998 as a result of the amalgamation of the City of Toronto. Part XII of the *City of Toronto Act, 1997* grants City Council the power to establish the TPA. In exercising this power, Council was to pass a bylaw specifying, among other things, (a) the size and composition of the TPA board; (b) the qualifications of its members; (c) rules regarding reappointment; and (d) procedures for filling vacancies.

On January 7, 1998, the TPA itself passed a constating bylaw, By-Law No. 1 (the "Old Bylaw"), which provided for the composition of the Board and its governance.

On February 6, 1998, City Council adopted Chapter 179 of the Toronto Municipal Code, "Parking Authority" ("Chapter 179"). Chapter 179 provides the TPA with a mandate to exercise all of the powers, rights authorities and privileges conferred upon the City with respect to "the construction, maintenance, operation and management of parking facilities within the City of Toronto, including on-street parking meter and parking machine facilities," subject to limited decisions and functions that were reserved to Council.

We understand that there is a general consensus that Chapter 179 has superseded or displaced the Old Bylaw. This is consistent with our observations that the Old Bylaw is neither considered controlling by the Board nor followed. For the purposes of this report, we treat it as superseded.

##### **4.2 Structure of the Toronto Parking Authority and its Board**

The TPA is a local board of the City of Toronto. As a local board the TPA acts as an agent of the City.<sup>2</sup>

As provided in Chapter 179, the Board is composed of the following members:

1. Seven members appointed by City Council, each of whom shall be a person qualified to be elected as a member of City Council and a resident of the City of Toronto;
2. Two of the seven members shall be members of Council; and

---

<sup>1</sup> *City of Toronto Act, 2006*, SO 2006, c 11, Sch A, ss. 180-81 [*City of Toronto Act, 2006*].

<sup>2</sup> *City of Toronto Act, 2006*, s. 142(2).

3. The City’s senior transportation administrator shall be a non-voting member of the Board.

In contrast, the Old Bylaw provided that no members of Council were eligible to be appointed a director.

## **5. BACKGROUND**

In this section, we review the 1111 Arrow Road transaction and its relationship to the TPA’s governance framework.

We review the events leading up to the entering into, and then termination of, the agreement to purchase 1111 Arrow Road. This description does not differ materially from that in the Auditor General’s Report. The chronology provided by the Auditor General may provide useful further context for the conclusions in this report.

### **5.1 Lead up to acquisition of 1111 Arrow Road**

Councillor 1 first brought the property at 1111 Arrow Road to the attention of the TPA as a potential acquisition in or around June 2015. A site visit by management and selected members of the Board followed. Councillor 1 at the time sat on the boards of both the TPA and the Emery Village Business Improvement Area, the local business improvement area that includes 1111 Arrow Road and that falls within his ward.

The TPA continued to negotiate the transaction through the fall of 2015 and in January 2016 the TPA forwarded a draft agreement of purchase and sale (the “APS”) to the vendor. The draft APS proposed a purchase price of \$12 million on a conditional basis (further described below). The President of the TPA acknowledged that a transaction of this magnitude was “significant” for the TPA.

At the same time, in January 2016, at the instigation of Councillor 1, City staff drafted a report recommending to City Council that it direct and authorize the TPA to purchase 1111 Arrow Road on certain terms. Management of the TPA was consulted on the report and advised City staff on its drafting.

On March 31, 2016, City Council approved a resolution directing and authorizing TPA to purchase 1111 Arrow Road “at fair market value ... [on terms] approved by the Toronto Parking Authority Board.”

### **5.2 May and July Board meetings**

The purchase of 1111 Arrow Road was discussed at TPA Board meetings on May 26 and July 28, 2016. Reports were delivered to the Board on May 24 and July 27, 2016, respectively. The staff reports still did not include a business case, formal or otherwise, in relation to current or future parking needs in the area. Nor did they outline the cost, revenue or return on investment of operating a parking facility at 1111 Arrow Road. At neither meeting did the management explain the basis for determining that the approximately \$12 million purchase price was fair market valuation of the property. And the staff reports only made a brief reference to the existing digital sign on the property.

Councillor 2, who sat on the Board, asked for more information after both Board meetings and followed up with management. For example, after the May 2016 meeting, Councillor 2 asked for a copy of the appraisal of 1111 Arrow Road and was told that he would have the appraisal when the final proposal was presented to the Board. This did not happen.

At both meetings, the Board approved TPA staff's recommendations to enter into the purchase of 1111 Arrow Road. At the July meeting, the Board's approval was subject to an amendment that the due diligence conducted by the staff would be reported to the Board as soon as possible.

The TPA signed the 1111 Arrow Road APS on August 19, 2016. Consistent with the TPA's practice, the deal was "conditional" insofar as it included a broad ability to exit during the due diligence period of 60 days post-signing for any reason. This allowed the TPA to walk away from the transaction at its discretion.

### **5.3 Arrow Road valuations**

In August 2015, the management of the TPA commissioned a draft appraisal from Integris Real Estate Counsellors. It appraised the value of 1111 Arrow Road at \$7,500,000 (the "2015 Integris Appraisal"). This 2015 appraisal was not mentioned in the May or July 2016 staff reports.

In July 2016, management began in earnest to value 1111 Arrow Road. This included two components: an appraisal of the land value by a registered appraiser and a valuation of the sign license currently on 1111 Arrow Road and/or alternate sign license(s).

The sign valuator, Allvision LLC, was never formally retained by the TPA. Further, the principal of Allvision had personal or business connections to a number of the parties involved in the 1111 Arrow Road transaction. Among other things, he had worked for the vendor to obtain the very sign license to be valued.

The sign valuation process involved multiple drafts and approaches. The initial valuation contemplated the possibility of a second sign on 1111 Arrow Road before it became clear that a second sign could not be installed. A subsequent valuation based on the current sign valued the sign license at approximately the same value as the second sign model. Management was involved in the drafting process in problematic ways. The Allvision report ultimately assessed the sign value in the range of \$4.15 - \$4.55 million. Senior members of management have told us they had significant doubts regarding the reliability of Allvision's final valuation.

Altus Group Ltd, the successor to Integris, was retained to value the land, which it appraised at \$8 million. Despite requests and heated conversations with senior TPA management, Altus was unwilling to incorporate the Allvision conclusions into its report. Altus determined that doing so would have been improper because the Allvision valuation was superficial, lacking support and missing critical elements for it to be credible.

The Altus appraisal and the Allvision valuation were provided to the Board on September 9, 2016. No cautionary language was provided to the Board regarding the reliability of the Allvision valuation or the lack of independence of the valuator.

#### **5.4 Board meeting of September 15, 2016**

The Board discussed the 1111 Arrow Road transaction at length during its September 15, 2016 meeting.

At the beginning of September, Councillor 2 had asked the Auditor General to conduct an inquiry into the matter because of his concerns over the lack of disclosure and appropriate controls over the transaction. At the September 15 meeting, the Auditor General gave a presentation to the Board on her investigation. Councillor 2 also posed a series of questions regarding the transaction, the appraisal and the sign valuation.

TPA management suggested that the TPA staff still had to review the appraisal and valuation in full. In response to Councillor 2's questions, management alluded to concerns regarding the sign valuation. They did not disclose the nature of those concerns nor did they disclose the nature of management's involvement in the valuation.

When Councillor 2 asked for a business case supporting the transaction, he was directed to the May and July Board reports. These reports did not contain analysis that could constitute a business case. We have confirmed that no business case analysis was conducted by management.

Several of the directors were concerned about the nature, tone and conduct of Councillor 2's questioning. They felt that he did not articulate his concerns well and were concerned that the questioning was accusatory and disrespectful of TPA's staff. None of the directors, nor the Chair, raised these issues at the meeting. Several of these same directors noted that the credibility of Councillor 2's critiques and concerns were coloured by what they described as habits of poor attendance, late arrivals, early departures and a lack of preparation.

After meeting with the Auditor General, management conducted further diligence regarding the sign valuation. In an October 25, 2016 Board report, TPA staff concluded that the Allvision valuation of the sign was not supportable. The TPA had internally valued the sign at approximately \$1,500,000 to \$2,000,000. The TPA terminated the APS shortly thereafter.

### **6. GOVERNANCE CONCLUSIONS AND RECOMMENDATIONS**

#### **6.1 Introduction**

Under the governance framework of the TPA, the TPA Board is accountable to the City for its proper administration in accordance with the mandate set by Council. In turn, management and the TPA staff are accountable to the Board.

Successful governance is built on a system of rules, policies and procedures. It relies on a collection of different bodies (the Board, its committees, management) and people (Chair, members of the Board, the President). But most of all, successful governance is a way of thinking that forms the basis of a culture of governance. An institution like the TPA must turn its mind to how it can promote good governance and accountability. Its Board and management must consistently strive towards creating a culture founded on good governance principles.

Given the issues that arose from the 1111 Arrow Road transaction, City Council asked us to consider ways in which the governance culture could be improved at the TPA. The remainder of this report addresses this question.

## 6.2 Governance framework

The TPA is a statutory agent of the City of Toronto. The governance of a local board of the City is distinct from the governance of private corporations.

Nonetheless, the mandate of this review is a normative one. Our governance recommendations are informed by models of good governance generally accepted in the corporate and not-for-profit contexts.

For ease of reference, we provide a brief review of the relevant principles below.

Boards of directors are charged with oversight of the management of the business affairs of the corporation.<sup>3</sup> Directors are expected to focus on monitoring the activities of management as opposed to being actively involved in a company's operations. This is colloquially known as the "noses-in, fingers-out" principle.

The directors' focus should remain on the most significant processes and decisions of a corporation. Generally, it is sufficient for the Board to ensure that adequate systems and policies are in place for the effective monitoring of operational matters, while reviewing and approving material decisions. However, boards always remain ultimately responsible for how management powers are exercised by officers and employees. While directors should, and in most cases are entitled to, rely on management as honest and capable, they must put appropriate systems in place and be alert to warning signs that suggest problems.<sup>4</sup>

Directors owe duties of both loyalty and care to the corporation.<sup>5</sup> The duties are similar for non-profit corporations.<sup>6</sup> Each is described below.

### 6.2.1 *Duty of loyalty and good faith*

The duty of loyalty requires directors to act with a view to the best interest of a corporation, selflessly, honestly, and loyally.<sup>7</sup> This duty is owed to the corporation and only the corporation. In the course of exercising this duty, a director is entitled to consider the interests of a variety of corporate stakeholders. Nonetheless, a directors must act fairly and responsibly in the best interest of the corporation itself.<sup>8</sup>

The general duty of loyalty and good faith includes more particularized duties:

---

<sup>3</sup> CBCA, R.S.C 1985, c. C-44 s. 102(1); OBCA s. 115(1).

<sup>4</sup> Barry J. Reiter, *Directors' Duties in Canada*, 6 ed. (Markham: Lexis Nexis Canada, 2016) at p. 36.

<sup>5</sup> See e.g. CBCA s. 122(1); OBCA s. 134(1).

<sup>6</sup> See e.g. *Not-for-Profit Corporations Act, 2010*, SO 2010, c 15 s. 43.

<sup>7</sup> *Peoples Department Stores. Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461 at para 32; Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3d ed (London: Scribblers Publishing, 2006) at p. 305.

<sup>8</sup> *BCE Inc. v. 1976 Debentureholders*, [2008] 3 SCR 560 at para 37.

1. *Duty to act independently.* Directors must exercise their own independent best judgment to promote the interests of the corporation.<sup>9</sup> This may require them to diverge from the view of the management or of directors. Their decisions cannot be beholden or instructed by any person or entity, including one that nominates them to the Board.<sup>10</sup>
2. *Duty of confidentiality.* Directors have a duty not to disclose confidential information of the corporation.<sup>11</sup> This duty facilitates the broader role of the director. First, it breeds confidence in the board to have healthy discussions and accept dissent (see below). Second, directors have a right to access all information of the corporation and the duty of confidence facilitates trust in the sharing sensitive of information with the Board.<sup>12</sup>
3. *Duty of disclosure.* A director has a duty to act openly and honestly.<sup>13</sup> A director must disclose all relevant information that she has to the Board. This facilitates one of the advantages of appointing a Board with diverse expertise and experience: this broad background of information must be shared with the entire Board.
4. *Duty to avoid conflicts of interest.* As a fiduciary, a director cannot personally profit at the expense of the corporation. This includes, but is not limited to, taking corporate property or opportunities for the director's benefit.<sup>14</sup> It follows that a director must disclose and may not vote on corporate matters that would directly benefit her. Corporate statutes have codified this rule, requiring disclosure if the director has a material interest in a proposed material contract or transaction (or has a material interest in the counterparty). Generally, directors are not permitted to vote on matters in respect of which they have a conflict of interest.<sup>15</sup>

### 6.2.2 *Duty of Care*

A director has the duty to act carefully and exhibit the diligence and skill that a reasonably prudent person would exercise in comparable circumstances.<sup>16</sup> In essence, a director will satisfy this duty if she makes decisions prudently and on an informed basis.<sup>17</sup> This in turn requires the directors to ask relevant questions and, when necessary, undertake appropriate investigations.

In *Directors' Duties in Canada*, the author provides a helpful elaboration of what steps a director must take to be considered fully informed:

---

<sup>9</sup> Poonam Puri and Jeffrey Larsen, *Corporate Governance and Securities Regulation in the 21st Century*, (Markham: LexisNexis Canada, 2004) at p. 231.

<sup>10</sup> *Teck Corp. Ltd. v. Millar* (1972), 33 D.L.R. (3d) 288 (B.C.S.C.).

<sup>11</sup> Peter Loose, Michael Griffiths et al., *The Company Director: Powers, Duties and Liabilities*, 10th ed (Bristol: Jordans Publishing Limited, 2008) at p. 273.

<sup>12</sup> See *SRM Global Master Fund Limited Partnership v. Hudbay Minerals Inc.*, 2009 CanLII 9377 (ON SC) para. 23.

<sup>13</sup> Poonam Puri and Jeffrey Larsen, *Corporate Governance and Securities Regulation in the 21st Century*, (Markham: LexisNexis Canada, 2004) at p. 231.

<sup>14</sup> *Can. Aero v. O'Malley*, [1974] SCR 592, 606-609.

<sup>15</sup> See e.g. *CBCA* s. 120; *OBCA* s. 132.

<sup>16</sup> *CBCA*, s. 122; *OBCA*, s. 134(1).

<sup>17</sup> *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 SCR 461, para. 67.

1. understand their duties;
2. inform themselves early on in order to have an impact on the process;
3. devote sufficient time and attention to the consideration of all relevant information;
4. attend every board meeting or, if unable to attend, inform themselves about what took place at the meeting;
5. ensure that they follow appropriate steps and procedures, including the following:
  - a. making the appropriate inquiries and conduct necessary investigations,
  - b. obtaining the appropriate expert and independent advice,
  - c. establishing appropriate committees where necessary,
  - d. addressing any available alternatives, and
  - e. giving due considerations to issues that may arise;
6. ensure that they review in a timely fashion documentation that is provided to them, in order to ensure that the company is pursuing the appropriate strategic direction, that business and liquidity are sufficiently stable, and that management is prepared for potential contingencies;
7. act on recommendations provided; and
8. ensure that their proceeding and discussions are properly recorded in order to demonstrate a genuine and reasonably informed evaluation.<sup>18</sup>

### **6.3 Role and duties of the TPA Board and its members**

The roles and responsibilities of the members of the TPA Board are not well defined. There does not appear to be a current policy or bylaw that addresses the governance of the TPA or the procedure to guide governance decisions.

The TPA is in need of a modern governance and procedural policy that would address such governance questions. Such a policy would necessarily address the roles and duties of directors. This section canvasses three principles that should inform the TPA's future governance structure.

First, a director oversees management but does not manage directly.<sup>19</sup> It is a fundamental principle of modern governance that the day-to-day operations of the TPA are conducted by its management. The administration of the TPA's responsibilities is delegated to its President and is carried out by him and his staff. Therefore, the Board's governance role is principally focused

---

<sup>18</sup> Barry J. Reiter, *Directors' Duties in Canada*, 6 ed. (Markham: Lexis Nexis Canada, 2016) at p. 55.

<sup>19</sup> James A. Millard Q.C., *The Responsible Director* (Toronto: Carswell, 1989) at p. 4.



on the oversight of management and its administration of the TPA. This role is of heightened importance when the TPA is entering into material transactions because the agency is spending and raising public funds and entrusted with the public purse.

Second, a director of the TPA owes duties of loyalty and care to the City.

Third, successful TPA directors must exercise respect for each other and management.<sup>20</sup> This includes demonstrating both respect for dissent and collegiality towards the Board and staff.

### 6.3.1 *To supervise management but not to manage*

The Board cannot discharge its responsibility to supervise management without being fully informed regarding the business, finances and operations of the TPA. The task of ensuring a well-informed Board implies duties incumbent on both the Board and on management.

Directors should be have an obligation to be inquisitive.<sup>21</sup> They must ask relevant and searching questions to gain an understanding of the issues and their context. They must insist that management provide full responses. They must seek information when matters are incomplete or do not make sense. For its part, management must be responsive to these inquiries and must provide timely, complete and relevant information to the Board.

#### 6.3.1.1 Management must provide all material and relevant information

Management acts as the Board's informational gatekeeper.<sup>22</sup> It must determine at the first instance what information should be passed to the Board. Not all information is relevant or material to the Board's oversight functions. Directors do not have the capacity, or the need, to know about the minutiae of TPA operations. Too much detail does not assist the Board in achieving effective supervision of the organization and may even distract from it.<sup>23</sup>

In selecting what information is relevant and material, management must exercise its gatekeeping responsibility carefully. Management's duty is to diligently provide an accurate, clear and complete informational picture to the Board. It should not omit information where doing so could leave the Board with an inaccurate understanding of an issue. Management must not omit information because it is either negative or portrays management in a negative light. Nor may it omit information on the basis that it would lead the Board to disagree with a management recommendation. Management can—and should—place this information in context and be prepared to answer any relevant questions, but it should not be withheld. The hope that better facts will develop in the future is not a sufficient rationale for keeping material information from the Board.

---

<sup>20</sup> Alice Klettner, *Corporate Governance Regulation: The Changing Roles and Responsibilities of Boards of Directors* (New York: Routledge, 2017) at 105-106.

<sup>21</sup> G Brown, *The Independent Director: The Non-Executive Director's Guide to Effective Board Presence* (London: Palgrave Macmillan, 2015) at p. 141.

<sup>22</sup> Martin Hilb, *New Corporate Governance: Successful Board Management Tools* (New York: Springer Heidelberg Dordrecht, 2012) at p. 167.

<sup>23</sup> Colin B. Carter and Jay W. Lorsch, *Back to the Drawing Board: Designing Corporate Boards for a Complex World* (Boston: Harvard Business Review Press, 2004) at p. 27.

The Board's consideration of the 1111 Arrow Road transaction reveals potential governance concerns arising from the incomplete provision of information to the Board. Some examples include:

- **2015 Integris Report.** Management did not provide the Board with information about the unsigned 2015 Integris Report, which appraised 1111 Arrow Road at \$7.5 million, until late September 2016, despite the mentioning of its existence at the July 2016 meeting. The 2015 Integris report represented management's best information on the true value of the land at 1111 Arrow Road at a time when the Board was making critical decisions on the transaction. While the appraisal only appraised the value of the land—and not the sign—the appraisal could have demonstrated the need for management to justify the remainder of the purchase price and served as a relevant comparison for future appraisals. The 2015 Integris report would have been important to the Board's decision making process in May and July 2016. We understand that management had concerns that the report was stale-dated. These concerns should have been presented to the Board alongside the appraisal itself. Management must trust that the Board has the judgment and expertise to use the information appropriately if provided with the necessary context.
- **Direction of City Council.** On March 31, 2016, City Council passed a resolution directing the TPA to acquire 1111 Arrow Road at fair market value, on terms and conditions to be negotiated by the President. Management did not explain to the Board its role in in the drafting of the March 31, 2016 direction. Nor did management explain to the Board how management interpreted the direction and how its standard acquisition practices might have changed in response to the direction. Management must ensure that the Board has the benefit of their experience and judgment to inform their decision-making process.
- **Absence of a Business Case.** In the staff reports to the Board in May and July 2016 regarding 1111 Arrow Road, management did not provide any financial or business case regarding the acquisition of 1111 Arrow Road. Without this information, the Board was unable to assess whether the purchase was consistent with the financial returns of TPA's previous acquisitions.
- **Sign value and valuation.** Management did not, in any staff report, appropriately describe the significance of the value of the sign to the purchase price being considered for 1111 Arrow Road. Nor did any staff report outline the process for valuing the sign. When, at the July 2016 meeting, management discussed the value of the property, they did so solely with respect to the value of the land, not the sign. And when they received the sign valuation, management did not explain its concerns regarding the valuation to the Board. When management presents information to the Board, without providing caveats or concerns, the Board may presume that management believes that the information is accurate and is entitled to rely on it. As a result, management must disclose any concerns about the accuracy or reliability of information provided to the Board.
- **Sign valuator.** In August and September 2016, TPA relied on the Consultant to provide a valuation of the sign. The Consultant was not an independent valuator. The Board was entitled to understand the Consultant's conflicts of interest and the details of

his engagement in order to provide context for the Consultant’s valuation of the sign. Without this information, the Board may have placed undue reliance on the information.

#### 6.3.1.2 Directors must ask all relevant questions

Directors are obligated to be inquisitive in the exercise of their duties. The members of the TPA Board must make inquiries needed to understand all of the briefing information regarding Board decisions and to ask questions if they have concerns regarding any matter before them or the absence of sufficient or complete information from management.

Several interviewees emphasized to us the importance of the Board trusting management and the information it provided. This is undoubtedly true. The Board is entitled to rely on management and the information it provides.<sup>24</sup>

However, the importance of a trusting relationship cannot alleviate the ultimate responsibility that the Board bears for oversight.<sup>25</sup> It is the Board, not management, that has been entrusted by the City with ensuring that the TPA is appropriately managed.

This is especially relevant where, as in the case of the 1111 Arrow Road transaction, a situation raises red flags to the Board. In such cases, it is of critical importance that the Board ask all relevant questions to ensure that it has all of the relevant information before it. Without this information, the Board cannot exercise its independent judgment.

There were numerous warning signs in the case of the 1111 Arrow Road transaction that arguably called for further inquiry. Some examples of situations where the omission of material questions raised governance concerns include:

- ***Direction of City Council.*** In May 2016, the Board was faced with a direction from City Council to purchase 1111 Arrow Road. This was understood to be a unique circumstance. It was incumbent on the Board to inquire into the nature of City Council’s direction, how it was to be applied and whether management intended to approach this transaction differently from previous acquisitions.
- ***Absence of Business Case.*** In the staff reports to the Board in May and July 2016 regarding 1111 Arrow Road, no business or financial case was provided to support the purchase of the property. This was inconsistent with the information that the Board normally received. It was incumbent on the Board to ask management why this information was not provided and, if appropriate, to ask for a financial case.
- ***2015 Integris Report.*** When the existence of the 2015 Integris Report was made known to the Board at the July 2016 meeting, the Board did not ask any questions about the process by which the appraisal was conducted, the outcome of the appraisal, or why it had not been provided to the Board either. Nor did the Board issue any directions to management to disclose the report or the underlying information.

---

<sup>24</sup> CBCA, s. 123(4)-(5); OBCA, s. 135(4).

<sup>25</sup> Ada Demb and F. Friedrich Neubauer, *The Corporate Board: Confronting the Paradoxes* (Oxford: Oxford University Press, 1992) at p. 70-71.

- **Concerns regarding transaction.** We were informed that several members of the Board had concerns regarding the 1111 Arrow Road transaction beginning in July 2016. With the exception of one member, the Board did not act on its concerns by making specific inquiries into the case for the transaction. Notably, several Board members told us that they were skeptical about the professionalism and/or credibility of the Allvision sign valuator. Yet this concern was not discussed in Board meetings nor did the Board ask for any specific information regarding the sign valuation.

#### 6.3.1.1 Board must ensure that management answers directors' questions

When the Board asks questions or requests information, management should respond completely and accurately. Management should treat doing so as a priority.

Questions from individual directors should be treated in the same manner unless they are clearly inappropriate.<sup>26</sup> Each director has the same obligation to be fully informed.<sup>27</sup> Given the different backgrounds and expertise that each director brings to the Board, different directors may require different information in order to satisfy themselves that they have discharged their oversight duties effectively. It is the role of management to provide the information that each director requires to fulfill her oversight duties.

Unfortunately, TPA management has not always fully abided by these principles in the past. It appears that at times, management preferred their understanding of what the Board needed to know over responses to specific Board requests. In some instances, management did not address the requests with any sense of urgency. This appears to contradict the principle that the TPA's directors should have an unfettered right to information about the TPA.

Omissions in this regard can be found both within and outside of the 1111 Arrow Road transaction context. With reference to 1111 Arrow Road, one member of the Board made a series of informational requests during the spring and summer of 2016. For the most part, management did not respond to these requests. In one instance, in May 2016 the President told the director that he would receive an appraisal of 1111 Arrow Road before the next approval of the transaction was brought before the Board. No appraisal was provided to that director or the Board in advance of, or at, the July 2016 meeting. No explanation was offered for that omission.

We reiterate that the duty to obtain accurate information is a shared responsibility. The Board relies on management to provide information. But when management omitted to provide material information on a timely basis, the Board should have pressed its inquiries and followed up until it was assured that it had the information it needed to reach a fully informed conclusion. This is an essential part of the Board's supervisory obligations.

#### 6.3.1.2 Directors must review all relevant information before making a decision

The Board's supervisory responsibilities require it to wait until it has all of the requisite information, within reason, before rendering a final decision, such as a decision to approve a material transaction. It cannot approve a material decision on the basis of partial information and then delegate the final approval of material conditions to management. This replaces the

---

<sup>26</sup> Alice Belcher, *Directors Decisions and the Law: Promoting Success* (Oxon: Routledge, 2014) at p. 178.

<sup>27</sup> *Ibid* at p. 185.

exercise of independent judgment of the Board with the judgment of management, contrary to the fundamental role of the directors.

This is not to say that the Board should not receive interim reports before all information has been gathered. It should be kept informed on developments at the TPA. Indeed, for transactions that are sufficiently large or material, it may be appropriate for the Board to grant interim approval, provided that the directors have sufficient information to make such interim determinations. The Board should retain oversight of any such interim decisions and, when a Board is asked to grant final approval of the transaction, it should refrain from voting until its members are satisfied that they have all of the information needed to make an informed decision.<sup>28</sup>

Some concerns regarding this governance issue can be seen in the 1111 Arrow Road transaction and more broadly in the controls over TPA's real estate transactions.

***Real estate acquisitions.*** The TPA historically acquired real estate on a fully conditional basis<sup>29</sup> before obtaining an independent appraisal to certify that the purchase price represented fair market value. Both management and the Board defended this practice as providing flexibility to the TPA to enter into a deal quickly while preserving its right to withdraw from, or renegotiate, a deal that an appraisal found was overpriced.

We understand that the TPA's real estate practices have changed to become more consistent with City-wide practices. As such we do not review the specific concerns that the conditional offer system presented. Our focus is on the historical involvement of the Board in real estate transactions.

In the ordinary course,<sup>30</sup> management would seek Board approval for a proposed real estate transaction before any diligence was conducted. This would constitute final approval, except where further approval was needed to change the terms of the transaction. In our review of all TPA real estate acquisitions since January 2015, we were unable to find anything to suggest that, in the ordinary course, an acquisition would return to the Board, either for management to report on the results of diligence or to seek final approval of the Board once the diligence was complete. This included the results of an independent appraisal; the appraiser's findings were almost never reported to the Board.

From the records, it appears that the Board had no oversight of the diligence process or the implementation of its decision. The TPA has historically adhered to this model irrespective of the size of the transaction; small transactions were dealt with in the same manner as large transactions presenting significantly larger risk to the TPA and its principal, the City.

---

<sup>28</sup> Denise Kleinrichert and Anita Silvers, "Risk Disclosure and Transparency: Toward Corporate Collective and Collaborative Informed Consent" in Robert W. Kolb and Donald Schwartz *Corporate Boards: Managers of Risk, Sources of Risk* (Oxford: Wiley-Blackwell, 2010) at p. 317-318.

<sup>29</sup> By fully conditional, we mean that a diligence provision in the APS allowed the TPA to cancel the APS at its discretion, for any reason, during the due diligence period. If agreements are cancelled during this conditional period, the deposit is fully refundable and the TPA is returned to the position it was in before it entered the deal (less any transactional costs e.g. legal or due diligence costs).

<sup>30</sup> The TPA had no policy on real estate transactions acquisitions.

This practice can provide some governance lessons for the TPA to avoid in the future. For future material decisions, including approvals of material transactions, the Board should have an opportunity to review all of the information ultimately available to the TPA before the transaction is considered approved.

**1111 Arrow Road.** With respect to the 1111 Arrow Road transaction, the Board passed resolutions in May and July 2016 to negotiate and enter into a PSA. In July the Board asked for the results of the due diligence to be reported to it.

Both resolutions were passed without the Board seeing the results of an appraisal of the property. Given that a \$12 million purchase price is material<sup>31</sup> to the operations of the TPA, and given that the March 31, 2016 City Council direction expressly called for the transaction to be at fair market value, it is unclear on what basis the Board could satisfy itself that it was fully informed in passing these resolutions without any information about the fairness of the purchase price. Even for this conditional acquisition, it would have been better practice for the Board to accept the May and July board reports on an informational basis and defer the Board's decision until it had all of the relevant information, which would have included the results of an appraisal.

### 6.3.2 *Directors' Duties of Care and Loyalty*

The duties of loyalty and care of directors generally, should equally apply to each member of the TPA Board.

To avoid any question that such duties apply, they should be expressly set out in Chapter 179 of the Municipal Code. The Code should make clear that directors' duty of loyalty is owed to the City of Toronto. As an agent of the City of Toronto, the TPA must act in the City's best interest. The TPA's Board and its members are no different.

Although the broad principles of the duty of loyalty are applicable to the Board, there is an additional statutory context regarding conflicts of interest. The directors of the TPA Board are governed by the Code of Conduct for Members of Local Boards (Restricted Definition) (the "Code of Conduct")<sup>32</sup> and the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M. 50. In short, a Board member must disclose any pecuniary interest, direct or indirect, in a matter before the board, must not take part in the discussion or vote of the matter, and must not attempt to influence the vote on the matter.<sup>33</sup> The Integrity Commissioner is currently trusted with investigating and reporting on breaches of the Code of Conduct. We understand that she is engaged in an investigation of the 1111 Arrow Road matter and therefore refrain from further comment on this issue.

However, a director's duties go further than strict conflict of interest provisions. A director has a general duty of disclosure to the Board where she possesses information relevant to a Board

---

<sup>31</sup> The materiality threshold is ultimately to be determined by the Board. However, for the 2016 fiscal year, the auditors had accepted \$5.7 million or 10% of net income as a materiality threshold. \$12 million is comfortably above this threshold.

<sup>32</sup> Available at <https://www.toronto.ca/city-government/accountability-operations-customer-service/accountability-officers/integrity-commissioner/codes-of-conduct-and-resources/members-of-local-boards-restricted-definition/conduct-standards-for-members-of-local-boards/>

<sup>33</sup> Municipal Conflict of Interest Act, R.S.O. 1990, c. M. 50, s. 5(1).

matter that may not be known by the other directors. This duty applies irrespective of the source of the information. The director must disclose material information whether she obtained it passively by virtue of her background, by her participation in other organizations, or by her independent efforts to investigate the specific matter at hand. All Board members must be equally informed when voting on a matter.

This did not seem to be ordinary practice at the TPA. With respect to the 1111 Arrow Road transaction, it is likely that at least one member of the Board, Councillor 1, had information that others did not. He had been actively involved with plan for the development of 1111 Arrow Road for years. He had consulted with the mayor and City staff regarding the a project that would be installed on the site. And he was the main motivation in City staff drafting and recommending the March 31, 2016 direction to Council. In our view, the relevant facts relating to the past involvement of a director in the transaction should be disclosed to his fellow directors, even if he had no formal conflicts of interest.

### 6.3.3 *Respect for directors and management*

#### 6.3.3.1 Dissent

Directors who properly exercise their duty of loyalty to TPA may inevitably disagree. The duty of loyalty requires each director to exercise her independent judgment to determine what is best for TPA.<sup>34</sup> She must heed that judgment even if it differs from the recommendation of management or the will of the majority of the Board. In such cases, dissent is not optional; it is required.

Embracing the potential for dissent is salutary for Boards.<sup>35</sup> It sparks discussions. It discourages groupthink. And it is a frequent reminder that the Board members have different backgrounds, experience and expertise from which to draw. Further discussion may lead the Board to reconsider its initial opinion and side with the dissenter. Or it may force the Board to engage in better analysis and oversight, even if it arrives at the same conclusion.<sup>36</sup>

In the case of the TPA, dissent, historically, has not always been respected. The 1111 Arrow Road transaction is an example. There was a vociferous dissenter in 2016 who made repeated requests for information from management and the Board. Management and the other members of the Board were not receptive to the contrarian view. They questioned his expertise and his motivations. His requests for further information before voting largely fell on deaf ears. In internal correspondence, the Chair criticized his behavior to the President. And the Board demanded that he resign if he did not apologize for behavior that the other directors viewed as uncivil.

The value of dissent can itself be seen in 1111 Arrow Road transaction. It is beyond the scope of this report to opine on whether, in the absence of dissent, the TPA would have closed the 1111 Arrow Road Transaction at \$12.1 million. Regardless, it cannot be ignored that, in this case, the dissenting director's concerns over the transaction were justified. The purchase price established

---

<sup>34</sup> Alice Klettner, *Corporate Governance Regulation: The Changing Roles and Responsibilities of Boards of Directors* (New York: Routledge, 2017) at p. 102.

<sup>35</sup> Peter C. Browning and William L. Sparks, *The Director's Manual: A Framework for Board Governance* (Hoboken: Wiley, 2015) at p. 106.

<sup>36</sup> Jeffrey A. Sonnenfeld, "What Makes Great Board Great" (2002) 80:9 Harv Bus Rev. 1 at p.5.

for the transaction was not at fair market value. When the transaction was presented to the Board in May, and then again in July, there was no support to show that the purchase price was at fair value. A proper recognition of the role of the dissenting director may have resulted in the 1111 Arrow Road transaction being abandoned earlier and/or in a less contentious manner.

We acknowledge that welcoming dissent can be hard. Dealing with loud dissent is even more so. This is all the more difficult in the municipal government context where the open meeting rule requires that such disagreements happen in public. But directors do themselves a disservice if they expect unanimity. New Board members should be trained to better deal with dissent. Collegial but spirited debate must be the order of the day. Members must seek to understand the positions of the directors who disagree and why. And they must accept that such positions are legitimate, valuable and welcome.

### 6.3.3.2 Collegiality

Collegiality is the lubricant that keeps the machinery of governance working.<sup>37</sup> Board members have a difficult job: they are expected to absorb significant amounts of information in an area in which they are not subject matter experts and make difficult decisions in order to safeguard the public's money. Being treated in a collegial manner is implicit in the respect for this work and the individuals who do it. Directors—and TPA employees—are entitled to not be distracted from their responsibilities by uncivil discourse or attacks on their dignity. This is even more so for a City agency where Board members are often volunteering their time or are remunerated at rates significantly below what they could command in the private sector.

Collegiality escapes ready definition. The Old Bylaw prohibited the use of “offensive words or unparliamentarily language” as well as any question that is “ironical, rhetorical, contains innuendo or satire; is trivial vague or meaningless; or contains questions and answers.” The Code of Conduct requires members of the Board to “conduct themselves with decorum” and “show respect for the professional capacities of staff.” As a further point of reference, the Council Procedures Bylaw, Toronto Municipal Code Chapter 27, provides that all members have a right to be treated with “respect and courtesy” and are obligated to “refrain[] from using any offensive, disrespectful or unparliamentary language about any member, any City officials or other City employee, or the Council as a whole.”<sup>38</sup>

Ultimately, collegiality is not reducible to polite language or any other specific prohibition. It comes down to showing respect for the other participants in the governance process: directors, the Chair, the President and TPA staff.

What collegiality cannot mean is an absence of confrontation or disagreement. Collegiality does not call for an abdication of a Board's primary responsibilities to oversee management, ask hard questions, and, when necessary, take corrective action. When conceived of properly, collegiality and a director's duties are not in conflict: a properly functioning board can do its job and be collegial while doing it.

Board consideration of the 1111 Arrow Road transaction revealed potential deficits in collegiality.

---

<sup>37</sup> Alice Klettner, *Corporate Governance Regulation: The Changing Roles and Responsibilities of Boards of Directors* (New York: Routledge, 2017) at 100.

<sup>38</sup> See Toronto Municipal Code Chp. 27-3, 27-15, Council Procedures.



First, we understand that there are allegations that individual directors did not fulfil their responsibilities under the Code of Conduct to show respect for staff. This matter is being reviewed by the Integrity Commissioner and we do not address it further here.

Second, it appears to us that some of the dissent among the Board surrounding the 1111 Arrow Road transaction resulted from poor interpersonal dynamics. Or, to put it differently, Board members may have lacked the necessary respect for one another, which impaired the Board's ability properly function. We see this in the difficulty the Board members had with communicating with each other. The dissenting director did not fully engage with the Chair or the other directors, ostensibly because he did not trust that they would give due consideration to his concerns. On the other hand, the other directors did not inquire with the dissenting director as to the nature of his concerns that he raised in the Board meetings. Many of these directors did not trust that the concerns were legitimate and some believed that the dissenting director had not made the requisite time commitment to the Board for his concerns to be credible. The Chair did not engage either of these groups. Collegiality is not an instant remedy to problems with communication or respect, but it is a necessary building block to get there.

#### **6.4 Role and duties of Chair**

The Chair of the Board has significant responsibilities in addition to her role as director. The Chair is the leader of the governance process. A good Chair should strive to create a culture of good governance in a board and an agency as a whole.

Leading Board meetings is only one responsibility of the Chair. The Chair also acts as a critical bridge between the Board and management. She works closely with the President to ensure that the Board and management roles remain distinct but cooperate in a manner that is consistent with best governance practices.

The Chair takes on responsibilities and obligations that go beyond that of the other members of the Board. The Chair's special duties are reflected in her higher compensation.<sup>39</sup>

We have concerns that we cannot find a description of the role, responsibilities or duties of the Chair in any TPA governance documents. We have observed that this lack of definition has led to issues with TPA governance, most readily seen in the 1111 Arrow Road transaction.

Below we provide an outline for the role and duties of a Chair. We have outlined four critical responsibilities incumbent upon the Chair: (i) leadership of the Board; (ii) relationship with management; (iii) responsibility for Board meetings; and (iv) responsibility for governance. We address each in turn.

Issues related to the selection and qualifications of the Chair are addressed below in Section 6.5, Composition of the Board.

##### *6.4.1 Leadership of the Board*

---

<sup>39</sup> Ira T Kay and Steven Van Putten, *Myths and Realities of Executive Pay* (Cambridge: Cambridge University Press, 2007) at p. 130.

The Chair is the leader of the Board and responsible for establishing effective corporate governance processes and practices.

At the same time, the Chair also is responsible *to* the Board and her role is to facilitate the ability of the Board itself to collectively make governance decisions in an effective manner. This is consistent with the Board’s collective responsibility for the governance of the TPA.

The Chair’s relationship with the Board presents itself in a variety of different roles and responsibilities. These include the responsibility for the operation and functioning of the Board, a duty to ensure that the directors understand their responsibilities to the agency, a duty to ensure that the Board can function independently of management, the responsibility to ensure that TPA information is properly shared with the Board and between Board members and the responsibility to coordinate performance evaluations. Each is explored below.

#### 6.4.1.1 Operations and functioning of the Board

The Chair, together with the Board secretary, is responsible for ensuring that the Board functions properly.<sup>40</sup> This ranges from responsibility for Board orientation in the business of the TPA to managing and resolving conflict between directors. The Chair should consult regularly with the Board secretary to locate and resolve problems as they occur.

#### 6.4.1.2 Duty to ensure that the Board can function independently of management

Members of the Board can exercise their independent judgment only if they can make decisions separate from management. The Chair plays an important role in protecting this separation. She works with management to ensure that the Board has the information that it requires.<sup>41</sup> She also should work directly with the TPA’s auditor and the Board’s advisors, where necessary, so that the Board can obtain information separately and apart from management.

#### 6.4.1.3 Duty to ensure that boundaries between management and the Board are respected

As discussed above, the Board is not involved in the day-to-day management of the TPA. Nor should it be. That is the role of management. The Chair should take steps to ensure that this remains the case and dissuade members of the Board from involving themselves in the quotidian activities of the agency. In this vein, the Chair should generally be the conduit for questions from members of the Board to management. For example, if a member desires to ask a question of the President, the Chair should be copied or otherwise involved in these communications.

#### 6.4.1.4 Sharing of information

The Chair is responsible for ensuring that all material information is shared amongst the Board members. This means that if the Chair receives material information from the President or another member of management, he needs to ensure that it is shared in a timely manner with

---

<sup>40</sup> Morten Huse, *Boards, Governance and Value Creation: The Human Side of Corporate Governance* (Cambridge: Cambridge University Press, 2007) at p. 185.

<sup>41</sup> *Ibid.*

the Board.<sup>42</sup> But it also means that if the Chair becomes aware that any director has information that is material to the Board's decisions or to the supervision of the TPA, he must cause the information to be shared with the remainder of the Board.

In the context of the 1111 Arrow Road transaction, we have concerns that the Chair failed to fulfill each of the roles and responsibilities outlined above. A better definition of the role of Chair, and appropriate training, may address these issues in the future.

#### 6.4.2 *Relationship with management*

The Chair is the liaison between the Board and management. Unlike the remainder of the Board, it is to be expected that the Chair would have an active and ongoing relationship with management, generally through the President.

This manifests in a variety of different ways. Key among them is regular communication between the Chair and the President. The Chair should regularly speak to the President between meetings. The Chair can use these discussions to make sure that management is providing complete, accurate and timely information to the Board. And the Chair can advise management of issues that are relevant to the Board for which they would want additional information provided.

If the Chair is informed of material information by management, the Chair should discuss the best means of informing the Board (*e.g.*, as an informational Board report at the next meeting). If the information is of an urgent nature, the Chair should then disseminate that information to the members immediately and should consider calling for an urgent meeting, if necessary.

The Chair's role also includes ensuring that management is providing information as requested by directors or the Board. If a director requests information, either through the Chair or directly from the President with the knowledge of the Chair, the Chair is ultimately responsible for ensuring that management provides that information in a timely manner. The same holds for information requested by a Board as a body. If it is not produced, the Chair should follow up, request an explanation for the delay, determine an action plan for delivery of the information, and report back to the Board. The directors' right to information means little if the Chair is unable or unwilling to enforce it.

We are concerned that historically this aspect of the role of Chair was not well understood at the TPA. Significant confusion on this point was demonstrated in the events surrounding the 1111 Arrow Road transaction. For example, the Chair was aware of informational requests by a director regarding the 1111 Arrow Road transaction, including requests for historical and current appraisals. The role of Chair should have included proactively engaging in discussions with the requesting director and following up with management. When management repeatedly failed to produce the information, the Chair should have actively discussed this omission with management. We do not believe that it would be appropriate for a Chair to dismiss the request as a frolic of a lone director (see section 6.3.1 above).

---

<sup>42</sup> *Ibid.*

### 6.4.3 *Leadership of Board Meetings*

The Chair is responsible for Board meetings. That responsibility extends beyond the time of the Board meeting itself and includes, with the assistance of the secretary, facilitating and organizing the meetings.

#### 6.4.3.1 Agenda setting

The Chair is ultimately responsible for setting the agenda of each Board meeting with the assistance of the secretary.<sup>43</sup> In doing so, the Chair should consult with the President and understand management's priorities and the decisions that staff wishes for the Board to address at any given meeting. The Chair should also have a regard for the Board's priorities, including a consideration and review of mission statements and policies, follow-up on previous decisions or transactions and a discussion of strategic issues.

Agenda setting is not intended to be a rote exercise. Careful thought is needed to balance the time available to the Board, the priority of items before it and the Board's long-term goals. The Chair must work with the secretary and management to put into place a process for appropriate agenda items to be reviewed and revisited in the future. For example, provision should be made for staff to report on the implementation of Board directions and policies.

We understand that it was the practice of the TPA for the President to set the agenda with advance notice to the Chair who, historically, had little comment on the agenda items. While consultation with the President is important, the organization and management of the meetings is a Board matter and should be led by the Chair with the input of the President and secretary, which can be done by way of a pre-Board meeting.

#### 6.4.3.2 Briefing materials provided in a timely manner

In order to facilitate Board's role in the oversight of management, the Chair must ensure that management provides briefing materials in a timely manner. The lack of timely provision of briefing materials was a significant issue throughout the 1111 Arrow Road transaction approval process.

The time for materials to be provided should be set in the governance and procedural policy by the Board, adhered to by management and enforced by the Chair. By way of example, the Old Bylaw provided for a notice period of one week.

The timely provision of materials is both a matter of respect for the Board and of good governance. As noted above, a member of the Board has a duty to devote sufficient time to prepare for a meeting. Appropriate time to review materials is necessary for the members to fulfil their duty to read, engage and formulate questions on the briefing materials.

Urgency may demand deviations from this principle. When appropriate, the Chair may allow a supplemental agenda item to be added if, for example, an urgent issue emerges prior to the meeting. But the Chair should carefully weigh the urgency of new materials against the risk that if materials are delivered late, directors may not receive them or may not have sufficient time to review them with the necessary degree of care.

---

<sup>43</sup> *Ibid.*

In the context of the 1111 Arrow Road a director complained both that he did not receive the materials and that he did not have sufficient time to review them. At both the May and July 2016 meetings, consideration of the transaction was a supplemental agenda item. In May, the staff report was delivered two days before the Board meeting. In July, the report was delivered the day before the meeting. We received no satisfactory explanations as to why the reports were not delivered to the Board in a timely manner.

Moreover, a review of the agendas and minutes of the Board since 2015 shows that the use of supplemental agendas was not unusual, including providing briefing materials on a single day's notice. Supplemental agenda items should be exceptional. The Chair should work with management to avoid their use becoming ordinary course circumstances. Management has months' notice of Board meetings and should organize their reporting around the notice dates. If management cannot meet notice deadlines, in many cases the report should wait until the next meeting of the Board or, if urgent, a special meeting of the Board should be called.

#### 6.4.3.3 Chairing the meeting

The Chair acts as the chair of meetings of the Board. The Chair is responsible for calling regular and special meetings of the Board and providing notice to the members and the public of such meetings.

The Chair should follow the TPA's governance and procedural policies. As we note above, it is clear that the TPA needs a new governance and procedural policy.

It is important that the Chair be familiar with the policy and its application and that she adhere to it. For example, open meeting rules are very important for a municipal agency. Disagreement as to open meetings arose with respect to the 1111 Arrow Road transaction. The Chair should be familiar with the application of the relevant principles of the *City of Toronto Act, 2006* providing for open meetings and the limited nature of the exceptions.

The Chair should not make these determinations alone. She should be assisted by the secretary to the Board. We understand that certain city agency boards have named the Clerk of the City of Toronto to be the secretary. Having a member of the office of the Clerk present for meetings may be of great value to the TPA and its Chair.

Chairing a meeting is more than enforcing procedural rules. The Chair must conduct each meeting in an efficient and collegial manner. The issues for a Chair to concern herself with are potentially manifold and beyond the scope of this report, but include (i) ensuring that directors each have time to speak and encouraging participation; (ii) stimulating debate and thoughtful questions; (iii) facilitating consensus; and (iv) ensuring that all directors and staff are treated with appropriate respect, including ensuring compliance with the Code of Conduct.<sup>44</sup>

We understand that there were complaints about the conduct of a director at the September 2016 Board meeting. As we noted above, we offer no comments or conclusions here on whether that behavior was appropriate. Nonetheless, if there was behavior that gave cause for concerns

---

<sup>44</sup> Martin Hilb, *New Corporate Governance Successful Board Management Tools*, 4th ed (New York: Springer, 2012) at p. 53-54.

about collegiality towards staff, then it was the role of the Chair to intervene and direct the relevant member of the Board to refrain from such questioning.

#### 6.4.3.4 Clarity regarding decisions is reached

In order for the independent judgment of the Board to be given effect, the results of the Board votes must be recorded and the meaning of the resolutions must be clear. It is the responsibility of the Chair to ensure both.

First, it is the Chair's role, with the assistance of the secretary, to ensure that minutes are accurate and complete.

Second, the Chair should raise concerns when a resolution, or amendments to such resolutions, are unclear or fail to provide clear guidance to management and the Board in the future. Ambiguous language is to be avoided.

Issues with ambiguity arose in the Board consideration of the 1111 Arrow Road transaction. In the July 2016 meeting, the Board amended the resolution approving the 1111 Arrow Road purchase by adding the following direction: "due diligence shall be reported to the Board as soon as possible." In our discussions with management and directors, it appears that it was ambiguous whether the matter remained open and, once diligence was provided, whether the approval of the 1111 Arrow Road transaction would return to the Board. The Chair would do well to ask clarifying questions and suggest alternative wording that would ensure that the resolution reflects the Board's considered decision.

#### 6.4.4 *Responsibility for governance*

Governance of the TPA is the responsibility of the Board.<sup>45</sup> Governance is both a collective and individual duty of the directors. But the Chair has a leadership role in steering the Board towards the consideration of governance issues, determining and reviewing governance policies and ensuring compliance with those policies.

The critical issue for the TPA is the establishment of a governance and procedural policy or policies. As noted above, the Old Bylaw is the only governance or procedural document that we identified in our review. We understand that it may not be effective. It was subject to neither review nor amendment and we have seen nothing to suggest that it was actively complied with.

We understand that when the interim board of the TPA was installed it elected to use the Council procedural bylaw for the TPA's meetings.

Once an ordinarily constituted Board is re-appointed, it may not be necessary (or even ideal) for the TPA to use a procedural by-law that is drafted for use by Council.<sup>46</sup> There are provisions that are inapplicable to the TPA, including roles that do not correspond to the agency (*e.g.* the Mayor, Deputy Mayor and Sergeant-at-Arms). Additionally, there are necessary governance provisions, many touched upon in this report, that are not addressed in the Council procedural bylaw, including the duties of directors and role of the Chair itself.

---

<sup>45</sup> Thomas Clarke, *International Corporate Governance* (New York: Routledge, 2007) at p. 33.

<sup>46</sup> See Toronto Municipal Code Chp. 27, Council Procedures.

While the Council bylaw may be helpful as a reference, we would suggest that the Chair lead the Board through the process of drafting a new governance and procedural policy. The office of the City Clerk may be of assistance in drafting such a policy. An agency-centred policy may be a useful reference for other City agencies that are also considering revising their governance frameworks.

Once in place, it is the Chair's role to ensure that the governance and procedural policy is complied with and reviewed regularly. If, after consultation with the Board, the Chair is of the opinion that the policy needs to be updated, she should propose amendments.

Finally, the Chair plays a broader, continuing governance role with respect to individual directors. If she is concerned about a director's commitment to his duties—whether that is a commitment to spend the requisite time to prepare and attend meetings or a duty to disclose all relevant information—it is the duty of the Chair to discuss those issues with the given director. The Chair is also responsible for recognizing the need for continuing education of individual directors or the Board as a whole. This creates a reciprocal obligation on the Chair to be informed about governance best practices and procedures in order to allow him to educate the Board.

## **6.5 Composition of Board**

The composition of a Board drives a culture of good governance as much, if not more, than fixed policies.<sup>47</sup> The composition of the TPA's Board is one of the key distinguishing features between it and its analogues in the private and non-for-profit sectors.

Below we consider a few of these distinguishing features in addressing the following issues: (i) the nomination of directors; (ii) the nomination of the Chair; (iii) the size of the Board; and (iv) the role of councillor directors on the Board.

### *6.5.1 Nomination of directors*

There are two types of directors on the TPA Board: (1) two councillors who serve on the TPA Board for a renewable term of 2 years; and (2) five public directors who serve renewable 4 year terms. We understand that each is nominated and appointed differently. All serve at the pleasure of Council.<sup>48</sup>

We address the public directors here and discuss councillor directors below.

We understand that the City Clerk coordinates the nomination process of public directors. Toronto residents apply to join the Board of a city agency. The City Clerk designs an application process to encourage participation of diverse members of Toronto to participate in City agencies.

---

<sup>47</sup> Colin B. Carter and Jay W. Lorsch, *Back to the Drawing Board: Designing Corporate Boards for a Complex World* (Boston: Harvard Business Review Press, 2004) at p. 8-9.

<sup>48</sup> Chapter 179 provides for the City of Toronto's General Manager of Transportation Services or a designate to have a seat on the Board as a non-voting member. Council should consider whether to continue this appointment.

The Clerk's office then compiles the list of candidates and assesses them as highly qualified, qualified or not qualified. They undertake this assessment with an eye to the needs of the Board. The current appointment matrix calls for a public members to collectively demonstrate a range of qualifications including the following:

1. a sound financial and administrative background, including experience in real estate joint ventures;
2. a sound background in human resources and union-related matters;
3. a clear understanding of land use and transportation planning;
4. an understanding of commercial enterprises, including marketing and advertising;
5. understanding of public service objectives and operations; and
6. commercial sensitivity and acumen.<sup>49</sup>

The Clerk's office provides a list of potential candidates to the Civic Appointment Committee, which then selects individuals to interview for the Board, considers their appointment and recommends appointments to Council. Council votes to approve the public directors. Appointments are to be made consistently with the City's Public Appointments Policy.

We commend the work of the City Clerk and Clerk staff to promote diverse and merit-based appointments to the Board. Governance benefits from diverse backgrounds, experiences and viewpoints.

Moreover, given the important work of the Board in safeguarding the delivery of services to the public and the spending of public funds, we emphasize the importance of appointing Board members on the basis of skills and experiences that are valuable to the Board. Having members with broad and diverse backgrounds is critical to governance. However, as this report emphasizes, experience with governance policies and practices themselves should not be overlooked. The Board would benefit if future appointments of public members considered previous board experience—including in private, not-for-profit, crown corporation or other public contexts—or other governance experience.

### *6.5.2 Nomination of the Chair*

The Chair is nominated by the Civic Appointments Committee and appointed by Council. This decision dates from a 2011 Council decision to directly appoint the chairs of the boards of City agencies.<sup>50</sup> The decision was made to create accountability mechanisms to the City.

We recommend that Council reconsider this decision. In our view, the Chair of the TPA Board should be appointed by the members of the Board.

First, as canvassed in this report, the Chair plays an important leadership role in the Board's governance functions and obligations.<sup>51</sup> It is critical that the Chair has the confidence of the Board both as a leader and a fellow director. In order to effectively do so, the Chair should be chosen and elected by her peer directors for a term.

---

<sup>49</sup> Available at: <https://secure.toronto.ca/pa/decisionBody/29.do>

<sup>50</sup> Decision of City Council, April 12, 2011, EX4.6, s. 2(a)(i).

<sup>51</sup> The recommendations in this section equally apply to the vice-chair. We understand that the vice-chair is currently elected by the Board.



Second, the term of the Chair should be two years. This allows the Board to impose a sense of discipline on the Chair. If the Chair is not providing sufficient leadership or fulfilling her role, she should be replaced.

Third, the appointment of a Chair by Council is not necessary to establish the accountability of the TPA to the City. Accountability may be established by other means, including regular reporting, a review of strategy and mandates and the role of the accountability officers. In our view, the direct appointment of the Chair arguably sends the wrong message about governance and accountability.

### *6.5.3 Size of the Board*

During the course of our review we have encountered nothing to suggest that the current size of the Board negatively affects the governance of the TPA. There is no reason to believe that increasing the size of the TPA Board by two directors, whether member of the public or Council, will have a positive effect on the Governance of the TPA.

We do not recommend changing the size of the Board.

### *6.5.4 Role of councillors on the Board.*

At the request of the Executive Committee of Council, in April 2011 the City Manager considered the role of councillors on the boards of City corporations and agencies. The City Manager's discussion reflects the best rationale we encountered for the councillors' role:

As a director serving on the board of directors of a City agency or corporation, a City Councillor has an equal voice on the board. However, a City Councillor has the opportunity to bring a unique perspective to the board and may act as an emissary for Council to the board.

[...]

Overall, Councillors are in a good position to provide high level strategic advice to the board in order to ensure well-balanced board decisions that incorporate the City's overall perspective and are consistent with Council's direction.<sup>52</sup>

In our interviews with Board members, the role of councillors on the Board was affirmed as valuable. Councillors can advise the Board of Council's priorities and can communicate with Council on behalf of the Board and the TPA.

Given the view of the City Manager in 2011 and our interviews and discussions in the course of this review, we see no reason to recommend reducing the role of councillors on the Board. This recommendation is contingent on there being councillors who are willing to fulfil the obligations of a director.

If councillors are to continue to serve on the Board, three additional issues should be addressed: (i) the duties of care and diligence of a councillor; (ii) the councillor director's duty of care to the

---

<sup>52</sup> Report of the City Manager, "Follow-up Report to EX4.6 and EX4.7" April 11, 2011, attachment 4.

City; and (iii) the confidentiality of information learned by a councillor in her role as a member of the Board.

#### 6.5.4.1 Duty of care and diligence

All directors, including councillors, owe the same duty of care and diligence to TPA. They must all devote sufficient time and attention to understand the materials provided to them and the issues at hand. They must all prepare and attend Board meetings and engage thoughtfully in the matters before them. There cannot be two classes of directors; the expectations on councillor directors can be no lower than for public directors.

#### 6.5.4.2 Duty to the City

All directors, including councillor directors, owe their duty of loyalty to the City. While this duty is framed within the mandate and powers of the TPA, all directors must exercise their judgment in the best interest the City.

We thus do not see a potential for a conflict of interest between a councillor’s role as councillor and a member of the Board. This does not give rise to a situation of dual loyalty where a directors owes a distinct duty to a corporation and a separate duty to the nominating agency.<sup>53</sup> Nor does a councillor’s representation of his ward or duties arising from serving on different City bodies create a conflict of interest when acting as member of the Board.<sup>54</sup>

Nonetheless, the duties of disclosure and loyalty apply as outlined above. If a councillor believes that one of his other roles precludes him from disclosing material information to the Board or precludes him from acting solely in the best interest of the City, he must declare a conflict and recuse himself.

#### 6.5.4.3 Duty of confidentiality

All directors have a duty to keep the TPA’s confidences. Nonetheless, in our opinion, because the TPA acts as an agent of the City, this duty does not preclude a councillor from discussing confidential information with other members of the City staff or Council. We add three caveats to this conclusion.

First, a councillor should exercise her discretion when discussing sensitive information with City staff or Council and, if appropriate, should consult the Chair before doing so.

Second, when sharing confidential information of the TPA, a councillor should consider the nature of the information and whether any protections must be taken when sharing the information. For example, a councillor should consider whether it would be appropriate to request an *in camera* session before revealing confidential TPA information to Council. Councillors should be urged to consult with the City Clerk or his staff when considering these issues.

---

<sup>53</sup> See Clifford S. Goldfarb, “Dual Loyalties on Non-Profit Boards: Serving Two Masters” CBA-OBA National Symposium of Charity Law, May 2011.

<sup>54</sup> *Orangeville (Town) v. Dufferin (County)*, 2010 ONCA 83, para. 27.

Third, there is no basis to believe that a councillor—or any director, for that matter—is precluded by a duty of confidentiality from approaching the auditor general or the integrity commissioner with any confidential information that she obtains in her capacity as a member of the Board, assuming that the director acts in good faith and with a valid reason. In furtherance of their duties, accountability officers have free access to the information of local boards such as the TPA.<sup>55</sup> Under these circumstances, we can see no conflict between a member of the Board’s duty of loyalty to the City and the sharing of information with an accountability officer that the City has appointed to protect the City’s own interests.

## **6.6 General governance recommendations**

### *6.6.1 Strategic direction of the TPA*

The directors are charged with setting the strategic direction for the TPA, in accordance with the mandate provided by Council.

In short, the directors must consider management’s recommendations and, in view of their own independent judgments set out the strategy of the TPA. Once they have set the strategy they must consider how individual decisions advance this strategy, ensure that TPA policies and operations advance the strategy and provide strategic advice to management.

The TPA has taken positive steps in this regard. With the assistance of outside consultants, it established a strategic plan in 2014 and is currently in the process of reconsidering the strategic plan. We commend the TPA for these steps.

Nonetheless, we make the following observations.

First, while management has critical input into the development of the strategic plan, the long-term strategic direction of the TPA is properly set by the Board. The process of the strategic review should be “owned” by the Board. The Board may delegate this issue to a committee, but the Board should be actively involved in the development of the strategic plan.

Second, any strategic plan should be reviewed annually. The Board should consider whether the policies and practices of the TPA are generally consistent with the strategic plan and whether the strategic plan remains consistent with the needs of the TPA and the City. If this review raises any concerns, the Board should initiate a process to address them.

Third, the mandate of the TPA must be part of the strategic plan and its annual review. The directors should consider whether the strategy, policies and practice of the TPA are consistent with the TPA’s mandate. The Board should also consider whether the mandate from Council is consistent with the changing parking landscape of Toronto and allows the TPA to advance the interests of the City. If the Board believes that the mandate of the TPA should change, it should communicate as such to Council.

### *6.6.2 Policies*

Robust policies are a critical tool in modern corporate governance. We would expect the same from the TPA. While the Board is not involved in the day-to-day operations of the TPA, clear

---

<sup>55</sup> See e.g., *City of Toronto Act*, ss. 160(3), 160(4), 179(1), 179(2).

policies can help ensure that the TPA is being operated in a manner consistent with the standards the Board believes are appropriate for the agency.

The TPA has adopted a wide variety of policies that are collected in the policy resolution manual.

The Board has struck a standing committee, the Policy Resolution Committee, to review the policy resolution manual. A committee of the whole, the Policy Resolution Committee's Charter calls for a review of policies every two years. The "Review of Policy" policy resolution provides that "every second year, normally in March or April, the collective policy resolutions of the Authority will be reviewed by the President and the Board Directors [*sic*] in order that policies and current practices are consistent."

Despite this structure, the TPA historically has not defined all of the policies material to its governance. Specifically, the Board has yet to establish (i) comprehensive governance and procedures policies and (ii) a real estate acquisition policy. The Board must take careful consideration of what policies are necessary to preserve financial controls and oversight of, and reporting by, management and what policies are necessary to define the Board's own governance processes. These policies are in addition to those required by statute or City bylaw.<sup>56</sup>

Given the importance of policies to the core of governance, we make the following observations.

First, in our opinion, the review of policies should occur annually. To assist in this review, the Board should receive reports from management, responsible Board committees and, with respect to the governance and procedural policy, the Chair. The review should consider (i) whether the policies are consistent with TPA practice; (ii) whether the policies provide sufficient reporting to assist Board oversight; (iii) whether the policies are consistent with governance best practices; (iv) whether the policies are consistent with the Board's strategic vision for the TPA; and (v) whether additional policies are necessary to address any of the previous considerations.

Second, the review of policy should be clearly outlined in the governance and procedural policy.

Finally, it is important that the TPA have the benefit of best governance practices in considering what policies to draft and the substance of those policies. The same may be true of other City agencies. We would recommend that the City Clerk consider drafting a policy handbook for City agencies including a list of relevant policies and draft pro forma policies that could be adapted by each agency with, if available, the advice of the office of the City Clerk. This policy handbook should too be regularly revised.

### 6.6.3 *Governance Training and Education*

The members of the Board are currently offered little governance training when they join the Board. While they receive a substantive orientation on the business of the TPA, they receive only a brief outline of their governance role as directors. They did not receive specific training on their duty of loyalty, duty of care, the role of directors or the chair, the role of policies or many of the other issues discussed in this report. We understand that there is currently no training program provided by the City to the directors of its local boards or agencies.

---

<sup>56</sup> See e.g. *City of Toronto Act*, s. 212(2); Toronto Municipal Code Chapter 192.

Such training is critical to establishing a culture of good governance.<sup>57</sup> The directors with whom we spoke strongly echoed a need for more extensive training. Better governance begins with the understanding by the directors of their duties.

We recommend that each director be provided governance training as part of new director orientation. The training should directly address the role of a director in the context of a City agency taking into account specific the municipal code, the *City of Toronto Act, 2006* and provincial legislation. Below is a non-exhaustive list of topics that such training should be addressed in any training session:

- Applicable statutes, city bylaws and policies
- The role and duties of directors, including the duty of loyalty, duty of care, respect for dissent and the importance of collegiality
- The role and duties of the Chair
- The role of policies in Board governance, required policies and policy review
- The Code of Conduct
- Open meeting requirements
- Role of the City’s accountability officers
- Best governance practices

We recognize that the City Clerk and her staff may be best placed to organize this training. We also recognize that this training may be of interest other local boards and City agencies. The City Clerk may wish to consider running a governance training program for the entire class of incoming directors at all of the City local boards and agencies. We would expect that this program would require one to two full days. The Clerk’s office may wish to partner with a governance consultant or a university to design and deliver the educational program, but it is important that that any program be customized to the context of Ontario local boards and agencies.

#### *6.6.4 Response to review by Auditor General*

The Auditor General has conducted at least two recent inquiries into practices at the TPA: an audit into real estate practices in 2015 and the inquiry into the 1111 Arrow Road transaction.

The role of the Auditor General is to conduct financial compliance and performance audits. In doing so, she promotes accountability for the City agencies’ stewardship of public funds and value for money. City agencies should embrace this assistance. It helps them better fulfil their mandates and render better service to the residents of Toronto.

The TPA has not, historically, been as welcoming of the Auditor General’s involvement as would befit a City agency. We were surprised at the response from the TPA to the Auditor’s 2015 real estate audit. This is unfortunate given that several of the Auditor-General’s recommendations, if properly implemented, would have improved the governance process in 2016 surrounding the 1111 Arrow Road transaction.

---

<sup>57</sup> Michael A.m. Keehner and David R. Koenig, “The Relationship Between Boards of Directors and their Risk Management Organizations: Are Standards of Best Practice Emerging?” in Robert W. Kolb and Donald Schwartz, *Corporate Boards: Managers of Risk, Sources of Risk* (Oxford: Blackwell Publishing, 2009) at p. 47-50.

For example, the Auditor General noted that the TPA generally used the same property appraisal firm for the majority of its transactions and its rosters of appraisers was not established through a formal pre-qualification process. The Auditor-General recommended that the Board of Directors request that the President consider obtaining market value appraisals from independent appraisers who are selected from a competitively established roster of pre-qualified service providers. The Auditor General also noted that that TPA did not have a formal policy for real estate acquisition. She recommended that the TPA formalize its policy for real property acquisitions.

The Board adopted both of these recommendations at its October 2015 meeting. But we have seen no evidence that any steps were taken to implement either recommendation—and they clearly were not implemented with respect to the 1111 Arrow Road transaction the following year. In October 2015, the Board did not set a timeline or direct management to report to the Board on the status of the implementation. In our conversations with directors, it appears that the Board relied on the follow-up reports by the Auditor General to inform it on the status of the implementation. In our opinion, this is not a sufficient response.

We would recommend a different approach to the interactions between the TPA and the Auditor General.

First, while the Auditor General necessarily must engage with management to gather the necessary information, the Chair, on behalf of the Board, should take ownership of the engagement with the Auditor General.

The Auditor General should first report to the Board’s audit committee, at a special meeting if necessary. The audit committee should inquire as to the findings of the Auditor General, the cooperation of management and the ultimate recommendations of the Auditor General. The audit committee should also canvass the views of management. The audit committee should then report out to the Board.

Second, when adopting recommendations of the Auditor General, the Board should ask management to report on implementation within a reasonable timeframe, with such reporting to continue until the recommendation is fully implemented. The Board should also consider directing management to implement the recommendation within a set time period and reporting on the status of meeting this deadline.

The comments in this section could be taken to apply to any of the City’s accountability officers.

#### *6.6.5 Evaluation of Board and Management*

Evaluation processes can allow a Board to best assess whether it and its committees are functioning effectively. An evaluation process is the means by which the Board can understand its successes, challenges and weaknesses in order to contemplate how its practices and the performances of its members and management can be improved.

An authority on governance has observed the importance of evaluation as follows:

A common challenge that boards and directors face is a lack of clarity regarding the board’s mandate, role and responsibilities, potentially affect the working

relationship between the board and management. Management may feel micromanaged, while the board may feel it is not adequately involved in some of the key decisions. An evaluation can highlight areas where confusion exists; remedial action can then be undertaken by means of procedural changes, further education, open group discussion, or interviews. Directors may be unfamiliar with the communication channels that are available and which types of communication are most appreciated and effective. If left unaddressed, this lack of clarity can simmer beneath the surface and impact a director's enthusiasm, commitment and contribution. The evaluation process provides an opportunity to assess the relationship and open the lines of communication.<sup>58</sup>

Many of these observations are applicable to the Board during the period in which the 1111 Arrow Road transaction was being pursued.

The evaluation of management and the Board should be considered separately.

#### 6.6.5.1 Evaluation of Management

As we discussed above in section 6.3, a central duty of the Board is to oversee management. To do so effectively, the Board needs to remain apprised of management's performance.

One way of doing this, seen in the private sector, is for a Board to consistently end its meeting with two *in camera* sessions. The first session is closed to all management except the President and is used to discuss any issues, current or potential, with management generally. The second session is closed to all management, inclusive of the President, in order to evaluate the performance of the President himself. The Chair must be disciplined to ensure that the *in camera* session does not address issues beyond evaluation of management.

We believe that adopting a similar procedure could assist the governance of the TPA. However, we recognize the limitations imposed by the open meeting principle. At a minimum, an *in camera* meeting would have to (i) meet one of the enumerated exceptions to the open meeting requirement;<sup>59</sup> and (ii) the resolution providing for the closed session must be capable of providing sufficient information regarding the nature of the matter to be considered in the *in camera* session.<sup>60</sup> All resolutions, decisions and other proceedings at all meetings, including *in camera* sessions, must be recorded in some fashion.<sup>61</sup>

We would recommend that the Board discuss this issue with the office of the City Clerk to determine if there is a manner in which such it could implement such regular *in camera* sessions.

#### 6.6.5.2 Evaluation of the Board and the Chair

The Board must itself take ownership of designing an evaluation process. The benefits from the evaluation arise from the buy-in from the Board. The evaluation process must be designed to

---

<sup>58</sup> Barry J. Reiter, *Directors' Duties in Canada*, 6 ed. (Markham: Lexis Nexis Canada, 2016) at p. 141.

<sup>59</sup> *City of Toronto Act, 2006*, s. 190

<sup>60</sup> *City of Toronto Act, 2006*, s. 190(4); *Farber v. Kingston (City)*, 2007 ONCA 173.

<sup>61</sup> *City of Toronto Act, 2006*, s. 190(8).

encourage honesty and constructive input. The process should not be complicated and should be sensitively handled and administered.

Any program of evaluation should assess the Board's operations at multiple levels.

First, directors should evaluate the Board as a whole. Directors should consider the performance of the Board including (i) whether it is successfully acquitting itself of its role and responsibilities (ii) whether it is focused on the right issues; (iii) whether it is implementing its strategic plan; (iv) whether the Board has access to the right information and (v) whether its decision are being implemented effectively. The Board should also consider, at a high level, whether the composition of directors is appropriate or whether it needs additional expertise.

Second, directors should evaluate the committees on which they sit. They should evaluate the committees in relation to their mandates and should consider the effectiveness, leadership and output of the committees.

Third, directors should evaluate the Chair. The directors should consider whether the Chair is an effective leader, providing guidance on governance issues and is otherwise carrying effectively carrying out her role and duties. Giving directors a more important role in the selection of the Chair, as we recommend above, will help ensure that this feedback is taken seriously.

Finally, individual directors should be evaluated. It is common practice in the private sector for directors to evaluate themselves. In the context of the TPA, the Board may wish to consider having the Chair evaluate each director and provide constructive feedback on how the director could better fulfil the role.

The Chair should collect the results of the evaluation and the Board should constructively discuss the findings.

## **7. SUMMARY OF RECOMMENDATIONS**

In this section, we summarize the relevant recommendations addressed previously in this Report.

### **7.1 Role and Duties of Directors**

This Report has discussed, at length, the appropriate role and duties of directors of the TPA. Creating a culture of governance cannot flow from a single recommendation and requires different approaches to training, nominations, policies, evaluation etc., all of which are addressed in this section below. Nonetheless, it would be helpful for each incoming director to receive written reference materials outlining their duties to the TPA consistent with the explanations provided in this report.

*Recommendation 1: As part of proper orientation, the TPA should provide each incoming director with reference materials outlining their duties to the TPA consistent with the explanations provided in this Report.*

### **7.2 Role and Duties of Chair**



The Chair is the leader of the governance process. A good Chair should strive to create a culture of good governance in the Board and the TPA as a whole. The Chair also plays specific roles in ensuring proper governance of the TPA.

First, as leader of the Board itself, The Chair, together with the Board secretary must ensure that the Board functions properly and independently of management. A critical aspect of that role is the receipt of information requested by the Board. The Chair is responsible for ensuring the management provides requested information in a timely manner. Furthermore, when material information is received, it is the Chair's responsibility to ensure that it is shared amongst all Board members. There does not appear currently to be a system in place for such sharing of information. We recommend that the Chair develop such a system.

Second, the Chair is responsible for both acting as the liaison between the Board and management and in setting the agenda of the Board. We recommend that, in advance of the meeting, the Chair should meet with the President and Secretary in advance of each meeting. Such meetings should be used to set the agenda of the next Board meeting.

Third, the Chair is responsible for leading efficient and effective Board meetings. Doing so requires familiarity with not only the procedural bylaw but also broader principles such as the open meeting principles set out on the *City of Toronto Act, 2006*. The Chair is to be assisted by the Secretary in making determinations of these procedural issues. We understand that the Clerk's office has been named as secretary by several City boards and agencies, given its considerable experience in these areas. We recommend that the TPA consider similarly appointing the Clerk or her delegate as Secretary.

Finally, like the directors, the Chair should receive written reference materials outlining the duties of the Chair consistent with the explanations provided in this Report.

*Recommendation 2: The Chair, with the assistance of the Secretary, should develop a system for tracking information requests by the Board or individual directors and a procedure to ensure that the requested information is provided in a timely manner.*

*Recommendation 3: The Chair should develop a system for the sharing of material information received by the Board, or an individual director.*

*Recommendation 4: The Chair should meet with the President and Secretary in advance of each Board meeting and finalize the agenda for the next Board meeting.*

*Recommendation 5: The Clerk of the City of Toronto, or her delegate, should be appointed as Secretary.*

*Recommendation 6: The TPA should provide the Chair with reference materials outlining his or her duties to the TPA consistent with the explanations provided in this Report.*

### **7.3 Nominations**

The selection of the members of the Board is integral to shaping the governance of the TPA. For this reason, we were asked to consider the composition of the Board.

With respect to public directors, we do not recommend a change in the number of public directors, but recommend that the Clerk’s office recognize the importance of governance in their assessment of nominees for public directors. The Board would benefit if future appointments of public directors considered previous board—including in private, not-for-profit, crown corporation or other public contests—or other governance experience.

With respect to councillor directors, we see no reason to recommend reducing the role of councillors on the Board. However, the appointment must be on the basis, and understanding by the councillors, that they bear the same responsibilities and commitments as the public directors.

With respect to the nomination of the Chair, we recommend that the Chair be appointed by her peers, the Board, from the ranks of its current membership. The term of the Chair should be two years to allow replacement by the Board if the Chair is not providing sufficient leadership or fulfilling her role.

*Recommendation 7: City Council should, with respect of the nominations of public directors to the Board, take into account the previous governance experience of the candidates.*

*Recommendation 8: All directors should dedicate the same time and effort regardless of whether they also hold public office.*

*Recommendation 9: The Chair should be appointed by the members of the Board for a term of two years.*

#### **7.4 Amendments of Municipal Code Chapter 179**

We recommend that, in light of this Report, Council review and revisit Chapter 179 as it relates to the governance of the TPA. In particular, the directors’ duties of care and loyalty should be directly set out in the Municipal Code. The language of these duties could be modelled on the description in the *Canada Business Corporations Act* or the *Ontario Business Corporations Act*.<sup>62</sup> The Code should make clear that directors’ duty of loyalty is owed to the City of Toronto. The TPA is an agent of the City of Toronto, and the Board must act in the best interest of the City.

Chapter 179 also provides for the General Manager of Transportation Services, or a delegate, to serve as a non-voting member of the Board. In our discussions with City staff, it was recommended that, where Council’s intent is that a City official should be present to either (i) facilitate good relations with Council; or (ii) as a monitor, Council should replace the concept of a “non-voting member” with a clause that instead grants access to a named official or her designate, entitling that official to receive agendas, notices and minutes and to attend board and committee meeting as of right. With respect to the TPA, Council should consider whether the current provision with respect to the General Manager of Transportation Services should be amended.

---

<sup>62</sup> CBCA, R.S.C 1985, c. C-44 s. 122(1)(a); OBCA s. 134(1).

*Recommendation 10: Municipal Code Chapter 179 should be amended to expressly set out the duties of care and loyalty of the directors of the Board, as an agent of the City of Toronto, including providing that all duties are owed to the City of Toronto.*

*Recommendation 11: Council should consider whether the General Manager of Transportation Services should continue as a member of the Board (non-voting).*

## **7.5 Governance and Procedural Policy**

A governance and procedural policy is critical to shaping the governance of the TPA.

Once an ordinarily-constituted Board is appointed, it should be the priority of the new Chair to lead a process for developing a governance and procedural policy, which should address the issues discussed in sections 6.3 and 6.4 of this Report. The policy can act both as a mechanism to establish consistent procedures for the functioning of the Board and management as well as establishing the expectations of the roles that both the Board and management play in establishing proper governance.

In advance of the process, we recommend that the Chair seek the advice and input of the office of the City Clerk throughout the development of the policy as the Clerk and her staff may provide assistance. We would also recommend that the TPA discuss with the office of the City Clerk whether the policy could be used as a reference for other City agencies that are considering revising their governance frameworks.

*Recommendation 12: Once an ordinarily constituted Board is appointed, the Chair should lead the process to develop a new governance and procedural policy, which should address, among other things, the following:*

- 1. detail the governance roles and duties of directors, the Chair, the President and the TPA staff consistent with the discussion in sections 6.3 and 6.4 of this Report;*
- 2. provide for the directors to owe a duty of collegiality to other Board members and TPA staff;*
- 3. provide for a robust right for directors' to dissent;*
- 4. protect the right of directors to report to an accountability officer, provided that they do so in good faith and for a valid reason;*
- 5. outline the directors' roles;*
- 6. outline the process for directors to seek and receive information from management;*
- 7. provide for the procedure for the approval of material transactions in a manner that is consistent with the Board's duties;*
- 8. provide for the reporting to the Board of the closing of all material transactions; and,*

9. *set out the period in which all Board briefing materials must be provided to directors in advance of a meeting and the provision for exceptional circumstances in which late material is permitted.*

*Recommendation 13: In drafting the governance and procedural policy, the Chair should seek the assistance of the office of the Clerk of the City of Toronto and discuss whether a City agency-centred policy could be drafted as a reference to other City agencies who are considering revising their governance frameworks.*

## **7.6 Training**

The members of the Board are currently offered little governance training when they join the Board. We recommend that each director be provided governance training as part of new director orientation. The training should directly address the role of a director in the context of a City agency taking into account specifically the municipal code, the *City of Toronto Act, 2006* and provincial legislation. A non-exhaustive list of topics that such training should be addressed in any training session includes: (i) applicable statutes, city bylaws and policies (ii) the role and duties of directors, including the duty of loyalty, duty of care, respect for dissent and the importance of collegiality; (iii) the role and duties of the Chair; (iv) the role of policies in Board governance, required policies and policy review; (v) the Code of Conduct; (vi) the open meeting requirements; (vii) the role of the City's accountability officers; (viii) and best governance practices.

It appears that the City Clerk and her staff may be best placed to organize this training. We also recognize that this training may be of interest other local boards and City agencies. The City Clerk may wish to consider running a governance training program for the entire class of incoming directors at all of the City local boards and agencies. We would expect that this program would require one to two full days. The Clerk's office may wish to partner with a governance consultant or a university to design and deliver the educational program, but it is important that that any program be customized to the context of Ontario local boards and agencies. We would recommend that the Chair and President discuss this training possibility with the office of the City Clerk.

*Recommendation 14: All incoming directors should receive substantive governance training as part of their orientation, focused on the role of a director on the board of a City agency and the relevant statutory framework.*

*Recommendation 15: The Chair and the President should discuss with the office of the City Clerk consider whether this training could be offered in conjunction with other City boards agencies and administered by the office of the City Clerk.*

## **7.7 Strategic direction**

In the Report, we acknowledge that the TPA has taken positive steps in drafting a strategic plan and is in the process of revising it. We make recommendations with respect to its regular review and amendment in the future.

*Recommendation 16: The Board should review the strategic plan annually, including whether the policies and practices of the TPA are generally consistent with the strategic*

*plan and whether the plan remains consistent with the needs of the TPA and City and to make revisions as necessary.*

*Recommendation 17: When reviewing the strategic plan, the Board should also review the mandate of the TPA, whether the mandate is consistent with the changing landscape of the City of Toronto and whether the Board believes that the mandate should be changed; if so, the Board should make such recommendations to Council.*

## **7.8 Policies**

As detailed above in this Report, policies play an important role in allowing a Board to fulfil its oversight role of the TPA and its staff. Accordingly, the Board must ensure that its policies are kept current and applicable to the operations of the TPA.

The review of policies should occur annually. To assist in this review, the Board should receive reports from management, responsible Board committees and, with respect to the governance and procedural policy, the Chair. The review should consider (i) whether the policies are consistent with TPA practice; (ii) whether the policies provide sufficient reporting to assist Board oversight; (iii) whether the policies are consistent with governance best practices; (iv) whether the policies are consistent with the Board's strategic vision for the TPA; and (v) whether additional policies are necessary to address any of the previous considerations. The review of policy should be clearly outlined in the governance and procedural policy.

It is also important that the TPA have the benefit of best governance practices in considering what policies to draft and the substance of those policies. The same may be true of other City agencies. The office of the Clerk of the City of Toronto should consider drafting a policy handbook for City agencies including a list of relevant policies and draft pro forma policies that could be adapted by each agency with, if available, the advice of the office of the Clerk. The policy handbook would also require regular review and amendment, which in turn could be adopted by the relevant agencies.

*Recommendation 18: The Board should review the TPA's policies annually, the process of which should be set out in the governance and procedural policy.*

*Recommendation 19: The office of the Clerk of the City of Toronto should consider drafting a policy handbook that could be adopted in whole or in part by City agencies, with advice with the office of the Clerk.*

## **7.9 Response to reviews by accountability officers**

We would recommend that the TPA adjust its response to future inquiries from accountability officers of the City of Toronto, such as the Auditor General.

First, the Board should take ownership of such reviews on behalf of the TPA, with the accountability officer reporting first to the relevant subcommittee *e.g.* the Auditor General would first make a report to the audit committee. This subcommittee should inquire as to the findings of the accountability officer, the cooperation of management and the ultimate recommendations of the accountability officer. The subcommittee committee should also canvass the views of management. The subcommittee should then report out to the Board with a view on the recommendations of the accountability officer.

Second, when adopting recommendations, the Board should direct management to report on implementation within a reasonable timeframe, with such reporting to continue until the recommendation is fully implemented. The Board should also consider directing management to implement the recommendation within a set time period and reporting on the status of meeting this deadline.

*Recommendation 20: The Board should take ownership of interacting with an accountability officer who is undertaking a review of the TPA through the relevant subcommittee, which would meet with, and make inquiries of, the accountability officer, canvas the view of management, and then report out to the Board with a view on the accountability officer's ultimate recommendations.*

*Recommendation 21: When adopting recommendations of an accountability officer, the Board should direct management to report on implementation within a reasonable timeframe or set a deadline for management and direct reporting of the implementation of this deadline.*

#### **7.10 Evaluation of Management**

The Board needs to evaluate the performance of management, including the President, to acquit its oversight role.

One way of doing this, seen in the private sector, is for a Board to consistently end its meeting with two *in camera* sessions: one session closed to all management except the President and is used to discuss any issues, current or potential, with management generally; and the second session is closed to all management, in order to evaluate the performance of the President himself. We recognize the restrictions posed by the open meeting principle and recommend that the Board discuss this matter with the office of the City Clerk to determine if an acceptable approach to these *in camera* review sessions could be developed.

*Recommendation 22: The Board should discuss with the office of the Clerk of the City of Toronto the manner in which it could implement a regular in camera review of management and the President that is consistent with the open meeting principles and its exceptions.*

#### **7.11 Evaluation of the Board and Chair**

The Board too must evaluate itself on how well it, and the Chair, are fulfilling their governance responsibilities. The evaluation should be sensitively administered.

*Recommendation 23: The Board should design an evaluation framework to evaluate the performance of (i) the Board as a whole; (ii) the committees of the Board; (iii) the Chair and (iv) the individual directors. The Chair should collect the results of the evaluation and the Board should constructively discuss the findings.*