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By E-mail
councilmeeting@toronto.ca

Mayor Tory and City Councillors
City of Toronto Council
2nd floor, West Tower, City Hall
100 Queen Street West
Toronto, ON M5H 2N2

Attention: Ms. Marilyn Toft, Manager

Dear Mayor Tory and City Councillors:

**Re: Item PH31.1 - Development in Proximity to Rail: Amendment to the Official Plan – Final Report and OPA 536
Talus (Bathurst) Limited and Related Companies**

We are solicitors for Talus (Bathurst) Limited and related companies (collectively “Talus”), the owner of properties located in the City of Toronto including: 1109 Bathurst Street. Talus also has broad land interests in the City of Toronto and acquires additional interest in lands in the City from time to time. We have reviewed the Development in Proximity to Rail: Amendment to the Official Plan – Final Report, dated January 27, 2022 (the “Report”) and the draft Official Plan Amendment No. 536 (the “OPA”) as set out in Attachment 1 to this Report.

We agree with the stated goal of the OPA and recognize the importance of addressing safety in development along the City’s rail corridors. However, we believe that this goal is already being met through current development approval processes. There is no evidence that this OPA will change or improve development safety in proximity to rail facilities such that this OPA intervention is needed or warranted.

Talus’ concerns with the OPA are discussed below, which speak to the prematurity of the instrument.

Lack of Differentiation of Land Uses

Policy 1 of the OPA will require the submission of a Rail Safety and Risk Mitigation Study as part of a “complete application to introduce, develop or intensify land uses within the area of influence of rail”, but does not differentiate between different types of land uses, including those that may be more or less sensitive to the operations of a railway in close proximity.

The Provincial Policy Statement, 2020 (the “PPS”), particularly Policy 1.2.6.1, speaks to achieving land use compatibility as between major facilities, which includes rail facilities, and sensitive land uses. One of the land use compatibility criteria in Policy 1.2.6.1 is to minimize risk to public health and safety. The PPS does not require planning and development to consider land use compatibility as between rail facilities and other major facilities, employment, commercial or retail facilities.

The OPA should be revised to exempt all non-sensitive development in proximity to rail from having to undertake and submit a Rail Safety and Risk Mitigation Study as part of a complete application.

Lands In “Proximity to Rail”

Policy 1 of the OPA will require the submission of a Rail Safety and Risk Mitigation Study as part of a “complete application to introduce, develop or intensify land uses within the area of influence of rail”, but the OPA fails to define the term “area of influence of rail”.

Staff reference 30 m in the Report, while the Rail Association Guidelines set out 30 m or 15 m requirements from railway lands to a building. Rail authorities argue that that the “rail influence area” for a rail yard should be 1 km and 300 m for a rail line. Since the OPA is silent on the matter, there is uncertainty as to what lands are subject to the Rail Safety and Risk Mitigation Study requirements of the OPA.

Lack of Transition

The OPA does not contain transition provisions, which are critical to prevent prejudice to landowners or developers with development projects and applications that are already approved.

A site may have an approved zoning by-law amendment that is predicated on certain approved rail mitigation. Requirements to undertake a Rail Safety and Risk Mitigation Study in conjunction with further development approvals will require such rail mitigation to be re-evaluated, potentially relative to new criteria, representing uncertainty that the development permitted by the zoning by-law amendment can be built.

The OPA should be revised to exempt approved developments and future applications that arise out of, or implement, such instruments.

Duplicative Processes Lead to Uncertainty

The OPA requires that a Rail Safety and Risk Mitigation Study be prepared in conjunction with each development approval that introduces, develops or intensifies land uses within the area of influence of rail. As drafted, a new Rail Safety and Risk Mitigation Study would be required at each stage of development approval: Official Plan Amendment, By-law Amendment, Site Plan Approval, consent, plan of subdivision approval, plan of condominium approval, etc. This is duplicative, leads to uncertainty given that at each development approval, rail mitigation requirements may differ, and is likely unnecessary.

It also may be inappropriate for the OPA to require such a Study depending on the proposed land use in “proximity to rail” (see the discussion above) or scale of the “development” being proposed, for example accessory structures.

At zoning by-law amendment, when land use and building envelope permissions are established, that is when rail mitigation should be considered and secured. A new Rail Safety and Risk Mitigation Study should only be required at Site Plan Approval or in conjunction with other development approvals should alternative rail mitigation be sought by the land owner/applicant or when a zoning by-law amendment is not required.

OPA 536 Indemnification

Policy 2(c) of the OPA requires the landowner to enter into an agreement with the City, whereby both the landowner and the qualified professional engineer who has stamped the drawings for alternative mitigation measures would “assume responsibility for, and indemnify the City from, damages to persons and property resulting from a derailment on the rail corridor”.

If the City is going to enter the arena of regulating rail safety, which is the intent of the OPA, the City must also bear the responsibility for approving rail mitigation measures as part of its statutory duty in reviewing and approving land use planning applications. The City cannot foist this liability onto a third party, and it is unlikely that engineers will enter into such indemnification agreements. This indemnification requirements will limit all development (employment, commercial, institutional, mixed use and residential) in "proximity to rail" facilities and will potentially reduce opportunities for transit-orientated development. Policy 2(c) must be removed from the OPA.

Requests

For the above noted reasons, on behalf of Talus we respectfully request that Council's decision on the OPA be deferred and that staff be directed to return the item for Council's consideration when the above noted matters have been addressed, in order to ensure that a balanced and reasonable rail safety process is established, with clear and transparent requirements and obligations for all.

We also ask to be provided with notice of all upcoming meetings of Council and Committees of Council at which the OPA will be considered and we ask to be provided with notice of Council's decision with respect to the OPA.

Thank you for your consideration of this submission. If you have any questions or require further information, please contact the undersigned.

STIKEMAN ELLIOTT LLP



Calvin Lantz
Partner

CL/na
cc. Jonathan Wheeler, *Talus (Bathurst) Limited*