

By email

8 March 2022

FOA

Kerri Voumvakis, Director Strategic Initiatives
Brooke Marshall, Senior Planner
City Planning
City of Toronto

Our ref 283576-00/03

Dear Sir/Madam

Development in Proximity to Rail: Amendment to the Official Plan

Feedback on rail safety review policies

Arup is a multi-disciplinary built environment and engineering consultancy. In Toronto we have and continue to provide rail expertise, including developing rail safety and risk mitigation reports for many developments including a number seeking to build in close proximity of the city's rail corridors. We also undertake peer reviews for the City of Toronto of the rail safety and risk mitigation reports for development applications.

This letter is to provide feedback on an aspect of the proposed measures to amend the Official Plan that are intended to support a consistent approach for developments in adjacency to rail corridors and facilities. Specifically, we are providing feedback on the proposed policies within Attachment 1: Official Plan Amendments. The proposed policy states the following about the intent to enter an agreement with the landowner and engineer:

the landowner will enter into an agreement with the City to be registered on title, whereby the landowner and the qualified professional engineer whose stamp appears on the drawings for the alternative rail safety mitigation measures assume responsibility for, and indemnify the City from, damages to persons and property resulting from a derailment on the rail corridor.

Our review of this is based on the fact that the objective of the rail safety report is to demonstrate that alternative measures, such as crash walls that allow a development to be closer to a rail corridor, are intended to ensure the level of risk is the same or lower when compared to typical measures and setbacks. The studies are focused, as required by the guidance, on reducing the consequences of a train derailment in relation to sensitive and high occupancy land uses only. It is not the intention of the study or measures to eliminate the risk entirely, nor is it possible to eliminate the risks entirely. The likelihood of a train derailment is a function of the railway design and infrastructure within the rail corridor. The developer's proposals do not change the railway infrastructure and so do not change the likelihood of a train derailing.

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From this perspective it is not appropriate to ask that the developer or engineer indemnify the city for *damages to persons and property resulting from a derailment on the rail corridor* as they are not in control of this risk.

Other considerations in relation to the engineer's responsibility also include:

- It must be clear that the engineer is subject to the exercise of reasonable skill and care and is only liable if and to the extent that it fails to exercise such standard.
- Any liability of the engineer must consider the engineer's scope and the limitations of same. For example, if the engineer's brief is clear that the engineer cannot guarantee eliminating all risk but rather managing risk to reasonably low levels of risk, then engineer should not have any liability for all risk.
- The engineer holds a contract with the developer/landowner, with whom the engineer has agreed a scope (with limitations), terms and conditions and whose instructions the engineer follows in respect of key decisions. In the event of any claims by a third party (in this instance, the City), it must be clear that the engineer will be entitled to rely on the same limitations and defenses that the engineer would have as if the City were named a joint client with the developer/landowner.

These considerations are important as without them then a broad request for indemnity, such as that that appear to be proposed here, would be beyond the scope of professional liability insurance typically available to engineers. This requirement for the engineer to indemnify the city as written could act to prevent engineers being prepared to support the development community in building developments along the rail corridors and in doing so stifle the city building that the process is intended to support.

We support a robust process of engineering study, as currently proposed through the rail safety and risk mitigation reports, that enables developments to be configuration and a range of bespoke approaches used to meet particular site constraints and context. We also support appropriate review by the authorities. What we would recommend is that the responsibilities and liability on the engineer are commensurate with their scope of work, the objectives of their study and established professional practice standards.

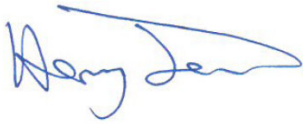
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Yours sincerely



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