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By E-Mail

Honourable Rob Flack
Minister of Municipal Affairs and Housing
777 Bay Street, 17th Floor
Toronto, ON M7A 2J3

Dear Minister Flack:

Re: Proposed Changes to Support Standardizing Parkland Requirements - Encumbered Parkland
ERO number 026-0312

We are writing to support the consultation being undertaken by the Ministry of Municipal Affairs with respect to facilitating the ability of encumbered lands to satisfy *Planning Act* parkland dedication requirements. We provide in this submission our comments with respect to appropriate criteria for consideration in accepting such encumbered parkland, and the process for making such determinations of appropriateness.

In general, criteria should be kept as simple and open as possible. Efforts to anticipate every possible situation and project will invariably fail. Excessively detailed criteria will tend to limit positive creative opportunities that benefit the public. As such, the general approach identified in the consultation of setting limited clear general criteria appears to be the most appropriate way of balancing a need to ensure any encumbered parkland proposed meets public parkland needs, while not blocking or preventing creative and innovative solutions, appropriate to specific development proposals.

With respect to process, there are gaps around the concept of a municipal "decision" to refuse to accept encumbered parkland, which is the key trigger event for an appeal to have the matter resolved by the Tribunal on appeal. Those gaps, and a balanced approach, can be achieved by providing a mechanism for landowners to request a decision at any point, and to be able to then appeal the decision, or non-decision, to the Tribunal. This will provide greater certainty to the process, and minimize the risk of abuse by municipalities refusing to make decisions.

The Approach of Identifying Ineligible Land, and the Proposed Categories for Inclusion Appears Appropriate - And Contaminated Lands is An Appropriate Criterion for Ineligibility

The proposed approach of clearly identifying categories of land that cannot qualify as encumbered parkland represents the type of general, and clear standard that is appropriate to apply as a criterion.

The identification of "contaminated lands" as ineligible seems appropriate. The key description of contaminated lands as those lands having contaminants "that pose a public health risk" is also one that should be maintained. However, if contaminated lands are remediated to meet the scientific and legal standards established for the intended uses, and demonstrated as such in a record of site condition, those lands should no longer be treated as ineligible.

Tests of Accessibility and Comfort for Use Are Appropriate Requirements

The Provincial posting indicates that, for land that is otherwise encumbered to be treated as eligible parkland, it must be "accessible by all users directly from the public realm".

This is an appropriate requirement. It is sensible that parkland must be accessible to users who make use of the public realm in order to access the site. Typically parks are located with some frontage on a public road (and often its adjacent sidewalks). In some locations, access to a park may instead be from a trail or multi-purpose pathway - but typically such trails or pathways are both in public ownership, and connect with larger pedestrian or trail systems. Such publicly owned pathways and trails should be considered to be part of the "public realm", for the purposes of this requirement. The proposed Regulation should make clear that such trails and pathways are considered to be part of the "public realm".

The proposed requirement that the parkland should be "readily visible from the public realm" is also a reasonable requirement. If such a requirement is not established in the Regulation, there is a risk that space which functions largely as a private recreational or garden area within a larger development gets treated as parkland. While such private recreation spaces may be desirable and appropriate, they do not represent an adequate substitute for public parkland.

Encumbered parkland should look and function as park or public recreation space in such a fashion that the casual observer, when seeing the space, would not be able to readily distinguish it from otherwise unencumbered parkland. Visibility and accessibility are, together, the key elements to ensure that encumbered parkland is seen by the public as simply parkland.

The proposed Regulation also proposes that the land in question "must be of a size and shape that is capable of serving park or public recreational purposes." This is also a reasonable requirement. The parkland should be on land that appears intended for that purpose - not as remnant, or otherwise unusable or undevelopable lands. It must be a meaningful park, of value as an asset to the community. For this reason, the "size and shape" for park or public recreational purposes requirement is reasonable to include in the regulation.

Use of Lands Above Underground Parking As Parkland Has Potential to Achieve Valuable Urban Spaces

The previous general practice whereby municipalities would prefer to take cash-in-lieu of parkland instead of accepting encumbered parkland established above below-grade parking garages has produced a history of missed opportunities.

A prime example can be found in the heart of downtown Toronto, at Roundhouse Park. This is one of the most loved and vibrant park spaces in the downtown core. With ample space, and an interesting theme that respects the local history, it is a welcome space enjoyed by many on pleasant days who take it in after visiting the CN Tower, the Aquarium or the Stadium - all located just steps away. Yet this very special and vibrant park space is constructed on top the underground parking garage of the Metro Toronto Convention Centre. If there had not been the imagination and creativity of the participants at the time, this "encumbered park", that works so well, would never have happened.

By allowing for more encumbered parks to be established, and incentivizing their location in otherwise dense areas, we can look forward to more surprising and unexpected high quality parks being built in areas where that would not have been practical or possible previously.

Issuing a Regulation to provide guidance on the criteria and requirements for such encumbered - without being overly prescriptive - will create the opportunity for more creative and innovative new park planning, especially in dense urban areas.

A Practical Implementation Issue - The Matter of a Municipal "Decision" to Refuse to Accept Encumbered Parkland

The intention of the amendments to the *Planning Act* respecting encumbered parkland is to permit an appeal to the Ontario Land Tribunal in cases where a municipality has refused to accept encumbered parkland under section 42 of the *Act*.

The statute provides that an appeal can be filed by a landowner within 20 days of receiving a notice from a municipality of its decision to refuse to accept the park. However, there is a lack of clarity about the point in time that such a decision must be made by a municipality - and thus about the appropriate timing of an appeal.

A straightforward reading of the amendments would lead one to a conclusion that the intention is that such a decision be made at an early stage in the process of the consideration of an application, so that the question can be considered by the Tribunal and resolved before finalizing other *Planning Act* approvals. However, it is possible that a municipality could delay making a decision until late in the Planning process - or potentially even after other planning application matters have been decided.

The lack of clarity on this matter could lead to a variety of scenarios where the provision is utilized by a municipality to delay a project, or use the parkland decision as leverage in other matters. This is potentially problematic.

One solution might be for a provision to be established in the statute allowing a landowner to appeal to the Tribunal for a "non-decision" of a Municipality on a proposed encumbered park. This would be similar to the same appeal for non-decision potential that exists for official plan, zoning and site plan applications in the *Planning Act*. However, this would require a further amendment to the statute.

In the alternative, some further direction should be provided in the Regulation to allow the triggering of a decision by a municipality - allowing for an appeal at that point. This could be as simple as a requirement that once a proposal for encumbered park has been made, a municipality must make a decision within a certain time period if the landowner requests a decision. This could fit in the scope of the process established in the Regulation, under the scope of section 42 (4.34).

Or, the Regulation could include a mechanism whereby a landowner can "request" a decision on a proposed encumbered parkland contribution, and the Municipality could then be required to make and provide notice of a "decision" within a certain time frame. The Regulation could further provide that the failure of the municipality to provide notice of decision within that time frame after a request for a decision, would constitute a "deemed refusal", allowing the landowner to appeal the matter to the Ontario Land Tribunal.

Conclusion - A Regulation to Permit Encumbered Parkland to Satisfy Park Requirements Under Section 42 of the Planning Act is A Positive Step Forward that Will Facilitate Creative Park Planning

In summary, we are supportive of the proposed Regulation to facilitate the establishment of encumbered parks under section 42 of the *Planning Act*. We believe that it will open the door to more, larger, and creative new recreation spaces - especially in built-up areas of cities - than would otherwise be possible.

We encourage you to take these comments into account, including those respecting the potential appeal process.

We would be delighted to discuss this submission with you further.

Yours truly,

AIRD & BERLIS LLP

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Partner