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Benefits and Risks municipalities face in gratuitously obtaining lands for Roads and Parks by agreeing to share same with the landowner

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A: Introduction[1]

There is little doubt that, at least in Ontario, population growth is occurring within cities and the expectation is that this trend will continue.[2] The provincial government directs where within a city a significant portion of that population growth should be planned by setting specific density targets for defined geographic areas, known as Urban Growth Centres.[3] These Urban Growth Centres are typically in the downtown of a municipality and are areas that are built-up, so the planned growth is mostly accommodated through intensification and redevelopment of underutilized lands. Urban Growth Centres have public roads and parks that service the existing population, which may have some additional capacity. But as population densities increase, a municipality will inevitably require new roads and parks in these areas in order to maintain current service levels.

The above is not to say that new roads and parks are not required outside of Urban Growth Centres; rather, municipalities face greater challenges in obtaining roads and parks within Urban Growth Centres because of the limited and expensive supply of land.

With municipalities in Ontario, and perhaps across North America, facing increased fiscal restraint, there is a need for municipalities to obtain road and parks gratuitously. However for the reasons mentioned above, that can be difficult to do in an Urban Growth Centre or its equivalent – making the problem significant.

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[1] The comments in this paper belong to the author and are not on behalf of the Corporation of the City of Mississauga.

[2] For example: the *Growth Plan for the Greater Golden Horseshoe, 2006* ("the Growth Plan") a provincial planning document, projects population growth in the City of Toronto to increase to 3.3 million by 2031. The City of Toronto's population as of 2011 was 2.615 million.

[3] See the Growth Plan – for example: policy 2.2.4 (5) provides that Urban Growth Centres will be planned to achieve, by 2031 or earlier, a minimum gross density target of – 400 residents and jobs combined per hectare for each of the urban growth centres in the City of Toronto and 200 residents and jobs combined per hectare for the growth centre within the City of Mississauga.

This paper explores the challenge of gratuitously obtaining roads and parks in Urban Growth Centres in Ontario. However, this is a challenge that exists in many other municipalities across North America and so this paper has a much broader application. This paper begins by briefly examining the statutory tools that are available to municipalities in Ontario to gratuitously obtain roads and/or parks. Ontario is not unique in having such planning tools as similar (and, in some instances, more robust) tools exist in other Provinces in Canada. Take for example, the *Planning Act*[4] for the Province of Manitoba, which permits, as a condition of making an amendment to a zoning by-law, the board or council to require the owner of the affected property to enter into a development agreement. Pursuant to subsection 150 of the Manitoba *Planning Act*, that development agreement can require the construction or maintenance at the Owner's expense of works, including roads, connecting streets and street lighting.[5] The development agreement can also require the conveyance of lands for public reserve purposes, not exceeding 10% of the lands, or alternatively a cash-in-lieu payment.[6] A comprehensive analysis of statutory tools available to obtain roads and/or parks across Canada would be helpful but is beyond the scope of this paper.

This paper explores the instance where the statutory tools do not solve the problem, in which case sharing the lands for the roads and/or parks with the landowner of an adjacent development proposal (the "Landowner") is suggested as one possible solution of incentivizing the Landowner to gratuitously provide the same. This is a solution that has application beyond Ontario. The sharing of lands typically permits the Landowner to install and maintain

[4] *The Planning Act*, C.C.S.M. c. P80.
[5] *Ibid.*ss. 150.
[6] *Ibid.* ss. 135 para. 6e and ss. 136(1).

infrastructure beneath the road and/or park, typically a parking structure. There are two options on how this relationship may be entered into with the Landowner, including:

(1) Strata division between surface public road and/or public park and private parking structure; and

(2) Private road and/or private park with public right-of-way on top of the private parking structure.

The pros and cons of each of these options are explored, including in relation to the status quo which is a public road and/or public park on fee simple. Finally, an example of these options being implemented through a recently approved development application in an Urban Growth Centre within the City of Mississauga is explored.

B: Statutory Tools Available to Obtain Roads and/or Parks

In Ontario, there are planning tools that municipalities can utilize to gratuitously obtain roads and/or parks generally and within Urban Growth Centres, and these tools include Parkland Dedication; Subdivision Control; Bonusing; and in certain limited circumstances, Site Plan Control.[7] What follows is a brief summary of each tool and some reasons why the tool might not be sufficient to obtain roads and/or parks gratuitously.

- **Parkland dedication** – Subsection 42(1) of the *Planning Act*[8] permits a municipality to pass a by-law requiring as a condition of development or redevelopment that land be

[7] It is recognized that municipalities can raise funds for roads and/or parks through property taxation, and/or through development charges for that portion of the road and/or park required to service new development. The land itself could then be purchased through an agreement entered into with the landowner, or it can be obtained through expropriation. However, this option is not explored in this paper in part because of the high cost of land in Urban Growth Centers and the increased fiscal constraints municipalities face in Ontario that makes obtaining road and/or parks gratuitously preferable.

[8] *Planning Act*, R.S.O. 1990, c. P.13.

conveyed for park or other recreational purposes. The conveyance cannot exceed 2% of the land in the case of commercial or industrial development or redevelopment, and 5% of the land in the case of all other forms of development or redevelopment. Subsection 42(6) of the *Planning Act* authorizes a municipality to accept all or part of the parkland dedication requirement in the form of payment of monies instead of land dedication. The issue with the aforementioned parkland dedication requirement is that it is not well suited for high density development, which is the form of development commonly found in Urban Growth Centres. For example, 5% of the land typically required for the development of a 30 storey residential building is likely insufficient land to meet the parkland needs generated by the residents of that building. To address this issue, subsection 42(3) of the *Planning Act* permits municipalities to require conveyance of park at an alternative rate of one hectare for each 300 dwelling units proposed or at such lesser rate as may be specified in the by-law. The alternative rate, however, can only be utilized where the proposed development is for residential purposes. Recently, the Ontario Municipal Board (the "Board")[9] has found that it has jurisdiction to hear not only whether an alternative rate should be used, but also what that alternative rate should be.[10] This has the potential to reduce how much land can be obtained for parkland using this tool. Indeed, in *Yonge Bayview Holdings Inc. v. Richmond Hill (Town)* [11] the Board ruled that it has jurisdiction to impose an Official Plan policy that would affect a municipality's parkland by-law. In that case, the Board did so by imposing a cap

[9] Note: the Ontario Municipal Board is a provincial administrative tribunal that has jurisdiction to hear all *Planning Act* appeals. A review of an Ontario Municipal Board decision may be made with leave to appeal to the Divisional Court of Ontario.
[10] *Amir-Hessam Ltd v. Richmond Hill (Town),* [2012] 74 O.M.B.R 236, 4 M.P.L.R. (5th) 328.
[11] [2015] O.M.B.D. No. 15, 2015 CarswellOnt 501.

on the amount of land (or monies paid in lieu of land) that the Town of Richmond Hill could obtain through its parkland bylaw to 25% of the area of the development parcel. In determining the applicability of the parkland dedication provisions of the *Planning Act*, consideration must also be given to the magnitude of the development.[12] Even where there is authority to obtain a significant parkland contribution under subsection 42(1) of the *Planning Act*, there may be other concerns to using the tool. Specifically, it may impose such a significant cost that it negatively impacts the feasibility of the development, or with respect to residential development, it may increase the cost of housing which may be contrary to any municipal affordable housing objectives. This tool also does not directly assist a municipality with obtaining roads.

- **Subdivision control** – If a proposed development requires the subdivision of land, Subsection 51(25) of the *Planning Act*[13]or Section 53 of the *Planning Act*[14], permit the approval authority as a condition of subdivision approval to impose such conditions to the approval of a plan of subdivision as in the opinion of the approval authority are reasonable, having regarding to the nature of the development proposed for the subdivision, including a requirement that:
    - land be dedicated or other requirements met for park or other recreational purposes under section 51.1 of the *Planning Act*; and
    - such highways, including pedestrian pathways, bicycle pathways and public transit right of way, be dedicated as the approval authority considers necessary.

[12] *Pension Fund Realty and Ottawa (City)* [1981] 32 O.R. (2d) 611, 122 D.L.R. (3d) 308.
[13] *Planning Act*, R.S.O. 1990, c. P.13.
[14] Note: Section 53 of the *Planning Act* permits the severance of land with a consent, and permits the approval authority to impose the same conditions on approval of the consent as may be imposed on approval of a plan of subdivision.

With respect to parkland requirements that may be imposed under subdivision control, the requirements under section 51.1 of the *Planning Act* are nearly identical to those under subsection 42 of the *Planning Act*, which are explained above. As a result, the availability of subdivision control as a mechanism to obtain parkland is subject to many of the same concerns. The discretion provided to the approval authority under subsection 51(25) of the *Planning* Act is broad, however the Divisional Court of Ontario has been clear that the exercise of it must be relevant, and fairly and reasonably relate to the matters set out in the *Planning Act* or to the consequences of the development.[15] Moreover, the Board has found that the discretion to impose conditions pursuant to Subsection 51(25) of the *Planning Act*, should meet a fourfold test that the condition be "reasonable, relevant, necessary and equal".[16] Where a proposed development does not require a plan of subdivision or the severance of land, this tool is not available. This can be the case with infill development within an Urban Growth Centre. Moreover, even where the tool is available, it may be unreasonable to impose the condition – for example, requiring the landowner to convey roads that are not shown in the municipality's in-force official plan, which may occur where the implementation of the official plan policy that includes the roads is moving slower than the pace of redevelopment of the lands required for the roads.

- **Bonusing** – Section 37 of the *Planning Act* permits a municipality, through a zoning by-law amendment, to authorize increases in the height and density of a development otherwise permitted by the zoning by-law for the development lands in return for the

[15] *Re Mills et al. and Land Division Committee of the Regional Municipality of York et al.* [1975] O.J. No. 2405, 60 D.L.R. (3d) 405 (Div. Ct.).
[16] *Bodnar, Re* [2014] O.M.B.D. No. 746, 82 O.M.B.R. 77.

provision of such facilities, services or matters as are set out in the zoning bylaw amendment. In order for a municipality to seek a section 37 bonus, it must have policies in its official plan related to the authorization of increases in height and density of development. The Board has held that section 37 benefits must be grounded in fair, clear, transparent, predictable and specific requirements that are set out in the official plan.[17] The value of the community benefit is often tied to the uplift value in the land that results from the proposed increased in height and/or density of the lands. In Urban Growth Centres, the form of development often demands additional height and density and so the section 37 tool is useful to obtain community benefits – and a form of community benefit can be roads and/or parks. There is case law that suggests that there needs to be a nexus between the development for which zoning approval is being given and the community or public benefit tied to the approval.[18] It is not hard to see how a park or road near or using part of the development lands would meet this nexus requirement and be of public benefit. However, there can be competing community or public benefits, and with a limitation on what is a fair section 37 contribution, there may not be sufficient funds from this tool to provide for roads and/or parks gratuitously. Also, in some instances, there is no additional height and density required for a proposed development, even within an Urban Growth Centre, and in such instance this tool is not available.

- **Site Plan Control –** there is no statutory authority to obtain parkland or public highways gratuitously through site plan control. However, this tool can be used with some limited

[17] *Dun West Properties Ltd. v. Toronto (City)* [2014] O.M.B.D. No. 171, 21 M.P.L.R. (5th) 157.
[18] *Sterling Silver Development Corp. v. Toronto (City)*, [2005] O.M.B.D. 1313.

success as a mechanism for negotiation with the Landowner, where the Landowner requires site plan approval. Subsection 41(7) of the *Planning Act* does authorize a municipality to obtain gratuitously a road widening to an existing public highway provided that the required widening is shown on or described in the municipality's official plan. The site plan control provisions also permit a municipality to obtain gratuitously part of the development lands for a public transit right of way, provided that this is also show on or described in the municipality's official plan.

Where the above tools can be used to obtain roads and/or parks, the likely result is that the municipality will obtain public roads and/or public parks on a fee simple interest. Such a form of ownership of roads and/or parks raises an additional consideration that there will likely be no on-going funding from the Landowner for the cost of maintaining and/or repairing the road and/or parks. Where the above tools do not provide a mechanism for a municipality to obtain roads and/or parks gratuitously, one option is for the municipality to offer to share the lands for the roads and/or parks with the Landowner as a means of incentivising the Landowner to gratuitously provide the same.

C: Pros and Cons on Variations on the Sharing of Lands

A Landowner may be willing to share the lands for a road and/or park in an Urban Growth Centre, where the Landowner is permitted to maintain a private parking structure beneath said road and/or park. In such instance, the Landowner may also be willing to

construct the road and/or park gratuitously. As mentioned above, there are two variations on how lands can be shared in this manner, including:

(1) Strata division between surface public road and/or public park and private parking structure (the "Strata Option");

(2) Private road and/or private park with public right-of-way on top of the private parking structure (the "Public Easement Option").[19]

What follows is analysis of the pros and cons of the Strata Option and the Public Easement Option, in relation to the status quo, which is a public road and/or public park on fee simple (the "Status Quo Option"). As the issues to consider in analyzing the Strata Option, the Public Easement Option and the Status Quo Option are somewhat distinct for road and parks, the analysis for each is done separately. The identification of issues to consider in determining the pros and cons is not intended to be comprehensive, but instead to highlight some of the significant issues.

i) ***Roads***

- **Security of Public Access** – A City will want to control public access to a road it seeks to add to its network. For the Status Quo Option, the right to do this exists because the road will be a public highway, and that right is maintained until at least such time as the municipality may make a decision to close said public highway. The City's control over the road includes restricting the common law right of passage and the common law

[19] Another option is for the City to acquire all of the lands, build a parking structure beneath it, and then licence back the parking structure to the owner of the lands. The issue with this approach is that the municipality will likely need to make a significant capital investment to pay for the cost of constructing the parking structure, which is recouped through a licence fee from the Landowner. This option is not explored in this paper because it is inconsistent with the premise that municipalities are facing fiscal constraints.

right of access.[20] It also permits a municipality to have control over temporary closures of the road, whether this is required for maintenance and/or repairs to the roads; occupancy of the road for a special events such as a parade; or occupancy of the road to facilitate the development of adjacent lands. The Strata Option shares the same rights because the road is also a public highway. The Public Easement Option requires the City to negotiate with the Landowner over the security of public access and to include same in the easement agreement entered into with the Landowner. There is also a need for enforcement of the easement agreement, in the event that the Landowner does not comply with the provisions of the easement agreement.

- **Regulation of Traffic under Highway Traffic Act** – The *Highway Traffic Act* applies to public highways in Ontario. As a result, it would be applicable to both the Status Quo Option and the Strata Option. With respect to the Public Easement option, it may be difficult to ensure public safety on the road because the enforcement and penalty provisions under the *Highway Traffic Act* are not applicable.[21] That said, there are many instances where motor vehicles travel over roads that are not public highways and anarchy does not ensue.
- **Public Third Party Liability –** For both the Status Quo Option and the Strata Option, there is a fairly well understood body of law that governs public third party liability arising from the design, maintenance and/or repair of the roads. Municipalities in Ontario have an obligation to maintain and keep the road in a state of repair that is

[20] "Without limiting sections 9, 10, 11, a municipality may pass by-laws removing or restricting the common law right of passage by the public over a highway and the common law right of access to the highway by an owner of land abutting a highway", *Municipal Act 2001*, S.O. 2001, c. 25, s. 35.
[21] *Highway Traffic Act*, R.S.O. 1990, c. H.8.

reasonable in the circumstances, including the character and location of the highway.[22] If a municipality defaults on this obligation, it is subject to liability under the *Negligence Act*. However, there are defences available, including that the municipality met at the time the cause of action arose, minimum repair standards established by the Minister of Transportation.[23] If the municipality is found to be negligent, it typically will resort to its insurance program which governs liability arising from such negligence on public highways.

With the Strata Option, there is the additional complication that if the repair of the road requires exposure of the underground parking structure and the waterproof membrane, there may be some desire to coordinate the repair of the road with any required repairs to parking structure and the waterproof membrane. This if not properly managed with the Landowner could result in a delay in any required repairs to the road, and that delay gives rise to the risk of third party liability arising from the disrepair of the road.

With the Public Easement Option, there is no need for the road to be built to public highway standards for liability reasons, but a poorly designed road could give rise to third-party liability. Invariably, the road is likely to be designed to standards nearly the same as municipal standards in order to meet other municipal objectives, including ensuring that the road meets streetscape and public realm policies the City may have. In terms of third party liability arising from maintenance and/or repair of the road, there is

[22] *Municipal Act,* s. 44.
[23] O.Reg 239/02.

no defence available under the *Municipal Act, 2001*.[24] The easement agreement entered into with the Landowner needs to delineate who will be responsible for third party liability. It is possible to shift a significant portion of the liability to the Landowner, especially where it also requires the road. To the extent that the municipality is responsible in certain instances for third party liability, it will need to obtain private insurance.

- **Achievement of Streetscape and Public Realm Policies –** With the Status Quo Option, the ordinary concerns associated with creating a satisfactory streetscape exist, including finding sufficient space in the municipal boulevard to accommodate trees and public utility infrastructure. The Strata Option and Public Easement Option complicate this by the existence of a parking structure beneath the road. It is difficult to plant trees in wells above a parking structure. However, silva cells can be used in some applications, and there is also the option for planter boxes.
- **Use of Right of Way for Underground Services –** Municipalities typically place infrastructure under their control, including storm water and sanitary sewers within a public right of way. A utility service provider in Ontario typically has a statutory easement to place their below ground infrastructure within a public right of way. The Status Quo option accommodates this. The Strata Option can accommodate this provided that there is sufficient space for the pipes in the strata that the City will own, as well as an appropriate agreement entered into with the Landowner to ensure the

[24] *Supra* note 22.

protection of the pipes. The Public Easement Option would generally limit the use of the below grade portion of the lands for private services of the Landowner.

- **Future Capital Expenses and Disrepair of the Parking Structure –** With the Status Quo Option, a municipality will budget for capital expenses required to resurface the road as required. Where a parking structure is beneath the road, the Landowner is required to convey to the City support easements. As there is a risk that the Landowner may fail to maintain and/or repair the parking structure to a condition that will continue to support the road, the municipality may wish to create a capital reserve to pay for the same. With the Strata Option, an option can be granted to the municipality to acquire the parking structure in the event that the Landowner fails to maintain it to a specified standard.
- **Operational Maintenance –** The obligation and expense of maintaining the roads is on the municipality for the Status Quo Option, and likely for the Strata Option. With the Public Easement Option, through agreement the Landowner can be obligated to maintain and/or repair the roads at its expense. This can be preferable from a liability perspective, where any repairs to the road may interfere with the below-grade parking structure.

ii) ***Parks***

On the issue of 'operational maintenance' or 'future capital expense and disrepair of the parking structure' the analysis for the Status Quo Option, the Strata Option and the Public Easement Option is the same for parks as it is for roads. Other issues to consider for parks, include:

- **Park Design Function & Programing –** A municipality will have full control over the park's design, function and programing with the Status Quo Option and the Strata Option. With the Easement Option some control over the design of the park, its function and programing can be obtained through agreement. A means of ensuring that the municipality has a say in the ongoing park programming is to setup a joint programing committee with the Landowner.
- **Loss of Parkland Credit –** With the Status Quo Option or the Strata Option, it is likely that if the Landowner conveys a fee simple interest in lands for parkland, a municipality in Ontario will have to provide the Landowner with a credit against any parkland dedication requirement it may otherwise have pursuant to section 42 of the *Planning Act*. With the Public Easement Option, whether a parkland credit is provided is dependent on the agreement reached with the Landowner.
- **Restrictions on Planting –** The Status Quo Option permits a municipality to create a park with a significant tree canopy. Permitting a parking structure beneath a park jeopardizes this. Creative technical design strategies and greening solutions can be implemented to achieve design excellence with a park above a parking structure. However, even if this is achieved, it is likely that the park will be impacted negatively whenever any reconstruction and/or repair work is necessary to the waterproof membrane of the parking structure. Under both the Strata Option and the Public Easement Option, the Landowner can be obligated to pay for any corresponding repairs that are necessary to the park as a result of repairs required to the parking structure and its waterproof membrane.

If the Status Quo Option can be obtained gratuitously then that approach is preferable for roads or parks given the issues considered above. Between the Strata Option and the Public Easement Option, what is the better option turns on what is more important to the municipality. Generally, if the primary concern is ensuring that the municipality has full control over the road and/or park and minimizes the risk of the road or park not existing in the future, then the Strata Option is preferable. However, if the municipality's primary concern is minimizing costs and liability, then the Public Easement Option is preferable.

D: Case Study - Development Application in the City of Mississauga

Through a recently approved development application, the Corporation of the City of Mississauga (the "City") has obtained roads using the Status Quo Option, the Strata Option and the Public Easement Option as well as a park through the Public Easement Option. The approved development, the roads and the park are in the downtown of the City, which is an Urban Growth Centre known as Mississauga City Centre.

To understand what was negotiated with the Landowner, it is important to first understand the development as well as certain background information including the policy framework in which negotiations were entered into with the Landowner.

i) *The Development & the Developer*

The development involved the south west expansion of an existing mall in the downtown of the City of Mississauga. The mall is known as Square One Mall and, at the time, had already gone through a fairly recent expansion to the north west portion of the mall. With the inclusion

of the south west expansion, the mall now has a total retail space of approximately 2.1 million square feet.[25] The south west expansion consists of new retail space of approximately 100,000 square feet for a luxury clothing retailer known as Holt Renfrew. In addition, the south west expansion of the mall includes a mall extension east of the Holt Renfrew store, a revised road network, public open space area and future development blocks to the east and west of the public open space area (the "Proposed Development"). Attached at Schedule "A" of this paper is a concept plan that shows the development lands (the "Development Lands") and each component of the south west expansion.

The registered owner of Square One Mall is OMERS Realty Management Corporation and Square One Property Corporation. But for the purposes of this paper, it can be called Oxford Properties ("Oxford"), as that entity manages the mall and is responsible for facilitating the development. Oxford is also the owner of significant land holdings within downtown Mississauga surrounding Square One Mall. It is therefore an important stakeholder for the City in the development of the downtown of the City of Mississauga.

ii) *The Policy Framework*

A portion of Mississauga City Centre, including at that time the subject lands, are subject to an Interim Control By-law, specifically City of Mississauga By-law 046-2011 (the "ICB"), and subsequent amendments thereto.[26] The ICB precludes any land, building or structure from being used for any purpose except the continued use of the land building or structure lawfully existing on the date the ICB was enacted. This freeze on development for a portion of

[25] Branda Dalgish, "Next Role for the shopping mall: City State?", *The Globe and Mail*, (16 June 2014), online: The Globe and Mail < http://www.theglobeandmail.com/report-on-business/industry-news/property-report/next-role-for-the-shopping-mall-city-state/article19186358/>.
[26] An interim control by-law may be enacted pursuant to subsection 38 of the *Planning Act*.

Mississauga City Centre was done to provide sufficient time to implement the findings of a city-initiated master plan study that was done for lands within Mississauga City Centre, known as Downtown 21. In March 2013, Mississauga City Council adopted Official Plan Amendment No. 8 ("OPA 8"), which modifies the Downtown Local Area Plan for the City of Mississauga. In addition, City Council passed an implementing zoning by-law, Zoning By-law No. 050-2013 ("ZBA 050-2013"). Both of these planning instruments were appealed to the Board by a number of affected landowners, including Oxford, and most of these appeals have yet to be resolved at the time of this paper. As a result, the ICB continues to be in-force.[27] OPA 8 and ZBA 050-2013 identified the roads and public open space the City required in connection with the Proposed Development, and as a result the City's identification of these required roads and parks in its official plan and zoning bylaw was under appeal.

A significant portion of downtown Mississauga, including the subject lands, has an "H" holding zoning designation. This holding zone designation is enacted pursuant to subsection 36 of the *Planning Act*, which states:

> The Council of a local municipality may, in a by-law passed under section 34, by the use of the holding symbol "H" (or "h") in conjunction with any use designation, specify the use to which lands, building or structures may be put at such time in the future as the holding symbol is removed by amendment to the by-law.

A condition of lifting this "H" hold designation is the execution of a development agreement and servicing agreement with the City. However, this condition did not give the City

[27] Subsection 38(6.1) of the *Planning Act* provides that " if the period of time during which an interim control by-law is in effect has expired and the Council has passed a by-law under section 34 consequent on the completion of the review or study within the period of time specified in the interim control by-law, but there is an appeal of the by-law under subsection 34(19), the interim control bylaw continues in effect as if it has not expired until the date of the order of the Municipal Board, or until date of notice issued by the secretary of the Board under subsection 34(23.1) unless the interim control by-law is repealed."

an unfettered right to negotiate with Oxford for roads and parks through a development agreement. This is because Oxford's application to lift the 'H" hold designation could have been appealed to the Board and, with OPA 8 and ZBA 050-2013 under appeal, the City had no statutory authority or policy framework to obtain the roads and/or parks gratuitously.

The proposed development was subject to site plan control pursuant to subsection 41 of the *Planning Act*, but as mentioned earlier, this tool has a limited application to obtaining road and/or parks gratuitously. With respect to the other tools mentioned earlier in this paper for obtaining roads and parks gratuitously, these were of little to no assistance in this case. This is because there was no subdivision application; any parkland dedication requirements were limited because the Proposed Development was non-residential; and no bonusing was available because of the City's existing zoning standards. The City has unlimited height and density in its downtown, and so at least in the downtown the section 37 bonusing tool is not available.

iii) ***The Deal***

In order to move forward with its Proposed Development, Oxford required the following planning approvals:

(1) A partial repeal of the interim control by-law and as a result a corresponding partial approval of OPA 8 and ZBA 0050-2013 as it applies to the subject lands;

(2) Approval of a lifting of the "H" application and the execution of a development agreement; and

(3) Site plan approval.

In addition, Oxford had an interest in the roads the City sought because these roads would also be used by customers seeking access to Square One Mall. The south west expansion of Square One Mall resulted in the elimination of a number of above-grade parking spaces, and the proposed additional retail space increased Oxford's parking requirement. Oxford, therefore, had an interest in finding a means of expanding its existing and proposed below-grade parking structures beneath the retail expansion. Going deeper, including beneath the retail expansion was not financially viable. Oxford therefore had an interest in obtaining the right to have below grading parking structures beneath certain roads and parks.

A City interest in the Proposed Development was to obtain gratuitously the roads and parks shown in OPA 8 on the Development Lands. As Downtown 21 identified the Development Lands as significant for the downtown, the City also has an interest in ensuring that the roads and park on these lands were designed and constructed to elevated streetscape and park design standards.

The policy framework and the above interests encouraged Oxford and the City to negotiate a development agreement that ultimately obligated Oxford to provide the City a number of things, including the following:

- To gratuitously design, construct and convey to the City a road that is to elevated City standards and specifications for a future public highway shown as Mercer Street on Schedule "A" attached hereto;

- To gratuitously design, construct and convey to the City a road that is to the City's standards and specifications for a future public highway shown as Princess Royal Drive – West on Schedule "A" attached hereto;

- To gratuitously design and construct above a below grade parking structure a private road that is to elevated City standards and specifications shown as Princess Royal Drive – Middle and East on Schedule "A" attached hereto, and to grant the City a public access easement over the private road;

- To gratuitously design and construct above a below grade parking structure a road that is to elevated City standards and specifications for a future public highway shown as The Exchange on Schedule "A" attached hereto, and to convey to the City a strata that will contain the future public highway but not the below grade parking structure; and

- To gratuitously design and construct above a below grade parking structure a park that is to City standards and specifications and to grant the City a public easement over the park, which park is shown as Park on Schedule "A" attached hereto.

iv) ***The Development Agreement***

The development agreement addressed a number of issues associated with sharing of the lands for the road and the parks with Oxford and/or any future owner of the parking structure. The primary issue was how the municipality would deal with the design, construction and future maintenance and repair of the private parking structure beneath roads or a park that are publicly accessible and in one instance beneath a public highway. What follows is a summary of how this was addressed contractually through the development agreement:

- **Load Plan** - In designing the below grade parking structure beneath the road or the park, Oxford was required to have its structural engineer prepare and certify a load plan describing the loading requirements necessary to support the roads and parks. With respect to the roads, the load plan was required to address City fire trucks which may mount the sidewalks and walkways, waste disposal trucks and equipment and machinery required for maintenance and repair of the roads. A copy of the load plan was provided to the City.

- **Construction and Design Drawings –** the structural engineer was required to ensure that the construction and design drawings for the below grade parking structure complied with the *Ontario Building Code*[28] and/or the *Canadian Highway Bridge Design Code*,[29] whichever provided the higher standard of design and included allowance for and has such additional strength as the structural engineer considers appropriate having regard to the load plan.

  The construction and design drawings were also required to ensure that the roof deck of the parking structure contained an adequate parking garage protection system, including a roof drainage system and was waterproofed with an appropriate membrane to protect against use and maintenance of the roads and park above the parking structure so as to prevent water penetration into the parking structure.

- **Specialist Consultant -** if the City was not satisfied with the construction and design drawings or the load plan, the City was permitted to retain an independent structural engineer to peer review the construction and design drawings and load plan submitted by Oxford, at Oxford's expense.

- **Design and Construction of the Parking Garage** – Oxford was made responsible for designing and constructing the parking structure in accordance with the load plan and the construction and design drawings and any revisions the specialist consultant retained by the City recommended.

[28] O.Reg 332/12.
[29] O.Reg.104/97 defines the Canadian Highway Bridge Design Code as "means the 'Canadian Highway Bridge Design Code' designated as CAN/CSA-S6-00 published by the Canadian Standards Association and the 'Commentary on CAN/CSA-S6-00, Canadian Highway Bridge Design Code' published by the Canadian Standards Association as they may be amended from time to time".

- **Maintenance and Reconstruction of the Parking Garage** – Oxford is required to keep all structural components of the parking structure in a good state of repair and in a manner and quality consistent with a prudent owner and the requirements of Ontario Regulation 104/97 and the *Canadian Highway Bridge Design Code*.
- **Temporary Closure of Roads and/or Parks for Parking Garage Repair –** where repair, maintenance or replacement work requires the temporary interruption of the roads or the parks, Oxford is required to provide the City notice and shall thereafter schedule such works during the time of year that will cause the least interruption to pedestrians and traffic. The City's consent is required in order to proceed with the works, save and except in emergency situations, where consent is not required.
- **Restoration of Street and/or Park –** Oxford is required immediately upon completion of any repair or maintenance to the parking structure, to restore any damage to the road and/or park at its expense to its previous condition to the extent reasonably possible.
- **City's Right to Repair Parking Structure –** The City has the right to enter into the parking structure to inspect the state of repair and maintenance of the parking structure upon giving Oxford written notice. If after providing notice of any defects with the parking structure, Oxford fails to remedy the defaults within a reasonable time period, the City can undertake the repairs and thereafter Oxford agrees to reimburse the City for any costs it incurs. Although the City has the right to repair the parking structure, it has no contractual obligation to inspect and/or repair the parking structure.

- **Emergency City Repairs –** In the event of an emergency where the life or safety of the public is endangered, the City has the right to undertake repairs on the parking structure, at Oxford's expense, without notice to Oxford.
- **Owner to obtain insurance for parking garage and provide indemnity to City –** Oxford is required to insure and keep insured the parking garage and the roads and park to be supported thereby for their full replacement cost, without depreciation. It is also required to obtain comprehensive general liability insurance covering damages, losses, claims and expenses for or in connection with any personal injury death or property damage that might be incurred on or about the roads or park or is the result of the maintenance, repair, reconstruction or operation of the parking structure, including any damage arising from the failure of the parking structure to provide support for the roads or park. This insurance policy is ultimately required to be to the City's satisfaction. Oxford has also agreed to provide the City an appropriate indemnity for any losses that the City could incur in connection with the road and/or park being situated above its parking structure.
- **Condition Assessment Program –** Oxford has agreed to prepare a condition assessment report every three years on the parking structure. It is also required to provide a certificate from a professional engineer licenced in the Province of Ontario within 180 day of the submission of the condition assessment report, certifying the completion by Oxford of all works, maintenance, repairs, modifications to the parking structure recommended or required by the condition assessment report. Oxford is also required to provide a signed certificate issued by a senior officer of Oxford confirming with and as

part of the condition assessment report that Oxford has set aside sufficient funds to satisfy and perform its obligations to maintain, repair and restore the parking garage, and by consequence any repairs to the road and/or park.

- **City Repairs to the Strata Road** – Should the City make repairs to the road so as to expose the parking garage protection system of the parking structure, Oxford agrees that it will at its expense coordinate and undertake any repairs, maintenance, reconstruction or replacement work to the parking garage protection system or parking structure as may be required.

E: Conclusion

The need for roads and parks is increasing in Urban Growth Centres or their equivalent, however the cost to municipalities to obtain these roads and/or parks is more expensive in such an area. Municipalities are facing fiscal constraints and so despite the aforementioned, it is preferable for municipalities to obtain these roads and/or parks gratuitously.

In Ontario, the existing planning tools provide some means of obtaining roads and/or parks gratuitously in Urban Growth Centres. It would appear that similar tools exist in other jurisdictions. Where the planning tools permit a municipality to obtain a road and/or park gratuitously, the form of ownership is a fee simple interest and the road will likely become a public highway. However, where the planning tools do not provide a means of obtaining roads and/or parks gratuitously, a municipality can consider sharing the lands for the road and/or park with the Landowner.

There are two options for how this can occur that were discussed in this paper: i) stratified ownership of the road and/or park; or ii), a public easement over the road and/or park, both of these options take place above a privately owned parking structure. What is preferable to a municipality turns on what the municipality values more. If control and certainty of the road and/or parks existence is of primary importance, then the Strata Option is recommended. If the potential to minimize cost and liability is more important, then the Public Easement Option is recommended. Both options were utilized in the City, in part because control and certainty was of primary importance for the existence of one of the roads – The Exchange.

This paper has explored some of the issues associated with sharing lands for road and/or parks with the Landowner. The City was in part encouraged to enter into the relationship it did with Oxford because of the interest Oxford has in the success of the roads and park as both are connected with a significant investment Oxford has made in downtown Mississauga – Square One Mall. It remains unclear at this time whether the City would enter into such a relationship in different circumstances, because at least in Ontario the idea of sharing lands for roads and/or parks is still in its infancy. It is not clear what issues may come up in the long run, which neither the Landowner or the City at this time could have contemplated. Although municipalities in Ontario are beginning to consider entering into such relationship – including the City of Toronto and the City of Vaughan, more exploration needs to occur if this type of relationship will become standard practice. That said, the sharing of lands for roads and/or parks appears to be a viable option for obtaining roads and/or parks gratuitously within an Urban Growth Centre, or its equivalent.