



Ombudsman  
Toronto

*Listening. Investigating. Improving City Services.*

## **Ombudsman Toronto Report**

Enquiry into the  
Section 37 Agreement  
for the Historic Mimico Train Station

July 9, 2018

<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>INTRODUCTION.....</b>	<b>2</b>
<b>OMBUDSMAN TORONTO ENQUIRY: STEPS TAKEN.....</b>	<b>3</b>
<b>BACKGROUND: HISTORY OF THE STATION AND CREATION OF MSCO .....</b>	<b>3</b>
<b>NEGOTIATION, DRAFTING, APPROVAL AND EXECUTION OF THE S.37 AGREEMENT .....</b>	<b>5</b>
Negotiation.....	5
Drafting .....	6
Council Approval.....	7
Execution .....	8
<b>ADMINISTRATION AND ENFORCEMENT OF THE AGREEMENT .....</b>	<b>9</b>
The MSCO License Suspension Agreement.....	10
The Developer's License Agreement .....	11
The City Prepares Conditions for Site Plan Approval.....	12
Disagreements about Ductwork and MSCO's Ongoing Restricted Access .....	13
The City Gives Site Plan Approval .....	13
The City Requires MSCO to Negotiate with the Developer for the Rehabilitation Plan .....	13
Ombudsman Toronto Seeks Update from the City on Rehabilitation Plan Status.....	15
<b>THE DEVELOPER'S LAND IS SOLD UNDER RECEIVERSHIP .....</b>	<b>15</b>
<b>DISSOLUTION OF MSCO .....</b>	<b>16</b>
<b>THE CURRENT STATE OF THE MIMICO STATION AND THE DEVELOPMENT LAND .....</b>	<b>16</b>
The Station.....	16
The Development Land.....	16
The City States that this Section 37 Agreement Presented Unique Challenges .....	17
The City has made Process Changes to Reduce the Chance of Section 37 Agreement Conditions Being Overlooked.....	17
The City's Section 37 Implementation Guidelines and Negotiation Protocol .....	17
The Auditor General's 2011 Report on Section 37 Benefits and New City Planning Processes .....	18
<b>FINDINGS .....</b>	<b>19</b>
The City's Communication and Coordination were Inadequate .....	19

<i>The City Should Have Communicated Better Internally, both among Staff and with City Council</i> .....	19
<i>The City Should have Communicated Better with MSCO</i> .....	20
The City Did Not Enforce the Terms of the Section 37 Agreement .....	21
The City Did Not Fulfill its Responsibility to Resolve Implementation Issues Once They Arose.....	21
<b>OMBUDSMAN RECOMMENDATIONS</b> .....	22
Regarding Section 37 Agreements Generally .....	22
<i>Coordinating Staff Roles and Responsibilities</i> .....	22
<i>Working with Community Organizations</i> .....	22
<i>Ensuring Implementation</i> .....	23
<i>Formalization of Changes</i> .....	23
Regarding the Mimico Station .....	23
<b>THE CITY'S RESPONSE</b> .....	23
Regarding Section 37 Agreements Generally .....	23
<i>Coordinating Staff Roles and Responsibilities</i> .....	23
<i>Working with Community Organizations</i> .....	24
<i>Ensuring Implementation</i> .....	24
Regarding the Mimico Station .....	24
<b>FOLLOW UP</b> .....	25

## **EXECUTIVE SUMMARY**

A community group called Mimico Station Community Organization ("MSCO") began a project in 2004 to relocate and restore a historic train station originally built by the Grand Trunk Railroad in 1916 (the "Station"). MSCO hoped to complete the work by 2016, in time to celebrate the Station's 100<sup>th</sup> year.

In late 2008, a condominium developer submitted a rezoning application to allow it to build condominium units on a property across from the City of Toronto park into which MSCO had moved the Station. City staff recommended that City Council approve the application as well as a Section 37 agreement between the City and the developer.

A Section 37 agreement may be used when a developer wishes to add height and/or density to a given project, as long as the proposed development constitutes good planning. The developer undertakes to contribute some negotiated form of community benefit, such as park improvements or public art, either through cash or in-kind. In this case, the negotiated benefit was that the developer would rehabilitate the Station, including the interior and exterior. The Section 37 agreement required the developer to give the City a Letter of Credit to cover the work and create a Rehabilitation Plan based on MSCO's Heritage Impact Statement before the City would give site plan approval.

The City gave site plan approval in July, 2016 without having received either the Letter of Credit or the Rehabilitation Plan. The developer went into receivership in February 2017. The development property was then sold to a new owner. The Station currently sits empty and is structurally unsafe.

An Enquiry by Ombudsman Toronto found that three issues caused or contributed to problems that arose when the City attempted to implement the Section 37 Agreement: poor communication, failure to enforce the terms of the Agreement, and failure to adequately resolve implementation issues.

Ombudsman Toronto made a number of recommendations to prevent problems with Section 37 agreements in the future. These include assigning a staff lead to all future Section 37 agreements, with clearly outlined responsibilities from the time of negotiations to the completion of the community benefits. Where a community organization is involved, the organization's role should be explicitly stated in the agreement and the City should consult with the community organization and keep it up to date on the project's progress.

Ombudsman Toronto also recommended that the City's Parks, Forestry and Recreation division, with other City staff as needed, formulate a plan for future use of the Station and present that plan to City Council's Parks & Environment Committee in early 2019.

The City agreed with all the Enquiry's findings, accepted all the recommendations and has begun to implement them. Ombudsman Toronto will follow up on the implementation of its recommendations.

## INTRODUCTION

1. Section 37 of Ontario's *Planning Act* allows municipalities to increase the height and/or density of a proposed development beyond what zoning-bylaws permit in return for the developer providing community benefits.
2. The City of Toronto's Official Plan, which the City describes as providing "the blueprint and long-term vision for how the City will grow", is a consolidation of policies that guides urban planning in the City. It includes policies related to Section 37. Section 37 benefits can include amenities such as park improvements, shared community space for non-profits, streetscape improvements and public art. Sometimes a developer will contribute money for a Section 37 benefit rather than construct the benefit itself. This is often referred to as the developer providing an *in-kind* or *non-cash* benefit.
3. The Official Plan requires that the proposed Section 37 benefit bear a reasonable planning relationship to the increased height and/or density of the proposed development (often by being geographically close to it). The proposed development must constitute good planning and infrastructure to support the development must be adequate.
4. Between 2011 and 2017, the City entered into 344 Section 37 agreements.
5. While gathering general information about the City's Section 37 process, Ombudsman Toronto came across a December 2015 news article<sup>1</sup> about a volunteer community group, Mimico Station Community Organization ("MSCO"), that had come together to restore the historic Mimico train station in Etobicoke (the "Station").
6. The news article explained that the City and a developer who owned land across the street from the Station had negotiated a Section 37 agreement requiring the developer to restore or renovate the Station (the "S.37 Agreement"). In exchange, Toronto City Council had rezoned the developer's land, allowing construction of a 26-storey condominium and permitting the developer to use the Station as a condo sales centre for two years.
7. The news article reported that MSCO had understood that the entire Station would be restored. According to the City, however, "the city's expectation was that the developer would be responsible to complete the exterior rehabilitation but not the interior restoration".
8. We contacted MSCO, who told us that it had tried to address its concerns with the City, but believed it had been met with indifference.

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<sup>1</sup> <http://www.cbc.ca/news/canada/toronto/650k-plan-to-restore-mimico-train-station-off-the-rails-community-group-says-1.3356351>

9. We began an Enquiry to explore what, if anything, had gone wrong with the S.37 Agreement and whether systemic improvements are necessary.
10. Our Enquiry revealed several problems with the way the City handled the S.37 Agreement.
11. We made nine recommendations to improve communication, coordination and enforcement of Section 37 agreements, and about future plans for the Station in particular. The two City divisions involved in the S.37 Agreement accepted our findings and agreed with our recommendations. They committed to implementing the recommendations, and have already begun to do so.

### **OMBUDSMAN TORONTO ENQUIRY: STEPS TAKEN**

12. Ombudsman Toronto requested and reviewed extensive documentation from the City Planning and Parks, Forestry and Recreation ("PF&R") divisions, and from MSCO.
13. We interviewed representatives of MSCO and staff from the City's PF&R and City Planning divisions, including employees in Community Planning and Heritage Preservation Services ("Heritage"), both units within City Planning, as well as the Ward Councillor.
14. We also conducted a site visit at the Station.

### **BACKGROUND: HISTORY OF THE STATION AND CREATION OF MSCO**

15. Originally built in 1916 by the Grand Trunk Railway for passenger rail travel, the Station became part of the Canadian National Railway ("CNR") in 1923 when the two railways merged. The Station stopped being used for passenger service in the late 1960s, when GO Transit opened a station nearby. CNR used the Station occasionally as sleeping quarters for its railway workers, but abandoned it completely by 1989. The land on which the Station sat was sold in 2002 by CNR to a private owner.
16. The Station deteriorated steadily over the years. In late 2002, the property owner applied for a demolition permit. City Council saved the Station temporarily in November 2002 when it expressed the intention to designate it under the *Ontario Heritage Act*. In 2004, however, the City granted permission for demolition unless the Station could be moved to a new location, off the owner's property. The owner agreed to donate the Station if it could be relocated.
17. MSCO was formed in 2004 in coalition with the Rotary Club of Etobicoke, as a grassroots community response to the Station's threatened demolition. MSCO's stated objectives were to restore the Station to its 1916 design, establish a railway

museum and educational centre to feature the railway's history, and ensure the Station remained a vibrant attraction that was accessible to the public. MSCO was also committed to strengthening south Etobicoke's sense of community through the restoration of the Station.

18. The City issued a Request for Proposals for the "relocation, restoration and adaptive reuse of the Station". In late 2004, MSCO was the successful bidder. The City's Economic Development and Parks Committee<sup>2</sup> adopted City staff's recommendation that the City execute a license agreement "for the relocation to a City park, restoration and operation of the Mimico Railway Station as a public facility...."<sup>3</sup>
19. To achieve its goals, MSCO registered as a non-profit charitable organization, accepted in-kind and monetary donations from community members, and organized local fundraising events. Volunteers and community sponsors were integral to MSCO's efforts to restore the Station.
20. MSCO moved the Station to a temporary location in 2005. In 2006, MSCO entered into a license agreement with the City ("MSCO's License Agreement") based on its successful bid, in which it agreed to relocate, restore, and operate the Station at its own expense as a community meeting facility and railway museum for 20 years, until 2026.
21. In MSCO's License Agreement, MSCO committed to investing a minimum of \$700,000 towards restoration and renovations of the Station.
22. In 2006, MSCO developed a Heritage Impact Statement with architectural plans that described in detail the work required, which MSCO would undertake.
23. The Heritage Impact Statement was the blueprint for the work MSCO committed to undertake in the public interest. It outlined MSCO's restoration strategy for both the exterior and interior of the building. It referred to specific heritage features of the original station interior, including the hardwood floors, pine tongue and groove dado rails, and exposed wall and ceiling coverings, and restoration – or, where necessary, reconstruction – of historic elements such as a ticket bay and the baggage room.
24. The Heritage Impact Statement included descriptions of an interior ticket agent room, waiting room and baggage claim counter, as well as some modern features such as folding doors and air conditioning registers.

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<sup>2</sup> This Committee has since become two - the Economic Development Committee, and Parks and Environment Committee.

<sup>3</sup> <https://www.toronto.ca/legdocs/2004/agendas/council/cc041130/edp8rpt/cl003.pdf>

25. In 2007, MSCO moved the Station to its current location in Coronation Park in Etobicoke, across the street from its original location. PF&R told us it supported the move financially.
26. MSCO estimates that between 2006 and 2011, it completed approximately 95% of the Station's exterior work, leaving most of the interior work unfinished. MSCO's work on the Station during this time period was funded primarily through charitable donations and two infusions of Section 37 monies through separate and unrelated agreements<sup>4</sup>.

## **NEGOTIATION, DRAFTING, APPROVAL AND EXECUTION OF THE S.37 AGREEMENT**

### **Negotiation**

27. In late 2008, the developer submitted a zoning bylaw amendment application for a proposed condominium development on a property near Coronation Park and the Station.
28. In the spring of 2010, the City determined that the proposed development would support a Section 37 agreement and started to consider both the type and quantum of community benefit. Emails and meeting notes show that City staff, the ward Councillor and the developer decided that requiring the developer to "restore"<sup>5</sup> the Station would be an appropriate benefit.
29. The Councillor presented the idea to MSCO as a win-win proposal and MSCO agreed to the plan. PF&R told us it believed MSCO had lost momentum by 2010 and the S.37 Agreement was conceived to assist MSCO in finishing the Station.
30. During our Enquiry, PF&R told us that it now questions whether MSCO ever had the capacity to complete the project on its own. PF&R did not, however, provide evidence to substantiate this view.
31. The proposed Section 37 agreement included a plan to allow the developer to use the Station as a sales centre for one year at a nominal fee, with an option to renew for a second year at market rent. This would require the City to suspend MSCO's License Agreement.
32. As a result of its discussions with City staff and the Councillor, MSCO understood that:

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<sup>4</sup> MSCO received funds from two Section 37 agreements from other area developments in 2007 and 2009, for \$45,000 and \$75,000 respectively. Neither of these two Section 37 agreements are the focus of this Enquiry report.

<sup>5</sup> The term *restore* is used throughout City Planning correspondence in 2010 about the plans for the Station.

- the developer would undertake and pay for the remaining restoration work for the Station as outlined in MSCO's Heritage Impact Statement;
  - the restored Station would then revert back to MSCO's control so it could continue with its original plans to open a public railway museum and community space; and
  - this would occur in time for planned celebrations of the Station's 2016 centenary.
33. The developer and the City obtained cost estimates<sup>6</sup> to complete the Station. Both estimates provided for interior work consistent with MSCO's Heritage Impact Statement, including restoring interior wood panelling, the cost of purchasing heritage hardware including a stove and lighting fixtures, and heritage architect consultant fees that included interior elevations and plans.
34. PF&R and City Planning staff initially appeared to be working towards an agreement requiring the developer to restore both the interior and exterior of the Station in accordance with MSCO's vision as set out in MSCO's License Agreement and Heritage Impact Statement. Internal staff notes and emails referred to a Section 37 in-kind contribution to *fully restore* the Station and a *full historical restoration* of the Station.
35. Heritage staff noted that the City had stated its intention to designate the Station on its historical inventory. While only the exterior would be designated, they expressed concern in 2010 about losing heritage features of the Station if it were used as a sales centre.

## Drafting

36. Community Planning staff reviewed and edited a draft of the S.37 Agreement in December, 2010. That draft provided that before the City would issue the "first Building Permit", the developer would be required to provide the City with a "Conservation Plan" to "restore the [Station] in accordance with the Restoration Strategy set out in the Mimico Railway Station Heritage Impact Statement". The draft did not distinguish between interior and exterior work, and the word *restoration* was used throughout the draft.
37. The draft also required the developer to provide the City with a Letter of Credit before the City would issue an "Above-Grade Building Permit" for the development.

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<sup>6</sup> The City's cost estimate for the work was much higher than the developer's. The City's estimate noted that the developer's estimate had only addressed heritage concerns, and had not laid out the full costs for a kitchen and other non-heritage related work or appropriate mark-ups. The City addressed this by including language in the Section 37 Agreement that a Letter of Credit for the greater of an approved cost estimate or \$650,000 would be required. The Letter of Credit was to ensure the Rehabilitation Work was completed according to the Rehabilitation Plan. Costs over and above the Letter of Credit would still be the developer's responsibility.

38. During the ongoing drafting of the S.37 Agreement in late January 2011, Heritage emailed Community Planning asserting that the then-current draft was inaccurate because it implied that all of the proposed Station work would involve "restoration". Heritage said that it was in fact a rehabilitation project with three distinct types of work: *exterior restoration*, *interior alterations*, and *landscape improvements*<sup>7</sup>.
39. Heritage proposed that the S.37 Agreement require the developer to submit a Rehabilitation Plan detailing the scope of work, plans and drawings for each of these three areas.
40. We asked Heritage why it believed the draft S.37 Agreement needed these changes. Heritage explained that the City's plan to designate the Station under the *Ontario Heritage Act* would cover only the exterior of the Station, not the interior. Heritage told us however that regardless, Community Planning could have included requirements for interior restoration in the S.37 Agreement had it wished to do so.
41. During our Enquiry, City Planning told us that *restoration* is the act of restoring lost elements and repairing and replacing heritage attributes "in-kind". *Rehabilitation* is the act of preparing a heritage property for new use. City Planning explained that the terms are not interchangeable. Staff notes and emails in 2010 and early 2011 referred to the *restoration* of the Station.
42. The final S.37 Agreement contained Heritage's suggested language of *exterior restoration* and *interior alterations*, and required a Rehabilitation Plan based on MSCO's Heritage Impact Statement<sup>8</sup>. It required that the Manager of Heritage and PF&R's General Manager approve the Rehabilitation Plan.
43. The final S.37 Agreement also required the developer to provide the City with a Rehabilitation Plan, and a Letter of Credit to secure the Rehabilitation Work in accordance with the Rehabilitation Plan, before it could receive Site Plan Approval (rather than building permits, as stated in the earlier draft).

## **Council Approval**

44. There were two staff reports about the S.37 Agreement. The first, prepared by City Planning in December 2010, was considered by Etobicoke York Community Council in January 2011 and by City Council on February 7, 2011. The report dealt with the developer's plans for its site adjacent to the Station and proposed Section

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<sup>7</sup> We received two different versions of this email, one from each of Community Planning and Heritage. Heritage gave us an undated version which appeared to be a draft, and contained some different language from the one sent on January 25, 2011. The differences included which City division would be primarily responsible for approving each of the three distinct components of work. Heritage could not find the sent version in its files.

<sup>8</sup> The S.37 Agreement's definition of "Rehabilitation Plan" states that it is based on, "but not limited to", the Restoration Plan in MSCO's Heritage Impact Statement. Clause 5.3 states that the Rehabilitation Plan shall be based on the Restoration Plan, and does not include the phrase "but not limited to".

37 contributions<sup>9</sup>. The second staff report, prepared jointly by PF&R and City Planning, was also considered by City Council on February 7, 2011, and addressed the required amendment to MSCO's License Agreement to allow the Section 37 contribution for the Station<sup>10</sup>.

45. The December 2010 report stated: "[it has] been agreed by the owner that they will restore the Mimico Train Station as their Section 37 contribution. They will be fully responsible for the complete work including permitting, labour and material costs associated with the historical restoration of the Mimico Train Station..."
46. The February 2011 report to City Council was for approval of the Section 37 contributions discussed at Etobicoke York Community Council in the December 2010 report, and also to recommend suspension of MSCO's License Agreement "to allow for the restoration of the [Station] by [the developer] and the use of the restored station as a sales office."
47. The February 2011 report stated that the developer had agreed to:  
...restore the Mimico Train Station, as well as provide related landscape improvements to Coronation Park, as their Section 37 contribution. [The developer] will be fully responsible for the completion of the works, including permitting, labour and material costs associated with the historical restoration of the Mimico Train Station...
48. The report further stated "[the suspension of MSCO's License Agreement] shall not limit [MSCO's] input into the restoration process while [the Station] is being rehabilitated", and stated that the "net value of the restoration work, accounting for the value of the sales office license, is expected to be approximately \$650,000."
49. Neither report made any distinction between the Station's interior and exterior. The December 2010 report did not use the terms "rehabilitate" or "rehabilitation", but instead referred to the Station's restoration throughout. The February 2011 report referred to the Station's "restoration" and "rehabilitation" interchangeably.
50. City Council approved both reports on February 7, 2011.

## **Execution**

51. The developer and the City signed the S.37 Agreement on February 8, 2011, and the City registered it on title in June 2011. The registration means that anyone who owns the developer's land, including any subsequent owner, is legally bound by the terms of the S.37 Agreement.

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<sup>9</sup> <https://www.toronto.ca/legdocs/mmis/2011/ey/bgrd/backgroundfile-34631.pdf>

<sup>10</sup> <https://www.toronto.ca/legdocs/mmis/2011/cc/bgrd/backgroundfile-35763.pdf>

52. The Agreement required the developer to produce a "Rehabilitation Plan" based on MSCO's Heritage Impact Statement.<sup>11</sup>
53. The Agreement provided that the City would not issue Site Plan Approval until the developer had submitted:
  - A Rehabilitation Plan satisfactory to Heritage and PF&R, based on the restoration plan in MSCO's Heritage Impact Statement from 2006; and
  - A Letter of Credit for \$650,000 to secure the completion of the Station work.
54. While it was negotiating and drafting the S.37 Agreement, the City did not consult with MSCO. The City did not provide MSCO with a copy of the S.37 Agreement, either in draft or final form, until June 2013.

## **ADMINISTRATION AND ENFORCEMENT OF THE AGREEMENT**

55. In mid-February, 2011, City Planning asked the developer to submit the Rehabilitation Plan as a first step in the Site Plan Approval process. The developer did not submit one.
56. MSCO told us that it did not have access to the Station beginning in 2011. It thought that perhaps its license to use the Station had been suspended since February 2011, when the S.37 Agreement was signed. In May of 2011, MSCO contacted PF&R about when the developer would start working on the Station. PF&R replied saying it did not know and would ask the developer.
57. Almost a year later, in March of 2012, MSCO contacted Community Planning to request "the list of restoration and improvement items that the developer has agreed to". MSCO stated, "[b]elieve it or not, we have never seen this list."
58. While considering MSCO's request, Heritage told Community Planning that the developer had not submitted the required Rehabilitation Plan or Letter of Credit. In an email to Community Planning, Heritage staff said they "thought this project had died" and hadn't "heard a peep from anyone since the S.37 agreement was negotiated."
59. Because the Station is located on City park land, the City assigned PF&R staff to monitor completion of work on the Station under the S.37 Agreement. Records show that PF&R staff had also been involved in negotiating the S.37 Agreement. The PF&R staff member tasked with overseeing the completion of the Station told us they had little experience with Section 37 agreements of this scope.

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<sup>11</sup> "Rehabilitation Plan", "Restoration Plan" and "Rehabilitation Work" are all defined terms in the S.37 Agreement.

## **The MSCO License Suspension Agreement**

60. In 2013, the City, the developer, and MSCO began meeting to discuss details of the developer's required Rehabilitation Plan.
61. In May of 2013, the City asked MSCO to sign a license suspension agreement covering the period from April 1, 2013 to May 31, 2015 (the "MSCO License Suspension Agreement").
62. As contemplated by the S.37 Agreement, the MSCO License Suspension Agreement suspended all of MSCO's rights and obligations in relation to the Station for a period of two years until May 31, 2015 to allow the developer to use the Station as a temporary sales centre.
63. As noted above, MSCO had been uncertain since 2011 whether its ability to use the Station had already been suspended.
64. In May, 2013, before signing the MSCO License Suspension Agreement, MSCO raised a number of concerns and issues with the City. These included the following:
  - MSCO inquired whether MSCO's License Agreement was currently suspended or in effect.
  - It asked what the terms of the S.37 Agreement were and whether it could have a copy.
  - It informed the City that having learned in early 2013 that the developer still did not have a license agreement with the City to use the Station as a sales centre, MSCO had used its funds to install a basement floor slab.
  - MSCO identified a number of deficiencies in the developer's work on the Station.
65. The City provided MSCO with a copy of the S.37 Agreement in June 2013. One month later, in July 2013, MSCO asked for amendments to the S.37 Agreement. MSCO wanted the S.37 Agreement to say that the Rehabilitation Plan should also be based on MSCO's permit documents from 2007, which included elevations, mechanical drawings, section details and floor plans. MSCO also wanted a requirement that any work the developer would do on the Station that was different from MSCO's plans would need to be approved by MSCO's architects, and for the final certificate of completion to be issued by a consultant architect mutually agreed upon by the City, the developer and MSCO.
66. The City responded by explaining that the S.37 Agreement could not be amended because it had already been approved by City Council and registered on title. The City told MSCO that any concerns related to deficiencies would have to be addressed with the developer.

## The Developer's License Agreement

67. In May of 2013, PF&R advised Legal Services that the developer was working on the Station for use as a sales centre but did not have a license agreement yet.
68. That month, the developer signed a license agreement with the City ("the Developer's License Agreement"). The Developer's License Agreement required that the developer:
  - renovate the Station in accordance with the Rehabilitation Plan required under the S.37 Agreement by May 15, 2015;
  - consult with and allow input from MSCO regarding the "Rehabilitation Work";
  - release the Station back to MSCO by June 1, 2015, in preparation for celebrations MSCO was planning for 2016 to mark the Station's centenary;
  - agree not to perform Rehabilitation Work or make any other changes that would significantly diminish the value or utility of the Station; and
  - submit full drawings and details to the General Manager of PF&R before the City would issue building permits to allow work on the Station to start.
69. The Developer's License Agreement provided for the developer to use the Station as a sales centre for a nominal fee during the first year, and at market rent for the second year.
70. It also reiterated the developer's obligation under the S.37 Agreement to submit a \$650,000 Letter of Credit to the City.
71. The developer modified the Station for use as a sales centre sometime in 2013. MSCO told us that it believed the developer began the sales centre conversion in April 2013. PF&R noted in a May, 2013 internal email that the developer was completing work on the sales centre. Because the developer did not apply for building permits or submit full drawings to the General Manager of PF&R as required by the Developer's License Agreement, however, the City does not know when the interior modifications actually occurred.
72. In May of 2013, when the Developer's License Agreement was signed, the developer's owner was quoted on a home construction blog saying that the developer planned to recreate the exact layout of the original Station, including a baggage and ticketing area, and that the developer would reuse the historical wood floor.
73. According to MSCO, however, the developer removed original panelling and other similar historical features from the Station's interior when converting it to a sales centre. PF&R told us that it does not believe many significant historic details remained on the interior when the developer took control of the Station.

74. MSCO told us that the developer did not consult with it during construction of the sales centre space, except in relation to a contentious ductwork issue around 2015, as outlined below.

### **The City Prepares Conditions for Site Plan Approval**

75. The *City of Toronto Act, 2006* and the *Planning Act* allow the City to review a proposed development in certain areas of the City to ensure that it is "attractive and compatible with the surrounding area and contributes to the economic, social and environmental vitality of the City"<sup>12</sup>. Features such as building designs, site access and servicing, waste storage, parking, loading and landscaping are reviewed.
76. This process is called Site Plan Control. The City has a two-stage process for Site Plan Control: Notice of Approval Conditions ("NOAC") and the issuance of Site Plan Approval. The NOAC sets out all the pre and post-approval conditions a developer must satisfy. The pre-approval conditions must be met before Site Plan Approval will be granted. The post-approval conditions are secured when the City and developer enter into a Site Plan Agreement (a pre-approval condition listed in the NOAC).
77. In August of 2014, Community Planning was preparing the NOAC for the development. Community Planning asked Heritage whether the developer had submitted a Letter of Credit as required by the S.37 Agreement, stating that if not, it should be added as a pre-approval condition in the NOAC.
78. Heritage responded to Community Planning that the developer had not submitted a Rehabilitation Plan. However, Heritage also said that since the exterior work had been completed generally in accordance with MSCO's Heritage Impact Statement drawings from 2006, a Rehabilitation Plan "seem[ed] unnecessary at this point." Heritage did not comment on whether the developer had, or had not, submitted a Letter of Credit.
79. Neither the Letter of Credit nor Rehabilitation Plan condition from the S.37 Agreement was included as a condition in the NOAC, which the City issued in January 2015.
80. During our Enquiry, Heritage staff told us that by saying that the Rehabilitation Plan seemed unnecessary, they did not intend to waive any requirements under the S.37 Agreement. They told us that although the Rehabilitation Plan seemed unnecessary, it was still legally required, and Community Planning should have obtained it.

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<sup>12</sup> <https://www.toronto.ca/city-government/planning-development/application-forms-fees/building-toronto-together-a-development-guide/site-plan-control-applications/> and <https://www.toronto.ca/city-government/planning-development/application-forms-fees/building-toronto-together-a-development-guide/glossary-of-terms/>

## **Disagreements about Ductwork and MSCO's Ongoing Restricted Access**

81. In 2015 and early in 2016, PF&R met with MSCO and the developer to determine what work was left to be done on the Station. Disputes arose about the scope of the work and who was responsible for correcting a ductwork configuration problem.
82. In agreement with the developer, MSCO had obtained an HVAC permit in 2015. MSCO helped contract the work because it had secured a grant to install geothermal heating in the Station. According to MSCO however, it had limited access to the Station, so the developer oversaw the ductwork installation. A structural problem arose and the developer and the City took the position that MSCO was responsible for fixing the deficiencies.
83. MSCO refuted the position of the developer and the City. PF&R told us this issue was difficult and was negotiated throughout much of 2016.
84. The date for the end of the Developer's License Agreement and completion of the work on the Station – May 31, 2015 – passed. MSCO could not access the Station, which was still set up as a sales centre, because it was locked. The date for MSCO's anticipated 2016 centenary celebrations at the Station came and went.
85. The City did not get the Station key back from the developer until January 2017.

## **The City Gives Site Plan Approval**

86. The City and the developer executed a Site Plan Agreement on July 29, 2015, and City Planning gave the developer Site Plan Approval approximately one year later, on July 12, 2016.
87. As set out above, the S.37 Agreement required that the developer submit an approved Rehabilitation Plan and Letter of Credit before the City would give Site Plan Approval. When the City gave Site Plan Approval, it had received neither. City staff told us that granting Site Plan Approval without the required Rehabilitation Plan and Letter of Credit in place was an oversight.

## **The City Requires MSCO to Negotiate with the Developer for the Rehabilitation Plan**

88. In January 2016, City staff met with MSCO and the ward Councillor's staff to continue discussing the scope and details of items to be included in the Rehabilitation Plan and for completion of the Station before the City and MSCO could take over possession. Staff from Heritage, Community Planning and PF&R were present.
89. According to PF&R staff, Heritage staff asserted that Heritage's only obligations were the Station's exterior, since the interior did not require any historical

approvals. PF&R staff determined that, as the Station's owner, PF&R was responsible for the safety and stability of the Station and ensuring no ongoing financial liability to the City.

90. A plan was made that Heritage and PF&R would notify City Planning when they were satisfied with the Rehabilitation Plan, since this condition was tied to the developer's Site Plan Approval.
91. A PF&R staff member involved told us that, in hindsight, it would have been helpful to have Heritage's guidance on the interior. PF&R's focus after this meeting was on having a safe building, without a focus on restoration or heritage-like features.
92. In February 2016, PF&R asked MSCO to resolve the ductwork issues with the developer. PF&R said that once MSCO and the developer had resolved the ductwork issues, PF&R could work with the developer to get a Rehabilitation Plan.
93. By mid-November 2016, emails among PF&R, MSCO and the developer show that PF&R wanted MSCO and the developer to agree on a Rehabilitation Plan without PF&R's involvement.
94. PF&R told us it took this position because it believed MSCO should be involved in negotiating the details of the Rehabilitation Plan. This was because in PF&R's view, that process was affected by "deficiencies in the manner [MSCO's] restorations have been completed which became known to the parties as the discussions progressed." PF&R staff said they made repeated attempts to facilitate discussion between MSCO and the developer.
95. MSCO wrote to PF&R in November 2016 saying MSCO found it "exasperating" that it was not getting "any help from [the City] in getting [the developer] to do the work it has contracted to do."
96. On November 16, 2016, PF&R staff wrote to MSCO: "It is incumbent on [the developer] and [MSCO] to come to an agreement on the Rehabilitation Plan. I will respectfully step aside... Once you have a plan I will be able to review the plan along with relevant City staff."
97. MSCO responded, "... If the City washes its hands off [sic] the project there seems no point in meeting. Nevertheless we are available for a meeting..."
98. PF&R responded, "[l]et's be clear that the City is not washing its hands from the project. I have made it clear...that [the developer] and MSCO must first negotiate the rehabilitation plan and present it to [PF&R]. I will not be involved in the process as a decision-maker or a facilitator until there is a plan to present to the City."

99. In December 2016, MSCO told the City that it had met with the developer. MSCO believed that the developer would look into some final issues, coordinate architects and engineers, and begin work on the Rehabilitation Plan.

### **Ombudsman Toronto Seeks Update from the City on Rehabilitation Plan Status**

100. In December 2016, the Ombudsman wrote to the General Manager of PF&R and City Planning's Chief Planner. She requested an update on the negotiations among the City, the developer and MSCO to resolve the disagreements over responsibilities and next steps that had apparently halted progress on the Station.
101. Replying jointly in January of 2017, the two division heads informed the Ombudsman that the City's process required the developer and MSCO to agree on a Rehabilitation Plan and that PF&R staff were working with them to facilitate and finalize it. They said that a Rehabilitation Plan had been agreed to in principle in November 2016, and was "expected to be completed in the next couple of days." They noted that the Rehabilitation Plan was to be prepared in accordance with MSCO's Heritage Impact Statement of 2006.
102. The Ombudsman immediately replied, expressing concern that the City appeared to have effectively waived its responsibility to ensure that the developer met its obligations under the S.37 Agreement. She informed them that Ombudsman Toronto's Enquiry into the matter was continuing.

### **THE DEVELOPER'S LAND IS SOLD UNDER RECEIVERSHIP**

103. In May of 2017, while still awaiting the Rehabilitation Plan, we learned that the developer had been placed in court-ordered receivership in February 2017. Despite being aware of our ongoing Enquiry, neither PF&R nor City Planning had advised Ombudsman Toronto of this significant development.
104. In late August 2017, the developer's land was sold under the receivership to a new owner who, PF&R advised us, intends to develop the site. As noted earlier, the S.37 Agreement is registered on title. It therefore legally binds the new owner of the land.
105. City Planning and PF&R told us that the Site Plan Approval granted to the developer in July 2016 transferred with the sale of the developer's property to the new owner. If the new owner wants to continue the currently approved development, the owner will have to apply for an extension to the Site Plan Approval if the project is not completed by July 2018 – two years after Site Plan Approval was granted.

## DISSOLUTION OF MSCO

106. MSCO told Ombudsman Toronto that the delays and frustrations associated with the S.37 Agreement caused the group to lose momentum.
107. In July 2017, MSCO wrote to the City to inform it of MSCO's intention to dissolve as a corporation<sup>13</sup>. It told the City that because of the loss of the Station's historic interior and what it saw as the inaction of the City and the developer, its dream of opening the Station as a community centre and museum in the public interest had been "shattered".

## THE CURRENT STATE OF THE MIMICO STATION AND THE DEVELOPMENT LAND

### The Station

108. As of the date of this report, the Station is empty. PF&R staff told us their architect believes it is structurally unsafe and cannot currently be used for any purpose.
109. During Ombudsman Toronto's site visit in September 2017, we observed no historical features in the interior. No original hardwood flooring, dado rails or exposed wall and ceiling coverings as described in the 2006 Heritage Impact Statement were apparent.
110. On the main level, we observed new laminate flooring, drywall, and sample modern condominium kitchen and washroom installations. The basement was unfinished and contained construction debris, condominium sales and promotional materials, and what appeared to be a temporary shoring post supporting the ceiling.
111. Despite City Council's expressed intention to designate the Station as a heritage property under the *Ontario Heritage Act* fifteen years ago, it has not yet done so. Heritage staff told us that this designation was supposed to occur after the building had been moved and restored by MSCO<sup>14</sup>.

### The Development Land

112. The development land has a conditional foundation permit and built foundations completed by the developer. City Planning advised us that it is likely the new owner will need an inspection of the existing foundation work, because it has been exposed to the elements since the developer went into receivership.

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<sup>13</sup> MSCO returned \$35,841.34 in unspent Section 37 monies to the City, which it had received in 2009.

<sup>14</sup> City Planning advised us that Heritage staff have not yet brought forward a designating by-law because a special land survey is required from the City's Surveys and Mapping staff, who have their own system for prioritizing their work. It stressed that the fact that there is not yet a designating by-law should not be construed as a lack of interest in the property.

113. The new owner has told the City it will likely meet with staff in the fall of 2018 to discuss its plans for the site.

## **OTHER CONSIDERATIONS, POLICIES AND REPORTS**

### **The City States that this Section 37 Agreement Presented Unique Challenges**

114. City Planning told us that the S.37 Agreement was unusual and differed from most other Section 37 agreements in several ways. These included the following:
- Although the S.37 Agreement was between the developer and the City, MSCO – a third party volunteer group – was to be the recipient of the community benefit.
  - It is unusual for a Section 37 agreement to require the developer to complete certain parts of the benefit before getting Site Plan Approval.
  - The fact that the heritage building was in a City-owned park, as opposed to in the development itself, was "totally novel".
  - The developer undertook work on the Station's exterior without the City's permission and without obtaining necessary permits.
  - City Planning experienced significant turnover of staff involved in this file.

### **The City has made Process Changes to Reduce the Chance of Section 37 Agreement Conditions Being Overlooked**

115. City Planning told us that its Section 37 agreement templates now require that the City obtain any required Letter of Credit securing in-kind benefits before it issues above-grade building permits, not Site Plan Approval.
116. This change allows the City to note the Letter of Credit requirement in its Integrated Business Management System ("IBMS") and to flag it as a building permit requirement. Because Section 37 agreements are codified in the zoning by-law for the development site, they are considered "applicable law" under the Building Code. If a building permit application does not meet applicable law – for example because the required Letter of Credit is not in place – the City's Toronto Building division will not issue the building permit.

### **The City's Section 37 Implementation Guidelines and Negotiation Protocol**

117. In 2007, City Council adopted two processes to assist staff in implementing the Official Plan's Section 37 policies. The *Implementation Guidelines for Section 37 of the Planning Act* ("Implementation Guidelines") address when a development might meet the criteria of eligibility for Section 37 contributions, how to determine the quantum of the contribution, types of community benefits, and what provisions may be included in a Section 37 agreement for that type of benefit.

118. The *Protocol for Negotiating Section 37 Community Benefits* ("Negotiation Protocol") addresses community and Ward Councillor consultation when determining a benefit, and the coordination and timing of Section 37 negotiations.
119. While the Implementation Guidelines and Negotiation Protocol help staff interpret the Official Plan's Section 37 policies, they do not address assigning staff to lead a Section 37 agreement, how to involve affected community groups during the Section 37 agreement's drafting and administration, or how to ensure that Letters of Credit or other requirements of the Section 37 agreement related to in-kind benefits are obtained.

### **The Auditor General's 2011 Report on Section 37 Benefits and New City Planning Processes**

120. The Auditor General's March 2011 report to the Audit Committee, "Community Benefits Secured Under Section 37 or 45 of the Planning Act", made a number of recommendations, including:
  - City Planning develop and implement a monitoring process to ensure receipt of all in-kind Section 37 benefits;
  - City Planning review the status of community benefits secured since amalgamation to determine whether cash and in-kind benefits have been received; and
  - the City develop monitoring controls to effectively administer Section 37 letters of credit, once obtained.
121. City Planning told us that it had implemented most of the process changes that the Auditor General had recommended. Some of those changes would have affected this S.37 Agreement, if they had been in place at the time. This includes the new role of Project Coordinator, established in 2016.
122. The Project Coordinator provides policy advice on Section 37 agreements when requested by staff or Councillors, but primarily is responsible for tracking the completion of Section 37 benefits. The Project Coordinator monitors the construction and completion of in-kind Section 37 benefits once above-grade building permits have been issued by the City.
123. Because above-grade building permits were never issued for the development site, the Station and the S.37 Agreement never became part of the Project Coordinator's monitoring process.
124. City Planning also told us that when Toronto Building receives a Section 37 Letter of Credit as a condition before issuing above-grade building permits, it is now entered into a centralized database where it can be tracked.

## FINDINGS

125. We found three areas of concern with the City's handling of the S.37 Agreement, from the perspective of administrative fairness:
- i. Communication and coordination throughout the process were inadequate, both internally and with MSCO;
  - ii. The City did not enforce the terms of the S.37 Agreement when it issued Site Plan Approval without the required Letter of Credit and Rehabilitation Plan; and
  - iii. The City did not fulfill its responsibility to ensure that the developer did the work it was required to do under the S.37 Agreement and to address implementation problems once they arose.

### **The City's Communication and Coordination were Inadequate**

#### ***The City Should Have Communicated Better Internally, both among Staff and with City Council***

##### What Was Required Was Unclear

126. The draft Agreement of December 2010, as well as both the City's and the developer's cost estimates, all contemplated a restoration of both the interior and exterior of the Station.
127. When staff were drafting the S.37 Agreement, Heritage suggested the word *alterations* for the interior instead of *restoration*, since restoration has a particular meaning for designated buildings (implying complete restoration of existing elements and reconstruction of unsalvageable ones to achieve historical accuracy).
128. We find that the Agreement, as written, anticipates a rehabilitation that includes all of the features outlined in the Heritage Impact Statement. Whether called a rehabilitation or a restoration, the Rehabilitation Plan was supposed to be based on MSCO's Heritage Impact Statement, which outlines retention and recreation of many of the Station's interior heritage features.
129. We find that the semantic distinction between exterior renovation and interior alterations caused confusion among staff about the extent and quality of work required on the interior of the Station. The shift in language from a discussion of restoration of the entire Station, to restoration of the exterior only, led to staff losing sight of the work required on the interior to comply with MSCO's Heritage Impact Statement.

130. The December 2010 staff report to Etobicoke York Community Council spoke simply of *restoration* of the Station. The February 2011 report to City Council used the terms "restore" and "rehabilitate" interchangeably.
131. We find that these two staff reports created the impression that the S.37 Agreement would require the developer to fully restore the Station, with no distinction between the exterior and interior. The reports suggested that the developer would be responsible for implementing MSCO's plans as outlined in its Heritage Impact Statement, which focused on restoring and recreating much of the original Station, inside and out.
132. It is reasonable to assume, given the language used in the reports, that City Council understood that the developer would conduct a full restoration of the Station, in accordance with MSCO's plans. Staff did not inform City Council otherwise.
133. We find that many City staff members involved in the Section 37 negotiations also understood at the time that the Station would be fully restored, both on the exterior and the interior. This confusion over language, as well as different versions of Heritage's email on the subject, illustrates staff's general lack of clarity, coordination and effective communication about what the S.37 Agreement should require.

#### Who was Responsible was Unclear

134. After the S.37 Agreement was signed, there was no coordination or shared understanding among City staff about which division – City Planning or PF&R – would be responsible for enforcing the developer's obligations. Heritage determined that it was responsible only for the exterior of the Station, despite the S.37 Agreement's requirement that Heritage and PF&R jointly approve the Rehabilitation Plan.
135. This lack of coordination between City Planning and PF&R contributed to the City mistakenly giving Site Plan Approval without having received the required Letter of Credit and Rehabilitation Plan. Under the S.37 Agreement, the developer was required to provide both – to the satisfaction of Heritage and PF&R – before it could obtain Site Plan Approval.

#### ***The City Should have Communicated Better with MSCO***

136. When negotiating the S.37 Agreement with the developer and drafting its terms, the City did not seek or obtain any input from MSCO, despite MSCO's obvious interest in and knowledge of the Station project and MSCO's lease to operate the Station as a public museum once the developer's sales centre closed and the Station work was complete.

137. MSCO understood that the S.37 Agreement would require the developer to restore both the Station's exterior and interior. MSCO believed the restoration would be based on MSCO's Heritage Impact Statement and would further MSCO's plan for a heritage museum and community space.
138. This critical lack of communication contributed to confusion and disagreement about what the S.37 Agreement required.
139. The City should have provided MSCO with periodic, detailed updates on the status of the Station from 2011 to 2013. It did not do so.

### **The City Did Not Enforce the Terms of the Section 37 Agreement**

140. The developer never provided the City with the Rehabilitation Plan or Letter of Credit that the S.37 Agreement required.
141. Had the City been more active in requiring the developer to provide a Rehabilitation Plan in a timely manner, the Station might have been rehabilitated, if not in time for MSCO's planned centenary celebrations, then perhaps by now.
142. The developer's Letter of Credit could have secured funds for the Station's rehabilitation, in spite of the developer's insolvency.

### **The City Did Not Fulfill its Responsibility to Resolve Implementation Issues Once They Arose**

143. It was essential for MSCO to be involved in the development of the Rehabilitation Plan, since the plan was for MSCO to run the museum and community space after the developer finished the rehabilitation. We do not fault the City for involving MSCO in this.
144. However, instead of requiring the developer to submit a Rehabilitation Plan satisfactory to the City as the S.37 Agreement required, the City directed MSCO to negotiate the Rehabilitation Plan with the developer directly and essentially withdrew from the discussions. Obtaining this plan was the City's responsibility, not MSCO's.
145. Although PF&R said that it facilitated discussion between MSCO and the developer, the City was a party to the S.37 Agreement, not MSCO. The City's role was not to facilitate a discussion between MSCO and the developer, but rather to ensure that the developer fulfilled its contractual obligations.
146. In our view, the City cannot excuse the fact that it did not obtain the required Rehabilitation Plan based on the fact that it allegedly found deficiencies in the interior work completed by MSCO. Regardless of who may have caused what

deficiencies, the City had a contractual obligation to obtain the Rehabilitation Plan from the developer.

147. The City did not adequately monitor the enforcement of the S.37 Agreement. Simply put, the essential premise on which a Section 37 agreement is based – that is, a developer can be required to provide community benefits where a proposal for added height and density is deemed appropriate – is rendered meaningless if the community does not receive the promised return.

## **OMBUDSMAN RECOMMENDATIONS**

148. In consideration of the information gathered through this Enquiry, we made the following recommendations:

### **Regarding Section 37 Agreements Generally**

#### ***Coordinating Staff Roles and Responsibilities***

1. For every Section 37 agreement, City Planning should identify a staff lead. The staff lead should be responsible for overseeing the Section 37 agreement from initial negotiation through to completion of each benefit.
2. Where a Section 37 agreement also involves other divisions besides City Planning, the staff lead should establish a team for the Section 37 agreement, which includes staff from the other City divisions. The staff lead should be responsible for clearly outlining the roles and responsibilities of each team member and ensuring that they fulfill these roles and responsibilities in a timely way.
3. The staff lead should be responsible for ensuring that the property owner and the City meet all of their contractual obligations under the Section 37 agreement.

#### ***Working with Community Organizations***

4. Section 37 agreements involving a third party (community) organization should clearly outline the organization's role, and the extent and form of its involvement in the Section 37 agreement.
5. City Planning should provide any third party (community) organization involved in a Section 37 agreement with a copy of the draft before the Section 37 agreement is finalized, in order to allow the organization to provide feedback. City Planning should also ensure the organization promptly receives a final copy of the Section 37 agreement once executed.

6. The City should provide regular, scheduled updates to third party organizations about an agreement's implementation status.

### ***Ensuring Implementation***

7. City Planning should create a checklist or other tool(s) to aid in ensuring that it enforces all requirements of Section 37 agreements.

### ***Formalization of Changes***

8. City Planning should record changes resulting from recommendations 1 to 7 in a written process. The purpose of the written process is to ensure that Section 37 agreements stay on track.

### **Regarding the Mimico Station**

9. PF&R, in consultation with City Planning and any other relevant divisions, should develop a detailed plan for the Station. This plan should be presented to the Parks & Environment Committee in the first quarter of 2019.

## **THE CITY'S RESPONSE**

149. Both City Planning and PF&R accepted the findings of our Enquiry and agreed with its recommendations. They have committed to implementing the recommendations and have already taken some steps to do so.

### **Regarding Section 37 Agreements Generally**

#### ***Coordinating Staff Roles and Responsibilities***

150. City Planning told us that in the future, it will ensure that a coordinating team of staff from appropriate divisions is identified in complex Section 37 agreements. This coordinating team will be tasked with project managing the implementation and delivery of the community benefits. City Planning has committed to ensuring that the coordination team's roles are clear at the time of drafting.
151. PF&R agrees with City Planning's approach, and has assured us that its internal Parks Development and Capital Projects section will seek a clear statement of its responsibilities in future Section 37 agreements.

### ***Working with Community Organizations***

152. City Planning told us it has committed to greater collaboration with any community organization that will benefit from a Section 37 agreement. City Planning is working with Legal Services in improve its Section 37 agreement templates to address the increase in Section 37 agreements involving third party organizations. Relevant divisions are developing term sheets to attach to these types of Section 37 agreements, which will contain language for the implementing by-law.
153. City Planning anticipates staff training on these new templates in the fall of 2018.

### ***Ensuring Implementation***

154. City Planning told us that to respond to our recommendations, it now has tools in place so that Community Planners are aware of necessary preconditions and requirements in Section 37 agreements to ensure they are met before any authorization is granted in the development process.
155. City Planning is also developing an electronic "secondary checklist" in IBMS to identify all necessary Section 37 preconditions and their triggers.

### ***Regarding the Mimico Station***

156. In April of 2018, in response to our recommendations, PF&R undertook a site and cost assessment of the Station.
157. PF&R informed us that it plans to enforce the S.37 Agreement with the new owner of the development property.
158. If the new owner wishes to develop the property with the current zoning permissions, PF&R (with the help of City Planning and Legal Services) will obtain from the new owner a Rehabilitation Plan for the Station. That Rehabilitation Plan will align with MSCO's Heritage Impact Statement, as outlined in the S.37 Agreement.
159. If the new owner wants to change the proposed development from the 2016 Site Plan Approval, or when that approval expires in July, 2018, new development applications will be required. PF&R and City Planning told us the Section 37 requirements will be revisited at that time. PF&R said that if the development no longer supports a Section 37 agreement – for example, if the new owner wants a smaller development without the increased height and/or density – then the rehabilitation costs would become PF&R's responsibility.
160. PF&R told us that whether the Station is ultimately rehabilitated under a Section 37 agreement or through PF&R's budget, it intends to seek an arts and culture

operator for the Station, with the help of the City's Economic Development and Culture division.

**FOLLOW UP**

161. Ombudsman Toronto will follow up quarterly with PF&R and City Planning on the implementation of our recommendations until they are complete.

(Original Signed)

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Susan E. Opler  
Ombudsman