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MEMORANDUM

CONFIDENTIAL LAWYER / CLIENT PRIVILEGE

To Kevin Newson
Executive Director, Procurement
Waterfront Toronto

From Paul M. Lalonde

Date November 23, 2018

Subject Pre-solicitation Market Soundings

We have been asked to provide our views on the following two questions that have arisen in the context of the Quayside Innovation and Funding Partner RFP ("Quayside RFP"):

> *To what extent can a contracting authority carry out pre-solicitation market soundings with potential bidders and other stakeholders?*
>
> *Did Sidewalk Labs ("SWL") benefit from any unfair advantage as a result of certain pre-solicitation communications with Waterfront Toronto?*

1. Pre-solicitation Market Soundings

Pre-solicitation market research and consultations (often called "market soundings") are commonly carried out by contracting authorities contemplating complex, high value or innovative procurement projects. The objectives of such communications typically include, among others, a better understanding of available market offerings, the state of evolving technology, alternative policy or other solutions deployed in other jurisdictions and creative ways of addressing organizational or operational objectives. The hope is that such exercises lead to a better solicitation process, better solicitation documents, better evaluation criteria and more effective and efficient project outcomes for the contracting authority.

In principle, there is nothing improper about pre-solicitations consultations with potential bidders or other parties. In fact, in complex or innovative procurements, such exercises are widely considered as a best practice and an important first step in designing a successful solicitation. Pre-solicitation exercises can take a variety of different forms, including one-on-one meetings with stakeholders and potential bidders, bidder conferences, independent research, the publication of requests for expressions of interest, among many other forms and formats.

There are no specific legal rules or directives that apply to the conduct of pre-solicitation market soundings. For example, the trade agreements do not specifically refer to pre-solicitation market soundings (except to the extent they impose pre-conditions to participating in a subsequent solicitation process or compromise the impartiality of the procurement process). Likewise, the Ontario Broader Public Sector Procurement Directive does not impose any specific rules relating to market soundings.

However, once a solicitation is issued, the normal rules of procurement apply. Under Common Law rules, the trade agreements and under the BPS Directive, tendering organizations must conduct fair and impartial competitions and must avoid providing any bidder an unfair advantage. In assessing whether a competition is fair, or whether it discloses an unfair advantage, any relevant activities of the contracting authority can be considered, including market soundings._

2. Did SWL benefit from an unfair advantage in the Quayside RFP?

a. Assumptions

In advance of the Quayside RFP, Waterfront Toronto engaged in extensive market soundings. These involved meetings with over fifty stakeholders and potential bidders (some of which ultimately did bid on the opportunity) and public consultations. As part of this market sounding Waterfront Toronto met with and exchanged information with SWL. The communications with SWL included the provision of the following documents (among others):

- three one-page topographical maps (the "Maps"); and

- one five-page extract of a February 2016 draft of the Port Lands and South of Eastern Transportation and Servicing Master Plan, prepared by Dillon Consulting (the "Dillon Extract").

These documents are attached for convenience, respectively, at Appendix "A" and "B" hereto.

We have been asked whether the provision of these specific documents provided SWL with an unfair advantage in the context of the Quayside RFP.

b. The Maps

With respect to the Maps, you have confirmed as follows. These were provided to SWL and to another bidder, Ellis Don, before the issuance of the Quayside RFP. They were provided in response to a request from these companies and you have confirmed that you were prepared to provide them to anyone who requested them. No other bidder requested the Maps. The Maps provide the topography of the Eastern Waterfront including the Quayside property. Topographical Map 1 is particularly detailed, providing information on the location of trees, catch basins, junction boxes, manholes, light standards and other physical features of the area. You have also advised that the maps were provided to several other third parties over the course of the relevant period. The names of these parties and the dates on which the maps were provided are listed at Appendix C of this memorandum.

We note that there was a wealth of detailed information on the Quayside property available to all bidders. This information was provided in, among other things, the Portlands Flood Protection Due Diligence Report that was publicly available on the Waterfront Toronto website at the time of the Quayside RFP. The said Flood Protection Report contains detailed information that is similar to the kind of detailed topographical data available on the topographical maps provided to SWL.

As such, we conclude that SWL did not receive anything that was not available to other bidders. In providing the maps, Waterfront Toronto provided SWL with a courtesy it would have provided to any stakeholder that requested it.

In addition, even if the Maps were available to SWL and not to others, we are not convinced that the information in the Maps provided SWL with any advantage in submitting a winning proposal. The detailed information in the Maps about topographical and physical features present on site, such as trees, manholes, poles and the like were not relevant in terms of responding to the RFP. The basic physical features of the site that might be relevant to responding to the RFP (location, general disposition, existing structures, ownership etc.) were all available to bidders. Any additional details germane to responding to the RFP were either available in information already on the public record, available from Waterfront Toronto on request or easily observable on a site inspection. As such, possession of the maps provided no advantage over other bidders.

c. Dillon Extract

The Port Lands and South of Eastern Transportation and Servicing Master Plan ("Transportation Master Plan") was commissioned by Waterfront Toronto and delivered in final form in September 2017. The Dillon Extract contains five pages (pages 57 to 61) from a February 2016 draft of the Transportation Master Plan. It was provided to SWL in December 2016 by Waterfront Toronto in response to a request from SWL before the issuance of the Quayside RFP on March 17, 2016. At that time, it was publicly known that Dillon was preparing the Transportation Master Plan but SWL was the only potential bidder who asked for the relevant information. Waterfront Toronto has advised that if other potential bidders had requested this information, it would have been provided on the same basis as this is consistent with Waterfront Toronto protocols as a public organization.

The Dillon Extract contains sections 4.3 and 4.4 of the draft Transportation Master Plan. These two sections cover, respectively, Goods Movement (Trucks, Rail) and Future Assessment. Section 4.3 covers Truck Trip Generation (4.3.1), Trip Distribution (4.3.2), Trip Assignment (4.3.3) and provides some information on the state of goods movement by rail and truck to, from and through the Port Lands and how anticipated truck traffic (detailed elsewhere in the study) was estimated. Section 4.4 explains Dillon's assessment of traffic scenarios for the anticipated 2065 peak hour conditions and its assessment of long term lane deficiencies in the area. We note that section 4 refers to two tables (10 and 19) and one figure (9) providing, respectively, assessments of future peak hour conditions, future base network deficiencies and a Future Base Case Scenario. The tables and figure themselves, however, are not contained in the Dillon Extract. These tables and figure were not provided to SWL with the Dillon Extract and were not requested by SWL.

In assessing whether the information in the Dillon Extract provided SWL with an unfair advantage, we considered the extent to which this information was available to other bidders. First, we note that Waterfront Toronto has confirmed that the truck and rail traffic-related information provided to SWL was available on request to other bidders. None availed themselves of this even though the fact that the study was being carried out by Dillon was a matter of significant public notoriety (including because it involved public consultation).

Second, we considered the extent to which the information was otherwise publicly available. In this regard, we underscore the wealth of information that was publicly available to bidders before and during the course of the RFP. This information was extensive and included substantial transportation-related studies such as for the Port Lands and Gardiner EA. The following key documents and/or public consultations were available in the public domain prior to when the Dillon Extract was shared with SWL:

1. The Gardiner Expressway and Lake Shore Boulevard East Environmental Assessment Appendix P – Goods Movement Analysis, May 2015. Online at: http://www.gardinereast.ca/sites/default/files/documents/Appendix%20P%20-%20Goods%20Movement%20Study%20Report%202015-05-01_0.pdf.

2. The Gardiner Expressway and Lake Shore Boulevard East Environmental Assessment Transportation Planning Technical Report, November 2016. Online at: https://waterfrontoronto.ca/nbe/wcm/connect/waterfront/52711dca-24e5-4a68-9ee6-b51b525f11c1/Appendix+K+-+Transportation+Planning+Technical+Report+2016-11-07.pdf?MOD=AJPERES&CACHEID=52711dca-24e5-4a68-9ee6-b51b525f11c1.

3. Nov 2015 – Public Information Centre (public meeting) depicted all the alternatives for roads being considered, the evaluation criteria and a preliminary preferred alternative for a road network. Online at: https://portlandsto.ca/wp-content/uploads/2015_11_13_transportation_and_servicing_as_sent_1.pdf.

4. The link to the final Transportation Servicing and Master Plan dated Sept 2017 shows the dates of public consultations where the preferred streets network and streets detail (such as on the map below) was discussed taking place between Sept 18, 2013 – October 13, 2016 (pages 39-42). Online at: https://portlandsto.ca/wp-content/uploads/TSMP_EA-Report-Sept+29+2017.compressed.pdf.

Finally, we assessed whether the information contained in the Dillon Extract was material in relation to the requirements of the RFP. In this regard, we note that the RFP was for an Innovation and Funding Partner to work with Waterfront Toronto in developing plans for the Quayside Development Project. None of the mandatory and rated requirements (see RFP Appendix C) in any way refer to truck, rail or other modes of goods shipment. As such, the content of the Dillon Extract is unrelated to the evaluation criteria in the Quayside RFP, which relate primarily to the bidder's capabilities (financial and technical), track record of innovation and its vision for the site and the City. As such, it is difficult to see how the specific information in the Dillon Extract regarding merchandise transportation might have provided any advantage in responding to the RFP.

Based on our assessment of the information provided and the nature and requirements of the Quayside RFP, we conclude that the Dillon Extract provided no unfair advantage to SWL in comparison to other bidders.

a. Appearance of Unfairness

Having concluded that SWL did not benefit from an unfair advantage, we considered whether providing the Maps and the Dillon Extract raises an appearance of unfairness or bias in favour of SWL. In

considering whether there is a reasonable basis to conclude that there was an appearance of unfairness, we have applied by analogy the standard applied by the Courts in assessing the appearance of a conflict of interest or apprehension of bias in the conduct of a public official. The test is whether a reasonable person, properly informed would apprehend that there was conscious or unconscious bias on the part of the decision maker.[1] In other words, would a reasonable person who was informed as to all the relevant facts of the situation conclude that Waterfront Toronto was biased in favour of SWL in providing it with the Maps and the Dillon Extract?

Applying this standard to the communications of the Maps and the Dillon Extract, we conclude that the situation does not raise a reasonable apprehension of bias or conflict of interest. In our view, a reasonable person, properly informed of the information outlined above and other relevant information regarding the RFP process (such as the involvement of a fairness monitor), would not arrive at the conclusion that Waterfront Toronto acted in a manner that was biased.

We hope that the above provides useful guidance and we look forward to addressing any questions or concerns you may have.

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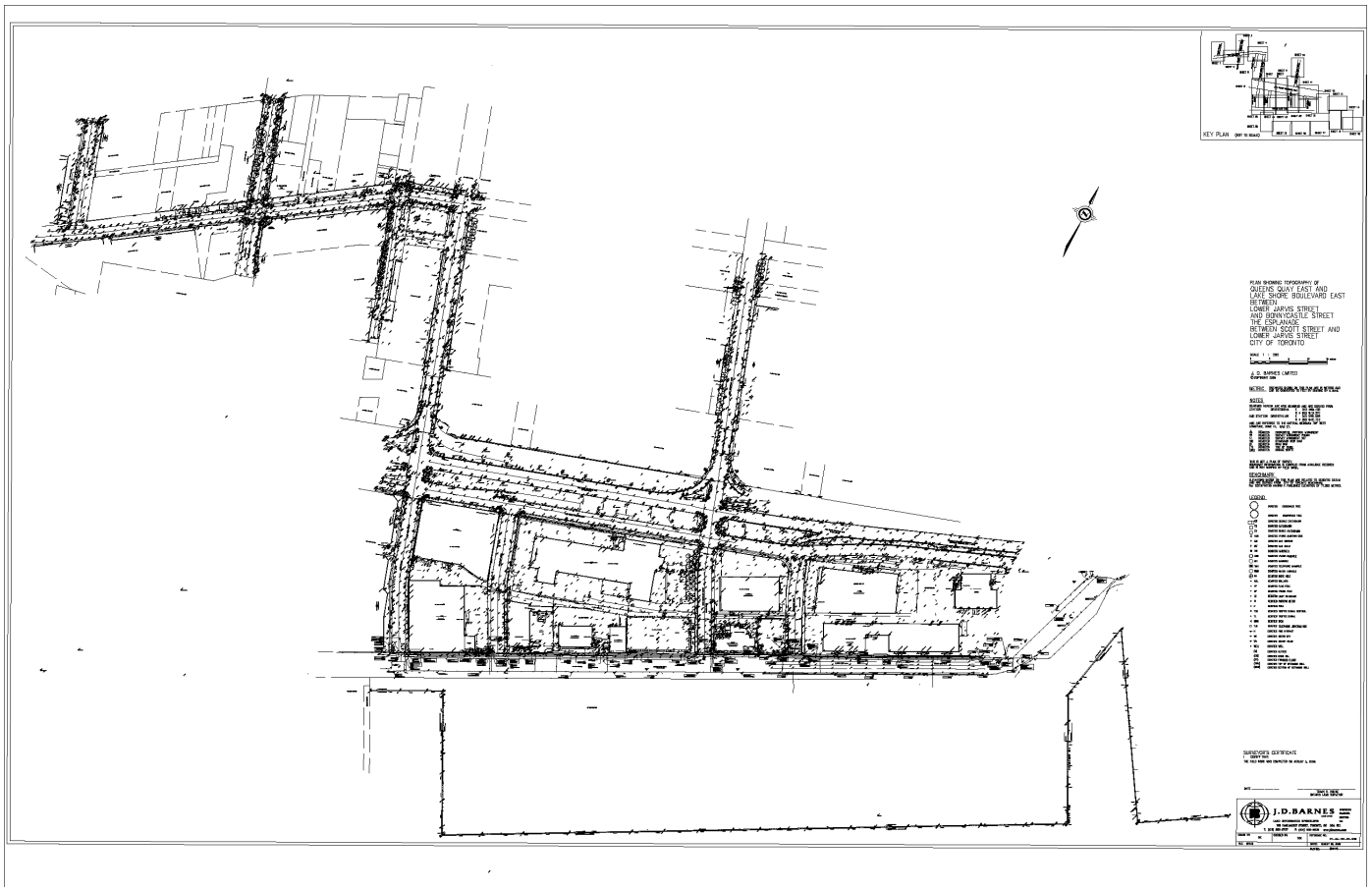
[1] See, *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at para. 66, cited, e.g., in Sinnadurai, Dharshini, *Apprehending Reasonable Apprehension of Bias*, December 10, 2014, https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/apprehending-reasonable-apprehension-bias.

APPENDIX A


KEY PLAN
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LAKE SHORE BOULEVARD EAST
BETWEEN
LOWER JARVIS STREET
AND BONNYCASTLE STREET
THE ESPLANADE
BETWEEN SCOTT STREET AND
LOWER JARVIS STREET
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SURVEYOR'S CERTIFICATE
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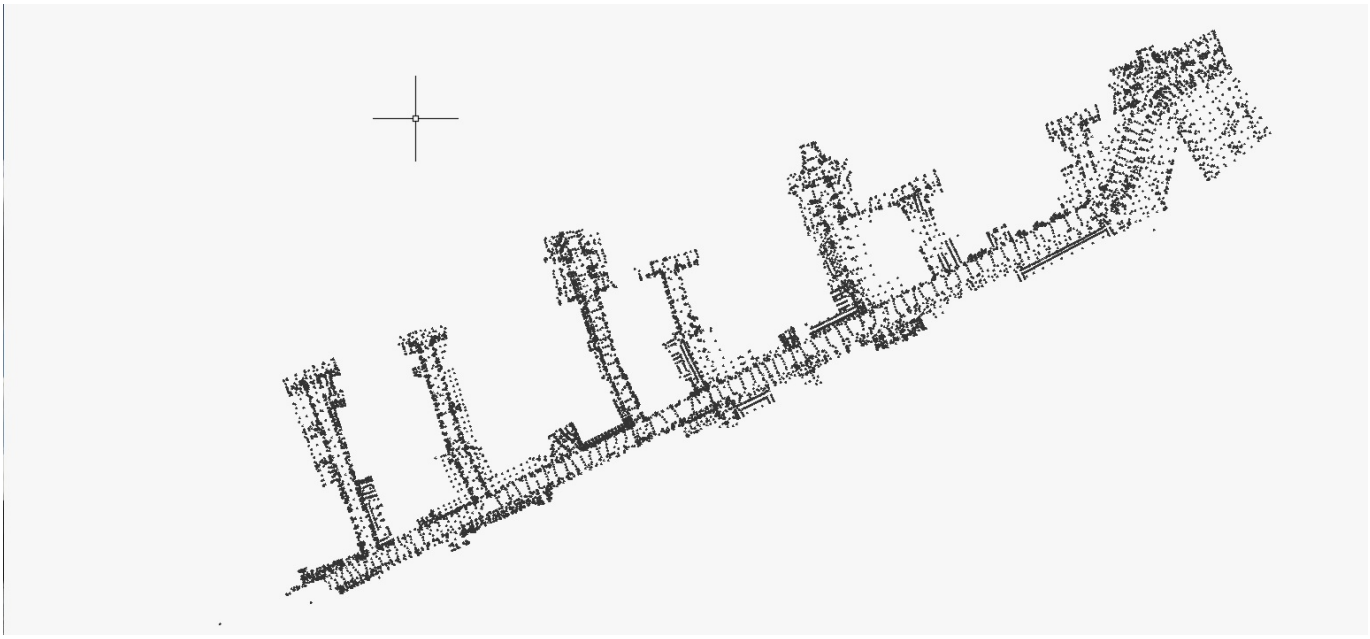

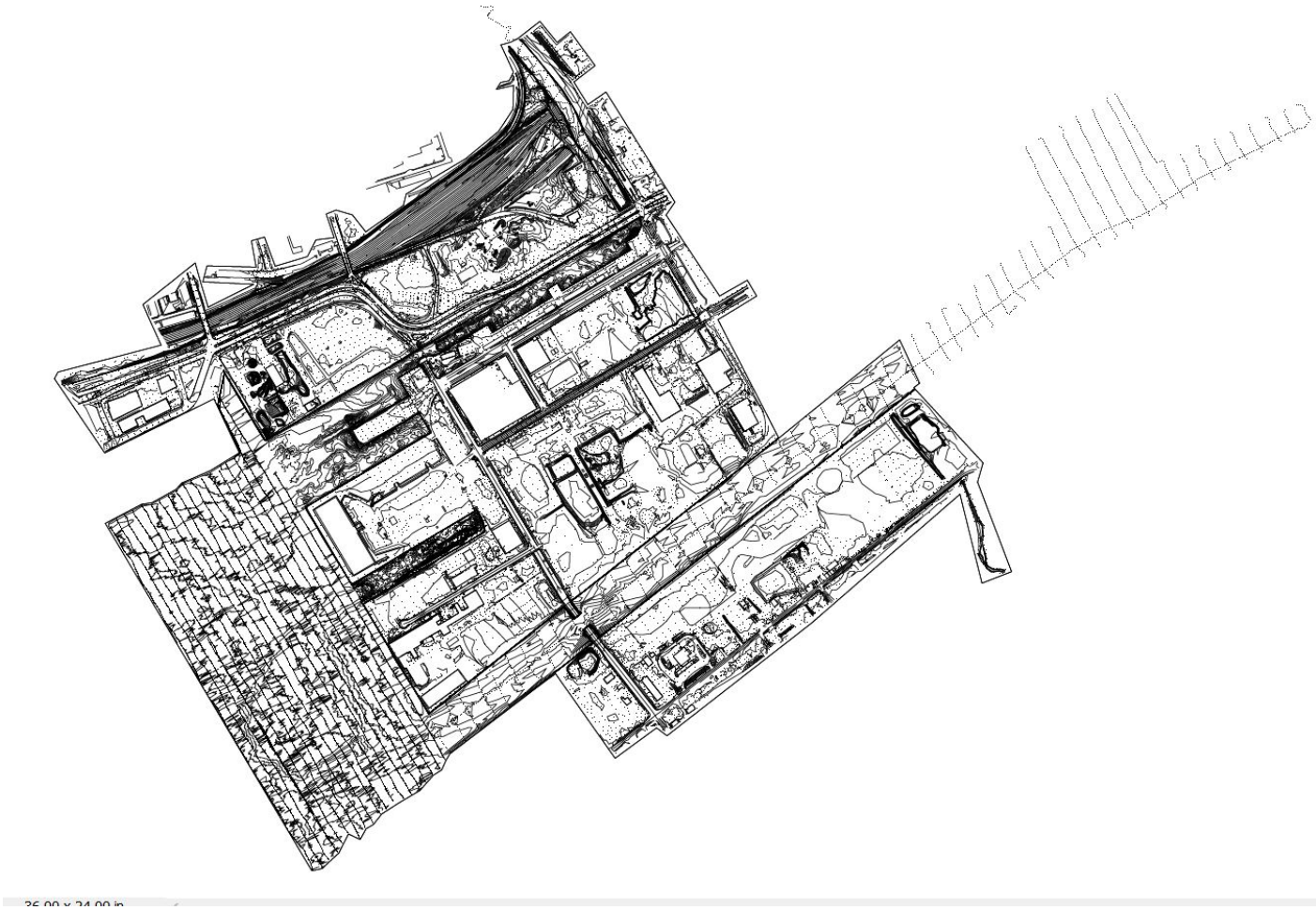

APPENDIX B

4.3 Goods Movement (Trucks, Rail)

One of the objectives of the planning framework was to continue to support industrial and port activity in the future. Considerations for both truck and rail activity included:

- Ensure the transportation system supports development and land use, while recognizing the need for effective movement and interaction of people and goods
- Plan for effective goods movement facilities and systems that minimize impacts and provide direct access.
- Maintain transportation connections to the Don Valley Parkway and Gardiner Expressway to support future goods movement.
- Consider goods movement as a key performance indicator in assessing area transportation requirements
- Work with the City and industries to protect the goods movement network.

Good movement in the study area is provided by two modes: Truck; and Rail

Heavy rail activity in the study area will be limited to very specific industrial activity at the Port Authority lands. Activity will be limited and at infrequent times. Rail activity will be accommodated in the future by the existing spur line connecting along Unwin, Leslie, and Lake Shore to the Keating lines.

Trucking in and out of the Port Lands area is more significant and expected to continue at today's levels if not more.

The following sections described the separate trip generation, trip distribution, and assignment processes for the truck activity in the study area.

4.3.1 Truck Trip Generation

Truck traffic in the Port Lands area comprises two types: i) Port Lands Based - to/from area land uses (commercial and industrial); and ii) External Zones - external trucks. The following details how these truck movements were estimated for the 2065 horizon.

Port Lands-Based Trucks

The estimation of trucks in the Port Lands and south of Eastern area was calculated according to forecasted employment using the following data:

- Port Lands Population Employment and Floor Area projections (Port Lands Projections_Sep8.xls - City of Toronto, Sept 8, 2014)
- Daily truck trip generation rates provided via "Estimating Urban Commercial Vehicle Movements in the Greater Toronto-Hamilton Area (Metrolinx / McMaster, 2010)" – Exhibit 17
- Daily distribution of truck traffic also provided via "Estimating Urban Commercial Vehicle Movements in the Greater Toronto-Hamilton Area (Metrolinx / McMaster, 2010)" – Exhibit 41
- Information on the operation of existing land uses that are to remain in the area
- Existing year (2013) truck counts throughout the study area

Based on the available data, it was possible to estimate trucks in several different categories for several types of trucks, as follows:

- Categorised by generalized land use - Industrial, Wholesale, Retail, Services, Transportation
- Categorised by truck type – Light, Medium, Heavy

The method used to calculate goods movement for the Port Lands-based Approach was based on the following steps:

- Calibrate existing year model to match car and truck counts independently. This provided the base number of trucks within the study area and associated the trucks with specific zones and travel patterns. This allowed for direct control of the number of trucks in the future year based on knowledge of future land use changes in the area.
- Calculate AM and PM Peak Hour truck trip production and attraction rates per employee from daily rates and graphs showing the breakdown of typical trip movements throughout the GTHA, as provided in the Metrolinx/McMaster document.
- It was necessary to assume that the AM Peak Hour attraction rate is equivalent to PM Peak Hour production rate and vice versa. This means that the same number of vehicles that leave in the AM come back in the PM. This results in no net change in number of trucks in the area on a daily basis.
- Apply AM and PM Peak hour trip generation rates (production and attraction) to the employment estimates by Land Use type in Port Lands. These provided a generalized number of trucks for various zones in the area.
- An examination was made of the number of trucks produced by various known land uses. Information from these specific sites was used to override the generalised calculations where the specific information exists.
- For areas with existing land uses that are to be removed or reduced in size, the existing year produced and attracted trips were factored down based on existing gross floor area and "existing gross floor area to remain". This takes the existing truck activity in the area and adjusts it to represent the continuation of certain land uses in Port Lands in the future.
- The trips produced through new trip generation with trips from remaining land uses was used to create the total 2065 truck demand for model zones within the Port Lands and South of Eastern Area.

Trucks Outside of Port Lands and South of Eastern

As the strategic and operational models represented a larger area than the focused study area, it was necessary to produce truck forecasts for areas outside of the Port Lands and South of Eastern areas for the 2065 horizon. The general approach was identical to that applied in calculating non-study-area 2065 auto trips and applied the following data:

- Calibrated 2013 truck travel demand matrix
- EMME 2001 and 2031 auto trip matrices

The method used to calculate goods movement for the External Zone Approach was based on the following steps:

- The Compound Annual Growth Rate (CAGR) was calculated for EMME model zones between the two model years (2001 and 2031). This provided a general growth rate for the various areas of the model outside of the focused study area.
- As the strategic and operational models created for this project have a finer zone structure than the regional EMME model, it was necessary to associate the Port Lands model "child" zones to larger EMME "parent" zones. This assigned the growth rate for the larger parent zone to the smaller child zone.

- The assigned CAGR for the associated EMME parent zone was applied to individual Port Lands child zones to calculate the growth in truck trips between 2013 and 2031.
- It was assumed that the areas outside of the Port Lands and South of Eastern focus area would reach "build out" by the year 2031. This means that no growth in trucks (or cars) was applied beyond the 2031 estimates for areas outside of the Port Lands and South of Eastern area. These truck trips represent 2065 truck trip activity outside of the study area.

Overall Truck Demands

The two sets of truck demands described above (study area and outside of study area) were combined together to form a consolidated set of truck demands for 2065. The final step in this process was to take the generalised truck values and distribute them to a more refined definition of truck type.

The overall truck trip table was refined based on two pieces of data:

- Exhibit 40 in "Estimating Urban Commercial Vehicle Movements in the Greater Toronto-Hamilton Area (Metrolinx / McMaster, 2010)" – Proportions of Commercial Vehicle trips made by Heavy, Medium, and Light Commercial Vehicles
- Port Lands forecasted Land Uses (City of Toronto)

The difference between light and medium trucks was assumed to not be critical for this study. As a result, the truck trips were distributed to heavy trucks (tractor/trailer types and larger vehicles) and light/medium (cube vans, delivery trucks). 4.3.3

The method used to calculate the final distribution of truck trips for the combined areas was based on the following steps:

- The trip generation results for the study area with trips calculated for non-study area zones were combined into a single table. This created the overall truck trip productions and attractions for 2065.
- The proportions given in the Metrolinx/McMaster document were applied to break down the final truck trip matrix into heavy trucks and light/medium trucks. This was generally given as an overall split of 15% heavy vehicles and 85% medium/light vehicles. 4.4
- Individual land uses in the study area model zones were examined to determine the likely proportion of heavy or light/medium commercial vehicles for these uses where better information was available. This provided a more realistic estimate of the truck activity specific to the Port Lands and South of Eastern area than the generalised rates provided by the Metrolinx/McMaster document.
- Zones outside of the Port Lands and South of Eastern area were split directly into 15% heavy vehicle and 85% medium/light vehicle based on the information given in the Metrolinx/McMaster document.

The above processes resulted in two truck matrices for the year 2065: heavy vehicles and medium/light vehicles. The final truck trip tables are provided in Appendix T-2.

4.3.2 Trip Distribution

With the trips generation quantified, the next step was to distribute the volumes to study area zones and network. The following data was used:

- Classified vehicle turning counts along Lake Shore Boulevard: Cherry, Don, Booth, Logan, Carlaw, Leslie
- Study area zone trip production and trip attraction totals

- Corridor between Don Roadway and Carlaw - 2 lanes deficiency
- Corridor between Carlaw and Leslie – 1 lane deficiency
- Crossing Ship Channel between Cherry and Leslie – 1 lane deficiency

- East West
  - North of Lake Shore – 1 lane deficiency
  - South of Lake Shore, north of Ship Channel – 1 lane deficiency
  - South of Ship Channel – 1 lane deficiency

The identified deficiencies were used to define discrete sub-areas reflective of local capacity and operational needs to support travel. This was one consideration in the identification and evaluation of the transportation alternatives.

APPENDIX C

LIST OF THIRD PARTIES TO WHICH TOPOGRAPHICAL MAPS WERE DELIVERED

Delivery date: August 31, 2015:

- MVVA
- CH2M (now Jacobs)
- GHD
- Riggs

As part of the solicitation process in RFP 2016-48 – November 16, 2016, RFP 2016-47 – December 29, 2016 and RFP 2017-44 – August 11, 2017:

- Ellis Don
- Golder
- WSP
- MVVA
- Geosyntec
- AmecFW
- Altus
- Entuitive
- City of Toronto
- TRCA
- Ports Toronto
- TPLC/CreateTO
- EnvironmentCanada

September 6, 2013

- Dillon

Other parties:

- Planning Alliance February 3, 2012
- University of Toronto September 24, 2018
- University of Melbourne September 6, 2013
- Penn State September 24, 2010
- Beanfield February 23, 2015
- DTAH March 7, 2011
- GBC April 2, 2013
- First Gulf December 16, 2015
- Public Works October 7, 2015