

**5. SUBDIVISIONS
AIR RIGHTS
KANATA REGIONAL SHOPPING CENTRE**

COMMITTEE RECOMMENDATIONS

That Council approve:

- 1. That the air rights located beyond 5.5 metres above Blocks 3 and 4, Plan 4M-921 be declared surplus to Regional needs;**
- 2. The granting of a lease for the air rights (above 5.5 metres) over Block 4, Plan 4M-921 to Penex Kanata Limited for a period of ninety-nine years at nominal consideration with the Penex having the option of renewing the lease for two, twenty-five year periods at fair market rent;**
- 3. That the Region grant to Penex Kanata Limited an option to acquire the air rights (above 5.5 metres) over Block 3 at fair market value with such price to be agreed upon between the Region/new City and Penex, or, in the absence of agreement, as determined by an arbitrator;**
- 4. Penex shall have until the expiration of two years following the earlier of the completion of the construction of the Transitway station or the park and ride at the regional shopping centre site to exercise the option.**

DOCUMENTATION

- 1. Joint A/Regional Solicitor and Planning and Development Commissioner's report dated 11 Oct 00 is immediately attached.**
- 2. Extract of Draft Corporate Services and Economic Development Committee Minute, 17 Oct 00, immediately follows the report and includes a record of all votes.**

REGION OF OTTAWA-CARLETON
RÉGION D'OTTAWA-CARLETON

REPORT
RAPPORT

Our File/N/Réf. S.3.2.953
Your File/V/Réf.

DATE 11 October 2000

TO/DEST. Co-ordinator
 Corporate Services and Economic Development Committee

FROM/EXP. Acting Regional Solicitor
 Planning and Development Approvals Commissioner

SUBJECT/OBJET **SUBDIVISIONS - AIR RIGHTS**
 KANATA REGIONAL SHOPPING CENTRE

DEPARTMENTAL RECOMMENDATIONS

That the Corporate Services and Economic Development Committee recommend Council approve:

- 1. That the air rights located beyond 5.5 metres above Blocks 3 and 4, Plan 4M-921 be declared surplus to Regional needs;**
- 2. The granting of a lease for the air rights (above 5.5 metres) over Block 4, Plan 4M-921 to Penex Kanata Limited for a period of ninety-nine years at nominal consideration with the Penex having the option of renewing the lease for two, twenty-five year periods at fair market rent;**
- 3. That the Region grant to Penex Kanata Limited an option to acquire the air rights (above 5.5 metres) over Block 3 at fair market value with such price to be agreed upon between the Region/new City and Penex, or, in the absence of agreement, as determined by an arbitrator;**
- 4. That Penex shall have until the expiration of two years following the earlier of the completion of the construction of the Transitway station or the park and ride at the regional shopping centre site to exercise the option.**

BACKGROUND

Commencing with the earliest discussion of the detailed official policies for the Kanata Town Centre, the Region has supported a compact development form for the regional shopping centre. To encourage this development form, in their comments in 1993 on Kanata Official Plan Amendment No. 24, Regional staff recommended that policies be included in the amendment to permit development over the transitway and transitway platforms in order to promote a compact and intensive development form.

The 1997 Regional Official Plan similarly provides in Policy 3.2.12 that the Region shall:

...encourage the creation of a community core as a focal point for the new development or redevelopment area by:

- a) enabling the core to develop over time as a compact, mixed-use, pedestrian, cyclist and transit-friendly activity node;

Finally, Kanata Official Plan Amendment No. 51, approved in the context of the recent hearings on commercial policies in the City of Kanata permits development at the Regional Shopping City by way of an air rights agreement.

DISCUSSION

The Region acquired Block 4 on Plan 4M-921 in 1994 at a price of one dollar for transitway purposes through conditions of subdivision approval. Block 3 was also acquired in 1994 for a park and ride by purchase for a consideration of \$1,650,000. The terms of the acquisition of Block 4, as provided in the subdivision agreement, state that the "Region covenants and agrees to transfer the lands which are surplus to the transitway needs abutting Block 4 on the Plan of Subdivision to the Owner for nominal consideration." It is consistent with the terms of this subdivision agreement that the portion of Block 4 not required for Regional purposes, i.e. that above 5.5 metres, would be granted to Penex for nominal consideration.

With respect to Block 3, while the intensification of this site, allowing for a park and ride, is consistent with Regional and Kanata official plan policy, given that the Region paid the full market value for this site, it is the opinion of staff that it is necessary to ensure that the fair market value for the air rights over Block 3 is paid to the Region. While it has not been possible to date to reach agreement with Penex as to the value of the air rights, Penex has requested that some degree of certainty be provided that it will be able to acquire the air rights.

An approach that meets the objective of providing compensation at market value to the Region while also providing certainty to Penex is the granting of an option to purchase. Under this scenario, staff, with the concurrence of Council, would indicate the price at which the Region/new City was prepared to sell the air rights over Block 3. A period of negotiation would follow. In the event that an agreement with respect to price is not reached, the question of price would be referred to an arbitrator for a final decision.

To provide a time limit to the option, Penex would be given until the expiration of two years following the earlier of the completion of the construction of the transitway station or the park and ride at the regional shopping centre site to exercise the option.

PRINCIPLES OF AIR RIGHTS AGREEMENT

The air rights agreement provides that the interest leased to Penex Kanata shall be five and one-half metres above the highest point of the platform, the bus lanes or the park and ride area. The location of the highest point is of course not known at this time. Therefore, if prior to the construction of the transitway either the Region/new City of Ottawa or Penex wish to conclusively determine the point of commencement of the air rights, the agreement provides a process of negotiation by which the parties can agree as to the point or refer the matter to arbitration. In either event the agreement states that the location of the highest point of the platform, bus lanes and park and ride shall be based upon the approach a reasonably prudent engineer acting for a municipality would consider in designing a Transitway station and a park and ride at the locations contemplated.

Staff note that five and one-half metres would be sufficient clearance for light rail were it to be extended to this site.

NEW CITY OF OTTAWA

The encouragement of intensive development at the Kanata Regional Shopping Centre site is consistent with the official plans of the Region and the City of Kanata. The lease of air rights will therefore not have any negative impact on the new City.

OTTAWA TRANSITION BOARD

The air rights agreement and granting of the option will require the approval of the Ottawa Transition Board.

FINANCIAL IMPACT

Should the Region/new City of Ottawa wish to proceed with the determination of the precise location of the base of the air rights in advance of Penex, then it will incur minor costs (<\$10,000) in so doing.

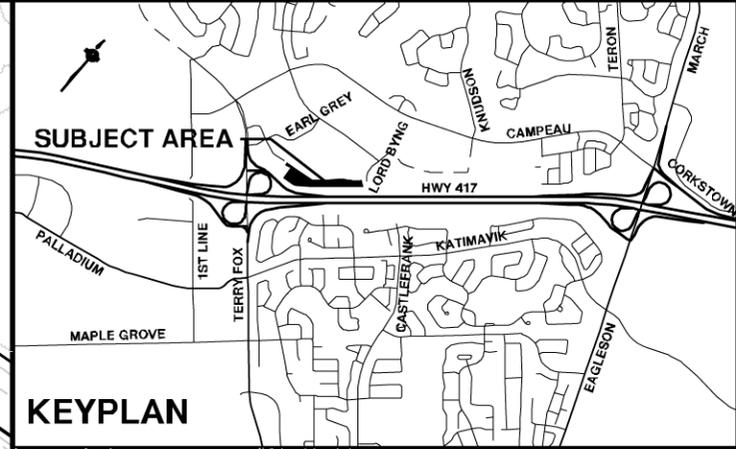
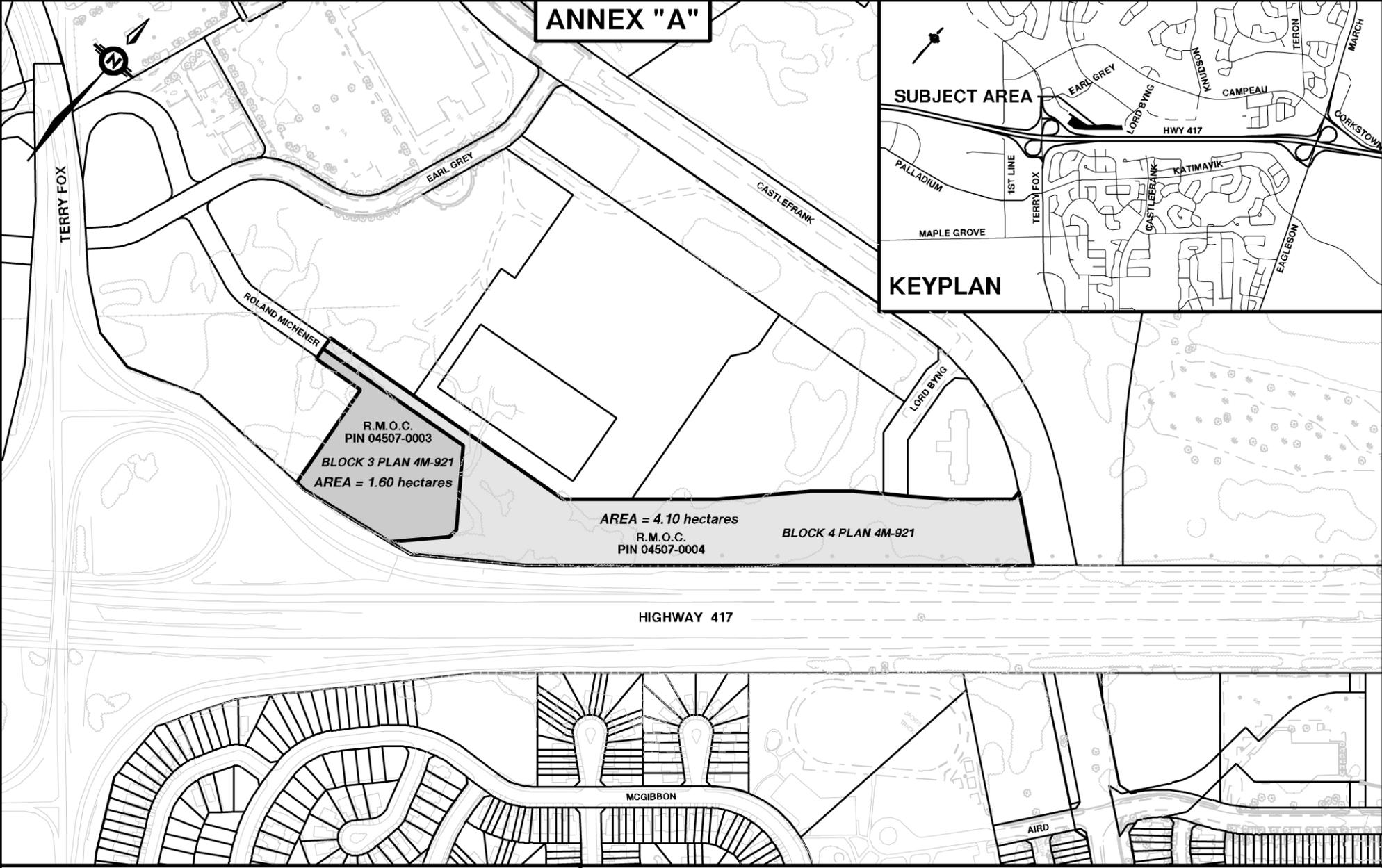
Should Penex determine to exercise the option for the air rights over Block 3, such will represent a revenue to the new City. As described above, the amount of the revenue will be determined by agreement, or failing agreement, arbitration.

Approved by
E.A. Johnston

Approved by
N. Tunnacliffe, RPP, MCIP

EAJ/NT/TCM

ANNEX "A"



HIGHWAY 417

MCGIBBON

AIRD

BLOCKS 3 & 4 PLAN 4M-921

**REGION OF OTTAWA-CARLETON
INFORMATION TECHNOLOGY OFFICE**

OWNER : AS SHOWN AREA : AS NOTED

SCALE 1:5000 METRIC DATE : OCT./2000 FILE

BRANCH SURVEYS & MAPPING

Extract of Draft Minute
Corporate Services and
Economic Development Committee
17 October 2000

SUBDIVISIONS ***

AIR RIGHTS

KANATA REGIONAL SHOPPING CENTRE

- Joint A/Regional Solicitor and Planning and Development Commissioner's
report dated 11 Oct 00

Mr. Dennis Eberhard, Assistant Vice-President, Pen Equity Management Corporation, spoke to the Committee on this matter. Mr. Eberhard addressed report recommendation nos. 3 and 4.

As background, Mr. Eberhard reported that in 1997 Pen Equity entered into discussions with the Region to obtain the air rights over the park and ride facility and the transit lands. He stated that in May 1997, Pen Equity received a letter from Regional Planning staff that outlined the principles of the air rights over the park and ride facility. The speaker pointed out the letter stated Pen Equity would receive the air rights for both the park and ride and transit lands at a nominal consideration. Mr. Eberhard continued to explain an agreement was drafted and finalized two years ago, however, the parties have since been trying to define the agreement schedules. The speaker stated in July 2000, Pen Equity expressed concern with the long negotiations, noting the importance for a resolution and the need for Pen Equity to be able to incorporate the air rights into their future marketing design of the shopping center. Mr. Eberhard reported Pen Equity was informed in July 2000 that the Property Services Division had not reviewed this agreement and the Region now assessed that there was considerable value to the air rights over the park and ride facility (Block 3). He expressed concern and surprise at this statement, referencing the need to redraft the agreement to incorporate the conditions as set out in the report, and the change in staff's opinion with regard to the air rights over Block 3. Mr. Eberhard stated it was only in the last three months that staff had decided some value should be assigned to Block 3, noting the figure from an appraisal was not disclosed to him. In closing, Mr. Eberhard emphasized air rights was a very expensive and challenging development to undertake, and stated the air rights should be provided at a nominal amount. He added the original planning rationale for the nominal consideration was that high-density development in and around a transit facility would be beneficial for the Region and support the large investment in the transit facility and system. Mr. Eberhard requested Committee to support the original agreement and urged for closure on the issue.

*****NOTE: TRANSITION BOARD APPROVAL WILL BE REQUIRED FOLLOWING COUNCIL
CONSIDERATION OF THIS ITEM**

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Councillor Munter reported he had spoke with Pen Equity and staff and suggested a compromise from the staff recommendations and the request from Pen Equity. The Councillor pointed out the Region purchased the land for the sole purpose of the transitway and park and ride. Councillor Munter acknowledged the desire for staff to attempt to recover the expenditure, however, he referenced the original 1997 Regional position in that there was a public interest in this initiative. As a compromise, Councillor Munter suggested Pen Equity have access to the air rights over Block 3 for nominal consideration for three years following the construction of the transit facility. He recommended at the end of the three years, if Pen Equity has not developed the space, then the Region had the right to put forward a request for proposal to obtain another developer and Pen Equity could not frustrate the process.

Councillor Meilleur stated it was an objective of the transitway system to build an employment center near by. The Councillor acknowledged staff's opinion that the air rights were of monetary value; however, she stated she wished to see the Pen Equity project advance. Councillor Meilleur moved a Motion outlining the Munter compromise.

Councillor Cantin agreed with the staff opinion the air rights were of value and inquired what the value was. T. Marc, Manager, Planning and Development Law, confirmed there was substantial value to the lands; however, he could not disclose a figure. He reported Block 4 was acquired subject to a subdivision agreement that specifically stated the air rights would be granted for \$1.00. Although, with respect to Block 3 (the park and ride facility), Mr. Marc stated the Region had paid \$1.65 million for the lands. Councillor Cantin referenced the Gloucester Shopping Centre / Blair transit facility and the Glen View Park and Commerce buildings. He wondered how those projects were dealt with and noted the need for consistency. With respect to the three-year term, the Councillor felt it was too long.

In the absence of Chair Chiarelli, Councillor Loney moved into the position of Acting Chair for the remainder of the meeting.

Councillor van den Ham expressed his support for the staff recommendations and the need to determine a value for Block 3. In response to an inquiry, Mr. Marc confirmed the discussions with Pen Equity from 1997 to the spring of 2000 were on the basis that nominal consideration would be paid for both Blocks 3 and 4. However, Mr. Marc stated there was no commitment at a high level {senior staff, Committee, Council or a signed agreement} that justified disposal of the air rights over Block 3 for \$1.00. Therefore, he explained staff changed their position and now believes that given the

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substantial expenditure for the property, market value should be assigned to the air rights over Block 3.

Councillor Beamish inquired about the construction proposed by Pen Equity. Mr. Eberhard reviewed the proposal, emphasizing the associated challenges and expenses. He acknowledged the prime location of the property with respect to the value; however, he referenced the reality of incorporating it into Pen Equity's development and the need to make it economical and effective. Mr. Eberhard believed the air rights were a separate issue from the purchase price paid by the Region when they acquired the property for transportation purposes.

Councillor Hunter stated air rights had value if there was a competitive market, noting Pen Equity could use the air rights whereas another company would actually have to build a structure and would lose their dollar advantage. He questioned the proposed high value of the air rights as suggested by staff. Councillor Hunter referenced the 1997 letter and stated it should take precedent, noting the letter and commitments must have been vetted for accuracy. He did not support the Meilleur motion, as the timing of the transitway was unknown. In addition, Pen Equity had the opportunity to move ahead at this time with a proposed project but required some assurance with respect to the air rights.

Councillor Munter disagreed with the previous comments with respect to the land value; he reviewed the location of the property and rationale for its substantial value. However, Councillor Munter referred to the 1997 commitments and the public interest in having the site developed. He reviewed his compromise that if Pen Equity were unsuccessful with their project, the Region would proceed with a request for proposal.

Councillor Loney inquired on the size of the proposed building. Mr. Eberhard acknowledged the Pen Equity's interest in the air rights. However, he stated they could not guarantee a building or the type of building at this time. He reiterated the expense, challenge and need for a parking structure to be incorporated into the existing development of the shopping centre. The speaker further explained it might be Pen Equity's desire to incorporate the air rights into the marketing of the project to increase tenant interest. With respect to co-operating with another developer in the long term, Mr. Eberhard stated Pen Equity would have to look closely at the impact on their operations.

Councillor Loney supported the notion that a substantial employment centre be developed on the location to tie in with the transitway. The Councillor supported the nominal consideration for Block 3; however, he suggested the need for some minimal

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requirements such as the assurance that a large employment centre would be constructed, referencing the public interest. In response, Mr. Eberhard was not agreeable to this, stating Pen Equity could not give up their ability to protect their tenants and facilities from the encroachment of an adjoining development or their legal rights to the ownership of the property.

Councillor Cantin referenced the Gloucester Centre and the arrangement to use some parking space for park and ride purposes to encourage transit users. He reviewed the advantages to having people travel through the shopping centre. However, the Councillor noted the difference in the type of development i.e. office towers. In response to a question, Mr. Marc confirmed the land was sold to the Region for transportation purposes with no conditions attached. As a result, the Councillor did not support the Meilleur motion and moved to refer the issue to the new City of Ottawa Council.

Councillor Munter stated it was not correct to expect a developer to use all their retail parking space. He referenced the need for reasonable accommodation through an agreement and there would be some control, but not the ability for Pen Equity to block the process. Mr. Eberhard referenced outstanding issues such as access. He reiterated the cost and challenges of the venture, stating to add the cost for the air may make the proposal uneconomical.

Councillor Beamish expressed his support for some comments made by Councillor Munter as well as the staff position. However, he stated he could not support the Meilleur motion. He believed there was a value to the air rights, which would only rise over time and could be determined at a later time. Councillor Beamish stated the Region had an obligation to the taxpayer to be compensated for that value. In closing, the Councillor referenced the unfortunate situation created by the 1997 letter. However, he stated Pen Equity should have realized this letter held no final authority until approved by Council or through a signed agreement. As another means to compromise and allow Pen Equity proceed with their marketing plans, Councillor Beamish moved a motion as outlined below.

Councillor van den Ham suggested the real question was the value of the air rights. He agreed there was a need to provide assurance to Pen Equity to allow them to proceed with their marketing. He expressed his support for the report recommendations as it provides the guarantee Pen Equity will obtain the air rights, noting recourse to an arbitrator, and provides closure to the issue.

Councillor Cantin requested withdrawal of his referral motion, in support of the report recommendations. The Committee concurred.

Moved by R. Cantin

That this item be referred to the New City Council for debate and consideration.

WITHDRAWN

Moved by M. Meilleur

Amend report recommendation no. 2 by adding Block 3, as follows:

2. The granting of a lease for the air rights (above 5.5 metres) over Block 3 and Block 4, Plan 4M-921 to Penex Kanata Limited for a period of ninety-nine years at nominal consideration with the Penex having the option of renewing the lease for two, twenty-five year periods at fair market rent;

Replace report recommendation nos. 3 and 4 with the following :

3. That the foregoing be subject to a legal agreement between the Region and Penex Kanata Limited allowing the Region to conduct a Request for Proposal for the development of these air rights if Penex Kanata has not yet applied for and received development approval within three years following the earlier of the completion of the construction of the Transitway station or the park and ride at the regional shopping center site, such legal agreement specifying that Penex Kanata Limited can not unreasonably withhold its consent for access, egress and other co-operation required for the development of the site by a different developer, and requiring high-density employment development.

LOST

NAYS: D. Beamish, R. Cantin, B. Hill, W. Stewart, R. van den Ham ... 5
YEAS: G. Hunter, A. Loney, M. Meilleur ... 3

Moved by D. Beamish

That the Corporate Services and Economic Development Committee recommend that Council agree in principle that the concept of the development of air rights over the Kanata Town Centre Park and Ride Lot be supported, and that the staff be directed to negotiate at the time of development proposal for suitable compensation.

LOST

NAYS: G. Hunter, A. Loney, M. Meilleur, R. van den Ham ... 4
YEAS: D. Beamish, R. Cantin, B. Hill, W. Stewart ... 4

As the Beamish and Meilleur motions lost, the Committee then considered the staff recommendations.

That the Corporate Services and Economic Development Committee recommend Council approve:

- 1. That the air rights located beyond 5.5 metres above Blocks 3 and 4, Plan 4M-921 be declared surplus to Regional needs;**
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CARRIED

YEAS: R. Cantin, B. Hill, A. Loney, M. Meilleur, W. Stewart, R. van den Ham ... 6
NAYS: D. Beamish, G. Hunter ... 2