



**STAFF REPORT
ACTION REQUIRED**

Don Valley Brick Works – Lease of Part of 550 Bayview Avenue to Evergreen – Additional Considerations (Ward 29 – Toronto – Danforth)

Date:	June 25, 2007
To:	Government Management Committee
From:	Joseph P. Pennachetti, Deputy City Manager & Chief Financial Officer Sue Corke, Deputy City Manager
Wards:	29
Reference Number:	P:\2007\Internal Services\Cf\gm07030cf – et (AFS #5450)

SUMMARY

By its adoption of Clause 23 of Report No. 5 of the Administration Committee at its meeting held on July 25, 26 and 27, 2006, City Council authorized the entering into of a lease (the “Lease”) with Evergreen (formerly Evergreen Environmental Foundation) for the industrial pad portion of the Don Valley Brick Works site for its “Evergreen at the Brickworks” project (the “Project”). Through the course of detailed lease negotiations, staff have noted that the scope and total cost of the Project had changed, and several important issues have arisen that require consideration and approval by Council before the Lease can be completed.

Firstly, the estimated construction cost has increased from the \$38 million presented to Council in July 2006 to now \$42 million. Secondly, Evergreen is requesting an increase to any loan guarantee to be provided by the City and TRCA, from \$3 million as previously estimated, to a revised amount of up to \$7.5 million commensurate with the increased Project costs. In light of this, Evergreen will provide a \$500,000 letter of security or segregated cash capital security fund as sufficient performance and/or construction lien security from Evergreen for the Project. This report also requests authority to amend certain of Council’s previously approved terms and conditions for the Lease.

RECOMMENDATIONS

The Deputy City Manager and Chief Financial Officer and the Deputy City Manager, Sue Corke, recommend that:

1. Subject to City Council approval of Recommendations No. 2 and No. 3 below, authority be granted for the City to issue a joint and several capital loan guarantee with Toronto and Region Conservation Authority (“TRCA”) for a maximum amount not to exceed \$7.5 million (inclusive of all interest, costs and charges) (the “Guarantee”) and authority be granted to enter into any agreements or documents between the City, TRCA, Evergreen and Evergreen’s institutional or private Project lenders(s) (“Interim Project financiers”) as may be required, desirable or necessary in relation to the interim financing arrangement(s) in an amount of approximately \$18.4 million (inclusive of all interest costs and charges) (“Interim Financing”) to facilitate the construction of the Project known as “Evergreen at the Brickworks”, at 550 Bayview Avenue, all on terms and conditions satisfactory to the Deputy City Manager and Chief Financial Officer in consultation with the General Manager of Economic Development and Culture and TRCA, in form acceptable to the City Solicitor, and including the following:
 - i) The capital loan guarantee be deemed to be in the interest of the City;
 - ii) Council make an exception to its policy for Capital Loan and Line of Credit Guarantees for cultural and community organizations, as amended in February 2005, which establishes the total limit for all loan guarantees to \$10 million, to allow for this Guarantee without affecting the limit of the policy;
 - iii) Evergreen be required to provide the City with an irrevocable letter of credit or similar security acceptable to the Deputy City Manager and Chief Financial Officer, in the amount of \$0.5 million for the purposes of funding any debt service deficiencies associated with the Guarantee towards the Project for the duration of the Interim Financing, Project completion and/or possible construction liens attaching to the Project;
 - iv) Any agreement(s) between the City, TRCA, Evergreen and their design build guaranteed price contractor be limited to the proposed maximum price of \$42 million, inclusive of applicable taxes (excluding recoverable GST payments), and be to the satisfaction of the Deputy City Manager and Chief Financial Officer, in consultation with the General Manager of Economic Development and Culture, TRCA and the City Solicitor;
 - v) Evergreen having secured Interim Financing arrangements from Interim Project Financier(s) who are acceptable to both the City and TRCA, and Evergreen having satisfactorily demonstrated that it has negotiated with its Interim Project Financier(s) a binding interest rate for the Interim Financing arrangements to be jointly and severally guaranteed, in part, by the Guarantee, commensurate with

- the City's loan guarantee and credit rating to the satisfaction of the Deputy City Manager and Chief Financial Officer;
- vi) Evergreen having secured and being in good standing under a binding commitment from the Ontario Heritage Trust for a cash contribution for this Project in the amount of up to \$10 million and TRCA and the City, if required, being provided with a satisfactory comfort letter from Ontario Heritage Trust in that regard;
 - vii) Evergreen having secured and being in good standing under a binding commitment from Infrastructure Canada for a cash contribution for this Project in the amount of up to \$20 million and the City and TRCA, if required, being provided with a satisfactory comfort letter from Infrastructure Canada in that regard;
 - viii) Evergreen having submitted to the Deputy City Manager and Chief Financial Officer a formal business plan demonstrating to the satisfaction of Deputy City Manager and Chief Financial Officer and the General Manager of Economic Development Culture and Tourism the adequacy of projected operating cash flow from operations to retire the Interim Financing within the 4 year timeline required by recommendation 1 (ix) below;
 - ix) A further condition of the Guarantee and of the Lease be that the Interim Financing shall be repaid in full, and that the Guarantee expire, by no later than the earlier of the end of year 4 of operation of Evergreen at the Project calculated from the Commencement Date of the Lease or on earlier termination or payout of the Interim Financing;
 - x) The Guarantee be for the purposes of facilitating the funding of the construction and construction related capital costs of \$42 million, guaranteeing Project completion and/or possible construction liens attaching to the Project, and that any material changes thereto require the prior written consent of both the TRCA and the Deputy City Manager and Chief Financial Officer of the City, in consultation with the General Manager of Economic Development and Culture;
 - xi) TRCA having approved the issuance of such Guarantee on terms and conditions satisfactory to the Chief Financial Officer of the City, in consultation with the General Manager of Economic Development and Culture, in form acceptable to the City Solicitor; and
 - xii) Those other terms and conditions as per attached Appendix "1" to this report, Sections 4 and 5, subject to such further revisions and other terms and conditions as may be satisfactory to the Deputy City Manager and Chief Financial Officer in consultation with the General Manager of Economic Development, Culture and Tourism and TRCA, all in form acceptable to the City Solicitor.

2. The authority granted in Clause 23 of Report No. 5 of the Administration Committee adopted by City Council at its meeting held on July 25, 26 and 27, 2006 to enter into a Lease with Evergreen be revised as per attached Appendix "1" to this report, subject to such further revisions and other Lease terms and conditions as may be satisfactory to the Deputy City Manager and Chief Financial Officer, in consultation with the General Manager of Economic Development, Culture and Tourism and TRCA, all in a form acceptable to the City Solicitor.
3. City Council endorse the single perpetual Heritage Easement Agreement for the Leased Premises to be entered into between TRCA and Ontario Heritage Trust upon the terms and conditions as ultimately devised by Preservation Services and TRCA, working in co-operation with Evergreen and Ontario Heritage Trust, in form acceptable to the City Solicitor and legal counsel for TRCA.
4. The appropriate City Officials be authorized and directed to take the necessary action to give effect thereto.

FINANCIAL IMPACT

The total Project capital costs anticipated by Council in July 2006 were \$38 million. Over the past year Evergreen's plan has modified to be more sensitive to heritage site features and to be designed to a higher green standard. The current comparable cost today is \$42 million which includes a 20% construction contingency.

The public sector portion of the capital campaign has obtained commitments in the amounts of \$10 million from the Province of Ontario, and a revised contribution of \$20 million from the Government of Canada. Evergreen, a not-for-profit charitable organization, has currently raised over \$7 million in pledges toward a target of \$25 million in private donations. A total Project cost of \$55 million is estimated by Evergreen and includes the \$42 million capital cost noted above, with an additional \$13 million allowance for programming costs and an endowment for Evergreen to be funded from Evergreen's private donation campaign. The following chart summarizes the sources and uses of funds for this Project.

Table 1 - Project Sources and Uses of Funds

Uses	Sources
\$42 million capital costs	\$10 million Ontario
	\$20 million Canada
	<u>\$12 million Private donations</u>
\$42 million Total capital	\$42 million Total capital
<u>\$13 million operating programming and endowment</u>	<u>\$13 million Private donations</u>
\$55 million Project TOTAL	\$55 million Project TOTAL

The timing of such funding, being in arrears, has necessitated that Evergreen acquire interim financing in an amount estimated by Evergreen at approximately \$18.4 million, inclusive of interest charges, toward the \$42 million capital costs of the Project.

Due to the nature of federal and provincial contributions being paid in arrears, Evergreen will require interim financing in the form of a loan or loans from its institutional or private lending institution(s), estimated at a maximum exposure of \$18.4 million, inclusive of debt charges, toward the \$42 million capital cost. Evergreen is therefore requesting that the City and the TRCA jointly guarantee a \$7.5 million portion of the proposed \$18.4 million Interim Financing from its Interim Project Financiers. The guaranteed portion of the Interim Financing from the City and TRCA will assist in Project cash flow management, associated with the capital costs of the Project, prior to the flow of government funding to Evergreen. All financing arrangements are to be secured prior to commencement of the Lease.

Once construction is completed, it is expected that funding commitments from the federal and provincial governments in the aggregate of \$30 million will have been fully paid to Evergreen, with the balance of the \$42 million capital cost, or \$12 million, to be funded by Evergreen's private donor campaign and operating surpluses from business activities on-site. Evergreen anticipates that the balance of outstanding Interim Financing will be fully repaid by the fourth year of operations, and thereby the City's and TRCA's Guarantee would be extinguished.

Evergreen has submitted a draft business plan for staff review in support of its Guarantee request. As Evergreen refines its business plan in final form, staff will continue to perform due diligence on the plan and related Guarantee issues, and may include further conditions pertaining to the Guarantee request to the satisfaction of the Deputy City Manager and Chief Financial Officer.

DECISION HISTORY

Pursuant to the authority granted in Consolidated Clause 2 of the Economic Development and Parks Committee adopted by City Council at its meeting held on September 28, 29, 30 and October 1, 2004, the City and TRCA entered into a Memorandum of Understanding (MOU) with Evergreen in 2004 based on a proposal Evergreen made in response to a Request for Proposals that the City issued in 2003.

The MOU contemplated a lease of the industrial pad, a complex of derelict and contaminated industrial buildings that are historically designated. Council at its meeting held on July 25, 26, and 27, 2006 adopted Clause 23 of Report No. 5 of the Administration Committee which granted authority to enter into a Lease with Evergreen for the Leased Premises on the terms and conditions attached as Schedule “A” to such report. Since that time, Evergreen has launched its capital campaign and hired a design team. With encouragement from the City’s Brick Works Advisory Committee and through other public consultations, Evergreen’s design team undertook a review of the master plan to make the Project a model of design sustainability and to be more sensitive to the heritage features on the site.

As the Project’s design started to crystallize, costs became more definitive. With the public portion of the capital campaign successfully concluded, the schedule of pledge payments also became more predictable. As additional Project related details began to emerge including issues relating to construction cash flow, construction financing, loan guarantees, performance security, environmental responsibilities and Ontario Heritage Trust’s requirement of a paramount perpetual Heritage Easement for the site, staff noted that the recommended solutions did not fit with the current Lease authority authorized by City Council in 2006.

ISSUE BACKGROUND

City Council’s issuance of the Guarantee with TRCA and its revision of its 2006 authority to enter into a Lease with Evergreen as per attached Appendix “1” and its endorsement of a single perpetual Heritage Easement Agreement for the Leased Premises to be entered into between TRCA and Ontario Heritage Trust are necessary to move the Project forward and for any Lease to be executed with Evergreen. An executed Lease is an imperative pre-condition for Evergreen being able to access Federal and Provincial funding necessary to complete its Project planning without interruption and to satisfy the municipal approval requirements.

COMMENTS

Project Costs and Financing

Evergreen advises that to date, it has received approximately \$7 million from a variety of sources as part of its private portion of the capital campaign. Consequently, Evergreen currently has commitments for \$37 million of the \$42 million necessary for construction.

The \$42 million capital cost of the Project, although largely funded by disbursements from the committed federal and provincial funds, is to be paid in stages, but only after the work for each particular stage is complete. Evergreen advises that it will require necessary interim funding of to a maximum exposure of approximately \$18.4 million (inclusive of debt charges) during the construction phase. Further, Evergreen is requesting that the City and TRCA provide a loan guarantee in the amount of \$7.5 million of its required \$18.4 million interim Project financing loan, inclusive of debt charges. TRCA has agreed to jointly provide such a loan guarantee.

In addition to the safeguard imposed in Recommendation No. 1 to this report, any such joint and several loan Guarantee will be subject to meeting the City's policy for line of credit guarantees, including the requirements that it and the TRCA be satisfied with the business plan of the Tenant and the Tenant's ability to repay its \$18.4 million interim Project financing loan(s), and such of the other terms and conditions as per Sections 4 and 4 in attached Appendix "1" to this report as may be considered necessary or desirable by the Deputy City Manager and Chief Financial Officer in consultation with the General Manager of Economic Development, Culture and Tourism.

Business Plan

Evergreen has submitted a draft business plan and will be finalizing details seeking approval from its board of directors during the summer. The draft business plan explained the various site uses and related revenue and expense projections from the proposed site operations, such as the native plant nursery, demonstration gardens and sub-tenant rental income. It is anticipated that such a final business plan will be submitted to the Deputy City Manager and Chief Financial Officer for review and due diligence as to the viability of the business plan and ability of the venture to repay any Interim Financing, prior to finalization of any Guarantee and related documentation as noted in this report.

Single Heritage Easement Agreement

By its adoption of Consolidated Clause 31 of Report No. 6 of the Toronto and East York Community Council at its meeting held on July 20, 21, and 22, 2004, City Council had previously designated the entire ensemble of industrial buildings and a Heritage Impact Statement was prepared. City Council further requested in its earlier 2006 Lease approval that Preservation Services, working in co-operation with Evergreen, TRCA and

Ontario Heritage Trust, work towards devising a single heritage easement agreement to cover the site to avoid any conflict between the City and the Province in that regard. Through the course of negotiations to date with Evergreen, TRCA and Ontario Heritage Trust, Ontario Heritage Trust is insisting that it hold a non-terminable prior perpetual easement agreement as a pre-condition of the Province's \$10 million funding contribution to Evergreen for the Project . The terms of this easement are close to being finalized between the parties to this agreement and the City.

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SIGNATURE

Sue Corke
Deputy City Manager

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Deputy City Manager and
Chief Financial Officer

ATTACHMENTS

Appendix 1 -
Revised Terms and Conditions - Leasing of
Don Valley Brickworks Site

Appendix 1

Revised Terms and Conditions
Leasing of Don Valley Brick Works Site
550 Bayview Avenue, Toronto

(1) New Name of Tenant:

Evergreen (formerly Environmental Foundation), a not-for-profit charitable corporation incorporated under the *Corporations Act* (Canada) and registered under the *Income Tax Act* (Canada).

(2) Description of Leased Premises:

Approximately twelve (12) acres comprising the southerly portion of the approximately 40.7 acre site formerly occupied by the Don Valley Brick Works (the "Site") located on the west side of Bayview Avenue, just north of the Bloor Street Bridge, being the lands shown more or less as Parts 1-10 inclusive on Reference Plan 66R-66R-22918 in the Land Registry Office for the Land Titles Division of Toronto (No. 66) together with the existing buildings and structures thereon. Under memorandum of understanding between the Parties contained in Clause 2 of Report 6 of the Economic Development and Parks Committee adopted by City Council meeting held on September 28, 29, 30 and October 1, 2004 (the "2004 MOU") the Leased Premises are limited to the horizontal land strata from the surface of the ground up and, with the exception of any necessary building foundations and landscaping in accordance with: (i) a perpetual heritage easement agreement to be provided by Toronto and Region Conservation Authority ("TRCA") to Ontario Heritage Trust (formerly the Ontario Heritage Foundation); (ii) a risk assessment or risk assessment plan accepted by the Ministry of Environment (Ontario) and any record of site condition filed or submitted for filing on the Ministry of Environment's Environmental Site Registry to be provided by the City and TRCA; (iii) any certificate of property use issued by the Ministry of Environment; and (iv) Evergreen's Master Plan and related plans and specifications for Evergreen's proposed project as approved of by Ontario Heritage Trust, TRCA and the City, the Leased Premises do not include the subsurface or ground water (the "Retained Lands").

(3) Commencement Date:

May 1, 2008, subject to extension by agreement of all Parties to a date not later than December 31, 2008.

(4) TRCA and City's \$7.5 Million Capital Loan Guarantee:

The Tenant has expressed concern with respect to its operating cash flow during construction which will be constrained and, secondly, its capital cash flow since the timing for its pledges and the flow of recently announced Federal and Provincial funding to the Tenant will not correspond directly with the Tenant's spending on construction. The Tenant has said that it may require a joint and several TRCA and City loan guarantee of up to \$7,500,000 (inclusive of all interest, costs and charges) (the "Loan Guarantee") on an interim financing line of credit facility arrangement of approximately \$18.4 Million ("Loan Agreement(s)" that it is currently negotiating with institutional or private lenders ("Lenders") to be acceptable to TRCA and the City in order for the Tenant to meet its cash flow requirements for Project construction purposes. The intent of this Loan Guarantee is to provide bridge financing between Evergreen's receipt of various funds raised from its private and public donors as well as the Federal and Provincial governments and progress payments required by various contractors, firms and suppliers during the course of completing various stages of the Project.

Therefore, in connection with and to facilitate completion of the Tenant's construction work, Evergreen is requesting TRCA and the City to jointly and severally issue a Loan Guarantee(s) of up to \$7,500,000 in the aggregate (inclusive of all interest, costs and charges) on a Loan Agreement of approximately \$18,400,000 that Evergreen is currently negotiating with its proposed Lenders and to enter into an agreement with the Tenant and its approved Lenders in respect thereof (the "Lender Agreement(s)"). Accordingly, the issuance, form and substance of any Loan Guarantee and Lender Agreement will be subject to the concurrence and approval of TRCA and the terms and conditions thereof are to be satisfactory to the Deputy City Manager and Chief Financial Officer in consultation with the General Manager of Economic Development, Culture and Tourism, all in form acceptable to the City Solicitor and in accordance with the following:

- (a) up to the maximum amount of seven million five hundred thousand dollars (\$7,500,000.00) in the aggregate (inclusive of all interest payable by the Tenant and costs and charges under the Loan Agreement);
- (b) the Lender(s) is/are to be acceptable to TRCA and the City;
- (c) the Loan Agreement(s) are paid in full, and the Loan Guarantee(s) and Lender Agreement(s) expire by no later than the earlier of the end of four years commencing on the Commencement Date of the Lease or on earlier termination or payout of the loan in question;

- (d) unless otherwise agreed to in writing by TRCA and the City in their sole discretion, if judgment is obtained on the Loan Guarantee(s), the Lenders rights of enforcement are to be restricted so that no Personal Property Security Act filing shall be made against TRCA and/or the City and the Lenders shall not register its judgment in any Sheriff's office;
- (e) TRCA and the City will be provided with copies of the relevant Loan Guarantee(s), Lender Agreement(s) and Loan Agreement(s), and all other pertinent documents, as well as any demands and enforcement notices issued to borrowers/guarantors;
- (f) the Loan Guarantee(s) and Lender Agreement(s) will be subject to set off against any amounts that TRCA or the City may have to pay to remove any liens or any deficiency in the Flood Reserve Funds referred to in Section 7;
- (g) the Tenant shall provide in a timely manner to TRCA and the City for approval and there shall be deposited with and held by the City and TRCA or as they may direct, all such documentation and written information as TRCA and the Deputy City Manager and Chief Financial Officer in their sole discretion, consider necessary or desirable to assess the form and substance of the Loan Guarantee(s) and Lender Agreement(s) and related documentation as well as to protect the rights and interests of TRCA and the City in the event of default by the Tenant and/or as security to the City and TRCA for the payment and performance of the obligations of the Tenant under the Lease, and TRCA and the City in their unfettered discretion shall have approved of both the form and substance of the same and the priority of registration of all relevant security, to the extent applicable. A non-exhaustive description of the foregoing documentation and information includes: (i) the Tenant's financial statements (including audited statement, if required); (ii) the Tenant's business plan and master plan; (iii) all Tenant insurance policies to be taken out and maintained by it under the Lease; (iv) the Loan Agreement(s), the proposed Loan Guarantee(s) and Lender Agreement(s); (v) an irrevocable \$500,000 letter of credit facility or similar \$500,000 LOC/Cash Security as described in Section 5 below to be provided by the Tenant for the purposes of funding any debt service deficiencies associated with the Loan Guarantee and as security for an uncured Tenant default under the Lease, including Project completion and/or any possible construction liens attaching to the Project; and, (vi) subject to any such prior security as required under any Loan Agreement as approved of by the Deputy City Manager and Chief Financial Officer in consultation

with TRCA, the following security to be granted by the Tenant in favour of TRCA and the City as security for the performance of the Tenant's obligations under the Lease including Project completion and repayment of any Loan Guarantee: (i) a general assignment of all agreements affecting the Project; (ii) a collateral leasehold charge of the Tenant's interest in the Leased Premises; (iii) a collateral security interest agreement in all property of the Tenant located on the Leased Premises; (iv) a subordination/priority and/or forbearance agreement with any approved Lender(s) of the Tenant; and (v) an assignment of any remaining Project funding on Tenant default, all to the extent considered reasonably practicable in the circumstances;

- (h) at the option of TRCA and the City to be exercised in their individual discretion, both TRCA and the City will have entered into a pari passu agreement on terms and conditions acceptable to them and in form acceptable to their legal counsel; and
- (i) the Loan Guarantee(s) and Lender Agreement(s) and all related documentation shall be on terms and conditions entirely acceptable to TRCA and the City and in form acceptable to their legal counsel.

(5) Construction Lien Concerns:

Typically, the Tenant should provide security to ensure that its obligations to the contractor will be fulfilled, otherwise, the general contractor, if unpaid, could lien the Leased Premises and the City and TRCA may be at risk for the unpaid amount. There is a real concern with respect to possible construction liens attaching to the Leased Premises because: (i) it is not possible to quantify this risk since the Tenant's construction and payment schedules and financing commitments with its Lenders remain to be determined; and (ii) because the Tenant has confirmed that it can only provide security against this risk to TRCA and the City under the Lease in the form of an irrevocable letter of credit or similar security acceptable to the Deputy City Manager and Chief Financial Officer (for example, possibly a segregated cash capital fund in the amount of \$500,000 to be applied upon demand by the City and TRCA during the Lease Term if there is an uncured default by the Tenant on terms and conditions acceptable to TRCA and the City, including its replenishment and the unencumbered access and control thereof by TRCA and the City, if required (the "\$500,000 LOC/Cash Security"). The Tenant's obligation to maintain this fund will end upon the later of Project completion or expiration of the \$7.5 Million joint and several Loan Guarantee(s) described in Section 5 above and the expiration of all relevant lien periods and to there being no liens outstanding.

(6) Environmental

- (1) The definition of “Contamination” shall mean the presence of contaminants at levels that contravene applicable Environmental Laws or at levels which exceed or are inconsistent with the levels described in the Heritage Easement Agreement to be entered into between TRCA and Ontario Heritage Trust in respect of the Leased Premises, the Master Plan, the Risk Management Plan or the Record of Site Condition.

The City will at its expense submit for filing for a record of site condition on the Environmental Site Registry maintained by the Ministry of the Environment (Ontario) on or before a date to be mutually agreed upon between the General Manager in consultation with the Chief Corporate Officer, and TRCA and the Tenant. Except as permitted under the Environmental Protection Act (Ontario), R.S.O. 1990, c. E.19, the Tenant will not use the Leased Premises until such time as a satisfactory record of site condition has been filed and TRCA and the City have received such assurances regarding amendments from the Ministry of Environment (Ontario) as TRCA and the General Manager in consultation with the Chief Corporate Officer consider necessary or desirable in the circumstances.

The Tenant accepts and agrees to be solely responsible for the satisfactory remediation of all existing and elevated levels of dust and any related Ministry of Labour (Ontario) concerns or requirements.

Under the 2004 MOU approved by Council, the Tenant was not to assume responsibility for existing contamination of the Leased Premises. Accordingly, while the Tenant and its Permitted Occupants will be required to release the City and TRCA in this regard, the Lease will not contain any “indemnity” by the Tenant or its Permitted Occupants in favour of the City or TRCA for any losses or damages suffered by any third party at the Leased Premises due to historical contamination, regardless of whether such third party came on to the Property as a result of the Tenant’s activities. Further TRCA and the City are to remediate the existing buildings on the Leased Premises by removing the asbestos roofs and other historical contamination found within these buildings at an estimated cost of approximately eight hundred and forty thousand dollars (\$840,000.00). The Tenant has agreed to be responsible for disposal of the existing asbestos roofs at an estimated cost of approximately two hundred and seventy thousand dollars (\$270,000.00).

- (2) Under the 2004 MOU approved by Council, TRCA and the City are also responsible to ensure that the Retained Lands comply with Ontario Regulation 153/04 under the *Environmental Protection Act* (Ontario) for the Tenant’s uses. Accordingly, the City and TRCA will provide a Record of Site Condition ("RSC") for the Retained Lands based on a Risk Assessment ("RA") accepted by the Ministry of the Environment and will

pay all costs associated with the implementation of risk management measures in accordance with such RA and Risk Management Plan ("RMP"), except that the Tenant shall pay the disposal costs of any soil where:

- (a) the Tenant elects to excavate or requests the City to remove the soil; and
 - (b) removal of such soil from the Retained Lands would not have been required to permit the use of the Retained Lands for parkland.
- (3) Once the RSC is filed or submitted for filing on the Environmental Site Registry, the Tenant will not require the City or TRCA to perform any additional remediation of the historical contamination except as provided in the RMP or as ordered by the Ministry of the Environment (Ontario). The Tenant will release TRCA and the City from all losses that the Tenant, TRCA or the City may incur, including economic loss, direct or indirect, relating to or arising from or associated with the historical contaminants and the condition of these lands as described in the RSC or caused by any breach of Clause 6 hereof or any non-compliance with any Environmental Law by the Tenant or its Permitted Occupants or invitees. The Tenant will also require that the same release be included in all subleases and occupancy agreements that the Tenant may enter into for the Leased Premises.
 - (4) During the term of the Lease and upon its termination or expiration, the Tenant will remediate any contamination it or its Permitted Occupants as defined in the Lease, in the reasonable opinion of the General Manager, have caused or allowed to the Leased Premises and the remaining Brick Works site, including the Retained Lands and the Weston Quarry Garden lands, to the extent required by all applicable laws, and the RA and RMP, as amended.
 - (5) Subject to any obligation contained in the Risk Assessment or Risk Management Plan or any Certificate of Property Use, no digging or excavation of any part of the Retained Lands will be permitted without the prior written approval of the City and TRCA, acting reasonably, whether or not such digging or excavation is contemplated in the Master Plan or the Lease.
 - (6) Once the RSC is filed or submitted for filing in the Environmental Site Registry, if additional contamination is discovered in, on or about the Retained Lands or any part which the Ministry of the Environment orders the City, TRCA and/or the Tenant to investigate, manage or remediate in compliance with then current environmental legislation and regulations:

- (a) TRCA and the City will use their commercially reasonable efforts to comply with such requirements, up to a cumulative aggregate sum of five hundred thousand dollars (\$500,000.00) inclusive of soil testing, excavation and related work, which sum shall be CPI adjusted on an annual basis from the Commencement Date.
- (b) If the cumulative aggregate cost of such requirements is more than five hundred thousand dollars (\$500,000.00), as adjusted,
 - (i) The Tenant will have the option to pay the additional costs of complying with such requirements that are reasonably attributable to the occupancy of the affected area by the Tenant or its permitted occupants as defined in the Lease, i.e., those costs that the City and TRCA would not be required to pay if the affected area were excluded from the Leased Premises. If so, the City and TRCA shall pay the remaining costs and shall comply with the regulatory requirement;
 - (ii) If the Tenant does not agree to pay the additional costs as set out in clause (b)(i) above:
 - (1) the Parties will endeavour to negotiate the terms and conditions of a mutually satisfactory cost-sharing agreement to deal with such excess costs, in form acceptable to the City Solicitor; or
 - (2) if the Parties, acting reasonably, do not wish to enter into any such cost-sharing agreement, then:
 - (a) the City and TRCA may isolate the contaminated area or areas in question and may delete such portion(s) from the Lease, for the period of time required to comply with the Order;
 - (b) If the Order requires remediation of the entire Leased Premises, the area deleted from the Lease may be the entire Leased Premises, and the Lease will be suspended for the period of time required to comply with the Order;
 - (c) If the Order permits the City and TRCA a choice of options for compliance, including an option of non-use or limited use, the

Tenant will not require the City and TRCA to select an option that requires unlimited use or a more expensive option;

- (d) The Tenant will have an option of terminating the entire Lease if it demonstrates to the satisfaction of the General Manager and TRCA, acting reasonably, that isolation and deletion of any such contaminated area would materially and negatively affect an integral area of the Tenant's operation;
 - (e) If all or part of the Leased Premises are deleted from the Lease under this clause, or if the Tenant terminates the Lease under this clause, each Party will be released from all obligations to the other arising after such deletion or termination and for all related liabilities including economic loss, mutatis mutandis. The Tenant will have the reasonable right to remove its fixtures and chattels from the Leased Premises if not in default; and
 - (f) The Tenant will require that an acknowledgement to the foregoing effect and the same release in favour of TRCA and the City be included in all permitted subleases and other occupancy agreements that the Tenant may enter into for the Leased Premises.
- (7) the Tenant, in its use and occupation of the Leased Premises and its activities thereon whether directly or through its Permitted Occupants, will fully comply with all applicable Environmental Laws of the Ministry of Environment and the *Environmental Protection Act* (Ontario), and any other Authority for the protection of the environment. The Tenant covenants that, during the Term, no hazardous substances shall be used, generated, released, manufactured, refined, produced, processed, stored, disposed of or allowed anywhere in, on, under or about the Leased Premises or Remaining Site Lands, other than in accordance with applicable Environmental Laws and the provisions of this Agreement. Without limiting the foregoing, the Tenant covenants that any Permitted Occupant, including approved sub-tenants, licensees or invitees, will comply with the provisions of Clause 6 hereof and all applicable

Environmental Laws regulating the use, generation, storage, transportation and disposal of hazardous substances in, on, under or about the Remaining Site Lands or any part thereof. The foregoing will not relieve TRCA or the City of their respective environmental obligations hereunder.

- (8) The Tenant will obtain and comply at its sole expense, with the terms of all licences, certificates of approval, permits and other approvals required by Environmental Laws, and the Lease for the conduct of its business at or from the Leased Premises, and will require any Permitted Occupant to do the same.
- (9) The Tenant will not authorize, cause or permit a Contamination in, on, under or from the Site including the Leased Premises, the Weston Quarry Garden Lands and the Remaining Site Lands. Where such a discharge referred to herein does occur, the Tenant will immediately report the occurrence of the Discharge to all Authorities to whom notification is required under Environmental Laws in the circumstances, and to the City. The Tenant will then immediately stop and clean up the Discharge to bring the Leased Premises and any other affected area, into compliance with Environmental Laws, will repair any damage to the Leased Premises or Remaining Site Lands caused by such Discharge and will provide the City and TRCA with a certificate from the Tenant's duly qualified consulting engineer confirming such compliance. If the Tenant fails or refuses to promptly clean up a Discharge referred to herein, and to restore the Leased Premises and any other area of Remaining Site Lands affected by the Discharge, the City may elect in writing to carry out the whole or any part of the clean up and restoration at the Tenant's expense.
- (10) The Tenant will permit the City to perform an audit by a qualified professional of the Tenant's Discharges of Contaminants into the Leased Premises or Remaining Site Lands in, on, under or from the Leased Premises at any time(s) during the Term on ten Business Days Notice to the Tenant provided that a representative of the Tenant may at all times (but without obligation) accompany the City's personnel.
- (11) The Tenant will fully comply with all orders of an Authority which may be directed to the Tenant and which relate to the Leased Premises or the Weston Quarry Garden Lands or any part thereof and shall bear the expense of such orders provided that, in the reasonable opinion of the General Manager, the contamination which is the subject of the order can be reasonably considered to have been caused or permitted by the Tenant or its Permitted Occupants or its/their invitees or operations or activities or lack of care and attention. The foregoing will not relieve TRCA or the City of their respective environmental obligations hereunder.

- (12) Should an order of an Authority be issued to the City requiring the City to do anything in relation to a Discharge of Contaminants caused or permitted by the Tenant and relating to the Tenant's use of the Leased Premises or Weston Quarry Garden Lands, the Tenant will at its own expense, on receipt of written Notice from the City, comply with the order at the Tenant's expense including preparing and submitting the required plans and meet all related requirements and the Tenant shall carry out all such clean up plans under the direction of the Authority. If the Tenant fails or refuses to promptly and fully carry out an order referred to in this Environmental Section 6, or if, in the City's reasonable opinion, the Tenant is not competent to carry out the order, the City may elect in writing to carry out the whole or any part of the order at the Tenant's expense.
- (13) Except in an emergency where no notice is required, TRCA and/or the City may, on a minimum of 24 hours prior written Notice, inspect the Leased Premises and the Tenant's records relating to its handling of Contaminants to determine whether the Tenant is fully complying with all Environmental Laws and its environmental obligations under this Agreement. Where TRCA and/or the City reasonably considers it necessary, the inspection may be performed in whole or in part by experts, and may include sampling, monitoring, and other tests, provided that all intrusive testing shall be carried out in the presence of a representative of the Tenant. If TRCA and/or the City's inspection discloses a breach of an Environmental Law, or a fact situation which could reasonably be anticipated to result in a breach of an Environmental Law, TRCA and/or the City will have the right to take whatever steps are reasonably required to rectify such breach, or prevent such breach from occurring, as the case may be.
- (14) Where TRCA and/or the City have carried out an order referred to in Environmental subsection 6.12 hereof or has cleaned up or made restoration as a result of a Discharge referred to in Environmental subsection 6.9 hereof, or has otherwise incurred any expense or damage relating to a Discharge of Contaminants caused by the Tenant, and/or arising from the Tenant's use of the Leased Premises, the Tenant will indemnify TRCA and/or the City as the case may be for all costs incurred by TRCA and/or by the City with respect to any of the foregoing.
- (15) The Tenant shall, at its sole cost and expense, at the expiration of the Term, or such earlier termination of this Agreement, remove all Tenant's Contamination in accordance with all Applicable Laws of any Authority and repair any damage to the Site, including the Leased Premises, the Weston Quarry Garden Lands and the Remaining Site Lands caused by the existence and/or the removal of any Tenant's Contamination. TRCA, the City and the Tenant shall mutually agree, acting reasonably, with

respect to the management and control of any consultants responsible for remediation. All reports and other materials of scientists, engineers or other environmental consultants of the Tenant and related to the Leased Premises shall be addressed to the Tenant, TRCA and the City and TRCA and the City shall be entitled to rely on such materials for all purposes. The Tenant further undertakes to plan and permit any of its remediation measures and processes to be integrated with any construction processes to be undertaken by TRCA and/or the City. The Parties will mutually agree with respect to the co-ordination and scheduling of such work and the allocation of costs therefore (whether by way of direct payment or reimbursement) if any of TRCA and/or the City's remediation work is undertaken by the Tenant, it being agreed that any remediation obligations of TRCA and/or the City in respect of Remaining Site Lands shall be without prejudice to its/their rights, if any, to pursue those Persons responsible for such contamination.

- (16) Tenant acknowledges that it has reviewed and is fully familiar with and accepts the Risk Management Plan. The Tenant agrees during the Term, at its own expense, to implement and adhere to or cause the implementation and adherence to of all its terms and provisions, including the risk control and management measures and other protocols described or contemplated therein. If any Certificate of Property Use is subsequently issued by the Ministry of the Environment (Ontario), the Tenant also covenants and agrees to comply during the Term, at its expense, with those provisions of the *Environmental Protection Act* (Ontario) and O.Reg 153/04 governing property use and to provide the City and TRCA with such evidence of compliance therewith as they may reasonably require forthwith upon request.
- (17) The Tenant further acknowledges that this Risk Management Plan is to be reviewed and assessed by the Ministry of Environment (Ontario) and that as a condition of its final approval by the Ministry of the Environment (Ontario), the Risk Management Plan may and shall include such further or other terms and or risk management control measures as may be required by the Ministry of the Environment (Ontario) in its discretion, all of which the Tenant hereby accepts and which the Tenant similarly covenants and agrees to implement and adhere to or cause the implementation and adherence to at its own expense during the Term.
- (18) As per the Risk Management Plan, the Tenant covenants and agrees that at all times during the Term, it shall strictly and timely comply with and cause compliance with the following provisions of the Risk Management Plan as amended and any Certificate of Property Use issued by the Ministry of the Environment (Ontario): (a) there is to be nil tree planting except in accordance with the Risk Management Plan and the Heritage Easement Agreement; and (b) the Tenant must cap the Leased Premises

with a hard concrete or asphalt surface or with one (1) metre (3 feet) soft surface of clean fill to the satisfaction of the Chief Corporate Officer except in accordance with the Risk Management Plan and the Heritage Easement Agreement.

- (19) The Tenant shall ensure at its expense during the Term that all construction or other Work (i.e., designs/architects/contractors/engineers) and operations at the Leased Premises, whether by it or of any Permitted Occupant or its/their Authorized Members, comply with the Risk Management Plan and any Certificate of Property Use issued by the Ministry of the Environment (Ontario), and the Tenant will provide the City and TRCA with such evidence of compliance therewith as they may reasonably require forthwith upon request.
- (20) The Tenant acknowledges that as per the Risk Management Plan, the City or TRCA may be required to annually or bi-annually monitor the ground water and sub-surface of the Remaining Site Lands to ensure the site conditions of the Leased Premises remain consistent with the Risk Management Plan and, if not, that the City or TRCA may be required or determine it appropriate and are hereby granted full and complete permission to implement or otherwise put in place at no expense to the Tenant certain other engineered controls as may be required or determined desirable by the Ministry of the Environment (Ontario) to rectify sub-surface anomalies and ensure that Leased Premises' sub-surface conditions remain consistent with the Risk Management Plan and the Heritage Easement Agreement as aforesaid. However, if there is anything done or omitted to be done by the Tenant, its Authorized Members or Permitted Occupants, including members of the public, which the Chief Corporate Officer reasonably determines to have caused such inconsistency, then, the Tenant shall be responsible to forthwith rectify same at its expense. Without limiting the generality of the foregoing, and as required by the approved Risk Management Plan and the Heritage Easement Agreement, the City will conduct groundwater monitoring as required by the Risk Management Plan, semi-annually for three years. Sample results will be evaluated using the PSSs (Property Specific Standards) developed for the Site. Should concentrations exceed the PSSs for two or more samples, then a remedial option evaluation should be conducted. Sampling may be discontinued if permitted by groundwater quality trends and with the agreement of the Ministry of the Environment (Ontario).
- (21) Except in an emergency in which case no Notice is required, the Tenant hereby allows and grants the City and TRCA and its/their Authorized Members full access to the Leased Premises or any part at all times during the Term during normal business hours and at any other time on twenty-four (24) hours Notice (on foot, with vehicles, supplies or equipment) to

inspect, monitor and ascertain compliance with the Risk Management Plan and any issued Certificate of Property Use and other issued requirements of the Ministry of the Environment (Ontario) in respect of the Leased Premises or any part. If access is denied or interfered with, then, TRCA and/or the City shall have the right without compensation or further notice, in their sole discretion at any time and from time to time, to suspend such activities at the Leased Premises and to isolate such area(s) in questions that requires, in the reasonable discretion of the Chief Corporate Officer, suspension or isolation until a satisfactory correction of the condition complained about has been made.

(7) Maintenance and Repair:

The Tenant will build and retrofit all buildings and other improvements to flood-proofing TRCA regulatory standards. Since the Leased Premises are in a flood plain, the Tenant's all-risk insurance coverage may exclude flood coverage if unavailable at commercially reasonable rates. If so, the Tenant's obligation to repair and maintain under the Lease and to leave the Leased Premises in good order and condition will necessarily exclude damage due to an uninsured catastrophic flood. In regard to the Tenant's maintenance and repair obligations, however, the Lease will require the Tenant to have reserved and set aside on or before substantial completion of the Project and to continue to reserve and maintain at all times during the Term, a segregated fund from its operating funds in a CPI indexed amount of two hundred and fifty thousand dollars (\$250,000.00) (the "Flood Reserve Funds") to be applied for clean-up and remediation of the Leased Premises or any part in the event of a flooding event during the Term on terms and conditions acceptable to TRCA and the City, including its replenishment and the unencumbered access and control thereof by TRCA and the City, if required.

(8) Pre-Conditions to Lease Commencement in favour of City and TRCA:

On or before May 1, 2008, the Tenant will submit to TRCA and the City for approval, its construction plans and specifications, pre-tender cost estimates and a detailed construction schedule and shall demonstrate it has fulfilled all the preconditions necessary to obtain a building permit.

On or before May 1, 2008, the Tenant will have entered into a construction contract and all necessary agreements with the architect and architect's consultants for the project and a general and specific assignment of the benefit of such agreements, as continuing collateral security, all in form and substance satisfactory to the City and TRCA.

On or before May 1, 2008, the Tenant will have entered into a binding offer of interim financing with its Lenders acceptable to TRCA and the City in an amount not greater than eighteen million dollars (\$18,000,000) and on terms and

conditions entirely satisfactory to TRCA and the City and unless waived by TRCA and the City, providing for an assignment of such financing on Tenant default to TRCA and the City upon request and for a subordination/forbearance and priority agreement to be entered into between the Parties and such Lender, in a form acceptable to the City Solicitor and legal counsel for TRCA.

On or before May 1, 2007, the Tenant will have entered into a binding offer of finance and contribution agreement with the Province of Ontario in the principal amount of not less than ten million dollars (\$10,000,000) and with the Federal Government of Canada in the principal amount of up to twenty million dollars (\$20,000,000) on terms and conditions entirely acceptable to TRCA and the City in their unfettered discretion. In this regard, both Ontario Heritage Trust and Infrastructure Canada are to provide TRCA and the City with executed original comfort letters in respect of their respective funding contribution agreement with the Tenant on terms and conditions satisfactory to TRCA and the City.

On or before May 1, 2008, the Tenant will provide TRCA and the Deputy City Manager and Chief Financial Officer of the City with evidence of the Tenant's receipt of a further amount of capital fundraising for its Project equal to the greater of: (i) twelve million dollars (\$12,000,000.00) or (ii) a sum equal to the amount of the actual "hard" construction costs for the Project as certified to the City and TRCA by a duly qualified cost consultant appointed by the City plus twenty (20%) thereof, all on terms and conditions entirely acceptable to TRCA and the Deputy City Manager and Chief Financial Officer of the City, in a form acceptable to the City Solicitor and legal counsel for TRCA.

On or before its application for a building permit in respect of the Project, the Tenant will submit a hoarding and construction access plan to the City and TRCA for their approval by them in their capacity as Parties to the Lease.

On or before the Commencement Date, the Tenant's architect shall have provided TRCA and the City with satisfactory written evidence of the Tenant's receipt of all necessary approvals from all authorities required to construct and complete the Project, including all requisite building permits.

There shall be no material default under the interim licence or permit arrangement which the Tenant has requested the Parks, Forestry and Recreation Department to issue for its limited use and occupancy of certain parts of the Leased Premises prior to the Commencement Date and any other obligation of the Tenant to the City or TRCA in respect of the Site or any part, including any heritage easement agreement.

(9) Other:

Such further revisions and other Lease terms and conditions as may be satisfactory to the Deputy City Manager and Chief Financial Officer, in consultation with TRCA, all in a form satisfactory to the City Solicitor.