

Use Agreement for The Bentway

Date: January 24, 2018

To: Executive Committee

From: Deputy City Manager Cluster A, Deputy City Manager Cluster B,
Deputy City Manager Internal Corporate Services

Wards: Ward 19 – Trinity-Spadina and Ward 20 – Trinity-Spadina

SUMMARY

This report seeks Council endorsement of the major terms of a Use Agreement for The Bentway, which The Bentway Conservancy will program, operate and maintain in partnership with the City of Toronto. The Bentway Conservancy was established as a not-for-profit corporation on September 14, 2016.

This report responds to Council's request for details regarding particular aspects of programming, operations and maintenance, including the need to protect public access to the new open space, the need to foster collaboration between Fort York National Historic Site and the Conservancy, the need to manage sponsor and donor recognition, as well as the need to manage event frequency and intensity in a manner that recognizes adjacent uses.

The exact terms and nature of the partnership between The Bentway Conservancy and the City of Toronto will be defined in a Use Agreement. The Conservancy will have a close working relationship with Fort York National Historic Site, as this first phase of The Bentway is entirely on lands that are part of the National Historic Site. The Use Agreement will therefore include a detailed Relationship Framework between The Conservancy and Fort York National Historic Site. Areas of cooperation include site maintenance, joint programming, event management, fundraising and sponsorship, as well as the need to maintain public access across the National Historic Site.

Announced in December 2015, The Bentway will transform a linear area from approximately Strachan Avenue to Spadina Avenue beneath the elevated Gardiner Expressway into a major civic and cultural asset that will provide much needed public open space and amenities in a rapidly growing area of Toronto. The entire first phase of The Bentway passes through the federally designated Fort York National Historic Site, which is managed through the Museums and Heritage Services section of the Economic Development and Culture Division, with the considerable involvement of The Friends of

Fort York and Garrison Common, as well as the Fort York Foundation. Future phases of The Bentway will extend the project to the east.

The Terms of the Use Agreement for The Bentway represent a comprehensive framework that provides the City of Toronto and The Bentway Conservancy with tools for successful collaboration and communication, while also providing The Bentway with the independence needed to leverage additional funding and implement high quality programming, operations and maintenance.

RECOMMENDATIONS

The Deputy City Manager Cluster A, Deputy City Manager Cluster B and Deputy City Manager Internal Corporate Services recommend that:

1. City Council approve the Major Terms of a Use Agreement for The Bentway from the Deputy City Manager Cluster A, Deputy City Manager Cluster B, and Deputy City Manager Internal Corporate Services, which will establish the governing terms and conditions for The Bentway Conservancy's use of City Lands; such agreement to include a Relationship Framework between the City of Toronto and The Bentway Conservancy setting out the roles and responsibilities of the Parties in programming, operating and maintaining the City Lands; and
2. City Council authorize the Deputy City Manager Cluster A, Deputy City Manager Cluster B and Deputy City Manager Internal Corporate Services to negotiate and enter into any and all other agreements necessary to implement the Use Agreement, on terms acceptable to the said Deputy City Managers, and in a form satisfactory to the City Solicitor.

FINANCIAL IMPACT

There are no financial implications resulting from adoption of this report.

The Acting Chief Financial Officer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

At its meeting of December 9, 2015, City Council endorsed a report from the Deputy City Manager Cluster A and the Deputy City Manager Cluster B: "Private Donation to Animate the F.G. Gardiner Expressway from approximately Strachan Avenue to Spadina Avenue (EX10.7)." In so doing, Council authorized the City to accept a donation of up to \$25 million from the Judy and Wilmot Matthews Foundation dedicated

to improving public realm beneath the elevated Gardiner Expressway between Strachan Avenue and Spadina Avenue.

Council also authorized the Deputy City Manager, Cluster A, and Deputy City Manager Cluster B, to negotiate and enter into two legal agreements with respect to the project, based on terms and conditions described in the report and the Term Sheet appended to it. These included a Memorandum of Understanding outlining roles and responsibilities of the City of Toronto, Waterfront Toronto and the Foundation, as well as a Delivery Agreement regarding project funding and delivery between the City of Toronto and Waterfront Toronto.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2015.EX10.7>

On July 12, 2016, City Council endorsed a report on "Governance and Funding Options for Project: Under Gardiner (now The Bentway) and Class Environmental Assessment for Crossing of Fort York Boulevard." In so doing, Council authorized the Deputy City Manager, Cluster A and Deputy City Manager, Cluster B to amend the approved Dec. 21, 2015 Memorandum of Understanding among the City of Toronto, Waterfront Toronto and Judy and Wilmot Matthews Foundation to include a Post Construction Plan. The Plan, among other matters, facilitates the completion of the Foundation's \$25 million donation to the City, as well as the creation of an independent not-for-profit charitable corporation to program, operate and maintain the Bentway. At its meeting, Council also endorsed conveyance of private land to the City at no cost for the purpose of forming the east landing of the future suspended bridge over Fort York Boulevard.

This report fulfills Council's additional request for a report back with details regarding aspects of programming, operations and maintenance. This includes the need to protect public access to the new open space and amenities, foster collaboration between Fort York National Historic Site and the Bentway Conservancy, manage sponsor and donor recognition and manage event frequency and intensity.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2016.EX16.12#>

At its December 13, 2016 meeting, City Council endorsed a Supplementary Report from the Deputy City Manager and Chief Financial Officer on "Gardiner West Public Realm Improvements Reserve Fund (EX10.7a)" as part of a larger report on Administrative Amendments to Reserve Fund Accounts. This report authorized staff to establish an obligatory reserve fund account named the "Gardiner West Public Realm Improvements Reserve Fund" in Schedule 15 of the City of Toronto Municipal Code Chapter 227, Reserves and Reserve Funds, to enable the City to transfer funds to Waterfront Toronto and The Bentway Conservancy from the donated project funds.

<http://www.toronto.ca/legdocs/mmis/2015/cc/bgrd/backgroundfile-86500.pdf>

COMMENTS

The Bentway is a major civic and cultural asset that will attract residents from across the City to its unique public open space and amenities. Made possible by a \$25 million private donation, the Bentway will transform about two kilometres of City land next to the elevated Gardiner Expressway from approximately Strachan Avenue to Spadina Avenue. This area lies within the boundaries of the designated waterfront area that is the subject of the tri-government waterfront revitalization initiative. The entire first phase of The Bentway passes through the federally designated but City-owned Fort York National Historic Site; future phases will expand the project to the east. The project will advance both Official Plan and Central Waterfront Secondary Plan goals while complementing Fort York's overall landscape master plan.

An Executive Steering Committee with representation from the City, Waterfront Toronto and the Donor has been managing the implementation of the project. The City of Toronto will retain ownership of the land and of amenities created through the project, while The Bentway Conservancy will operate and manage portions of the site, in coordination with the Economic Development and Culture Division which oversees the Fort York National Historic Site.

Considerable progress has been made since the November 2015 donation. A Memorandum of Understanding (MOU) was executed by the City, Waterfront Toronto and the donor on December 22, 2015. The MOU defined eligible capital costs, as well as the roles and responsibilities of each party with respect to the implementation of the project. At the same time, the City established a Gardiner West Public Realm Improvements Reserve Fund to enable the City to flow donated funds to Waterfront Toronto and The Bentway Conservancy. A Delivery Agreement between the City and Waterfront Toronto was executed on January 31, 2017, enabling Waterfront Toronto to design and construct the project.

A contractor was hired by Waterfront Toronto. Construction of subsurface work began in March 2017 in the 5.8-acre area between Strachan Avenue and Fort York Boulevard. Building construction is nearing completion, including washroom facilities and rooms for Zamboni storage and ice refrigeration. Completed capital elements include a 220-metre ice skating trail in front of Fort York's Visitor Centre that hosted the Mayor's Skate Party on January 7, 2018.

The balance of phase one improvements will be complete by summer 2018, including an outdoor amphitheatre, a trail, gardens and other programming space. The official opening of the Bentway site is scheduled for summer 2018. As funding becomes available, a suspended pedestrian and cycling bridge over Fort York Boulevard and an extension of the skating trail, as well as other improvements, are envisioned for areas east of the phase one site.

The Bentway Conservancy

The Bentway Conservancy was incorporated on September 14, 2016 under the Canada Not-for-Profit Corporations Act. In July 2016, the not-for-profit model was approved by

Council as an appropriate model for the long-term programming, operations and maintenance of the project. In August 2017, the Conservancy applied to the Canada Revenue Agency for charitable status, for which it is awaiting approval.

While not yet at full complement, The Bentway Conservancy has been building the capacity to program, operate and maintain the site. Beginning with the March 27, 2017 hiring of the Chief Executive Officer, the Conservancy now has a number of facilities management, programming and fundraising staff to manage the winter 2018 season and beyond.

The Bentway Board of Directors will be responsible for setting the Conservancy's long-term objectives and strategic plans, and to provide the appropriate financial accountability. Two local City Councillors – currently Ward 19 Councillor Mike Layton and Ward 20 Councillor Joe Cressy – represent the City of Toronto on The Bentway Conservancy Board of Directors.

Bentway Use Agreement and Relationship Framework

The City of Toronto requires a legal agreement in order to permit The Bentway Conservancy to program, operate and maintain portions of City lands between approximately Strachan Avenue and Spadina Avenue. In approving this report, City Council will authorize staff to negotiate and enter into a Use Agreement with The Bentway Conservancy for 21 years less a day, in accordance with the Major Terms of a Use Agreement for The Bentway, attached to this report. These terms summarize the conditions under which The Bentway Conservancy will occupy and manage City lands belonging to Fort York National Historic Site, for the purpose of fostering a cultural and civic space beneath the Gardiner Expressway. The terms also reflect a Relationship Framework that will form part of the Use Agreement, and define the partnership between the City of Toronto's Fort York National Historic Site and The Bentway Conservancy.

The Bentway Conservancy is currently operating the new skating trail on an interim basis through a Licence Agreement with the City of Toronto, which expires at the end of April 2018. Once executed, the Use Agreement will supersede the Licence Agreement. Together with the Council-approved MOU, the Use Agreement will establish the entire agreement between the City and the Conservancy.

Relationship Framework

Because the lands form part of Fort York National Historic Site, the Use Agreement includes a Relationship Framework that defines the collaborative relationship between the Conservancy and Fort York, which is managed by City Museums and Heritage Services, Economic Development and Culture Division. While Fort York and the Conservancy have different missions, the shared site presents opportunities to build a close and mutually beneficial working relationship in areas of event management, operation and maintenance.

The project lands located approximately between Gardiner bents 48 to 52, from Strachan Avenue to Garrison Road, will be the primary responsibility of the Conservancy. Responsibility for the lands located approximately between Gardiner

bents 52 to 82, from Garrison Road to east of the Fort York Visitors Centre, will rest with Fort York National Historic Site. Lands located approximately between Gardiner bents 82 to 93, from the intersections with Angelique Street to Grand Magazine Street, will be shared by both parties.

In the Relationship Framework, the Conservancy will have a strong programming and fundraising focus, while the Fort York Museum will continue to manage the National Historic Site and present the site's rich history. Both parties will undertake their activities in accordance with the Fort York Heritage Conservation District Plan and Statement of Commemorative Integrity.

Use of Lands and Public Access

As defined under "Use" in the Term Sheet appended to this report, programming and event planning, including the frequency and intensity of major events, will be developed in a manner that fosters collaboration and respectful partnerships with the community. Through a joint Liaison Committee, the City and Conservancy will create an annual programming plan that will identify opportunities for joint marketing and fundraising, rental agreements, shared programming and access to programming zones.

Public access across the historic site will be maintained, including public access to trails, connections and cross-routes. The Bentway Conservancy will provide free and open access to the lands, including access to the majority of public lands during ticketed events. While it is recognized that public access may be restricted for short periods from time to time for major events, including set up and take down, the parties will abide by the principle of full public access to the site.

Rights of Access to Municipal Infrastructure

The parties will respect the City's need for access to the Gardiner Expressway and other municipal infrastructure within the area, for the purpose of inspecting, maintaining, alerting, renewing, replacing, and any other activities required to ensure sound municipal infrastructure. Similarly, the City will reserve all easements it needs to protect its municipal services in the area, including roadways and water services, as well as emergency, vehicular and pedestrian access.

Naming Rights, Sponsorship and Signage

Both The Bentway Conservancy and Fort York National Historic Site will establish a coordinated approach to wayfinding, interpretive and donor-recognition signage. This will include named space recognition, donor recognition and event- or program-based recognition.

As summarized in the attached Term Sheet, the Use Agreement will set out the governing principles for the Conservancy in its activities. While not a City division or ABC (agency, board or commission), given its unique relationship to the Fort York National Historic site, The Bentway Conservancy is committed to governing its activities according to the principles of the City's space-naming and heritage site policies. These principles include protecting the character, reputation, integrity, aesthetic standards and safety of Fort York National Historic Site.

Similar to other Toronto facilities, such as Evergreen Brick Works, the Use Agreement will grant The Bentway Conservancy the ability to name components of The Bentway located within areas of its operational jurisdiction, as shown in Attachment 2: Map of Stratified Bentway Lands. In areas that are jointly managed by the Conservancy and Fort York, naming of components will require permission from the General Manager of Economic Development and Culture Division. The Conservancy will also be required to seek Fort York staff approval and expertise on all historical interpretation and signage, given the sensitivity of maintaining the character and integrity of the historic site.

Revenues and Costs

As part of the Use Agreement, both Fort York National Historic Site and The Bentway Conservancy will undertake independent and joint fundraising activities. Fort York will continue with its robust program of ticketed and public events that raise revenues for its operations. The Conservancy has set ambitious annual fundraising targets, and will be raising funds from philanthropic donations, rental fees, ticketed events, food and beverage sales, and skate rentals.

A schedule of revenue opportunities and costs associated with maintaining the site is being developed by the parties. It will establish rental rates and landmark fees for the various spaces within the site, such as the skating circuit, Strachan Gate, Fort York Visitor Centre, Garrison Common, etc., and identify the costing model associated with each.

It is expected that the ambitious target set by The Bentway Conservancy for the number of events staged and associated revenues will have an impact on Fort York's ability to operate as it has done in recent years. Fort York will work with the Conservancy to find a balance that meets both Fort York's requirements as well as the objectives of the Bentway.

Insurance

As part of its tenure on City lands, The Bentway Conservancy must retain a number of types of insurance to the satisfaction of the City's Risk Management Division. These include property insurance, structures insurance, contingent liability, commercial general liability, liquor liability and automobile insurance, among others. The Conservancy has provided the City with a certificate of insurance as part of the Licence Agreement, effective Dec. 15, 2017.

Operations and Maintenance

The Relationship Framework outlines the responsibilities for programming, operations and maintenance of The Bentway site. Waterfront Toronto's contractor will provide a two-year warranty on all work completed on site. The Bentway Conservancy will be responsible for all maintenance of and repair to infrastructure created for The Bentway project, including the Zamboni building, washroom facilities, skating trail, Strachan Gate as well as landscaping, lighting, water and subsurface works. Together with Fort York National Historic Site staff, the parties will identify opportunities to maximize operational efficiencies across the site. They will develop a plan for enforcing municipal bylaws, as well as a coordinated approach to food service and cost-sharing opportunities to improve maintenance in a manner that is coordinated with other Gardiner maintenance, and utility and site servicing.

Collaboration and Dispute Resolution Mechanisms

The Use Agreement will include standard clauses regarding the conditions under which the parties may seek defaults and remedies or even, in an unlikely scenario, lease termination. Collaboration and dispute resolution mechanisms have been developed to minimize and resolve any differences that may arise. There will be three levels of staff coordination by which the Conservancy and Fort York National Historic Site may address issues. These will include a staff Liaison Committee for everyday exchange and coordination, an Executive Steering Committee for significant and strategic matters, and a Resolution Body that will be co-chaired by the General Manager of the Economic Development and Culture Division and The Bentway Conservancy Board of Directors for matters that remain unresolved. At its discretion, the Resolution Body may, in turn, engage a neutral third-party to facilitate dispute resolution.

Next Steps

Should Council adopt this report, the project partners will finalize and execute a Use Agreement between The Bentway Conservancy and the City of Toronto. The Use Agreement will include a Relationship Framework between The Bentway Conservancy and Fort York National Historic Site, which is managed by Museum and Heritage Services, Economic Development and Culture Division. Once executed, the Use Agreement will supersede the interim Licence Agreement that currently allows the Conservancy to manage and operate portions of the site for the 2018 winter season.

The Bentway Conservancy has expressed an interest in a longer term for this agreement. A longer tenure will assist the Conservancy's ability to secure significant philanthropic gifts to achieve self-sufficiency and success over the long term. Currently, leases of more than 21 years are deemed a land disposition or sale under Chapter 213 of the City of Toronto Municipal Code as well as the Ontario Planning Act, Part 6: Subdivision of Land, Section 50.3.b.1.

The project partners have agreed to explore longer term occupancy for a period of up to 50 years. Consideration will be given to an Official Plan Amendment or other vehicle that may help secure a longer term. Consultations with the appropriate City divisions and stakeholders, including the Friends of Fort York and the Fort York Foundation, will be undertaken as part of this endeavour.

Conclusion

The Bentway is taking its place among a roster of destination open spaces along Toronto's waterfront, including the Fort York National Historic Site. The Bentway will be governed in its programming, operations and maintenance by a series of important principles that are outlined in a Use Agreement and Relationship Framework with Fort York National Historic Site, including the need to maintain public access to heritage lands. Should Council approve this report, The Bentway Conservancy will be authorized to occupy portions of the National Historic Site for 21 years less a day from the date of execution of the Use Agreement between the City of Toronto and The Bentway Conservancy. Longer term occupancy, likely through an Official Plan Amendment, will be explored in the coming year.

The Waterfront Secretariat has prepared this report in consultation with The Bentway Conservancy as well as a number of City divisions, including Economic Development and Culture, Toronto Office of Partnerships, Legal Services, City Planning and Real Estate Services.

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ATTACHMENTS

Attachment 1: Major Terms of a Use Agreement for The Bentway
Attachment 2: Map of Stratified Bentway Lands

Attachment 1: Major Terms of a Use Agreement for The Bentway

Parties:	City of Toronto (the "City") and The Bentway Conservancy (the "Conservancy")
Lands:	The stratified City Lands located below the Gardiner Expressway between approximately Strachan Avenue and Fort York Boulevard, as shown in Attachment 2. The Lands, most of which form part of the Fort York National Historic Site, are divided into three areas by operational jurisdiction: Priority City Lands to be managed by Economic Development and Culture; Priority Conservancy Lands; and Shared Access Lands in which use will be shared by both.
Goal:	The goal of the Parties in entering the Use Agreement is to establish the governing terms and conditions for The Bentway Conservancy's use of various portions of the Lands as outlined in the Use Agreement, as well as the roles and responsibilities of the Parties in programming, operating and maintaining these Lands.
Principles:	The Parties agree to abide by the Fort York Heritage Conservation District Plan and Statement of Commemorative Integrity, a key tenet of which is to maintain public access across the heritage lands and historic site. While undertaking their own unique branding and fundraising activities, the Parties will coordinate their approach to key marketing, stakeholder engagement and event planning activities, as well as wayfinding, interpretation and signage, including donor recognition.
"As is":	The Conservancy accepts the Lands "as is" in its present condition and acknowledges that the City makes no representations with respect to the zoning, health and safety, physical or environmental condition of the Premises.
Term:	21 years less one day.
Subsequent Terms:	To ensure the continued success of The Bentway, the Parties agree to act in good faith to negotiate subsequent terms of 21 years less a day in consultation with stakeholders, including the Friends of Fort York and the Fort York Foundation. In the event that the Conservancy is unable to maintain its obligations as set out herein, the City fully expects to continue to operate the Lands as part of Fort York National Historic Site for the long-term and foreseeable future.

Commencement Date:	Upon execution of The Bentway Use Agreement.
Basic Fee:	Nominal fee of \$1 per year
Use:	The Conservancy will use the Lands for the purpose of providing a platform for a range of programming including: festivals, markets, performances (theatre, dance, and music), artistic performances, sports and recreation and repose. The Conservancy's use will be subject to a list of prohibited activities in line with other public spaces. These include the need to maintain public access across the heritage Lands and historic site, including public access to the majority of public Lands during private ticketed events. While it is recognized that public access may be restricted for short periods from time to time for major events as well as set up and tear down, the Parties will abide by the principle of public access to all grounds.
City's Reserved Easements:	The City will reserve all easements necessary for the City to protect its municipal services within the Lands, including municipal water services. The City will reserve an easement for public vehicular and pedestrian access as required. Any other easements that are necessary will also be reserved by the City.
Rights of Access to Municipal Infrastructure:	The City reserves and retains all such rights required for the purpose of inspecting, maintaining, altering, renewing, repairing, replacing, modifying, reconstructing, replacing or for possible future dismantling and removal of the Gardiner Expressway as well as any other existing infrastructure within the City Lands, together with the right of ingress and egress for such purposes.
Roadways:	Any rights of use granted under this agreement do not extend to any roadways.
Naming Rights, Sponsorship and Signage:	The Parties will govern themselves by the principles of the City's naming and sponsorship policies as well as policies governing Fort York National Historic site. These principles include protecting the reputation, integrity, aesthetic standards and safety of the historic site. The Bentway Conservancy will be permitted to name components of The Bentway on Lands within its operational jurisdiction, as shown in Attachment 2: Map of Stratified Bentway Lands. In areas that are jointly managed by the Conservancy and Fort York, permission for naming will be required from the General Manager of Economic Development and Culture Division. The Bentway Conservancy will also require Fort

	York Museum staff authorization for all historical interpretation and signage.
Revenues and Costs:	The Parties shall retain revenues for their own operations from independent fundraising and sponsorship activities. They will establish rental rates and landmark fees for the various site areas and identify costing models associated with each. The City and Conservancy, along with third-party operators, will be subject to those rates save and except when the Parties undertake joint fundraising, event and sponsorship activities.
Insurance:	The Conservancy shall obtain adequate insurance of all types in amounts and form satisfactory to the City’s Risk Management Division.
Operations and Maintenance:	As part of the Use Agreement, the Parties are developing a Relationship Framework between the City and the Conservancy which outlines responsibilities for programming, operations and maintenance of the site. The Bentway and Fort York National Historic Site will each be fully responsible for maintaining their jurisdictional areas. The Parties will also develop joint maintenance opportunities and efficiencies, including coordination with Gardiner and other municipal, utility and site servicing maintenance.
Dispute Resolution:	The Parties have developed mechanisms to minimize and manage disputes under the Use Agreement that may arise. These consist of a POM (programming, operations and maintenance) Liaison Committee, an Executive Steering Committee, and a Resolution Body comprised of the General Manager of Economic Development and Culture and Chair of the Conservancy Board of Directors. The Resolution Body may at its discretion, engage a third party to facilitate dispute, including under the Arbitrations Act (Ontario) by a sole arbitrator agreed upon by the Parties, or failing agreement appointed by a judge of the Superior Court of Justice for the Province of Ontario upon the application of either party hereto. Any determination by arbitration as aforesaid shall include a determination as to payment of the costs of the arbitration and shall be binding upon the Parties hereto, who shall not have any right of appeal from such determination.

Attachment 2: Map of Stratified Bentway Lands

