

## **Metrolinx Subways Program - Real Estate Protocol and Land Valuation Principles for Subways and GO Expansion Programs**

**Date:** November 23, 2021

**To:** Executive Committee

**From:** Executive Director, Corporate Real Estate Management

**Wards:** All

### **SUMMARY**

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This report seeks City Council authority to execute a Real Estate Protocol (the "Protocol") for the Province of Ontario's priority transit projects (the "Subways Program") based on the terms outlined in this report.

The Subways Program delivered by Metrolinx represents a significant investment towards transit expansion within the City of Toronto. The Subways Program includes the Ontario Line, the Scarborough Subway Extension, the Eglinton Crosstown West Extension and the Yonge North Subway Extension.

To support the delivery of the Province's Subways Program on an accelerated basis, Metrolinx requires interests, both on a temporary and permanent basis, in certain City real property (the "City Subway Lands"). City, Toronto Transit Commission ("T.T.C.") and Metrolinx staff have been working closely to establish terms that govern the access, acquisition, ownership and disposition of real property between the parties. This report outlines those terms and also notes the processes to be followed by Metrolinx to facilitate City and T.T.C. review of City infrastructure to be built on City Subway Lands and other lands to be transferred to the City, and review of Subways Program infrastructure as it relates to City assets and infrastructure. The protocol includes a process for the parties to develop a Commissioning and Acceptance Protocol for City infrastructure.

Staff are recommending the Protocol be executed, in advance of the conclusion of negotiations currently underway with the Province on a Subways Program Term Sheet ("Term Sheet"), and ultimately the negotiation of a Subways Master Agreement ("Subways Master Agreement") between the City, T.T.C. and Metrolinx, as Metrolinx requires land for the Subways Program sooner than these documents can be negotiated and executed.

City staff anticipate reporting back to City Council in 2022 on the conclusion of the negotiation of the Term Sheet and to seek approval to negotiate and execute a Subways Master Agreement based on the terms of the Term Sheet. The Protocol will ultimately form part of the Subways Master Agreement. The Protocol provides that the Term Sheet being negotiated with the Province, if approved by Council, will take precedence over this Protocol should there be any inconsistencies.

In the absence of the Protocol, Metrolinx has and would continue to pursue City property through the *Expropriations Act*.

## **RECOMMENDATIONS**

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The Executive Director, Corporate Real Estate Management recommends that:

1. City Council authorize the City Manager in consultation with the Chief Executive Officer, Toronto Transit Commission to finalize negotiations and enter into and execute a Real Estate Protocol with Metrolinx and the T.T.C. for the Subways Program no later than February 28, 2022, or such other date as agreed to by the parties, based on the terms outlined in this report, and to enter into any such ancillary or related agreements, amendments, extensions and renewals as may be necessary, all on such terms and conditions as are satisfactory to the City Manager, in consultation with the Chief Executive Officer, T.T.C., the Deputy City Manager, Infrastructure and Development Services, the Deputy City Manager, Corporate Services, and the Chief Financial Officer and Treasurer and any other relevant official, in a form acceptable to the City Solicitor.
2. City Council authorize the City Solicitor to submit the necessary bill(s) to amend Toronto Municipal Code Chapter 213, Real Property to include the Ontario Line, Scarborough Subway Extension, the Eglinton Crosstown West Extension and the Yonge North Subway Extension to the definition of "Transit Projects".
3. City Council delegate authority to each of the Deputy City Manager, Corporate Services, the Executive Director, Corporate Real Estate Management, and the Director, Transaction Services, severally, to approve the disposal to Metrolinx and the use by Metrolinx of certain City lands required by Metrolinx for the Subways Program (the "City Subway Lands"), including surface and subsurface public highway, for nominal consideration, provided that such disposal is:
  - a) at no net operating cost to the City, and/or the T.T.C. at the time of disposition, which would include, but not limited to, relocation costs, lost revenues or other out of pocket costs;
  - b) of lands are not required for municipal purposes (current and future) as already identified by the City in its ten year capital plan, as same may be amended from time to time; and

c) subject to existing City and T.T.C. infrastructure and assets and third party utility rights.

4. With respect to the City Subway Lands designated as Public Highway, City Council authorize the permanent closure of any City Subway Lands that are not otherwise required to continue to be designated as public highways and exempt these lands from the requirements of City of Toronto Municipal Code Chapter 162, Public Notice.

5. City Council authorize the Deputy City Manager, Corporate Services, the Executive Director, Corporate Real Estate Management, and the Director, Transaction Services, severally, to utilize the land valuation principles set out in Attachment 2 for the City Subway Lands required by Metrolinx, and, notwithstanding EX16.4, to utilize the same land valuation principles set out in Attachment 2 for City lands required by Metrolinx for its GO Expansion Program.

6. City Council authorize severally each of the Managers in Transaction Services, Corporate Real Estate Management to approve and execute nominal sum licence agreements, Omnibus Permission to Enter Agreements ("O.P.T.E.") or further amending agreements to O.P.T.E.s with Metrolinx to authorize the use of any City-owned or managed property required by Metrolinx to perform due diligence work to facilitate the Subways Program or the GO Expansion Program, on the same terms and conditions as the original O.P.T.E. and such additional and/or amended terms and conditions as may be acceptable to the Director, Transaction Services and in a form satisfactory to the City Solicitor, and to waive the City's administrative fee for each new or amending agreement pursuant to Chapter 441 of the Toronto Municipal Code.

7. City Council forward this report to the Toronto Transit Commission Board for information.

## **FINANCIAL IMPACT**

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The City will transfer the necessary City Subway Land interests to Metrolinx for the Subways Program. These interests will consist of fee simple transfers, easements, licences and permits in respect of City property including City public highway lands (both surface and subsurface), as required for the Subways Program in accordance with the terms outlined in this report.

In addition, consideration to be paid for City Subway Lands and City lands required for the GO Expansion Program shall be based on terms within this report and as set out in Attachment 1. The Protocol will also further detail conditions upon which the City will accept Metrolinx lands for the purposes of operating and maintaining City assets and infrastructure once constructed by Metrolinx, based on terms within this report.

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

## DECISION HISTORY

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In June 2021, Executive Committee considered EX25.5 Update on Metrolinx Transit Expansion Projects – Second Quarter 2021 which provided a status update on the Subways Program.

<https://www.toronto.ca/legdocs/mmis/2021/ex/bgrd/backgroundfile-168614.pdf>

In September 2020, City Council adopted, with amendments, EX16.4 Metrolinx-City of Toronto Master Agreement for the GO Expansion Program which authorized the City Manager to finalize negotiations, enter into and execute a GO Expansion Master Agreement for the Metrolinx GO Expansion Program, based on principles outlined within the report, including those related to real estate.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2020.EX16.4>

In October 2019, City Council considered EX9.1 Toronto-Ontario Transit Update and authorized the City Manager to negotiate, enter into and execute a Preliminary Agreement with the Province and/or any other relevant provincial agency, in accordance with the terms set out in the term sheet in Attachment 6 to that report. City Council also authorized the City Manager, in consultation with the Chief Executive Officer, Toronto Transit Commission, to negotiate a Subways Master Agreement and/or other applicable agreements with the Province and/or any other relevant provincial agency for the purposes of the Provincial Subways Program.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2019.EX9.1>

On April 24, 2018, City Council adopted, with amendments, EX33.1 Implementation of the SmartTrack Stations Program and the Metrolinx Regional Express Rail Program (now GO Expansion Program) and authorized the Deputy City Manager to approve and execute a real estate protocol with Metrolinx, based on terms and conditions set out in that report, satisfactory to the Deputy City Manager, in consultation with the City Solicitor.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2018.EX33.1>

## COMMENTS

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### Background

Metrolinx continues to make progress to deliver its Subways Program on an accelerated basis. City and T.T.C. staff continue to be actively engaged with Metrolinx through project meetings and are providing input through review of draft studies and designs, and in participating in commercial meetings to inform procurement processes as well as providing Metrolinx with short-term access to the City Subway Lands for the purposes of carrying out due diligence in furtherance of the Subways Program.

Concurrently, the City is working with the Province of Ontario to establish a Term Sheet for the Subways Master Agreement and anticipate recommending terms and seeking authority from City Council for a Subways Master Agreement between the City, T.T.C. and Metrolinx based on the Term Sheet in 2022.

While terms for the Subways Master Agreement (the "Subways Master Agreement") continue to be negotiated, there is a need for a Real Estate Protocol (the "Protocol") in advance of a Subways Master Agreement as Metrolinx is required to provide its contractor with access to City Subway Lands by April 2022 for early tunneling work and other associated works.

### **Rationale for Protocol Execution**

The Protocol will govern the access, acquisition, ownership and disposition of real property between Metrolinx and the City/T.T.C., and includes related processes to be followed by Metrolinx to facilitate City and T.T.C. review of City Infrastructure and Subways Program as it relates to City assets and infrastructure and also includes a process for developing a Commissioning and Acceptance Protocol for City Infrastructure. The Protocol is consistent with the terms relating to real estate transaction negotiated between the City and Metrolinx in connection with the GO Expansion Programs. Key terms and conditions of the Subway Protocol are set out in Attachment 1.

While clauses related to dispute resolution, permits, licences and approvals, and design review and construction approvals are better suited for a Subways Master Agreement, these clauses have been included in the Protocol to protect the City/T.T.C. interests and ensure Metrolinx complies with City/T.T.C. requirements while on City Subway Lands and/or while working on City/T.T.C. infrastructure. It is expected that such terms will ultimately be incorporated into the Subways Master Agreement and supersede those contained in the Protocol.

### **Compensation for City Lands**

Consistent with the real estate principles set out in EX33.1 for the GO Expansion Program, this Protocol authorizes the disposition of City-owned lands to Metrolinx for nominal consideration where such lands are deemed not to have a municipal purpose and are required for the Metrolinx Subways Program.

For any City-owned lands deemed to have a municipal purpose, including Parkland and Open Space and Public Highway Lands, and any lands deemed to be income producing or intended for future development, any disposition will be at fair market value. The City and Metrolinx have agreed to specific terms of reference for the determination of the fair market value, as further set out in Attachment 2.

In order to be consistent with how land valuation is determined for City Subways Lands required for the Metrolinx's Subways Program and for City lands required for the Metrolinx GO Expansion Program, this report also requests the valuation principles set out in Attachment 2 be applied to both City Subways Lands and the City lands required for Metrolinx's GO Expansion Program. This will ensure a consistent and strategic approach to valuation for all City lands required for Metrolinx's transit programs and reduce potential for conflicts and ambiguity.

### **Omnibus Permission to Enter Agreements**

Metrolinx currently relies on the Omnibus Permission to Enter Agreements ("O.P.T.E.") or other City permits and licences to access and perform site due diligence work (both non-invasive and limited invasive work). Authority for the O.P.T.E. and all amending

agreements, thus far, was obtained through delegated authority pursuant to Article 2 – Delegation of Authorities under Chapter 213 – Real Property of the Toronto Municipal Code.

In order to expedite the request for short term due diligence work on City property, this report seeks City Council authority to authorize the Managers of Transaction Services, Corporate Real Estate Management to enter into licence agreements, O.P.T.E.s or any amending agreements to O.P.T.E.'s for due diligence work to facilitate the Subways Programs or the GO Expansion Program, on the same terms and conditions of the original O.P.T.E.; and/or such additional and/or amended terms and conditions that are satisfactory to the Director of Transaction Services; and to waive the City's administrative fee for each new or amending O.P.T.E. agreements pursuant to Chapter 441 of the Toronto Municipal Code.

### **Current Status of Subways Program – Land Acquisition**

While Metrolinx has initiated expropriation proceedings for the tunnel lands required for the Scarborough Subway Extension ("S.S.E.") and the Eglinton Crosstown West Extension ("E.C.W.E.") under the *Expropriations Act*, these expropriations are meant to act as a backstop for Metrolinx to gain access to the City Subways Lands by April 2022 for their advance tunnel contractors. There has been a commitment from Metrolinx to withdraw these expropriations should the Protocol for the Subways Program be executed by February 28, 2022.

It is important to note that through the *Building Transit Faster Act* ("B.T.F.A."), the Province has eliminated hearings of necessity for expropriations of property that are at least partly on transit corridor land and are for a priority transit project. Under the B.T.F.A., priority transit projects means the S.S.E., E.C.W.E., Ontario Line ("O.L."), and Yonge North Subway Extension ("Y.N.S.E.") and any other prescribed provincial transit project. This significantly accelerates the timeline for Metrolinx to expropriate properties. To date, the Province has designated transit corridor lands for the O.L., S.S.E., and E.C.W.E. but have not yet been designated for the Y.N.S.E. and may occur in 2022. Metrolinx continues to note its approach to land acquisition is through good-faith negotiations with property owners and to only utilize these accelerated expropriation powers under B.T.F.A. as a last stop measure.

In addition to the accelerated expropriation powers provided under B.T.F.A., Section 47 of the *Metrolinx Act* was also amended to provide the Lieutenant Governor in Council the ability to order the City to transfer to Metrolinx with or without compensation, all or some of the City and its agencies' assets, liabilities, rights and obligations with respect to a rapid transit project that is the sole responsibility of Metrolinx, including contractual rights, interests, approvals, registrations and entitlements, and any real or personal property. Under the amended *Metrolinx Act*, a transfer pursuant to Section 47 does not constitute an expropriation or injurious infection for the purposes of the *Expropriations Act* or otherwise at law.

The Protocol would establish a common understanding and contractual approach to facilitate timely real estate transactions between the City and Metrolinx and is intended to limit Metrolinx's need to expropriate City lands. However, the Protocol does not restrict Metrolinx from exercising its rights under the *Expropriations Act* at any point in

the property negotiation process nor does it limit the City's rights under the *Expropriations Act*.

## **CONTACT**

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## **SIGNATURE**

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Patrick Matozzo  
Executive Director, Corporate Real Estate Management

## **ATTACHMENTS**

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Attachment 1 – Subway Real Estate Protocol Major Terms and Conditions  
Attachment 2 – Land Valuation Principles