

Consolidated Clause in Works Committee Report 6, which was considered by City Council on September 25, 26 and 27, 2006.

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**Durham Boundary Facilities Agreement -
Kingston Road Bridge Over the Rouge River
(Ward 44, Scarborough East)**

City Council on September 25, 26 and 27, 2006, adopted this Clause without amendment.

The Works Committee recommends that City Council adopt the staff recommendations in the Recommendations Section of the report (August 18, 2006) from the General Manager, Transportation Services.

Purpose:

To seek authorization for the execution of an agreement between the Region of Durham and the City of Toronto respecting cost-sharing and maintenance of the Kingston Road Bridge over the Rouge River and the stretch of Kingston Road between the easterly end of the bridge and Altona Road in Pickering.

Financial Implications and Impact Statement:

There are no additional funding implications resulting from the adoption of this report.

Recommendations:

It is recommended that:

- (1) authorization be granted to execute an agreement between the City of Toronto and the Region of Durham, generally in accordance with the terms and conditions contained in the draft agreement appended to this report; and
- (2) the appropriate City officials be authorized and directed to take the necessary action to give effect thereto.

Comments:

The Kingston Road bridge over the Rouge River was formerly owned by the Province of Ontario when it formed part of Highway 2A Provincial Highway. When the Government of Ontario rationalized its system, they decided to download the bridge on November 27, 1997, to both the City of Toronto and the Region of Durham (see Appendix 'A' of the attached draft agreement).

The City's Structures and Expressways staff have completed a thorough assessment of the bridge structure and have identified the need for some immediate repairs to its parapet walls and sidewalks, which pose a safety concern. The Region of Durham was informed of the urgency of the work and agreed that we should proceed, provided a formal agreement is drafted that defines the protocols of co-operation between both jurisdictions regarding the bridge.

The attached draft agreement reflects the terms and conditions and legal obligations of each party.

Key points of the agreement include that:

- City of Toronto will be responsible for all activities affecting the bridge, including: inspection, maintenance and management of capital work;
- City of Toronto will carry out all structural maintenance on the bridge with a cost-sharing split on a 50/50 percent basis with the Region of Durham;
- if maintenance work is required on the bridge and Durham's financial obligation exceeds \$50,000.00, then the City of Toronto agrees to obtain prior written approval from Durham before any work is carried out;
- capital improvements require mutual agreement of both parties and will be shared on a 50/50 percent basis;
- City of Toronto will be fully responsible for all roadway winter maintenance along Kingston Road, between the easterly limit of the bridge and Altona Road in Pickering. Durham will compensate Toronto fully for all winter maintenance expenses on this section of road;
- under these conditions, the City of Toronto indemnifies the Region of Durham of any liabilities related to those delegated activities and agrees to list Durham as an insured third party; and
- the unit costs of work that the City of Toronto will be using to invoice the Region of Durham will be reviewed every three years.

Conclusions:

The agreement with the Region of Durham will formalize the terms and conditions that have been the basis of co-operation between the two municipalities. The agreement formalizes this arrangement and hence does not impose any additional costs to the City of Toronto.

Staff of Legal Services, Risk Management of Corporate Finance and Technical Services have been consulted in the preparation of this report.

Contact:

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Attachment:

Draft agreement between the City of Toronto and the Region of Durham.

DRAFT

THIS AGREEMENT made this day of 2006.

B E T W E E N:

THE REGIONAL MUNICIPALITY OF DURHAM
herein called "Durham"

of The First Part

and

CITY OF TORONTO
herein called "Toronto"

of The Second Part

BACKGROUND:

WHEREAS each of Toronto and Durham are neighbouring municipalities sharing a common boundary;

AND WHEREAS that part of the common boundary is comprised of a Bridge (as hereinafter defined) which has been jointly used by both municipalities;

AND WHEREAS Durham and Toronto now desire to enter into this Agreement setting forth their respective rights and obligations with respect to the maintenance, repair and construction of the boundary Bridge;

IN CONSIDERATION of the foregoing Background, the mutual covenants in this Agreement and other good and valuable consideration (the receipt and adequacy of which are hereby acknowledged) the Parties agree as follows:

ARTICLE I INTERPRETATION

1.1 **Definitions:** In this Agreement, except where the context or subject matter is inconsistent therewith, the following terms shall have the following meanings:

“Applicable Laws” means all statutes, regulations, codes, by-laws, ordinances, orders and requirements, whether federal, provincial, municipal or by any other governmental authority, commission, board, agency department or regulatory body having jurisdiction, which apply to the subject matter or matters of this Agreement, including the *Bridges Act*, R.S.O. 1990, c.B.12 and the *Public Transportation and Highways Improvement Act*, R.S.O. 1990, c.P.50;

“Boulevard Surface” means the non-structural hard surface of the Bridge required for the safe passage of pedestrians and vehicles, and includes paved surface, curbs, gutters, culverts, catch basins, storm sewer drain, sidewalks, medians, guide rails, signage, line markings;

“Boulevard Surface Maintenance” means the continuous, diligent and ongoing maintenance and repair of all Boulevard Surface components situated on the Bridge, including pothole patching, crack sealing, depression/settlement repairs, sidewalk patching/repair, guide-rail, catch basin and storm sewer drain clean out, line painting, snow plowing, snow removal, salting and road (and joint) washing;

“Bridge” means the physical structure of the Kingston Road crossing over the Rouge River between the most easterly joint to the most westerly joint plus ten (10 m) metres on each side, the common boundary between Durham and Toronto, including the embankment abutments, approach slabs, bridge deck, main structural frame, structural piers, foundations and footings and structural suspension, bearing and expansion joints, and the Boulevard Surface; [See Appendix A]

“Business Day” means any day other than a Saturday, Sunday and statutory or civic holiday;

“Capital Improvements” means the work done to create or upgrade the bridge structure, including, widening, twinning, improving approaches to the bridge, installation of safety features, lighting conduits, boulevard and/or sidewalk improvement;

“Inspection” means “careful examination” of the bridge structure and the local area surrounding it, by checking for erosion problems, element defects, and testing the condition and performance of those elements against established standards for the purpose of ascertaining whether the structure is safe and sound for public use or whether repairs are needed to make it so;

“Loss” or “Losses” means any and all liabilities, charges, cost, direct or indirect damages (including punitive damages), loss of profits, consequential damages, incidental damages, special damages, losses or expenses (including without limitation, court costs, arbitration fees, penalties, fines, amounts paid in settlement of claims and reasonable legal fees and expenses of investigation);

“Party” means either Durham or Toronto and **“Parties”** means both of them, and in the case of any indemnity provision herein, the terms Durham or Toronto shall be deemed to include all councillors, elected officials, officers, employees or agents of the Party to be indemnified;

“Person” includes an individual, corporation, partnership, joint venture, trust, unincorporated organization, the Crown or any agency or instrumentality thereof or any other entity recognized by law;

“Structural Maintenance” means the continuous, diligent and ongoing maintenance and repair of all structural components of the Bridges (excluding Boulevard Surface) that ensures good state of repair and safe loading capacity, in compliance with all Applicable Laws; such maintenance includes all required alterations, replacements, modifications or upgrades to the structural components of the Bridge. Alterations to the Bridge will be identified by Toronto and agreed to by Durham Staff.

1.2 **Headings and Index:** The division of this Agreement into articles, sections, subsections and schedules and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement. The articles, section, subsection and schedule headings in this Agreement are not intended to be full or precise descriptions of the text to which they refer and should not be considered part of this Agreement.

1.3 **Extended Meanings:** The words expressed in the singular include the plural and vice versa and words in one gender include all genders.

1.4 **Entire Agreement:** This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions whether oral or written of the parties pertaining to such subject matter. There are no warranties, representations or other agreements between the parties in connection with the subject matter hereof except those specifically set out herein. The execution of this Agreement has not been induced by nor do any of the parties rely upon or regard as material any representations not included in this Agreement. No supplement, modification or waiver of this Agreement shall be binding unless executed, in writing, by the party to be bound thereby. A waiver of any of the provisions of this Agreement shall not be deemed or shall constitute a waiver of any other provision whether or not similar nor shall such waiver constitute a continuing waiver unless otherwise expressly provided.

1.5 **Governing Law:** This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.

1.6 **Currency:** Unless otherwise indicated, all dollar amounts referred to in this Agreement are in Canadian funds.

1.7 **Invalidity:** If any of the provisions contained in this Agreement are found by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions contained herein shall not be in any way affected or impaired thereby.

1.8 **Agreement Life:** This agreement expires in ten years from the date of effective execution by the duly authorized executives of both parties. The agreement is renewable and renegotiable at the end of the ten-year period.

ARTICLE II MAINTENANCE BY TORONTO

2.1 **Maintenance:** Except as otherwise provided in this Article or Article III, Toronto shall be responsible for the performance and implementation of all Structural Maintenance and Boulevard Surface Maintenance required to be performed under all Applicable Laws with respect to the structural components of the Bridge. Toronto shall also be responsible for the performance and implementation of all capital improvements required for all Structural and Boulevard Surface of the Bridge, subject to the mutual consent, in writing, of both parties to the capital improvements.

2.2 **Cost Sharing:** The costs and expenses incurred by Toronto with respect to the Boulevard Surface Maintenance and Structural Maintenance work as well as the agreed upon costs of Capital Improvements of the Bridge in accordance with Section 2.1 shall be shared equally between Toronto and Durham. Costs of both Structural Maintenance (including safety and state-of-good-repair measures as well winter operations), which is estimated at \$8,000.00 annually (\$4,000.00 for each party) will be shared equally between Durham and Toronto. Durham will compensate Toronto with an additional annual payment of \$3,650.00 for the maintenance and upkeep of the stretch on Kingston Road starting at the aforementioned bridge (as the west boundary) and Altona Road (as the east boundary). Accordingly Durham will pay Toronto seven thousand and six hundred and fifty dollars (\$7,650.00) on June 30th of each year. The parties agree that these costs shall be reviewed and adjusted every three years to reflect the actual costs incurred by Toronto in performing the work.

2.3 **Cost Sharing for Structural Maintenance over \$ 50,000.00:** Should 50% of the cost for any Structural Maintenance required to be performed on the Bridge exceed \$50,000.00, Durham shall not be required to pay its 50% share of the cost of that work until such time as it has granted, in writing, its consent to the work, which consent shall not be unreasonably withheld. Toronto and Durham shall determine arrangement for payments (amounts and dates) of such costs. If the parties are unable to agree as to the need for work to be performed, or the costs of the work, then the provisions of section 2.6 shall apply. In any event, Toronto shall have the right to perform any such work without the consent of Durham provided that it pays the full cost.

2.4 **Cost Sharing for Approaches to the Bridge:** Winter maintenance on both approaches (Alton Road centreline being the easterly limit) will be carried out by Toronto. Durham will compensate Toronto for winter operations on its City Streets at the rate of \$2.28 per square metre per year (applicable to the stretch of Kingston Road between the bridge and Alton Road) as discussed in section 2.2 of this agreement. This is the \$3,650.00 dollars included in section 2.2, above. The parties agree that these costs shall be reviewed and adjusted every three years to reflect the actual costs incurred by Toronto in performing the work.

2.6 **Dispute Resolution:** Should either Party wish to dispute any portion of the invoice, the undisputed part of the invoice shall still be paid within the timeframe as provided in this Article. The disputed section shall be resolved through discussions between Durham's Commissioner of Works and Toronto's General Manager of Transportation Services, or their respective designates. If this dispute resolution mechanism fails, then the parties may submit the dispute to an independent third party for arbitration.

ARTICLE III PERFORMANCE

3.1 **Performance of Obligations:** Each of the Parties hereto agree to perform their obligations:

- (a) in a good and workmanlike manner;
- (b) with all due diligence and dispatch; and
- (c) in compliance with all Applicable Laws.

ARTICLE IV INDEMNITIES AND INSURANCE

4.1 **General Indemnity by Toronto:** Except on matters covered by section 2.3 that require written consent from Durham and Durham has not given that consent, Toronto shall indemnify and hold Durham harmless from and against any and all Losses incurred by Durham or which Durham may suffer or become liable for, as a result of, or in connection with, or in relation to any matter arising under or in consequence of any breach of any term, obligation or covenant of Toronto contained in this Agreement or otherwise arising directly or indirectly in relation to any act, omission, error or negligence of Toronto or any of its employees, contractors, consultants or agents in the performance of any of Toronto's obligations under this Agreement.

4.2 **Insurance:** During the term of this Agreement, Toronto shall obtain and maintain in full force and effect, at its own cost, Commercial General Liability insurance issued by an insurance company authorized by law to carry on business in the Province of Ontario, providing for, without limitation, coverage for third party bodily injury, property damage and personal injury. Such policy shall:

- (a) have inclusive limits of not less than FIVE MILLION DOLLARS (\$5,000,000.00) per occurrence;
- (b) contain a cross-liability clause endorsement of standard wording;
- (c) add Durham as an additional insured;
- (d) not be terminated, cancelled, or materially altered unless written notice of such termination, cancellation or material alteration is given to the other party at least thirty (30) clear days before the effective date thereof; and

- (e) require that a party, upon the request of the other party, shall provide proof of insurance in a form satisfactory to the other party's insurance or risk manager.

ARTICLE V TERM AND TERMINATION

5.1 **Term:** The term of this Agreement shall commence on the 1st day of January, 2006 and expire on January 1, 2016, unless terminated by either party on not less than six months' written notice (the "Term").

5.2 **Default:** In the event that either party is in breach of its obligations under this agreement, the other party shall be entitled to notify the defaulting party of such breach. If the defaulting party does not remedy the breach within 30 days of the notice, or where it is not reasonable to resolve the breach within 30 days, commence to remedy the breach and diligently pursue the remedy within 30 days, then the notifying party shall be entitled to terminate this agreement.

ARTICLE VI GENERAL

6.1 **Notice:** Any notice, demand, consent, or other communication (in this section), a notice required or permitted to be given or made in this Agreement shall be in writing and shall be sufficiently given or made if:

- (a) delivered in person, during normal business hours on a Business Day and left with a receptionist or other responsible employee of the relevant party at the applicable address set forth below; or
- (b) sent by prepaid first-class mail; or
- (c) sent by any electronic means of sending messages including facsimile transmission which produces a paper record (Electronic Transmission) during normal business hours on a Business Day.

In the case of a notice to Durham addressed to it at:

THE REGIONAL MUNICIPALITY OF DURHAM
605 Rossland Rd. E.
P.O. Box 623
Whitby, ON L1N 6A3

Attention: Clifford Curtis, Commissioner of Works (or his/her successor)

Facsimile Number: (905) 668-2051

and in the case of a notice to Toronto addressed to it at:

CITY OF TORONTO
100 Queen Street West
23rd Floor, East Tower
Toronto City Hall
Toronto, ON M5H 2N2

Attention: Gary Welsh, General Manager, Transportation Services (or his/her successor)

Facsimile Number: (416) 392-4540

Each notice sent in accordance with this section shall be deemed to have been received:

- (a) at the time it was delivered in person; or
- (b) at the beginning of business on the third (3rd) Business Day after it was mailed, excluding each Business Day during which there existed any general interruption in postal services due to strike, lock-out or other cause; or
- (c) at the start of business on the first (1st) Business Day after the day on which it was sent by electronic transmission.

Any party may change its address for notice by giving notice to the other parties as provided in this section.

6.2 **Further Assurances:** Each Party shall do such acts and shall execute such further documents, conveyances, deeds, assignments, transfers and the like and will cause the doing of such acts and will cause the execution of such further documents as are within its power as any other Party may, in writing, at any time and from time to time reasonably request be done and/or executed in order to give full effect to the provisions of this Agreement.

6.3 **Assignment:** The Parties shall not be entitled to assign, transfer, license or otherwise divest the benefits of their respective rights under this Agreement without the prior written consent of the other, which consent may be arbitrarily or unreasonably withheld.

6.4 **Binding on Successors:** This Agreement shall ensure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.

6.5 **Force Majeure:** Except as expressly provided or otherwise in this Agreement, dates and times by which a Party is required to render performance under this Agreement shall be postponed automatically to the extent and for the period of time that such a Party is prevented from meeting them by any reason of any cause beyond its reasonable control. The Party prevented from rendering performance must, however, notify the other Party immediately and in detail of the commencement and nature of such cause: and the probable consequences thereof. Such Party must use its reasonable efforts to render performance in a timely manner utilizing to

such end, all resources reasonably required under the circumstances including obtaining supplies or services from other sources if same were reasonably available.

6.6 **Independent Contractor:** In giving effect to this Agreement, no Party shall be or be deemed an agent or employee of the other Party for any purpose and that their relationship to each other shall be that of independent contractors. Nothing in this Agreement shall constitute a partnership or a joint venture between the Parties. No Party shall have the right to enter into contracts or pledges credit of or incur expenses or liabilities on behalf of the other Party.

6.7 Time of the Essence: Time shall be of the essence hereof.

IN WITNESS WHEREOF the Parties have duly executed this Agreement.

THE REGIONAL MUNICIPALITY OF DURHAM

Per:

Roger Anderson, Regional Chairman

Per:

Pat Madill, Regional Clerk

CITY OF TORONTO

Per:

Joseph P. Pennachetti, Deputy City Manager and Chief Financial Officer

Per:

Ulli S. Watkiss, City Clerk