

Delegation of Authority for Crossing Agreements

Date:	January 4, 2013
To:	Public Works and Infrastructure Committee
From:	Acting Executive Director, Technical Services General Manager, Toronto Water General Manager, Transportation Services
Wards:	All
Reference Number:	P:\2012\Cluster B\TEC\PW13017 (AFS #16691)

SUMMARY

This report seeks standing delegated authority for each of the Division Heads of Technical Services, Toronto Water and Transportation Services, as applicable, to enter into crossing agreements, or permits for construction of a crossing, necessary to allow City infrastructure to cross a third party's lands or infrastructure. This would include sewer and watermain pipes, bridges, tunnels, roads, trails, bike paths, overpasses and underpasses which are required to cross another organization's lands or infrastructure (e.g., railway corridors or oil and gas pipelines) in the course of implementing an approved City capital project. Delegating this standing authority would streamline existing authorities that are available for some of these agreements.

RECOMMENDATIONS

The Acting Executive Director of Technical Services, the General Manager of Toronto Water and the General Manager of Transportation Services recommend that:

1. City Council delegate standing authority to the Division Heads of Technical Services, Toronto Water, and Transportation Services, as appropriate depending on their respective area of responsibility, to negotiate, enter into and execute on behalf of the City any crossing agreement, crossing permit, or related document required to give effect to an agreement or permit necessary to permit the construction, installation, maintenance, repair, alteration, replacement and expansion of City infrastructure for roads, trails, bike paths or utility purposes, across, over, under or along lands or infrastructure owned by third parties,

including, without limitation, any renewals, extensions or subsequent amendments to a crossing agreement or permit (a "Crossing Agreement"), on terms and conditions satisfactory to the applicable Division Head, and in a form satisfactory to the City Solicitor, and to make payments of amounts owing under the crossing agreements or crossing permits, subject to the following conditions:

- (a) the applicable Division Head is satisfied that the crossing work is part of an approved capital or operating budget;
- (b) the applicable Division Head is satisfied that the City infrastructure cannot reasonably be located entirely on City lands or in a location that will not cross the lands or infrastructure of a third party; and
- (c) the applicable Division Head, in consultation with the City Solicitor on legal matters, is of the view that the terms and conditions of the Crossing Agreement are commercially reasonable in the circumstances.

2. City Council also delegate standing authority to the Division Heads referenced in Recommendation 1 to file any Crossing Agreement with any relevant regulatory or governmental authority (e.g., the Canadian Transportation Agency) if the applicable Division Head determines that such filing is appropriate or necessary.

Financial Impact

There is no immediate financial impact as a result of this report. The cost of crossing work and any fees that may arise from the agreement will be funded through the applicable Division's Approved Capital or Operating Budgets, as appropriate.

As noted below, it is also not uncommon for such agreements to require the City, at its own cost, to relocate its infrastructure, located on lands owned by a third party, on request in order to accommodate the operations of the third party. The potential costs that may be associated with possible future relocation are speculative and likely difficult to quantify when permission to install the crossing is initially requested.

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

ISSUE BACKGROUND

From time to time, an approved capital project will require that the City lay its infrastructure across a third party's lands or infrastructure. For example, it is not unusual for the City's sewers, watermains and roadways to cross railway corridors and oil or gas pipelines. In such circumstances, the City needs permission from the owner. Typically, permission is conveyed to the City in the form of a permit or crossing agreement between the parties that sets out the rights and responsibilities of each party.

The former Metro Council on September 27, 1988 adopted, Report No. 12, Clause 10 of the former Metro Works Committee which gave delegated standing authority to staff for

signing agreements with pipeline oil companies for the crossing of their pipelines by Metro sewers and watermains. However, this authority is limited as it does not pertain to other infrastructure or other parties which might typically be involved in crossings (e.g., roads crossing rail corridors). In addition to this former Metro authority, City Council has delegated standing authority to enter into leases and licenses where the term of these agreements, including all renewals, is limited to a period of less than 21 years (Executive Committee Item No. 43.7, as adopted by Council at its meeting on May 11, 2010). However, because this authority was not intended or designed to address the needs of long term installation of infrastructure, the limit of 21 years is problematic since crossing agreements are generally intended to have terms that are much longer. The use of the delegated real estate authorities is also not suited for crossing agreements or permits for crossings because these documents typically do not contain any real estate provisions that require the expertise of the Real Estate Services Division. For example, there usually is no monthly or annual fee to negotiate since any fee that is imposed under these agreements or permits are generally nominal one time fees for processing the documents.

COMMENTS

The authority being sought in this report will be available for permits and crossing agreements regardless of the term. Where possible, this will allow for the term of such agreements to better reflect the useful life of the infrastructure in question thereby minimizing uncertainty related to the City's rights in respect of that crossing area. While the City generally prefers an easement for the placement of long term infrastructure, where the third party will not agree to grant an easement (which would be entered into using the existing delegation for certain real estate matters, where applicable) then the parties would enter into a crossing agreement.

It is not unusual for the City to be asked to sign a permit or a crossing agreement when it installs its infrastructure, for road, trail, bike path or utility purposes, across the lands or infrastructure of a third party. A standing delegated authority for negotiating and signing what are primarily standard form agreements would avoid unduly lengthening Committee and Council agendas. In addition, the City is often required to meet deadlines for various expenditures including government funding opportunities which may be adversely affected by the need to obtain specific Council authority. The ability of operating divisions to proceed with approved capital projects or meet construction deadlines is also often delayed while approval is obtained.

While the terms and conditions of the permits and crossing agreements can vary, they typically address such basic matters as the following: the nature of the work, the location, the cost, relocation requirements, and any related financial security such as insurance requirements. These permits and crossing agreements are designed to grant permission to the City while protecting the interests of the owner whose land or infrastructure the City wants to cross.

For example, such permits and agreements often require indemnities from the City that are intended to protect the owner of the lands/infrastructure being crossed from damage

to its property and any claim arising from the installation of the City's infrastructure or related works. The potential costs to the City in providing such indemnities cannot be quantified when the agreement is signed. These permits and agreements also often require the City to carry insurance as security in the event of damage. In addition, there may be fees required for a permit or crossing agreement. Historically, up-front fees have ranged from \$3,000 to \$5,000.

While permits usually only cover the period of construction, the term of the crossing agreements varies and may be for a period of time that is shorter than the useful life of the infrastructure. This means that if an agreement expires before the end of the useful life of the municipal infrastructure, the City will have to negotiate the terms of a new agreement or, if it is unsuccessful in doing so, may have to relocate its works. It is also not uncommon for such agreements to require the City, at its own cost, to relocate its infrastructure on request in order to accommodate the operations of the third party. The costs that may be associated with possible future relocation are speculative and difficult to quantify when permission to install the crossing is initially requested.

Although each third party owner typically has its own standard form crossing agreement that it is reluctant to amend, as a general practice, the City works to negotiate the terms having regard to what is, in the judgement of the Division Head in consultation with the City Solicitor, commercially reasonable in the circumstances including consideration of existing property rights and the technical or engineering requirements related to the City's infrastructure (e.g., whether there is no reasonable alternative location for the infrastructure). Furthermore, legislation that governs the third party may impose certain requirements for the crossings and would also need to be considered. What is commercially reasonable in the circumstances of negotiating such agreements also generally refers to terms and conditions similar to, or more favourable than, those found in other agreements of the same or similar nature.

In order to properly negotiate the terms of these agreements, it is important to see what terms have been agreed to in the past. To assist in making such comparisons, staff will explore the potential for the creation of a central City repository and filing system for all crossing agreements.

If the applicable Division Head, after consulting with the City Solicitor on legal matters, is of the view that the terms of an agreement are not commercially reasonable in the circumstances (e.g., there are terms that are not normally used in similar agreements for similar projects), then specific authority to enter into that agreement will be requested from Council. Any agreement that falls outside the scope of this authority and which does not have any other delegated authority will be the subject of a staff report to committee and Council as required.

This authority is not intended to rescind, supersede, limit or vary any existing delegated authority granted by Council including, without limitation, the standing delegated authority for certain real estate matters or a delegated authority granted under the Municipal Code or a City by-law and is intended to be in addition to such existing delegated authorities.

CONTACT

Tony Pagnanelli, P.Eng.
Acting Executive Director
Technical Services
Tel: 416-392-8256
E-mail: tpagnan@toronto.ca

Katherine Frankl
Solicitor
Legal Services
Tel: 416-397-5406
E-mail: kfrankl@toronto.ca

SIGNATURE

Tony Pagnanelli, P. Eng.
Acting Executive Director
Technical Services

Lou Di Gironimo
General Manager
Toronto Water

Stephen Buckley
General Manager
Transportation Services