



## Toronto Pan Am Sports Centre Inc. – Shareholder Matters and Operating Agreement

<b>Date:</b>	March 3, 2014
<b>To:</b>	Executive Committee
<b>From:</b>	City Manager
<b>Wards:</b>	City-wide
<b>Ref. Number:</b>	

### SUMMARY

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In October 2013, City Council approved the establishment of a corporation to operate the Toronto Pan Am Sports Centre (the “Facility”), jointly owned by the City of Toronto and the Governing Council of the University of Toronto (the “University”). A Co-ownership Agreement and Unanimous Shareholders’ Agreement are in place and the Toronto Pan Am Sports Centre Inc. (“TPASC Inc.”) was incorporated on December 18, 2013. A number of implementation activities flow from the establishment of TPASC Inc., including matters that require approval by the Shareholders:

1. **By-law No. 1:** The Board of TPASC Inc. approved TPASC Inc. By-law No. 1, relating generally to the transaction of the business and affairs of the corporation. This report presents By-law No. 1 for approval by City Council, acting as Shareholder, pursuant to the *Business Corporations Act* (Ontario). The University has already provided its approval of By-law No. 1.
2. **Operating Agreement:** This report provides authority for the City Manager to negotiate, approve and execute an Operating Agreement among the City, University and TPASC Inc. to formalize operational matters with respect to the Facility’s occupants including the City.
3. **Appointment of Auditor:** This report provides authority for the City Manager to provide approval by the City, acting as Shareholder, of the appointment of the auditor for TPASC Inc. pursuant to the *Business Corporations Act* (Ontario).
4. **Composition of the Board:** As requested by City Council, this report proposes an amendment to the composition of the Board of TPASC Inc. with respect to the City’s appointees to the Board and a process and timeline for City Council to appoint 2 citizen members as Directors following the 2015 Games.

## RECOMMENDATIONS

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The City Manager recommends that:

1. City Council approve, ratify and confirm By-law No. 1 of Toronto Pan Am Sports Centre Inc. (“TPASC Inc.”), as approved by the Board of Directors of TPASC Inc. at its meeting on February 10, 2014, and forming Appendix A to this Report, and authorize the City Manager to execute a Shareholder resolution to this effect.
2. City Council delegate to the City Manager authority to negotiate, approve, execute, and amend as and when necessary, an Operating Agreement and any ancillary agreements and documents among the City of Toronto, Governing Council of the University of Toronto and TPASC Inc. with respect to operational and occupancy matters, including but not limited to the matters set out in Appendix B to this report, on such terms and conditions as may be satisfactory to the City Manager and City Solicitor.
3. City Council delegate to the City Manager authority to approve, on behalf of the City acting as Shareholder, the appointment of the auditor for TPASC Inc. upon the recommendation of the Board of TPASC Inc. based on a competitive procurement process, and execute a Shareholder resolution to this effect.
4. City Council:
  - a. amend the composition of the Board of TPASC Inc. to replace 2 of the Directors appointed by the City (the Director of Management Services in Parks, Forestry and Recreation and the General Manager of Economic Development and Culture or his/her designate) with 2 citizen members, effective on January 2, 2016, such that the composition of the 5 Directors of the Board of TPASC Inc. appointed by the City shall be:
    - (i) 2 citizen members;
    - (ii) the Director of Community Recreation in Parks, Forestry and Recreation;
    - (iii) the Director of Accounting Services in the Office of the Treasurer;
    - (iv) the Director of Facilities Operations in Facilities Management; and
  - b. amend the City’s *Policy on Board Governance Structures* to revise the Board composition as set out in Recommendation 4a and to revise the eligibility criteria, qualifications and appointment process with respect to the appointment by the City of citizen members as Directors of the Board of TPASC Inc., as set out in Appendix C to this report; and
  - c. request the City Clerk to initiate in 2015 the process to recruit citizen members for TPASC Inc. with recommendations on citizen member appointees to be reported to City Council in November 2015.

5. The appropriate City Officials be authorized and directed to take the necessary actions to give effect thereto.

## **Financial Impact**

There are no financial impacts arising from approval of TPASC Inc. By-law No. 1.

A capital reserve account for the Facility will be established and maintained for funding major maintenance and capital expenditures, as set out in the Financial Impact statement in Report EX34.8 adopted by City Council in October 2013. Approximately \$1.5 million of the annual contributions from the Legacy Fund will be allocated to the reserve account for this purpose. The City and the University will also make further contributions as necessary and in accordance with capital maintenance plans to ensure sufficient funding is available for anticipated future maintenance and capital expenditures as part of the annual operating funding provided to TPASC Inc.

The annual licence fee that forms part of the terms of the Operating Agreement and which is to be paid by TPASC Inc. will be shared equally by the City and the University. The licence fee will create an annual cost pressure for TPASC Inc. which the City and University will be required to cover, also on an equal basis. The amount of the licence fee received as the City's share will be entirely offset by a City contribution to TPASC Inc. to cover the shortfall resulting from the fee, with a zero net impact on the City.

Costs for advertising and a search consultant associated with recruitment of citizen members as Directors of the Board of TPASC Inc. who are appointed by the City, are costs to the City. Necessary additional funds for this recruitment once determined will be included in the City Clerk's Office operating budget submission for 2015.

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

## **Decision History**

In December 2008, City Council endorsed the City's participation in a bid to host the 2015 Games to be held in Toronto and the Greater Golden Horseshoe. The bid itself was initiated, funded and led by the Government of Ontario.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2008.EX26.6>

In February 2009, City Council authorized the City Manager to negotiate, approve and execute on the City's behalf a multi-party agreement with the Federal and Provincial governments and other key 2015 Games partners. City Council also approved investments totalling \$49.5 million in six City owned assets to be used as training, competition or festival venues during the 2015 Games, including \$37.5 million for the development of the Pan Am Aquatic Centre and Field House to be developed and operated in partnership with the University of Toronto.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2009.EX29.10>

In February 2011, City Council approved additional funding of up to \$47 million and three additional projects, for a total City investment of up to \$96.5 million in a total of nine 2015 Games capital projects.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.EX2.5>

At its May 25, 2011 meeting, the Scarborough Community Council recommended a rezoning application for the Pan Am Aquatic Centre and Field House site. This was approved by City Council on June 14, 2011.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.SC7.18>

In November 2012, City Council endorsed the establishment of a joint not-for-profit corporation with the Governing Council of the University of Toronto for the purpose of managing and operating the facility. City Council also directed the City Manager to request the Province of Ontario to amend O. Reg. 609/06 under the *City of Toronto Act, 2006* to allow the City to establish such a corporation, and to report back on appropriate governance structures and shareholder agreements.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2012.EX24.12>

In October 2013, City Council approved the establishment of a corporation to manage and operate the Toronto Pan Am Sports Centre to be jointly owned by the City and the University. City Council approved the terms and conditions for co-ownership and shareholder agreements between the City and the University, the governance structure for the corporation, and the City's appointments to the Board of Directors of TPASC Inc. City Council also requested the City Manager to report on the composition of the Board of TPASC Inc. including a process to appoint two citizen members as Directors.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.EX34.8>

## COMMENTS

### TPASC Inc. By-law No. 1

The City and the University, acting as Shareholders of TPASC Inc., are required to approve TPASC Inc. By-law No. 1 pursuant to the *Business Corporations Act* (Ontario). The University has already approved By-law No. 1, and approval by City Council is required.

Leading up to the incorporation and start-up of TPASC Inc., and prior to the Board of TPASC Inc. appointing senior employees, staff of the City and the University jointly developed By-law No. 1 for TPASC Inc. By-law No. 1 was considered and approved by the Board of TPASC Inc. at its meeting on February 10, 2014, and made retroactive to the date of incorporation on December 18, 2013. Pursuant to the *Business Corporations Act* (Ontario), any actions or decisions taken by the Board under the By-law prior to ratification and approval by the Shareholders are and remain valid.

Provisions in By-law No. 1 are consistent with provisions in the Unanimous Shareholders' Agreement that was approved by the City and the University in 2013. By-law No. 1 also sets out additional provisions and details for the Board of TPASC Inc. to properly operate, including such matters as: authorities for execution of corporation documents; determining banking arrangements; process for calling Board meetings; appointment of the Chair and Vice-Chair of the Board; indemnification of directors and officers; process for shareholder meetings and voting procedures.

By-law No. 1 represents the requirements of the Board of TPASC Inc. as well as the interests of the City and University as Shareholders. It is recommended that City Council, acting as Shareholder, approve and ratify TPASC Inc. By-law No. 1.

### **Operating Agreement**

An Operating Agreement is required among the City, University and TPASC Inc. to transfer to TPASC Inc. the responsibility for operating and maintaining the Facility as contemplated in the Unanimous Shareholders' Agreement and the Co-Ownership Agreement approved by City Council and dated December 18, 2013 between the City and the University (the "Co-Owners"). The Operating Agreement will allow TPASC Inc. to enter into ancillary sub-leases or sub-licences, as appropriate, in relation to use of the Facility, with the Canadian Sport Institute Ontario ("CSIO"), the City and University, and for food concessions and other retail space and a sports injuries clinic, on commercially reasonable terms, subject to the consent of the City and University if appropriate. TPASC Inc. will be independent and have authority to hire its own staff, procure goods and services, open bank accounts and enter into any agreements that are necessary to operate and maintain the Facility and related parking.

The funding model for operating and capital expenses for the Facility was approved by City Council in Report EX34.8 in October 2013:

- The annual licence fee to be set out in the Operating Agreement will be paid by TPASC Inc. to the City and the University in equal shares. The licence fee creates a cost pressure for TPASC Inc. which the City and University will be required to cover on an equal basis. The amount of the licence fee received as the City's share will be entirely offset by an annual contribution by the City to cover its share of TPASC Inc.'s shortfall resulting from the license fee. As a result, there will be a zero net impact on the City.
- A capital reserve account for the Facility will be established and maintained for funding major maintenance and capital expenditures. Approximately \$1.5 million of the annual contributions from the Legacy Fund will be allocated to the reserve account for this purpose. The City and the University will also make further contributions as necessary and in accordance with capital maintenance plans to ensure sufficient funding is available for anticipated future maintenance and capital expenditures as part of the annual operating funding provided to TPASC Inc.

As described in the Co-Ownership Agreement, the Operating Agreement will also set forth each Co-Owner's rights and obligations relating to the use of the Facility, in the case of the University for student and other University programs and in the case of the City for community and other City programs. The University and the City will commit to use 17% and 31%, respectively, of the total number of hours in each financial year that the Facility is available for use by the Co-Owners and third-party users, and will pay user fees to TPASC Inc. in respect thereof. Of the balance of the Facility's available time, 30% will be used by high-performance sports organizations and 22% by other third-party users, all of which will pay rent or licence fees, as the case may be, to TPASC Inc.

The City will occupy approximately 39 square metres (about 420 square feet) of gross office space in the Facility. The University will occupy approximately 280 square metres (about 3,000 square feet) of gross office space while CSIO will occupy approximately 2,780 square metres (about 30,000 square feet).

TPASC Inc. will retain the revenues it generates from the Facility and will be responsible for all operating and capital costs associated with the Facility, with the exception of those that are the responsibility of other users pursuant to user agreements or other applicable agreements. Some of the matters to be addressed in the Operating Agreement are set out in Appendix B attached to this report.

### **Appointment of Auditor for TPASC Inc.**

The Board of TPASC Inc. is undertaking a process to recruit an auditor for TPASC Inc. and the Board will recommend the appointment of an auditor for approval by the Shareholders, as required under the *Business Corporations Act* (Ontario). To expedite the approval of an auditor by the Shareholders, it is proposed that City Council delegate this authority to the City Manager. The City Manager will provide approval by the City, acting as Shareholder, of the appointment of the auditor for TPASC Inc., upon the recommendation of the Board of TPASC Inc. based on a competitive procurement process. The City Manager will execute a Shareholder resolution to this effect.

### **Composition of the Board of TPASC Inc. and City Appointments**

In October 2013, City Council approved the establishment of TPASC Inc. to operate the Facility with a Board structure consisting of 10 members, with 5 to be appointed by each of the City and the University. Recognizing the commitments of the City and the University in relation to the staging and legacy of the 2015 Games, City Council and the University approved a Board of Directors of TPASC Inc. initially composed of staff of the City and University.

While the approved Unanimous Shareholders' Agreement provided for a review of the Board structure in 2017, following the initial 3 year transition period, City Council in October 2013 requested the City Manager to consult with the University and report on a process for the City to appoint 2 citizen members to serve on the Board of TPASC Inc. prior to the 2017 review.

The Unanimous Shareholders' Agreement contains a provision for each Shareholder to appoint up to 2 non-staff members to the Board, and calls for the City and University to consult with each other regarding the composition of the Board. The City has consulted with the University on City Council's request to have the City appoint 2 citizen members to the Board. The position taken by the City and University is that the terms and conditions of the Co-Ownership Agreement and the Unanimous Shareholders' Agreement must always be respected, but otherwise the appointment of Directors should follow the respective appointments policies of the City and of the University as the appointing bodies. The University acknowledges the direction being proposed by the City in this report with respect to the City's appointees to the Board.

There are significant challenges surrounding TPASC Inc. and the Facility:

- TPASC Inc. and the Facility are in a start-up phase;
- there is urgency in finishing the Facility and having it fully operational by September 2014;
- the Facility must be prepared for handing over to the Toronto Organizing Committee on a schedule to accommodate the 2015 Pan American and Parapan American Games ("Toronto 2015");
- Toronto 2015 will have exclusive use of the Facility from May 15, 2015 to September 15, 2015 to prepare for and to stage the 2015 Games; and
- Toronto 2015 must restore the Facility and return it to TPASC Inc. at the end of that period.

Given these factors and the operational nature of the Facility, the Board composition with City staff appointed as the City's 5 directors of the Board should not be amended prior to the 2015 Games. However, it would be appropriate to replace 2 City staff with 2 citizen members as Directors of the Board appointed by the City once the 2015 Games have been completed and Toronto 2015 has returned the Facility to TPASC Inc.

The term citizen member, as defined in the *Public Appointments Policy* and as used in the *Policy on Board Governance Structures*, refers to residents of the City of Toronto who are not Council Members, City or agency staff, or staff of City corporations or their subsidiaries. It does not indicate Canadian citizenship and may include permanent residents, refugees, refugee claimants, and residents without homes.

To this end, the eligibility criteria and the qualifications set out in the Unanimous Shareholders' Agreement and By-law No. 1 for Directors of the Board would equally apply to citizen members. To ensure the citizen appointees are independent of other parties with an interest in TPASC Inc., it is proposed that the *Policy on Board Governance Structures* for the City's appointees to the Board of TPASC Inc. be amended such that citizens are ineligible for appointment if they or their immediate family members are currently, or in the 12 month period prior to an appointment taking effect were, employees, officers, directors or agents, as the case may be:

- of the University of Toronto;
- of TPASC Inc.;

- of license or lease holders or tenants of or at TPASC Inc.;
- of the Legacy Fund Allocations Committee or the Toronto Community Foundation or such other body or organization from time-to-time involved in reviewing or approving allocations from the Legacy Fund; or
- of other Beneficiary Legacy Facilities (other than TPASC Inc.) which are eligible for allocations from the Legacy Fund.

Immediate family members above include a child, parent and spouse as defined in the *Code of Conduct for Members of Council*. The 12-month cooling-off period above is consistent with the standard in *Municipal Code Chapter 140, Lobbying*, for senior public office holders who must wait 12 months before they may lobby once they cease to be a senior public office holder.

It is important that the City's Board appointees not only demonstrate some of the skill qualifications that Board members must meet as a whole, but that the Board has sufficient financial management expertise as demanded by the roles and functions of the Board. It is therefore proposed that the *Policy on Board Governance Structures* for the City's appointees to the Board of TPASC Inc. be amended to require that at least one of the citizen members appointed by City Council have financial management expertise.

The City Clerk will initiate the process for recruitment of citizen members for TPASC Inc. in 2015 with recommendations on citizen member appointees to be reported to City Council November 2015. It would be appropriate for these appointments to follow the Advertised Recruitment process and be assisted by a search consultant, as provided for in the *Public Appointments Policy*. It is proposed that the term of appointment for the City's citizen appointees will commence on January 2, 2016.

It is recommended that City Council amend the *Policy on Board Governance Structures* for TPASC Inc. for the appointment by the City of citizen members as Directors of the Board, including Board composition, eligibility criteria, qualifications and appointment process, as set out in Appendix C to this report. This change requires that City Council amend the composition of the City's appointees to the Board of TPASC Inc. to remove the Director of Management Services in Parks, Forestry and Recreation and the General Manager of Economic Development and Culture or his/her designate from, and add 2 citizen members to, the Board. The composition of the 5 Directors of the Board appointed by the City as of January 2, 2016, will be as follows:

- 2 citizen members;
- the Director of Community Recreation in Parks, Forestry and Recreation;
- the Director of Accounting Services in the Office of the Treasurer; and
- the Director of Facilities Operations in Facilities Management.



## **CONTACT**

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## **SIGNATURE**

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Joseph P. Pennachetti,  
City Manager

## **ATTACHMENTS**

- Appendix A: By-law No. 1 of Toronto Pan Am Sports Centre Inc.  
(as approved by the Board on February 10, 2014)
- Appendix B: Major Terms of Operating Agreement Among the  
City, University and TPASC Inc.
- Appendix C: *Policy on Board Governance Structures:*  
Toronto Pan Am Sports Centre Inc. Board Of Directors