ATTACHMENT 2 – Notification of Actions of the Chief Building Official Concerning Objections to the Statements of Disallowance (February 1, 2017)

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Mr. Harrington,

Notification of Actions of the Chief Building Official Concerning Objections to the Statements of Disallowance – Requests for Refund – 2 Strachan Avenue
Sign I.D. No. 19-059 - 2011 to 2014 Taxation Years

We are in receipt of your letter of January 30, 2017 and Notices of Objection wherein your client, Clarity Outdoor Media Inc. ("Clarity"), objects to the Statements of Disallowance issued by the Chief Building Official (the "CBO") in response to Clarity's Requests for Refund made pursuant to s. 771-9 of Chapter 771, Taxation, Third Party Sign Tax, of the City of Toronto Municipal Code ("Chapter 771"). The Requests for Refund made by Clarity were in respect of taxes paid for the tax years 2011 through to 2014 in connection with the third party ground sign located at 2 Strachan Avenue (the "Sign") which was operated by Clarity during the relevant period.

Clarity takes the position that it is entitled to a full refund of the taxes paid on the basis that the exemption provided for in s. 771-8.K applied. S. 771-8.K provides that "no tax is payable" by an owner of a sign as defined by Chapter 771 ("Sign Owner") who is:

> K. During the term of a revenue sharing agreement with the City of Toronto, an Owner who has entered into a revenue sharing agreement with the City of Toronto.

It is Clarity's position that its revenue sharing agreement with the Board of Governors of Exhibition Place (the "Ex Place BOG") in respect of the Sign constituted a revenue sharing agreement with the City such that no third party sign tax ("TPST") was payable. The reasoning for its position in this regard is set out in your letter of January 30, 2017.

The objections are made pursuant to Article IX of Chapter 771. Pursuant to s. 771-37, the CBO has, as required, with all due dispatch reconsidered the statements of disallowance on the basis of the arguments you have put forward in your letter of January 30, 2017. However, the CBO does not accept these arguments, rejects the proposition that the exemption in s. 771-8.K applied, and has accordingly issued fresh Statements of

Disallowance for each of the taxation years in issue which are enclosed. The CBO's reasoning is set out below.

Legislative and Governing Framework

Once again, it is not disputed that Clarity was the Sign Owner of the Sign for the taxation years in issue. It is also not disputed that Clarity operated the Sign pursuant to a revenue sharing agreement between Clarity and the Ex Place BOG. Further, the background legislative framework, as set out in your letter and as set out below, is not in dispute.

City Boards Generally

S. 141 of the *City of Toronto Act, 2006* ("COTA") authorizes the City to establish a city board and to provide for, among other things, the relationship between the City and the board, including their financial and reporting relationship.

Pursuant to s. 142 of COTA, a city board is a body corporate unless the City provides otherwise when establishing the board. While it is agreed that s. 142(2) establishes that a city board is an agent of the City, s. 142(3) expressly notes that a city board is a local board of the City *for all purposes (emphasis added)*.

Pursuant to s. 143 of COTA, the City may give a city board the control and management of such municipal services and activities as the City considers appropriate and shall do so by delegating the powers and duties of the City to the board in accordance with COTA. Pursuant to s. 143(2), a city board has all the powers of a natural person.

The Ex Place BOG

"Exhibition Place" is defined in s. 406 of COTA as the land known as Exhibition Place and adjacent land to the south created by fill, which was vested in the City on January 1, 1998 by the *City of Toronto Act, 1997,* except for any interest of the Crown in right of Ontario.

Pursuant to s. 407(1) of COTA, the Ex Place BOG is continued as a city board and its purposes are the operation, management and maintenance of Exhibition Place.

The powers and duties of the Ex Place BOG are delegated by the City in Chapter 63, Exhibition Place, Governance, of the City of Toronto Municipal Code ("Chapter 63") and the Relationship Framework (the "Framework") adopted by City Council. The provisions of Chapter 63 and Framework which you have cited in your letter are not disputed.

Pursuant to s. 63-4 of Chapter 63, the Ex Place BOG reports to City Council and is charged with the continued, long-term operation, management and maintenance of Exhibition Place as a strategic City asset on behalf of the City of Toronto. Among other

powers, the Ex Place BOG has authority to procure goods and services in its own name using a competitive procurement process (63-4.F), to enter into any contracts and agreements in its own name within the constraints of City by-laws and the Framework (63-4.H) and to initiate or defend legal actions in its own name (63-4.I). Pursuant to s. 63-5, Exhibition Place staff are employees of the Ex Place BOG and are not members of the Toronto Public Service. Pursuant to s. 63-6.F, the decision of the Ex Place BOG to enter into any agreement with a third party related to the provision of services, leasing and/or licensing of buildings or lands in excess of four years requires the consent, approval or other action from Council.

The purposes of the Framework are set out in s. 1.2 of the Framework. These purposes include:

- Recognizing the Ex Place BOG's authority to manage the business and affairs of Exhibition Place in accordance with the Framework and COTA (1.2.1);
- Setting out the conditions that promote an effective and collaborative relationship between the City and the Ex Place BOG (1.2.2);
- Identifying the types and levels of support provided by the City to the Ex Place BOG and the responsibilities and obligations of the Ex Place BOG (1.2.3); and
- Articulating Council's delegation of authority, expectations, and requirements for the Ex Place BOG (1.2.5).

The City's rationale for having a city board manage Exhibition Place, as opposed to the City directly managing, as set out in s. 2.2 of the Framework, includes operating Exhibition Place holistically as a self-sufficient business unit responsible for all inter-related assets and business supports permitting focused attention on the strategic objectives for the site.

It is reiterated in the Framework that the Ex Place BOG has authority to enter into any contracts and agreements in its own name within the constraints of City by-laws and the Framework (s.2.3.8) and that the Ex Place BOG may initiate or defend legal actions in its own name (s. 2.3.9). The Framework further reiterates that the Ex Place BOG must receive the consent, approval or other action from Council with respect to the decision to enter into an agreement in its own name with a third party related to the provision of services, leasing and/or licensing of buildings or lands, prior to entering into the agreement, where the term of the agreement would be in excess of four years. Pursuant to s. 9.1.2, the Ex Place BOG is designated as a separate institution for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act.*

The revenue sharing agreement between Clarity and the Ex Place BOG was entered into pursuant to the legislative framework described above. Given that the term of the agreement exceeds four years, it was entered into with Council approval.

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The Revenue Sharing Agreement

It is not disputed that the revenue sharing agreement between Clarity and the Ex Place BOG was entered into on July 1, 2010 (it was backdated to this date) following approval of the Ex Place BOG's decision to enter into this agreement by City Council on August 25, 2010 (the "Agreement"), and that this action followed a Request for Proposals process (the "RFP") in which Clarity participated. However, the Agreement that was ultimately entered into was not the agreement provided for in the RFP. Clarity refused to enter into the agreement provided for in the RFP, which was the subject of an earlier City Council decision of August 5, 2009, but rather, entered into the revenue sharing agreement with the Ex Place BOG on differing terms. It was this decision of the Ex Place BOG to enter specifically into the Agreement, after Clarity's refusal to comply with the terms of the RFP, that was the subject of the August 25, 2010 decision of City Council.

S. 3.1 of the Agreement provides that Clarity shall be responsible, at its sole cost and expense, for operating and maintaining the Sign and that it shall comply with all applicable government legislation, regulations, and municipal by-laws.

S. 3.3 of the Agreement provides:

> The Company shall be responsible for all Taxes and Impositions, including any realty taxes and any present or future Taxes and Impositions which may arise out of the erection and operation of the Sign, and any sales taxes duly chargeable on amounts payable by the Company to the Board under this Agreement.

"Taxes and Impositions" are defined in s. 1.1 of the Agreement as follows:

> "Taxes and Impositions" means all taxes, assessments or levies whether general or special, ordinary or extraordinary, foreseen or unforeseen, of whatever nature or kind, which are from time to time levied, assessed, charged or imposed by any taxing authority or any government, municipal or other body having jurisdiction upon or against the lands comprising Exhibition Place or which may give rise to a remedy against the lands, provided that no charges imposed by, at the instance of, or for the direct benefit of the Board shall constitute Taxes and Impositions.

This definition does not exclude TPST pursuant to Chapter 771. The TPST falls within the definition of "Taxes and Impositions" under the Agreement.

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S. 8.1.1 of the Agreement provides that throughout the term of the Agreement, Clarity shall be the owner of the Sign. It is not disputed by Clarity that it was the Sign Owner in the subject taxation years when it operated the Sign pursuant to the Agreement. Given the CBO's position that s. 771-8.K did not apply (as discussed in detail below), it follows that TPST was payable by Clarity pursuant to the Agreement.

The Effect of the Legislative and Governing Framework

It is your position that the effect of the legislative and governing framework and the common law of agency is that the Agreement is between Clarity and the City. You state on page six of your letter that,

> "The Agreement reads consistently with the proposition that the Ex Place BOG was entering into a revenue sharing agreement with a third party as part of its mandate to manage Exhibition Place as the City's agent. There is no indication in the Agreement that the agency relationship between the Ex Place BOG and the City was being altered or that the Ex Place BOG would be deemed to not be the 'City of Toronto' for certain purposes. It is therefore untenable for the CBO to now take the position that the Agreement is with an entity other than 'the City of Toronto' for purposes of s. 771-8K."

It is your position that because the Agreement was in essence between Clarity and the City, the exemption in s. 771-8.K of Chapter 771 applies such that no TPST was payable by Clarity.

The CBO does not agree with your analysis. While it is not disputed that there is an agency relationship between the City and the Ex Place BOG by virtue of COTA and that the particulars of said agency relationship are provided for in the applicable legislation, by-laws and the Framework, this does not mean that the Agreement was entered into with the City. Firstly, the City and the Ex Place BOG are separate legal entities. The Ex Place BOG is a body corporate, distinct from the City, with all the powers of a natural person. As set out above, the Ex Place BOG has many powers wherein it can act independently of the City including, but not limited to, procuring goods and services and entering into agreements. Its staff are not employees of the City, and it can initiate or defend legal proceedings in its own name. It is, in all respects, a separate entity from the City.

Secondly, any measures of control asserted by the City over the Ex Place BOG by way of Chapter 63 and the Framework do not render the City and Ex Place BOG the same entity. Further, the fact that the Ex Place BOG requires approval from Council of its decision to enter into an agreement in its own name with a third party related to the provision of services, leasing and/or licensing of buildings or lands in excess of four years does not render said agreement one with the City. More specifically, the fact that the Ex Place BOG needed Council approval to enter into the Agreement with Clarity does not mean that the

City was authorizing the Ex Place BOG to negotiate an agreement for the City directly. It is emphasized that the Ex Place BOG has the power to enter into similar agreements in its own name albeit with shorter terms without these decisions requiring the prior approval of the City. The requirement of Council approval of the Ex Place BOG's decisions to enter into agreements with terms exceeding four years is but an additional layer of scrutiny to ensure effective management of the City's asset, Exhibition Place. Whatever the term of an agreement, the agreement is with the Ex Place BOG. While the City may be a third party beneficiary in some such agreements, it does not follow that the City is an actual party to the agreements.

As you repeatedly point out, the Ex Place BOG manages, operates and maintains Exhibition Place for the City. You emphasize that the Ex Place BOG is an agent of the City under COTA. However, even if it is accepted that the Agreement was entered into by the Ex Place BOG as an agent of the City, it does not follow that the exemption in s. 771-8.K applies. You indicate that there is ample jurisprudence concerning the law of agency to confirm that in executing the Agreement with Clarity, the Ex Place BOG was acting on behalf of its principal, the City. You submit that when an agent acts with actual (or presumed) authority on behalf of a named or unnamed principal to make a contract with a third party, the resulting contract is between the third party and the principal. However, where a contract is entered into between a third party and an agent, the jurisprudence deals with whether said agreement can be enforced as against the principal in the particular circumstances in terms of meeting the obligations in said agreement. Even if a court would find that the Agreement between the Ex Place BOG and the City is enforceable as against the City as a matter of law in respect of satisfying the Ex Place BOG's obligations under the Agreement, this does not mean that the exemption in s. 771-8.K applies to Clarity as discussed below.

The Exemption in S. 771-8.K

The question of whether the exemption in s. 771-8.K applies to the Agreement is an entirely separate legal question from whether the Agreement is enforceable as against the City given the agency relationship between the Ex Place BOG and the City. It is open to the City to differentiate as it sees fit in granting exemptions to the payment of TPST in order to further its municipal objectives. It was open to the City to not grant any exemptions, in relation to the City, its local boards, corporations or commissions, at all. Nevertheless, the City opted to approve those exemptions set out in s. 771-8 of Chapter 771, including that set out in s. 771-8.K.

Section 10 of COTA provides that a by-law passed under COTA may be general or specific in its application and may differentiate in any way and on any basis the City considers appropriate. The power to so differentiate includes the right to differentiate between the City and its local boards. It includes the right to differentiate between the City and city boards notwithstanding the existence of a statutory agency relationship. It could even

include the right to differentiate between various City divisions. In enacting Chapter 771, the City made a specific decision to differentiate between the City and local boards (including city boards) for valid and specific policy reasons.

When passing Chapter 771, the City opted to exempt a Sign Owner who has entered into a revenue sharing agreement with the City during the term of said agreement. It did not exempt a Sign Owner who has entered into a revenue sharing agreement with a city board. Had it intended to do so, it would have done so expressly.

Pursuant to the principles of statutory construction, a purposive approach must be applied to the interpretation of by-laws looking at the plain meaning of the words in the broader context of the by-law as a whole and the broader objectives and intentions of the municipality in passing the by-law. With respect to intention, the fact is that the City did not intend to exempt a Sign Owner who has entered into a revenue sharing agreement with a city board or any other local board. Its intention was simply to exempt a Sign Owner who has entered into a revenue sharing agreement with the City directly. This intention was borne out of the existing coordinated street furniture agreement as the associated reports make clear.

When Chapter 771 was put forward to Council for approval, the reports dealt with potential estimate revenues. These estimates proffered by City staff as to the projected tax revenues did not exclude signs which were the subject of revenue sharing agreements with city boards (for example, signs on lands managed by the Toronto Parking Authority which is a city board) as it was always contemplated that any such signs would be subject to the TPST. However, these estimates of tax revenues did exclude signs which were subject to revenue sharing agreements with the City. The primary source of revenue sharing agreements with the City was the coordinated street furniture agreement which included specific terms off-setting future municipal taxes on signs. These estimates of potential sign tax revenues were based on the detailed inventory of the location, size, type and technology of all third party signs in the City of Toronto prepared as part of the Sign By-law Project. At the time of the report, the potential impact of extending the exemption to revenue sharing agreements with city boards was known to City staff.

As the proposed by-law moved through the approval process, City staff were specifically asked to report further on the question of the financial impact to the City if the exemption relating to revenue sharing agreements with the City were not adopted, including the provision of updated estimates. Staff's response indicated that there would be no change in estimated tax revenues and explained that this was due to the fact that the exemption for revenue sharing agreements would relate to the coordinated street furniture agreement. City staff explained that given the particulars of the coordinated street furniture agreement (any application of taxes would be offset by a reduction in the revenues to the City such that the effect would be revenue neutral), there would be no change to the financial impact to the City. Had the intention been for s. 771-8.K to further include revenue sharing agreements with city boards, staff's response would have been different as the projected

revenue estimates would have been affected. It is clear that no intention on the part of City Council to exempt revenue sharing agreements with both the City and city boards can be inferred from the reports concerning the TPST and the specific subject exemption presented to City Council.

It must also be emphasized that when the Ex Place BOG reported to Council in seeking approval for the Agreement, it did not indicate in the Financial Impact portion of the report that there would be a negative financial impact to the City in that by virtue of entering into said agreement, s. 771-8.K would apply such that the City would not obtain any tax revenue in connection with the Sign. If the Sign were exempt from TPST pursuant to s. 771-8.K, this would have been important information for Council to consider. It is clear from this background that, at the time City Council considered approving the Ex Place BOG's decision to enter into the Agreement, after Clarity had previously reneged on its contractual obligations under the RFP to enter into a previous agreement (which would have been more financially beneficial to the Ex Place BOG), the Ex Place BOG did not believe that the Agreement would constitute an agreement that would exempt Clarity from the payment of the TPST and thereby have specific financial impacts on the City.

As noted above, the City's rationale for having a board manage Exhibition Place, as opposed to the City directly managing, as set out in s. 2.2 of the Framework, includes operating Exhibition Place holistically as a self-sufficient business unit responsible for all inter-related assets and business supports permitting focused attention on the strategic objectives for the site. It is the Ex Place BOG's mandate to operate, manage and maintain Exhibition Place in such a manner so as to maximize the potential of said strategic asset for the City. It is not, however, the Ex Place BOG's mandate to simultaneously consider the City's broader objectives unrelated to Exhibition Place. The Ex Place BOG's role is to operate Exhibition Place holistically as a self-sufficient business unit and to manage this asset to maximize its potential. This specific and focused role and responsibility of the Ex Place BOG may conflict with the broader objectives of the City with respect to a City-wide program of general application. By differentiating between the City and its city boards in s. 771-8.K, the City managed this potential conflict and ensured that its broader tax objectives were met while ensuring that city boards could advance their specific objectives to manage specific assets.

With regard to the plain meaning of the words in the by-law, s.771-8 itself provides further evidence of the fact that references to the City of Toronto therein were not intended to include local boards (including city boards) and that the City expressly intended to differentiate between itself and its local boards. Pursuant to s. 771-8.J, an exemption to the payment of TPST is further provided to a local board as defined in COTA where the local board is the Sign Owner, while in s. 771-8.I, an exemption is provided to the City of Toronto where the City is the Sign Owner. Accordingly, there is a clear distinction in Chapter 771 between the City and its boards. As such, had the City intended to exempt a Sign Owner who entered into a revenue sharing agreement with a local board, it would have expressly done so. It did not. The exemption in s. 771-8.K applies only to a Sign

Owner who has entered into a revenue sharing agreement with the City.

With regard to the differentiation between the City and local boards, you indicate in your letter that the fact that the Ex Place BOG is a local board of the City does not form the basis of Clarity's request for refund. Clarity is asserting that s. 771-8.K applies by virtue of the Ex Place BOG's being a "city board". You state that while all city boards are deemed to be local boards pursuant to s. 142(3) of COTA, the reverse is not true. This is not disputed. However, you argue that by virtue of the fact that city boards are agents of the City, it is entirely consistent that "local boards" and "the City of Toronto" are identified separately as "owners" that are potentially exempt from TPST in s. 771-8. You indicate that there is nothing in s. 771-2 (definitions), s. 771-8 (exemptions) or any other section of Chapter 771 that purports to define or identify the City as not inclusive of its city boards. This argument is expressly rejected.

It is reiterated that pursuant to s. 142(3) of COTA, it has been expressly noted by the provincial legislature that a city board is a local board of the City for all purposes. You acknowledge and accept that all city boards are local boards. You further acknowledge that local boards are specifically referred to in the listed exemptions set out in s. 771-8 as distinguished from the City (for example, local boards are listed in s. 771-8.J while the City is listed separately in relation to the exemptions contained in s. 771-8.I and s. 771-8.K). Reference to the larger class of "local boards" would include all members of that class, including those of the subclass known as "city boards". There is nothing in Chapter 771 to suggest or instruct otherwise. Once again, the City and its city boards are separate entities notwithstanding their agency relationship. Had the intention been for all references to the City to include its city boards, the by-law would have specifically so provided. It did not. To suggest that any reference to the City in a City by-law would include its city boards by virtue of the relationship of agency would have far reaching implications for the City.

Lastly, you argue that using Chapter 771 to separate the City from the Ex Place BOG is contrary to s. 23(2) of COTA. You state that while the City has delegated the control and management of Exhibition Place to the Ex Place BOG, the City may not by by-law remove the City's power to deal with Exhibition Place. You state that the CBO's reading of s. 771-8.K attempts to disassociate the City from its powers over Exhibition Place, which powers include the sole authority to authorize four-year contracts like the Agreement. The CBO does not accept this argument. Providing for different taxation regulations depending on the party with whom an agreement is entered does not derogate from the City's power to deal with Exhibition Place. Whether or not the Sign is exempt from tax does not in any way remove the City's power to deal with Exhibition Place. Once again, whether the Agreement is enforceable as against the City in terms of the obligations of the Ex Place BOG under the Agreement by virtue of the existing agency relationship is separate and distinct from the City's power to differentiate in its by-laws pursuant to s. 10 of COTA. There is nothing in Chapter 771 which removes the City's power to deal with Exhibition Place.

The same is true of your argument respecting s. 11(1)(a) of COTA which provides that a city by-law is without effect to the extent of any conflict with a provincial Act. You argue that the CBO's interpretation of s. 771-8.K would fail to give effect to the express provisions of COTA by deeming the Ex Place BOG to not be the City's agent for the purposes of Chapter 771. This is not so. The provisions of Chapter 771 are not in conflict with COTA and particularly the creation of an agency relationship between the City and the Ex Place BOG. However, the existence of said agency relationship does not remove the City's power pursuant to s. 10 of COTA to differentiate between itself and its city boards when granting tax exemptions.

In summary, pursuant to s. 10 of COTA, it was open to the City to differentiate between itself and its boards in its by-laws. The City opted to differentiate between itself and its local boards, including city boards, in Chapter 771 when approving exemptions to the payment of TPST. As such, the exemption in s. 771-8K applies only to a Sign Owner who has entered into a revenue sharing agreement with the City and does not apply to a Sign Owner who has entered into a revenue sharing agreement with a city board regardless of the agency relationship between that board and the City. This is the City's statutory prerogative.

Conclusion

In conclusion, pursuant to s. 771-37, the CBO has with all due dispatch reconsidered the statements of disallowance on the basis of the arguments you have put forward in your letter of January 30, 2017. However, the CBO does not accept these arguments, rejects the proposition that the exemption in S. 771-8.K applied, and has accordingly issued fresh Statements of Disallowance for each of the taxation years in issue which are enclosed. Notwithstanding the agency relationship between the City and the Ex Place BOG, the City opted to differentiate between itself and its city boards when granting exemptions to the payment of TPST in s. 771-8.K. It opted to exempt a Sign Owner who has entered into a revenue sharing agreement with the City for the term of said agreement. It did not exempt a Sign Owner who has entered into a revenue sharing agreement with a city board. As such, s. 771-8.K did not apply to Clarity, and TPST was indeed payable.

Please be advised that it is open to Clarity to appeal to Council to have the statement of disallowances vacated or varied or a fresh statement of disallowance issued provided a Notice of Appeal is served on the City Clerk within 90 days of the date of service of this letter. The approved form of the Notice of Appeal and requirements for service are available on-line at:

http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=63349ba6aa360410VgnVCM10000071d60f89RCRD

or in person by contacting Robert Bader in the Sign By-law Unit at: (416) 392-4113.

If you have any questions, staff in the Sign By-law Unit are available to discuss this matter further, if necessary.

Mario Angelucci
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Toronto Building