

Grant of Easement to Cloverdale Mall Inc. (Cloverdale) for Airspace Surrounding a Bridge Owned by Cloverdale, over The East Mall

Date: April 27, 2023

To: Etobicoke York Community Council

From: Director, Transportation Planning and Capital Program, Transportation Services

Ward: WARD 3 (Etobicoke-Lakeshore)

SUMMARY

The purpose of this report is to obtain the City Council's approval to grant a permanent easement to Cloverdale Mall Inc. (Cloverdale) for the airspace surrounding an existing bridge (Bridge) owned by Cloverdale, over The East Mall. To date, Cloverdale does not have a registered easement over this airspace but the decision of the Honourable Justice Susan Vella on July 27, 2021 in ***Cloverdale Mall Inc. v. City of Toronto, 2021 ONSC 5235, Court File No. CV-20-00636972*** (the "**Court Decision**") confirmed that Cloverdale enjoys an implied easement of necessity over the airspace surrounding the bridge. This report is required to authorize the registration of an easement, on terms negotiated between Cloverdale and the City and acceptable to the City Solicitor, to give effect to the Court Decision.

The location and boundaries of the proposed easement in favour of Cloverdale are shown in **Appendix A** and substantially on the terms and conditions outlined in **Appendix B**.

RECOMMENDATIONS

The Director, Transportation Planning and Capital Program, Transportation Services recommends that:

1. City Council grants authority to enter into the permanent easement agreement with Cloverdale for the airspace surrounding the existing Cloverdale Bridge over The East Mall, as shown on the Reference Plan in **Appendix A** and substantially on the terms and conditions outlined in **Appendix B** and on such further terms

as may be acceptable to the General Manager, Transportation Services and in a form satisfactory to the City Solicitor.

FINANCIAL IMPACT

There is no anticipated financial impact. Each party will bear their own costs, and Cloverdale as the "purchaser" of the easement transfer for nominal consideration will bear the costs of registering the easement.

COMMENTS

The City of Toronto (the City) is the registered owner of the public highway known as The East Mall.

Cloverdale Mall Inc. (Cloverdale) is the registered owner of the lands on the west side of The East Mall, currently occupied by a shopping mall, and the registered owner of several lands on the east side of The East Mall, currently occupied by a beer store and a gas station.

In 1969, Cloverdale built a bridge over The East Mall to enable Cloverdale customers to travel (on foot and in vehicles) between the Cloverdale Mall Lands on the west side and their lands on the east side. A map showing the location of the bridge in relation to The East Mall and Cloverdale Mall Lands is provided on **Appendix A**.

However, there was no easement or other interest registered on title to The East Mall and ownership and maintenance responsibility of the Bridge were unclear.

In 2018, an application was commenced by the City to determine ownership of the Bridge and who, between the City and Cloverdale, had the obligation to repair the Bridge. In *City of Toronto v. Cloverdale Mall Inc.*, 2018 ONSC 5748, the Honourable Justice D.A. Wilson J. made a decision in favour of the City, holding that Cloverdale is the owner of the Bridge and as such is responsible for its repair, upkeep, and maintenance as the purpose of the Bridge was to ensure that customers continued to come to the stores on the lands owned by Cloverdale after the expropriation and construction of the highway.

In 2021, an application was commenced by Cloverdale on whether they have an implied easement from the City in the airspace over The East Mall Lands occupied by the Bridge, or whether they only have a mere license to occupy that airspace. This is important because if Cloverdale has an implied easement, it has greater rights to deal with the Bridge as it deems fit, including potentially selling its interest in the Bridge. However, if Cloverdale only has a license to occupy that airspace from the City, then Cloverdale would simply have a personal right which cannot be conveyed without the City's consent. Furthermore, the City could revoke that license upon reasonable notice.

In *Cloverdale Mall Inc. v. City of Toronto*, 2021 ONSC 5235, Court File No. CV-20-00636972, the Honourable Justice Susan Vella made a decision that Cloverdale has an implied easement over the airspace surrounding the Bridge, and the Justice directed the parties to determine the terms of the easement to be registered on title to The East Mall with respect to the Bridge.

The parties have now negotiated the location and terms of the easement, as set out in the Reference Plan as shown in **Appendix A2** and the Draft Bridge Easement Agreement provided in **Appendix B** and staff are seeking authority to register the easement on title to The East Mall. Cloverdale remains responsible to maintain, repair, and reconstruct the Bridge.

For the foregoing reasons, it is recommended that City Council grant approval of the Bridge easement to Cloverdale.

CONTACT

Mark Berkovitz, Manager, Asset Management, Transportation Planning & Capital Program, Transportation Services, Mark.Berkovitz@toronto.ca

SIGNATURE

Ashley Curtis
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Attachments:

Appendix A1 – Bridge Location Map

Appendix A2 – Reference Plan

Appendix B – Draft Bridge Easement Agreement

ATTACHMENTS

Appendix A1 – Bridge Location Map



Appendix B – Draft Bridge Easement Agreement

BRIDGE EASEMENT
(SCHEDULE TO TRANSFER OF EASEMENT)

WHEREAS:

(A) City of Toronto (the “**City**”) is the registered owner of the public highway known as The East Mall more particularly described in *Schedule A* attached hereto (the “**East Mall Lands**”);

(B) Cloverdale Mall Inc. (“**Cloverdale**”) is the registered owner of lands currently occupied by a shopping mall, more particularly described in Part 1 of *Schedule B* attached hereto (the “**Cloverdale Mall Lands**”), and lands currently occupied by a beer store and former gas station site, more particularly described in Part 2 of *Schedule B* attached hereto (the “**Severed Lands**”);

(C) The Cloverdale Mall Lands are separated from the Severed Lands by the East Mall Lands and, as of the date hereof, are connected by a bridge over the East Mall Lands immediately north of Dundas Street West (the “**Bridge**”);

(D) Cloverdale is the owner of the Bridge in accordance with the decision of The Honourable Justice D.A. Wilson on September 28, 2018 in *City of Toronto v. Cloverdale Mall Inc.*, 2018 ONSC 5748, Court File No. CV-17-577241 and, in accordance with the decision of The Honourable Justice Susan Vella on July 27, 2021 in *Cloverdale Mall Inc. v. City of Toronto*, 2021 ONSC 5235, Court File No. CV-20-00636972, has the benefit of an implied easement over the airspace surrounding the Bridge;

(E) The City and Cloverdale have agreed to the terms of an easement with respect to the Bridge as set out in this agreement (this “**Agreement**”); and

(F) By adoption of item [•] by Toronto City Council, at its meeting on [■], 2023, the City authorized the registration of this Agreement on title to the East Mall Lands, for nominal consideration, to give effect to the decision of The Honourable Justice Susan Vella on July 27, 2021 in *Cloverdale Mall Inc. v. City of Toronto*, 2021 ONSC 5235, Court File No. CV-20-00636972,

NOW THEREFORE THIS AGREEMENT WITNESSES that, in consideration of the mutual covenants contained in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and Cloverdale agree as follows:

1. Definitions

The terms defined herein shall have, for all purposes of this Agreement, the following meanings, unless the context expressly or by necessary implication otherwise requires:

(a) “**Agreement**” has the meaning given to it in recital (E);

(b) “**Applicable Laws**” means all applicable federal, provincial and municipal laws, statutes, regulations, rules and by-laws, all orders and permits, and all applicable common laws or

equitable principles, whether now or hereafter in force and effect that have the force of law, including all applicable by-laws and safety regulations of the City;

- (c) “**Assignee**” and “**Assignor**” have the meanings given to them in Section 13(1)
- (d) “**Assumption Agreement**” means the agreement described in Section 13(1);
- (e) “**Beneficiaries**” means, with respect to Cloverdale, the tenants, subtenants, invitees, customers, guests, licensees, agents, contractors, subcontractors and employees of Cloverdale and its successors and assigns;
- (f) “**Bridge**” has the meaning given to it in recital (C), and includes the road deck, rails, piers, load-bearing and other support members and all other elements of the bridge structure;
- (g) “**Bridge Easement**” has the meaning given to it in Section 2;
- (h) “**Bridge Easement Lands**” has the meaning given to it in Section 2 and means the lands designated as Part [■] on Plan 66R[■]
- (i) “**Bridge Repair Notice**” has the meaning given to it in Section 6(1);
- (j) “**Bridge Work**” has the meaning given to it in Section 5;
- (k) “**Business Day**” means any day other than a Saturday, Sunday or statutory holiday in the Province of Ontario;
- (l) “**City**” means City of Toronto and its successors and assigns;
- (m) “**Claims**” means all past, present and future claims, suits, proceedings, liabilities, obligations, losses, damages, penalties, judgments, costs, expenses, fines, disbursements, legal fees on a substantial indemnity basis and other professional fees and disbursements, interest, demands and actions of any nature or any kind whatsoever;
- (n) “**Cloverdale**” means Cloverdale Mall Inc. and its successors and assigns;
- (o) “**Cloverdale Mall Lands**” has the meaning given to it in recital (B), and means the lands described in Part 1 of *Schedule B* attached hereto;
- (p) “**Connected Lands**” has the meaning given to it in Section 14;
- (q) “**Dominant Lands**” means the Cloverdale Mall Lands and the Severed Lands;
- (r) “**East Mall Lands**” has the meaning given to it in recital (A), and means the lands described in *Schedule A* attached hereto;
- (s) “**Emergency Situation**” means a condition or circumstance occurring which, if not remedied immediately and without delay, would result with reasonable certainty in damage (or further damage) to the Bridge or the East Mall Lands beneath the Bridge or an imminent

threat to the health or safety of persons using the Bridge or the East Mall Lands beneath the Bridge;

- (t) “**Severed Lands**” has the meaning given to it in recital (B), and means the lands described in Part 2 of *Schedule B* attached hereto;
- (u) “**Transferred Interest**” has the meaning given to it in Section 13(1);
- (v) “**Unavoidable Delay**” means if Cloverdale or the City is *bona fide* delayed or hindered in or prevented from the performance of any term, covenant or act required under this Agreement by reason of strikes, labour troubles, inability to procure materials or services, power failure, restrictive governmental laws or regulations, inability to obtain, or delay in obtaining, governmental approvals, permits, licences or allocations, riots, insurrection, sabotage, rebellion, war, act of God, pandemic, epidemic or other reason whether of a similar nature or not which is not the fault of the party delayed in performing work or performing acts required to be done hereunder, but shall in no event include by reason only of a lack of funds; and
- (w) “**Unconnected Lands**” has the meaning given to it in Section 14.

2. Grant of Bridge Easement

The City, with the intent and for the purpose of benefiting the Dominant Lands, hereby grants, transfers and conveys to Cloverdale, and its successors and assigns, for its benefit and use and for the benefit and use of its Beneficiaries, in common with all others entitled thereto, a perpetual, non-exclusive easement on, over, along, across and upon the portion of the East Mall Lands designated as Part [■] on Plan 66R-[■] (the “**Bridge Easement Lands**”), for the purpose of permitting Cloverdale and its Beneficiaries to own, use, operate, manage, maintain, repair, remove, reconstruct and replace the Bridge from time to time, subject to the terms and conditions set out herein (the “**Bridge Easement**”). The parties acknowledge and agree that: (i) the Dominant Lands are the dominant tenement that enjoys the benefit of the Bridge Easement; (ii) the East Mall Lands are the servient tenement that carries the burden of the Bridge Easement.

3. Ownership of the Bridge

The City and Cloverdale acknowledge and agree that Cloverdale is the sole and absolute owner of the Bridge and, in connection with such ownership:

- (a) Cloverdale shall have sole control of, and sole custody over, all aspects of the ownership, use, operation, management, security, safety, maintenance, repair, removal, reconstruction and replacement of the Bridge, subject to the terms and conditions of this Agreement;
- (b) Cloverdale may control access to, and passage over, the Bridge in such manner as Cloverdale may determine in its sole, absolute and subjective discretion, subject to Applicable Laws;

- (c) Cloverdale shall be responsible, at its own cost and expense, for keeping, inspecting and maintaining the Bridge in good repair and condition, in accordance with Applicable Laws; and
- (d) Cloverdale shall have the right from time to time to remove the Bridge and/or to replace it with another bridge within the Bridge Easement Lands, following which any such replacement bridge shall constitute the “Bridge” for all purposes of this Agreement.

4. Insurance

Cloverdale shall effect and maintain the following insurance coverage with respect to the Bridge:

- (a) commercial general liability insurance containing inclusive limits of not less than \$15,000,000.00 per occurrence, covering bodily injury and property damage, naming the City as an additional insured, at all times;
- (b) all-risk property insurance on a replacement cost basis at all times unless the insurance described in Section 4(c) is in effect; and
- (c) during the course of any Bridge Work, Cloverdale shall effect and maintain builders’ all-risk property insurance coverage on a replacement cost basis unless the insurance described in Section 4(b) is in effect.

The commercial general liability insurance policy shall include a cross-liability coverage/severability of interest clause. The City, acting reasonably, may require the limit of the commercial general liability insurance policy to be increased from time to time, provided that such increased amount of commercial general liability insurance is commercially available. Each policy of insurance referred to in this Section shall include a provision that the insurance is primary to any insurance that may be effected or maintained by the City, a waiver of subrogation in favour of the City and those for whom it is in law responsible (assuming the risk, loss or damage is not caused by the City or those for whom it is in law responsible), and shall also contain a 30 days’ advance written notice of cancellation clause in favour of the City. Upon written request by the City from time to time, Cloverdale will provide the City with a certificate of insurance confirming that the insurance coverage set out in this Section 4 is in effect and being maintained.

5. Bridge Work

If Cloverdale wishes to: (i) effect repairs to the exterior sides, bottom or supports for the Bridge that require the erection of scaffolding or other support structures over the East Mall Lands; or (ii) remove and/or replace the Bridge with a replacement bridge (collectively, the “**Bridge Work**”), Cloverdale agrees as follows:

- (a) save and except in the case of an Emergency Situation, not less than 45 days prior to the commencement of the Bridge Work, Cloverdale shall deliver to the City:
 - (i) written notice of Cloverdale’s intention to effect the Bridge Work;
 - (ii) detailed design plans and drawings for the Bridge Work, if applicable;

- (iii) a traffic management plan and construction schedule (in this Section, the “**Traffic Management Plan**”) describing the impact of the Bridge Work upon the public highway within the East Mall Lands;
 - (iv) a report or plan prepared by the architect, professional engineer or construction manager responsible for the Bridge Work addressing the manner in which pedestrians, vehicles and City-owned infrastructure will be protected from: (A) any materials that may fall from the Bridge during the Bridge Work; and (B) any snow, ice or other materials that may fall from the repaired or replaced Bridge; and
 - (v) if required by applicable City policy then in effect, provide and maintain an irrevocable letter of credit from a Schedule I Bank in an amount to be determined by the City’s General Manager, Transportation Services or a designate of the City’s General Manager, Transportation Services, to be retained by the City for the duration of construction within the East Mall Lands to secure against any damage to the public highway and to guarantee that any restoration of the public highway required during the Bridge Work is completed to the satisfaction of the General Manager Transportation Services. Such letter of credit will be released upon delivery to the City of: (A) a post construction sign-off letter stamped and signed by the structural engineering firm that designed the Bridge Work stating that the Bridge is safe and ready to be opened to vehicular and pedestrian traffic; and (B) as-built drawings of the Bridge;
- (b) Cloverdale shall obtain all permits for the Bridge Work as may be required by Applicable Laws, and shall be subject to such requirements in connection with the issuance of such permits as may be reasonably imposed by the City and as are required by the City in connection with construction projects of a similar size, scope, complexity and cost as the Bridge Work;
 - (c) Cloverdale shall effect the Bridge Work in a good and workmanlike manner in accordance with Applicable Laws, including Article III of City of Toronto Municipal Code Chapter 743, Streets and Sidewalks, as it may be amended;
 - (d) save and except in the case of an Emergency Situation, Cloverdale shall effect the Bridge Work substantially in accordance with the Traffic Management Plan, subject to Unavoidable Delay;
 - (e) Cloverdale shall confine its activities with respect to the Bridge Work to the Bridge Easement Lands and the Dominant Lands, except as may be set out in the Traffic Management Plan and approved by the City, acting reasonably;
 - (f) Cloverdale shall pay all costs and expenses of the Bridge Work and shall cause to be vacated any construction liens that may be registered against title to the East Mall Lands as a result of the Bridge Work within 60 days following receipt of notice of the existence of any such construction liens;
 - (g) Cloverdale agrees to indemnify and save harmless the City from and against any and all Claims that may be suffered or incurred by the City, in its capacity as the owner of the East

Mall Lands, arising from or in respect of any breach by Cloverdale of its obligations with respect to the Bridge Work set out in this Section 5. or any negligence by Cloverdale in effecting the Bridge Work, save and except for any Claims resulting from the breach of this Agreement or negligence of the City, its employees, agents or contractors or those for whom the City is at law responsible; and

- (h) following completion of the Bridge Work, Cloverdale shall restore any portion of the East Mall Lands affected by the Bridge Work to its former condition as had existed prior to the commencement of the Bridge Work.

6. Public Safety - Bridge

(1) Where, in the opinion of the City, a danger to public safety arises as the result of a failure or defect in the Bridge, the City may provide written notice to Cloverdale setting out in reasonable detail the failure or defect in the Bridge (the “**Bridge Repair Notice**”). If Cloverdale:

- (a) fails within 60 days following receipt of the Bridge Repair Notice to either: (i) commence repairs; or (ii) make application for any permits required; or
- (b) following the commencement of such repairs or the issuance of required permits, thereafter fails to diligently continue such repairs,

the City shall, without any further notice to Cloverdale, be entitled to enter onto such portions of the Dominant Lands as may be necessary to perform the repairs necessary to correct the failure or defect in the Bridge identified in the Bridge Repair Notice, all at the reasonable cost of Cloverdale, such repairs to be performed in accordance with Applicable Laws. If the City elects to commence such repairs in accordance with the terms hereof, then the City shall diligently proceed to complete such repairs. Cloverdale acknowledges and agrees that this Section imposes no obligation or duty on the City to provide any Bridge Repair Notice or to perform the repairs necessary to correct the failure or defect in the Bridge identified in any Bridge Repair Notice.

(2) If an Emergency Situation arises as a result of a failure or defect in the Bridge, the City shall, without having given notice to Cloverdale, be entitled to enter onto such portions of the Dominant Lands as may be necessary to perform such emergency work on the Bridge as is necessary to deal with the Emergency Situation, all at the reasonable cost of Cloverdale, such work to be performed in accordance with Applicable Laws. If the City elects to commence such repairs in accordance with the terms hereof, then the City shall diligently proceed to complete such repairs. Cloverdale acknowledges and agrees that this Section imposes no obligation or duty on the City to perform such emergency work.

(3) If the City makes repairs to the Bridge pursuant to this Section 6, the City will maintain records and accounts of the cost of the work performed on the Bridge by the City, and the City shall deliver an invoice for the cost of the repairs to the Bridge, together with such records and accounts, to Cloverdale. Cloverdale shall pay any such invoice within 60 days following receipt.

7. Unavoidable Delay

If and to the extent either party is prevented, delayed or restricted in the fulfilment of any obligation hereunder, other than the payment of money, because of Unavoidable Delay it shall be deemed not to be a default in the performance of such obligation and any period for the performance of such obligation shall be extended accordingly and the other party to this Agreement shall not be entitled to compensation for any inconvenience, nuisance or discomfort thereby occasioned. Each party shall notify the other party forthwith after becoming aware of an Unavoidable Delay affecting it and will, from time to time, notify the other party of the expected duration of the period during which Unavoidable Delay applies.

8. Notices

Any notice, certificate, consent, determination or other communication required or permitted to be given or made under this Agreement shall be in writing and shall be effectively given and made if: (i) delivered personally; (ii) sent by prepaid next day courier service; or (iii) sent by email, with a hard copy to follow sent by prepaid next day courier service, in each case to the applicable address set out below:

- (a) in the case of the City addressed to it at:

City of Toronto
Transportation Services
Right-of-Way Management
Metro Hall, 17th Floor
55 John Street
Toronto, Ontario
M5V 3C6

Attention: Manager, Right-of-Way Management

and to:

City of Toronto
Legal Services
Metro Hall, 26th Floor, Station 1260
55 John Street
Toronto, Ontario
M5V 3C6

Attention: Vanessa Bacher, Solicitor

Email: Legalrec@toronto.ca

- (b) in the case of Cloverdale addressed to it at:

Cloverdale Mall Inc.
c/o QuadReal Property Group LP
199 Bay Street, Suite 4900
Toronto, Ontario
M5L 1G2

Attention: Senior Vice President, Retail
Email: jay.camacho@quadreal.com

and to:

Cloverdale Mall Inc.
c/o QuadReal Property Group LP
Cloverdale Mall, Management Office
250 The East Mall
Toronto, Ontario
M9B 3Y8

Attention: Property Manager (Cloverdale Mall)

Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of receipt of a hard copy if delivered or sent by courier service or sent by email, with a hard copy to follow sent by prepaid next day courier service, provided that such day in either event is a Business Day and the communication is so delivered prior to 5:00 p.m. (Toronto time) on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day. Any party may from time to time change its address under this Section by notice to the other party given in the manner provided by this Section.

9. Further Assurances

Each of the parties shall from time to time hereafter and upon any reasonable request of the other party, make or cause to be made all such further acts, deeds, assurances and things as may be required or necessary to more effectually implement and carry out the true intent and meaning of this Agreement.

10. Compliance Certificate

Each of the parties hereto agrees at any time and from time to time, but no more than two times per calendar year, within 10 days following written request by the other party, to execute and deliver to the other party a certificate addressed to the other party and/or another party designated by the other party that has or may acquire any interest in the Dominant Lands or any part thereof or the East Mall Lands or any part thereof, stating:

- (a) that this Agreement is unmodified and in full force and effect or, if there has been any modification, that this Agreement is in full force and effect as modified and identifying the modification; and
- (b) whether or not there is any existing default hereunder by the responding party or, to the knowledge of the responding party, by the requesting party and if there is any such default, specifying the nature and extent thereof.

Each of the parties acknowledges and agrees that the City charges a fee for any such compliance certificate in accordance with the City's Municipal Code, as it may be amended.

11. Burden and Benefit of Bridge Easement

The burden of the Bridge Easement shall run with and bind the East Mall Lands and every part thereof and shall be for the benefit of and run with the Dominant Lands and every part thereof.

12. Successors and Assigns

All of the covenants and agreements contained in this Agreement shall be binding upon the parties hereto and their respective successors and assigns and shall enure to the benefit of and be enforceable by the parties hereto and their respective successors and assigns pursuant to the terms and conditions of this Agreement.

13. Assignment

(1) Cloverdale, its successors and permitted assigns (collectively in this Section, the "**Cloverdale Assignor**") covenants and agrees that, prior to any conveyance or transfer of the Dominant Lands or any part thereof (save and except for any Unconnected Lands), the Cloverdale Assignor shall assign its rights, benefits, covenants and obligations under this Agreement, to the extent of the interest in the Dominant Lands (save and except for any Unconnected Lands) being transferred or conveyed (in this Section, the "**Cloverdale Transferred Interest**"), to the transferee of the Cloverdale Transferred Interest (in this Section, the "**Cloverdale Assignee**"). The Cloverdale Assignor shall require the Cloverdale Assignee, concurrent with the completion of the conveyance or transfer of the Cloverdale Transferred Interest, to execute and deliver to the City an assumption agreement with the City, satisfactory in form and content to the City Solicitor, acting reasonably, wherein the Cloverdale Assignee agrees to assume the covenants and obligations of the Cloverdale Assignor set out in this Agreement with respect to the Cloverdale Transferred Interest, and to be bound by the terms of this Agreement with respect to the Cloverdale Transferred Interest. Upon the execution and delivery to the City of such assumption agreement, the Cloverdale Assignee shall be entitled to all of the rights and benefits and shall be bound by all of the covenants and obligations of the Cloverdale Assignor under this Agreement with respect to the Cloverdale Transferred Interest as if it was an original party to this Agreement.

(2) The City, its successors and permitted assigns (collectively in this Section, the "**City Assignor**") covenants and agrees that, prior to any conveyance or transfer of the East Mall Lands or any part thereof (which includes the Bridge Easement Lands), the City Assignor shall assign its rights, benefits, covenants and obligations under this Agreement, to the extent of the interest in the East Mall Lands (which includes the Bridge Easement Lands) being transferred or conveyed (in this Section, the "**City Transferred Interest**"), to the transferee of the City Transferred Interest (in this Section, the "**City Assignee**"). The City Assignor shall require the City Assignee, concurrent with the completion of the conveyance or transfer of the City Transferred Interest, to execute and deliver to Cloverdale an assumption agreement with Cloverdale, satisfactory in form and content to Cloverdale, acting reasonably, wherein the City Assignee agrees to assume the covenants and obligations of the City Assignor set out in this Agreement with respect to the City Transferred Interest, and to be bound by the terms of this Agreement with respect to the City

Transferred Interest. Upon the execution and delivery to Cloverdale of such assumption agreement, the City Assignee shall be entitled to all of the rights and benefits and shall be bound by all of the covenants and obligations of the City Assignor under this Agreement with respect to the City Transferred Interest as if it was an original party to this Agreement.

(3) The parties acknowledge and agree that subject to the terms and conditions of this Agreement and subject to compliance with Applicable Laws, Cloverdale may transfer, mortgage or lease the Cloverdale Mall Lands or any part thereof and the Severed Lands and any part thereof independently of the others without affecting the validity or enforcement of this Agreement.

(4) If the Dominant Lands, save and except for any Unconnected Lands, or any part thereof becomes governed by the *Condominium Act* (Ontario), the condominium corporation created shall execute and deliver to the City an assumption agreement with the City, satisfactory in form and content to the City Solicitor, acting reasonably, wherein the condominium corporation agrees to assume the covenants and obligations of Cloverdale set out in this Agreement with respect to the Dominant Lands or the part thereof to be governed *Condominium Act* (Ontario), and to be bound by the terms of this Agreement with respect to the Dominant Lands or the part thereof to be governed by the *Condominium Act* (Ontario). Upon the execution and delivery to the City of such assumption agreement, the condominium corporation shall be entitled to all of the rights and benefits and shall be bound by all of the covenants and obligations of Cloverdale under this Agreement with respect to the Dominant Lands or the part thereof to be governed by the *Condominium Act* (Ontario). The requirement set out in Section 13(1) hereof that any Cloverdale Assignee agrees to assume the covenants and obligations of the Cloverdale Assignor set out herein and to be bound by the terms of this Agreement with respect to the Cloverdale Transferred Interest shall not apply to any subsequent dealings with individual condominium units.

14. Unconnected Lands

If Cloverdale effects a lawful severance of the Cloverdale Malls Lands or the Severed Lands pursuant to Applicable Laws, whereby a severed portion or portions of the Cloverdale Mall Lands and/or the Severed Lands have access to the Bridge (in this Section, the “**Connected Lands**”) and the other severed portion or portions of the Cloverdale Mall Lands and/or the Severed Lands (the “**Unconnected Lands**”) do not have access to the Bridge, the City agrees that upon delivery by Cloverdale to the City of written evidence that:

- (a) such severance has been obtained; and
- (b) the Unconnected Lands do not have access to the Bridge, which may be a written statement by the registered owner of the Unconnected Lands that the Unconnected Lands do not have access to the Bridge,

this Agreement shall no longer affect the Unconnected Lands. Following delivery of the items specified in Sections 14(a) and 14(b), Cloverdale may apply to the City for a partial release of this Agreement from the Unconnected Lands. Each of the parties acknowledges and agrees that the City charges a fee for any such partial release in accordance with the City’s Municipal Code, as it may be amended.

15. Interpretation

- (1) The division of this Agreement into Sections and subsections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.
- (2) Unless the context requires otherwise, words importing the singular include the plural and vice versa and words importing gender include all genders.
- (3) This Agreement and all of the Schedules constitutes the entire agreement between the parties with respect to the subject matter of this Agreement and, except as stated herein, contains all of the covenants and agreements of the parties. This Agreement supersedes all prior negotiations or agreements between the parties, whether written or verbal, with respect to the Bridge.
- (4) If any provision contained in this Agreement or its application to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected, and each provision of this Agreement shall be separately valid and enforceable to the fullest extent permitted by law.
- (5) Any reference in this Agreement to any statute or any section thereof shall, unless otherwise expressly stated, be deemed to be a reference to such statute or section as amended, restated or re-enacted from time to time.
- (6) Time shall be of the essence of this Agreement. Except as expressly set out in this Agreement, the computation of any period of time referred to in this Agreement shall exclude the first day and include the last day of such period. The time limited for performing or completing any matter under this Agreement may be extended or abridged by an agreement in writing by the parties or by their respective solicitors. Where anything is required to be done under this Agreement on a day that is not a Business Day, then the time for such thing to be done shall be the next following Business Day.
- (7) This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the applicable laws of Canada.
- (8) Wherever the words “include”, “includes” or “including” are used in this Agreement, they will be deemed to be followed by the words “without limitation”, whether or not they are in fact followed by those words or words of similar meaning.

16. City as a Municipality

Nothing in this Agreement derogates from, interferes with, or fetters the exercise by the City of all of its rights and obligations as a municipality (whether discretionary or mandatory), or imposes any obligations on the City in its role as a municipality, and the City shall not be prevented from or prejudiced in carrying out its statutory rights and responsibilities, including its planning rights and responsibilities. Nothing in this Agreement derogates from, interferes with, or fetters the exercise by the City’s officers, employees, agents, representatives or elected and appointed

officials of all of their rights, or imposes any obligations on the City’s officers, employees, agents, representatives or elected and appointed officials, except as expressly set out in this Agreement.

17. Execution

This Agreement may be executed in counterparts, each of which shall be deemed an original and which, taken together, shall constitute one and the same instrument. Each counterpart of this Agreement, and any other document to be delivered by one or more parties under this Agreement, may be executed by electronic signature through a City-Approved Electronic Signature Platform (as defined below), or by handwritten signature delivered to the other party or parties by electronic transmission in PDF format. Any such electronic signature or handwritten signature delivered by electronic transmission shall be valid, binding and enforceable upon the party or parties so executing and/or delivering same electronically to the same extent and shall have the same legal effect as an original signature. If and when one or more parties hereto executes this Agreement by or through a City-Approved Electronic Signature Platform, then such party or parties shall, upon the request of another party hereto, be obliged to forthwith provide the requesting party with a certificate of completion or similar certificate produced or issued by such City-Approved Electronic Signature Platform, which confirms, verifies and/or validates the electronic signature of the party or parties so executing same electronically. For the purposes of this Section, “City-Approved Electronic Signature Platform” means DocuSign Inc.’s electronic signing platform or any other similar secure electronic application or platform acceptable to the City in its sole and absolute discretion and “electronic signature” and “electronic” shall have the meanings respectively ascribed to such terms in the *Electronic Commerce Act, 2000*, S.O. 2000, c. 17, as amended.

18. Registration

This Agreement shall be registered against title to the East Mall Lands and the Dominant Lands and each of the parties agrees to co-operate with the other to facilitate such registration.

IN WITNESS WHEREOF the parties have executed this Agreement.

DATE:

CLOVERDALE MALL INC.

By: _____
Name:
Title:

By: _____
Name:
Title:

I/We have authority to bind the Corporation

DATE:

Authorized by:

CITY OF TORONTO

Per: _____
Name:
Title:

Per: _____
Name:
Title:

APPROVED AS TO FORM

.....
Vanessa Bacher
For Wendy Walberg, City Solicitor
File No. 8000-755- 2008
ID 202033539

I/We have authority to bind the City.

SCHEDULE A
EAST MALL LANDS

PIN 07551-0181 (LT)

PT OF THE EAST MALL LYING BTN LYNNFORD DR AND DUNDAS ST W AND BEING PT BLK B, C, G & H, PL 4805, AS IN TRANSFER PL 10611 (EB490416); PT 1 FT RES, PL 4805, AS IN TRANSFER PL 10611 (EB490416); PT THE EAST MALL, PL 4392, (FORMERLY ROYDON DR) LYING W OF THE EAST MALL CR; PT BLK C, PL 4392, AS IN EB187622; ETOBICOKE, CITY OF TORONTO

PIN 07551-0186 (LT)

PT OF DUNDAS ST W LYING E OF THE PRODUCTION SLY OF THE WLY LIMIT OF THE EAST MALL AND BEING ; PT RDAL BTN CONS 4 & 5 COLONEL SMITH'S TRACT; PT LTS 9 & 10, CON 5 COLONEL SMITH'S TRACT ; PT LT 10, CON 4 COLONEL SMITH'S TRACT; PT BLK C, PL 4392; PT SERVICE RD, PL 4392 ; PT THE EAST MALL, PL 4392, (FORMERLY ROYDON DR) ALL BEING PT 2 TRANSFER PL 10997 (EB511296); ETOBICOKE, CITY OF TORONTO

SCHEDULE B

DOMINANT LANDS

PART 1 – CLOVERDALE MALL LANDS

PIN 07552-0031 (LT)

BLK A, PL 4805, BLK D & E, PL 4805, PT BLK B, F, G & H, PL 4805, PT 1 FT RES, PL 4805, PT 15 FT WID, PL 4805, PT LT 10, CON 5 COLONEL SMITH'S TRACT & PT BLK C, PL 4392, CLOSED BY EB390902, PT LT 288, PL 4315, PT BLK C, PL 4315, PT BROADLEIGH AV, PL 4392, CLOSED BY EB355566, ALL BEING PT 1, 64R11007; S/T EB419433, S/T EB348897; S/T TB283132; ETOBICOKE. REGISTERED OWNER'S NAME AMENDED UNDER TB165925, TB618074 ON 96/12/20 BY LOUISE RICHARD-BEAULNE, CITY OF TORONTO

PART 2 – SEVERED LANDS

PIN 07551-0170 (LT)

PCL A-2, SEC B4392; PT BLK A, PL 4392, PART 1 & 2, R4685, S/T AN EASEMENT OR RIGHT IN THE NATURE OF AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE BOROUGH OF ETOBICOKE, AT ANY TIME TO ENTER UPON THAT PART OF THE SAID BLK A, DESIGNATED AS PT 2 ON THE SAID PL R4685, FOR THE PURPOSE OF CONSTRUCTING SANITARY AND STORM SEWERS OF ALL KINDS AND SUCH OTHER INCIDENTAL WORKINGS AS MAY BE NECESSARY IN CONNECTION THEREWITH, IN OVER AND UNDER THE SURFACE, OF THE SAID LANDS AND OF KEEPING THEM AT ALL TIMES IN GOOD CONDITION AND REPAIR AND FOR EVERY SUCH PURPOSE, THE SAID THE CORPORATION OF THE BOROUGH OF ETOBICOKE SHALL HAVE ACCESS TO THE SAID LANDS AT ALL TIMES BY ITS SERVANTS, EMPLOYEES AND WORKMEN; ETOBICOKE, CITY OF TORONTO

PIN 07551-0195 (LT)

PART SERVICE ROAD AND PART OF THE EAST MALL PLAN 4392, (FORMERLY ROYDON DRIVE CLOSED BY PLAN 8648 (EB355565) AND PLAN 9032 (EB390902), PART BLOCK C AND H AND PART OF THE ONE FOOT RESERVE PLAN 4805, PART OF BLOCK C PLAN 4392, BEING PART 1 ON 66R-32616; CITY OF TORONTO