



Staff Report

Community Services

Report To: Special Meeting of Council
Meeting Date: December 7, 2018
Report Number: CSPW.18.088
Subject: Authorization to Execute Northwinds Beach Pedestrian Access Permit Agreement with Ministry of Transportation
Prepared by: Shawn Everitt, Interim CAO

A. Recommendations

THAT Council receive Staff Report CSPW.18.088, entitled “Authorization to Execute Northwinds Beach Pedestrian Access Permit Agreement with Ministry of Transportation”;

AND THAT Council authorize the Mayor and Clerk to execute the agreement.

B. Overview

This report outlines a request to Council to authorize the execution of an agreement with the Ministry of Transportation (MTO) with regards to the construction of the Northwinds Beach Pedestrian Access.

C. Background

Northwinds Beach is one of the Town’s most popular and well visited waterfront parks. However, the parking at this park is limited and the park is located on the north side of Highway 26 with no easy pedestrian access point at the closest set of traffic lights.

In order to enhance public safety, a pedestrian access point will be constructed just North of the traffic lights at the intersection of Highway 26 and Grey Road 19. This project was approved through the 2018 Budget. This will allow pedestrians to safely cross at the traffic lights and easily access Northwinds Beach without having to walk along Highway 26 to reach the parking lot access point.

D. Analysis

In order to construct the pedestrian access point at Northwinds Beach, the Town must enter into an agreement with the MTO to permit the town to encroach on Highway 26 and MTO Lands. A copy of this agreement has been included as Attachment 1 to this report. The agreement, and all associated terms and conditions, will remain in effect for the life of the pedestrian access.

E. The Blue Mountains Strategic Plan

Goal #2: Engage Our Communities & Partners
Objective #1 Improve External Communication with our Constituents
Objective #3 Strengthen Partnerships

Goal #3: Support Healthy Lifestyles
Objective #1 Promote the Town as a Healthy Community

Goal #4: Promote a Culture of Organizational & Operational Excellence
Objective #3 To Consistently Deliver Excellent Customer Service
Objective #5 Constantly Identify Opportunities to Improve Efficiencies and Effectiveness

F. Environmental Impacts

Every effort will be made to keep the environmental impacts of the construction to a minimum.

G. Financial Impact

There is no fee associated with the encroachment agreement.

H. In consultation with

Ministry of Transportation (MTO)

Manager of Purchasing and Risk Management

Town Solicitor

I. Public Engagement

The topic of this Staff Report has not been subject to a Public Meeting and/or a Public Information Centre as neither a Public Meeting nor a Public Information Centre are required. Comments regarding this report should be submitted to Shawn Everitt, Interim CAO at cao@thebluemountain.ca.

J. Attached

1. Draft MTO Agreement

Respectfully submitted,

Shawn Everitt
Interim CAO

For more information, please contact:
Shawn Everitt
cao@thebluemountains.ca
519-599-3131 extension 234

THIS AGREEMENT made **this _____ day of _____, 2018**

BETWEEN:

**HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF ONTARIO, REPRESENTED BY THE MINISTER OF
TRANSPORTATION FOR THE PROVINCE OF ONTARIO**
(hereinafter referred to as the "Ministry")

OF THE FIRST PART

- and -

THE CORPORATION OF THE TOWN OF THE BLUE MOUNTAINS
(hereinafter referred to as the "Corporation")

OF THE SECOND PART

WHEREAS:

- A. The lands comprising a public highway, being the existing Controlled Access Highway No. 26 (the "Highway"), are vested in the Ministry and are under the jurisdiction and control of the Ministry;
- B. The Corporation wishes, at its sole expense and cost, to design, construct, repair, maintain and use a multi-use path (the "Path") for pedestrian purposes within the Highway from the intersection at Grey Road 19 to Northwinds Beach as shown on the sketch attached as Schedule "A";
- C. The Ministry is of the opinion that the construction, maintenance and use of the Path can be carried out without unduly interfering with the public use of the Highway;
- D. This Agreement is deemed to be a permit to the Corporation from the Ministry under section 38(2)(a) of the *Public Transportation and Highway Improvement Act* R.S.O. 1990, c. P.50 as amended ("PTHIA");
- E. The Corporation shall apply for and obtain a more a specific permit ("Permit") from the Ministry before conducting any construction, repair or maintenance of the Path in accordance with the requirements of section 38 of the PTHIA as further specified herein; and
- F. The Ministry has agreed to allow the Corporation to design, construct, repair, maintain and use the Path upon the terms and conditions of this Agreement.

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

TERM

1. The term of this Agreement shall be for one (1) year commencing on the day of the issuance of the Permit, provided that the term shall be automatically renewed for further periods of one year commencing on its anniversary date unless a party gives the other not less than sixty (60) days prior written notice of its intention to terminate this Agreement at the end of the term or current renewal term.

USE

2. Upon execution of this Agreement by both parties the Corporation may design, construct, repair, maintain and use the Path as a pedestrian walkway in general as more particularly set out herein.

APPROVAL

3. The Ministry grants only permission pursuant to the provisions of the PTHIA, and the Corporation shall be responsible for obtaining all approvals required from any other authority in order to carry out any activity with respect to the Path.

CORPORATION'S RESPONSIBILITIES

4. The Corporation shall:
 - (a) design and construct the Path to standards acceptable to the Ministry;
 - (b) be responsible for the provision of any and all maintenance and repair of the Path, including all illumination associated with the Path, as well as the removal of debris, garbage, vegetation and snow; and shall carry out Path maintenance and any and all other work or services incidental to maintenance and repair, and for any and all costs for said maintenance and repair, including power consumption;
 - (c) ensure that any maintenance and repair performed with respect to the Path is performed promptly and in such a manner so as to cause no interference with the Highway or the use of the Highway by the public;
 - (d) compensate the Ministry in full for any damage caused or any harm done to the Highway and associated structures and road equipment as a result of maintenance and repair performed, or not performed, as the case may be, by the Corporation with respect to the Path;
 - (e) complete modifications of access points to the Path as per Ministry standards as set out in any Permits;
 - (f) take all reasonable steps required to ensure the Path is used for public leisure uses such as walking and cycling uses and no other uses within the Highway property limits. Motorized vehicles are not permitted;
 - (g) supervise the use of the Path within the Highway property limits as reasonably required to protect the public and adjacent property owners from vandalism and other criminal acts;

- (h) be responsible for Path signing. The Corporation shall not place any Path signs within the Highway property limits without the prior written approval and/or a Permit from the Ministry. The Ministry may remove and dispose of any Path signs placed without the required approval;
- (i) obtain prior written approval in the form of a Permit from the Ministry and comply with the terms and conditions therein for work, other than routine annual or periodic maintenance, that is to be undertaken on the Path by non-Ministry personnel. The Ministry may renew the Permit upon request of the Corporation. After obtaining the Ministry's approval, the Corporation shall notify the Ministry at least seven days before carrying out any such work; and
- (j) be responsible for the costs and maintenance of any modifications to the Highway or its structures necessitated because of the Path system.

EMERGENCY AND HIGHWAY PURPOSES

- 5. Notwithstanding any other provision of this Agreement, the Ministry may suspend or terminate this Agreement at any time before the expiry of its term, if the Ministry deems, in its sole discretion, that;
 - (a) it requires the lands under the Highway occupied by the Path for an emergency or for the purposes of installing, repairing or maintaining the Highway, or other public needs; or
 - (b) emergency work must be carried out by the Ministry on the Highway in order to protect the travelling public and/or preserve the integrity of the Highway right-of-way;

on condition that the Ministry give the Corporation oral or written notice of such emergency or need to install, repair or maintain the Highway. The Ministry shall not be liable to the Corporation for any costs incurred by the suspension or termination of this Agreement, or any costs incurred by the Corporation to restore the Path by reason of this Section.

LIABILITY

- 6. The Corporation shall indemnify and save harmless at all times, including after the termination of this Agreement, the Ministry, its Minister, servants, employees, and agents from and against any and all demands, losses, costs (including reasonable legal costs), damages, injuries (including death), claims, actions or causes of action, proceedings, in any manner arising due to, out of, from, or in connection with the existence of this Agreement.

7. The Corporation shall reimburse the Ministry for all costs reasonably incurred by the Ministry to repair and maintain the Highway when the need for such repair and maintenance can be reasonably attributed to the negligent failure by the Corporation to comply with the provisions of this Agreement.
8. The Ministry shall not be liable in any manner whatsoever for any loss, injury, or damage to person or property including loss of life, by whosoever suffered, that in any way is connected to the establishment, use or the operation of the Path unless caused by the negligence or the wilful act of an employee or agent of the Ministry while acting within the scope of his or her employment or agency respectively. The Ministry shall not be liable for any incidental, indirect, special or consequential damages or loss of use, revenue or profit suffered by any party arising out of or in any way connected to this Agreement. These provisions shall survive the termination or expiry of this Agreement.
9. The terms of this Agreement are hereby deemed to be terms of a Permit from the Ministry to the Corporation, pursuant to section 38(11) of the PTHIA, allowing the Path to be located within the Highway property limits, and the Path shall be subject to the authority of the Ministry accordingly.
10. The Corporation warrants that it has taken all necessary steps, done all acts, passed all by-laws and obtained all approvals within its power required to give it authority to enter into this Agreement.

TITLE IN THE MINISTRY PROPERTY LIMITS / PTHIA SECTION 33(1) UNDERTAKING

11. The parties agree that:
 - (a) no provision of this Agreement, nor any construction, repair, maintenance or use of the Path is to be construed as creating in the Corporation any right, title or interest in the Ministry's property limits or fixtures erected thereon other than the right to construct, repair, maintain and use the Path in accordance with the terms of this Agreement; and
 - (b) the Path is hereby deemed to be, also a municipal undertaking of the Corporation within the Highway property limits under the end portion of section 33(1) of the PTHIA whereby the Corporation is liable for want of repair of the municipal undertaking whether the want of repair is the result of nonfeasance or misfeasance, in the same manner and to the same extent as in the case of any other like work constructed by the Corporation.

INSURANCE

12. The Corporation shall, during the term of this Agreement, have in place at its cost, with insurers having a secure A.M. Best rating of B+ or greater or the equivalent, a fully paid-up commercial general liability policy of insurance covering third party property damage, bodily injury and personal injury. Such policy shall:
 - (a) name the Ministry as an additional insured;
 - (b) have the Corporation as named insured;
 - (c) provide 30 days written notice to the Ministry of cancellation, termination or material change;

- (d) have an inclusive limit of not less than five million dollars (\$5,000,000.00) per occurrence; and
- (e) contain a cross-liability clause endorsement.

A certificate for the said insurance policy for commercial general liability insurance shall be provided to the Ministry when the Corporation delivers signed copies of this Agreement to the Ministry. The Ministry shall be provided with renewal replacements on or before the expiry of such insurance.

TERMINATION

- 13. The Ministry may terminate this Agreement at any time, without cause, upon sixty (60) days written notice being provided to the Corporation.
- 14. The Ministry may terminate this Agreement, immediately upon providing notice to the Corporation, if the Corporation fails to fulfil any of the terms and conditions of this Agreement.
- 15. Notwithstanding Section 14, the Ministry may, in its reasonable discretion, give written notice to the Corporation of a breach of the terms and conditions of this Agreement and allow the Corporation a reasonable period of time in which to remedy the breach.
- 16. The Ministry's rights under Section 14 and Section 15 shall not in any manner be prejudiced even if the Ministry has overlooked or condoned any non-compliance with the terms and conditions of this Agreement by the Corporation.

MINISTRY'S RIGHTS ON TERMINATION

- 17. In the event of the termination of this Agreement, the Ministry shall be under no further obligation to the Corporation, except to recover from the Corporation any damages, costs and expenses incurred as a result of such termination.
- 18. Upon the termination of this Agreement, the Corporation shall, at its sole cost and expense, remove entirely any fixtures, unless otherwise instructed by the Ministry, and restore the lands upon which the Path is located to a condition at least as good as their former condition, including the replacement of any fences or other barriers present at the commencement of this Agreement.
- 19. Should the Corporation fail to comply with Section 18 of this Agreement, the Ministry may undertake to do anything that will remedy the default and may, without foregoing any other remedies, perform the removal, restoration or replacement work and the Corporation shall be required to pay the Ministry for all reasonable costs to perform the said work.

COSTS

- 20. The Corporation agrees to pay all costs and expenses in connection with the design, construction, repair, maintenance and use of the Path as set out in this Agreement.

CONFLICTS

- 21. Where there is a conflict between this Agreement and the terms and conditions contained in a Permit issued to the Corporation, the terms and conditions contained in this Agreement shall govern. Such Permit shall have annotated on it:

“this Permit is subject to the terms of an Agreement dated the ____ day of ____ 2018 between the Ministry of Transportation and the Corporation.”

22. Where there is a conflict between this Agreement and the terms and conditions of other agreements that the Corporation may have entered into with another party, this Agreement shall govern.

NOTICES

23. Any notices to be given under the provisions of this Agreement shall be in writing and shall be given by personal delivery or sent by facsimile or mailed by prepaid registered mail. Subject to change by either party with written notice, notice shall be addressed as follows:

The Ministry: Ministry of Transportation
659 Exeter Road, London, ON, N6E 1L3
Dan Barber, Head Corridor Management Section
Telephone: 519-873-4578
Fax: 519-873-4228

Corporation: The Corporation of The Town of The Blue Mountains
32 Mill Street, P.O Box 310, Thornbury ON N0H 2P0
Terry Green, Manager of Parks and Trails
Telephone: 519-599-3131 x353
Fax: 519-599-7723

Such notices, invoices, demands, or correspondence as aforesaid shall be deemed to have been received by the party to whom it is mailed on the third business day following the day of posting, or on the day of delivery or transmission if provided by personal delivery, or facsimile, unless delivered or transmitted on a weekend or a holiday, in which case such notice shall be deemed to have been received on the next business day. In the event in an interruption in the postal service, notice shall be given by personal delivery or facsimile.

SUCCESSORS AND ASSIGNS

24. This Agreement shall enure to the benefit of, and be binding upon, the parties hereto and their respective successors and permitted assigns.
25. This Agreement may not be assigned by the Corporation without the prior written consent of the Ministry.

SEVERABILITY

26. If any provision of this Agreement or portion thereof or the application thereof to any person or circumstances shall to any extent be invalid or unenforceable:
- (a) the remainder of this Agreement and its application to any person or circumstances shall not be affected thereby; and
 - (b) the parties hereto will negotiate in good faith to amend this Agreement to implement the intentions set forth herein.
27. Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

NO PARTNERSHIP

28. The parties understand and agree that nothing contained in this Agreement shall constitute or be deemed to create a partnership or joint venture between the parties hereto.

APPLICABLE LAW

29. This Agreement shall be governed by the laws of the Province of Ontario and the federal laws of Canada.

IN WITNESS OF ALL contained in this Agreement:

Dated this _____ day of _____, 2018.

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO,
REPRESENTED BY THE MINISTER OF TRANSPORTATION FOR THE PROVINCE
OF ONTARIO**

Dan Barber, Head Corridor Management Section

Dated this _____ day of _____, 20____ .

THE CORPORATION OF THE TOWN OF THE BLUE MOUNTAINS

Alar Soever, Mayor

C.S.

Corrina Giles, Clerk

Schedule "A"

to an Agreement between the Ministry of Transportation and the Corporation of The Town of The Blue Mountains

