

REAL ESTATE SERVICES PROTOCOL

MADE this day of , 2016

BETWEEN:

METROLINX

and

CITY OF HAMILTON
(the “City”)

1. Purpose

The purpose of this Real Estate Services Protocol is to set out the Services (as defined below) to be provided by the City to Metrolinx to acquire real property required for the Hamilton LRT and the roles and responsibilities of each of Metrolinx and the City pertaining to such Services. The City and Metrolinx will act collaboratively, cooperatively and in good faith with a view to ensuring acquisition of the real properties within the applicable delivery dates. The City represents and warrants that it is properly authorized by the City Council or its delegated officials, if required, to enter into this Real Estate Services Protocol and to perform its obligations under it and that no other consent or approval is required. The City further represents that the persons performing the Services have the requisite skill and competence to perform the Services.

2. Services

2.1 In the provision of the Services, the City is an independent consultant to Metrolinx. The Services will be performed by the persons designated by the City from time to time. A list of such persons shall be provided to Metrolinx. Such persons shall be employees of the City and not employees or agents of Metrolinx. Any solicitors performing the Services shall be members in good standing of the Law Society of Upper Canada and insured by Law Pro. Any insurance premiums shall be paid by Metrolinx. Metrolinx shall also pay for course work required to maintain law society standing, as pre-approved by Metrolinx.

2.2 Metrolinx is responsible for all costs of acquiring the Properties including any injurious affection claims under the *Expropriations Act*, Ontario.

2.3 The City shall acquire real property (which means and includes an estate in fee simple, leasehold estate, servient tenement by way of easement and license, whether temporary or permanent, as the case may be) (individually a “**Property**” and sometimes collectively referred to as the “**Properties**” or the “**Lands**”) for the Project on behalf of Metrolinx in accordance with the provisions of this Real Estate Services Protocol (the “**Services**”). The City shall provide and perform the Services in a timely manner in accordance with the timelines prescribed by Metrolinx from time to time, to a standard of diligence and care consistent with the standard of diligence and care adhered to by competent professionals performing work similar to the Services and in accordance with applicable law, this Protocol and directions by Metrolinx from time to time.

2.4 Metrolinx will deliver to the City a property requisition substantially in the form attached as Schedule A (the “**Property Requisition**”) for each Property that Metrolinx requires the City to acquire on its behalf that will set out:

- (a) the address or legal description of the Property,
- (b) the size or approximate size of the Property and a draft plan of survey or other plan or sketch sufficient to identify the requirement where only a portion of the Property is required,
- (c) if available, utility locates and/or easements and information pertaining to grading and drainage of the Property;
- (d) the nature of the interest required (fee simple, temporary or permanent easement, lease, licence or permission to enter etc.),
- (e) the date possession is required and the length of the term if a temporary interest is being acquired, and
- (f) the proposed use.

For clarity, it is intended that the City will perform the Services in respect of Properties for the Project to be acquired from third parties and not from the City or its boards and, agencies, or from the Province and its boards and agencies.

2.5 The Services to be provided by the City in respect of each Property shall include the following:

- (a) Appraisals
 - For each Property, the City shall obtain either an appraisal or an opinion of value to identify the market value. The City may utilize the services of its appraisers who are employees of the City or retain the services of an independent appraiser or appraisers approved by Metrolinx, provided however that for Properties whose market value exceeds \$25,000, an independent appraisal is required. If the City uses the appraisers who are employees of the City to perform appraisal services, Metrolinx will pay membership dues in professional accrediting organizations, and insurance and recertification costs (provided that such employees are engaged 100% on Metrolinx work or if engaged less than 100%, then a proportionate basis).
 - Each appraisal or opinion of value shall be peer-reviewed in accordance with CUSPAP standards and approved by either an in-house City appraiser or a contract review appraiser.
 - A copy of each appraisal report or opinion of value, together with the confirmation of approval by City’s review appraiser shall be provided to Metrolinx prior to making any binding commitment to acquire a Property, subject to the following requirements: (a) for Property with an appraised value in excess of \$2,000,000, the Director of Realty Services

at Metrolinx shall within ten (10) business days of receiving the appraisal report advise the City if in Metrolinx's sole opinion, either a further peer review or a further independent appraisal is required, and (b) for Property with an appraised value in excess of \$10,000,000, a second independent appraisal will, unless otherwise determined by Metrolinx, be required and undertaken by the City.

(b) Surveys

○ For each Property, the City shall obtain boundary surveys as required for property acquisitions, expropriations, easements and other interests to be acquired by Metrolinx including without limitation the preparation of reference plans, and expropriation plans. The City may utilize the services of its surveyors who are employees of the City or the City may retain the services of an independent surveyor or surveyors approved by Metrolinx.

(c) Agreements of Purchase and Sale

○ The City shall undertake and perform property acquisition negotiations for all Properties in respect of which Metrolinx has provided a Property Requisition to the City subject to the provisions of this Real Estate Services Protocol, obtaining approvals where required as set out herein and the directions of Metrolinx from time to time. The City shall use templates approved by Metrolinx for this purpose and shall discuss with and obtain the prior written approval of Metrolinx for any material deviations from template.

○ Agreements of Purchase and Sale may provide for payment to the Owner (as defined in Section 1 of the *Expropriations* (Ontario)) of the following:

- (i) legal, appraisal and consulting costs incurred by an Owner;
- (ii) penalties for prepayment, postponements, and/or partial discharges of any mortgage or charge registered against the Property;
- (iii) relocation and/or equivalent reinstatement costs of the Owner;
- (iv) disturbance damages, including business loss;
- (v) other reasonable consideration paid to the Owner (and tenants) to avoid expropriation, including any amounts that might be payable to the Owner if the Property had been acquired by expropriation;
- (vi) land transfer tax and other applicable taxes;
- (vii) any other compensation as required by the *Expropriations Act*;

(d) Closings:

○ The City shall close all approved agreements of purchase and sale and shall submit to Metrolinx a requisition for closing funds no later than 10 days prior to a scheduled closing date. Metrolinx will provide a cheque to the City for closing proceeds.

(e) Expropriations

○ The City shall prepare and serve all necessary documents on behalf of Metrolinx to expropriate the Properties in respect of which Metrolinx has provided a Property Requisition to the City to assure that the specified delivery date is met. For this purpose expropriation proceedings shall be commenced no later than 12 months prior to the specified delivery date set out in a Property Requisition.

○ For each Property to be expropriated the City will provide to Metrolinx Realty Services for its approval at least 13 months prior to the specified delivery date a memorandum summarizing the property requirement, the proposed transit use, anticipated cost and delivery date; a briefing note that Metrolinx will use as the basis for its request to Ministry of Transportation for approval; the requisite reference plan(s); 4 copies of the application for approval to expropriate; copies of the notices to be served on the Owner and third party interests; and a copy of newspaper advertising, all in a form approved and provided by Metrolinx to the City (the “**Expropriation Application Submittal**”).

○ The City shall advise Metrolinx if it becomes aware of any hearings of necessity that are requested and shall arrange the hearing date, co-ordinate, facilitate and provide all materials, assemble the necessary evidence for the hearing and prepare all necessary documentation to support the hearing, including assembling third party expert witnesses, if required and approved by Metrolinx. Metrolinx shall arrange for the appointment of an Inquiry Officer.

○ Where no hearing of necessity has been held, the City shall prepare Certificates of Approval for each Property that is being expropriated together with a memorandum summarizing the Property requirement, proposed transit use and delivery date, a briefing note to be used by Metrolinx as the basis for its request to the Ministry of Transportation for a Certificate of Approval, the requisite reference plans, 4 copies of the Certificate of Approval for the Minister’s signature all in form approved and provided by Metrolinx (the “**Expropriation Approval Submittal**”).

○ Where a hearing of necessity has been held and the Inquiry Officer’s report has been received, in addition to the items identified above, the City shall prepare and provide to Metrolinx a copy of the Inquiry Officer’s Report and draft reasons for approval for the Minister’s consideration.

○ The City shall cause the required Plans of Expropriation to be prepared and submitted to Metrolinx for signature and cause same to be registered on title.

○ The City shall prepare Notices of Possession, Notices of Election and Notices of Expropriation for execution by Metrolinx and cause same to be served on the Owner and third party interests;

○ The City shall obtain a Section 25 appraisal and prepare the Section 25 Offer for execution by Metrolinx, cause same to be served on the Owner and process payment once accepted by the Owner. Metrolinx will provide a cheque to the City to pay the Section 25 Offer.

(f) Title and Off-Title Inquiries

○ For each Property, the City shall undertake the title and off-title searches specified by Metrolinx from time to time which shall include Ontario Hydro and the local hydro authority for unregistered easements, executions, corporate searches, and real property taxes. Full 40 year searches shall be required for all Properties that are not in Land Titles. Abutting lands searches shall be required for all Properties. Title shall be taken in the name of Metrolinx unless otherwise directed by Metrolinx, specifically with respect to Lands required for the widening of the City highway, in which case it is anticipated that title will go directly to the City.

(g) Land Transfer Tax

○ Metrolinx, as a Crown Agency, is not required to pay municipal or provincial Land Transfer Tax.

(h) Excess Lands

○ The City shall not acquire any land in excess of the Property specifically identified in a Property Requisition. If the City is of the opinion that it is fiscally prudent to acquire excess land it shall provide a detailed rationale and justification for the proposed acquisition of any excess land to Metrolinx and Metrolinx, in its sole discretion, will make the determination of whether the proposed acquisition of excess land is justified and appropriate and will advise the City accordingly. Metrolinx will dispose of any excess land not required for the Hamilton LRT entirely in its own discretion and will be entitled to the proceeds of any such disposition including to hold such proceeds in a reserve/contingency account for the Project.

(i) Approval Process

○ The City shall obtain Metrolinx's prior written approval before entering into binding commitments to an Owner to acquire a Property or to settle compensation resulting from an expropriation.

○ For the purpose of obtaining Metrolinx's approval the City shall submit to Metrolinx Realty Services an approval submittal, which shall include a memorandum summarizing the approval being requested, background information including: property requirement, the existing use and proposed transit use, and the proposed business terms in the form approved and provided by Metrolinx to the City for this purpose; the agreement or other document for which approval is being sought, a copy of the Property Requisition, the survey (unless it is the acquisition of the entire property), the appraisal reports, the results of other all diligence inquiries, an assessment of any risks to Metrolinx, including tax arrears and a description of any terms or conditions that are not in the template (the "**Approval Submittal**").

○ For a Property with an aggregate purchase price of less than \$10,000,000 the Approval Submittals will be delivered to Metrolinx no later than 15 days prior to the date upon which the commitment date expires. Metrolinx will review and advise whether the Approval Submittal is complete within 5 days of receipt. Metrolinx will approve or refuse

its approval to any such complete Approval Submittal prior to the expiry of the condition date.

- For a Property with an aggregate purchase price in excess of \$10,000,000 the approval of the Metrolinx Board of Directors may be required, and for such purposes Metrolinx may require the City to provide additional information. An Approval Submittal for Properties in excess of \$10,000,000 shall be delivered to Metrolinx no later than 21 days prior to the scheduled Board Meeting.

- If Metrolinx specifies that an Approval Submission contains omissions or deficiencies the City will rectify such omissions and deficiencies as quickly as possible. Metrolinx will not be required to approve or to decline to approve a request for approval until the relevant Approval Submission is complete.

- In determining whether an offer to be made to an Owner is made pursuant to s. 25 of the *Expropriations Act*, exceeds the approval thresholds identified above, the total value of the compensation shall include the market value of the Property and damages for injurious affection and disturbance as determined by the Section 25 appraisal, exclusive of interest and costs.

(j) Claims:

- The City shall immediately advise Metrolinx of any notices of arbitration and statements of claim received relating to Lands that have been expropriated or any other claims relating to the Project of which it becomes aware. Metrolinx may direct the City to manage arbitrations and statements of claim and, if so directed, the City shall provide regular status reports on progress of the arbitration and claim to Metrolinx and shall follow any directions provided by Metrolinx from time to time. The City shall provide a summary of settlement discussions to Metrolinx and shall obtain the approval of Metrolinx for all proposed settlements of expropriation compensation proceedings and claims in accordance with the Approval Process outlined above.

(j) Record Books

- The City shall prepare and deliver to Metrolinx a record book for each completed Property acquisition containing, without limitation, copies of appraisals, surveys, environmental and other reports prepared by the City or third parties, agreements of purchase and sale, a record of negotiations, notes, closing documents, Approval Submission, Metrolinx approval and any other relevant information pertaining to such Property.

2.6 The City is not liable for any incorrect information provided by Metrolinx save and except that the City shall immediately notify Metrolinx if and when it becomes aware of any such misinformation or discrepancy in information known or ascertained by the City.

3. Environmental Due Diligence

- Metrolinx may undertake such environmental due diligence as it deems appropriate for the Properties, including a Phase One Environmental Site Assessment and where recommended, a Phase Two Environmental Site Assessment. Metrolinx may require the City to endeavour to negotiate and obtain Permissions to Enter for Properties to enable it

cause environmental due diligence testing to be undertaken prior to entering into an agreement of purchase and sale.

- Metrolinx may instruct the City to endeavour to obtain a reduction and the amount of any such reduction in the purchase price for Properties requiring remediation. Metrolinx may instruct the City to require the Owner to remediate prior to closing. The City will liaise with Metrolinx with respect to negotiating such reductions and remediation prior to closing. All reductions (including the failure to obtain a reduction) and remediation plans (including the failure to obtain the Owner's agreement to remediate shall be approved by Metrolinx.

- Metrolinx will endeavour to obtain permission to share the results of environmental reports and to obtain reliance letters addressed to the City in respect of Properties acquired from third parties that will be transferred in whole or in part to the City for road widening and other purposes.

4. Payment for the Services and for Third Party Costs

4.1 Metrolinx will reimburse the City for third party costs incurred by the City to perform the Services, including: appraisal, environmental and other service provider costs; expert witness services (including reports) relating to expropriation matters; advertising and serving notice in accordance with the *Expropriations Act*; registration costs; title search disbursements including costs of retaining freelance title searchers, including Teraview fees; off title search enquiry disbursements; courier/process server costs; special examiner and other reporting costs – e.g. discoveries, court reporter and transcripts (related to expropriation matters); and any other costs reasonably incurred referable to the acquisition of Properties and approved by Metrolinx (the “**Third Party Costs**”).

4.2 The City will invoice Metrolinx on a quarterly basis for reimbursement of Third Party Costs. Third Party Costs shall be billed with no mark-up and the invoices to Metrolinx will be substantiated by copies of actual third party invoices for such Third Party Costs. Metrolinx will pay approved invoices within 30 days of receipt.

4.3 Metrolinx, in its discretion, may provide front end working funds to the City for Third Party Costs based on expenditure projections approved by Metrolinx in order to enable the City to pay or be reimbursed for Third Party Costs incurred by it. The City shall provide to Metrolinx a detailed accounting of the expenditures and direct costs paid from any such working funds, in a form satisfactory to the Chief Financial Officer or the Director of Realty for Metrolinx. The detailed accounting will be provided to Metrolinx quarterly in accordance with the accounting control requirements determined by Metrolinx from time to time. The City will take all necessary steps required to obtain and provide copies of any and all additional information reasonably required or requested by Metrolinx to enable Metrolinx or Metrolinx's auditors to validate expenditure of the working funds and to justify reimbursement of Third Party Costs incurred by the City, as applicable.

4.4 Metrolinx will pay to the City, City staff costs based on “Hourly Recovery Rates” calculated as base hourly rate (salary) with an overhead multiplier as approved by Metrolinx in advance. The overhead multiplier projection shall be inclusive of all costs that are attributable to the position in question including but not limited to the following: fringe benefits, payroll burden,

office expenses, tools, equipment, software licences, and any and all other costs of performing the Services other than Third Party Costs and amounts paid to Owners. On the basis that the City's policies and directives with respect to reimbursement of mileage costs and meals are consistent with/more stringent than the Ontario Governments' Directive issued by the Management Board of Cabinet Nov. 2004, revised April, 2010 on Ontario Public service's Travel, Meal and Hospitality Expenses, the City shall adhere to and follow its own City policies and shall provide an attestation to Metrolinx in this regard together with the applicable invoice for these items. All staff to be dedicated exclusively to provide the Services. If by reason of exceptional circumstances Metrolinx agrees to City staff being engaged on less than a full-time basis, Metrolinx will pay for the Services based on proportion of time actually spent on Metrolinx work. Hourly Recovery Rates once approved by Metrolinx may be adjusted annually to allow for inflationary increases of salaries, subject to prior approval by Metrolinx. The City will invoice Metrolinx on a quarterly basis. Metrolinx will pay approved invoices within 30 days of receipt.

5. Consultants

5.1 The City may retain the services of knowledgeable and skilled real estate consultants and other professionals as required to assist with provision of the Services, including, but not limited to, appraisers, surveyors, environmental consultants, property negotiators and business consultants. The City shall adhere to a fair and transparent procurement policy acceptable to Metrolinx in retaining any such consultants. Alternatively, the City may advise Metrolinx that it would like Metrolinx to engage the services of consultants with whom Metrolinx has a vendor-of-record arrangement for some or all of the specific components of the Services set out in this Section 4.1. The City shall ensure that any reports provided by such consultants may be relied upon by Metrolinx and at Metrolinx's request by contractors and their lenders.

6. Termination

6.1 Either Party may terminate this Agreement and the provision of Services hereunder in its sole discretion, without cause, upon not less than 30 days written notice to the other. If either Party defaults in the performance of its obligations under this Agreement, the non-defaulting Party may terminate this Agreement on notice to the defaulting Party and provided that the defaulting Party has not cured the default promptly following such notice without the requirement to provide further notice. If Metrolinx terminates this Agreement other than by reason of default or non-performance by the City, Metrolinx will pay for the Services performed by the City to the date of termination and any irrevocable expenses (included termination or severance costs for employees and persons retained for the purpose of performing the Services) committed by the City in respect of the Services prior to the notice of termination. Upon termination the City shall deliver to Metrolinx all records to the effective date of termination.

7. Confidentiality

7.1 For purposes of this Section 6, "Confidential Information" means (i) any information that a Party would not be required to disclose under the *Freedom of Information and Protection of Privacy Act*, and the *Municipal Freedom of Information and Protection of Privacy Act*, Ontario, (ii) the procurement process pertaining to any component of the Project, and any information relating to the process and the solicitation of documents save and except where same is generally available to the public without fault or breach by the recipient, but only after that information becomes generally available to the public, (iii) any proprietary information from a third party supplied in

confidence which may comprise trade secrets, or technical, commercial or financial information, disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of such third party or result in undue loss to such third party or undue gain to others, (iv) any personal information as defined in the *Freedom of Information and Protection of Privacy Act*, and the *Municipal Freedom of Information and Protection of Privacy Act*, Ontario, (v) any other information specifically designated in writing by a Party as being confidential, (vi) any improvements, modifications and enhancements or, and information and things derived from or utilizing any Confidential Information referred to in the foregoing clauses.

7.2 The City shall:

- (a) keep all Confidential Information confidential and secure;
- (b) limit the disclosure of Confidential Information to only those persons who have a need to know and who are bound by agreement or otherwise to keep the Confidential Information in confidence substantially on the terms hereof;
- (c) not directly or indirectly disclose, destroy, exploit or use any Confidential Information (except for the purpose of performing the Services or except if required by law) without first obtaining the written consent of Metrolinx and in respect of any third party, the written consent of Metrolinx and such third party;
- (d) provide Confidential Information to Metrolinx on demand; and
- (e) return all Confidential Information to Metrolinx on termination of this Agreement and retain no copy or portion thereof.

7.3 If the City becomes compelled by the MFIPPA or other applicable law to disclose any Confidential Information, the City will provide Metrolinx with prompt notice to that effect in order to allow Metrolinx to seek one or more protective orders or other appropriate remedies to prevent or limit such disclosure, and shall co-operate with Metrolinx and its legal counsel to the fullest extent. Notwithstanding and subject to the foregoing, the City shall disclose only that portion of the Confidential Information that it is legally required to disclose.

7.4 The provisions of this Section 7 shall survive termination of this Agreement and remain in full force and effect.

8. Notices

8.1 Any notice or other communication with respect to this Agreement (the “Notice”) shall be effectively given if delivered or sent by letter or email addressed:

in the case of Metrolinx to:

Metrolinx Realty Services



and

in the case of the City to:

●
or to such other address, email address or to such other individuals as Metrolinx or the City, as the case may be, from time to time designates in writing to the other. Any Notice that is delivered will have been received on delivery; any Notice sent by email will be deemed to have been received on the date that the email is sent, and any Notice mailed by regular mail will be deemed to have been received 8 days after having been mailed.

9. Miscellaneous Provisions

9.1 Counterpart Execution: This Agreement may be executed in several counterparts, each executed counterpart shall be deemed to be an original, and the counterparts together shall constitute one and the same instrument.

9.2 Time of the Essence: Time is of the essence of this Agreement.

9.3 Applicable Law: This Agreement is governed by the laws of the Province of Ontario.

9.4 Successors and Assigns: This Agreement is binding upon the successors and permitted assigns of the Parties. No Party may assign its interest in this Agreement in whole or in part without the written consent of the other Party, except that Metrolinx may, without consent of the City, transfer or assign this Agreement or any component of it to the Government of Ontario or to a Crown Agency as defined by the *Crown Agencies Act*, or to a third party acquiring Metrolinx’s interest in all or part of the Project provided that such third party owns the Project.

9.5 Amendment : The Parties may amend this Agreement from time to time but no amendment shall be effective unless it is in writing and signed by the Parties.

IN WITNESS WHEREOF the Parties have executed this Agreement

METROLINX

By: _____
Name:
Title:

By: _____
Name:
Title:
I/We have the authority to bind the corporation

CITY OF HAMILTON

By: _____
Name:
Title:
I have the authority to bind the corporation

APPENDIX 1 –PROPERTY REQUISITION FORM

Requisition for Property Services						
Property Information			Project Information			
Request No: Revision No: Property Address: Property Description:			Project Name:			
Owner: PIN#: Property Area Required:			Project No.: Project Manager: Phone: Included in Capital Budget: Budget Category: Budget Page Reference:			
Type of Property Requirements	Type of Property Taking					
	Fee Taking			Easement		
	Full Taking	Partial Taking	Subsurface Fee Taking	Surface	Subsurface	Aerial
Permanent						
Temporary						
Other						
Intended Use of Property (Check as appropriate)						
Station/Bus Facility:			Utility Relocation:			
Trackway ROW:			Parking/Passenger Pick-Up and Drop-Off:			
Workspace/Staging Area: Temporary taking for traffic staging/detour			Other (Specify):			
Access Road						
Duration of Occupancy:			Construction Commencing:			
Agreement Required by:						
Condition of Site on Possession:						
Description of Requirement/Key Issues:						
Information Attached						
Site Map:			Draft R Plan:			
Property Map:			Final R Plan:			
Other (Specify): Property Sketches –						
Recommended for Acquisition by:			Signature		Date	
1. Slevak Strzemieczny, Project Manager						
2. Mike Poskin, Project Coordinator						
Approved by:						
3. Stephanie Rice, Manager- Third Party, Planning and Property						
4. Rupert McNay, Manager - Controls						
5. Mark Ciavarro, Director – Program Management						
6. Patricia Simpson, Director – Transit Expansion Property Acquisition Unit, City of Toronto						

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