

**8 F 5 : H'CONSTRUCTION AND LICENCING
AGREEMENT (the "Agreement")**

THIS AGREEMENT is effective as of November 1, 2016 (the "**Effective Date**")

B E T W E E N:

CITY OF HAMILTON
(the "**City**")

and

HAMILTON WENTWORTH CATHOLIC DISTRICT SCHOOL BOARD
(the "**Board**")

Each a "**Party**" and collectively the "**Parties**"

WHEREAS the Board owns the lands as outlined in the survey and aerial photograph attached hereto as Schedule "A" (the "**Board Lands**");

AND WHEREAS the City owns lands adjacent to the Board Lands, as outlined in Schedule "A" attached hereto (the "**City Lands**");

AND WHEREAS the City wishes to construct a trail (the "**Project**") partially on the Board Lands as shown on Schedule "A" attached hereto (the "**Trail**");

AND WHEREAS the City and the Board each permit and wish to facilitate public access to the Trail;

AND WHEREAS on January 25, 2017, the Council of the City, in adopting the Public Works Committee Staff Report 16-015a, authorized this Agreement;

NOW THEREFORE IN CONSIDERATION of the mutual covenants hereinafter contained, the Parties covenant and agree as follows:

TERM

1. This Agreement shall commence on the Effective Date and shall continue through October 31, 2021 (the "**Term**"). Commencing on November 1, 2021 and on each fifth anniversary of November 1 thereafter, this Agreement shall automatically renew for consecutive five-year periods unless either Party provides the other with six (6) months' prior written notice that it wishes to terminate this Agreement. All such renewals shall be on the same terms and conditions contained herein save and except obligations of the City and the Board related to the construction of the Trail.

RIGHT TO ENTER

2. As of the Effective Date, the Board authorizes the City (which includes for these

purposes, its elected and appointed officials, officers, directors, servants, employees, volunteers, invitees, contractors, agents, assigns and insurers) to enter on and use that portion of the Board Lands on which the Trail will be located (and such reasonable additional Board Lands as the City may require for construction and maintenance) for construction and maintenance of the Trail. Once the Trail is constructed, the Board authorizes the City and members of the public to enter on, and use, that portion of the Board Lands as required for the purposes of accessing, traversing, maintaining and using the Trail, provided that such authorization shall not restrict the right of the Board to limit or prohibit the use of its parking facilities as it sees fit.

CITY OBLIGATIONS

3. In connection with the construction of the Project, the City covenants as follows:
 - (a) it shall create, or arrange for the creation of, the drawings and specifications for the Project, and shall advise the Board of any elements which directly impact the Board Lands;
 - (b) except as otherwise provided for in this Agreement, the City shall provide or retain all workers and procure all materials required for construction;
 - (c) the City shall be responsible for managing construction;
 - (d) the City shall advise the Board of all significant developments during the course of the Project;
 - (e) except as otherwise provided for in this Agreement, the City shall be responsible for all costs associated with construction;
 - (f) the City shall pay all charges incurred by the City for any services, work or materials which may be supplied, done or performed in respect of the Project, and the City shall forthwith discharge any liens arising therefrom at any time claimed or registered against or in respect of the Board Lands or any part thereof. In the event the City shall fail to cause any such liens forthwith to be discharged after being notified thereon, then, in addition to any other right or remedy of the Board, the Board may, but shall not be obligated to, discharge same by paying the amount claimed to be due into court to discharge the lien and the amount so paid by the Board and all costs and expenses, including reasonable solicitor's fees on a substantial indemnity basis, incurred by the Board in procuring the discharge of such lien, shall be payable by the City forthwith;
 - (g) the City and all its contractors, during the construction of the Project, shall endeavor to adequately protect and preserve all existing sod, trees, shrubs and other landscaping items, if any, on the Board Lands which do not directly or unavoidably interfere with the design and construction of the Project;

- (h) the City shall maintain the full length of the Trail; and
- (i) the City, with the prior approval of the Board, shall erect and maintain signs at the expense of the City at the northern and southern access points to Board Lands indicating the location and access point(s) of the Trail.

BOARD OBLIGATIONS

- 4. The Board covenants as follows:
 - (a) on request from the City, the Board shall provide timely review and comment on the drawings and specifications prepared by the City; and
 - (b) subject to the terms of this Agreement, on completion of the Project, the Board shall allow continuous access to the Trail on the Board Lands by the public.

LIABILITY AND INDEMNIFICATION

- 5. With respect to those portions of the Board Lands that do not constitute a portion of the Trail, the Board:
 - (a) shall defend, indemnify and save harmless the City, its elected and appointed officials, officers, directors, servants, employees, volunteers, invitees, contractors, agents, assigns and insurers against all actions, causes of action, suits, claims, assessments, costs and damages of any kind whatsoever, including reasonable legal fees which the City may incur or suffer as a result of any willful misconduct or any negligence of the Board or those persons for whom in law it is responsible; and
 - (b) hereby releases and forever discharges the City and all persons identified in section 5(a) from any claims, actions, causes of action, suits and demands whatsoever that it has, may have or will have against the City arising from or related to the Project, except to the extent caused by the willful misconduct or negligence of the City or those for whom in law it is responsible.

This section shall survive the expiry or termination of this Agreement.

- 6. With respect to the construction, maintenance and use of the Trail, the City:
 - (a) shall defend, indemnify and save harmless the Board, its officers, directors, officials, servants, contractors, agents and employees against all actions, causes of action, suits, claims assessments, costs and damages of any kind whatsoever including reasonable legal fees which the Board may incur or suffer as a result of any: (i) performance or non-

performance of this Agreement by the City or those persons for whom in law it is responsible; or (ii) occurrence or incident on the Trail which the City or those persons for whom in law it is responsible are required to maintain pursuant to this Agreement; and

- (b) hereby releases and forever discharges the Board and all persons identified in s.6(a) from any claims, actions, causes of action, suits and demands whatsoever that it has, may have or will have against the Board arising from the use, construction or maintenance of the Trail by the City or any third party, except to the extent caused by the willful misconduct or negligence of the Board or those for whom in law it is responsible.

This section shall survive the expiry or termination of this Agreement.

INSURANCE

- 7. The Board and City each agree with respect to their respective obligations under this Agreement to obtain and maintain a comprehensive general liability policy which:
 - (a) names the City or the Board, as the case may be, as an additional insured;
 - (b) includes the following extensions of coverage:
 - Broad form Property Damage Coverage;
 - Occurrence Property Damage and Land Liability Coverage;
 - Personal Injury Liability Coverage;
 - Blanket Contractual Liability Coverage;
 - Completed Operations Coverage;
 - Owner's Liability and Protective Coverage; and
 - Cross Liability Coverage and Severability of Interest Provisions
 - (c) provides not less than Five Million Dollars (\$5,000,000.00) per occurrence inclusive limits of liability; and
 - (d) provides that the policy shall not be cancelled, amended, modified, terminated or expire without thirty (30) days' written notice to the other Party.
- 8. These insurance coverages shall also extend to cover all liabilities assumed by each respective Party under this Agreement; extend to insure against loss of, or damage to, property owned by the City or by others; and include coverage as unnamed insureds, any person employed, appointed or retained by the City or by the Board, whichever case may be; and preclude subrogation claims against the other Party and any other person insured under the policy, except to the extent loss or damage is caused by that Party's or person's willful act or omission or negligence.

9. The Parties shall deliver to each other certificates of insurance originally signed by authorized insurance representatives, prior to the execution of this Agreement. Certificate Holder for the City will be addressed as: City of Hamilton, City Hall, 71 Main Street West Hamilton, Ontario LSP 4Y5, attn. Public Works, Parks and Cemeteries. All certificates, cancellation, nonrenewal or adverse change notices for the City will be mailed to this address.

DEFAULT

10. A Party shall be in default of this Agreement if it fails or neglects to comply with or perform any covenant or term of this Agreement and such failure or neglect continues for a period of five (5) days (or such longer period of time specified by the non-defaulting Party, having regard to the nature of the default) after receipt by the defaulting Party of written notice from the non-defaulting Party setting out the particulars of such non-compliance (the “**non-compliance notice period**”).
11. If a Party is in default under this Agreement beyond the non-compliance notice period, then the non-defaulting Party may at its option:
 - (a) remedy, or cause to be remedied, any such default and all costs and expenses incurred by the non-defaulting Party in so doing shall be immediately payable by the defaulting Party upon presentation of the appropriate supporting documents including invoices; and/or
 - (b) terminate this Agreement by written notice to the defaulting Party at any time after the expiration of the non-compliance notice period.
12. Upon termination of this Agreement, the City shall immediately cease construction of the Project and, within a period of twenty (20) days after termination, remove from the Board Lands all of its property and equipment and shall repair any damage caused to the Board Lands by such removal, however, under no circumstances will the City be required to restore the Board Lands to the condition they were in prior to this Agreement. The City shall also erect ‘No Trespassing’ signs at the southern and northern access points to the Board Lands.
13. No reference to, nor exercise of, any specific right or remedy by a Party shall prejudice or preclude such party from exercising any other remedy, whether allowed at law or in equity or expressly provided for herein. No such remedy shall be exclusive or dependent upon any other such remedy but such party may from time to time exercise any one or more of such remedies independently or in combination.

NON ASSIGNMENT

14. Neither the City nor the Board shall assign this Agreement, or any right

hereunder, without the express written agreement of the other Party. Any purported assignment contrary to this section shall be of no legal effect.

NOTICE

15. Any notice herein required or permitted to be given under this Agreement shall be delivered personally, by registered mail, email or by fax to the parties at the following addresses:

if to the City:

City of Hamilton, Public Works Department
Corporate Assets and Strategic Planning
Landscape Architectural Services
77 James Street North, Suite 400
Hamilton, ON LSR 2K3
Fax: 905-546-4515
Email: Julia.VanderLaandeVries@hamilton.ca
Attention: Julia van der Laan de Vries

if to the Board:

HAMILTON WENTWORTH CATHOLIC DISTRICT SCHOOL BOARD
90 Mulberry Street
P.O. Box 2012
Hamilton, ON L8N 3R9
Fax: 905-525-1724
Email: (insert email address)
Attention: (insert name)

Any notice sent by registered mail shall be deemed to be given on the fifth (5th) day after the day of mailing. Any notice sent by fax or email shall be deemed to be on the next business day. If the Party giving any notice, demand or other communication knows or ought reasonably to know of any difficulties with the postal system which might affect the delivery of mail, any such communication is not to be mailed but given by personal delivery, email or by facsimile.

Each Party shall immediately advise the other Party of any change in the Party's address or contact information.

GENERAL PROVISIONS

16. Each Party covenants for itself and its servants, contractors, agents and employees that it will comply with all applicable federal, provincial and municipal laws, rules, regulations and by-laws in the performance of this Agreement.
17. A reference to any act, by-law, rule or regulation or to a provision thereof shall be deemed to include a reference to any act, by-law, rule or regulation or

provision enacted in substitution therefor or amendment thereof.

18. This Agreement shall be governed by and construed under the laws of the Province of Ontario.
19. Time is of the essence of this Agreement, and if any extension of time shall be granted, time shall continue to be of the essence in respect of the extension of time.
20. No amendment to this Agreement shall be valid or binding unless set out in writing and executed by all the parties hereto.
21. This Agreement contains the entire agreement between the Parties with respect to the subject matter thereof.
22. This Agreement shall enure to the benefit of, and be binding upon, each of the Parties and each of their respective successors and permitted assigns.
23. The headings to each section are inserted for convenience of reference only and do not form part of the Agreement.
24. If any provision of this Agreement is determined by a court of competent jurisdiction to be illegal or unenforceable, then such clause shall be considered separate and severable from the rest of this Agreement, and the remaining provisions shall remain in full force and effect, and shall continue to be binding upon the parties as though the illegal or unenforceable provision had never been included.
25. Each Party covenants and agrees to provide such further documents or instruments required by the other Party as may be reasonably necessary or desirable to give effect to the access contemplated by this Agreement.

[Signature Page Follows]

IN WITNESS WHEREOF the Parties have duly executed this Agreement by its officers duly authorized in that behalf

CITY OF HAMILTON

Name:
Title:
Date:

Approved to
Form:

Michael Kyne
Legal Services

Approved to Content:

Name:
Dept.:

Name:
Title:
Date:

I/We have authority to bind the corporation.

HAMILTON WENTWORTH CATHOLIC DISTRICT SCHOOL BOARD

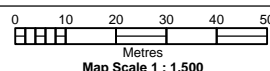
Name:
Title:
Date:

Name:
Title:
Date:

I/We have authority to bind the Board.



Kay Drage Park Trail Connection



DATE: August 15, 2016

DRAWN BY: JJ

NOTE: Aerial Photography - City of Hamilton 2015

