

From: [Albers, Kathy](#)
To: [Merulla, Sam](#); [Nann, Nrinder](#); [Collins, Chad](#); [Jackson, Tom](#); [Pauls, Esther](#); [Farr, Jason](#); [Danko, John-Paul](#); [VanderBeek, Arlene](#); [Ferguson, Lloyd](#); [Whitehead, Terry](#); [Pearson, Maria](#)
Cc: [Murdoch, Craig](#); [Piedimonte, Diane](#); [Johnston, Evan](#); [Giulietti, Daniela](#); [Finelli, Lucy](#); [Kreidl, Samantha](#); [Burden, Nancy](#); [Milovanov, Zora](#); [Freeman, Lyndzee](#); [Sally, Maureen](#); [Leverton, Ryan](#); [Wojewoda, Nikola](#); [Litzen, Julie](#); [McKinnon, Dan](#); [Wunderlich, Nancy](#); [Davenport, Alicia](#); [Kessler, Raymond](#); [Auty, Nicole](#); [Leendertse, Ken](#); [Scarlett, Sam](#); [Monaghan, Marcia](#)
Subject: FW: Hamilton Aviary
Date: February 1, 2019 3:55:56 PM
Attachments: [Signed Copy June 18.pdf](#)
[Chronology Aviary Jan 19.xlsx](#)

Public Works Committee Members,

On Monday Feb 4th, The Friends of the Aviary (Churchill Park) will be attending Public Works Committee (PWC) as a delegation to provide an update on their search for a new home for the Parrots / Birds that they care for on behalf of the City. I am providing a brief history and outline of the agreement between the Friends of the Aviary (FOA) & the City of Hamilton, as it relates to agenda item 8.3.

As the issue of re-homing the birds has been discussed over the past year and a half, this summary is to serve as a reminder of what has transpired and what was agreed to between the City and the FOA.

On August 22nd, 2017 orders were issued to the City by the Ontario Society for the Prevention of Cruelty to Animals (OSPCA) for the volunteer run aviary for 1) rodent control and ingress to the bird enclosures and, 2) appropriate exposure to full spectrum lighting. During this time the FOA Board of Directors was experiencing transition and had splintered into 2 opposing groups.

On October 16th, 2017 staff Report PW17080 was tabled at PWC outlining the issues with the current facility at 85 Oak Knoll Drive (Churchill Park). At this same PWC meeting a delegation from the FOA was received. PWC direction at that time was for Staff to have 4 weeks to meet with the presenters and work through a number of issues (Governance structure, OSPCA Orders and financial challenges)

On November 13th, 2017 PWC reconsidered Report PW17080 and \$40k was approved to address the building clean up and existing OSPCA orders. Staff were also directed by Committee to negotiate and enter into a new agreement incorporating the recommendations of Report PW17080, with the FOA and terminate the existing 1992 agreement. Within the new agreement the initial date was set out for the FOA to report back to Committee on June 30th, 2018. A second delegation from the FOA was also received by Committee.

On April 30th, 2018 the FOA requested additional time to confirm a new location for the birds and to report back to PWC. This request was granted by PWC with a new deadline date of February 4th, 2019.

Key dates were outlined in the new agreement between the FOA and the City of Hamilton, signed by

the current FOA Board of Directors. The following dates were set out in Section 7-9 of the attached agreement:

- Feb 4th, 2019 the FOA to confirm alternative location and confirm that the move from the current location will be completed no later than July 11, 2019.
- Provided the birds have been relocated by 11th July, 2019, the City shall transfer ownership of the birds to FOA no later than 5:00 pm, on 12th July, 2019.

As follows, Section 9 of the agreement outlines that if the aforementioned dates are not met:

9. In the event that FOA has failed to secure an alternate location by February 4, 2019 or fails to successfully complete the relocation by July 11, 2019, the FOA acknowledges that the City will commence relocation of the birds of the Aviary in consultation with the FOA and FOA acknowledges that all of its rights and responsibilities under this Agreement shall be terminated in accordance with the provisions of Paragraph 15 of this Agreement.

Attached to this email is the signed agreement between the FOA and the City of Hamilton and a brief chronology of events.

It is important to note that the facility at 85 Oak Knoll Drive that the FOA current operates in is owned by the Royal Botanical Gardens (RBG) through a lease agreement between the City and the RBG. This lease agreement has currently expired.

If you have any questions prior to the FOA group presenting at Public Works Committee Monday, please contact Sam Scarlett, Manager of Forestry and Horticulture at extension 3919.

Regards

Sam Scarlett
Manager, Forestry and Horticulture
Environmental Services
Office: (905) 546-2424 ext 3919
Cell: (905) 977-0407

THIS AGREEMENT MADE THIS ____ DAY OF _____, 2018.

BETWEEN

CITY OF HAMILTON
(hereinafter called the "City")

OF THE FIRST PART

-AND-

THE FRIENDS OF THE AVIARY
(hereinafter called the "FOA")

OF THE SECOND PART.

WHEREAS the City originally owned and operated an Aviary at the Dundurn Castle on York Boulevard in the City of Hamilton, Ontario which housed a mixed collection of birds owned by the City;

AND WHEREAS in 1996 the Aviary was moved to a building at 85 Oak Knoll Drive in the City of Hamilton, Ontario on lands owned by the Royal Botanical Gardens and leased to the City (the "Aviary");

AND WHEREAS the FOA has been managing the operation of the Aviary since the time it was located at Dundurn Castle and continued to operate the Aviary after its relocation to Oak Knoll Drive on a volunteer basis;

AND WHEREAS the City has deemed it prudent to close the Aviary effective November 2018;

AND WHEREAS FOA has expressed its desire to continue to operate the Aviary at an alternate location, to be determined;

AND WHEREAS the City has agreed that subject to FOA meeting a number of requirements as imposed by Council for the City of Hamilton ("City Council") and as reflected in this agreement, it is agreeable to transferring ownership of the birds of the Aviary to FOA effective July 12, 2019 for a fee of \$1.00;

NOW THEREFORE, this Agreement witnesses that, in consideration of the premises and the covenants contained herein, the parties agree with each other as follows:

OBLIGATIONS OF THE FRIENDS OF THE AVIARY

1. The FOA shall maintain an Active corporate status and comply with all of the provisions and obligations under the *Corporations Act*, R.S.O. 1990, CHAPTER C.38, and any Regulations made thereunder, for the duration of this Agreement including, at a minimum, until after such time as ownership of the birds of the Aviary are transferred to FOA and until any obligations stemming from such transfer are completed, if applicable, pursuant to the provisions of any future transfer agreement (the "Transfer").
2. The FOA shall comply with the provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), and the Regulations made thereunder. For greater certainty, unless FOA is recognized as a registered charity in good standing with the Government of Canada it shall not hold itself out as a charity or issue charitable receipts.
3. The FOA shall maintain in force throughout the duration of this Agreement, at its sole cost and expense including the payment of all deductibles, insurance in accordance with Schedule "A" to this Agreement.
4. The FOA shall defend, indemnify and hold harmless the City against, any and all claims, actions, suits, proceedings, costs, expenses, damages and liabilities, including reasonable attorney's fees and costs: (a) arising out of, connected with, or resulting from the FOA's use of the Aviary unless same are caused directly or

indirectly by any negligent act or omission of the City; or (b) arising from any breach by the FOA of any provision of this Agreement. The foregoing indemnity shall survive the termination of this Agreement notwithstanding any provision of this Agreement to the contrary.

5. The FOA agrees to manage and operate the Aviary, on a volunteer basis, until the termination of this Agreement as determined by Paragraph 15 herein.

6. The FOA agrees that its members will:

- a. Provide day to day care of the birds at the Aviary;
- b. Provide special care for birds of the Aviary that become ill, including the administering of medication as determined and directed by a veterinarian on an as needed basis;
- c. Provide transportation to and from veterinarian care on an as needed basis;
- d. Maintain standards of health, hygiene and living conditions for the birds of the Aviary at or above the minimum standards required by the Ontario Society of Prevention of Cruelty to Animals ("OSPAC") and its governing legislation the *Ontario Society of Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36, and the Regulations made thereunder;
- e. Use only recognized government approved products and application methods in the care of the birds;
- f. Continue to run the Aviary as a "closed" Aviary and not to accept any new birds into the Aviary or breed birds of the Aviary for the duration of this Agreement or, until the FOA have taken ownership of the birds and moved the Aviary to an alternate location;
- g. Maintain an inventory of the birds;
- h. Maintain financial records and provide a detailed accounting of expenditures to the City upon request;

- i. Take and follow any and all instructions/directions related to the Aviary or the birds of the Aviary from the Director of Environmental Services for the City or his or her designate; and
 - j. Provide a request for supplies to the Director of Environmental Services for the City on a monthly basis.
7. The FOA shall commence immediate efforts to secure an alternate location for the birds of the Aviary and shall report back to the Public Works Committee at the first meeting in February, 2019, scheduled for February 4, 2019, for the purpose of confirming the alternate location and confirming that the move to this location will be completed no later than July 11, 2019. For greater certainty, FOA shall provide the necessary information to staff no later than January 21, 2019 for review prior to the FOA report to the Public Works Committee on February 4, 2019.
8. Providing FOA has complied with all of the terms and provisions of this Agreement, including Paragraph 7 herein, and providing the birds have been relocated by July 11, 2019, the City shall transfer ownership of the birds to FOA not later than 5:00 p.m. on July 12, 2019. FOA shall take all steps and do all things necessary, including the execution of any Transfer agreements or documents as required, to accept legal ownership of the birds of the Aviary, in accordance with the terms and conditions of the said Transfer, which terms shall be as determined between the parties acting in good faith. For greater certainty, as a condition of the said Transfer, FOA shall agree to take the birds on an "as is" basis, to release the City from any and all liability, and to indemnify and hold the City harmless in relation to all matters arising from the City's previous ownership of the birds of the Aviary.
9. In the event that FOA has failed to secure an alternate location by February 4, 2019 or fails to successfully complete the relocation by July 11, 2019, the FOA acknowledges that the City will commence relocation of the birds of the Aviary in

consultation with the FOA and FOA acknowledges that all of its rights and responsibilities under this Agreement shall be terminated in accordance with the provisions of Paragraph 15 of this Agreement.

OBLIGATIONS OF THE CITY

10. The City shall continue to supply funds for food and other bird supplies, for the care of the birds of the Aviary within the limits of Council approved budget amounts.
11. The City shall be responsible for all costs associated with veterinary care and/or prescribed medications required for the birds of the Aviary, on an as needed basis.
12. The City shall continue to conduct regular inspections of the Aviary to ensure compliance with the terms of this Agreement, including the cleanliness of the Aviary and the well-being of the birds of the Aviary.

GENERAL

13. The Agreement between the City and the Friends of Dundurn Aviary dated May 27, 1992 is hereby cancelled and terminated.
14. Nothing in this Agreement creates an employment relationship between the members of FOA and the City and neither party will represent that it has any authority to assume or create any obligation of any nature or kind whatsoever on behalf of the other party, nor to represent the other party as agent or in any other capacity, except with the express permission of the other party.
15. This Agreement and all obligations thereunder shall be terminated as follows:

- a. Where City Council has agreed to transfer ownership of the birds of the Aviary to FOA in accordance with Paragraph 8 of this Agreement, on the earlier of:
 - i. The date on which all of the birds of the Aviary have been relocated from the Oak Knoll Drive location by FOA and the Transfer of ownership has been completed; or
 - ii. 5:00 p.m. on July 12, 2019.

- b. Where the birds of the Aviary are to be relocated by the City in accordance with Paragraph 9 of this Agreement, on the earlier of:
 - i. The date on which all of the birds of the Aviary have been relocated by the City, or
 - ii. A date not later than July 12, 2019 as specified in writing by the City, at its sole discretion, by providing notice to the FOA in accordance with the provisions of Paragraph 17 of this Agreement.

- c. Where the FOA fails to comply with any of its obligations or any of the terms and conditions contained herein to the satisfaction of the City acting reasonably, the City shall have the right to terminate this Agreement immediately upon notice to the FOA in accordance with the provisions of Paragraph 17. For greater certainty, any proposed Transfer of ownership of the birds to FOA shall be null and void upon termination of this Agreement under this subsection "c".

16. This Agreement shall not be assigned by either party without the prior written consent of the other party.

17. Any written notice, or any other thing to be given or delivered pursuant to this Agreement shall be deemed properly given if delivered personally or mailed by registered mail as follows:

- a. If given to FOA:

The Friends of the Aviary
c/o Kimberly O'Hare
P.O. Box 89071
Hamilton, ON L8S 4R5

b. If given to the City:

City of Hamilton
Attention: City Clerk
City Hall
71 Main Street West
P.O. Box 2040
Hamilton, ON L8N 3T4

c. At such other address of which the party to be notified has given written notice to the other party in accordance with the above.

d. Such notice shall be deemed to have been given at the time it was delivered when delivered personally, or three (3) days from the date of mailing where sent by registered mail. For greater certainty, personal delivery to the FOA shall be deemed effective when given to any of the directors or officers of FOA.

18. This Agreement constitutes the entire agreement between the parties and the parties agree that there are no other verbal or written statements, representations, warranties, covenants or agreements between the parties affecting the subject matter of this Agreement.

19. If any provision of this Agreement is determined to be unenforceable, invalid or in breach of any law by any tribunal, public body or court of competent jurisdiction for any reason whatsoever, the unenforceability or invalidity of such provision shall not affect the enforceability or validity of the remaining provisions of this Agreement and such unenforceable or invalid provision shall be severed from the remainder of this Agreement and as so modified this Agreement shall continue in full force and effect.

20. This Agreement may not be amended except in writing and signed by both parties.

The signature page follows.

IN WITNESS WHEREOF the parties hereto have hereunto affixed their corporate seals attested by the hands of their proper officers duly authorized in that behalf.

SIGNED, SEALED & DELIVERED
In the Presence of:

THE FRIENDS OF THE AVIARY
Per:



Witness Name: Chantale Gauthier



Name: Kimberly O'Hare
Title: Director
Date: 11 June 2018



Witness Name: Chantale Gauthier



Name: Sherry Houston
Title: Secretary
Date: 11 June 2018



Witness Name: Chantale Gauthier



Name: Lisa Houston
Title: Vice Chair
Date: June 11 18



Witness Name: Chantale Gauthier



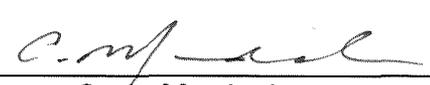
Name: Melonie Suckale
Title: Chair
Date: June 11 / 18
We have authority to bind the Corporation.

CITY OF HAMILTON

Per:

APPROVED
AS TO FORM

LEGAL SERVICES


Name: Craig Murdoch

Title: Director of Environmental Services

Date:

Schedule "A"- Insurance Requirements

The FOA shall obtain and maintain insurance in accordance with the following provisions:

- a. Commercial general liability and property damage insurance covering against any and all claims for bodily injury, including death, personal injury, and property damage or loss, including acts or omissions of the FOA, its volunteers, employees, contractors, sub-contractors, agents and invitees and in a form and with an insurance company acceptable to the City. Such policies of insurance shall include, but not be limited to the following: all risk tenant's legal liability, land and premises liability; occupier's liability; blanket contractual liability; owners and contractors liability; non-owned automobile liability; cross-liability and severability of interest provisions. FOA shall maintain Property Insurance, as may be applicable, with respect to loss or damage (including fire, theft, burglary, etc.) of its own property and property in its care, custody and control.
- b. Such policies of insurance shall have a limit of coverage of not less than Two Million Dollars (\$2,000,000.00) per occurrence and Four Million Dollars (\$4,000,000.00) in the aggregate or such higher limits as the City, acting reasonably and prudently, may from time to time require.
- c. Such policies and certificates shall name as an additional insured the City of Hamilton and Royal Botanical Gardens.
- d. Such policies shall also require at least thirty (30) days' written prior notice of any change to or amendment, cancellation, expiration or termination of the coverage under such policies to be given to the City and be in a form satisfactory to the City.

- e. All insurers shall be licensed to do business in Ontario, and such insurers and the insurance coverages shall be acceptable to the City acting reasonably and prudently.
- f. The FOA shall deliver to the City certificates of insurance originally signed by authorized insurance representatives, or, if required by the City certified copies of such policies prior to the execution of this Agreement and for all renewals thereafter during the Term of this Agreement no later than sixty (60) days prior to their renewal date and at any other time upon request by the City. Certificate Holder will be addressed as City Of Hamilton, City Hall, 71 Main Street West, Hamilton, Ontario L8P 4Y5.
- g. All insurance coverages to be provided by the FOA herein shall be primary and not call into contribution any other insurance coverages available to the City and such coverage shall preclude subrogation claims against the City and any other person insured under the policy.
- h. Insurance requirements and coverage herein shall not limit, reduce, or waive any of the FOA's obligations to indemnify the City pursuant to this Agreement herein or the liabilities assumed by the FOA under this Agreement. The FOA shall not do or omit to do anything that may breach, limit, restrict, or prejudice the terms or conditions of the insurance coverages referred to herein.

Aviary - Chronology of Events

EVENTS	DATE
CoH oversees Aviary operations, managed by FOA. City provides building, building maintenance, food, cleaning & operational supplies and pays veterinarian care. Last agreement in 1992. Current location at Churchill Park since 1995.	1992
Aviary included in Gage Park Masterplan	2010
Council direction not to build Aviary at Gage Park.	2013
Order issued by OSPCA - resolve rodent issue, install full spectrum lighting (\$7500)	22-Aug-17
City Management Staff do deep clean of aviary due to FOA volunteer issues. (65 Birds)	July , 2017
Animal Control request to assist with strategies to ensure maintenance standards at the Aviary, assist with leading volunteers in interim	Aug, 2017
Notice to FOA - Team Leader (Horticulture/Animal Control Staff) will be present to oversee activities of the volunteers. 7 days/week 9-12pm	23-Aug-17
Report by City Staff to PW Committee (PW17080)	16-Oct-17
Notice sent to FOA from CoH Staff to attend PW Committee to present their plan at the Nov 13, 2017 meeting	18-Oct-17
FOA address PW Committee, request time to re-locate. Request granted to June 30, 2018 to confirm location. Move completed by Nov 22, 2018	13-Nov-17
Extension for FOA to report back to PW Committee with a plan, granted from June 30, 2018 to first meeting in Feb, 2019	30-Apr-18
Manager F&H works with Legal for new agreement with City & FOA. New agreement presented to FOA and signed by both CoH and FOA.	11-Jun-18
FOA provide information outlined in agreement to staff prior to PWC	Jan 21st, 2019
FOA to report back to PWC	Feb 4th, 2019
<i>Deadline for FOA to move to new location</i>	<i>July 11th, 2019</i>
<i>City to FOA bird transfer</i>	<i>July 12th, 2019</i>