**Agenda – Council – June 25, 2014**

**Report – Standing Policy Committee on Property and Development – June 10, 2014**

**Item No. 4 Approval for "Enter to Construct" Agreements for Panet Road / Molson Street Reconstruction and Twinning and Other Situations**

STANDING COMMITTEE RECOMMENDATION:

On June 18, 2014, the Executive Policy Committee concurred in the recommendation of the Standing Policy Committee on Property and Development submitted the following to Council:

1. That the City enter into "enter to construct" agreements authorizing the City to enter upon properties shown on the map attached as Schedule A on Panet Road and Molson Avenue between Munroe Avenue and Kimberley Avenue for the purposes of commencing construction on the Panet Road/Molson Street Reconstruction and Twinning Project approved by Council in the 2013 Capital Budget pending acquisition of said properties.

2. That the Chief Administrative Officer be authorized to negotiate and approve the terms and conditions of the "enter to construct" agreements referred to in Recommendation 1, including:

    A. the grant of releases and indemnities in favour of the property owners;

    B. undertakings that the City will, at its sole cost, effort and expense, return the properties to their original condition in the event that the transfer of title to said properties to the City is not finalized;

    C. such other terms and conditions deemed necessary by the City Solicitor / Director of Legal Services to protect the interests of the City.

3. That the Chief Administrative Officer be authorized to negotiate and approve other "enter to construct" agreements which allow the City to enter non-City properties with the above-noted terms and conditions in the following circumstances:

    A. the project for which entry and construction is proposed has been approved by Council, or a Standing Policy Committee with authority to do so;

    B. the budget approved for the project is sufficient to absorb the costs of returning the land to its original condition if the property is not acquired by the City;

C. the department seeking the authority to enter to construct provides a cost-benefit analysis that clearly demonstrates that the benefits outweigh the costs for entering prior to property acquisition;

D. the Chief Administrative Officer concludes that the risks of waiting until acquisition is complete exceed the risks of entering to construct prior to acquiring the property.

4. That the Chief Administrative Officer be authorized to negotiate and approve "enter to construct" agreements which would allow other parties to enter City properties in the following circumstances:

A. Council must have declared the land surplus or have authorized the sale of the land or an easement or other interest in the land which would allow the entry to construct on that land;

B. The Public Service must have negotiated the terms and conditions of the sale of the land, or an easement or other interest in the land;

and on condition that the party seeking to enter to construct must:

C. Meet insurance requirements certified by the City's Corporate Risk Manager to be adequate to protect the City's interests;

D. Provide an executed release and indemnity in a form certified by the Director of Legal Services and City Solicitor to be adequate to protect the City's interests;

E. Undertake, at its sole cost, effort and expense, to return the property to its original condition in the event that the sale is not finalized;

F. Prior to entry, provide a letter of credit or performance bond in the City's favour in an amount that is equal to or greater than the cost that would have to be incurred to return the land to its pre-entry condition that can be drawn on by the City in the event that the sale is not finalized;

G. Meet any other term or condition considered necessary by the Director of Legal Services and City Solicitor to adequately protect the interests of the City.

**Report - Standing Policy Committee on Property and Development – June 10, 2014**

5. That the proper officers of the City do all things necessary to carry out the intent of the foregoing.

**Report – Standing Policy Committee on Property and Development – June 10, 2014**

DECISION MAKING HISTORY:

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On June 18, 2014, the Executive Policy Committee concurred in the recommendation of the Standing Policy Committee on Property and Development and submitted the matter to Council.

STANDING COMMITTEE RECOMMENDATION:

On June 10, 2014, the Standing Policy Committee on Property and Development concurred in the recommendation of the Winnipeg Public Service and submitted the matter to the Executive Policy Committee and Council.

# ADMINISTRATIVE REPORT

**Title:** **Approval for "Enter to Construct" Agreements for Panet Road / Molson Street Reconstruction and Twinning and Other Situations**

**Critical Path:** **Standing Policy Committee on Property and Development**
**Executive Policy Committee**
**Council**

## AUTHORIZATION

| Author | Department Head | CFO | CAO |
|---|---|---|---|
| J. Zabudney | B. Thorgrimson | n/a | D. Joshi<br>A/CAO |

## RECOMMENDATIONS

1. That the City enter into "enter to construct" agreements authorizing the City to enter upon properties shown on the map attached as Schedule A on Panet Road and Molson Avenue between Munroe Avenue and Kimberley Avenue for the purposes of commencing construction on the Panet Road/Molson Street Reconstruction and Twinning Project approved by Council in the 2013 Capital Budget pending acquisition of said properties.

2. That the Chief Administrative Officer be authorized to negotiate and approve the terms and conditions of the "enter to construct" agreements referred to in Recommendation #1, including

H. the grant of releases and indemnities in favour of the property owners;
I. undertakings that the City will, at its sole cost, effort and expense, return the properties to their original condition in the event that the transfer of title to said properties to the City is not finalized;
J. such other terms and conditions deemed necessary by the City Solicitor / Director of Legal Services to protect the interests of the City.

3. That the Chief Administrative Officer be authorized to negotiate and approve other "enter to construct" agreements which allow the City to enter non-City properties with the above-noted terms and conditions in the following circumstances:

E. the project for which entry and construction is proposed has been approved by Council, or a Standing Policy Committee with authority to do so;
F. the budget approved for the project is sufficient to absorb the costs of returning the land to its original condition if the property is not acquired by the City;

G. the department seeking the authority to enter to construct provides a cost-benefit analysis that clearly demonstrates that the benefits outweigh the costs for entering prior to property acquisition;
H. the Chief Administrative Officer concludes that the risks of waiting until acquisition is complete exceed the risks of entering to construct prior to acquiring the property.

4. That the Chief Administrative Officer be authorized to negotiate and approve "enter to construct" agreements which would allow other parties to enter City properties in the following circumstances:

K. Council must have declared the land surplus or have authorized the sale of the land or an easement or other interest in the land which would allow the entry to construct on that land;
L. The Public Service must have negotiated the terms and conditions of the sale of the land, or an easement or other interest in the land;

and on condition that the party seeking to enter to construct must:

M. Meet insurance requirements certified by the City's Corporate Risk Manager to be adequate to protect the City's interests;
N. Provide an executed release and indemnity in a form certified by the Director of Legal Services and City Solicitor to be adequate to protect the City's interests;
O. Undertake, at its sole cost, effort and expense, to return the property to its original condition in the event that the sale is not finalized;
P. Prior to entry, provide a letter of credit or performance bond in the City's favour in an amount that is equal to or greater than the cost that would have to be incurred to return the land to its pre-entry condition that can be drawn on by the City in the event that the sale is not finalized;
Q. Meet any other term or condition considered necessary by the Director of Legal Services and City Solicitor to adequately protect the interests of the City.

5. That the proper officers of the City do all things necessary to carry out the intent of the foregoing.

## REASON FOR THE REPORT

Council approval is required before the City can enter into the "enter to construct" agreements proposed in this report.

## IMPLICATIONS OF THE RECOMMENDATIONS

Recommendation #1:

This project involves converting a two-lane undivided rural-type road into an urban divided four-lane road. It involves the relocation of overhead Hydro lines, the burial of MTS lines, the reconstruction and widening of the CP Rail Crossing, the installation of new land drainage sewers, the addition of bike lanes and sidewalks, and proper channelization of the intersection with Concordia. Property is required for the addition of right turn cut-offs at the

Molson/Concordia intersection, for the installation of the land drainage sewer on Molson, for the relocation of an overhead hydro line, and for a sidewalk. There are also some drainage easements required.

As noted below, Council has approved the Panet Road / Molson Avenue Reconstruction and Twinning Project as part of the Capital Budget. Acquisition of the necessary strips of land, as shown on the map attached as Schedule A, is proceeding.

However, while there are still no significant problems anticipated in the acquisition of the land, the process may take months to finalize. In order for construction of Phase 1 to proceed in the 2014 construction season, it is necessary to begin construction prior to the land being acquired. Contracts have already been entered into for the 2014 season and coordination with various utilities is predicated on proceeding in 2014. A failure to proceed until all the land is acquired could expose the City's contractual partners to significant costs and in turn could expose the City to the possibility of significant liability – perhaps up to $1.0 million or more.

In addition, if construction is delayed, there would be significant disruptive impacts on the neighbourhood and on traffic on Panet Road and Molson Avenue. These would be particularly severe if construction of Phase 2 (Surfacing Works) cannot be completed until 2015. In that event, traffic delays and the existence of an uncompleted construction project would continue throughout the winter months.

On the other hand, the risks of proceeding prior to acquisition of the properties are limited. First, there is no reason to anticipate any significant problems in acquiring the strips of land required. As noted in a Report provided to the Standing Policy Committee on Infrastructure Renewal and Public Works on February 4, 2014:

> *There has not been an expropriation report prepared as expropriation is not anticipated to be necessary. The reason for this is the majority of affected owners have been well-briefed on the project over the course of 2013 through in-person meetings with the project consultant as well as an open house. The community acknowledges this project will offer a significant improvement for all the owners, increasing public safety for pedestrians, vehicles, bicyclists and transit users), aesthetics, and as well improve private access. This project is considered desirable by the adjacent land owners and community. Discussions to date have been all positive and there does not appear to be any opposition to the necessary land acquisitions and drainage easements from the private owners.*

Second, even if there was an impasse as to the purchase of the land, Council could proceed to expropriate. Moreover, at this point, the chance of the project being cancelled – with the result that the land would have to be restored to its original condition at City expense – is highly limited.

Accordingly, because the risks of delaying are substantial and almost certain, while the risks of proceeding immediately are minimal, this Report recommends proceeding with construction on the basis of an "enter to construct" agreement being entered into with the affected property owners

Recommendation #2:

From the perspective of a property owner, an “enter to construct” agreement should include at least two key features:

- a release and indemnity by which the City agrees not to make any claim against the property owner for harm that the owner may suffer as a consequence of entering and constructing, and commits to protecting the property owner from claims made against him, her or it for harm occasioned by the City entering and constructing.
- A commitment by the City to restore the property to its original condition if the transfer of the land does not take place.

Recommendation #2 is seeking authorization for the CAO to negotiate and approve “enter to construct” agreements containing these key terms, as well as other terms typical of such agreements, for the Panet Road / Molson Avenue project.

Recommendation #3:

This Report is the second in recent months seeking Council approval for “enter to construct” agreements. (The first was related to the Polo Park Infrastructure Improvements Project.) Other similar situations exist which would also have to be brought to Council for approval if Recommendation #3 is not approved.

Preparing such a report and having it approved typically takes weeks or even months and can have a delaying effect on construction. Accordingly, rather than bringing numerous reports to Council or a Standing Policy Committee and seeking approval in all such situations, this Report recommends that Council authorize the CAO to negotiate and approve “enter to construct” agreements.

The CAO’s authority would be contingent on the following specified conditions being present:

- The specific project for which entry to construct is sought must have been approved by Council or a Standing Policy Committee authorized to do so. The CAO would not be allowed to approve “enter to construct” agreements prior to Council or a Standing Policy Committee with delegated authority authorizing the program.

- Second, the budget approved as part of the project must be adequate to meet one of the key commitments in an “enter to construct” agreement – the commitment to restore the land to its original condition if the transfer of land never takes place. (This could happen if, for example, the City were to change its mind and not follow through on the project or if it was determined to be possible to proceed with the project without acquiring the specific land in question.)

- Third, there must be a thorough cost-benefit analysis done of the possibility of entering to construct prior to the property being acquired through purchase or expropriation. Such an analysis should obviously include the financial risks to the City in proceeding prior to acquisition as opposed to the financial risks of waiting, but should include other non-financial risks as well. For example, as with the Panet Road/Molson Street project, the disruptive effects of delay on residents and traffic should be taken into account.

- Finally, the CAO must form the conclusion that the costs of waiting until acquisition is finalized outweigh the costs of proceeding with construction prior to acquisition.

Recommendation #4:

This report also contemplates situations in which the City is in the process of selling a property or an interest in a property and the purchaser wishes to enter to construct on the property prior to the finalization of the sale. Recommendation #4 would permit this to be done without additional reference to Council only if:

- Council had already declared the land surplus or approved the sale of the land or the interest in the land and the sale, once completed, would permit the entry to construct on that land; and
- The Public Service had already negotiated with the purchaser the basic terms of the sale or interest in the land.

Assuming these two circumstances exist, this recommendation would permit an agreement authorizing the purchaser to enter to construct prior to the finalization of the sale on the conditions mentioned. The key condition is that the purchaser must restore the land to its pre-entry condition in the event that the sale is not finalized. A performance bond or letter of credit sufficient to cover these costs would ensure that the City restore the land itself if necessary.

In addition, the purchaser must do the following:

- Meet insurance requirements certified by the City's Corporate Risk Manager to be adequate to protect the City's interests;
- Provide an executed release and indemnity in a form certified by the Director of Legal Services and City Solicitor to be adequate to protect the City's interests;
- Meet any other term or condition considered necessary by the Director of Legal Services and City Solicitor to adequately protect the interests of the City.

## HISTORY

On January 29, 2013, Council adopted the 2013 Capital Budget which included the Panet Road/Molson
Street Twinning – Munroe Avenue to Grassie Boulevard project for the preliminary and detail design. On December 17, 2013, Council adopted the 2014 Capital Budget that added $2,600,000 to the Panet
Road/Molson Street Twinning – Munroe Avenue to Grassie Boulevard project budget. On February 4, 2014, the Standing Policy Committee on Infrastructure Renewal and Public Works approved awarding the contract to Bayview Construction Ltd. for both Part 1 (Underground Works) and Part 2 (Surface Works) of the project. The report provided to the Standing Policy Committee included a map showing the properties that would be affected and identified the specific lands that would need to be purchased in order to complete the project. It also provided an update on the status of the acquisition process.

## FINANCIAL IMPACT

## Financial Impact Statement May 5, 2014

## Project Name:

**Approval for "Enter to Construct" Agreements for Panet Road / Molson Street Reconstruction and Twinning and Other Situations**

**COMMENTS:**

There are no direct financial implications associated with the recommendations contained in this report.

"Original Signed By"
Mike McGinn, CA
Manager of Finance

## CONSULTATION

**In preparing this report there was consultation with:**

Real Estate Division, Planning, Property and Development Department
Transportation Engineering Division, Public Works Department

## SUBMITTED BY

Department: Planning, Property and Development
Division: Real Estate
Prepared by: Barry Lucyk
Date: May 7, 2014
File No.

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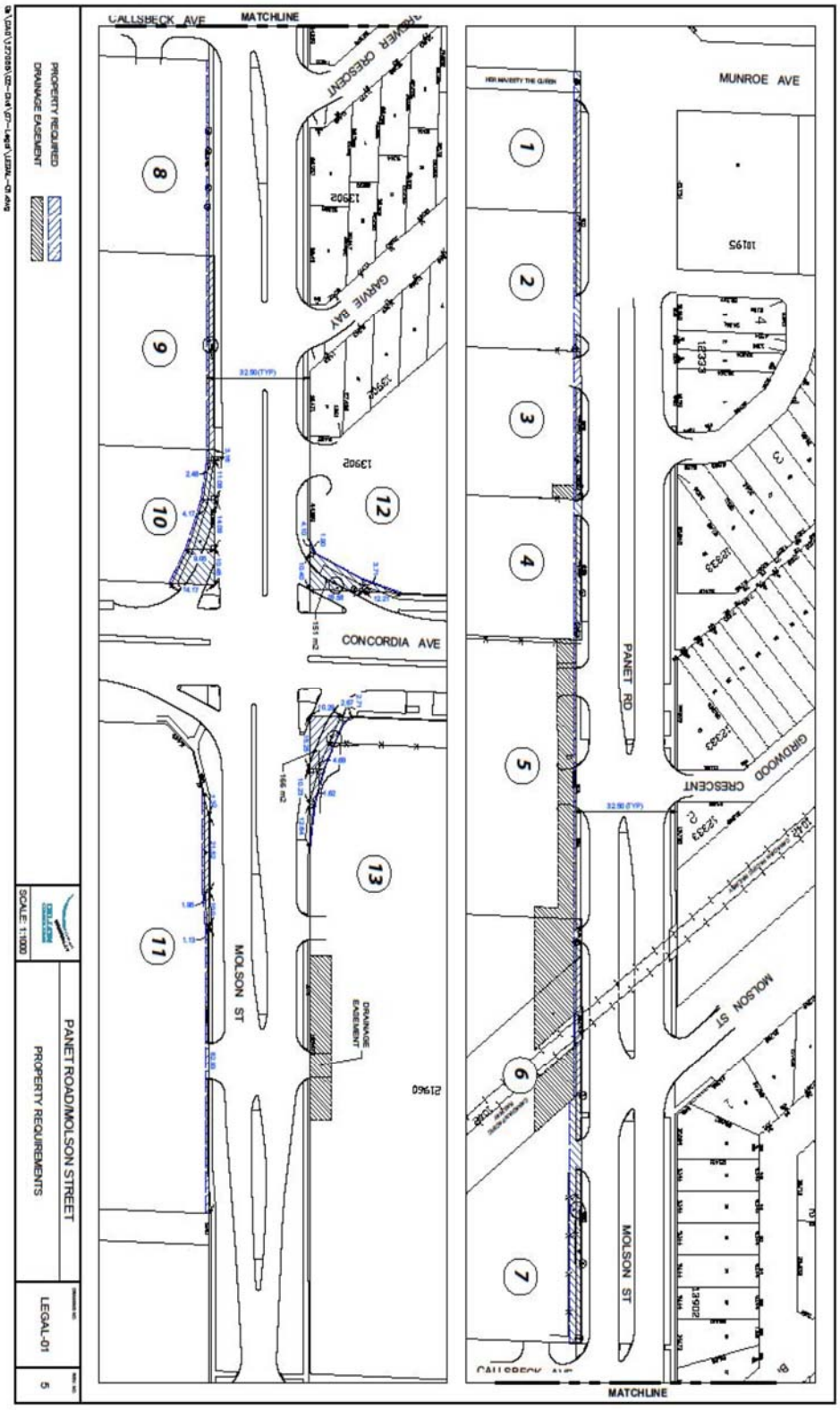
Schedule 'A'



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MUNROE AVE
GARVIE BAY
CONCORDIA AVE
PANET RD
GIRDWOOD CRESCENT
MOLSON ST
DRAINAGE EASEMENT
PROPERTY REQUIRED
DRAINAGE EASEMENT
PANET ROAD/MOLSON STREET
PROPERTY REQUIREMENTS
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