Minute No. 83
Report – Executive Policy Committee – December 7, 2016

Item No. 5 CN Rail Cost Apportionment – Waverley Street at CN Mainline (Rivers) Grade Separation

COUNCIL DECISION:

Council concurred in the recommendation of the Executive Policy Committee and adopted the following:

1. That a cost-sharing arrangement for CN Rail to pay the City $9,500,000.00 as their cost apportionment for the "Waverley Street at CN Mainline (Rivers) Grade Separation" capital project be approved.

2. That the funding identified in Recommendation 1 be used as a part of the City of Winnipeg's portion of project funding for the Waverley Underpass Project (ID#1805001413).

3. That the City enter into, execute and deliver a Crossing Agreement with CN Rail and such other agreements as determined necessary by the Director of Legal Services and City Solicitor to implement the intent of the foregoing (the "Ancillary Agreements").

4. That authority be delegated to the Chief Administrative Officer to negotiate and approve the terms and conditions of the Crossing Agreement and the Ancillary Agreements, in accordance with this report and such other terms and conditions deemed necessary by the Director of Legal Services and City Solicitor to protect the interests of the City.

5. That the Proper Officers of the City do all things necessary to implement the intent of the foregoing.

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DECISION MAKING HISTORY:

Moved by His Worship Mayor Bowman,
That the recommendation of the Executive Policy Committee be adopted.

Moved by Councillor Wyatt,
Seconded by Councillor Lukes,

That Item No. 5 of the Report of the Executive Policy Committee dated December 7, 2016 be referred back to the Executive Policy Committee with the following instructions:

That the item be referred to the Winnipeg Public Service for report back within 30 days to Executive Policy Committee, and that the Winnipeg Public Service be required to provide a full and detailed written report, in terms of, but not limited to, the following:

1) A copy of and a detailed description of the legal agreement between the rail authority and the COW as referred to in the extract from the administrative report re: 1930's;

   While every grade separation project is unique, the CTA guidelines for cost apportionment suggest that, for applicable City costs related to grade separation primarily due to road development, 85% be apportioned to the Road Authority, and 15% to the Rail Authority. In the present case, CN Rail has an additional obligation due to the existence of a legal agreement entered into by the City and CN Rail's predecessors, The Canadian Northern Railway Company and The Grand Trunk Pacific Railway Company, in 1930, which was ratified by Council as By-law 13988 on July 7, 1930. This agreement required that CN Rail construct a 50 foot wide two-lane overhead bridge structure including two 5 foot sidewalks at Waverley Street. Over the years, land development in the area and increased traffic demand at this site has resulted in a two-lane overhead bridge not being a feasible means of grade separation. Nonetheless, the existence of this agreement obligates CN to bear a more significant cost apportionment for the present project. The negotiated settlement reflects the change from an overhead bridge to an underpass due to land development as well as an expanded facility to accommodate five traffic lanes and two active transportation paths across the CN right-of-way.

2) An explanation, as well as the rational used, why the rail authority is not being required to pay for the grade separation as defined today, as the obligation was equally defined to be the financial responsibility of the rail authority in 1930's, now in light of the fact that a legal agreement setting such a precedent exists in the case of the Waverley crossing;

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DECISION MAKING HISTORY (continued):

3) And further provide an explanation why, when such an existing legal agreement is in favour of the rail authority and not the roads authority, the rail authority always ensures any settlement, in such a scenario would reflect said fact, and why the roads authority, in this case the City of Winnipeg, does not use the same legal and financial position to protect the ratepayers of Winnipeg.

The motion moved by Councillor Wyatt and seconded by Councillor Lukes was put.

Councillor Wyatt called for the yeas and nays as follows:

Yea: Councillors Dobson, Lukes, Schreyer, Wyatt and Sharma. 5

Nay: His Worship Mayor Bowman, Councillors Allard, Browaty, Eadie, Gerbasi, Gillingham, Gilroy, Mayes, Morantz, Orlikow and Pagtakhan. 11

and the motion moved by Councillor Wyatt and seconded by Councillor Lukes was declared lost.

The motion for adoption of the item was put.

Councillor Wyatt called for the yeas and nays as follows:

Yea: His Worship Mayor Bowman, Councillors Allard, Browaty, Gerbasi, Gillingham, Gilroy, Mayes, Morantz, Orlikow, Pagtakhan and Sharma. 11

Nay: Councillors Dobson, Eadie, Lukes Schreyer and Wyatt. 5

and the motion for adoption of the item was declared carried.

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On December 7, 2016, the Executive Policy Committee concurred in the recommendation of the Winnipeg Public Service and submitted the matter to Council.

ADMINISTRATIVE REPORT

Title: CN Rail Cost Apportionment – Waverley Street at CN Mainline (Rivers) Grade Separation

Critical Path: Executive Policy Committee – Council

AUTHORIZATION

Author	Department Head	CFO	CAO
B. Neirinck, P. Eng.	L. Escobar, P. Eng., PTOE for L. Deane	M. Ruta	D. McNeil

EXECUTIVE SUMMARY

Cost apportionment between the City and CN Rail for construction of the basic grade separation portion of the Waverley Underpass Project is subject to negotiation between the two parties.

A basic grade separation is defined as that portion of the work that is required to provide present day needs at the time of construction or reconstruction of the grade separation. That is, CN Rail is not required to pay for enhancements or for other project work being undertaken outside the scope of work required to achieve grade separation of the railway and roadway.

Negotiations were based on the Canadian Transportation Agency ("CTA") guidelines for determining cost apportionment as well as a 1930 Agreement between the City and CN's predecessors, The Canadian Northern Railway Company and The Grand Trunk Pacific Company, whereby the City allowed a number of street closures in exchange for certain improvements including certain obligations for a grade separation at Waverley Street.

The cost apportionment and detailed terms are also subject to executive approval from CN Rail, which was provided to the City on October 26, 2016. Once this cost apportionment is ratified by both parties, the City and CN will enter into a Crossing Agreement which will define the construction and maintenance terms for the grade separation including this cost apportionment. The Crossing Agreement will be filed with the CTA.

The current capital budget for the Waverley Street at CN Mainline (Rivers) Grade Separation project ("Waverley Underpass project") is sufficient. The funding derived under this cost-sharing arrangement with CN Rail represents a new source of City funding for the Waverley Underpass project. The Federal and Provincial Governments have advised that any funding obtained from CN for the project will go to offset the City's portion of the project funding and will not affect their contributions.

RECOMMENDATIONS

1. That Council approve a cost-sharing arrangement for CN Rail to pay the City $9,500,000.00 as their cost apportionment for the “Waverley Street at CN Mainline (Rivers) Grade Separation” capital project.

2. That the funding identified in Recommendation 1 be used as a part of the City of Winnipeg’s portion of project funding for the Waverley Underpass Project (ID#1805001413).

3. That the City enter into, execute and deliver a Crossing Agreement with CN Rail and such other agreements as determined necessary by the City Solicitor/Director of Legal Services to implement the intent of the foregoing (the “Ancillary Agreements”).

4. That authority be delegated to the Chief Administrative Officer to negotiate and approve the terms and conditions of the Crossing Agreement and the Ancillary Agreements, in accordance with this report and such other terms and conditions deemed necessary by the City Solicitor/Director of Legal Services to protect the interests of the City.

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

REASON FOR THE REPORT

Council approval is required to approve cost-sharing arrangements, enter into legal agreements, and amend project budgets.

IMPLICATIONS OF THE RECOMMENDATIONS

The lump sum payment to be made by CN Rail will be paid in annual installments based on the estimated percent completion of the basic grade separation work to the maximum lump sum identified.

The additional funding of $9.5 Million to be received from CN Rail will be used to reduce external debt issued on this project by $9.5 Million.

HISTORY / DISCUSSION

On January 29, 2013 Council adopted the 2013 Capital Budget which included $1,200,000 for Preliminary Engineering, Study, and Public Consultation for the Waverley Street at CN Mainline (Rivers) Grade Separation project.

On March 22, 2016 Council adopted the 2016 Capital Budget which included $155,082,000 for the remaining total project costs including construction of the Waverly Street at CN Mainline (Rivers) Grade Separation project for a total capital budget of $156,282,000.

Cost apportionment between the City and CN Rail for construction or reconstruction of basic grade separations is subject to negotiation between the two parties. Guidelines for

apportionment of costs are available from the Canada Transportation Agency ("CTA") to assist as a starting point in the negotiations. Under the Canadian Transportation Act, the CTA is responsible for making binding cost apportionment decisions where the parties involved cannot reach agreement; a process that takes a minimum of 6 months and up to several years to complete. Where parties have difficulty reaching a settlement, the CTA offers non-binding mediation services to assist the parties in reaching a settlement.

While every grade separation project is unique, the CTA guidelines for cost apportionment suggest that, for applicable City costs related to grade separation primarily due to road development, 85% be apportioned to the Road Authority, and 15% to the Rail Authority. In the present case, CN Rail has an additional obligation due to the existence of a legal agreement entered into by the City and CN Rail's predecessors, The Canadian Northern Railway Company and The Grand Trunk Pacific Railway Company, in 1930, which was ratified by Council as By-law 13988 on July 7, 1930. This agreement required that CN Rail construct a 50 foot wide two-lane overhead bridge structure including two 5 foot sidewalks at Waverley Street. Over the years, land development in the area and increased traffic demand at this site has resulted in a two-lane overhead bridge not being a feasible means of grade separation. Nonetheless, the existence of this agreement obligates CN to bear a more significant cost apportionment for the present project. The negotiated settlement reflects the change from an overhead bridge to an underpass due to land development as well as an expanded facility to accommodate five traffic lanes and two active transportation paths across the CN right-of-way.

If the cost apportionment is not accepted by either party, the next step would be the CTA adjudication process. As noted above that process will take a minimum of 6 months to complete but could take several years thus delaying the project. The CTA decision would be binding to both parties and there is no guarantee they will rule in favor of either party. Project funding from Infrastructure Canada is contingent on the City entering into a Crossing Agreement with CN who will not enter into that agreement without their cost apportionment decided.

FINANCIAL IMPACT

Financial Impact Statement

Date: October 19, 2016

Project Name: **First Year of Program** **2016**

CN Rail Cost Apportionment – Waverley Street At CN Mainline (Rivers) Grade Separation

	2016	2017	2018	2019	2020
Capital					
Capital Expenditures Required	$ -	$ -	$ -	$ -	$ -
Less: Existing Budgeted Costs	-	-	-	-	-
Additional Capital Budget Required	$ -	$ -	$ -	$ -	$ -
Funding Sources:					
Debt - Internal	$ -	$ -	$ -	$ -	$ -
Debt - External	(9,500,000)	-	-	-	-
Grants (Enter Description Here)	-	-	-	-	-
Reserves, Equity, Surplus	-	-	-	-	-
Other - CN Rail Cost Sharing Agreement	9,500,000	-	-	-	-
Total Funding	$ -	$ -	$ -	$ -	$ -
Total Additional Capital Budget Required	$ -				
Total Additional Debt Required	$ (9,500,000)				
Current Expenditures/Revenues					
Direct Costs	$ -	$ -	$ -	$ -	$ -
Less: Incremental Revenue/Recovery	-	-	-	-	-
Net Cost/(Benefit)	$ -	$ -	$ -	$ -	$ -
Less: Existing Budget Amounts	-	-	-	-	-
Net Budget Adjustment Required	$ -	$ -	$ -	$ -	$ -

Additional Comments: The total estimated cost of the Waverley Street at CN Mainline (Rivers) Grade Separation (Public Works Capital Project #1805001413) will remain at $156,282,000. Federal and Provincial funding contributions will remain the same. The additional funding from CN Rail will be used to reduce the external debt issue on this project.

"Original signed by J. Ruby, CPA, CA"
Jason Ruby, CPA, CA
Manger of Finance and Administration

CONSULTATION

In preparing this Report there was consultation with: N/A

OURWINNIPEG POLICY ALIGNMENT

N/A

SUBMITTED BY

Department: Public Works
Division: Engineering
Prepared by: C. Ward, P. Eng., Bridge Projects Engineer
B. Neirinck, P. Eng., Manager of Engineering
Date: October 26, 2016