



memorandum

DATE: August 27, 2014

TO: Mayor and Members of Council

FROM: MaryLee Farrugia
Commissioner of Legal & Administrative Services/City Solicitor

RE: **COMMUNICATION – COMMITTEE OF THE WHOLE – SEPTEMBER 2, 2014**
ITEM No. 54

c.b.
Communication
CW: <u>Sept 2/14</u>
Item: <u>54</u>

Please find attached to this Communication the “*Key Terms Position Comparison Matrix*” which is Attachment No. 3 of Item No. 54 on the Agenda:

Vaughan Healthcare Precinct Update
Cost Sharing Agreement and Site Servicing Tender
Ward 1

Also please note that under the “*Attachments*” section of Item No. 54, the reference to “v11” for “*Attachment No. 4 – Vaughan Healthcare Centre Implementation Plan*” should be changed to “v10”.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MaryLee Farrugia', written over a horizontal line.

MaryLee Farrugia
Commissioner of Legal & Administrative Services/City Solicitor

Attachment

cc: Barb Cribbett, Interim City Manager
Paul Jankowski, Commissioner of Public Works
Jeffrey Abrams, City Clerk

Draft Cost-Sharing Agreement
Between
The City of Vaughan (the "City") and Mackenzie Health (the "Hospital")

Position Comparison: Key Terms
(Prepared August 23, 2014)

Term		City of Vaughan (the "City") Position	Mackenzie Health (the "Hospital") Position
1. Infrastructure Plan and Infrastructure Costs		Agreed.	Agreed.
Refers to the site preparation and construction of roads and services to support the development of the 82-acre Precinct. The City is solely responsible for the construction of the Works (in two phases). Infrastructure Costs are estimated at \$31.3 million (excluding a future phase related to the Highway 400 Off-Ramp). The City will front-end the Infrastructure Costs and the Hospital will reimburse the City for its Proportionate Share.			
2. Shared Services and Shared Costs		Agreed.	Agreed.
- Refers to the site services and road system within the Infrastructure Plan intended to serve both the Hospital Lands and the Remainder Lands, and the associated cost. - Shared Costs are calculated to be \$27.7 million out of \$31.3 million of Infrastructure Costs.			
3. Developable Density		Agreed.	Agreed.
Defined as "1,980,000 square feet of developable floor area ("DFA") of which approximately 1,200,000 square feet of DFA is expected to be devoted to the Hospital Project".			
4. Amendments to the Infrastructure Plan		Project schedule will be at risk if delay results from required approval by Hospital. Dispute resolution available as a remedy for Hospital.	Hospital must approve changes to costs or schedule.
- From time to time, the City may need to amend the Infrastructure Plan to reflect a change in estimated costs related to the Shared Services. The City will notify the Hospital in the event of the following: a. a 10% increase or decrease in the estimated amount for Shared Costs; or, b. the anticipated date for substantial performance for completion of the Works has substantially changed.			

Term	City of Vaughan (the "City") Position	Mackenzie Health (the "Hospital") Position								
5. Cost-Sharing - Overall cost efficiency and risk mitigation shall be fundamental goals; - Only the costs of Shared Services shall be shared by the Parties; - Infrastructure Costs attributable solely to the development of the Remainder Lands shall be the responsibility of the City alone; - Shared Costs will be shared by the Parties proportionately on an area (DFA) basis or on a flow or volume basis; and, - The City is entitled to implement the Infrastructure Plan in accordance with the City's policies and practices respecting procurement and contract administration.	Agreed.	Agreed.								
6. Calculation of Proportionate Shares - The Proportionate Shares will be calculated as follows: - For Shared Costs allocated on an area basis: - The Proportionate Share for the Hospital will be 61% calculated on the Hospital's expected DFA of 1,200,000 square feet as a percentage of the total DFA of 1,980,000 square feet; and, - The Proportionate Share for the City will be 39% calculated on the DFA of the Remainder Lands as a percentage of total DFA. - For Shared Costs allocated on either a Flow Basis or a Volume Basis, the Proportionate Shares for the City and the Hospital will be the percentages as determined by the City's Consulting Engineer and agreed to by the Parties. - Proportionate Shares are calculated as follows: <table><tr><td>Total MH Share Estimate</td><td>\$M</td></tr><tr><td></td><td>10.7</td></tr><tr><td>Total CoV Share Estimate</td><td>20.6</td></tr><tr><td></td><td><u>31.3</u></td></tr></table>	Total MH Share Estimate	\$M		10.7	Total CoV Share Estimate	20.6		<u>31.3</u>	Agreed.	Agreed.
Total MH Share Estimate	\$M									
	10.7									
Total CoV Share Estimate	20.6									
	<u>31.3</u>									

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7. Initial Estimates and Periodic Adjustments	- Infrastructure Cost amounts and the Proportionate Shares are set out in cost-sharing schedules based on either tendered costs or estimates as of the date of the Cost-Sharing Agreement. Infrastructure Costs and Proportionate Shares will be subject to adjustment to represent the final determination of actual costs. - Adjustments will occur as cost information changes, which will require adjustments to the Proportionate Shares. Each Party's obligation to pay will reflect the final determination of the rights and obligations of the Parties.	Project schedule will be at risk if delay results from required approval by Hospital. Dispute resolution available as a remedy for Hospital.	Agreed, provided that City must seek Hospital's approval for changes in cost or schedule.
8. Full Security for the Hospital's Obligations	- The Hospital will deliver to the City within 30 calendar days of execution of the Cost-Sharing Agreement either cash or a Letter of Credit equal to 100% of the Hospital's Proportionate Share. - The form of the Letter of Credit will be the same as for the MOU Letter of Credit.	Agreed.	Agreed.
9. Calculations of Accrued Approved Costs and Statements to the Hospital	The Hospital will be provided with a monthly statement prepared by the City to inform the Hospital of the accrued amount of the Hospital's Proportionate Share of Approved Shared Costs incurred as at the date of the monthly statement.	The City would prefer quarterly statements and will propose to the Hospital in the next draft of the Agreement.	Pending agreement to quarterly versus monthly.
10. Final Cost Allocation	Within 60 days following completion of construction and disbursement of all holdback amounts, the City will deliver to the Hospital a statement of account setting out: the City's Proportionate Share of Approved Shared Costs; the Approved City Cost amounts; and, the final Hospital Share amount.	Agreed.	Agreed.
11. Covenant to Pay Approved Costs	The City will pay all Approved Costs for the Works in accordance with applicable construction contracts and the Hospital will pay to the City the final Hospital Share amount.	Agreed.	Agreed.

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12. Final Payments by the Hospital - Within 60 days of receiving from the City the Final Cost Allocation, the Hospital will either: remit the full outstanding Hospital Share amount; or, both (i) refer the Final Cost Allocation to the Parties' Officers for dispute resolution within 30 days of receiving the Final Cost Allocation and (ii) remit the undisputed portion of the outstanding Hospital Share within 60 days of receiving the Final Cost Allocation. - In the event that the Hospital does not remit the full or undisputed outstanding Hospital Share amount to the City by the 60-day deadline, the City will be entitled to draw upon the Security.	Agreed.	Agreed.
13. The Hospital's Right to Access and Inspect Records The Hospital, at its sole cost, or its representatives may audit and inspect the records and accounts of the City and/or the City's Contract Administrator. The City will grant the Hospital access to the relevant records and accounts within two days from receipt of a request for access.	Agreed to, but will negotiate five days rather than two days.	Pending agreement to five days versus two days.
14. Dispute Resolution – Cost-Related Issues If a dispute should arise with respect to: the quantum or nature of Infrastructure Costs and Approved Costs; the basis on which Shared Costs are apportioned and the Proportionate Shares that may be apportioned on a basis other than an Area Basis; or, any similar Infrastructure Cost-related matter, either the City or the Hospital may refer the dispute to both the City's City Manager and the Chief Executive Officer of the Hospital (the "Officers") and the Officers will consider the dispute at a meeting to be held no later than 15 business days following receipt of the dispute. In the event that the Officers are unable to resolve the dispute within 30 days of the meeting, either Part may initiate arbitration proceedings	Agreed.	Agreed.
15. Dispute Resolution – Contract Interpretation and Unresolved Disputes In the event that the Officers do not resolve a dispute between the Parties or if a claim or dispute should arise with respect to the interpretation of the Agreement or the performance or non-performance by either Party, either Party may require the claim, matter or dispute be submitted to and settled by a single arbitrator whose decision will be final and binding.	Agreed.	Agreed.

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16. Force Majeure - Force Majeure is anything beyond the reasonable control of either Party that adversely affects that Party's ability to perform its obligations. - Force Majeure will include the following: - natural disaster, unusually severe weather, earthquake, flood or other act of God; - breakdown, disruption or failure of rail or other transportation, any non-performance of rail or other transportation providers all others required in connection with the movement of rail or vehicular traffic; - fire, explosion, blockade, civil commotion, civil disobedience, riot, war or terrorism; - labour dispute or labour shortage; - act, inaction or intervention of any government, or any of their boards, any governmental agency, crown corporation, including delays in any regulatory or legislative process, any orders of a regulatory authority or any order of a court of competent jurisdiction save and except that the amount of funding contributed to the Hospital Project by the Ministry, by itself, should not constitute a Force Majeure event; or - negligence or wilful misconduct of others. - The Agreement is terminated if frustrated by Force Majeure. - The Parties shall share in the City's losses in accordance with cost-sharing as a result of Force Majeure.	Intent is to make it clear that the Hospital cannot claim as a Force Majeure event non-receipt of Ministry funding.	Hospital commits to reimburse City for Shared Costs regardless of whether Ministry reimburses Hospital, subject to approval of changes to Infrastructure Plan. Hospital reviewing specific provision in Agreement. Response pending, regarding provision for sharing in City's losses if Force Majeure event occurs.
17. Termination - The Cost-Sharing Agreement shall remain in full force and effect until such time as: - the Works are complete and the Hospital has paid all amounts payable to the City pursuant to this Agreement, including but not limited to the full Hospital Share amount and any Reconciliation Payment, and all related disputes have been settled or resolved, or - further performance of this Agreement is frustrated by Force Majeure, or - the Parties agree to terminate the Agreement.	Agreed.	Agreed.

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18. Remedies	In the event the Agreement is terminated for any reason, the City will be entitled to draw on the Security posted by the Hospital to compensate the City for: the accrued Hospital Share amount; and, the Hospital's Share of any losses or damages incurred by the City with respect to the termination, as determined by the Parties, the Officers or an arbitrator.	City does not agree with Hospital's changes.	Changed "for any reason" to "a default by the Hospital" (no definition for default). Added "in the event this Agreement is terminated for any reason prior to completion of the Works, the City shall not be entitled to draw down on the Security".
	19. Representations and Warranties Hospital included a new section that provides for representations and warranties by the Hospital and the City.	These added representations and warranties are not relevant for a Cost-Sharing Agreement arrangement. Further they are not appropriate with respect to an agreement between two public bodies.	New provision added by Hospital.