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| <b>TO:</b>     | <b>CHAIR AND MEMBERS<br/>CIVIC WORKS COMMITTEE<br/>MEETING ON MARCH 8<sup>th</sup>, 2016</b>  |
| <b>FROM:</b>   | <b>GEOFFREY P. BELCH<br/>CORPORATION COUNSEL</b>  |
| <b>SUBJECT</b> | <b>PROVINCE OF ONTARIO PARTNERSHIPS INITIATIVE AGREEMENT<br/>FOR THE SPRINGBANK DAM REHABILITATION PROJECT, DATED<br/>MARCH 8, 2005</b> |

**RECOMMENDATION**

That, on the recommendation of City Solicitor’s Office, this report **BE RECEIVED** for information.

**PREVIOUS REPORTS PERTINENT TO THIS MATTER**

Confidential Civic Works Report dated February 2<sup>nd</sup>, 2016

**BACKGROUND**

**Purpose of this Report**

Municipal Council is considering its options with respect to whether to repair or decommission the Springbank Dam.

If Council decides to decommission the dam, the City will need to consider the implications in light of the existing Funding Agreement for the Project between the City and the Province, as represented by the Minister of Natural Resources, dated March 8<sup>th</sup>, 2005, attached as Appendix “A”.

**Cost of the 2005 Springbank Dam Rehabilitation Project**

The total cost of the 2005 Springbank Dam Rehabilitation Project, the “Project”, was \$6.8 million dollars. This cost included approximately \$3 million dollars for the supply of the four overflow gates and various gate components such as the hydraulic lifting mechanisms, hinges and stainless steel side seals for each of four bays. Following the purchase of these components the City entered into a construction contract known as the “Civil Works Project”. The cost of the civil works, which involved modifications to the existing dam and all work to install the gates cost approximately \$3 million dollars. The remaining \$0.8 million was for consulting costs which included the preparation of an Environmental Assessment completed in December 2003, engineering design and contract administration.

**The 2005 Funding Agreement for the Project**

The City applied to the Province and the Federal governments to share the cost of the Project through the Canada-Ontario Infrastructure Program, “COIP”. In order to access funding under the “COIP” program, the City entered into a legally binding Funding Agreement, which is attached as Schedule “A” to this report. As noted in the project budget, at Schedule C of the Agreement, the Federal government share was \$1.4 million and the Provincial government share was an additional \$1.4 million. The City covered the balance of the Project cost of \$4.0 million dollars.

The purpose in funding this type of project is outlined in the recitals to the Agreement which is to “improve urban municipal infrastructure in Ontario”. The Agreement includes a condition at paragraph 63(m) that the Dam be available for public use during the appropriate season of the

| Agenda Item # | Page # |
|---------------|--------|
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year and “that such use will continue until at least March 31, 2027”. See paragraph 63(m) at page 19 of the attached Agreement (Schedule “A”).

A decision to decommission the Dam will need to consider the possibility that the provincial or federal government may invoke certain provisions of the agreement which call for the repayment of their funding shares in the event of a decision to decommission the Dam. The following provisions should specifically be considered:

*Section 20. **Recipient not carrying out Project.** The Recipient shall immediately notify the Ministry if it does not intend to carry out the Project in whole or in part as specified in Schedule “B” in which case the Ministry may, in its sole discretion, Adjust the Financial Assistance.*

*Section 28. **Behaviour of Recipient.** The Recipient shall carry out the Project in an economical and businesslike manner, in accordance with this Agreement and in particular, but without limitation, in accordance with the Budget and the Project Schedule subject to any reasonable changes that the Ministry may agree to or require from time to time in writing.*

**Section 63, Covenants, Representations and warranties**

....

*(m) The entire Facility is or will be (in the case of a new Facility) a facility that is used for sport, recreation, cultural, heritage and/or tourism purposes, that the entire Facility is or will be open to the public and available for public use throughout the year or the appropriate season of the year and that such use will continue until at least March 31, 2027.*

**Section 65. Event of Default.** Each and every one of the following events is an “**Event of Default**”.

*(a) If in the opinion of the Ministry, the Recipient fails to conform or comply with any term or covenant contained in this Agreement to be performed or complied with by the Recipient;*

....

*(h) if in the opinion of the Ministry the Recipient has failed to proceed diligently with the Project or abandons the Project in whole or in part, or the Recipient is otherwise in default in carrying out any of the terms, conditions or obligations of this Agreement, except where such failure is due to causes which, in the opinion of the Ministry are beyond the control of the Recipient;*

....

**Section 67. Remedies on default.** Notwithstanding any other rights which the Ministry may have under this Agreement, if an Event of Default has occurred, the Ministry shall have the following remedies provided only that in the case of an Event of Default which, in the opinion of the Ministry in its sole discretion, is curable, the Ministry has first given written notice of the Event of Default to the Recipient and the Recipient has failed to correct the Event of Default within 10 Business Days or such longer period of time as the Ministry may consent to in writing:

....

*(b) The Ministry may, at its option, terminate this Agreement and may, in its sole discretion, Adjust the Financial Assistance. The total amount of Financial Assistance shall be immediately due and payable by the Recipient and bear interest at the then current interest rate charged by the Province of Ontario on accounts receivable.*

**Section 68. Additional remedies.** In addition to the remedies described in Section 67, the Ministry may commence such legal action or proceedings as it, in its sole discretion, may deem expedient, without any additional notice under this Agreement.

**Section 84. Recipient cannot represent the Ministry.** The provision of Financial Assistance to the Recipient pursuant to this Agreement is for the sole purpose of, and is limited to, carrying out the Project. The Recipient warrants and agrees that under no circumstances shall it enter into

*any contract or commitment in the name of or on behalf of the Ministry and the Recipient acknowledges that it is not by the terms of this Agreement or otherwise, granted any right or authority to assume or create any obligation or responsibility, express or implied, on behalf of or in the name of the Ministry or to bind the Ministry in any manner whatsoever other than as specifically provided in this Agreement.*

**Conclusion**

The Funding Agreement is a continuing and legally binding agreement between the City and the senior levels of government. It sets out the conditions under which the City received a significant funding contribution totalling \$2.8 million dollars. The Agreement, at the provisions noted above, speaks to an expectation that the funding provided by those governments be used to complete and operate the Project. Clauses 20 and 26 require the City to “carry out” the Project. It is noted that the funding was in fact used with the intention to carry out the Project, which occurred between 2005 and 2008. Unfortunately, the Project failed during commissioning in 2008 for reasons that were not anticipated. Following that the City pursued its rights with litigation.

Clause 63(m) of the Funding Agreement imposes a performance requirement which is that the City shall operate the Dam for the benefit of the public until at least 2027. Similarly, Clause 67 of the Funding Agreement expresses the expectation of the funding parties that the City, as the Recipient, proceed diligently with the project and not abandon the Project.

Finally, Clause 67 of the Agreement, reserves a specific right of repayment to the funding agencies, including the right to seek the return of the Financial Assistance, totalling \$2.8 million, together with accrued interest. It is noted that this would require proof that the City was a “Default Event” within in the meaning of the Agreement. It is also noted that a decision to require repayment is in the sole discretion of the Ministry.

The MNRF is the “delivery agent” for this agreement, which was signed by the Minister of Natural Resources in 2005 when it was created.

**Acknowledgment**

This report has been prepared with assistance from Tom Copeland, P. Eng., John Lucas, P. Eng., and John Braam, P. Eng.

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| <b>PREPARED AND RECOMMENDED BY:</b>                         |
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| <b>GEOFFREY P. BELCH, CORPORATION COUNSEL, LL.B, M.B.A.</b> |

**Encl. Appendix “A”- Funding Agreement between City and Minister of Natural Resources**

- c.c. Art Zuidema, City Manager
- James Barber – City Solicitor
- John Braam – Managing Director of Environmental & Engineering Services & City Engineer