

CITY OF HAMILTON

***PUBLIC WORKS DEPARTMENT
Transit Division***

Report to: Chair and Members Public Works Committee	Submitted by: Scott Stewart, C.E.T. General Manager Public Works Department
Date: May 1, 2007	Prepared by: Andy McLaughlin Extension 1809

SUBJECT: Eastgate Transit Terminal Reconstruction (Ward 5) (PW07070)

RECOMMENDATION:

- (a) That the City of Hamilton enter into a transportation services licence agreement, in a form acceptable to the City Solicitor, between The Hamilton Street Railway Company (HSR) and Eastgate Square Holdings Inc. for the operation and maintenance of the Eastgate Transit Terminal for the period September 1, 2007 to August 31, 2027;
- (b) That the Mayor and City Clerk be authorized to execute as signatories to the licence agreement, consistent with their respective roles as President and Secretary of The Hamilton Street Railway Company;
- (c) That the General Manager of Finance & Corporate Services be authorized and directed to provide \$1,600,000 in capital funding, representing the City share of the construction and maintenance cost of the works, and that these funds be drawn from the one-time dedicated Federal Public Transit Gas Tax Reserve;
- (d) That items related to Tierra Apartments and traffic improvements at Eastgate Square be removed from the Outstanding Business List of the Public Works Committee.

Scott Stewart, C.E.T.
General Manager
Public Works

EXECUTIVE SUMMARY:

The City of Hamilton is embarking on its Transportation Master Plan, which includes an ambitious 25-year transit ridership growth initiative. Ambitious transit expansion plans

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have been developed, along with other transportation demand management measures, as the preferred approach to prevent severe congestion, gridlock and air quality degradation that has been modelled to occur by 2031 if the transportation trends continue to evolve without intervention. One of the key strategic elements to grow ridership is the development of Bus Rapid Transit (BRT) in several mixed use corridors. Phase 1 of the BRT program, which will eventually result in higher speed bus lines operating along arterial roads, featuring engineering measures to ensure that the buses will have priority over private vehicle traffic, requires that terminals be created at each end of the BRT corridors.

Eastgate Square Shopping Centre, located at Queenston Road and Centennial Parkway will be reconstructing their southeast parking lot and ring road in 2007. This will require the relocation and new construction of the existing Eastgate Transit Terminal used by five Hamilton Street Railway (HSR) bus routes, including the Beeline Express route which will evolve into the lower city east-west BRT route. Since Eastgate is one of the primary mixed use centres at the east end of the lower city BRT corridor, it makes sense to establish a permanent terminal for the BRT at this site.

Eastgate Square has updated their shopping centre to create an attractive destination for shopping. The mall's management are enthusiastically supporting a unique public private partnership that cements a long-term transit presence at the shopping centre and supports the integration of transportation infrastructure with land use changes. Experts cite this type of integration as critical in changing the mindset of consumers in terms of their choice of travel mode for day-to-day trip making. The goal is to make using transit as easy as using a car for the majority of trips in the urban area of the city.

The terminal will reflect the latest in Canadian contemporary design for bus transit terminals. It features state-of-the art amenities for passengers including fully accessible platforms, modern, low maintenance shelters, attractive landscaping and high security lighting.

In exchange for a 50% contribution by HSR for the transit terminal reconstruction costs and an up front payment by the City for the net present value of the estimated transit terminal maintenance costs, Queenston Road Investment Inc., owners of the shopping centre, through their holding company, Eastgate Square Holdings Inc. are prepared to enter into a twenty year transportation services licence agreement that will permit Transit to operate routes into the transit terminal until August 31, 2027.

A twenty year agreement provides an enhanced level of predictability to ensure a stable eastern node for Hamilton's future Bus Rapid Transit network. As the urban area undergoes intensification through to 2031, this network will be a crucial element in helping to increase transit's mode share from forty annual trips per capita to the Transportation Master Plan target of between eighty and 100 annual trips per capita.

The licence agreement fee of \$1,600,000 represents an effective use of resources, in that there presently are funds available for transit capital improvements in the one-time dedicated Federal Public Transit Gas Tax Reserve. Relieving HSR of ongoing maintenance expenditures will cost avoid future operating budget expenditure increases.

Staff has been negotiating with the owners and a suitable terminal design that promotes efficient and effective transit operations has been developed. The project is subject to

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site plan control and approval by the Development Planning Section, with specific conditions attached, is anticipated shortly in advance of the start of construction in May 2007. The owners have a target completion date of August 2007.

Transit staff has consulted with and received assistance from a range of municipal divisions with respect to the wording of the terminal licence agreement, site plan considerations and a funding strategy.

Changes at Eastgate Transit Terminal will put a fresh face on this important transit node and compliment the recent introduction of hybrid articulated buses to the Beeline Express bus route that has its east end terminus at the facility.

BACKGROUND:

The information/recommendations contained in this report primarily affects Ward 5.

The City has been operating various bus routes from Eastgate Square Transit Terminal since the mid 1980's, when a transit facility containing passenger amenities and bus turnaround functions was constructed on a portion of the southeast parking lot. Queenston Road Investment Inc., owners of the Eastgate Square Shopping Centre, have embarked on a multi year renovation plan for the shopping centre and in 2007 will be reconstructing a portion of the mall's ring road at the food court entrance, necessitating the demolition of the existing transit terminal. The reconstruction will require that the transit terminal be relocated southerly.

The mall owners, through their holding company, have agreed to enter into a twenty year licence agreement with the City that will provide for access and egress to the shopping centre property in order to provide off-road local and express bus services for transit customers. The owners will undertake the construction and ongoing maintenance of the new transit terminal. Upon execution of the licence agreement, the City will pay a one-half share of the capital costs associated with the terminal construction, along with an up-front payment for the estimated twenty year maintenance costs for the transit terminal.

The new terminal will be situated just north of the mall's Queenston Road property line, midway between Kenora Avenue and Centennial Parkway. As part of the reconstruction, a new signalized intersection will be installed on Queenston Road to facilitate the safe movement of vehicles, including buses, and pedestrians in/out of the shopping centre property and the Tierra Apartments and adjacent strip plaza located on the south side of Queenston Road. The signal will effectively address the pedestrian safety concerns that have been raised by the senior citizens at this location for a number of years. The costs for the new traffic signal are included in the capital costs being shared by the City and Eastgate Square.

ANALYSIS/RATIONALE:

The new terminal will provide simultaneous accommodation for up to eight buses and will replicate the end-of-line function currently provided at the existing terminal for the King, Beeline, Stoney Creek Central, Stoney Creek Local and Confederation Park bus routes. Egress for the Stoney Creek routes will be improved, in that they will be able to re-enter the adjacent arterial roadways via the new signalized intersection, avoiding a large portion of the mall's ring road system.

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Other operational features will include all-day access to secure washroom facilities for all HSR bus Operators. This improvement in Operator working conditions will make a positive contribution to employee morale that will enhance employee relations.

Portions of the bus platforms will be constructed to accommodate newly acquired 18.3m long articulated hybrid buses. Passenger amenities will include accessible concrete platforms, shelters, benches, litter containers and lighting. Although terminal passengers will be required to walk further to access the shopping centre doors, a new concrete walkway will feature a fabric-covered canopy to provide protection for adverse weather conditions.

The new licence agreement, attached in Appendix A, outlines the terms, conditions and responsibilities of the City and the mall's owners. It replaces an expired licence agreement that has been extended on a month-to-month basis, pending the relocation of the transit terminal.

The new licence agreement obligates Eastgate Square to undertake the entire responsibility for site maintenance at the transit terminal, which incorporates a bigger footprint and more amenities than the existing facility. Timely maintenance is important in attracting customers to the bus. Bus stops at a terminal are the first point of physical contact a customer has with the transit system. Platforms should be clean and free of litter and graffiti. Shelter glass should be clean. Benches should be clean and comfortable. In winter, platforms should be ice-free and the facility should be illuminated at night.

Eastgate Square's maintenance staff are on site 24 hours per day, seven days per week. Eastgate has established property maintenance standards that meet or exceed existing HSR standards for transit terminals. For example, litter is picked up daily throughout the Eastgate property. At the present HSR terminal, litter is removed three days per week by HSR's contractor. Eastgate cleans up broken glass on its property within one hour. The present response time for broken shelter glass removal by HSR's contractor is four hours. With respect to maintenance directly affecting HSR employees, the present HSR standard for Operator washroom cleaning at transit terminals is 3 days per week. At Eastgate, the washroom to be shared by HSR Operators and Eastgate food court workers will be cleaned daily. Modern, clean facilities help to maintain Operator morale.

Any disputes between the parties in connection with the licence agreement are to be resolved by arbitration. In the event that the arbitration process does not resolve matters and Eastgate moves to terminate the licence agreement prior to 2027, HSR maintains the right to hold Eastgate in default and commence legal action to recover damages. Additionally, the City may elect to revoke the parking credits that it provided in return for the transit terminal. Any redevelopment of the transit terminal lands prior to 2027 would be subject to the City approving a new site plan.

ALTERNATIVES FOR CONSIDERATION:

There are no suitable alternative off-street sites available for the transit terminal at the Queenston/Centennial node.

An on-street terminal using the curb lanes of Queenston Road, or another street in the vicinity of Eastgate Square, would reduce the amount of usable traffic lanes, require

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customers to cross the road to transfer between routes or access the shopping centre and require buses to follow circuitous routes in order to turnaround, contributing to increased operating costs.

FINANCIAL/STAFFING/LEGAL IMPLICATIONS:

Financial

At the conclusion of the 2007 Capital Budget deliberations, an amount of \$1,000,000 was approved by Committee of the Whole for the Eastgate Terminal project (Project # 5300685003), in addition to \$100,000 approved in the 2006 Capital Budget.

On March 30, 2007 Committee of the Whole approved funding the Eastgate Terminal and the Downtown Terminal from the Federal Public Transit Gas Tax Reserve instead of Provincial Gas Tax. The City cost to cover its share of the construction and twenty year maintenance of the transit terminal facility will be \$1,600,000.

The City received \$16,136,501 from Federal Public Transit Gas Tax Fund of which \$6.035 million has been allocated for bus replacement, \$600,000 for a Rapid Transit office, \$3.4 million for the Downtown Transit Terminal, and \$1.1 million for the Eastgate Terminal, leaving an unallocated reserve balance of approximately \$5.0 million.

With the completion of the Eastgate Terminal project, the unallocated reserve balance will be \$4.5 million.

Staffing

None. The licence agreement obligates the mall's owner to provide all maintenance services at the transit terminal throughout the twenty year life of the agreement. This will relieve HSR of providing a workforce to undertake responsibilities related to snow/ice control, litter control, shelter cleaning, Operator washroom cleaning, lighting maintenance, shelter and bench repair, landscaping and pavement maintenance.

Legal

Legal Services has reviewed the draft Transportation Services Licence Agreement that will permit the HSR to conduct its operations at the terminal through to August 31, 2027 and has approved it as to form. Legal Services will be reviewing the separate easement agreements for traffic signal hardware and providing the necessary assistance to the Traffic Engineering and Operations Section prior to their execution.

POLICIES AFFECTING PROPOSAL:

The City of Hamilton's Transit Ridership Growth Plan and Transit Asset Management Plans, approved by Council in 2006, has identified Eastgate Square as a key transit node in the lower City east-west corridor. This corridor is targeted for land use intensification in support of the Growth Related Integrated Development Strategy and the Provincial Places to Grow policies. The Plan has identified the upgrading of transit terminals, including Eastgate, as a key initiative and priority to support ridership growth.

The March 2007 final draft of the Hamilton Transportation Master Plan proposes development of a higher order transit network as a policy to support a doubling of transit ridership in 25 years time. Bus Rapid Transit (BRT) is a key element in the network and the eastern terminus of the lower city east/west BRT line and a proposed future

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north/south BRT or transit priority corridor is Eastgate Square. Convenient, attractive and accessible transit infrastructure is crucial in encouraging a societal shift that will result in public transit carrying the targeted 12% of all trips by 2031. Clean and well-maintained terminals contribute to a heightened sense of safety, security and comfort and influence travel decisions.

The Canadian Urban Transit Association (CUTA) has published Position Paper #5, The Economic Cost for Public Transit in Canada. Based on CUTA-sponsored studies it is estimated that for every \$1.00 invested in modest transit infrastructure improvements, \$1.40 is returned to the economy. CUTA believes that up-to-date, well-maintained public transit infrastructure not only supports economic growth, it also enhances community health and well-being and promotes environmental responsibility.

On March 5, 2007, a National Transit Strategy, developed by the Big City Mayors of the Federation of Canadian Municipalities, was announced. As a key strategic element, it has identified the integration of land use and transportation planning, to ensure that development supports transit and is oriented toward it. The Eastgate Transit Terminal project supports the continued integration of a bus terminal with a shopping centre.

RELEVANT CONSULTATION:

Public Works Department

The Eastgate Terminal project is the result of exceptional cross-sector cooperation within the Public Works Department. A number of divisions have been consulted.

Capital Planning & Implementation Division

Capital Planning & Implementation Division have agreed to provide construction oversight and related services for the Transit Division during the terminal reconstruction project to ensure that the completed facility will provide HSR with the intended functionality, in terms of transit operations and customer use.

Traffic Engineering & Operations Section

Traffic has worked with Queenston Road Investment Inc.'s consultant to approve final traffic impact studies related to the new signalized intersection. They will be preparing easement agreements with the mall's owners and the owners of the properties on the south side of Queenston Road that are served by the new signalized intersection that will permit the City to enter upon private property to maintain traffic control hardware.

Planning and Economic Development Department

Development Planning Section

Queenston Road Investment Inc. has made application for site plan control and is planning to commence the construction in May 2007 so that the project will be completed and open for bus traffic in August 2007. Development Planning Section have completed a circularization of municipal divisions and is preparing a standard site plan approval, subject to specific conditions that may be warranted.

Corporate Services Department

Risk Management Services have been consulted and have thoroughly scrutinized the contents of the licence agreement to ensure that the insurance requirements of the HSR

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are provided for and that the best interests of the City of Hamilton are reflected in clear and complete terms.

Financial Services have reviewed the request from HSR for capital funding and have determined that a draw from the one-time dedicated Federal Public Transit Gas Tax Reserve would be appropriate to cover the cost of the project.

CITY STRATEGIC COMMITMENT:

By evaluating the “**Triple Bottom Line**”, (community, environment, economic implications) we can make choices that create value across all three bottom lines, moving us closer to our vision for a sustainable community, and Provincial interests.

Community Well-Being is enhanced. **Yes** **No**

Public services and programs are delivered in an equitable manner, coordinated, efficient, effective and easily accessible to all citizens.

Environmental Well-Being is enhanced. **Yes** **No**

A sustainable transportation network provides many options for people and goods movement; vehicle-dependency is reduced.

Economic Well-Being is enhanced. **Yes** **No**

Infrastructure and compact, mixed use development minimize land consumption and servicing costs.

Does the option you are recommending create value across all three bottom lines?

Yes **No**

Do the options you are recommending make Hamilton a City of choice for high performance public servants?

Yes **No**

Bus Operator morale is addressed.

TRANSPORTATION SERVICES LICENCE AGREEMENT

AGREEMENT MADE the _____ day of _____, 2007

B E T W E E N:

EASTGATE SQUARE HOLDINGS INC.

(the "**Licensor**")

- and -

THE HAMILTON STREET RAILWAY COMPANY

(the "**Licensee**")

WHEREAS:

- A. Queenston Road Investment Inc. (the "Owner") owns the Property.
- B. The Licensor has leased the Property from the Owner.
- C. The Licensee wishes to continue to operate Transportation Services from the Property on the terms and conditions contained in this Agreement.

NOW THEREFORE in consideration of the mutual covenants and agreements set out in this Agreement and for other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties hereto covenant and agree as follows:

**ARTICLE 1
INTERPRETATION**

1.1 Definitions

The terms defined herein shall have, for all purposes of this Agreement, the following meanings, unless the context expressly or by necessary implication otherwise requires:

"Agreement" means this licence, together with all Schedules hereto, as amended from time to time in accordance with the terms hereof; "hereof", "hereto" and "hereunder" and similar expressions refer to this Agreement and not any particular Section of this Agreement; "Article", "Section" and "Schedule" mean and refer to the specified Article, Section or Schedule of or to this Agreement.

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"Applicable Laws" means, with respect to any Party, property, transaction or event, all laws, by-laws, rules, regulations, orders, judgements, decrees, decisions or other requirements having the force of law relating to or applicable to such Party, property, transaction or event.

"Business Day" means any day other than a Saturday, Sunday or statutory holiday in the Province of Ontario or other day where the administrative offices for the City of Hamilton are closed.

"Corrective Work" means all work required to re-construct the existing parking areas, curbs and internal roads in accordance with the Plans and in compliance with all federal, provincial and municipal legislative enactments, by-laws and regulations so as to conform to the Project.

"Event of Default" means a default by a Party in the performance or observance of any of its obligations under this Agreement and which default continues uncured after the Party in respect of which such default has occurred has failed to cure such default within ten (10) days after having received written notice thereof from the other Party.

"Governmental Authority" means any government, regulatory authority, governmental department, agency, commission, board, tribunal or court or other law, rule or regulation-making entity having jurisdiction on behalf of any nation, province or state or other subdivision thereof or any municipality, district or other subdivision thereof.

"Notice" has the meaning ascribed thereto in Section 9.1.

"Operator Washrooms" means one (1) male self-contained room and one (1) female self-contained room, each containing a flush toilet, a lavatory and a mirror, stocked with appropriate hygiene products, located within the shopping centre building. The rooms will be accessible through a secure, keyed or keypad access door located to the west of the shopping centre's food court public entrance and will be shared with tenants of the Shopping Centre.

"Party" means either:

- (a) the Licensor, its successor or successors and subsequent owners of the Property;
or
- (b) The Licensee and its successor or successors.

"Plans" means all construction drawings, plans, specifications and other documents satisfactory to the Licensor and necessary for the design, construction and completion of the Project and the Corrective Work, including structural, mechanical, electrical engineering and landscape design in compliance with all local building by-laws and other applicable governmental requirements and prepared by Pellow + Associates Architects Inc. dated March 9, 2007 and attached hereto as Schedule "B".

"Project" means the Roadways, Shelters, Transit Islands, Operator Washrooms and the curbs and sidewalks necessary for the provision of the Transportation Services.

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"Property" means the lands and premises comprising the Eastgate Square Shopping Centre, Hamilton, Ontario, as more particularly described on Schedule "A" annexed hereto.

"Regulations" means reasonable rules and regulations established from time to time by the Licensor respecting the Property, written notice of which is provided by the Licensor to the Licensee, from time to time.

"Roadways" means the portions of the Property outlined in green on Schedule "B" attached hereto.

"Shelters" means the bus shelters to be constructed in accordance with the Plans on the Transit Islands.

"Shopping Centre" means the Eastgate Square Shopping Centre.

"Transit Islands" means the portions of the Property outlined in red on Schedule "B" attached hereto upon which the Licensee shall construct concrete curbs and a slab in accordance with the Plans.

"Transportation Services" means:

- (a) the transportation of persons by Transportation Vehicles over, upon and along the Roadways; and
- (b) the use of Shelters by persons using the Transportation Vehicles.

"Transportation Vehicles" means the motor vehicles operated by the Licensee or a duly authorized employee or agent of the Licensee in providing the Transportation Services.

1.2 Business Days

Where anything is required to be done under this Agreement on a day that is not a Business Day, then the day for such thing to be done shall be the next following Business Day.

1.3 Schedules

The following Schedules are attached to and form part of this Agreement:

- Schedule "A" - The Property
- Schedule "B" - The Plans

1.4 Interpretation

- (1) *Headings and Table of Contents:* The division of this Agreement into Articles and Sections, the insertion of headings, and the provision of any table of contents are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

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- (2) Number and Gender: Unless the context requires otherwise, words importing the singular include the plural and vice versa and words importing gender include all genders.
- (3) Entire Agreement: This Agreement and all of the Schedules to this Agreement, together with any other agreements, instruments, certificates and other documents contemplated to be executed and delivered pursuant to this Agreement, constitute the entire agreement between the parties with respect to the subject matter of this Agreement and, except as stated in this Agreement and any of the Schedules to this Agreement and in the other agreements, instruments, certificates and other documents to be executed and delivered pursuant to this Agreement, contain all of the representations, undertakings and agreements of the parties. This Agreement supersedes all prior negotiations or agreements between the parties, whether written or verbal, with respect to the subject matter of this Agreement.
- (4) Currency: All references to money shall refer to Canadian funds. All certified cheques or bank drafts to be tendered pursuant to this Agreement shall be drawn on one of the 6 largest Canadian chartered banks.
- (5) Severability: If any provisions contained in this Agreement or its application to any Person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected, and each provision of this Agreement shall be separately valid and enforceable to the fullest extent permitted by law.
- (6) Statute Reference: Any reference in this Agreement to any statute or any Section thereof shall, unless otherwise expressly stated, be deemed to be a reference to such statute or Section as amended, restated or re-enacted from time to time.
- (7) Time: Time shall be of the essence of this Agreement. Except as expressly set out in this Agreement, the computation of any period of time referred to in this Agreement shall exclude the first day and include the last day of such period. The time limited for performing or completing any matter under this Agreement may be extended or abridged by an agreement in writing by the parties or by their respective solicitors.
- (8) Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the applicable laws of Canada.

**ARTICLE 2
ACCESS RIGHTS**

2.1 Grant of Access Rights

Subject to the terms and conditions contained in this Agreement, the Licensor grants to the Licensee a licence to enter upon and exit the Property at the locations designated on the Plan attached hereto as Schedule B and proceed over Roadways for access and egress to and from the Transit Islands to and from the adjacent public streets for the purposes of providing the Transportation Services. The term of this licence shall commence on September 1, 2007 for a period of twenty (20) years and expiring on August 31, 2027, unless terminated earlier in accordance with the provisions of Sections 11.1 and 14.10.

2.2 Payments for Licence

The Licensee shall pay to the Licensor a fee of \$ 1,600,000 upon execution of this License Agreement for the permissions granted hereunder.

2.3 Conditions

This Agreement and the Grant of Access Rights set out in Section 2.1 above are subject to the fulfillment, prior to the opening of the new Transit Islands and Roadways, of a complete and operational traffic signal in the approximate location shown on the Plans attached hereto as Schedule "B". This condition is inserted for the sole benefit of the Licensor and may be waived in its discretion at any time.

**ARTICLE 3
CONSTRUCTION**

3.1 Design

The Licensee acknowledges having reviewed the Plans attached hereto as Schedule "B" and approves of the Plans for the purposes of the Project.

3.2 Construction

The Licensor shall arrange for the construction of the Project and the Corrective Work in accordance with the Plans.

**ARTICLE 4
ROADWAYS, SHELTERS, TRANSIT ISLANDS AND OPERATOR WASHROOMS**

4.1 Maintenance

The Licensor, at its sole cost and expense, agrees to maintain, repair and keep in a good and tidy manner the Transit Islands, Operator Washrooms, Shelters and the Roadways.

4.2 Shelter and Transportation Vehicle Advertising

Neither the Licensor nor the Licensee shall be entitled to sell or lease advertising space on the Shelters, provided, however, the Licensee shall be permitted to post transit information regarding the Licensee's routes and times therein. The Licensee agrees to make a reasonable effort, subject to daily Transportation Vehicles availability, not to permit any fully painted or fully vinyl wrapped Transportation Vehicles advertising any shopping centre or food store on the Property.

4.3 Use of Shelters

The Licensee and the Licensor agree that the Shelters shall be used solely for the protection of persons waiting for Transportation Vehicles from rain, snow and other unfavourable weather conditions and for no other purpose.

4.4 Utilities

The Licensor shall be responsible for the cost of all electricity, water, power and other utilities (the "Utilities") used in or for all or any part of the Project.

4.5 Operator Washrooms

The Licensor and the Licensee agree that the Operator washrooms shall be used solely by on-duty HSR Operators and tenants of the Shopping Centre. The Licensee shall provide individual HSR Operators with the appropriate washroom key or keypad combination and shall provide locksmith services to repair and maintain the locks when necessary.

**ARTICLE 5
TRANSPORTATION SERVICES**

5.1 Hours of Operation

The Licensee shall provide the Transportation Services Monday through Sunday, including routes such as the King, Beeline, Stoney Creek Local, Stoney Creek Central and Confederation Park on Schedules produced by the Licensee's General Manager from time to time or at such other times or intervals as the parties hereto may agree upon from time to time.

5.2 Personnel

The Licensee shall only allow qualified personnel authorized under governing legislation to operate the Transportation Vehicles on the Property.

5.3 Operating Costs

The Licensee shall be responsible for all operating costs necessary for the provision of the Transportation Services, including without limiting the generality of the foregoing, fuel and electrical power necessary to operate Transportation Vehicles and any business taxes in respect of the Transportation Services.

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5.4 Use of Roadways

The parties hereto agree that nothing herein contained limits the use of the Roadways by the public at large except for those areas designated and marked for Transportation Vehicles only, which areas the Licensor shall use its reasonable efforts to prevent the use thereof by the public at large.

5.5 Delivery Vehicles

Nothing in Section 5.4 shall prohibit the use of those areas designated and marked for Transportation Vehicles only, by service and delivery vehicles that directly relate to the Shopping Centre provided however service and delivery shall not disrupt the Transportation Services.

**ARTICLE 6
TRANSPORTATION VEHICLES**

6.1 Rules and Regulations

The Licensee agrees that:

- (a) no Transportation Vehicle entering upon the Roadways may exceed fifteen (15) feet in height or one hundred (100) feet in length.
- (b) Transportation Vehicles shall be permitted to idle while on the Property, in accordance with the City of Hamilton Idling Control Policy.
- (c) without the prior written consent of the Licensor, the Transportation Vehicles are to be used only for the provision of the Transportation Services by the Licensee during the term of this Agreement and under the conditions set out herein and not for the provision of any charter or special event services.

**ARTICLE 7(D) THE TRANSPORTATION VEHICLES MAY STOP AT THE
TRANSIT ISLANDS TO ALLOW PASSENGERS TO ENTER THEREON, EXIT
THEREFROM OR EXPEND ROUTE RECOVERY TIME.
LIABILITY, INDEMNIFICATION AND INSURANCE**

7.1 Release

The Licensee hereby releases the Licensor, the Owner, Redcliff Realty Advisors Inc., Redcliff Realty Management Inc. and each of their officers, directors, shareholders, employees, agents (collectively the "Released Parties") for any personal injury, bodily injury, death or property damage caused by, or arising out of, the operations of the Licensee at the Property. The Licensee agrees that the Released Parties shall not be liable or responsible in any way for any personal injury, bodily injury, death or personal damage to any property of the Licensee or any persons, including employees of the Licensee or others arising from or out of any occurrence in, upon or relating to the Transportation Services unless such damage, loss, injury or death results from the negligence or wilful misconduct of the Licensor and/or the Owner.

7.2 Indemnification by Licensee

The Licensee agrees to defend, indemnify and hold harmless the Released Parties from and against all claims, demands, losses, costs, damages, actions, suits or proceedings relating to personal injury, bodily injury, including death, or property damage, including loss of use thereof, that arise out of or from the Licensee's use of the Property (hereinafter called the "Claims"), including any and all reasonable legal fees, costs and expenses incurred by the Released Parties in defending any such Claims. This indemnity shall not apply where such Claim is attributable to the negligence or willful misconduct of the Released Parties. The Released Parties will give prompt written notice to the Licensee of any and all Claims, including any claims which may give rise to a claim for indemnification pursuant to this Section 7.2. The Licensee undertakes and agrees, upon request therefor by the Licensor, to execute a separate written release and indemnity to and in favour of any of the Released Parties as provided in this Section 7.2 who or which are not parties to this Agreement, whereby such release and indemnity shall be in strict accordance with only the Licensee's obligations under this Agreement.

7.3 Indemnification by Licensor

The Licensor agrees to defend, indemnify and hold harmless the Licensee (including its directors, officers, employees, shareholders, contractors, agents and representatives) and City of Hamilton (including its directors, officers, employees, officials, contractors, agents, and representatives) from and against all claims, demands, losses, costs, damages, actions, suits or proceedings by third parties relating to personal bodily injury, including death, or property damage, including loss of use thereof that arise out of or are attributable to the negligence or willful misconduct of the Licensor and for which the Licensor has not been released pursuant to Section 7.1 of this Agreement, including any and all reasonable legal fees, costs and expenses incurred by the Licensee in defending any such claims. The Licensor will give prompt written notice to the Licensee of any and all third party claims which may give rise to a claim for indemnification pursuant to this Section 7.3.

7.4 Licensee's Insurance

The Licensee shall procure and maintain, with reputable insurance companies authorized to do business in Ontario, the following insurance coverages:

- (a) Liability Insurance: Commercial General Liability Insurance, reasonably acceptable to the Licensor, written on a comprehensive basis, insuring against liability for bodily injury, personal injury, including death and damage to property of others, including loss of use thereof, broad form property damage, non-owned automobile liability, owners' and contractors' protective insurance coverage, and products and completed operations coverage, all with respect to all business and activities of the Licensee at the Property. The aforementioned policy or policies shall be written with inclusive limits of not less than ten million dollars (\$10,000,000) per occurrence or such higher limits as the Licensor shall reasonably require from time to time. The Licensee agrees to a waiver of

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its rights of subrogation for recovery of insurable losses in favour of the Released Parties (as defined in Section 7.2 1 above).

The policy shall provide for severability of interests, cross liability, contain a waiver of the insurer's right of subrogation in favour of the ~~Indemnified~~ Released Parties and an endorsement providing sixty (60) days advance written notice to the Licensor prior to any cancellation of the policy or a change or amendment restricting coverage. Such insurance shall include the Released Parties as additional insureds.

- (b) Automobile Liability Insurance: Owned automobile public liability insurance for death and bodily injury and property damage to third parties for a comprehensive limit of not less than ten million dollars (\$ 10,000,000.00) per occurrence.

7.5 Survival of Indemnification Obligations

The parties hereto agree that the obligations to indemnify provided for in this Article 7 shall survive the expiration or termination of this Agreement and continue in full force and effect thereafter for an indefinite period.

**ARTICLE 8
WARRANTIES**

8.1 Each party respectively warrants the following is true as at the time of execution of this Agreement:

(a) It is a legal corporation with all requisite powers, capacities, licenses and permissions under its governing legislation and the other laws applicable to it and/or by-laws under which it is organized, to enter into and exercise its rights and perform and comply with its obligations under this Agreement, and that all actions, conditions and things have been done, taken or fulfilled with respect thereto, that are required by law, contract or otherwise;

(b) It is not prohibited or restricted from entering into any of the obligations assumed, liabilities imposed, or restrictions accepted under this Agreement, by any agreement, constating documents, constitution, legislation, statute, act, regulation, order or otherwise; and

(c) To the best of its information and belief, after making diligent inquiries, it is not aware of any material facts or circumstances having a bearing upon its ability to perform its obligations under this Agreement which have not been disclosed to the other party in writing.

**ARTICLE 9
NOTICES**

9.1 Notice

Any notice, certificate, consent, determination or other communication required or permitted to be given or made under this Agreement (a “Notice”) shall be in writing and shall be effectively given and made if (i) delivered personally, (ii) sent by prepaid courier service, or (iii) sent by fax or other similar means of electronic communication, in each case to the applicable address set out below:

- (a) in the case of the Licensor addressed to it at:

40 University Avenue, Suite 1200
Toronto, Ontario M5J 1T1
Attention: George S. Schott, President
Fax: (416) 362-9646

with a copy to:

Borden Ladner Gervais LLP
40 King Street West, Suite 4100
Toronto, Ontario M5H 3Y4
Attention: Morton G. Gross
Fax: (416) 361-2429

- (b) in the case of the Licensee addressed to it at:

2200 Upper James Street, RR #1
Mount Hope ON L0R 1W0

Attention: Director of Transit
Fax: (905) 679-7305

with a copy to:

City of Hamilton
Public Works Department
#320 - 77 James Street North
Hamilton ON L8R 2K3

Attention: General Manager of Public Works
Fax: (905) 546-4481

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9.2 Receipt of Notice

Any communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of faxing or sending by other means of recorded electronic communication, provided that such day in either event is a Business Day and the communication is so delivered, faxed or sent prior to 5:00 p.m. (Toronto time) on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

9.3 Change of Address

Any party may from time to time change its address under this Section by notice to the other party given in the manner provided by this Section.

**ARTICLE 10
ASSIGNMENT AND SUB-LICENSING**

10.1 This Agreement and the licence and privileges granted to the Licensee hereunder are personal to the Licensee and shall not be assigned or sub-licensed either in whole or in part by the Licensee without the consent in writing of the Licensor, which consent by the Licensor may be unreasonably withheld.

10.2 The Licensor shall have the right to assign all of its rights hereunder to any transferee or mortgagee of the Property, upon prior notice to the Licensee.

**ARTICLE 11
EARLY TERMINATION**

11.1 The parties hereto agree that the Licensee may terminate this Licence Agreement, without cause, on not less than twelve (12) months prior written notification to the other party.

11.2 Nothing contained herein in any way affects or limits the indemnity obligations of the Licensee or Licensor contained in Article 7 hereof which shall survive termination of this Licence Agreement.

**ARTICLE 12
REMOVAL AND RESTORATION**

12.1 Upon termination or expiry of this Licence Agreement, the Licensee shall:

- (i) remove the Shelters the Transit Islands and such portion of the Roadways and related curbs and sidewalks as the Licensor may require.
- (ii) restore the portion of the Property affected by the removal required by sub-section (i) hereof to the condition such areas were in immediately prior to the construction of the Project hereunder.
- (iii) construct a new roadway and related curbs and sidewalks in the locations determined by the Licensor, acting reasonably, to the Shopping Centre.

**ARTICLE 13
ENVIRONMENTAL MATTERS**

13.1 The Licensee shall not cause or allow any Hazardous Materials to be used, generated, treated, processed, handled, labelled, or stored, on, under or about, or transported to or from the Project or the Property except in strict compliance with all applicable Environmental Laws, as hereunder defined, and using all necessary and appropriate precautions which a prudent owner or operator of property would exercise.

13.2 The Licensee shall indemnify, defend with counsel, and hold the Released Parties harmless from and against any claims, actions, damages, costs and liabilities, prosecutions and administrative or other orders, directives, including any appeals thereof, arising out of any activities conducted by the Licensee on the Project or the Property, including without limitation, any leaks or spills from the Licensee's vehicles, except to the extent that same arise out of the negligent or wilful acts of misconduct of the Licensor or Owner (including its directors, officers, employees, shareholders, contractors, agents, mortgagees and representatives).

13.3 For purposes hereof, Hazardous Materials shall be defined as hazardous, toxic or dangerous substances or contaminants or pollutants under the *Canadian Environmental Protection Act* and the provincial environmental legislation and all other laws and ordinances governing matters relating to the natural environment, the man-made or structural environment or matters affecting human health or safety in effect in the Province; and any regulations, orders or directive promulgated pursuant thereto (collectively the "Environmental Laws"), as they may be amended from time to time.

13.4 The Licensee shall immediately notify the Licensor should the Licensee or its activities be the subject of any regulatory order or directive or be the subject of any investigation by regulatory officials with respect to environmental or health and safety matters.

**ARTICLE 14
GENERAL**

14.1 Non-Waiver

No consent to or waiver of any breach or default by any Party in the performance of its obligations herein or therein shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance by such Party of the same or any other obligations of such Party or waiver of any right to complain of any act or failure to act of any other Party or a waiver of any right to declare any other Party in default irrespective of how long such failure continues.

14.2 Cumulative Remedies

No remedy conferred upon or reserved to any Party is intended to be exclusive of any other remedy herein or at law, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now existing or hereafter to exist by law or by statute or in equity.

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14.3 Registration

Registration of this Agreement against title to the Property shall not be permitted.

14.4 Successors

All of the warranties, covenants and agreements contained in this Agreement shall be binding upon the parties and their respective successors and shall enure to the benefit of and be enforceable by the parties and their respective successors pursuant to the terms and conditions of this Agreement.

14.5 Counterparts

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which taken together shall be deemed to constitute one and the same instrument. Counterparts may be executed either in original or faxed form and the parties adopt any signatures received by a receiving fax machine as original signatures of the parties; provided, however, that any party providing its signature in such manner shall promptly forward to the other party an original of the signed copy of this Agreement which was so faxed. This Agreement may be executed by any person who has from time to time become a party hereto by his signing a counterpart hereof, each of which counterparts so executed shall be deemed to be an original and such counterparts together shall constitute a single instrument.

14.6 Right of Exclusion

The Licensor shall be entitled to exclude vehicles which in its reasonable discretion present a potential danger to the Property including, without limitation, vehicles utilizing propane fuel. The Licensee shall be permitted to operate Transportation Vehicles on the Property that utilize fuel-efficient and environmentally friendly propulsion technologies, provided that such operations are in accordance with applicable Federal, Provincial and Municipal regulations.

14.7 Control of Property

The use by the Licensee of the Property is subject to the exclusive control of the Property by the Licensor.

14.8 Licensee not a Lessee

No legal title or leasehold interest in the Property shall be deemed or construed to have been created or vested in the Licensee by anything contained herein.

14.9 Arbitration

Any matter or dispute in connection with this Agreement shall be resolved by Arbitration. Arbitration proceedings shall be commenced by the Party desiring arbitration (the "Initiating Party") delivering to the other Party (the "Responding Party") a Notice referring such matter or dispute to arbitration, and the provisions of the *Arbitration Act, 1991, S.O. 1991, c. 17: as amended ("Arbitration Act")* and the following principles shall apply to such arbitration:

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- (a) Upon Notice from the Initiating Party to the Responding Party, the Parties shall meet and attempt to agree upon an arbitrator. If the Parties are unable to agree on an arbitrator within ten (10) days from such Notice, then the arbitrator shall be appointed by a Judge of the Superior Court of Justice for Ontario pursuant to Section 10 of the *Arbitration Act*. The arbitrator so agreed upon or appointed, as the case may be, is herein referred to as an "Arbitrator".
- (b) The Arbitrator shall be an experienced arbitrator and shall be qualified by education and training to decide the particular question in dispute and shall be a person generally recognized in the business community as having familiarity with and expertise with the matter which is the subject of the dispute. No person who is then employed by any of the Parties or any person not dealing at arm's length with a Party, shall be appointed as the Arbitrator;
- (c) The Arbitrator will be required to render a decision and reasons to the Parties in an expeditious and prompt manner, and to set a schedule for the arbitration process which achieves this objective, while permitting all Parties due process and an opportunity to present their case and respond to the case presented by the other Party.
- (d) The decision and reasons of the Arbitrator shall be in writing and signed by the Arbitrator.
- (e) Such written decision and reasons of the Arbitrator shall be final and binding and the Parties agree that there will be no right of appeal with respect thereto except as provided in the *Arbitration Act*;
- (f) The compensation and expenses of the Arbitrator shall be paid in equal portions by the Parties hereto, unless otherwise determined by the Arbitrator, it being agreed that the Arbitrator has the power to allocate responsibility for such costs as he or she deems fit;
- (g) Notwithstanding anything herein contained and notwithstanding any failure to so state in any provision or provisions hereof, any dispute in respect of any matter set out in this Agreement shall be resolved by Arbitration at the request of any Party that is a party to such dispute; and
- (h) Where arbitration is required by this Agreement, commencement and completion of such arbitration in accordance with this Agreement shall be a condition precedent to the commencement of an action at law or in equity in respect of the matter required to be arbitrated.

14.10 Events of Default

Upon the occurrence of an Event of Default by a Party (the "Defaulting Party") the other Party (the "Non-Defaulting Party") shall have the right, in addition to any other remedies available to it at law or under this Agreement, to do one, any or all, either separately or simultaneously, of the following:

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- (i) bring any proceedings in the nature of specific performance, injunction or other equitable remedy, it being acknowledged by each of the Parties that damages at law may be an inadequate remedy for a default or breach of this Agreement;
- (ii) terminate this Agreement in the event that such Event of Default is not cured within a period of thirty (30) days following notice in writing by the Non-Defaulting Party to the Defaulting Party; and
- (iii) bring any action at law or in equity as may be necessary or advisable in order to recover damages.

14.11 Further Assurances

Each of the parties hereto covenants and agrees to do all acts and things and execute and deliver such further and other papers and documents as are necessary and desirable or as may be reasonably required by a party hereto to carry out the intent and purpose of and give full effect to this Agreement and every part thereof.

14.12 Regulations

The Licensor shall be entitled to make, amend, add to, delete or change Regulations, from time to time provided that the Regulations do not interfere with the Licensee's use of the Property for the provision of the Transportation Services.

14.13 Compliance with Applicable Laws

Each of the Parties agrees to comply with Applicable Laws.

14.14 Governing Law

This Agreement shall be governed by the laws of Ontario and the laws of Canada applicable therein.

14.15 Successors and Assigns

This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns.

14.16 Change in Project

The parties hereto further agree that the Licensor (in consultation with the Licensee, provided that such consultation shall not require the approval of the Licensee) may at its own cost and expense reconfigure or relocate the Project in the event those portion of the Property used for the Transportation Services are required by the Licensor and in such event this Licence Agreement shall be amended accordingly to take into account such reconfiguration or relocation.

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**ARTICLE 15
ENTIRE AGREEMENT**

This Agreement constitutes and defines the entire contract between the parties hereto. No oral term or condition, warranty, collateral understanding or agreement other than expressly contained in this Agreement shall form a part of the contract or be binding upon any party hereto.

IN WITNESS WHEREOF the Parties have executed this Agreement in quadruplicate.

EASTGATE SQUARE HOLDINGS INC.

By: _____
George S. Schott, President

By: _____

I/We have authority to bind the Corporation.

**THE HAMILTON STREET RAILWAY
COMPANY**

By: _____
Mayor Fred Eisenberger, President

By: _____
Kevin Christenson, Secretary

I/We have authority to bind the Corporation.

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SCHEDULE "A"

THE PROPERTY

SCHEDULE "B"

THE PLAN