

Highway 404 Mid-Block Cost Sharing Agreement for Detailed Design

This agreement, made in triplicate, this 4th day of March, 2010

B E T W E E N:

THE REGIONAL MUNICIPALITY OF YORK

(the "Region")

- and -

THE CORPORATION OF THE TOWN OF RICHMOND HILL

("Richmond Hill")

- and -

THE CORPORATION OF THE TOWN OF MARKHAM

("Markham")

WHEREAS the Region has jurisdiction over Highway 7 (YR 7) that runs from the western limit to the eastern limit of the Region and 16th Avenue (YR 73) that runs parallel to Highway 7.

AND WHEREAS in order to improve traffic operations within their municipal boundaries, all the parties have identified the need for construction of a grade separated structure to cross Highway 404 between Highway 7 (YR 7) and 16th Avenue (YR 73), including road connections to East Beaver Creek Road within Richmond Hill and Allstate Parkway within Markham, (the "Highway 404 Crossing") as a future capital infrastructure project.

AND WHEREAS by the adoption of Clause 4 of Report No. 5 of the Transportation and Works Committee on May 21st, 2009, Regional Council authorized the sharing of costs with Markham and Richmond Hill for the long-term maintenance and replacement costs for the Highway 404 Crossing;

AND WHEREAS the Council of The Corporation of the Town of Markham by resolution, enacted on _____, 200__, authorized Markham to enter into this Agreement;

ATTACHMENT A

AND WHEREAS the Council of The Corporation of the Town of Richmond Hill by a by-law, enacted on July 6, 2009, authorized Richmond Hill to enter into this Agreement;

AND WHEREAS the parties wish to retain an independent consultant to complete the detailed design for the construction and installation of the Highway 404 Crossing, which design shall extend from the intersection of East Beaver Creek Road and East Pearce Street, in the Town of Richmond Hill eastward to the intersection of Centurian Drive and Allstate Parkway, in the Town of Markham and include the approach roads connecting East Beaver Creek Road to Allstate Parkway (the "Detailed Design");

AND WHEREAS the parties have agreed to share the cost of the preparation of the Detailed Design equally;

AND WHEREAS Markham has agreed to procure and administer the contract for the preparation of the Detailed Design on behalf of all the parties with an independent consultant that is qualified under the Ministry of Transportation's (the "Ministry") Registry Appraisal and Qualification System for Complicated Structures (the "Consultant");

AND WHEREAS this Agreement is to function as a cost sharing agreement between all of the parties for the procurement of the Detailed Design only, and the parties intend to negotiate a further cost sharing agreement that will address all other costs, including construction, administration, maintenance and operation, related to the Highway 404 Crossing;

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1.0 DEFINITIONS

1.1 In this Agreement,

- (a) **"Agreement"** means this agreement;
- (b) **"Confidential Information"** means information disclosed to or obtained by Markham in connection with the fulfillment of the terms of this Agreement and which has been identified by either the Region or the Town as information which should be treated as confidential and all data, formulae, preliminary findings, and other material developed in pursuance of the preparation of the Detailed Design, excluding any such information which
 - (i.) is or becomes publicly available without breach of this Agreement;
 - (ii.) is already or subsequently comes rightfully into the possession of Markham without any obligations of confidentiality;

- (iii.) is independently developed by Markham outside the scope of this Agreement; or
 - (iv.) is rightfully obtained by Markham from third parties or under statute.
- (c) **“Markham”** or **“Project Manager”** means the Town of Markham or its authorized representative;
 - (d) **“Ministry”** means the Ministry of Transportation of Ontario;
 - (e) **“Parties”** mean collectively, the Region, Richmond Hill and Markham, and **“Party”** means any one of them;
 - (f) **“Purchasing By-law”** means Town of Markham By-law No. 2004-341, as amended from time to time, including policies, procedures and guidelines adopted by Markham to facilitate the purchase of goods and services; and
 - (g) **“Region”** means the Regional Municipality of York as a municipal corporation or its authorized representative and, where the context requires, its geographic area;
 - (h) **“Richmond Hill”** means the Town of Richmond Hill or its authorized representative.

2.0 MARKHAM’S RESPONSIBILITIES AS PROJECT MANAGER

2.1 Markham shall act as Project Manager with respect to the Detailed Design.

2.2 As Project Manager, Markham shall be responsible for retaining the Consultant, as well as for entering into and administering the contract with the Consultant for the preparation of the Detailed Design (the “Contract”), including:

- 2.2.1 preparing a request for proposals for the retention of the consultant for the Detailed Design (“RFP”) in consultation with the Region and Richmond Hill and in particular, ensuring that the Region’s and Richmond Hill’s input into the specifications for the Detailed Design is incorporated;
- 2.2.2 in preparing the RFP, coordinating the preparation of specifications for the Design with the Region and Richmond Hill,;
- 2.2.3 ensuring that the Design is in compliance with all applicable laws, by-laws, regulations, codes or policies;
- 2.2.4 subject to the Region and Richmond Hill’s approval with respect to items in the RFP that the Region and Richmond Hill have agreed to cost share, issuing the RFP and administering the procurement process in accordance with the Town’s

Purchasing By-law, including facilitating the evaluation process and award of the Contract with input from the Region and Richmond Hill;

- 2.2.5 prior to award of the Contract pursuant to the RFP, obtain the Region and Richmond Hill's approval if the cost of the preparation of the Detailed Design will exceed the maximum contribution set out in Section 3.1;
 - 2.2.6 upon completion of the selection of a Consultant pursuant to the RFP, entering into a contract with the Consultant for the Detailed Design (the "Contract");
 - 2.2.7 management and administration of the Contract;
 - 2.2.8 consulting with the Region and Richmond Hill on an active and ongoing basis throughout the administration of the Contracts on various matters, including the project schedule, utilization of contingencies and any unforeseen costs;
 - 2.2.9 providing the Region and Richmond Hill with any requested documentation in relation to the Contract, including Contract copies and; monthly invoices for costs incurred in connection with the preparation of the Detailed Design;
 - 2.2.10 making timely payments to the Consultant as required by the Contract;
 - 2.2.11 providing the Region and Richmond Hill copies of drafts of the Detailed Design for review and comment at the 30%, 60% and 90% stages of completion and a copy of the final Detailed Design;
 - 2.2.12 ensuring that all consents, approvals and permits necessary for the Detailed Design, including an encroachment permit from the Ministry have been obtained and providing confirmation to the Region and Richmond Hill that these have been obtained;
 - 2.2.13 ensuring that all employees agents and other persons operating under its authority are knowledgeable of, and abide by, the provisions of all statutes, regulations and other applicable laws and rules in regard to health and safety in the Province of Ontario
 - 2.2.14 ensuring that the Consultant adheres to the standards of the Ministry in completing the Detailed Design;
 - 2.2.15 submitting the Detailed Design, including all drawings, geotechnical reports and safety standards, to the Ministry for review; and
 - 2.2.16 obtaining the approval of the Ministry of the Detailed Design.
- 2.3 Markham shall be permitted to include in the scope of work of the RFP any additional work that Markham requires to be done by the Consultant for the sole benefit of

Markham, provided that such additional work is costed out separately in the RFP and provided that such work shall be done at Markham's sole expense. For the purposes of this Agreement, Detailed Design shall be deemed to exclude such additional work.

- 2.4 Markham shall obtain the prior written approval of the Region and Richmond Hill for any extra work that the Consultant advises is required during the course of completing the Detailed Design, including but not limited to unanticipated geotechnical investigation or any requirements of the Ministry of Transportation or the Toronto and Region Conservation Authority.

3.0 COSTS AND PAYMENT

- 3.1 The parties will each pay 1/3 of the total cost of the preparation of the Detailed Design and the Town's fee as set out in Section 3.5 (the "Town's Fee") up to a maximum of \$300,000, subject to the Region and Richmond Hill's approval for any amounts that exceed this amount.
- 3.2 Subject to Markham performing its obligations under this Agreement, the Region and Richmond Hill shall, within forty-five (45) days of receipt of invoices from Markham remit payment for such invoices.
- 3.3 Markham acknowledges that it shall be fully and solely responsible for the payments to be made to the Consultant, and that such payments are to be made in accordance with the Contract, independently of the payments to be made by the Region and Richmond Hill to Markham pursuant to this Agreement.
- 3.4 Markham shall maintain adequate records of accounts with respect to the costs of the preparation of the Detailed Design. Markham will provide the Region and Richmond Hill with detailed accounting and such supporting material as may be reasonably requested by the Region and/or Richmond Hill. Markham will permit the Region, Richmond Hill or any person designated by either the Region or Richmond Hill to examine, audit and copy any invoices, accounts, receipts or other records or materials relating to the preparation of the Detailed Design for a period of three years following completion of the Detailed Design by the Consultant.
- 3.5 The Town's fee for procuring and administering the Contract shall be calculated on FOUR and ONE-HALF PERCENT (4.5%) of the value of the Contract and such amount shall be included on the invoices to the Region and Richmond Hill.
- 3.6 If any Party fails to pay monies as required by this Agreement, that Party's outstanding payment shall accrue interest at the higher of the following, until paid in full
- a. prime plus 1% or
 - b. the interest rate charged by the Consultant.

4.0 INSURANCE AND INDEMNITY

- 4.1 In consideration of the Region and Richmond Hill entering into this Agreement, Markham agrees to indemnify and save harmless the Region, its Chair, Council Members, employees, elected officials, contractors, subcontractors and agents, officers, directors, employees, successor and assigns, and Richmond Hill, its elected officials, agents, officers, directors, employees and their respective successors and assigns, from all actions, causes of action, suits, claims and demands whatsoever which may arise directly or indirectly, by reason of the procurement process for and project management of the Detailed Design by Markham pursuant to the terms of this Agreement, including but not limited to (i) a breach by Markham of its obligations under this Agreement; and (ii) any dispute arising with respect to the preparation of the Detailed Design;
- 4.2 Without limiting the foregoing indemnity, Markham hereby releases the Region and its employees, elected officials, officers, representatives, contractors and agents against any and all actions, causes of action, suits, claims, demands whatsoever arising out of or in connection with this Agreement and from any liability for losses, damages, costs and claims of any kind arising out of or in connection with this Agreement, save and except if and to the extent caused or contributed to by the Region, its agents, contractors, employees or any others for whom the Region is responsible in law.
- 4.3 Without limiting the foregoing indemnity, Markham hereby releases Richmond Hill and its employees, elected officials, officers, representatives, contractors and agents against any and all actions, causes of action, suits, claims, demands whatsoever arising out of or in connection with this Agreement and from any liability for losses, damages, costs and claims of any kind arising out of or in connection with this Agreement, save and except if and to the extent caused or contributed to by Richmond Hill, its agents, contractors, employees or any others for whom Richmond Hill is responsible in law.
- 4.4 Markham shall require the Consultant to provide Commercial General Liability ("CGL") insurance, naming Markham, the Region and Richmond Hill as additional insureds, with limits of not less than Five Million Dollars (\$5,000,000) inclusive per occurrence for bodily injury, death and damage to property and maintain the coverage continuously from the date of execution of this Agreement to the expiry of the Term. Should this policy contain a General Aggregate, the minimum acceptable aggregate shall be ten million dollars (\$10,000,000.00). The CGL insurance shall include Cross Liability and Severability of Interest Clauses, Products & Completed Operations (12months), Owner's Contractor's Protective, Non-Owned Automobile Liability, and Standard Contractual Liability.

In place of the above mentioned insurance coverage, a combination of primary liability limits and Umbrella or Excess Liability limits which meet the coverage, limits, and aggregate noted above may be provided.

The Consultant shall provide and maintain Professional Liability or Errors & Omissions coverage in an amount not less than Two Million Dollars (\$2,000,000) per claim, in a form acceptable to the Region's Insurance and Risk Manager.

- 4.4 Where insurance is required in this Agreement, Markham shall provide a certificate of insurance from the Consultant showing the Region and Richmond Hill as additional insureds in the form of the certificate attached hereto as Schedule B. If the Region is not provided with a renewal of the policy at least fifteen (15) days prior to its expiration date, then the Region may arrange such renewal of insurance, as applicable, at the expense of the Consultant.

5.0 TERM

- 5.1 This Agreement shall remain in effect until the later of (a) the Ministry has approved the detailed design of the Structure; (b) all payments in respect of the Detailed Design have been made by the Parties hereto, in accordance with the terms of this Agreement; and (c) all provisions of the contract for the Detailed Design have been complied with in full.

6.0 NOTICE

- 6.1 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 mail, or (iii) sent prepaid by fax or other similar means of electronic communication, in each case to the applicable address set out below:

6.1.1 If to Markham: The Corporation of the Town of Markham
101 Town Centre Blvd,
Markham, Ontario L3R 9W3

Attention: Director of Engineering
Facsimile Number: (905) ???

6.1.2 If to Richmond Hill: The Corporation of the Town of Richmond Hill
225 East Beaver Creek Road
Richmond Hill, Ontario L4B 3P5

Attention: Commissioner of Engineering and Public Works
Facsimile Number: ext. _____

6.1.3 If to the Region: The Regional Municipality of York
17250 Yonge Street, Newmarket,
Ontario, L3Y 6Z1

Attention:
Facsimile Number: (905) 830-4444, ext. _____

Any Party may, from time to time by notice given as provided above, change its address for the purpose of this section.

- 6.2 Any such 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 4:30 p.m. 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. Any such communication sent by mail shall be deemed to have been given and made and to have been received on the fifth (5th) business day following the mailing thereof; provided however that no such communication shall be mailed during any actual or apprehended disruption of postal services. Any such communication given or made in any other manner shall be deemed to have been given or made and to have been received only upon actual receipt.

7.0 CONFLICT OF INTEREST AND CONFIDENTIAL INFORMATION

- 7.1 Markham will ensure that all activities in relation to the Detailed Design, including work undertaken by the Consultants, can be undertaken and completed without a conflict of interest (either actual or potential). Without limiting the generality of the foregoing, Markham acknowledges and agrees that it will be a conflict of interest for it to use Confidential Information where the party that has identified the information as confidential has not specifically authorized such use.

Markham will forthwith disclose to the Region and Richmond Hill any actual or potential situation that may be reasonably interpreted as either a conflict of interest or a potential conflict of interest.

- 7.2 Subject to the Freedom the *Municipal Freedom of Information and Protection of Privacy Act* and any amendments thereto and except as expressly provided in this Section, no Confidential Information shall be disclosed in any manner whatsoever without the approval in writing of the Region or Richmond Hill.

8.0 SEVERABILITY AND JURISDICTION

- 8.1 If any provision of this Agreement is determined by a Court of competent jurisdiction to be illegal or beyond the power, jurisdiction, or capacity of any party bound hereby, such provision shall be severed from this Agreement and the remainder of this Agreement shall continue in full force and effect and in such case the parties agree to negotiate in good faith to amend this Agreement in order to implement the intentions as set out herein. It is agreed and acknowledged by the parties that each is satisfied as to the jurisdiction of each party to enter into this Agreement. The parties agree that they shall not question the jurisdiction of any party to enter into this Agreement nor question the legality of any portion hereof, nor question the legality of any obligation created hereunder and the

parties, their successors and assigns are and shall be estopped from contending otherwise in any proceeding before a Court of competent jurisdiction or any administrative tribunal.

9.0 NO PARTNERSHIP

- 9.1 Notwithstanding the mutually beneficial arrangements between the parties related to the Detailed Design, nothing herein will create a partnership, joint venture or agency relationship between the parties. Any obligations or liabilities agreed to, undertaken by, imposed on or incurred by any party will be the sole responsibility of and at the sole cost of the party unless otherwise provided for in this Agreement.

10.0 MISCELLANEOUS

- 10.1 This Agreement shall be read with all changes in gender or number as required by the context.
- 10.2 No remedy herein conferred upon or reserved to any Party shall exclude any other remedy, but each remedy shall be cumulative and in addition to every other remedy given hereunder or hereafter existing at law or in equity or by statute. 9.2 Time shall be of the essence in this Agreement.
- 10.3 This Agreement and everything herein contained shall enure to the benefit of and be binding upon the Parties hereto, their successors and assigns.
- 10.4 The headings in this Agreement are solely for convenience or reference and shall not affect the interpretation thereof nor be deemed to define, limit or construe the contents of any provision of this Agreement.
- 10.5 This Agreement may be executed in any number of counterparts and each such counterpart shall for all purposes, constitute one agreement, binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart.
- 10.6 The Region, Markham and Richmond Hill agree to execute such further documents and cause the doing of such acts and cause the execution of such further documents as are within their power as the Region, Markham and Richmond Hill may reasonably request be done or executed, in order to give full effect to the provisions of this Agreement, subject to the Parties obtaining any required additional municipal or council approvals.
- 10.7 No amendment, waiver or termination of this Agreement will be binding unless executed in writing by all of the Parties hereto. No waiver of any provision of this Agreement will be deemed or will constitute a waiver of any provision, nor will any such waiver constitute a continuing waiver unless expressly provided for in this Agreement.
- 10.8 This Agreement shall be interpreted under and is governed by the laws of the Province of Ontario.

IN WITNESS WHEREOF the parties hereto by their duly authorized representatives have set for their signatures on the dates set out below.

THE REGIONAL MUNICIPALITY OF YORK

Per: _____
Chairman/CEO Bill Fisch

Per: _____
Regional Clerk Dennis Kelly

**THE CORPORATION OF THE TOWN
OF RICHMOND HILL**

Per:

Mayor Dave Barrow

Clerk Donna MacLarty

RECOMMENDED FOR EXECUTION
IN ACCORDANCE WITH BY-LAW
No. XXXX

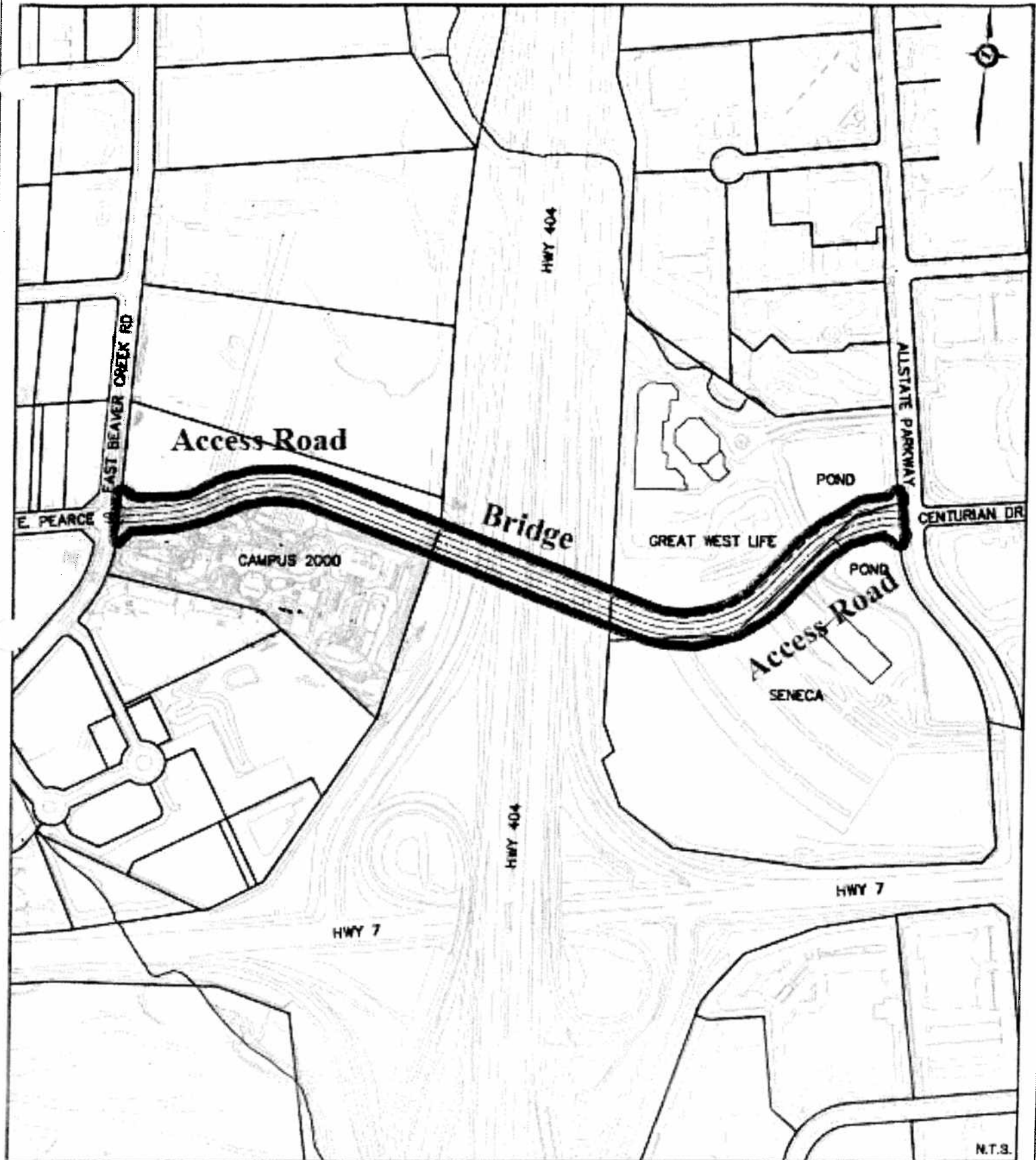
Italo Brutto
Commissioner of Engineering & Public Works

c/s

**THE CORPORATION OF THE TOWN OF
MARKHAM**

Per: _____
Mayor Frank Scarpitti

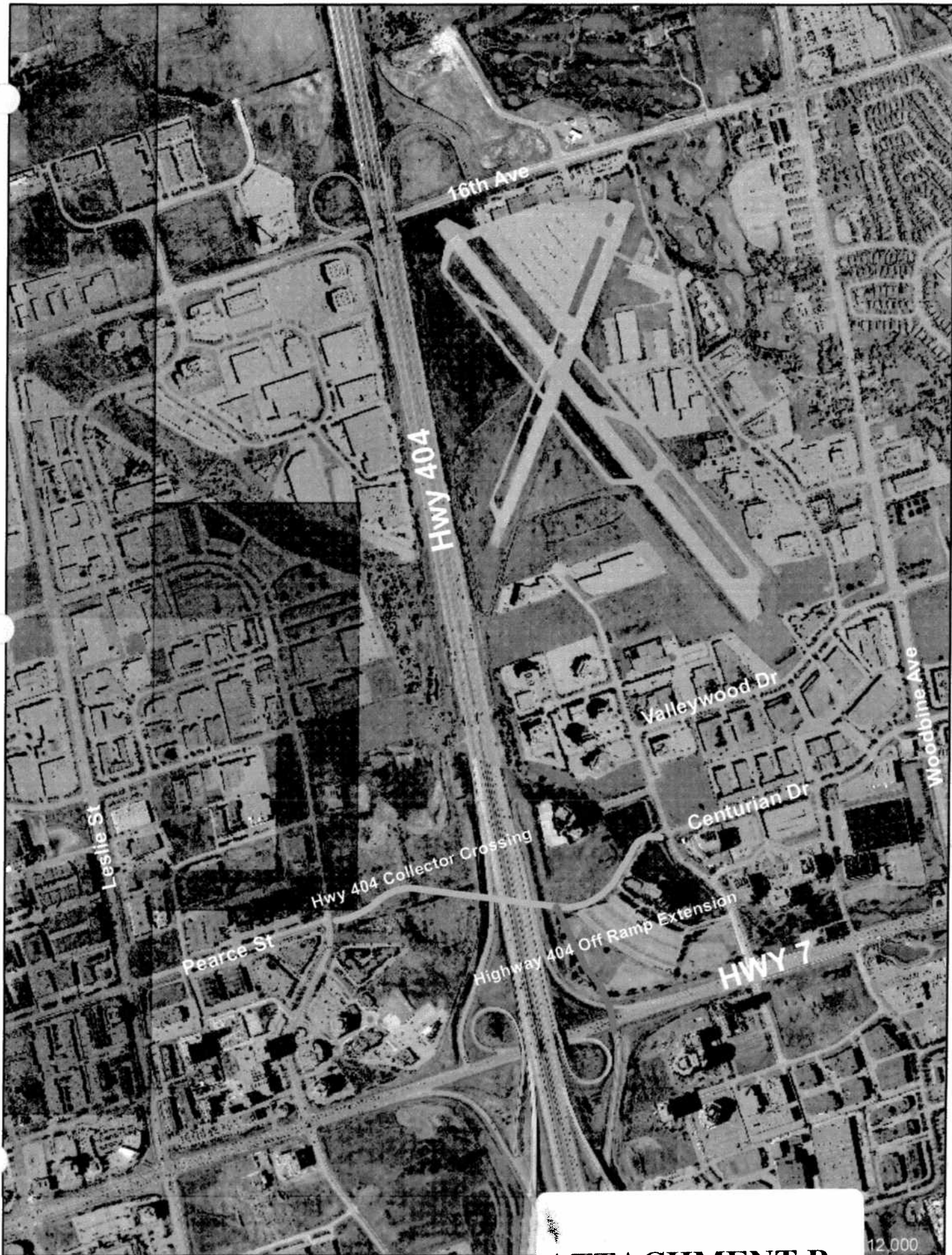
Per: _____
Clerk Kimberley Kitteringham



Site Location



N.T.S.



ATTACHMENT B