Council Direction:

This report responds to a request by City Council that staff provide a Report on impacts (ie. essential services) and potential savings for shutdown opportunities.

Information:

In contemplation of a City shutdown of services, there are a number of labour and employee relations issues that must be considered. These considerations do not deviate regardless of the length of the shutdown period and include the following:

1. Labour Relations – Unionized Employees

Given the nature of the operations primarily affected by the proposed shutdown, only the provisions provided for in the CUPE Local 5167 collective agreement were considered in this analysis. Specifically, articles 3.5(a) and (b) and 5.2 are the most relevant with respect to whether or not the City is allowed to shutdown its operations for a period of time.

Article 3.5 (a) & (b) provides the employer with the specific right to lay-off employees. They state that the Union recognizes the City’s exclusive right:

   a) to direct the work force which includes the right to direct, plan and control working operations and to schedule working hours and,
b) to hire, classify, transfer, promote, demote, dismiss, suspend or **layoff** employees because of lack of work or for other legitimate reason.

Article 5.2 also provides that there is no guarantee of the hours of work listed in the collective agreement and specifically states:

> The standard hours of work described in this Article are stated solely for the purpose of calculating overtime and shall not be considered as a guarantee of any minimum or as a restriction of any maximum number of hours worked.

As a result of these articles, the City has the right to lay-off its employees. There are no provisions in the collective agreement which specifically limit the number of employees that can be laid-off, or the length of time of those lay-offs.

Furthermore, the City’s right to lay-off employees because of a lack of work, or more importantly, because of “other legitimate reasons”, essentially negates any reasonable argument supporting the notion of an unlawful lock-out. Provided the City has legitimate financial reasons for the shutdown, it will likely be considered a lay-off as contemplated under the CUPE 5167 collective agreement.

Finally, provided the shutdown is for financial necessity and not an attempt to gain collective agreement concessions from the employees or the Union, any attempts by the union to argue an unlawful lock-out would likely be unsuccessful.

### 2. Employee Relations – Non-Unionized Employees

Under common law, employers are not given the right to lay-off non-unionized employees. In such cases, a lay-off could be considered constructive dismissal, unless the employer is permitted to lay-off the employee through an expressed or implied term in the employment agreement. There are no such expressed or implied terms in the current employment agreements for City non-union employees, and as such, these employees could argue that they are owed reasonable notice under common law.

There is some case law that would suggest that lay-off of non-unionized employees is permitted if there has been an established practice of such employees having being laid off in the past. This is not the case at the City, and as such, an argument for such an implied term in the employment agreements is not possible.

Having said that, it is highly unlikely that a non-unionized employee would argue constructive dismissal in pursuit of payment for notice in light of the temporary nature of the lay-offs.

### 3. Process implications

a) Unionized Employees:

The CUPE Local 5167 collective agreement contains provisions wherein the City should discuss the proposed shutdown with the Labour Management Committee
before the shutdown takes place. Specifically, a contemplated shutdown must be submitted as an agenda for the Labour Management Committee at least 14 days prior to the meeting date. A dispute resolution process for issues discussed at Labour Management Meetings is also available. Once this obligation has been fulfilled, the City is required to provide 14 days notice of the lay-off.

If the City decides to keep some services open during the shutdown period, the employees subject to the lay-off may have bumping rights (as stipulated in article 13.6 of the collective agreement). As a result, a more senior employee in one of the services that is being shutdown has the option, if he or she is qualified to perform the work, to take the position of a more junior employee working in one of the remaining active operations, thus sending the more junior employee into lay-off. In addition, members of the union executive board, grievance committee representatives and locations stewards are permitted to bump regardless of their seniority.

The CUPE Local 5167 collective agreement also includes lay-off and bumping provisions on bargaining unit wide basis. As such, any employee(s) who would be laid-off may exercise their rights to replace another employee with lesser seniority that occupies any classification equivalent to, or lesser than the classification they occupy, provided they are qualified to perform the work required. This is further complicated by language that allows the Outside Workgroup to have the right to “bump up” and replace employees with lesser seniority in a higher classification provided that the higher classification is within the Outside Workgroup and the employee is qualified to perform the work required. The administration of this language as contemplated by the proposed City shutdown of services would be quite complex and cumbersome, and would likely require agreement and concessions from the union with respect to the administration of same.

Finally, the City cannot shut down any of its services and lay-off any employees so that contractors perform those services instead (article 22.1)

4. Potential for immediate savings:

I. Unionized employees:

Employees using vacation during the lay-off period will negate the immediate savings of the shutdown. There is case law that would suggest that unionized employees have the right to exercise his or her preference for a vacation period.

In addition article 7.9 of the CUPE 5167 collective agreement states that “employees shall, when practicable, be granted the vacation period preferred by the employee……” In this case, it is likely that an arbitrator would allow any employee to take earned vacation during the lay-off period.

II. Non-unionized employees:

For non-unionized employees, the determination of when vacation can be taken should be set out in the employment contract. In this case, the employment contract is silent on such matters. Accordingly, the terms for vacation utilization are governed by the Employment Standards Act which states that the employer
determines when an employee can take vacation, and there is no mention of employee preference. Therefore, the City may “force” or “deny” vacation utilization during the shutdown period. Given the potential inequity and morale issues that may result, applying an inconsistent practice for vacation utilization for non-union employees during the shutdown period is not recommended.

III. Lieu Time:

Article 6.5 of the CUPE Local 5167 collective agreement allows employees to bank overtime hours to be taken as paid lieu time. Specifically, employees have the right to bank overtime to a maximum balance of 40 hours of lieu time. Such lieu time shall be granted at a time mutually agreed upon by the employee and the Department Head or designate, taking into account the operational requirement of the Section........"

Based on case law, and in consideration of article 6.5 of the collective agreement, an arbitrator would likely find that there is no operational requirement argument that would allow the City to prevent employees from using any banked lieu time during the shutdown period. The amount of accumulated lieu time, depending on the time of year, may significantly decrease the number of employees who could opt to use lieu time instead of being laid-off. Similar provisions would be granted to those non-union employees having lieu time banks.

5. Public Holidays:

Both union and non-union employees are entitled to receive pay for statutory holidays provided they meet the relevant requirements (ie. pass their probationary period and work on the “scheduled working day immediately preceding or succeeding” the holiday). As such, both union and non-union employees would be entitled to pay for any statutory holiday that may fall within the shutdown period provided the employee has met the above eligibility requirements.

6. Potential Option – Holiday Closure concept expansion

Since 1996, the City has incorporated a holiday closure program wherein the operations remain closed during the working days between Christmas and New Years. Staff in positions deemed non-essential for this period are given the option to accommodate the closure as follows:

i. Vacation;
ii. Floater days (which are no longer available);
iii. Access sick bank (where applicable);
iv. Take non-paid time;
v. Use accumulated lieu time;
vi. Or some combination thereof

Although no formal agreement exists with the unions recognizing this closure, the City has not received any grievances since the program was introduced in 1996.
In 2008, the Christmas Closure generated an average savings of $139,000 per day. Based on this experience, the City could estimate between 10 – 15% of the shutdown days being taken as non-paid.

Accordingly, an additional shutdown day contemplated during the 2009 Christmas holiday period would generate additional savings of approximately $139,000.

7. Operational Scenarios

To assess the potential impact of service shutdowns, operating departments were asked to provide some operational scenarios. The following scenarios were provided by Gillian Hendry, Director of Employment and Income Support Branch, Community Services Department; Rom D’Angelo, Manager of Corporate Buildings & Technical Services, Public Works Department; and Rob Hall, Director of Health Protection, Public Health Services.

Ontario Works Program:

The Ontario (OW) Program is facing a situation where the number of applicants is increasing and the number of cases exiting the program is decreasing. Intake for December, 2008 and January, 2009, caseload numbers and economic predictions indicate that the actual monthly caseload may increase substantially in 2009. Staff are implementing a contingency plan (e.g., overtime and changes to business procedures) in order to ensure timely service. The OW Intake Unit is currently booking application appointments up to 8 business days from the first point of contact. The provincial standard is within four business days. Intake numbers have increased by about 13% in January, 2009, in comparison to January, 2008.

If there is a reduction of available business hours for the Ontario Works program, customer service levels will not be met for timeliness and quality of service which may cause hardship for people applying for Ontario Works assistance. There will potentially be non-compliance with Ministry mandates such as regular participation agreement updates, length of wait time to complete an application, and documentation standards as there will be even less time for case managers to provide service. Outcome funding will be jeopardized as targets may not be achieved within the prescribed timelines which may result in a recovery of funds by the Ministry of Community and Social Services.

Energy, Fleet and Facilities:

Energy, Fleet and Facilities (EF&F) is a division of the Public Works Department with a clear mandate to provide services and support to other divisions and departments within the City who require any of the following: a) a place to work; b) energy to light, heat and cool their place of work; c) a vehicle or motorized equipment; and d) fuel to operate.

A week long shutdown would result in a reduction in energy consumption in both the fleet and facilities operations. This would result in many operational implications, risks and liabilities throughout other divisions within the Public Works Department – primarily Operations & Maintenance and Waste Management. From a Facilities perspective, the operations and energy usage in buildings would be reduced. Systems such as security monitoring, life safety systems, pumps & filtration systems in the recreation centres
would be a few examples of building components that require power during a shutdown scenario.

It is expected that a weeklong shutdown would generate approximately $50,000 - $70,000 in savings. This assumption is based on a shutdown during the “shoulder months” when there would be the least amount of impact to the community - which is typically between the winter and summer months (ie. May/June). Furthermore, this assumption does not include facilities such as Transit, Fire, and the Water Treatment Plant as well as other facilities operated on a contractual basis (ie. Stoney Creek City Hall – RCMP Tenant and the old Courthouse – McMaster University Tenant).

**Public Health Services – Health Protection Division**

The Health Protection Division (HPD) provides 24/7 coverage as mandated by the Province. There are a number of mandatory programs that require continuous coverage and our ability to immediately recall unionized staff from lay-off for emergency response and outbreak control. Any length of shutdown will result in non-compliance with Provincial Mandatory Program Requirements and would ultimately present a potential liability to the Board of Health should the Province wish to issue charges under the HPPA. It is estimated that in order to meet Mandatory Program Requirements, any potential savings realized through a shutdown will be significantly reduced or eliminated via increased costs associated with overtime, standby and call-outs, etc. in accordance with the applicable collective agreement(s). The timing of the shutdown will dictate which programs are deemed either essential or non-essential.

A shutdown of services may also jeopardize future funding for such programs. Specifically, the Province may not provide funding to cover the necessary program costs in future years should it determine that such funding is not necessary. As a result, future programs may be reduced which will directly affect our ability to maintain services at their current levels. For example, a 1 day shutdown may result in the above noted operational costs which are estimated at $9,500 however, funding from the Province will be forfeited by approximately $32,000 thereby resulting in added costs to the City.

In the case of a 5 day shutdown, HPD will be required to staff 50% of their complement. Demands for timely response must be maintained in the following areas: communicable disease reports, infectious disease outbreaks, housing and fixed premises complaints from the public, adverse water quality reports, issuing alerts for smog, excessive heat and cold, food recalls, vaccine provision for Doctors’ offices, etc. In addition, the HPD will not be able to meet the Provincial Mandatory Program Requirements if faced with a 5 day shutdown. Finally, the approximate savings of $23,750 will be negated by a Provincial funding shortfall of approximately $80,000 resulting in a net cost to the City.

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Chris Murray,
City Manager