SUBJECT: Agreement to Accept Compensation – Frank Butty Limited, Expropriation for Borer’s Creek, Town of Flamborough, Parts 1 to 3 on Expropriation Plan 89977 and Part 1 on Expropriation Plan 90204 (PW07140 / LS07018 / PED07285) (Ward 15)

RECOMMENDATION:

(a) That an Agreement by the Owner to Accept Compensation, resulting from the expropriation of easements over certain lands located on the north side of Highway No. 5 West, (as shown on Appendix “A” attached to Report PW07140 / LS07018 / PED07285) being part of Lot 24, Concession 3 in the former geographic Township of West Flamborough, in the former Town of Flamborough, described as Parts 1 to 3 on Expropriation Plan 89977 registered on July 16, 1991 and Part 1 on Expropriation Plan 90204 registered on July 18, 1991...
executed by the former owner Frank Butty Limited (Frank Butty) on September 13, 2007 be approved and completed and that the total full and final expropriation compensation of $110,000 plus legal, appraisal and other costs in the amount of $19,542.16 of which $6,700 as the Official Offer has not been paid, be charged to Account Number 59259 2050155001 (FL Borer’s Creek Contingency).

(b) That a final net payment of $129,542.16 resulting from the settlement of the expropriation be made to Feltmate Delbato Heagle LLP (Attention: James Tuck), in Trust for the former owner Frank Butty Limited.

(c) That the Mayor and City Clerk be authorized and directed to execute any necessary documents in a form satisfactory to the City Solicitor.

Scott Stewart, C.E.T.                                     Peter A. Barkwell
General Manager                                          City Solicitor
Public Works Department                                   Legal Services

_______________________________
Tim McCabe
General Manager
Planning and Economic Development Department

**EXECUTIVE SUMMARY:**

The purpose of this report is to request City Council’s approval to confirm the full and final settlement of a long outstanding expropriation of lands located at Highway No. 5, in the former Town of Flamborough for $110,000 plus legal expenses in the amount of $19,542.16 with a final payment to be made in the amount of $129,542.16. The expropriated lands were required for construction of the Town of Flamborough Borer’s Creek storm water management project.

**BACKGROUND:**

This report has implications for Ward 15 as the expropriated lands are located in a portion of the former flood plan of the Borer’s Creek in the former Town of Flamborough. This easement was required for the construction of the Borer’s Creek Storm Water Channel to contain the Borer’s Creek floodplain into an engineered channel and to allow for the installation of sanitary sewers.
The compensation claims of Frank Butty Limited arise from the expropriation by the then Town of Flamborough and Region of Hamilton-Wentworth (now the City of Hamilton) of a permanent easement bisecting the original 14.0 hectare (34.7 acres) parcel with easements over 1.546 hectares (3.82 acres) of the subject lands, identified as Parts 1 to 3 on Expropriation Plan 89977 and Part 1 on Expropriation Plan 90204. The subject property is located in the area of the Flamborough Business Park to the east of the Coreslab manufacturing plant on Highway No. 5 West at Coreslab Drive.

The purpose of the Borer’s Creek Channelization was to ensure flood reduction and stormwater management, resulting in a benefit to lands with residential and industrial development potential located within the Borer’s Creek Watershed. The beneficial result of the containment of the Borer’s Creek was to open up hundreds of acres of formerly flood prone lands on the north-east quadrant at Highway No. 6 and Highway No. 5 to residential development and to allow for the Flamborough Business Park development on the north-west quadrant at Highway No. 5 and Highway No. 6.

From the mid 1970’s to the late 1980’s various Conservation Authority, engineering, hydrological and planning studies were completed to prepare for the Borer’s Creek stormwater management project. On March 7, 1990 the Ontario Municipal Board (OMB) issued an Order allowing the Town of Flamborough to proceed with the construction of the Borer’s Creek Channelization. On April 18, 1990 the Council of the Town of Flamborough enacted By-Law 90-32-S to authorize the construction of the Borer’s Creek Channelization.

City of Hamilton Real Estate staff was requested to negotiate land purchases to facilitate the Borer’s Creek project. The majority of the necessary property interests were acquired on a voluntary basis. Staff was not able to purchase two properties, including the subject, and therefore steps were taken to proceed with Expropriation to obtain municipal ownership to allow for the channel construction. The subject Expropriation Plan No. 89977 was registered on July 16, 1991 and Expropriation Plan 90204 on July 18, 1991. The Notice of Expropriation was served on July 31, 1991 with Notice of Possession on September 20, 1991.

An Offer of Compensation in the amount of $6,700 based on an independent external Appraisal of the market value of the subject lands, pursuant to Section 25 of the Expropriations Act was served to the owner, Frank Butty Limited on October 11, 1991. The municipal $6,700 offer for the 3.82 acres was refused by the company and it chose to seek a legal claim for a higher compensation. The Region took vacant possession of the lands subject to the expropriation on December of 1991.

The Region’s original appraisal report, provided by Jacob Ellens & Associates, valued the parcel in the Borer’s Creek floodplain on the basis of highest and best use for the subject property as Conservation Lands and recommended a market value of $6,700 for the easement lands taken ($3,500 per acre, discounted to 50% for the easement acquisition), this being the amount offered to but not taken by the owner.
Lee A. Pinelli the former solicitor for the Town of Flamborough was retained by the Town and the Region to pursue this expropriation settlement. In the early years of the expropriation, municipal staff from the Real Estate Section and Mr. Pinelli held several meetings with the representative of Frank Butty Limited and another adjacent expropriated property owner (West Flamboro Development Limited) but further meetings were limited once these industrial property owners in 1992 commenced other legal actions against the Town of Flamborough and the Region of Hamilton-Wentworth.

In 1992 the Town of Flamborough imposed a $40,000 per acre tax rating surcharge on the industrial landowners benefiting from the project in order to offset the cost of the Borer’s Creek construction. These various owners, including Frank Butty, took the Town/Region to litigation in an attempt to mitigate or eliminate this surcharge. It appears that the subject expropriated property owner was distracted with this separate lawsuit and was not in a position to pursue the subject expropriation settlement.

In late 2000, after years of Hearings and Court proceedings, the rating lawsuit was ultimately settled favourably by the Supreme Court of Canada for the industrial landowners. Frank Butty Limited (and West Flamboro) represented by solicitor, Mr. Brian Morison, on February 15, 2001, was now able to deal with the Borer’s Creek expropriation and provided a Notice of Arbitration and Statement of Claim against the Region of Hamilton-Wentworth, the Town of Flamborough and the City of Hamilton. The Claim of damages resulting from the Expropriation was in the order of $1,250,000 plus unspecified additional injurious damages and expenses. Butty requested compensation based on industrial land value of $180,000 per acre for the area expropriated; interest from the date of the expropriation in 1991 at the prescribed 6% per annum; any legal, appraisal and other professional fees.

In efforts to negotiate a settlement, a formal meeting was requested with representatives of the City, the former property owners, their legal representative and members of the Province of Ontario’s Board of Negotiation to attempt to settle the issue of the market value of the expropriated lands. Unfortunately, as the two positions were so far apart, the Board was not able to assist the two sides to reach an agreement. However, comments and suggestions from the Board members did provide impetus to City staff to research alternative approaches to the City’s initial valuation of the subject property.

Some further progress was made over the next years in the Expropriation but unfortunately the passing away of Mr. Morison, the lawyer acting for Butty, delayed the negotiations. James Tuck of the firm Feltmate Delbato Heagle LLP was eventually retained by the claimant in late 2003.

As part of the litigation process the Claimant – Frank Butty Limited (jointly with West Flamboro Developments) and the Respondent – the City then commenced the legal process of Examination for Discovery. This formal presentation of facts by the two parties to provide and review evidence by witnesses was commenced in early 2004 and
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lasted into early 2007. During this period both sides provided reports in support of their opinion of market value for the expropriated lands and for any injurious damages to the balance of the property. Once again the two sides were not able to achieve a consensus of opinion and no agreement could be reached.

In order to try to bring an eventual conclusion to the claim, the next formal step in the Expropriation process was to take the matter to the Ontario Municipal Board for adjudication. A Hearing to present witnesses and provide evidence was scheduled over a number of weeks for September 2007. In an attempt to try to avoid this lengthy OMB Hearing, the ongoing legal costs for both sides and the potential risk of loss to the City, the City’s lawyer, Mr. Pinelli, was able to facilitate a meeting between the City, Frank Butty (along with West Flamboro) and a Negotiator representing the OMB. The Negotiator functions as an independent third party that attempts to bring the parties closer together and avoid an official OMB Hearing.

In early June 2007 the OMB Negotiator met with both sides over several days. Each side provided evidence of their position. After a number of group and separate meetings to find some resolution to the differences, a consensus for agreement was reached. The Claimant would drop its original claim and format of compensation, if the City would increase the market value of the expropriated lands to industrial rates and pay at a full fee simple compensation rate, rather than the 50% compensation for easement value. The City would also allow an injurious damage amount for any loss of value to the potential residential lands of Butty located north of the Borers Creek channel. Interest would be paid on the revised land value and injurious damages amount.

After a few rounds of proposals and counter proposals, the final Offer made by the City to settle was an all inclusive amount of $110,000 to include the negotiated value of the lands expropriated, any injurious damages to the lands not taken, any loss of income, owner’s time, interest from the date of the Expropriation and any and all other claims to compensation as set out in the Expropriations Act, as a full and final payment of the Expropriation plus reasonable legal fees and professional expenses incurred. A review by the City’s legal representative Mr. Pinelli of the Claimants lawyer’s time docket and professional fees incurred to date allowed for a further $19,542.06 in reasonable expenses.

What was expected to be a multi-week OMB Hearing would have required additional expenditures of legal and professional fees far beyond the amount already agreed to above for each of the sides, with the City to bear all these costs. Staff from Legal Services, Real Estate and outside Counsel support this all inclusive agreement as it represents a reasonably fair settlement to this Expropriation claim and avoids the risk of having to mount an expensive defence at the Ontario Municipal Board and pay further amounts in legal, appraisal, planning fees, interest costs and expend more staff time with no assurance of a favourable outcome for the City.
ANALYSIS OF ALTERNATIVES:

Should this recommendation not be approved, the City of Hamilton will be required to pursue a defence at the Ontario Municipal Board, which would involve the expenditure of significant professional fees and of City staff time to try to obtain a final decision but one that may not be favourable to the City.

ANALYSIS/RATIONALE:

Approval of the terms of the Agreement will remove the last outstanding litigation in the Borer’s Creek matter and any additional financial and legal claims against the City. Staff time would be freed up to pursue other legal and real estate matters and would avoid the risk of a larger monetary settlement imposed upon the City at the Ontario Municipal Board.

ALTERNATIVES FOR CONSIDERATION:

City staff could, if directed by Council, attempt to negotiate better financial terms than the agreed to all inclusive proposed settlement of $110,000 (plus outstanding legal fees), but any further delays would force the former property owner to reinstate the request for an OMB Hearing. The City would risk the imposition of a larger monetary award and the corresponding obligation for payment of legal and appraisal fees that would go with an OMB Hearing. This option is not recommended.

FINANCIAL/STAFFING/LEGAL IMPLICATIONS:

Financial: Sufficient funds are available in Account Number 59259 - 2050155001 (FL Borer’s Creek Contingency).

Staffing: N/A.

Legal: The City’s outside solicitor will be required to finalize the Agreement and deal with any registration of deeds, discharges and notices on title.

POLICIES AFFECTING PROPOSAL:

The City of Hamilton as an Expropriating Authority and as an Approving Authority under the Expropriations Act is required to attempt to resolve issues of value of the lands or interests taken by the City under the Expropriations Act. The proposed settlement deals with this obligation of the City and does not require any changes to City policy.
RELEVANT CONSULTATION:

Staff from Legal Services and the Real Estate Section along with outside engineers, lawyers and appraisers has been consulted in support of the City’s current position and to review the various proposals of value from the owners.

Public Works Department, Surveys & Technical Services, Capital Planning & Implementation Division.

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
  Outstanding Legal Claims and Litigation against the City is settled.

- Environmental Well-Being is enhanced. ☐ Yes ☑ No
  N/A.

- Economic Well-Being is enhanced. ☑ Yes ☐ No
  The proposed settlement avoids the continuation of litigation and expenditure of further costs by the City.

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

VDP/sd
Attach. (1)
Agreement to Accept Compensation
Frank Butty Limited
Expropriation of Channel Easements
Parts 1 to 3 on Expropriation Plan 89977 and
Part 1 on Expropriation Plan 90204
Former Town of Flamborough
CITY OF HAMILTON

Part of 43 Highway 5 West, Flamborough.