

THE CORPORATION OF THE MUNICIPALITY OF PORT HOPE

BY-LAW NO. 83/2022

Being a By-law to Authorize Execution of an Agreement between the Corporation of the Municipality of Port Hope and His Majesty the King in Right of the Province of Ontario, Represented by the Minister of Transportation for the Province of Ontario to Provide Access under the Provincial Highway 401 Bridge to Establish a Trail to Connect to the GRCA Millennium Trail.

WHEREAS the Municipal Act, 2001, Section 9 provides in part that a Municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority;

AND WHEREAS Council considered Report PRC-15-22 at the Committee of the Whole meeting of December 6, 2022 regarding an agreement with the Ministry of Transportation to provide access for pedestrian and recreational purposes under the Provincial Highway 401 bridge at Choate Road and at the Ganaraska River bridge to establish a trail to connect to the GRCA Millennium trail to the north;

NOW THEREFORE THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE MUNICIPALITY OF PORT HOPE ENACTS AS FOLLOWS:

1. THAT the Mayor and Municipal Clerk are hereby authorized to execute on behalf of the Corporation an Agreement with the Ministry of Transportation with the terms and conditions as set out in Appendix "A" attached hereto comprising part of this By-law.
2. THAT this By-law shall come into force the day it is finally passed.

READ a FIRST, SECOND and THIRD time and finally passed in Open Council this 20th day of December, 2022.

Olena Hankivsky, Mayor

Brian Gilmer, Clerk

THIS AGREEMENT made in quadruplicate *this* ____ day of _____, 2022

BETWEEN:

**HIS MAJESTY THE KING IN RIGHT OF
THE PROVINCE OF ONTARIO, REPRESENTED BY THE MINISTER OF
TRANSPORTATION FOR THE PROVINCE OF ONTARIO**
(hereinafter referred to as the "Ministry")

OF THE FIRST PART

- and -

THE CORPORATION OF THE MUNICIPALITY OF PORT HOPE
(hereinafter referred to as the "Municipality")

OF THE SECOND PART

WHEREAS

1. The lands comprising a public highway, being the existing King's Highway No. 401, are vested in the Ministry and are under the jurisdiction and control of the Ministry;
2. The Municipality wishes, at its sole expense and cost, to design, construct, use and maintain a public pedestrian and bicycle recreational trail for recreational purposes that would traverse under Highway 401 at the Ganaraska River and Choate Road Structures;
3. Pursuant to subsection 2(3) of the Public Transportation and Highway Improvement Act, R.S.O. 1990, c. P.50 as amended, ("PTHIA"), the Minister may authorize any municipality to use, construct, or maintain any buildings, structure or improvements in or on any space or area located under or over a highway under the jurisdiction of the Ministry where, in the opinion of the Minister, such construction, maintenance or use can be carried out without unduly interfering with the public use of the highway;
4. The Minister is of the opinion that the construction, maintenance, and use of the Trail under Highway 401 can be carried out without unduly interfering with the public use of Highway 401;
5. The Municipality shall apply for and obtain a permit from the Minister before conducting any construction, maintenance, or use of the Trail in accordance with the requirements of Section 38 of the PTHIA;
6. Section 116 of the PTHIA allows the Minister to enter into agreements for the purposes of the PTHIA, including agreements related to the safety and mobility of people and goods; and
7. The Ministry has agreed to allow the Municipality to design, construct, use and maintain the Trail under Highway 401 upon the terms and conditions of this agreement.

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:

DEFINITIONS:

1. In this Agreement,
 - a. **Trail** means that portion of the public pedestrian and bicycle recreational trail and structure under Highway 401, legally described on Schedule "A" and as shown on Schedule "B," attached to and forming part of this agreement;
 - b. **Highway 401** means that portion of the King's Highway Number 401, in the Municipality of Port Hope, Ontario, including its right of way, bridges and the area comprising its corridor control as provided for in Section 39 of the PTHIA;
 - c. **Minister** means the Minister of Transportation for the Province of Ontario;
 - d. **Permit** means a permit issued by the Minister or a delegate employee of the Ministry in accordance with Section 38 of the PTHIA that is required by the Municipality to design, construct, use and maintain the Trail under Highway 401;
 - e. **Utilities** shall mean, all utilities in whole or in part that exist now, and that may exist at any time and from time to time in the future, inclusive of any variations and incidentals thereto, that are within Highway 401 and that are located within the area of the Trail; and
 - f. **PTHIA** shall mean the Public Transportation and Highway Improvement Act, R.S.O. 1990, c. P.50 and any amendments thereto from time to time.

TERM

2. The term of this agreement shall run for a period of ten (10) years and shall commence on the day of issuance of the Permit. The term shall be automatically renewed for successive periods of ten (10) years each unless this Agreement is terminated in accordance with the provisions herein. The Municipality shall not undertake and work on the Trail until a Permit is issued under the PTHIA.

LICENCE

3. The Ministry grants to the Municipality a licence to construct, occupy, use, and maintain the Trail under Highway 401 in conjunction with a recreational trail in general.

APPROVAL

4. The Ministry grants only permission pursuant to the provisions of the PTHIA, and the City shall be responsible for obtaining all approvals required from any other authority in order to carry out the work with respect to the Trail.

MUNICIPALITY'S RESPONSIBILITIES

5. The Municipality shall:
 - a. design and construct the Trail to standards acceptable to the Ministry;
 - b. allow the Minister or their representative access and right to continuously inspect performance of the work set out in this agreement as the work progresses; and, subsequently, the condition of the Trail upon completion and thereafter;
 - c. be responsible for the maintenance, power consumption and keeping in repair of the Trail within the limit of the Highway 401 right of way, at the Municipality's sole cost and expense, to the same extent as the Ministry would be required to do under any rule of law, whether statutory or otherwise. The Ministry shall have the right to continuously inspect the condition of the Trail and shall have the right of access thereto for such purposes. Without limiting the generality of the foregoing, the Municipality's responsibilities shall include but shall not be limited to:

- i. all debris removal and spring cleanup of the Trail;
 - ii. washout repair;
 - iii. guide rail repairs, pothole patching, crack sealing and resurfacing of the Trail;
 - iv. Trail drainage;
 - v. all other work or services incidental to the maintenance and minor repair of the Trail;
- d. be responsible for all major repair and rehabilitation of the Trail within the limit of the Highway 401 right of way, at the Municipality's sole cost and expense, to the same extent as the Ministry would be required to under any rule of law, whether statutory or otherwise. The Ministry shall have the right to determine, in consultation with the Municipality, the schedule of any major rehabilitation and the timing of any closings of the Trail where, in the opinion of the Ministry, such closure is necessary for the purposes of carrying out any major rehabilitation. The Ministry may also close the Trail, if the Ministry deems, in its sole discretion, that it requires the Trail to be closed for dealing with any emergency on Highway 401;
- e. ensure that any maintenance and repair performed with respect to the Trail is performed promptly and in such a manner so as to cause no interference with Highway 401 or the use of Highway 401 by the public;
- f. compensate the Ministry in full for any damage caused or any harm done to Highway 401 as a result of maintenance and repair performed, or not performed, as the case may be, by the Municipality with respect to the Trail;
- g. take all reasonable steps required to ensure the Trail is used for public leisure uses such as walking, cycling and similar recreational and leisure uses within the Highway 401 right of way;
- h. employ reasonable measures to monitor the Trail within the Highway 401 right of way to minimize the threat of vandalism and other criminal acts against the public and adjacent property owners;
- i. be responsible for Trail signing. The Municipality shall not place any Trail signs adjacent to the Highway 401 right of way without prior written approval and/or a permit from the Ministry. The Ministry may remove and dispose of any Trail signs placed without the required approval;
- j. apart from the Trail signs referred to in clause (i) above, take reasonable efforts to ensure that no signs of any nature or kind whatsoever are placed on the Trail unless approved by the Ministry;
- k. be responsible for one hundred (100) percent of the costs and expenses of all relocations and modifications of utility facilities necessitated by the existence of the Trail;
- l. obtain prior written approval in the form of a Permit from the Ministry and comply with the terms and conditions therein, for work other than routine annual or periodic maintenance that is to be undertaken on the Trail.
- m. provide "as built" plans of the Trail, including details of Utilities, if any, signed and stamped by two Professional Engineers of Ontario, to the Ministry.

EMERGENCY AND HIGHWAY PURPOSES

6. Notwithstanding any other provision of this Agreement, the Ministry may suspend or terminate this Agreement before the expiry of its term, if the Ministry deems, in its sole discretion, that it requires the lands occupied by the Trail for an emergency or for the purposes of installing, repairing, or maintaining Highway 401 or other public needs, on condition that the Ministry give the Municipality oral or written notice of such emergency or need to install, repair, or maintain Highway 401. The ministry shall not be liable to the Municipality for any costs incurred by the suspension or termination of the Agreement. However, the Municipality shall indemnify and reimburse the Ministry for all costs reasonably incurred by the Ministry to repair and maintain Highway 401 when the need for such repair and maintenance can be reasonably attributed to the negligent failure by the Municipality to comply with the provisions of this Agreement.

INDEMNITY

7. The Municipality shall indemnify and save harmless at all times, including after the termination of this Agreement, the Ministry, its Minister, servants, employees, and agents from and against any and all demands, losses, costs (including reasonable legal costs), damages, injuries (including death), claims, actions or causes of action, proceedings in any manner arising due to, out of, from, or in connection with the Municipality's establishment, use or occupation of the Trail save and except any and all demands, losses, costs, damages, injuries (including death), claims, actions or causes of action, proceedings, in any manner arising due to, out of, from, or in occasioned by the negligence or willful act or omission of an employee, servant, or agent of the Ministry.
8. The parties shall acknowledge that the Municipality will not be undertaking any winter control or snow and ice removal, salting or sanding, upon the Trail as it is a recreational trail. Any liability which may arise as a result of that policy decision shall be fully assumed by the Municipality.
9. The Ministry shall not be liable in any manner whatsoever for any loss, injury, or damage to person or property including loss of life, whosoever suffered, that in any way is connected to the establishment, use or operation of the Trail unless caused by the negligence of willful act or omission of an employee or agent of the Ministry while acting within the scope of his or her employment or agency respectively. The Ministry shall not be liable for any incidental, indirect, special, or consequential damages or losses of use, revenue or profit suffered by any party arising out of or in any way connected to this Agreement. This provision shall survive the termination or the expiration of this Agreement.

PERMIT

10. The terms of this Agreement are hereby deemed to be terms of a permit from the Minister to the City, pursuant to section 38(11) of PTHIA, allowing the Trail to be located within the Highway 401 right of way, and the Trail shall be subject to the authority of the Minister accordingly.

MUNICIPALITY WARRANTY

11. The Municipality warrants that it has taken all necessary steps, done all acts, passed all by-laws, and obtained all approvals within its power required to give it authority to enter into this Agreement.

SECTION 33(1) UNDERTAKING BY THE MUNICIPALITY

12. The Trail is hereby deemed to be, also a municipal undertaking of the Municipality within the Highway 401 right of way under the end portion of Section 33(1) of the PTHIA whereby:

The Municipality is liable for want of repair of the municipal undertaking whether the want of repair of the result of nonfeasance or misfeasance, in the same manner and to the same extent as in the case of any other like work constructed by the Municipality.

INSURANCE

13. The Municipality shall, during the term of this Agreement, have in place at its cost, with insurers having a secure A.M. Best rating of B+ or greater or the equivalent, a fully paid-up commercial general liability policy of insurance covering third party property damage, bodily injury, and personal injury. Such policy shall:
 - a. name the Ministry as an additional insured; minimum \$5 million
 - b. have the Municipality as named insured;
 - c. provide 30 days written notice to the Ministry of cancellation, termination, or material change; and
 - d. contain a cross-liability clause endorsement.

TERMINATION

14. The Ministry may terminate this Agreement at any time, acting reasonably, upon thirty (30) days written notice being provided to the Municipality.
15. The Ministry may terminate this Agreement, immediately upon providing notice to the Municipality, in the event that the Municipality fails to fulfil any of the terms and conditions of this Agreement.
16. Notwithstanding, Section 15, the Ministry may, in its reasonable discretion, give written notice to the Municipality of a breach of the terms and conditions of this Agreement and allow the Municipality a reasonable period of time in which to remedy the breach.
17. The Ministry's rights under Section 15 and 16 shall not in any manner be prejudiced if the Ministry has overlooked or condoned any non-compliance with the terms and conditions of this Agreement by the Municipality.

MINISTRY'S RIGHTS ON TERMINATION

18. In the event of the termination of this Agreement, the Ministry shall be under no further obligation to the Municipality, except to recover from the Municipality any damages, costs and expenses incurred as a result of such termination.
19. Upon the termination of this Agreement, the Municipality shall, at its sole cost and expense, retire and abandon the Trail and, unless otherwise agreed to restore that part of Highway 401 occupied by the Trail, to the satisfaction of the Ministry, including the removal of any permanent structures or facilities. The work required to retire and abandon the Trail shall include appropriate measures to prevent the further use of the site as a trail. This obligation shall survive the termination of this Agreement.
20. Should the Municipality fail to comply with Section 19 of this Agreement, the Ministry may undertake to do anything that will remedy the default and may, without foregoing any other remedies, perform the removal, restoration or replacement work and the Municipality shall be required to pay the Ministry for all reasonable costs to perform the said work.

COSTS

21. The Municipality agrees to pay all costs and expenses in connection with the design, construction, occupation, use, and maintenance of the Trail under Highway 401 as set out in this Agreement.

CONFLICTS

22. This Agreement shall be constructed as constituting integral terms and conditions of a Permit issued to the Municipality and shall be read as if the terms and conditions of this Agreement were contained within the Permit. Where there is a conflict between this Agreement and the terms and conditions contained in a Permit issued to the Municipality, the terms and conditions contained in the Permit shall govern. Such Permit shall have annotated on it:

“this Permit is subject to the terms of the Agreement commencing on the day of the issuance of this Permit, between the Ministry of Transportation and the Municipality of Port Hope.”

23. Where there is a conflict between this Agreement and the terms and conditions of other agreements that the Municipality may have entered into with another party, this Agreement shall govern.

NOTICES

24. Any notices to be given under the provisions of the Agreement shall be in writing and shall be given by personal delivery or sent by facsimile (as further specified below), or mailed by prepaid registered mail, or delivered by courier service. Subject to change by either party with written notice, notice shall be addressed as follows:

The Ministry:	Ministry of Transportation Corridor Management Section 1355 John Counter Blvd Postal Bag 4000 Kingston, ON K7L 5A3
Attention:	Head
Telephone:	613-545-4744
Facsimile:	613-540-5106
City:	Municipality of Port Hope 56 Queen Street Port Hope, Ontario, L1A 3Z9
Attention:	Director of Corporate Services
Telephone:	905-885-4544
Facsimile:	905-885-7698

Such notices, invoices, demands, or correspondence as foresaid shall be deemed to have been received by the party to whom it is mailed on the third (3rd) business day following the day of posting, or on the day of delivery if provided by personal delivery, facsimile, or courier.

Such communications may be delivered by facsimile or other similar means of electronic communications (i.e. email). Provided that if an above day deemed for receipt is not a business day, such notice or other communication shall be deemed to have been received on the following business day. It is agreed that any notice to be given by the Municipality may be the manager of realty services and/or its legal counsel and need not be under the corporate seal of the Municipality and any such notice, so signed, shall be conclusively deemed to express the will and corporate act of the Municipality as therein contained and no further evidence thereof or of any by-law or resolution need be enacted or given.

Confidential material and billing documents shall not be delivered by facsimile or other similar means of electronic communications.

SUCCESSORS AND ASSIGN

25. This Agreement shall endure to the benefit of, and be binding upon, the parties hereto and their respective successors and assigns.

SEVERABILITY

26. If any provisions of this Agreement or portion thereof or the application thereof to any Person of circumstance shall to any extent be invalid or unenforceable:
- the remainder of the Agreement and its application to any person or circumstances shall not be affected thereby.
 - the parties thereto will negotiate in good faith to amend this Agreement to implement the intentions set forth herein.

27. Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

NO PARTNERSHIP

28. The parties understand and agree that nothing contained in this Agreement shall constitute or be deemed to create a partnership or joint venture between the parties hereto.

APPLICABLE LAW

29. This Agreement shall be governed by the laws of the Province of Ontario and the federal laws of Canada.

IN WITNESS WHEREOF the Minister, on behalf of the Part of the First Part, has hereunto set their hand, and the Part of the Second Part has hereunto affixed its Corporate Seal under the hands of its proper officers fully authorized in that behalf.

SIGNED this _____ day of _____, 2022.

**HIS MAJESTY THE KING IN RIGHT OF THE
PROVINCE OF ONTARIO, REPRESENTED
BY THE MINISTER OF TRANSPORTATION
FOR THE PROVINCE OF ONTARIO**

Per: _____

SIGNED AND SEALED this 20th day of December, 2022.

THE MUNICIPALITY OF PORT HOPE

Name: Olena Hankivsky
Title: Mayor

Name: Brian Gilmer
Title: Director of Corporate Services/Clerk

Schedule "A"
**to an Agreement between His Majesty the King in Right of the Province of Ontario,
represented by the Minister of Transportation for the Province of Ontario, and the
Corporation of the Municipality of Port Hope.**

Legal Description of the Trail lands

PIN:	51060-0206 (LT)
LEGAL DESCRIPTION:	Part of Lot 4, Concession 2 Township of Hope, now Town of Port Hope, County of Northumberland

Schedule "B"

to an Agreement between His Majesty the King in Right of the Province of Ontario, represented by the Minister of Transportation for the Province of Ontario, and the Corporation of the Municipality of Port Hope.

See Sketch of the Trail attached hereto

