

The Corporation of the Town of Tecumseh

By-Law Number 2022-091

Being an By-law to authorize the Execution of a Collaborative Work Agreement with the Corporation of the Town of Tecumseh and VIA Rail Canada Inc

Whereas The Corporation of the Town of Tecumseh (Town) is desirous of entering into a Collaborative Work Agreement (Agreement) with VIA Rail Canada Inc., for the construction works to be completed at the VIA Rail Crossing at Lesperance Road;

And whereas under Section 5 of *the Municipal Act 2001, S.O. 2001 c.M.25*, the powers of a municipality shall be exercised by its Council by by-law.

Now Therefore the Council of The Corporation of The Town of Tecumseh enacts as follows:

1. **That** the Mayor and the Clerk be and they are hereby authorized and empowered on behalf of The Corporation of the Town of Tecumseh, to execute an Agreement between The Corporation of the Town of Tecumseh and VIA Rail Canada, dated the 13th day of December, 2022, a copy of which Agreement is attached hereto and forms part of the by-law and to do such further and other acts which may be necessary to implement the said Agreement
2. **Read** a first, second, third time and finally passed this 13th day of December, 2022.

Gary McNamara, Mayor

Jennifer Alexander, Acting Clerk

COLLABORATIVE WORK AGREEMENT

BETWEEN:

CORPORATION OF THE TOWN OF TECUMSEH

917 Lesperance Road, Tecumseh, Ontario, N8B 1W9

(hereinafter called "**Tecumseh**")

AND:

VIA RAIL CANADA INC.

3, Place Ville-Marie, Suite 500, Montréal, Québec, H3B 2C9

(hereinafter called "**VIA**")

(individually a "**Party**" and collectively, the "**Parties**").

THE PARTIES AGREE AS FOLLOWS:

1. **Definitions**

- (a) In this Agreement, the following capitalized terms shall have the meaning ascribed as follows:
 - (i) "**Attorney Fees**" shall include, without limitation, attorneys' costs and fees, of whatever nature, reasonably incurred in the context of (1) a judicial action (judicial and extra judicial costs and fees); and/or (2) a dispute arising from an enforcement or interpretation of this Agreement or any other circumstances directly or indirectly related to the performance or non-performance of this Agreement.
 - (ii) "**Claims**" shall, in particular, include all claims, costs, charges, losses, liabilities, damages, demands, legal actions, Attorney Fees and expenses from whatever nature, source and kind in any manner. "Claims" shall also include any awards made against VIA and its Representatives under any statute for the protection of workmen.
 - (iii) "**Project**" means the Lesperance Road and VIA Grade Crossing Improvements project within the VIA Right-of Way (ROW) limits at or in the vicinity of 99.31 Chatham Subdivision;
 - (iv) "**Representatives**" includes collectively and individually, a Party's directors, officers, shareholders, employees, mandataries, agents, servants, representatives, contractors, subcontractors, consultants and those for whom such Party is in law responsible;
 - (v) "**Work**" means the work to be carried out by the Parties for the Project, as described in Schedule A attached hereto.

2. **Term**

- (a) This Agreement shall commence upon signature of this Agreement by both Parties ("**Effective Date**") and shall end upon completion of the Work, which the Parties estimate to be December 31, 2023.

- (b) Should either Party breach any of its obligations under this Agreement, the other Party shall have the right to terminate this Agreement upon seven (7) days written notice in the event a default continues for seven (7) days after the non-defaulting Party has given written notice of such default.

3. **Work**

- (a) The Parties agree to carry out the Work in accordance with the roles and responsibilities set out in Schedule “A”.
- (b) Tecumseh shall carry out its portion of the Work in accordance with plans preapproved in writing by VIA, and in accordance with VIA’s requirements respecting safe railway operations. No Work shall proceed until this Agreement has been signed and the plans approved by VIA. All drawings must be signed and sealed by a professional competent in the province where the Work will be executed. All federal regulations compliance must be clearly marked in the foot note of the drawings.
- (c) Tecumseh shall assign duly qualified personnel to perform its portion of the Work and shall co-operate with VIA or any other legislative authority to ensure that all work is performed in accordance with all applicable regulations and by-laws and that all permits and authorizations are obtained by Tecumseh. Tecumseh shall be responsible to pay for all charges imposed by such regulations and by-laws. Tecumseh shall also provide VIA with a road closure plan.
- (d) Notwithstanding the expiration or termination of this Agreement, Tecumseh agrees that any and all maintenance of the Work following its completion shall be Tecumseh’s sole and exclusive responsibility.

4. **Project Costs**

- (a) The Parties agree that all costs incurred to complete the Work shall be borne exclusively by Tecumseh, except as expressly provided in paragraph (b) of this Section 4. Without limiting the generality of the foregoing, Tecumseh shall bear all the costs incurred for Tecumseh’s entire surfacing of the approach at the crossing (for clarity, outside the range of 18 inches from the railway track measured in a straight perpendicular line). The party shall endeavor to have such costs funded in part through the RSIP Funding. In addition, Tecumseh shall bear all the costs incurred for the VIA’s West signal relocation, which is estimated at \$15,000.00 including labor, equipment and material if required.
- (b) In addition, each party shall bear fifty percent (50%) of the costs for VIA’s replacement/relaying of the tracks (for clarity, within the range of 18 inches from the railway track measured in a straight perpendicular line), which cost shall not exceed \$160,000.00 (i.e. 80 feet at \$2,000.00/foot installed).
- (c) Any amount owed by either Party to the other Party pursuant to this Agreement shall be payable within thirty (30) days following the first Party’s receipt of an invoice from the other Party.

5. **Audit Rights**

Each Party shall maintain proper books and records, in accordance with generally accepted accounting principles, and in such detail as is necessary for proper financial management. Each Party shall have the right to audit the actual direct costs charged to such Party at all reasonable times during the term of this Agreement and for a period of one (1) year thereafter. All audit related costs shall be borne by the Party seeking the right to audit.

6. **Force Majeure**

If either Party is prevented from carrying out any of its obligations hereunder by any event of force majeure, then any scheduled time for performance shall be extended for so long as such event of force majeure continues to prevent the performance of such obligations. Any Party prevented from carrying out any obligations by reason of an event of force majeure shall promptly give the other Party notice of the event of force majeure, including full particulars in respect thereof.

7. **Confidentiality**

- (a) Tecumseh and its Representatives shall maintain confidential all information pertaining to VIA and this Agreement acquired before, during and after the term of this Agreement, and all reports, specifications, drawings and other documentation produced hereunder, and shall not disclose or use same for any purposes other than for the performance of the obligations of this Agreement.
- (b) Tecumseh agrees to comply with all applicable federal and provincial laws relative to the protection of personal information with respect to this Agreement. VIA reserves its right to visit Tecumseh to evaluate and verify Tecumseh's compliance with any applicable federal and provincial law relative to the protection of personal information.
- (c) This Agreement and the information contained herein are confidential, subject to the provisions of the *Access to Information Act*, R.S.C. (1985), c. A-1 and the *Privacy Act*, R.S.C. (1985), c. P-21.
- (d) The provisions of this Section 8 shall survive the expiration or any termination of this Agreement.

8. **Compliance with Laws**

Each Party and its Representatives shall comply with all applicable laws, including environmental laws and the *Railway Safety Act* as well as all federal regulatory requirements and acknowledge having received a copy of the General Safety Rules and agree to fully abide by them. Tecumseh and its Representatives shall exercise caution at all times when near railway tracks or corridor or in the vicinity of an active railway track, or performing work near railway tracks or corridor or in the vicinity of an active railway track, and remain alert to the approach of trains, engines or cars, or other railway equipment from either direction and at any times.

The Work shall be carried out and at all times and maintained in accordance with the *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.) and all rules, requirements, regulations, directives, orders or plans adopted or approved by the Canadian Transportation Agency, Transport Canada, or any predecessor or successor governmental agency or body whose rules, requirements, regulations, directives or plans may have effect on the Work. Tecumseh agrees to observe and perform (and have its Representatives observe and perform) all the terms and conditions of the said rules, requirements, regulations, directives, orders or plans.

9. **Expulsion in the Event of Violation**

Tecumseh and its Representatives acknowledge that should they neglect, fail or refuse to abide fully with the stipulations, terms and conditions of this Agreement, they may be expelled from VIA's property, until such time that the matter has been resolved by VIA at its full satisfaction.

10. **Safety and Caution near Tracks**

- (a) No person shall, without lawful excuse, enter on land on which a line work is situated.
- (b) Tecumseh and its Representatives must keep the railway line clear and shall not place any material or equipment on railway tracks.
- (c) Tecumseh and its Representatives shall not, at any time and in any way, obstruct or impede the operation, the maintenance or the enjoyment of VIA's property by VIA and its Representatives or foul the track with equipment and shall act with care and diligence at all times. If VIA deems, without restriction, that the Works being undertaken or the method used to undertake the Works will impede VIA in any way, VIA may order the Works stopped, recommend a different methodology, require that adequate protective measures be taken and generally impose any measures or any combination of measures that VIA may deem necessary under the circumstances. Tecumseh shall comply with the requirement of this Section, at its risk and expense and without recourse against VIA.
- (d) Tecumseh and its Representatives shall take all necessary measures with respect to safety and fire protection.
- (e) If applicable, Tecumseh and its Representatives shall, prior to the commencement of the Work, ensure that all employees and subcontractors who will be performing the Works participate in a compulsory safety briefing and information session, and shall complete VIA Online Safety Test (www.erailsafe.com/canada). VIA shall have the right to verify compliance to the safety rules.

11. **Contractual Liability and Indemnification**

- (a) Tecumseh and its Representatives shall fully indemnify and save harmless VIA and its Representatives, and shall furthermore act as warrantor and take up VIA and its Representatives' defence to answer for all financial consequences for all Claims, including those for bodily injuries, death and any Claims of third parties, of whatever source, nature and kind in any manner, howsoever arising with respect to Tecumseh and its Representatives' obligations under the Agreement provided that Tecumseh may assert any valid defense against a third party Claim and Tecumseh is not a warrantor with respect to the negligent acts or omissions of VIA and its Representatives where Tecumseh has duly performed its obligations under the Agreement.
- (b) Tecumseh and its Representatives are liable for any material loss resulting from their actions, omissions, fault and negligence.
- (c) Tecumseh and its Representatives shall waive all Claims they may have against VIA and its Representatives arising out of an accident or otherwise, resulting from VIA and its Representatives' operations, ownership, use or possession of any property, or any person under VIA and its Representatives' control, provided the claim does not arise from VIA and its Representatives' wilfully reckless act or act of gross negligence.

- (d) Tecumseh agrees to obtain a waiver of liability from its Representatives. Such waiver and indemnity shall apply notwithstanding the failure by Tecumseh to obtain any written and signed waivers from its Representatives. Tecumseh and its Representatives further agree to pay compensation for any damage caused by Tecumseh and its Representatives to the property of VIA and its Representatives or a third party, and to indemnify VIA and its Representatives against any Claim that a third party may present to it regarding damage so caused to its property or injury (including death) arising out of the use of VIA's property.
- (e) Tecumseh and its Representatives agree that in no event they will enter into any settlement which involves the admission of liability by VIA and its Representatives, the imposition of any liability on VIA and its Representatives without VIA's prior and express written consent. VIA and its Representatives agree that in no event they will enter into any settlement which involves the admission of liability by Tecumseh and its Representatives, the imposition of any liability on Tecumseh and its Representatives without Tecumseh's prior and express written consent.

12. **Insurance**

- (a) Upon the signing of this Agreement and without restricting the generality of Section 11, Tecumseh and its Representatives shall obtain and maintain for the term of this Agreement the following insurance policies:

Commercial General Liability Insurance preferably an "occurrence" form, covering the liability of Tecumseh and its Representatives, for bodily injury, including death, and damage to property for a minimum amount of ten million dollars (\$10,000,000.00) per occurrence. The insurance policy shall include VIA as an additional insured and shall provide for the following coverage: contractual liability, cross liability, contingent liability, liability arising out of the ownership, use and operation of passenger railway equipment and non-owner automobile insurance.

Automobile Insurance covering Tecumseh and its Representatives' liability for any bodily injury, including death, caused by or arising out of or attributable to the vehicles, owned, rented or leased by Tecumseh and its Representatives for a minimum amount of ten million dollars (\$10,000,000.00) per event.

- (b) The policies mentioned above must include a rider specifying an obligation to serve VIA sixty (60) day written notice of any important modification or any termination of coverage. The automobile insurance shall have a standard thirty (30) day written notice.
- (c) Prior to the commencement of this Agreement, Tecumseh shall provide VIA with insurance certificates issued naming VIA as additional insured, dated and signed by an authorized representative of Tecumseh's insurers and evidencing all insurance requirements mentioned above including, if applicable. Notwithstanding the above, VIA reserves the right to ask for a certified copy of one or more insurance policy mentioned under this Section and Tecumseh hereby agree to provide such copy within thirty (30) days of VIA's request.
- (d) New insurance certificates evidencing renewal of the required insurance policies shall be submitted to VIA within thirty (30) days after renewal.
- (e) If Tecumseh fails to obtain or maintain in force the insurance policies provided for under this Section, VIA has the right to obtain such policies of its own initiative and provide proof to

Tecumseh, who shall then pay the associate cost upon VIA's request, or agree to let VIA deduct these cost from any amount owing.

(f) The parties agree that VIA's silence following:

- (1) Tecumseh's failure to comply with this Section or any of its subsections, whether or not VIA is aware of such failure; or
- (2) Tecumseh's issuance of an insurance certificate or a policy that fails to comply with the requirements contained in this Agreement,

does not exonerate Tecumseh from these failures, nor does it constitute a waiver of Tecumseh's obligations by VIA.

- (g) The acquisition and maintenance of the above insurance by Tecumseh and its Representatives shall in no manner be construed as to restrict or waive the liabilities, responsibilities or obligations of Tecumseh and its Representatives under this Agreement.
- (h) With regard to this Agreement, any failure by Tecumseh to comply with the obligations provided for under this Section, or any of its subsections, shall be deemed to be a material and substantial breach of this Agreement. In such circumstances, VIA may withhold all sums and payments owed to Tecumseh, in addition to all rights stipulated by law or by this Agreement, until such failure has been corrected by Tecumseh.

13. **Nature of Relationship**

The Parties acknowledge that Tecumseh is an independent contractor and neither it nor any employee or contractor hired or engaged by it are employees of VIA. VIA and Tecumseh agree that no representations shall be made or act undertaken by either of them which could establish or imply any apparent relationship of agency, partnership or employment and neither party shall be bound in any manner whatsoever by any agreements, warranties, representations or actions of the other party to such effect.

14. **Successors and Assigns**

This Agreement shall not be assignable in whole or in part by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld, and shall be binding upon and ensure to the benefit of the Parties, their respective successors and permitted assigns.

15. **Notice**

Any notice or other writing required or permitted to be given hereunder or for the purposes hereof (hereinafter in this Paragraph called a "Notice") to any Party shall be sufficiently given if delivered personally, or if sent by prepaid registered mail or if transmitted by email to such Party addressed:

- (a) Tecumseh Notice
in the case of a notice to Tecumseh at:

917 Lesperance Road, Tecumseh, Ontario, N8B 1W9

Attention: Kirby McArdle, Manager, Public Works and Transportation

With a second copy to

Attention: Jennifer Alexander, Acting Clerk

- (b) VIA Notice
in the case of a notice to VIA at:

VIA Rail Canada Inc.
3 Place Ville Marie, Suite 500
Montreal, Quebec H3B 2C9

Attention: Paul Charbachi, Senior Engineer, Infrastructure

or at such other address as the Party to whom such writing is to be given shall have last notified to the Party giving the same in the manner provided in this Section. Any notice delivered to the Party to whom it is addressed hereinbefore provided shall be deemed to have been given and received on the day it is so delivered at such address, provided that if such day is not a business day, then the notice shall be deemed to have been given and received on the business day next following such day.

16. **Full and Entire Agreement**

The Parties acknowledge that this Agreement faithfully constitutes the expression of their will and their common intention and is, therefore, the complete and entire agreement between the parties.

17. **Applicable Laws**

This Agreement shall be governed by and construed in accordance with the laws of the province of Ontario, and the laws of Canada applicable therein, without giving effect to any choice or conflict of law, rules and other provisions (whether in this province or in any other jurisdiction) that would cause the application of the laws of any jurisdiction other than those of this province. The parties elect domicile in the judicial district of Ottawa, in the Province of Ontario.

18. **Counterparts**

This Agreement may be executed in electronic format in one or more counterparts, including counterparts transmitted by email each of which, taken together, shall be deemed an original, and all of which together shall constitute one and the same Agreement.

It is upon the express wish and agreement of the parties that this Agreement is written in the English language. *Cette entente est rédigée dans la langue anglaise selon la volonté et l'entente expresses des parties.*

We have understood, consented to and signed this Agreement.

CORPORATION OF THE TOWN OF TECUMSEH

Per: _____
Gary McNamara
Mayor

Per: _____
Jennifer Alexander
Acting Clerk

VIA RAIL CANADA INC.

Per: _____
Yannick Warin,
Director, Infrastructure and Bridges

SCHEDULE “A”

SCOPE OF WORK

1. Description of Work

- Full depth road reconstruction of the rail approach including revising the existing road grades to meet the required maximum approach gradient outlined within the Transport Canada Grade Crossing Standards;
- Relocation of the existing rail signal north of the rail, west of Lesperance Road, to accommodate minimum design requirements of the Transport Canada Grade Crossing Standards (Construction to be done by VIA.)
- Installation of 2.0m wide asphalt sidewalks on both sides of the rail crossing with appropriate spacing from existing rail signals, separated from the road surface by an asphalt buffer zone;
- Repainting of all pavement markings and placement of regulatory signs to meet the standards outlined in Figure 3-1 in the Manual of Uniform Traffic Control Devices for Canada; and
- Hydro excavation of existing underground infrastructure to confirm location and depth. If required, cut and cap of existing abandoned watermains to accommodate proposed steel casing.

2. Roles and Responsibilities

Phase 1 (Design) – To December 2022.

- Tecumseh
 - i. On behalf of the Town, Dillon Consulting Limited has prepared detailed engineering drawings for the roadway improvements and other elements described above, excluding design regarding rail replacement, respiking, asphalt within the tracks, asphalt abutting the tracks., relocation of the railway signal.
- VIA
 - i. VIA has provided final review and comments for the design details on the relocation of the west signal relocation. VIA has confirmed that the east signal can remain. Detailed design of the rail signals including need to modify the signal and arms shall be done by VIA.

Phase 2 (Tendering) – October to December 2022.

- The Town will tender all components of the projects as noted below under the Construction phase (Phase 3) for the exception of the west Rail signal relocation.

Phase 3 (Construction) - (January 2023 to December 2023)

Tecumseh's general contractor will be responsible for all construction tasks with the exception of the following which shall be completed by VIA and are not part of Tecumseh's scope of work on the Project:

- Rail removal and reinstatement – Completed in September 2022;
- Relocation of the Rail Signal, West of Lesperance Road; and
- Flagging and VIA Inspection.

VIA Rail shall complete west rail signal relocation works including re-instatement of underground signal infrastructure in 2023 in coordination with the roadway works described above. The Town and General Contractor shall coordinate with VIA to schedule this work. VIA Rail shall provide the necessary forces to complete this work prior to the resurfacing of the railway crossing which is tentatively schedule for Spring/Summer 2023.

Note: Tecumseh shall comply with the Notification of Railway Works Regulations to provide notification prior to commencing works.

3. Additional Requirements

- Excess Soil removed within the VIA ROW will be kept onsite and will not be exported. Completion of Excess Soil testing will not be completed within the VIA ROW.
- VIA to provide details on removing and replacing of asphalt within the VIA right-of-way and 18 inches outside the rail.
- VIA will coordinate with the property owner of 12300 Tecumseh Road on the closure of the driveway within the ROW and/or encroachments associated with that property.
- Provisions to allow wiring and communication fiber pulling during future phases of the Tecumseh Road CIP (Community Improvement Plan) Main Street Improvements project.
- Tecumseh's fire hydrant located east of Lesperance Road, south of the rail, may continue in its present location and need not be relocated (except in the event of a railway expansion).