

THE CORPORATION OF THE
TOWN OF PELHAM
BY-LAW #3098 (2010)

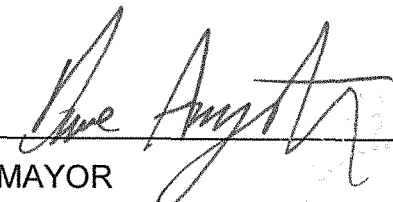
Being a by-law to authorize the Clerk to enter into an Operating Agreement with the Regional Municipality of Niagara regarding the Village of Chestnut Ridge Water Booster Pumping Station.

WHEREAS the Council of the Corporation of the Town of Pelham deems it desirable to enter into an Operating Agreement with the Regional Municipality of Niagara with respect to the Village of Chestnut Ridge Water Booster Pumping Station;

NOW THEREFORE COUNCIL OF THE CORPORATION OF THE TOWN OF PELHAM ENACTS AS FOLLOWS:

- (1) THAT the Operating Agreement attached hereto and made part of this by-law between the Corporation of the Town of Pelham and the Regional Municipality of Niagara be and the same is hereby approved;
- (2) THAT the Clerk be and is hereby authorized and instructed on behalf of the Corporation of the Town of Pelham to execute the said Agreement and the Clerk is hereby authorized to affix the Corporate Seal thereto.

READ A FIRST, SECOND AND THIRD TIME
AND FINALLY PASSED BY COUNCIL THIS
19th DAY OF APRIL, 2010 A.D.


MAYOR


CLERK

**VILLAGE OF CHESTNUT RIDGE WATER BOOSTER PUMPING STATION
OPERATING AGREEMENT**

THIS AGREEMENT made as of the twentieth day of April 2010

BETWEEN:

THE REGIONAL MUNICIPALITY OF NIAGARA
(the "Region")

and

THE CORPORATION OF THE TOWN OF PELHAM
(the "Town")

WHEREAS the Corporation of the Town of Pelham is the owner of the lands legally described as Part of Lot 3, Concession 7, in the Town of Pelham, in the Regional Municipality of Niagara, and designated as Part 1 on Reference Plan 59R-3960, and municipally known as part of 177 Regional Road 20, Pelham (the "Lands");

AND WHEREAS the Town is the owner of the water booster pumping station located on the Lands;

AND WHEREAS the Ministry of the Environment on June 18th, 2007, issued to the Walker Community Development Corporation (including its successors and assignees), Certificate of Approval for Municipal Drinking Water Systems Number 0318-72BPEA (the "Certificate");

AND WHEREAS the Certificate approved the construction of a water booster pumping station to service the development of The Village of Chestnut Ridge and portions of Lookout Street and Haist Street in the Town of Pelham subject to terms and conditions (the "Station");

AND WHEREAS the Parties wish the Region, at the Town's expense, to conduct all operational and maintenance requirements of the Certificate with respect to the Station;

NOW THEREFORE this Agreement witnesses that for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and the mutual promises herein, the Parties agree as follows:

ARTICLE I

INTERPRETATION

1.1 Definitions

In this Agreement and in the recitals and schedules hereto, unless there is something in the subject matter or context inconsistent therewith, the following words, terms and expressions shall have the following meanings:

- (a) "Applicable Law" means all applicable federal, provincial, municipal and other laws, statutes, regulations, by-laws and codes, now or hereafter in existence, having the force of law and as may be amended from time to time;

- (b) "Certificate" means the Certificate of Approval for Municipal Drinking Water Systems Number 0318-72BPEA issued by the Ministry of the Environment on June 18, 2007, and attached hereto as Schedule "A";
- (c) "Confidential Information" means materials, documents and information furnished to a party under this Agreement and designated in writing as confidential upon such furnishing (or which was developed jointly by the Parties in relation to this Agreement and designated in writing by the Parties as confidential), whether written or oral, tangible or intangible and in whatever form or medium provided; provided that the term Confidential Information shall not include information or data if: (i) it was known by or already in the possession of the party receiving such information or data without restriction, prior to its disclosure by the disclosing party; (ii) it is lawfully obtained by the receiving party from a third party without restriction; (iii) it is developed by the receiving party completely independent of any disclosure by a disclosing party; or (iv) it is ascertainable from a commercially available product;
- (d) "Lands" means the property owned by the Town and known municipally as 177 Regional Road 20 in the Town of Pelham in the Regional Municipality of Niagara and more particularly described in Schedule "B" attached to this Agreement;
- (e) "Services" means the services set out in section 4.2 of this Agreement; and
- (f) "Works" means the components of the water booster pumping station as listed and described on pages 1 and 2 of the Certificate.

1.2 Interpretation Not Affected by Headings, Etc.

Grammatical variations of any terms defined herein shall have similar meanings; words importing the singular meaning shall include the plural and vice versa; and words importing the masculine gender shall include the feminine and neuter genders and vice versa. The division of this Agreement into separate Articles, Sections, Subsections, Paragraphs, and Subparagraphs, and the insertion of headings and references are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

1.3 Governing Law

This Agreement is governed by the laws of the Province of Ontario and the laws of Canada applicable therein. The Parties agree, subject to the provisions of Article 11 respecting dispute resolution, that any legal actions arising out of this Agreement must be commenced in the Regional Municipality of Niagara in the Province of Ontario.

1.4 Currency

Unless otherwise indicated, all dollar amounts referred to in this Agreement are in lawful money of Canada.

1.5 Schedules

The following schedules are attached to this Agreement and incorporated herein:

- Schedule "A" - Certificate of Approval
- Schedule "B" - Description of Lands
- Schedule "C" - Description of Region labour and equipment rates

ARTICLE 2

GRANT

2.1 Grant of Rights to the Region

The Town grants to the Region, upon and subject to the terms, covenants, limitations and provisions set out in this Agreement,

- (a) the non-exclusive right to enter the Lands for the purpose of providing the Services under this Agreement; and
- (b) the authority to carry out any and all work that the Region, in its discretion, determines is required at the Lands and on the Works for the Station facility in order to maintain compliance with the Certificate.

ARTICLE 3

TERM

3.1 Term

The term of this Agreement shall commence on April 20, 2010 and shall continue for a period of one (1) year ending on April 20, 2011, ("the Operating Year") unless terminated sooner in accordance with the provisions of Article 10. The Agreement shall be reviewed at the one year point and amended as may be required and agreed by both Parties, and shall automatically renew on subsequent one year anniversaries thereafter, subject only to any further review and amendments agreed between the Parties.

ARTICLE 4

THE SERVICES

4.1 The Region shall undertake all operational and maintenance requirements for the Works in accordance with the requirements of the Certificate.

4.2 In order to fulfill its obligations under this Agreement, the Region shall perform the following Operation and Maintenance services (the "Services"):

- (a) perform routine inspections of the Station;
- (b) respond to maintenance requirements for the Works as necessary;
- (c) exercise and confirm operation of pump, alarms and controls, as required;
- (d) carry out additional work as required subject to prior approval by the Town;
- (e) receive and respond to notification of all installed alarms;
- (f) undertake emergency actions as required to ensure continued operation of the Station; and
- (g) carry out grass cutting and snow plowing on the Lands as required to access the Station.

4.3 In order to fulfill its obligations under this Agreement, the Town shall provide the Region with a 24-hour emergency contact listing to deal with matters involving contractors, suppliers and deficiencies.

ARTICLE 5

COMPENSATION

5.1 Fees for Services

- (a) The Town shall pay to the Region fees in the amount of the actual costs of the Services plus the applicable GST as compensation for the Services performed by the Region under this Agreement.
- (b) Invoices shall be paid by the Town to the Region on a monthly basis. Each monthly payment shall be received by the Region within thirty (30) days of the day the Invoice to be provided by the Region to the Town is given pursuant to the Notice provisions of section 12.4.

5.2 Fee Calculations

- (a) The actual costs shall include payment for
 - i. Required labour;
 - ii. Required equipment;
 - iii. Required materials;
 - iv. Emergency expenditures; and
 - v. Federal Goods and Services Tax ("GST").
- (b) The Region undertakes to use best efforts to mitigate emergency expenditures.
- (c) The Region shall provide an Invoice to the Town for every month of the Operating Year, calculated as soon as possible after the end of each month once the actual costs have been determined.
- (d) All costs associated with labour and equipment shall be invoiced as per the rates and fees contained in Schedule "C" of this Agreement, as may be amended by written agreement from time to time.

ARTICLE 6

TOWN'S OBLIGATIONS

6.1 Certificate of Approval

In addition to its obligations under Article 5 and elsewhere in this Agreement, the Town shall comply with the applicable provisions of the Certificate.

ARTICLE 7

MUTUAL OBLIGATIONS

7.1 Compliance with Laws

The Town and the Region shall observe, abide and comply promptly with all Applicable Law and with all requirements of all municipal and licensing authorities, including but not limited to, the Ministry of the Environment, the Ministry of Labour and all other lawful authorities respecting the Services to be provided by the Region under this Agreement and more specifically both Parties shall comply with the Certificate.

7.2 Review of Agreement

- (a) At the end of the Operating Year the Region and the Town shall meet to review the provisions of this Agreement.
- (b) Both Parties agree to implement changes to the Agreement required as agreed to as a result of this review.
- (c) Unless the Parties agree otherwise in writing, for the duration of the review of this Agreement, the terms and conditions of this Agreement shall remain in force and effect.

ARTICLE 8

INSURANCE

8.1 Insurance

Both Parties shall, at each Party's sole cost and expense, maintain insurance coverage which the Town and the Region mutually agree to be appropriate for the Region to carry out its obligations under this Agreement. At a minimum, each Party shall carry five million dollars (\$5,000,000) of commercial general liability insurance and shall have their policy endorsed to add the other Party as an Additional Insured, providing proof of same on a certificate of insurance at time of signing of this Agreement.

ARTICLE 9

INDEMNITIES

9.1 Indemnity by the Town

The Town shall indemnify and save harmless the Region, its elected officials, officers, employees, contractors and agents from and against all claims, orders and charges and all costs and expenses including legal fees and disbursements (including all legal fees and disbursements in connection with any and all appeals) arising in any way out of the design or performance or non-performance of the water booster pumping station facility in this Agreement. Without limiting the generality of the foregoing, such claims include:

- (a) all claims for personal injury or death;
- (b) all claims in respect of damage to real or personal property;
- (c) all claims relating to any infringement of any right or privilege; and
- (d) all claims, orders, and charges with respect to non-compliance with the Certificate.

9.2 Indemnity by the Region

The Region shall indemnify and save harmless the Town, its elected officials, officers, employees, contractors and agents from and against all claims, orders and charges and all costs and expenses including legal fees and disbursements (including all legal fees and disbursements in connection with any and all appeals) arising in any way out of the Services at the Works on the Lands as set out in this Agreement. Without limiting the generality of the foregoing, such claims include:

- (a) all claims for personal injury or death;
- (b) all claims in respect of damage to real or personal property;

- (c) all claims relating to any infringement of any right of privilege; and
- (d) all claims, orders and charges with respect to non-compliance with the Certificate.

which arise out of the Services of the Region at the Works.

ARTICLE 10

TERMINATION

10.1 Early Termination

Either party may terminate this Agreement by providing thirty (30) days written notice to the other party.

10.2 Survival on Termination

Notwithstanding termination of this Agreement pursuant to this Article 10, the rights and obligations which have accrued or arisen hereunder prior to the time of such termination or which directly result from such termination shall continue and shall not be affected or prejudiced thereby and such rights and obligations including the provisions of Article 9 of this Agreement, shall survive such termination and shall apply, mutatis mutandis, to the Parties and to the Station.

10.3 Accord and Satisfaction

No action taken by the Region or receipt by the Region of any payment which would have been authorized under this Agreement, after the effective date of termination of this Agreement, shall be construed to revive this Agreement or nullify such termination.

ARTICLE 11

DISPUTE RESOLUTION

11.1 Dispute Resolution

If a dispute occurs between the Parties concerning any matter governed by this Agreement, the project manager of the party raising the dispute shall promptly advise the project manager of the other party in writing, and the two project managers shall work together and use all reasonable efforts to resolve the dispute.

If the project managers are unable to resolve the dispute informally within five (5) business days of it being referred to them, the dispute shall be forwarded in writing to the Region's Commissioner of Public Works and the Town's Director of Community and Infrastructure Services for resolution. Using direct communications, the Commissioner and Director will have fifteen (15) business days from the matter being referred to them to resolve the dispute.

If the Commissioner and Director do not resolve the dispute, the dispute may, with the consent of both Parties, be referred to and finally resolved by arbitration under the *Arbitration Act, 1991*, S.O. 1991, c. 17, as amended. The place of arbitration will be the Regional Municipality of Niagara in the Province of Ontario.

ARTICLE 12

GENERAL PROVISIONS

12.1 Confidentiality

Subject to the Region's obligations under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, and for the duration of this Agreement and continuing two (2) Operating Years after the termination of this Agreement, each party shall, except with the prior written consent of the other party:

- (a) not use or disclose to any other person or entity any Confidential Information disclosed by any party, except as necessary for the performance of their respective responsibilities under this Agreement; and
- (b) limit access to all Confidential Information disclosed by any party to such employees, agents, consultants, affiliates, lenders and advisors as have a direct need to know in connection with this Agreement.

12.2 Disclaimer of Partnership

The Parties disclaim any intention to create a partnership or to constitute either of them the agent of the other. Nothing in this Agreement shall bind the Parties or any of them as partners or agents nor, except as may be expressly provided in this Agreement, constitute any of them the agent of the other party. No party shall be, or by reason of any provision herein contained be deemed to be, the agent or legal representative of the other party whether for purposes of this Agreement or otherwise, nor shall either party have any power or authority to act for, or assume any obligations or responsibility on behalf of, the other party.

12.3 Force Majeure

Neither party shall be responsible for delays or non-performance of this Agreement resulting directly or indirectly from impediments beyond its reasonable control (other than financial inability or by application of Applicable Law), including without limitation, any delay caused by fire or other impediment beyond the reasonable control of such party and not caused by an act or omission of such party, provided in the event of such delay or non-performance, the party continues to act reasonably to resolve such delay or non-performance.

12.4 Notices

Any notice, direction, request or document required or permitted to be given by either party to the other in writing shall be deemed to have been sufficiently and effectually given if delivered by hand or by prepaid registered mail at the addresses provided for below during normal business hours, or sent by facsimile transmission to the number shown below.

the Town at:

The Corporation of the Town of Pelham
PO Box 400, 20 Pelham Town Square
Fonthill, ON L0S 1E0

Attention: Director of Community and Infrastructure Services
Facsimile No: 905-892-5055

the Region at:

The Regional Municipality of Niagara
2201 St. David's Road, P.O. Box 1042
Thorold, Ontario
L2V 4T7

Attention: Commissioner of Public Works
Facsimile No.: 905-687-8056

or to such other address of a party as it shall specify to the other parties by written notice given in the manner aforesaid. Any such notice, direction, request, document or payment shall be deemed to have been given to and received by the party to whom it is addressed if:

- (a) delivered, on the date of delivery;
- (b) mailed, on the fifth day after the mailing thereof;
- (c) facsimile transmission before 5:00 p.m., on the date of facsimile transmission; and
- (d) facsimile transmission after 5:00 p.m., on the date following facsimile transmission.

12.5 Waiver

No consent or waiver, expressed or implied, by a party to or of any breach or default by another party in the performance by such other party of its obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other party hereunder. Failure on the part of a party to complain of any act or failure to act of another party or to declare another party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first-mentioned party of its rights hereunder.

12.6 Amendments

This Agreement may not be modified or amended except with the written consent of both Parties.

12.7 Further Assurances

The Parties hereto agree that they will from time to time at the reasonable request of the other party execute any documents and take such further action as may be required to accomplish the purposes of this Agreement.

12.8 Successors and Assigns / Assignment

This Agreement shall enure to the benefit of and be binding upon the Parties and their respective permitted assigns and successors, which shall mean any successor to either of the Parties in accordance with any legislation providing for same. Neither this Agreement nor any rights or obligations hereunder shall be assignable by any party without the prior written consent of the other party provided that such consent shall not be unreasonably or arbitrarily withheld.

12.9 Time

Time shall be of the essence of this Agreement. Any time limits specified in this Agreement may be extended with the consent in writing of both the Town and the Region, but no such extension of time shall operate or be deemed to operate as an extension of any other time limit, and time shall be deemed to remain of the essence of this Agreement notwithstanding any extension of any time limit.

12.10 Severability

In the event that any term, condition, or provision contained in this Agreement shall be determined invalid, unlawful or unenforceable to any extent, such term, condition or provision shall be severed from the remaining terms, conditions and provisions, which shall continue to be valid to the fullest extent permitted by law.

IN WITNESS WHEREOF the Parties hereto have duly executed this Agreement.

DATED at Pelham, this twentieth day of April 2010.

THE CORPORATION OF THE TOWN OF PELHAM

Per: Nancy J. Bozzato
Name: Nancy J. Bozzato
Position: Clerk

Per: Dave Augustyn
Name: Dave Augustyn
Position: Mayor

I/We have the authority to bind the corporation.

DATED at Thorold, this 17 day of May, 2010.

THE REGIONAL MUNICIPALITY OF NIAGARA

Approved for execution
Elizabeth
The Regional Municipality of Niagara
Legal Services

Per: Kenneth J. Brothers
Name: Kenneth J. Brothers
Position: Commissioner of Public Works

for

I have the authority to bind the corporation.