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TO: The Honorable Detroit City Council

FROM: David Whitaker, Director
Legislative Policy Division (LPD) Staff

DATE: October 25, 2018

RE: **Gordie Howe International Bridge Jurisdiction Issues**

On August 17, 2018, Council Member Castañeda-López requested that the Legislative Policy Division (LPD) provide a detailed report and map regarding areas within the Delray neighborhood subject to federal, state and local jurisdiction during construction of the Gordie Howe International Bridge (GHIB), as well as providing an opinion whether or not state, federal and international entities are required to comply with certain local laws.

As Council knows, the Gordie Howe International Bridge (GHIB) is in the early stages of site preparation for construction of a new international bridge crossing between Detroit's Delray neighborhood and Windsor, directly across the Detroit River. The international entity charged with this huge undertaking is the Windsor/Detroit Bridge Authority (WDBA). Their web site contains a wealth of information about the project and the WDBA.

Applicable Laws

To the best of LPD's understanding of this relatively complex structure and process, the most relevant document that speaks to legal jurisdictional issues is the 54-page "Crossing Agreement". That rigorously drafted document, dated June 15, 2012, among many other potentially important terms, includes the following salient provisions:

- It "provides a framework for a Crossing Authority established by Canada to design, construct, finance, operate and maintain a new International Crossing between Canada

and Michigan, under the oversight of a jointly established International Authority with three members appointed by Canada and the Crossing Authority and three members appointed by the Michigan Parties, and with funding approved by Canada, but with no funding by the Michigan Parties.” (P. 1);

- It provides a concise summary of the history of the GHIB project (P. 2);
- It states the purpose of the agreement (Pp. 2-3);
- It identifies the parties to the agreement: Canada, the Crossing Authority, Michigan, the Michigan Department of Transportation, and the Michigan Strategic Fund (Pp. 3-4);
- **It broadly defines “Applicable Law” as “in respect of any Person, property, transaction, event or other matter, as applicable, all present or future (except as otherwise specifically provided in this Agreement) Law relating or applicable to that Person, property, transaction, event or other matter.” (P. 4) (emphasis added)**
- **It once again broadly defines “Governmental Authority” as “any domestic or foreign government, including any federal, provincial, state, territorial or municipal government, and any government, agency, tribunal, commission or other authority exercising executive, legislative, judicial, regulatory or administrative functions of, or pertaining to, such government.” (P. 7) (emphasis added)**
- **It further broadly defines “Law” as “all laws (including common law), by-laws, ordinances, rules, statutes, regulations, treaties, orders, rules, judgments and decrees, and all official directives, rules, guidelines, notices, approvals, orders, policies and other requirements of any Governmental Authority, having the force of law, and shall include, with respect to the applicability of state law to the internal operations of the International Authority, the legal doctrine and principles developed in judicial decisions involving entities formed under an agreement entered into pursuant to Section 10 of Article I of the *US Constitution*.” (P. 8) (emphasis added)**
- It provides that “The internal governance, activities and operations of the International Authority, including meetings, deliberations and decisions of the International Authority, and all information related thereto, shall be subject to and governed by Applicable Law...” (P. 15)
- It states that “The Crossing Authority shall be responsible for International Crossing Project Activities (along with other specified activities) and shall be responsible for the design, construction, financing, operation and maintenance of the International Crossing, **in compliance with Applicable Law...**” (P. 25) (emphasis added);
- It requires that “Any Claim by a third party against the Crossing Authority arising out of any one or more of the design, construction and financing of the Michigan Crossing, the Michigan Interchange or the US Federal Plaza and any Claim by a third party against the Crossing Authority arising out of any one or more of the administration, operation,

maintenance and improvement of the Michigan Crossing or the US Federal Plaza shall be made in Michigan courts having jurisdiction over the Claim or in federal courts sitting in Michigan having jurisdiction over the Claim, as the case may be.” (P. 31);

- Section XV, “Governing Law”, states: **“The provisions of this Agreement with respect to the authorization and execution of this Agreement by the Michigan Parties, the establishment of the International Authority and the interpretation of any provisions of the Laws of Michigan and the Laws of the United States of America shall be governed by and construed in accordance with the Laws of Michigan and the Laws of the United States of America.** All other provisions of this Agreement shall be construed in accordance with the Laws of the Province of Ontario and the Laws of Canada. No provision of this Agreement shall be construed as a waiver of governmental or sovereign immunity by Canada or Michigan.” (P. 36) (emphasis added);

LPD’s reading of the above provisions of the Crossing Agreement, in light of the purposes and factual context of the GHIB international crossing project, is that local laws will continue to apply to the extent possible and consistent with the objectives of the WDBA and the project. The failure to omit local laws from the definition of “Applicable Law”, or to omit local government from the definition of “Governmental Authority”, together with the requirement that GHIB/WDBA activities must be governed by Applicable Law, seems to indicate the inclusion of local laws in governance of this major project’s activities, where applicable.

In order to enforce rights under such local laws in the United States, third parties would have to file suit in state or federal court. (Parties to the Crossing Agreement are required to submit their disputes, if any, to binding arbitration.) The inclusion of the “Laws of Michigan” as Governing Law for purposes of this project and the Crossing Agreement should, in LPD’s opinion, include local laws, which are part of Michigan law. LPD notes however, that this conclusion is 1) highly fact-specific, dependent on the particular features of any given factual context; and 2) there is no guarantee that any given court would necessarily agree in each and every specific case that any particular local law must govern every aspect of this major international project, in any foreseeable individual case. The ultimate determination must await specific factual development of disputed issues, if any.

Timely and Accurate Maps

The Director of Stakeholder Relations for the bridge authority was kind enough to provide us with the attached maps.

Pursuant to a Leases and Services Agreement dated June 19, 2017, the City leased 27 parcels of property, comprising a total of approximately 34.04 acres, to the authority for a terms of seven years. Also on June 19, 2017, the City and the Michigan Department of Transportation (MDOT) entered into a Jurisdictional Transfer Agreement, transferring jurisdictional control of certain specified road and alley segments for use in construction of the bridge. Sections C and D (Pp. 2-3) of that agreement specify four specific rights-of-way (ROW) that “MDOT shall acquire and dedicate to the City”, followed by seven specified routes to which MDOT will direct construction traffic.

At Council Member Castañeda-López's request, LPD recontacted the bridge authority's public affairs division and asked what the authority's position is, if any, regarding the possible assertion of local government land use regulation powers via zoning amendments. LPD was advised that they will consult their legal representatives regarding that question, and that it will take some time for them to respond officially. In the event that LPD receives a further response, Council will be advised.

If Council has any other questions or concerns regarding this subject, LPD will be happy to provide further research and analysis upon request.

PERMANENT ROAD / ALLEY SEGMENTS AND TEMPORARY ROAD SEGMENTS



LEGEND

- Permanent Road Segments
- Permanent Alley Segments
- Ready / Temp Road Segments
- Proposed Improvements
- Matchline
- Bridge and Pier Area

SHEET 1 OF 10
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