

SCHEDULE 28

REFINANCING

1. DEFINITIONS

1.1 In this Schedule 28 – Refinancing, unless the context indicates a contrary intention, terms which are defined in the Project Agreement (and not otherwise defined in this Schedule 28 – Refinancing) shall have meanings given to them in the Project Agreement and the following terms shall have the following meanings:

(a) “**Exempt Refinancing**” means:

- (i) a change in taxation or change in accounting treatment pursuant to a Change in Law or change in Canadian GAAP;
- (ii) the exercise of any right, the grant of any amendment, waiver or consent or any similar action under the Lending Agreements by the Lenders that does not provide for a financial benefit to DB Co under those agreements;
- (iii) any Qualifying Bank Transaction;
- (iv) any Rescue Refinancing;
- (v) any Refinancing that was approved by the City prior to the execution of the Project Agreement and occurs during the first six months following the date of the Project Agreement;
- (vi) any amendment, variation or supplement of any agreement approved by the City as part of any Variation under the Project Agreement; or
- (vii) any Permitted Borrowing.

(b) “**Qualifying Bank**” means a lending institution that is:

- (i) a bank listed in Schedule I, II or III of the *Bank Act* (Canada); or
- (ii) a bank, life insurance company, pension fund or fund managed by a professional fund manager that controls, either directly or through its affiliates, funds in excess of \$[REDACTED],

provided such institution is not a Restricted Person or a person whose standing or activities compromise (i) the City’s reputation or integrity, or (ii) the nature of the public transit system in the City of Toronto or the Province of Ontario so as to affect public confidence in the public transit system in the City of Toronto, the Province of Ontario or the Project.

(c) “**Qualifying Bank Transaction**” means:

- (i) the disposition by a Lender of any of its rights or interests in the Lending Agreements to a Qualifying Bank;

- (ii) the grant by a Lender to a Qualifying Bank of any rights of participation in respect of the Lending Agreements; or
 - (iii) the disposition or grant by a Lender to a Qualifying Bank of any other form of benefit or interest in either the Lending Agreements or the revenues or assets of DB Co, whether by way of security or otherwise.
- (d) **“Qualifying Refinancing”** means any Refinancing that will give rise to a Refinancing Gain that is not an Exempt Refinancing.
- (e) **“Refinancing”** means:
- (i) any amendment, variation, novation, supplement or replacement of any Lending Agreement;
 - (ii) the exercise of any right, or the grant of any waiver or consent, under any Lending Agreement;
 - (iii) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Lending Agreements or the creation or granting of any other form of benefit or interest in either the Lending Agreements or the contracts, revenues or assets of DB Co whether by way of security or otherwise; or
 - (iv) any other arrangement put in place by DB Co or another person which has an effect which is similar to any of the foregoing provisions of this definition above or which has the effect of limiting DB Co’s ability to carry out any of the foregoing provisions of this definition.
- (f) **“Refinancing Financial Model”** means a comprehensive and detailed financial model satisfactory to the City, acting reasonably, prepared for the purpose of Section 2 of this Schedule 28, which financial model shall be similar in form and content to the Financial Model, suitable for the purposes for which it will be used in this Schedule 28, and shall take into account:
- (i) cash flows for the entire Project Term;
 - (ii) any changes in structure and funding since the date of the Project Agreement;
 - (iii) the performance of the Works to the date of the Refinancing;
 - (iv) macroeconomic assumptions; and
 - (v) all other relevant factors
- having regard to any Exempt Financings previously undertaken in respect of which no Refinancing Gain is payable, and any Qualifying Financings in respect of which a Refinancing Gain has previously been paid.
- (g) **“Refinancing Gain”** means an amount equal to the greater of zero and $(A - B)$, where:

A = the total Cost of the Financing as calculated using the Refinancing Financial Model but without taking into account the effect of the Refinancing.

B = the total Cost of the Financing as calculated using the Refinancing Financial Model and taking into account the effect of the Refinancing.

- (h) “**Rescue Refinancing**” means any Refinancing which takes place due to the failure or prospective failure of DB Co to comply with any material financial obligation under the Lending Agreements, or any of them, which does not increase any liability of the City, whether actual or potential.

2. REFINANCING

2.1 DB Co shall not carry out:

- (a) any Qualifying Refinancing unless DB Co has obtained the prior written consent of the City, subject to Section 2.2; or
- (b) any Exempt Refinancing or any other Refinancing which does not result in a Refinancing Gain unless DB Co has delivered Notice of such Refinancing to the City before five Business Days of such Refinancing, except that such Notice shall not be required for a disposition by a Lender of its rights or participation in the Lending Agreements where such disposition is a trade of bonds issued as provided under a book-based system of a depository and pursuant to a trust indenture that comprises a portion of the Financing.

2.2 The City may withhold its consent to any Qualifying Refinancing, in its sole discretion:

- (a) where any person with whom DB Co proposes to carry out a Qualifying Refinancing is a Restricted Person;
- (b) if, at the time the Qualifying Refinancing is contemplated and effected, the Qualifying Refinancing will materially adversely affect the ability of DB Co to perform its obligations under the Project Documents or the Project Agreement; or
- (c) if, at the time the Qualifying Refinancing is contemplated and effected, the Qualifying Refinancing will have the effect of increasing any liability of the City, whether actual or contingent, present or future, known or unknown.

2.3 The City shall be entitled to receive:

- (a) a [REDACTED]% share of any Refinancing Gain arising from a Qualifying Refinancing, in respect of any Refinancing Gain up to (when considered in aggregate with all previous Qualifying Refinancings) a Refinancing Gain of \$[REDACTED];
- (b) a [REDACTED]% share of any further Refinancing Gain arising from a Qualifying Refinancing, in respect of any Refinancing Gain in excess of \$[REDACTED] and up to (when considered in aggregate with all previous Qualifying Refinancings) a Refinancing Gain of \$[REDACTED]; and
- (c) a [REDACTED]% share of any further Refinancing Gain arising from a Qualifying Refinancing.

- 2.4 DB Co shall promptly provide the City with full details of any proposed Qualifying Refinancing, including a copy of the proposed Refinancing Financial Model and the basis for the assumptions used in the proposed Refinancing Financial Model. The City shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over the Refinancing Financial Model and any documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with such Refinancing (whether or not such Refinancing is determined to be a Qualifying Refinancing). DB Co shall promptly, and, in any event, within five Business Days after receiving a written request from the City, provide any information in relation to a proposed Refinancing as the City may reasonably require. DB Co shall keep the City informed as to any changes to the terms of the Refinancing. Both the City and DB Co shall at all times act in good faith with respect to any Refinancing.
- 2.5 The City's share of the Refinancing Gain shall, subject to prior consent of DB Co, be received as a reduction in the amount of a Substantial Completion Payment and if such consent is not provided, shall be paid to the City from the net proceeds of the Qualifying Refinancing. Notwithstanding the preceding provisions, the City shall have the right to receive its share of the Refinancing Gain by way of a reduction to the latest Substantial Completion Payment irrespective of DB Co's prior consent.
- 2.6 The City and DB Co will negotiate in good faith to agree upon the basis and method of calculation of the Refinancing Gain. If the parties fail to agree upon the basis and method of calculation of the Refinancing Gain or the payment of the City's share, the Dispute shall be determined in accordance with Schedule 27 - Dispute Resolution Procedure. If applicable, both the City and DB Co shall work collaboratively to establish the rate setting process required to complete the Refinancing.
- 2.7 The Refinancing Gain shall be calculated after taking into account the reasonable out-of-pocket costs that each Party directly incurs in relation to the Qualifying Refinancing and on the basis that, within 15 Business Days following any Qualifying Refinancing, DB Co will reimburse the City for all such reasonable out-of-pocket costs incurred by the City.