

MEMORANDUM

TO: Mayor and Members of Council

CC: John Livey, CAO
Jim Sales, Commissioner of Community Services
Barb Roth, Director of Recreation and Culture

FROM: Catherine M. Conrad, Town Solicitor

DATE: March 21, 2006

RE: **VARLEY-MCKAY ART FOUNDATION MEMORANDUM
OF UNDERSTANDING**
Legal File No. 05 0512 LG 0035

On March 6, 2006, the Director, Recreation and Culture Services presented a report to General Committee seeking approval and authorization for the execution of a Memorandum of Understanding ("MOU") between the Varley-McKay Art Foundation and the Town. The Committee requested a number of amendments to the MOU. In order to address this request, the MOU has been revised as follows:

1. Paragraph 1, definition of "Members" has been modified to more clearly identify that the Members of the Foundation are the Mayor and members of Council.
2. Paragraph 3(d) has been modified to remove the requirement that the Town and the Foundation place "prime importance" on achieving maximum attendance at all exhibits, so that it is now just another goal of the Gallery.
3. Paragraph 5 was added to change the term of appointment for the Directors of the Foundation Board from a one year term to a three year staggered term.
4. Paragraphs 23 and 28 were amended to prohibit the splitting up of purchases or expenditures over \$100,000.00 into a series of acquisitions in order to avoid the necessity of obtaining prior approval from Council.
5. Paragraph 46, the dates for the term of the MOU have been updated.

A copy of the revised MOU is attached for Council's review and further consideration.



Catherine M. Conrad
Town Solicitor
Att.

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding dated the day of , 2006.

B E T W E E N:

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

-and-

VARLEY-MCKAY ART FOUNDATION OF MARKHAM
(the "Foundation")

WHEREAS pursuant to the Last Will and Testament of Kathleen Gormley McKay and Codicils thereto, all of which are attached as Schedule "A" (referred to collectively as the "Will"), a collection of artwork, gallery articles, studio articles and the Kathleen Gormley McKay Endowment Fund (the "Endowment Fund") were bequeathed to the Town under certain conditions;

AND WHEREAS one of those conditions was that a McKay Gallery be established and be properly designated under the *Cultural Property Export and Import Act* (the "Act");

AND WHEREAS the Gallery has been designated under the Act ;

AND WHEREAS the Town, the Art Gallery Board and the Foundation Board operated under the Terms of Reference established and adopted by the Town on December 18, 1998 (the "Terms of Reference");

AND WHEREAS pursuant to the Terms of Reference, the Art Gallery Board was established as an advisory Committee of the Town, whose purpose, among other matters, was to offer advice and make recommendations to the Town on the operation of the Gallery, and to make recommendations to the Gallery Board on the acquisition and deaccession of works of art and the fundraising necessary to carry on the programs developed jointly by the Art Gallery Board and the then Curator of the Art Gallery;

AND WHEREAS pursuant to the Terms of Reference and the Will, the Foundation Board carried out those functions relating to the acquisition and deaccession of works of art, the management and direction of the interest earned on the Endowment Fund, consulted with, the Curator and latterly, the Gallery Director, regarding the programs to be presented by the Gallery and develop Business Plans which allocated portions of the Endowment Fund to fund such programs;

AND WHEREAS the Town, to assist the Art Gallery Board and the Foundation Board, has provided secretarial assistance, legal advice and the appointment of a Director whose role, among other matters, is, in conjunction with Town Staff and the Foundation Board, to develop programs for the Gallery, to consult with the Foundation Board as to the source of funds to undertake such programs, the administration of the Gallery and to make recommendations to the appropriate Committees and/or the Foundation Board for the acquisition and deaccession of works of art;

AND WHEREAS the Town recognizes the extensive and generous contributions of the Art Gallery Board and volunteers who have been instrumental in the development of the Gallery and the Foundation;

AND WHEREAS the present Foundation, which is the subject of this Memorandum of Understanding, has evolved from these earlier bodies and its governance structure has grown out of the Terms of Reference and the Linton Report that lead to the merger of the earlier Art Gallery Board and the Foundation Board;

AND WHEREAS upon the initiation of the Art Gallery Board and the Foundation Board, it was believed that the functions and duties of the Art Gallery Board and the Foundation Board might best be carried on by the merger of the two Boards to be carried on under the existing Foundation Board;

AND WHEREAS the Town, on December 14, 2004, passed a Resolution and resolved, among other matters, that the functions of the Advisory Board be merged with the functions of the Board of the Varley-McKay Art Foundation of Markham;

AND WHEREAS the parties acknowledge that this Memorandum of Understanding shall replace and supercede the Terms of Reference for the Foundation and the Art Gallery Board adopted by the Town on December 15, 1998;

AND WHEREAS at its meeting on _____, 2005, Town Council passed a Resolution approving this Memorandum of Understanding;

AND WHEREAS at its meeting on _____, 2005, the Board of Directors of the Foundation passed a Resolution approving the Memorandum of Understanding;

NOW THEREFORE, the Town and the Foundation agree as follows:

PART I: OVERVIEW

DEFINITIONS

1. In this Memorandum of Understanding the following shall mean:

“Art Collection” shall include the Founding Gift and all other works of art owned by the Town, or acquired by the Board, or owned by the Foundation and loaned to the Town pursuant to this Memorandum of Understanding, but shall not include art acquired for use in the public art program by the Town;

“Board” shall mean, collectively, the Board of Directors of the Varley-McKay Art Foundation of Markham as appointed by the Members of the Foundation from time-to-time, and individually, as “Board Director”;

“Commissioner” shall mean the Commissioner of Community and Fire Services or his or her designate;

“Council” shall mean the Municipal Council of The Corporation of the Town of Markham;

“Foundation” shall mean the Varley-McKay Art Foundation of Markham;

“Founding Gift” shall mean the collection of art work, gallery articles and studio articles bequeathed to the Town pursuant to the Will, attached hereto as Schedule “A”;

“Gallery” shall mean the Frederick Horsman Varley Art Gallery of Markham and includes the enterprise, structure and land located at Carlton Road and Main Street, Unionville and the Kathleen Gormley-McKay Art Centre on Main Street, Unionville (the “McKay House”);

“Gallery Director” shall mean the person appointed by the Town, in consultation with the Board, as the Director of the Gallery;

“McKay Endowment Fund” shall mean the fund bequeathed to the Town pursuant to the Will;

“Members” shall mean all of the Regular Members of the Foundation as defined by By-law No. 1 of the Foundation who are the Members of Council of the Town of Markham, including the Mayor, as may be elected from time-to-time;

“Town” shall mean The Corporation of the Town of Markham and shall include from time-to-time any officer, servant, employee or agent of the Town who has been authorized by the Town to act on the Town’s behalf; and

“Will” shall mean the Last Will and Testament of Kathleen Gormley McKay, and any Codicils thereto, attached as Schedule “A”;

PURPOSE

2. The purpose of this Memorandum of Understanding is to set out the roles and responsibilities of the Town, including the Gallery and the Foundation, including the Board, with respect to the administration of the Gallery, the acquisition, deaccession and management of the Art Collection, the management of the McKay Endowment Fund and the use of Gallery facilities.

GOALS OF THE GALLERY

3. The Town and the Foundation acknowledge the Goals of the Gallery are as follows:
 - (a) To sustain and nurture the creative spirit of visual arts in Markham and beyond through the exhibition, interpretation and preservation of the achievements of Frederick Horsman Varley, his contemporaries, and other Canadian artists. In a period of redefinition of Canadian art by artists, the Varley Art Gallery will provide leadership in the visual arts through its programs and collecting activity and respond to the opportunities created so that it can be representative of all the communities it serves just as Markham is changing in time and place. To build an art collection in accordance with the provisions of the Town's Collection and Exhibition Management Policies and Procedures, attached as Schedule "B", as may be amended by the Town in consultation with the Foundation from time to time;
 - (b) To encourage appreciation and enjoyment of the visual arts in Markham by providing a facility where every visit will be a warm, friendly and enjoyable experience for all patrons and citizens by offering a balanced arts program that is composed of a variety of exhibits and educational programs;
 - (c) To continue to employ a decision-making process which incorporates both cultural, financial and community implications;
 - (d) To focus on, among other goals, fundraising activities, membership recruitment and corporate sponsorship; and achieving maximum attendance at all exhibits, educational tours and art related programs.

PART II: ROLES AND RESPONSIBILITIES OF THE FOUNDATION MEMBERS AND BOARD

4. The Members of the Foundation shall appoint a Board of Directors (the "Board"), consisting of up to nineteen (19) members to be comprised as follows:
 - a. Two members shall be appointed from Council;
 - b. The Mayor Ex-Officio; and
 - c. Up to sixteen members shall be appointed from the community at large and shall be considered based on recommendations from the Executive and Nominating Committee.
5. The term of the appointment of each Board Director shall be for a period of three years or for such term as may be required by By-law No. 1 of the Foundation, as may be amended from time to time. The Members shall appoint the Board so that the terms of the individual Board Directors are staggered with no more than one third of the Board being appointed in any one year.
6. The Board shall elect a Chair of the Board and any other officers as deemed necessary, on an annual basis.
7. The Board shall hold a minimum of six meetings annually.
8. The Members shall hold an annual general meeting in accordance with By-law No. 1 of the Foundation, and shall schedule such additional meetings from time-to-time as may be necessary to deal with Foundation business.
9. The Members and the Board, in exercising their respective rights and duties, shall do so in a manner consistent with the objectives and guiding principles set out in the Foundation's Charter and By-law No. 1 of the Foundation, attached hereto as Schedule "C", and the Goals of the Gallery as heretofore set out, and shall receive and maintain a fund or funds and shall apply all of the principal and income therefrom for the following charitable purposes:
 - a. To educate and promote the public's appreciation of the fine arts in the Town of Markham through the use of the Gallery;
 - b. To maintain and expand the existing collection of art works, objects and documentary material in respect of the collection; and

- c. To preserve and exhibit the collection.
10. The Members and the Board shall act honestly and in good faith with a view to the best interests of the Foundation and shall exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

STANDING COMMITTEES OF THE BOARD

11. The Board shall establish standing committees to undertake and assist the Board in its business. The Chair of each standing committee shall be a Director of the Board and the other standing committee members may be appointed by the Board through its nominating process.
12. The Board shall establish the following Standing Committees:
- a. Art Acquisition Committee;
 - b. Executive and Nominating Committee;
 - c. Development Committee;
 - d. Volunteer Committee; and
 - e. such other committees as the Board may deem to be necessary and appropriate from time-to-time.
13. Notwithstanding Section 10, the Board shall appoint the Gallery Director as a member of the Art Acquisition Committee, and the Gallery Director shall be a member ex officio of all other Committees of the Board.
14. The duties of the Standing Committees shall be as follows:
- a. Art Acquisition Committee – shall be responsible for making recommendations to the Board regarding all acquisitions and deaccessions of the Art Collection in accordance with the terms of this Memorandum of Understanding;
 - b. Executive and Nominating Committee – shall be responsible for:
 - i. providing recommendations to the Board about advice to be given to the Gallery Director and the Town regarding the operation of the Gallery;
 - ii. providing advice to the Members regarding the business affairs of the Foundation;

- iii. the preparation of a Strategic Plan for approval by the Board and the Members;
 - iv. the preparation of a Business Plans for approval by the Board; and
 - v. for selecting and recommending appropriate candidates to the Members for appointment to the Board.
 - c. Development Committee – shall be responsible for developing the overall fundraising strategy of the Foundation, including but not limited to, recommending specific campaigns to raise funds and solicit donations to support the purposes of the Foundation.
 - d. Volunteer Committee – shall be responsible for the development of a volunteer program which support the objects of the Foundation.
15. The Executive and Nominating Committee, when recommending candidates for approval by the Members, shall give due regard to the strategic needs of the Board which may include the following criteria:
- a. knowledge of fine art;
 - b. experience with charitable organizations; and
 - c. fundraising experience.

REPORTING

16. The Board shall prepare and present to the Members at the Annual General Meeting of the Members of the Foundation the following:
- a. A report on the activities of the Board for the previous year;
 - b. An audited Financial Statement of the Foundation, in accordance with By-law No. 1 and all applicable law; and
 - c. A Strategic Plan.
17. The financial year-end of the Foundation shall be December 31. Audited Financial Statements for the Corporation shall be prepared on a consolidated basis, and shall be presented to the Annual General Meeting of the Members, which said meeting shall be held within six (6) months of the Financial Year-end of the Corporation.

18. The Board shall provide the Commissioner with a copy of the material set out in paragraph 15 a. to c., inclusive, a minimum of thirty (30) days prior to the Annual General Meeting of the Members of the Foundation.

BUSINESS PLANS

19. The Board shall prepare a Strategic Plan which shall set out the long range strategic direction of the Board which shall include but is not limited to the long term fundraising plans and business objectives of the Board.
20. The Board shall prepare a Business Plan each year, commencing for the 2006 business year, which shall set out the fiscal plan of the Board for the next three business years which shall include but is not limited to planned or proposed fundraising initiatives and campaigns, and the proposed annual operating and capital budgets for the Foundation. The Business Plan shall be consistent with the goals and objectives of the Strategic Plan approved by the Members.
21. The Board shall provide the Commissioner with a copy of its draft Business Plan on or before May 1st for the following business year and a copy of its final Business Plan on or before September 1st of that same year.
22. The business year for the Board shall run from January 1st to December 31st in any given year.
23. The Board shall not purchase any goods, expend any funds or enter into any agreement or contract on behalf of the Foundation which is of a value of \$100, 000.00 or greater without the prior approval from the Members. No contract, expenditure of funds or purchase of goods shall be divided into one or more contracts or purchases so as to avoid the requirements of this subsection. Where a series of contracts or purchases which pertain to the same subject matter with the same supplier, customer or consultant in any twelve (12) month period combine to equal the limits set out herein, the series of contracts or purchases shall be deemed to be a single purchase for the purposes of this Agreement.

FUNDRAISING

24. The Board shall have, as one of its primary responsibilities, the undertaking of fundraising activities which support the objects of the

Foundation and which shall be consistent with the Board's Strategic Plan and Business Plan.

ADMINISTRATION OF THE McKAY ENDOWMENT FUND

25. The Board shall administer the income generated from the proceeds of the Endowment Fund which have been assigned by the Town to the Board, in accordance with the provisions of the Will.

ACQUISITION AND DEACCESSION OF ART

26. The Members and the Board acknowledge and shall be bound by the Town's "Collection and Exhibition Management Policies and Procedures" attached as Schedule "B" as may be amended by the Town in consultation with the Board from time-to-time.
27. Subject to the provisions of this Memorandum of Understanding, the Board shall undertake the acquisition of art for, and deaccession of art from, the Art Collection based on recommendations from the Art Acquisitions Committee and Gallery Director, and in accordance with the Town's "Collection and Exhibition Management Policies and Procedures" attached as schedule "B", as may be amended from time to time.
28. Any expenditure of funds or purchase of art with a fair market value greater than One Hundred Thousand Dollars (\$100,000.00), by the Board shall have the prior approval of the Members. No contract, expenditure of funds or purchase of art or goods shall be divided into one or more contracts or purchases so as to avoid the requirements of this subsection. Where a series of contracts or purchases which pertain to the same subject matter with the same supplier, customer or consultant in any twelve (12) month period combine to equal the limits set out herein, the series of contracts or purchases shall be deemed to be a single purchase for the purposes of this Agreement.
29. The Board acknowledge that all deaccession of works of art owned by the Town or which form part of the Art Collection must be approved by the Members and be in accordance with the Town's "Collection and Exhibition Management Policies and Procedures" attached as schedule "B", as may be amended from time to time.

WORKS OF ART OWNED BY THE FOUNDATION

30. All works of art which are acquired by the Foundation through purchase, donation, gifts or otherwise shall form part of the Art Collection of the Gallery, and shall be transferred to the Town in accordance with all applicable laws, rules and regulations.
31. All works of art which are acquired by the Foundation through gift or donation to the Foundation which cannot be legally transferred to the Town, shall be loaned to the Town for the exclusive use of the Town and such art shall form part of the Art Collection to be used by and displayed in the Gallery in accordance with the "Collection and Exhibition Management Policies and Procedures", as the Commissioner and/or the Gallery Director, in consultation with the Board, may deem appropriate.
32. The Foundation shall not loan out or display any of the works of art that it owns without the approval of the Gallery Director or the Commissioner, and except in accordance with the Town's Collection and Exhibition Management Policies and Procedures".

ETHICS

33. The Board shall adopt a Code of Ethics which shall be in keeping with the principles set out in the International Council of Museums Code of Ethics and as required by the Town's "Collection and Exhibition Management Policies and Procedures".

CONFLICT OF INTEREST

34. Notwithstanding the provisions of the Code of Ethics adopted by the Board, the Members, Board Directors and officer or employees of the Board shall avoid any activity which could be construed as an actual or potential conflict of interest with respect to the business of the Foundation or the Gallery, which shall include but is not limited to the following:
 - a. there will be no self-dealing or any conduct of private business or personal services between any Member, Board Director or officer or employee of the Board and the Foundation except as procedurally controlled to assure openness, competitive opportunity and equal access to inside information;

- b. no Member, Board Director or officer or employee of the Board shall enter into direct competition with the Gallery by bidding or entering into the market for items which the Gallery wishes to acquire; and
 - c. no Member, Board Director or officer or employees of the Board shall use their positions to obtain employment in the organization for themselves, family members or close associates.
35. The agendas for meetings of the Board or of the Members shall include provision for disclosure of a direct or indirect pecuniary interest in a matter and the general nature thereof.

CONFIDENTIALITY

36. Neither the Members, Board Directors or officers or employees of the Board shall disclose issues which are of a confidential nature involving the Foundation or the Gallery, which shall include but are not be limited to, all proposed or pending acquisitions and deaccessions of art, personnel issues, litigation or potential litigation, financial issues, legal issues and property issues.
37. Neither the Members, Board Directors or officers or employees of the Board shall make public statements on issues which impact on or relate to the Gallery or the Town without prior authorization from the Commissioner.

PRIVACY LEGISLATION

38. The Members, Board Directors and officers or employees of the Board acknowledge that the Town is bound by the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. M.56, as amended ("MFIPPA"). The Members, the Board Directors and officers or employees of the Board agree to respect the spirit of MFIPPA and any other Federal or Provincial privacy legislation that may be in effect during the term of this Memorandum of Understanding. The Members, the Board Directors and officers or employees of the Board shall not directly or indirectly disclose or destroy any personal or confidential information (defined as such in any applicable legislation) provided to it by the Town pursuant to this Memorandum of Understanding, without first obtaining the consent of the Commissioner.

COMPLIANCE WITH TOWN POLICIES AND APPLICABLE LAW

39. The Members and the Board Directors shall comply with all applicable by-laws, policies, guidelines and processes of the Town, including but not limited to the Town's "Collection and Exhibition Management Policies and Procedures", as may be amended by the Town from time-to-time. The Town agrees to assist the Board in this regard and will, to the best of its ability, provide the Board with notice and copies of such by-laws, policies, guidelines and processes of the Town.
40. The Members and Board Directors shall comply with all other applicable laws, ordinances, rules and regulations of all applicable federal, provincial and municipal governments.

PART III: OPERATION OF GALLERY

ADVISORY ROLE OF BOARD

41. The Board shall act in an advisory capacity and provide advice or make recommendations on matters regarding the administration and operation of the Gallery, which includes maintenance of the Gallery, and the maintenance and display of the Art Collection, for the Town and/or Gallery Director's consideration. All advice or recommendations provided by the Board shall be in the form of a resolution of the Board.

ROLES AND RESPONSIBILITIES OF THE TOWN

42. The Town, as the owner of the Gallery, and as the employer of the Gallery personnel, shall cause the Gallery to operate in a manner which is compatible with the Goals of the Gallery as heretofore set out and in accordance with the Town's "Collection and Exhibition Management Policies and Procedures", as may be amended from time to time.
43. The Town shall be responsible for the operation and maintenance of the Gallery and the Art Collection, which includes art owned by the Town and art owned by the Foundation and loaned to the Town pursuant to this Memorandum of Understanding, by undertaking or providing the following:

- a. Display some or all of the Art Collection as part of a permanent collection, from time-to-time and as deemed appropriate by the Gallery Director;
- b. Undertake conservation and restoration of the Art Collection;
- c. Provide for the safety, security and preservation of the collection, which includes obtaining insurance coverage for the Art Collection;
- d. Stage regular art exhibitions;
- e. Undertake program development for the Gallery;
- f. Make recommendations for the acquisition of works of art for the Art Collection to the Board;
- g. Monitor the Art Collection and review and revise the Collection and Exhibition Management Policies and Procedures, as required;
- h. Maintain and revise Gallery policies, as required, to ensure they are consistent with the Gallery's purpose and goals;
- i. Provide educational opportunities for the public;
- j. Review and make recommendations on potential donations accepted by the Board;
- k. In consultation with the Board, to set fees, admission, rates, rentals and any other charges for the use of the Gallery or any other facilities provided;
- l. In conjunction with the Board, to undertake fundraising and special programs or other projects for the Gallery;
- m. Undertake membership activities, including recruitment, and establishing rates and services provided;
- n. Operate a gift shop and provide art rental services, as deemed appropriate by the Town;
- o. Employ appropriate staff to operate the Gallery;

- p. In conjunction with the Board, recruit and train volunteers to assist with Gallery operations, tours, special events and programs; and
- q. In consultation with the Board, to set the strategic direction for the Gallery.

SUPPORT TO FOUNDATION

- 44. The Town shall provide the following support functions to enable the Board to carry out responsibilities pursuant to this Memorandum of Understanding:
 - a. employ appropriate Gallery Staff;
 - b. the Town's Clerk's Department shall provide clerical support services for all Board meetings;
 - c. the Town's Finance Department shall be responsible for maintaining a set of accounts, operating the Foundation's bank account, issuing tax receipts on behalf of the Foundation as required and filing the necessary returns required under the *Income Tax Act* on behalf of the Foundation, invest such other funds as may be gathered as a result of the Board's activities, and report to the Board or the Executive Committee of the Board, as deemed appropriate;
 - d. the Town's Clerk's Department shall be responsible for maintaining the corporate minute book for the Foundation;
 - e. the Town's Legal Department may provide legal advice on routine legal matters as and when deemed appropriate by the Town Solicitor.

MCKAY ENDOWMENT FUND

- 45. The Town shall be the custodian of the McKay Endowment Fund bequeathed by Kathleen McKay and shall assign the income generated from the McKay Endowment Fund to the Board to use and disburse as the Board shall determine in accordance with the provisions and requirements of the Will.

PART IV: GENERAL

TERM

46. This Memorandum of Understanding shall be for a one (1) year term, commencing on March 21, 2006 and terminating on March 20, 2007, and shall be automatically renewed for successive one (1) year terms thereafter until either party provides a minimum of at least ninety (90) days notice, in writing, of termination of this Memorandum of Understanding.

GOVERNING LAW

47. This Memorandum of Understanding shall be governed by and construed in accordance with the laws of the Province of Ontario.

ENTIRE AGREEMENT

48. Where specifically provided herein, the Schedules to this Memorandum of Understanding form and are part of this agreement. This Memorandum of Understanding constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and supercede all prior and contemporaneous agreements, undertakings, negotiations and discussions, whether oral or written, of the parties and there are no warranties, representations or other agreement between the parties in connection with the subject matter of this Memorandum of Understanding except as specifically set forth herein.
49. This Memorandum of Understanding and the Schedules, save and except for the Collection and Exhibition Management Policies and Procedures attached as Schedule "B", may not be amended or modified by the parties except in written instrument executed by both parties.
50. The parties acknowledge and agree that the Town may, as it deems appropriate and in consultation with the Board, amend the terms and provisions of the Collection and Exhibition Management Policies and Procedures attached as Schedule "B", and any amendments made hereinafter shall form part of this Memorandum of Understanding.

IN WITNESS WHEREOF, the parties hereto have hereunto affixed their corporate seals under the hands of their officers duly authorized in that regard.

SIGNED, SEALED AND DELIVERED

in the presence of:

) **VARLEY-MCKAY ART**
) **FOUNDATION OF MARKHAM**

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) Name:

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) **THE CORPORATION OF THE**
) **TOWN OF MARKHAM**

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) Name: Don Cousens

) Title: Mayor

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) Name: Sheila Birrell

) Title: Clerk