



The Municipal Corporation of the Town of Fort Erie

BY-LAW NO. 116-2014

BEING A BY-LAW TO AUTHORIZE A GRANT AND THE ENTRY INTO A GRANT FUNDING AGREEMENT WITH THE FORT ERIE LIVE RACING CONSORTIUM

WHEREAS Section 107(1) of the *Municipal Act, 2001*, S.O. 2001, c.25, as amended, provides that a municipality may grant on such terms as to security and otherwise as the council considers appropriate, to any person, group or body, for any purpose that council considers to be in the interests of the municipality, and

WHEREAS at the Council Meeting held on March 3, 2014, the Municipal Council of the Town of Fort Erie authorized a grant to the Fort Erie Live Racing Consortium in the amount of \$500,000 to be funded from the 2013 General Levy Operating Budget Surplus, to assist with the sustainability of the Fort Erie Race Track for the 2014 season, and

WHEREAS it is deemed desirable to enter into a Grant Funding Agreement with the Fort Erie Live Racing Consortium in the amount of amount of \$500,000 for the 2014 Fort Erie Race Track season;

NOW THEREFORE the Municipal Council of The Corporation of the Town of Fort Erie hereby enacts as follows:

1. **THAT** The Corporation of the Town of Fort Erie provide a conditional grant to the Fort Erie Live Racing Consortium in the amount of \$500,000 to be funded from the 2013 General Levy Operating Budget Surplus, to assist with the sustainability of the Fort Erie Race Track for the 2014 season, subject to the terms and conditions set out in a Grant Funding Agreement to be entered into with the Fort Erie Live Racing Consortium.
2. **THAT** the entry into a Grant Funding Agreement with the Fort Erie Live Racing Consortium in the form attached hereto as Schedule "A", is hereby authorized and approved.
3. **THAT** the Mayor and Clerk are hereby authorized and directed to execute the Grant Funding Agreement and to affix the corporate seal thereto.
4. **THAT** pursuant to the provisions of Sections 23.1 to 23.5 inclusive of the *Municipal Act, 2001*, as amended, the Clerk of the Town of Fort Erie is hereby authorized to effect any minor modifications or corrections solely of an administrative, numerical, grammatical,

SCHEDULE "A" TO BY-LAW NO. 116-2014

THIS CONDITIONAL GRANT FUNDING AGREEMENT

made in duplicate on the day of September, 2014.

B E T W E E N:

THE CORPORATION OF THE TOWN OF FORT ERIE

(referred to herein as the "Grantor")

- and -

FORT ERIE LIVE RACING CONSORTIUM

(referred to herein as the "Grantee")

WHEREAS the Grantee is a non-share capital corporation, duly incorporated under the *Corporations Act* for the sole purpose of preserving live racing at the Fort Erie Race Track (the "Track"), and

WHEREAS by a FAR Support Agreement effective April 1, 2014, the Ontario Racing Commission approved funding to the Grantee to operate the "Track", and

WHEREAS Section 107 of the *Municipal Act, 2001*, S.O. 2001, c. 25, provides that a municipality may make grants on such terms and conditions as to security and otherwise as council may consider expedient, and

WHEREAS at the Council meeting held on March 31, 2014, the Municipal Council of the Town of Fort Erie, authorized a grant to the Grantee in the amount of \$500,000 for the year 2014, to assist with the sustainability of the Track for the 2014 season, and

WHEREAS By-law No. 116-2014 passed by the Municipal Council of the Town of Fort Erie on September 8, 2014 authorized the making of a conditional grant to the Grantee in the amount of \$500,000 for the year 2014, to be funded from the 2013 General Levy Operating Budget Surplus, subject to the terms and conditions set out in a Grant Funding Agreement to be entered into with the Grantee.

NOW THEREFORE in consideration of the covenants and warranties, and subject to the terms and conditions in this Agreement, the parties agree as follows:

1. TERM

- 1.1. The parties agree that the term of this Agreement shall commence on the date of execution and end on December 31, 2014, unless otherwise terminated prior to such date in accordance with the provisions of this Agreement.

2. GRANT

- 2.1 Subject to the Grantee complying with the terms, conditions and other obligations set out in this Agreement, the Grantor shall make a one-time grant to the Grantee in the total amount of \$500,000 in the year 2014 to be used solely for the purpose of the not-for-profit operation and management of the Track and for no other purpose.
- 2.2 The Grantee covenants and agrees that no grant funds shall be used for the personal benefit of any of its directors, officers, employees, agents or trustees or for those for whom the Grantee is at law responsible and should any funds be so used, the grant shall be deemed to be a loan and shall become immediately due and payable upon demand by the Grantor.
- 2.3 The grant shall be provided by the Grantor to the Grantee in installments on the dates and in the amounts set out in Schedule "A".
- 2.4 It is agreed and understood that the making of the grant in no way commits the Grantor to provide other or additional grants or loans now or in the future. Further, it is agreed and understood that nothing in this Agreement shall be construed as prohibiting the Grantee from requesting further grants or loans.

3. RELATIONSHIP OF THE PARTIES

- 3.1 Nothing in this Agreement shall be deemed to constitute the Grantee an employee, servant, agent, partner of or in joint venture with the Grantor for any purpose whatsoever.
- 3.2 The Grantor shall not be responsible for any costs associated with the operation, maintenance and repair of the Track nor for any claims, proceedings or judgments arising from any tender and bidding process, or the hiring or termination of employees or contractors.

4. REPORTS

- 4.1 The Grantee shall, during the term of this Agreement and within six (6) months following the expiry of the fiscal year end of the Grantee, deliver to the Grantor a copy of its annual audited financial statements for such fiscal year which financial statements shall be prepared in accordance with generally accepted accounting principles and which statements shall be for the 2014 fiscal year end.

5. COVENANTS, REPRESENTATIONS AND WARRANTIES OF THE GRANTEE

- 5.1 The Grantee covenants, represents and warrants to the Grantor that:
 - (a) it is conducting and shall conduct its business in compliance with all applicable federal, provincial and municipal laws, and all rules, regulations, by-laws, notices, orders and approvals;

- (b) it has authority and any necessary approval to enter into this Agreement and to carry out its terms;
 - (c) it has or will apply for all permits, approvals, and licenses which are required in order to carry on the operations of the Track including, but not limited to, any approvals or licenses required by the Ontario Racing Commission;
 - (d) it validly exists as a legal entity with full power to perform and observe all of the terms and conditions of this Agreement.
- 5.2 The Grantee covenants, represents and warrants that it has, and shall maintain for the period during which this Agreement is in effect, by-laws or other legally necessary instruments to:
- (a) establish procedures to ensure the ongoing effective functioning of the Grantee;
 - (b) establish decision-making mechanisms;
 - (c) establish and maintain financial and administrative procedures which ensure the accurate recording and reporting of its operations and which maintain adequate administrative and financial control, and shall maintain accounting procedures consistent with sound operating practices in accordance with generally accepted accounting principles;
 - (d) establish procedures to enable the preparation and delivery of all reports required under this Agreement.
- 5.3 The Grantee shall notify the Grantor, in writing, immediately upon any of the following acts occurring:
- (a) the bankruptcy or insolvency of the Grantee, the filing against the Grantee of a petition in bankruptcy; the making of an authorized assignment or proposal for the benefit of creditors by the Grantee; the appointment of a receiver or trustee for the Grantee or for any assets of the Grantee or the institution by or against the Grantee of any other type of insolvency proceeding under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, or otherwise;
 - (b) the institution by or against the Grantee of any formal or informal proceeding for the dissolution or liquidation of the Grantee, or the winding up of the affairs of the Grantee;
 - (c) the receipt of a notice, statement, or settlement of claim against or instituted by the Grantee;

- (d) if the Grantee ceases to carry on operations or commits an act of bankruptcy;
 - (e) if any execution, sequestration or other process of any court becomes enforceable against the Grantee or if a distress or analogous process is levied upon the assets of the Grantee or any part thereof;
 - (f) if the Grantee ceases to be a non-share capital, non-profit Ontario corporation.
- 5.4 Upon request the Grantee shall provide the Grantor with proof of the matters referred to in this Section. It is a condition precedent to any payment under this Agreement that the representations and warranties under this Section are true at the time of payment and that the Grantee is not in default of compliance with any terms of this Agreement. The Grantor may request a report on the expenditure of the grant and declaration that it is in compliance with the terms of this Agreement. Where this is not the case, and the Grantee cannot provide the Grantor an adequate and reasonable remedy to the satisfaction of the Grantor, the Grantor may withhold future payments. The Grantor will withhold mid-year installments to the Grantee only in the event that the Grantee ceases operating the Track.
- 5.5 The Grantee covenants and agrees that it shall appoint the Grantor's current Chief Administrative Officer, or Interim Chief Administrative Officer, as the case may be, to its Board of Directors.

6. INSURANCE

- 6.1 The Grantee represents and warrants that it has obtained as of March 31, 2014, and shall maintain in full force and effect for the remainder of the term of the Agreement, at its own cost and expense, all the necessary and appropriate insurance that a prudent person carrying out the operations of a horse racing track similar to the Track would maintain, including commercial general liability insurance on an occurrence basis for third party bodily injury, personal injury and property damage, to an inclusive limit of not less than five million dollars (\$5,000,000) per occurrence. Subject to availability from its insurer and acceptable cost to the Grantee, the policy shall include the following:
- (i) the Grantor as additional insured with respect to liability arising in the course of performance of the Grantor's obligations under, or otherwise in connection with, the Agreement;
 - (ii) a cross liability clause;
 - (iii) contractual liability coverage; and

(iv) a 30 day written notice of cancellation, termination or material change.

6.2 The Grantee shall, before the Grantor distributes the grant, provide the Grantor with certificates of insurance, or other proof as may be requested by the Grantor, that confirms the insurance coverage as provided for in Section 6.1 is in force. Upon the request of the Grantor, the Grantee shall make available to the Grantor a copy of each insurance policy.

7. **INDEMNITY**

7.1 The Grantee agrees to indemnify and hold harmless the Grantor from and against all liability, losses, costs, damages, expenses, (including legal, expert and consultant fees), lawsuits, judgments, claims, demands, expenses, actions, causes of action and other proceedings, including any and all liability for damages to property and injury to persons (including death), which the Grantor may incur, sustain or suffer, otherwise than by reason of their own negligence or willful misconduct, as a result or arising out of or in relation to: (a) this Agreement or any breach of the terms of this Agreement by the Grantee, its officers, servants, employees, agents and consultants, or by a third party for whom the Grantee is responsible, and any of its officers, employees, servants or agents; (b) the ongoing operation, maintenance and repair of the Track, or (c) any omission or other willful or negligent act of the Grantee, a third party for whom the Grantee is responsible, their respective employees, officers, servants or agents; or (d) any claim for lien made pursuant to the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended.

7.2 The Grantee shall use its best efforts to secure from Nordic Gaming Corporation (hereinafter referred to as Nordic) in its Lease related to the operation and management of the Track, Nordic's agreement to indemnify and hold harmless the Grantor in substantially the same form and content as Section 7.1.

8. **DEFAULT AND TERMINATION**

8.1 Each and every one of the following events is an "Event of Default":

- (a) if in the opinion of the Grantor, the Grantee fails to conform or comply with any term or covenant contained in this Agreement to be performed or complied with by the Grantee;
- (b) if in the opinion of the Grantor, any representation or warranty made by the Grantee in this Agreement or any certificate delivered to the Grantor is materially untrue in any respect;
- (c) if an order shall be made or an effective resolution passed for the winding up, or liquidation or dissolution of the Grantee, or the Grantee is otherwise dissolved or ceases to carry on its operation;

- (d) if the Grantee uses any of the grant funds for a purpose not authorized by this Agreement without the prior written consent of the Grantor;
 - (e) if the Grantee admits in writing its inability to pay its debts generally as they become due, voluntarily suspends transactions of its usual business, becomes insolvent, bankrupt, makes an assignment for the benefit of its creditors, or if a receiver or manager, court appointed or otherwise, is appointed for its assets or if the Grantee takes the benefit of any statute from time to time in force relating to bankrupts insolvent debtors;
 - (f) if in the opinion of the Grantor a material adverse change occurs such that the viability of the Grantee as a going concern is threatened in the opinion of the Grantor, acting reasonably;
 - (g) if in the opinion of the Grantor the Grantee ceases to operate;
 - (h) if the Grantee ceases to be a non-share capital, not-for-profit Ontario corporation;
 - (i) if the Lease Agreement, as amended, wherein Nordic leases to the Grantee all of the Track together with all equipment used by Nordic in Nordic's horse racing business at the Track, is terminated prior to December 31, 2014;
 - (j) if the FAR Support Agreement effective April 1, 2014 between the Grantee and the Ontario Racing Commission is terminated or the Ontario Racing Commission suspends payments and directs previous payments to be returned pending an investigation, or adjusts the payment of funds, pursuant to the terms of the said Agreement, prior to December 31, 2014. .
- 8.2 The Grantor may, at any time, waive any Event of Default which may have occurred provided that no such waiver shall extend to, or be taken in any manner whatsoever to affect, any subsequent Event of Default or the right to remedies resulting therefrom, and that no such waiver shall be, or shall be deemed to constitute, a waiver of such Event of Default unless such waiver is in writing from the Grantor.
- 8.3 Notwithstanding any other rights which the Grantor may have under this Agreement, if an Event of Default has occurred, the Grantor shall have the following remedies provided only that in the case of an Event of Default which is curable, the Grantor has first given written notice of the Event of Default to the Grantee and the Grantee has failed to correct the Event of Default within 15 days or such reasonable period of time as the Grantor may consent to in writing:

- (a) Subject to Section 5.4, the Grantor shall have no further obligation to provide any grant funding as provided in this Agreement;
- (b) Subject to Section 5.4, the Grantor may, at its option, terminate this Agreement immediately, or the Grantor may, in its sole discretion, adjust the grant funding.

9. NOTICE

9.1 Any demand, notice or communication to be made or given hereunder shall be in writing and may be made or given by personal delivery or mailed by first class registered mail, postage prepaid or by transmittal by facsimile, telecopy, email or other electronic means of communication addressed to the respective parties as follows (or at such other address as that party specifies by written notice in accordance with this Subsection 9.1):

To the Grantor: Town of Fort Erie
 1 Municipal Centre Drive
 Fort Erie, Ontario, L2A 2S6

Attention: Jonathan Janzen, Treasurer

Email: jjanzen@forterie.on.ca

Facsimile: 905-871-9984

To the Grantee: Fort Erie Live Racing Consortium
 660 Garrison Road, Unit #1
 Fort Erie, Ontario, L2A 6E2

Attention: James A. Thibert, CEO

Email: jthibert@forteriecanada.com

Facsimile: 905-871-1077

9.2 Any demand, notice or communication made or given by personal delivery shall be conclusively deemed to be received on the day of actual delivery thereof. Any demand, notice or communication made or given by facsimile, email or other electronic means of communication, if made or given at a time when it would be received by the Grantee during its normal business hours on a business day, shall be deemed to be received at the time it is sent; otherwise, such electronic communication shall be deemed to be received on the first business day following the transmittal thereof. Any demand, notice or communication mailed by registered mail shall be deemed to have been received on the third business day following the day on which it was mailed.

10. GENERAL PROVISIONS

10.1 This Agreement including Schedule "A", constitutes the entire Agreement between the parties. There are no other agreements, understandings, representations or warranties, either collateral, oral or otherwise.

10.2 This Agreement may be amended, altered or added to only by written Agreement between the parties which Agreement is supplemental to this Agreement and thereafter forms part of this Agreement.

10.3 This Agreement shall enure to the benefit of and be binding upon the Grantee, its successors and permitted assigns. The Grantee shall not assign or in any way transfer this Agreement or any of its rights, privileges, duties or obligations under this Agreement without the prior written consent of the Grantor, which consent may be unreasonably withheld or delayed.

10.4 This Agreement shall enure to the benefit of and be binding upon the Grantor, its successors and assigns.

IN WITNESS WHEREOF the Parties hereto have hereunto affixed their corporate seals under the hands of their proper officers duly authorized in that behalf.

**Signed, Sealed and Delivered
In the Presence of:**

) **FORT ERIE LIVE RACING CONSORTIUM**
)
)
)
) _____
) **Name: James A. Thibert**
) **Title: CEO**
)
) **I have authority to bind the corporation.**
)
) **THE CORPORATION OF THE**
) **TOWN OF FORT ERIE**
)
)
) _____
) **MAYOR**
)
)
) _____
) **CLERK**

SCHEDULE "A"

Payment Date	Payment Amount
October 1, 2014	\$250,000
December 31, 2014	\$250,000
TOTAL	\$500,000