

The Corporation of the Township of Southgate

By-law Number 2020-129

**being a by-law to authorize an agreement between Fire Marque Inc.
and The Corporation of the Township of Southgate**

Whereas the Municipal Act, 2001, Chapter 25, as amended, Section 5 (3), states that municipal power, including a municipality's capacity, rights, powers and privileges, shall be exercised by by-law unless the municipality is specifically authorized to do otherwise; and

Whereas Section 8 of the Municipal Act, 2001, Chapter 25, as amended, provides that a municipality has the authority to govern its affairs as it considers appropriate and enables the municipality to respond to municipal issues; and

Whereas Section 9 of the Municipal Act, 2001, Chapter 25, as amended, provides that a municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act; and

Whereas it is deemed necessary and desirable that the Council of the Corporation of the Township of Southgate enact a by-law authorizing the Corporation to enter into an agreement with Fire Marque Inc.,

Now therefore be it resolved that the Council of the Corporation of the Township of Southgate enacts as follows:

1. **That** the agreement between Fire Marque Inc. and The Corporation of the Township of Southgate, attached hereto at Schedule A is hereby ratified and confirmed; and
2. **That** the Mayor and the Clerk are authorized to sign the agreement on behalf of the Township of Southgate; and
3. **That** where the provisions of any other by-law, resolution or action of Council are inconsistent with the provisions of this by-law, the provisions of this by-law shall prevail.

**Read a first, second and third time and finally passed this 4th day of
November, 2020.**

John Woodbury – Mayor

Lindsey Green – Clerk

AGENCY AGREEMENT

THIS AGENCY AGREEMENT (the "Agreement") made the 4th day of November, 2020.

BETWEEN:

FIRE MARQUE INC.
(herein after referred to as the "Agent")

- and -

THE CORPORATION OF THE TOWNSHIP OF SOUTHGATE
(herein after referred to as the "Municipality")

WHEREAS the Fire Department attends, when required, at Incident Sites to provide emergency services;

AND WHEREAS the costs and expenses incurred by the Fire Department as a result of attending at the Incident Sites and providing services may be recoverable through Indemnification Technology® with respect to insured perils through the Insurance Policies of the owner or tenant of the Incident Site;

AND WHEREAS the Municipality wishes to appoint the Agent, as its agent for the purpose of filing Claims on behalf of the Municipality and to recover, on their behalf, any insurance proceeds from the insurers of the affected parties which are recoverable in accordance with the terms of any policy agreement for the costs and expenses incurred by the Fire Department as a result of attending at the Incident Sites.

AND WHEREAS the Agent wishes to make the Claims and recover the recoverable proceeds of insurance on behalf of the Municipality in accordance with the terms and conditions set forth herein;

NOW THEREFORE, in consideration of the mutual terms and covenants herein contained, the Parties covenant and agree as follows:

1. DEFINITIONS

"**Agreement**" is this agreement, as may be amended;

"**Agency Fee**" is the financial compensation expressed as a percentage of the recovered Emergency Cost Recovery Proceeds in accordance with Section 6;

"**Agency Fee Taxes**" are all taxes, duties and other charges (including any GST, HST or other value added taxes) applicable to the Agency Fee;

"**Agent**" is Fire Marque Inc., or its successors and assigns;

"**Claims**" an amount requested for payment for an insured loss which falls under the terms of Insurance Policies;

"**Emergency Cost Recovery Proceeds**" are the funds recovered by the Agent as a result of filing Claims with insurers pursuant to the Insurance Policies of the owner and or tenant of an Incident Site to recover the costs and expenses incurred by the Fire Department as result of attending and providing emergency services at an Incident Site;

"Fire Department" means a group of firefighters authorized to provide fire protection services by the Municipality;

"Incident Reports" are the property statistical fire reports;

"Incident Sites" is the municipal address or property location of the incident which is attended at by the Fire Department in relation to which the Fire Department incurs costs and expenses as a result of providing their emergency services;

"Indemnification Technology®" is the intellectual property owned and employed by the Agent in making claims to recover costs and expenses of the Fire Department incurred as result of providing emergency services at an Incident Site and includes: incident reporting, data collection, and property insurance policy wording interpretation to maximize billing opportunities on behalf of the Fire Department by invoicing insurance companies for the costs of fire department attendance with respect to insured perils;

"Indemnitees" means the Agent, its directors, partners, officers, agents, and employees;

"Initial Term" is the period commencing from the date of first written above and continuing thereafter for a period of five years;

"Insurance Policies" means an insurance policy of the owner or tenant who owns or rents the property located on the Incident Site;

"Intellectual Property" is any intellectual property of the Agent, including but not limited to any software, trade names, trademarks, and copyrighted materials and any of the foregoing as it relates to Indemnification Technology®;

"Losses" means all loses, costs, expenses, interest, charges, assessments, damages, liabilities, obligations, fines and penalties, including all reasonable costs incurred investigating, defending or negotiating the settlement or resolution of any demand, lawsuit, action, or proceeding, and specifically including reasonable legal and other professional fees and expenses on a "full indemnity", "solicitor and his own client" or comparable basis, regardless of whether the foregoing arise in, under or by virtue of common law, equity or other applicable law, contract, negligence, strict liability, breach of duty or otherwise;

"Party" or **"Parties"** is the Agent and the Municipality;

"Municipality" is - The Corporation of the Township of Southgate;

"Renewal Term" is a renewal term of 3 years;

"Term" is the Initial Term together with any subsequent Renewal Terms, until this Agreement is terminated in accordance with Section 14;

"Termination Date" is the date this Agreement terminates in accordance with Section 14; and,

"Third Party Fire Departments" is a fire department, fire brigade, persons and/or equipment that are not part of the Fire Department.

2. TERM

The term of this Agreement will begin as of the date first written above and continue for the period of the Initial Term and will automatically renew for successive Renewal Terms upon the expiry of the Initial Term or any preceding Renewal Term, unless this Agreement is terminated in accordance with Section 14.

3. APPOINTMENT

The Municipality hereby appoints the Agent as its exclusive agent during the Term of this Agreement for the purpose of filing, on behalf of the Municipality, all Claims with insurers and to recover from any insurers on their behalf, any proceeds of insurance which are recoverable in accordance with the terms of any Insurance Policies of an owner or the tenant at any Incident Site.

4. AGENT OBLIGATIONS

During the Term of the Agreement, the Agent agrees:

- (a) To proceed diligently to prepare and file Claims with the insurer of the incident sites on behalf of the Municipality upon receipt of the Incident Reports from the Fire Department;
- (b) To establish and maintain a non interest bearing trust account to receive and hold any Emergency Cost Recovery Proceeds in trust on behalf of the Municipality (which proceeds may be comingled with the proceeds recovered for other municipalities and/or fire departments, for which Agent is providing similar services);
- (c) To remit on a quarterly basis or such period as agreed to between the Agent and the Municipality, the Emergency Cost Recovery Proceeds to the Municipality, less any Agency Fee, and Agency Fee Taxes deducted in accordance with Sections 6 and 7.
- (d) To deliver a statement to the Municipality providing reasonable detail in regards to the amounts being remitted for the applicable period; and
- (e) To maintain complete, detailed and adequate books and records pertaining to Claims and Emergency Cost Recovery Proceeds.

5. MUNICIPALITY'S OBLIGATIONS

During the Term of the Agreement, the Municipality agrees:

- (a) on a monthly basis or such period as agreed to between the Municipality and Agent, to provide the Agent with all the completed Incident Reports relating to its attendance at all Incident Sites during the period, setting forth in reasonable detail the services provided and the costs and expenses incurred by the Fire Department in attending such Incident Sites and providing information as to the applicable insured, the insurance company and the policy number of the Incident Site, if available;
- (b) in accordance with the Insurance Policies, ensure that the Emergency Cost Recovery Proceeds that are remitted to the Fire Department are used by the Fire Department for its own purposes, which purposes may include but not be limited to the following:
 - (i) the purchase of equipment for the Fire Department

- (ii) the provisions of training and education to the firefighters of the Fire Department; and/or
 - (iii) the purchase and/or provision of materials and equipment for fire inspection, fire prevention and public education programs;
- (c) if requested, to provide the Agent with documentation evidencing that the Fire Department is the sole beneficiary of any Emergency Cost Recovery Proceeds that have been remitted to the Municipality in accordance with Section 4; and
- (d) to the extent the Municipality or the Fire Department is paid or receives Emergency Cost Recovery Proceeds directly from the insurer under the Insurance Policy, or from the owner or tenant of an Incident Site (as a result of such owner or tenant receiving the Emergency Cost Recovery Proceeds directly from the insurer under the Insurance Policy), the Municipality agrees that it shall promptly remit payment of the Agency Fee that is payable to the Agent in relation to such Emergency Cost Recovery Proceeds (as determined in accordance with Section 6) and will provide the Agent with copies of all communications and notices received from the insurer under the Insurance Policy in relation to such Emergency Cost Recovery Proceeds for the Agent's own records.

6. AGENCY FEE

In consideration for the services provided by the Agent pursuant to this Agreement, during the Initial Term, the Agent will be entitled to a fee equal to thirty (30%) of all Emergency Cost Recovery Proceeds (the "**Agency Fee**"). The Agent will be entitled, on a monthly basis, to invoice the Municipality for the Agency Fee accrued in respect of the previous month Emergency Cost Recovery Proceeds and to deduct the Agency Fee from the Emergency Cost Recovery Proceeds. The Agent shall not be entitled to any further consideration from the Municipality or the Fire Department. The amount of the Agency Fee shall be negotiated by the Parties for any Renewal Terms.

7. TAXES

It is understood by the parties that the Agency Fee is exclusive of all taxes, duties and other charges (including any GST, HST or other value added taxes), ("**Agency Fee Taxes**"), applicable to the services provided by the Agent hereunder. The Agent shall withhold and deduct from the Emergency Cost Recovery Proceeds that are to be remitted to the Fire Department, any Agency Fee Taxes, and all such Agency Fee Taxes will be remitted to the applicable government agency, as and when required.

8. INTELLECTUAL PROPERTY

The Municipality agrees and acknowledges that any Intellectual Property of the Agent, including but not limited to any software, trade-names, trade-marks, and copyrighted materials and any of the foregoing as it relates to Indemnification Technology® are the property of the Agent, and the Municipality has no rights to this Intellectual Property as a result of this agreement or otherwise.

9. AUDIT

The Municipality has the right to audit, at its own expense, the records and accounts, during reasonable business hours and on advance written notice to the Agent; and, for up to twenty-four (24) Months from the end of the calendar year to which the records and accounts relate.

10. UNRECOVERABLE EXPENSES

No action will be undertaken by the Agent to collect any proceeds or file any Claims on behalf of the Municipality. The Fire Department will only be entitled to receive Emergency Cost Recovery Proceeds actually recovered by the Agent on behalf of the Municipality. The Municipality, at its own discretion, may elect to enforce the payment of the Emergency Cost Recovery Proceeds not recovered by the Agent through powers granted by their By-Laws or through litigation. Unless prior arrangements have been made on a specific file.

11. INCIDENTS ATTENDED TO BY OTHERS

It is acknowledged by the Parties that in certain instances, in addition to the Fire Department, other fire departments or other emergency personnel ("**Third Party Fire Departments**") may attend at an Incident Site and whose costs and expenses incurred as result of attending and providing emergency services at such Incident Site may also be recoverable under the Insurance Policies of the owner(s) or tenant(s) of such Incident Site. In such cases:

- (a) the Municipality acknowledges that the Emergency Cost Recovery Proceeds recovered in respect of such Incident Site may have to be shared with the Third Party Fire Departments, and Agent makes no representation and will not be required to take any action to determine the appropriate allocation of such Emergency Cost Recovery Proceeds between the Fire Department and the Third Party Fire Departments.
- (b) the Municipality shall negotiate an appropriate allocation of the Emergency Cost Recovery Proceeds with the Third-Party Fire Departments. If the Municipality and the Third Party Fire Departments are unable to agree to an appropriate allocation within a reasonable time, then Agent may, in its sole discretion but without obligation to do so, and on notice to Municipality, commence interpleader or a similar action or proceeding in connection with any dispute in relation to allocation of the Emergency Cost Recovery Proceeds and pay the Emergency Cost Recovery Proceeds into court, whereupon the Agent shall be released from any further obligations in respect of such Emergency Cost Recovery Proceeds and the Municipality shall indemnify and hold harmless the Indemnitees from any dispute arising with respect to such Emergency Cost Recovery Proceeds whether the Agent is acting as agent on behalf of the Third Party Fire Departments to the dispute or otherwise.

12. LIMIT ON LIABILITY

Other than Emergency Cost Recovery Proceeds actually recovered, the Agent will not be liable to the Municipality for any costs and expenses incurred as a result of the Fire Department attending and providing emergency services at an Incident Site which it was unable to recover through the Insurance Policies of the owner or tenant of such services

13. **INSURANCE & IDEMNIFICATION**

The Municipality agrees to indemnify and hold harmless the Indemnitees from and against any and all Losses that may be imposed on, incurred by, or asserted against, the Indemnitees or otherwise, in connection with the performance of its duties under this Agreement or any actions or inactions taken by the Fire Department or Municipality in connection with this Agreement, including as a result of any claims: (i) from insurers as a result of inaccuracies, misrepresentations or fraud in any of the Incident Reports and other information provided to Agent for the purpose of filing Claims; and (ii) from Third Party Fire Departments claiming rights to any Emergency Cost Recovery Proceeds that have been disbursed to the Fire Department. The foregoing liability and indemnification by Municipality shall not apply where the Losses arise from the Agent's gross negligence fraud or willful misconduct.

- (a) During the Term (and any renewal thereof as applicable) of this Agreement, the Agent shall procure and maintain an errors and omissions insurance policy of not less than two million dollars (\$2,000,000.00) coverage. The deductible shall not exceed twenty-five thousand dollars (\$25,000.00).
- (b) The Agent shall carry a Commercial Blanket Bond with an amount no less than Fifty Thousand Dollars (\$50,000.00) that protects both the Agent and the Municipality with respect to any loss resulting from dishonesty, disappearance, destruction and Forgery act(s) arising from the work being performed by the Agent under this Agreement on behalf of the Municipality.
- (c) The Agent shall, at their expense obtain and keep in force during the term of the Agreement, Commercial General Liability Insurance in an amount not less than five million dollars (\$5,000,000.00) per occurrence and five million (\$5,000,000.00) in the aggregate. This policy shall contain products and completed operations coverage, Non-owned automobile coverage, and coverage for claims resulting from Technology Network risks such as data breaches, unauthorized access, theft of confidential information, invasion of privacy, intellectual property infringement such as copyright, trademarks, service marks and trade dress. The deductible shall not exceed twenty-five thousand dollars (\$25,000.00). The Municipality has the right to request, at any time confirmation of the insurance coverages and that the policy is in force.

14. **TERMINATION**

Notwithstanding Section 2, this Agreement will terminate with 30 days' written notice by either Party (the "**Termination Date**"), provided that if this Agreement is terminated (other than as a result of a material breach of this Agreement by the Agent), the Agent shall be entitled to continue filing all Claims and collecting Emergency Cost Recovery Proceeds, for any incidents attended to by the Fire Department at Incident Sites which occurred prior to the date of the Termination Date of this Agreement, and such filings and recoveries shall remain subject to the terms and conditions of this Agreement. The Municipality or the Fire Department shall not make claims in respect of any incidents attended to by the Fire Department which occurred prior to the Terminate Date. The covenants set forth in this Section 14 shall survive the termination of this Agreement.

15. NOTICES

All notices, communications, statements and payments which may be required or permitted under this Agreement will be in writing and sent by registered mail, courier services, or transmitted by facsimile or other electronic means which produces a physical copy. Any party may change its address by notice to the other parties.

The addresses of the parties pursuant to this Section 15 are as follows:

If to the Municipality:

Township of Southgate
185667 Grey Road 9
Dundalk, Ontario
N0C 1B0
Phone: 519-923-2110
Fax: 519-923-9262

Attention: Clerk's Department

If to the Agent:

Fire Marque Inc.
P.O. Box 2018, Thornton, ON L0L 2N0
Phone: 1-855-424-5991 or 705-424-5991
Fax: 705-424-5702

Attention: Ted K. Woods

16. SEVERABILITY

If any provision of this Agreement is determined to be illegal, invalid or unenforceable by an arbitrator or any court of competent jurisdiction from which no appeal exists or is taken, that provision will be severed from this Agreement and the remaining provisions will remain in full force and effect.

17. ARBITRATION

All disputes, controversies and disagreements with respect to this Agreement, or any matter arising under or in connection with this Agreement, shall be finally settled by arbitration. Arbitration shall be conducted as follows:

- (a) the reference shall be to a single arbitrator appointed in accordance with the *Arbitration Act*, 1991, S.O. 1991, C. 17, as amended;
- (b) the decision of the arbitrator shall be final, conclusive and binding upon all parties;
- (c) unless otherwise determined by the arbitrator, the Parties shall pay an equal portion of the fees and expenses of the arbitrator;

- (d) the *Arbitration Act*, 1991, S.O. 1991, C. 17 shall apply to and govern each such reference to arbitration; and
- (e) All arbitrations shall be conducted in Barrie, Ontario **or in a location suitable to both parties.**

18. GOVERNING LAW

This Agreement is governed by, interpreted and enforced in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable in the province. Subject to Section 17, each of the Parties irrevocably attorns to the exclusive jurisdiction of the Courts of Ontario.

19. WAIVER

No waiver of any provision of this Agreement constitutes a waiver of any other provision.

20. ENTIRE AGREEMENT

Except as stated herein, this Agreement constitutes the entire agreement between the Parties concerning the subject matter hereof and, during the term hereof, supersedes all prior written or verbal agreements concerning such subject matter.

21. AMENDMENTS

Amendments to this agreement shall be in writing and be executed by the Parties. If agreed in writing by both Parties to this agreement an amendment shall form a part of this Agreement.

22. ASSIGNMENT

Neither this Agreement nor any of the rights or obligations under this Agreement are assignable or transferable by a Party without the prior written consent of the other Party, provided that nothing herein shall prevent The Agent from assigning this Agreement or any of its rights or obligations to an affiliate of The Agent, provided that the Agent agrees to remain liable to the Municipality for the obligations of such transferee affiliate.

23. ENUREMENT

This Agreement shall be binding upon and enure to the benefit of the Parties and their respective successors.

24. COUNTERPARTS

This Agreement may be executed and delivered in any number of counterparts (including by facsimile or other electronic transmission) and all counterparts taken together constitute one and the same instrument.

25. LEGAL RELATIONSHIP

In this Agreement nothing gives rise to an employment relationship for the provision of services between the Municipality and Agent. The Parties expressly acknowledge that they are independent and neither an employer-employee relationship is intended or created by this Agreement.

26. COLLECTION AND DISCLOSURE OF PRIVATE INFORMATION

Any information collected by the Agent and Municipality pursuant to this Agreement is subject to, and shall be handled in accordance with, the provisions of the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 as amended and the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, as amended.

27. LAWS

The Municipality and Agent, its employees and representatives, if any shall at all times comply with any and all applicable federal, provincial and municipal laws, ordinances, statutes, rules, regulations and orders in respect of the performance of this Agreement.

28. CONFIDENTIALITY

The Agent shall hold confidential and not disclose or release to any person other than the Agent and Municipality at any time during or following the term of this Agreement, except where required pursuant to the provisions of the Municipal Freedom of information and Protection of Privacy Act and/or the Personal Information Protection & Electronic Documents Act (PIPEDA), any information or document that identifies any individual or the nature and extent of services received by any individual without obtaining written consent of the Municipality prior to the release or disclosure of such confidential information. The Agent shall be entitled to disclose publicly the fact that the Municipality and/or the Fire Department are clients of the Agent.

29. CONFLICT OF INTEREST

The Agent shall disclose to the Municipality without delay any actual or potential situation that may be reasonably interpreted as either a conflict of interest or a potential conflict of interest, or breach of law in relation to this Agreement. A breach of this Section by the Agent shall entitle the Municipality to terminate this Agreement in addition to any other remedies that the municipality may have in law or equity.

[Remainder of this page left intentionally blank]

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first above written.

THE CORPORATION OF THE TOWNSHIP OF SOUTHGATE

By: _____
Name: John Woodbury
Title: Mayor

By: _____
Name: Lindsey Green
Title: Clerk

FIRE MARQUE INC.

By: _____
Name:
Title:

By: _____
Name:
Title: