

QUEENSWAY AVENUE PLAZA – LICENSE FOR ONGOING REPAIR AND MAINTENANCE

THIS AGREEMENT, dated for reference the 1st day of December, 2017, is

BETWEEN:

CITY OF KELOWNA, 1435 Water Street, Kelowna, British Columbia, V1Y 1J4

(the "City")

AND:

1324632 ALBERTA INC. (Inc. No. A72431), Suite 200, 8512 – 112 Street
NW, Edmonton, Alberta, T6G 2C8

(the "Licensee")

WHEREAS:

- A. The City has ownership and possession of the dedicated highway commonly known as Queensway Avenue and park commonly known as Kerry Park, and a portion of such highway and park are shown on the sketch plan attached as Schedule "A" (the "Road and Park Areas"), and the Licensee is the registered owner in fee simple of those adjacent lands located at 289 Queensway Avenue in Kelowna, British Columbia, legally described as Parcel Identifier: 029-450-403, Lot A District Lot 139 Osoyoos Division Yale District Plan EPP43122 (the "Hotel Lands");
- B. The Licensee has entered into a servicing agreement (the "Servicing Agreement") with the City for the construction and installation of a public plaza and related works and facilities (together, the "Plaza Works") on the Hotel Lands and the Road located in front of the Hotel Lands;
- C. The Licensee has granted a covenant in favour of the City (the "Covenant"), pursuant to section 219 of the *Land Title Act*, which Covenant is registered against title to the Hotel Lands under registration number _____, under which the Licensee has agreed to, following construction of the Plaza Works, thereafter repair and maintain those Plaza Works to the satisfaction of the City, all on the terms and conditions contained in the Covenant;
- D. The Licensee requires access to the Road and Park Areas from time to time in order to carry out the installation of the Plaza Works, the ongoing repair and maintenance of the Plaza Works located on the Road and Park Areas, and the operation of valet services for the hotel located on the Hotel Lands;

NOW THEREFORE in consideration of the payment of \$1.00 from the Licensee to the City and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the City, the City and the Licensee covenant and agree as follows:

1. **Grant of License** – The City grants to the Licensee the non-exclusive right and license (the "License") to enter onto and use the Road and Park Areas upon which the Plaza Works are located for the sole purpose of installing, repairing and maintaining the Plaza Works as required by the terms of the Covenant. The License granted herein authorizes the Licensee to enter upon and use only the Road and Park Areas reasonably necessary to install, repair and maintain the Plaza Works and only at such times as are acceptable to the City, acting reasonably. For the purposes outlined in this section 1, the Licensee shall have the right to bring onto the Road and Park Areas all necessary materials, vehicles, machinery, and equipment. The Licensee shall also have the right to use that portion of the Road and Park Areas immediately adjacent to the Hotel Lands, shown outlined in bold on the sketch attached as Schedule "B", for the purpose of operating valet services for the hotel located on the Hotel Lands, provided, however, that such valet services shall not block the drive aisle on the Road and Park Areas.
2. **Term** – The term of this Agreement shall commence on the date it is signed by both parties, and shall terminate on the earlier of:
 - (a) the date on which the hotel building to be constructed on the Hotel Lands concurrently with the Plaza Works is substantially destroyed or removed and not replaced; and
 - (b) the date on which the Covenant is removed from title to the Hotel Lands, without replacement.
3. **Standards of Maintenance and Repair** – The Licensee shall carry out the maintenance and repair of the Plaza Works in a good and workmanlike manner in accordance with the standards set out in the Covenant and to the reasonable satisfaction of the City. The Licensee shall supply all licenses, permits, tools, equipment, labour and materials necessary and required to complete all maintenance and repair work specified in the Covenant, and shall carry out the maintenance and repair of the Plaza Works in accordance with any such licenses and permits. The Licensee shall maintain the Plaza Works in good and safe condition so as to ensure the Plaza Works are safe for use by the public, including children, and such that the Plaza Works do not constitute a hazard to persons otherwise using the Road and Park Areas or the Hotel Lands.
4. **Licensee's Covenants** – The Licensee covenants and agrees with the City as follows:
 - (a) to use the Road and Park Areas only for the purposes outlined in section 1 of this Agreement and for no other purposes whatsoever without the prior written consent of the City in its sole discretion;

- (b) not to alter or modify the Road and Park Areas in any way beyond the scope of the Plaza Works or install any buildings or structures on the Road and Park Areas without obtaining the City's prior written consent and providing to the City all supporting documentation required by the City, including site plans relative to the proposed alteration or modification;
 - (c) to keep the areas adjacent to the Plaza Works free and clear of obstructions and open to public access at all times, exercising the greatest care in the use and occupation of the Road and Park Areas;
 - (d) not to cause, maintain, or permit anything that may be or become a nuisance or annoyance on the Road and Park Areas to the owners or occupiers of adjoining lands or to the public, including by the accumulation of rubbish or unused personal property of any kind;
 - (e) to pay all costs and expenses of any kind whatsoever associated with and payable in respect of the operation, use, repair, and maintenance of the Plaza Works on the Road and Park Areas and should the Licensee fail to pay the costs described above, the City may do so at the cost of the Licensee and charge the Licensee a 10% administration fee for doing so, and the Licensee shall pay the cost forthwith upon receipt of invoice of the same from the City;
 - (f) to make promptly all needed repairs to all Plaza Works, whether for reasonable wear and tear or otherwise, at the cost of the Licensee;
 - (g) not to allow any refuse, debris, garbage, waste, contaminants, pollutants or other loose or objectionable material to accumulate or be deposited on the Road and Park Areas, but rather to dispose of the same regularly and continuously and to take all reasonable measures to ensure that any effluent or other substance discharged, spilled, emitted, released or permitted to escape, seep or leak on or adjacent to the Road and Park Areas or into any ditches, culverts, drains or sewers on or adjacent to the Road and Park Areas does not contain any environmental contaminants or any substances harmful to any sewage disposal works; and
 - (h) to comply with all times with the *Builders Lien Act* (British Columbia) and to indemnify the City for all cost incurred by the City arising out of any claim of builder's lien relating to the Road and Park Areas or the Hotel Lands, which indemnity will survive the termination of this Agreement.
5. **Road and Park Areas Accepted "As Is"** – The Licensee accepts the Road and Park Areas on an "as is" basis and condition and any improvements made to the Road and Park Areas by the Licensee at any time prior to or during the currency of this Agreement shall be at the risk, cost and expense of the Licensee.

6. **Ownership of Plaza Works** – The Licensee acknowledges and agrees that, following construction and installation of the Plaza Works, all Plaza Works located on the Road and Park Areas shall become the property of the City, notwithstanding the Licensee's ongoing obligation to repair and maintain those Plaza Works at its sole expense. The Licensee shall assign to the City all warranties received or obtained in connection with the Plaza Works located on the Road and Park Areas.
7. **Non-Exclusive Use** – The Licensee acknowledges and agrees that any rights granted by the City to the Licensee herein are not exclusive and do not constitute any interest in the Road and Park Areas or the Plaza Works located thereon, and the Licensee's rights hereunder are at all times subject to the rights and interests of the City as owner and possessor of the Road and Park Areas and the Plaza Works located thereon.
8. **Entry and Inspection by City** – The City may at any time review and inspect the Road and Park Areas, the Plaza Works, and any work undertaken by the Licensee pursuant to this Agreement and the Covenant in order to determine if the Licensee is in compliance with the terms of this Agreement and the Covenant.
9. **Indemnity** – The Licensee will indemnify and save harmless the City from and against all liability, actions, damages, proceedings, costs, claims, demands and expenses whatsoever (including solicitor's fees and litigation expenses) which the City may incur or suffer or be put to by reason of or in connection with or arising from any breach, violation or non-performance by the Licensee of any obligation hereunder to be observed or performed by the Licensee, any wrongful act or neglect of the Licensee on or about the Road and Park Areas, any damage to property related to the Licensee's use and occupation of the Road and Park Areas, or the death or injury to any person related to the Licensee's use and occupation of the Road and Park Areas.
10. **Insurance** – From the date of commencement of construction of the Plaza Works and at all times thereafter, the Licensee shall obtain and keep in force comprehensive general liability insurance in the amount of not less than \$5,000,000.00 covering third party claims arising from the construction and/or maintenance of the Plaza Works, naming the City as an additional insured. A copy of the policy of insurance or a certificate of insurance issued by the insurer confirming that the required coverage is in place shall be provided by the Licensee to the City each year. The policy of insurance shall:
 - (a) be underwritten by an insurance company licensed to do business in British Columbia;
 - (b) include that the City is protected notwithstanding any act, neglect or misrepresentation by the Licensee which might otherwise result in the avoidance of a claim and that such policy is not affected or invalidated by any act, omission or negligence of any third party which is not within the knowledge and control of the insureds;

- (c) include a cross liability clause; and
 - (d) include a provision that the insurer will give the City 30 days written notice of any material changes in the insurance coverage or of cancellation or termination of it.
11. **Assignment to Future Owner of Hotel Lands** – If the Licensee transfers the fee simple interest in the Hotel Lands to any other person (the “New Owner”), the Licensee shall continue to indemnify and save harmless the City pursuant to paragraph 10 hereof until such time as the Licensee has delivered to City a copy of an assignment agreement originally signed by the New Owner by which the Licensee has assigned, and the New Owner has assumed, absolutely, the benefit and burden of this Agreement and a copy of any policy of insurance or certificate of insurance required under this Agreement. The assignment agreement shall be in the form attached hereto as Schedule “C”. Provided, however, that if the Hotel Lands are subdivided to create an air space parcel over which a strata plan is to be filed, this Licence will not apply to the owner of the air space parcel, or the strata corporation created by the filing of the strata plan noted above.
 12. **No Effect on Laws or Powers** – Nothing contained or implied herein shall prejudice or affect the rights and powers of the City in the exercise of its functions under any public or private statutes, bylaws, orders and regulations, all of which may be fully and effectively exercised in relation to the Road and Park Areas and the Hotel Lands as if the Agreement has not been executed and delivered by the City.
 13. **Enurement** – This Agreement shall enure to the benefit of and be binding upon the parties hereto, their successors and assigns.
 14. **Independent Parties** – The Licensee and all agents, servants and workers of the Licensee are not and shall not be deemed to be agents, servants or employees of the City.
 15. **No Public Law Duty** – Whenever in this Agreement the City is required or entitled at its discretion to consider granting any consent or approval, or is entitled to exercise any option to determine any matter, or to take any action or remedy, the City may do so in accordance with the contractual provisions of this Agreement and no public law duty of procedural fairness or principle of natural justice shall have any application.
 16. **Further Actions** – Each of the parties hereto shall from time to time hereafter and upon any reasonable request of the other, execute and deliver, make or cause to be made all such further acts, deeds, assurances and things as may be required or necessary to more effectually implement and carry out the true intent and meaning of this Agreement.
 17. **Waiver or Non-action** – Waiver by the City of any breach of any term, covenant or condition of this Agreement by the Licensee must not be deemed to be a waiver of any subsequent default by the Licensee. Failure by the City to take any action in respect of any breach of any term, covenant or condition of this Agreement by the Licensee must not be deemed to be a waiver of such term, covenant or condition.

18. **Severance** – The invalidity of any particular provision of this Agreement shall not affect any other provision hereof and this Agreement shall be construed as if such invalid provision were omitted.
19. **Interpretation** – Wherever the singular or the masculine are used, the same shall be construed as meaning the plural or the feminine or the body politic or corporate where the context or the parties hereto so require.
20. **Time of the Essence** – Time is of the essence of this Agreement.
21. **Laws of British Columbia** – This Agreement must be construed according to the laws of the Province of British Columbia.

IN WITNESS WHEREOF the parties have duly executed this Agreement as of the day and year written below:

CITY OF KELOWNA by its authorized)
 signatories:)
)
 _____)
 Mayor:)
)
 _____)
 Corporate Officer:)
)
 _____)
 Date:)

1324632 ALBERTA INC. by its authorized)
 signatory(ies):)
)
 _____)
 Name:)
)
PHIL MILROY)
 Name:)
)
JULY 30/18)
 Date:)

SCHEDULE "A"

SKETCH SHOWING ROAD AND PARK AREAS

BLOCK F
DL 1527

A
PLAN KAP83363

QUEENSWAY AVENUE

MAINTENANCE AGREEMENT AREA
1,182 m²

QUEENSWAY AVENUE

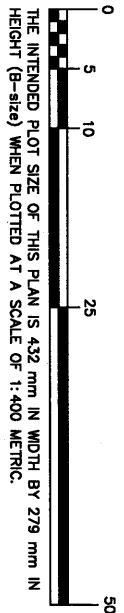
SCHEDULE 'A'
Not to Scale

1
PLAN 2207

1
PLAN EPP77920

LANE

PLAN TO ACCOMPANY MAINTENANCE AGREEMENT
OVER PORTIONS OF QUEENSWAY AVENUE,
WATER STREET, LOT A, DL 139, ODYD, PLAN KAP83363
AND THAT PART OF WATER STREET IN DL 139 ODYD
BEING PART OF ROAD DEDICATED BY PLAN 462
AS SHOWN ON PLAN EPP43859 EXCEPT PLAN EPP77919.

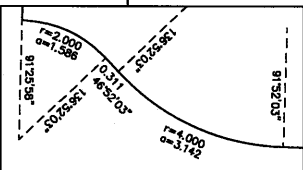


All distances are in metres and decimals thereof.
Grid bearings are derived from Plan EPP77920.



WATER STREET

REMAINDER
THAT PART OF WATER
STREET IN DL 139 ODYD
BEING PART OF ROAD
DEDICATED BY PLAN 462
AS SHOWN ON PLAN EPP43859
EXCEPT PLAN EPP77919

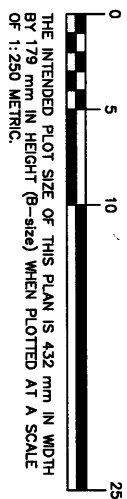


D.A. GODDARD SURVEYS
103-1358 ST. PAUL STREET, KELOWNA,
file 416204-SK2 March 30, 2018.

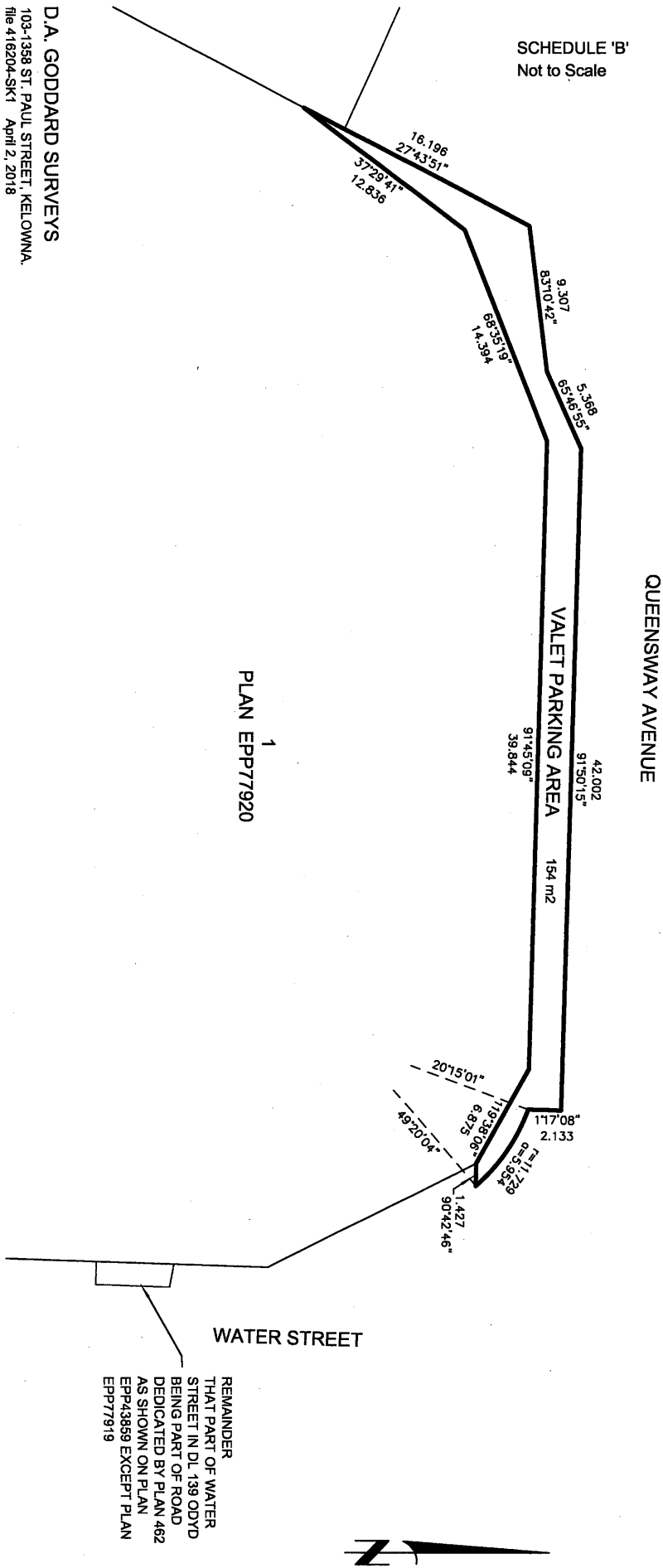
SCHEDULE "B"

SKETCH SHOWING LICENSE AREA FOR VALET SERVICES

PLAN TO ACCOMPANY VALET PARKING AGREEMENT OVER PORTIONS OF QUEENSWAY AVENUE AND WATER STREET.



All distances are in metres and decimals thereof.
Grid bearings are derived from Plan EPP77920.



D.A. GODDARD SURVEYS
103-1358 ST. PAUL STREET, KELOWNA,
file 416204-SK1 April 2, 2018

SCHEDULE "C"**ASSIGNMENT AGREEMENT**

This Agreement made the ____ day of _____, 20__ is

Between:

1324632 ALBERTA INC. (Inc. No. A72431), Suite 200, 8512 – 112
Street NW, Edmonton, Alberta, T6G 2C8

(the "Assignor")

And:

(name of new owner)
of (address)

(the "Assignee")

WHEREAS:

- A. By a License Agreement dated for reference December 1, 2017, a copy of which is annexed hereto as Appendix 1 (the "Agreement") between the City of Kelowna as owner (the "City") and the Assignor as licensee (the "Licensee"), the City granted to the Licensee a nonexclusive license more particularly described in the Agreement for the purposes and upon the term and conditions set out therein;
- B. It was a term of the Agreement that if the Licensee therein should transfer the fee simple in the Hotel Lands to any other person or stratify the Hotel Lands, the obligations of the Licensee to indemnify and save harmless the City would continue until this form of Assignment Agreement, originally signed by the new owner, was delivered to the City;
- C. The Assignor herein as the registered owner of the Hotel Lands has deposited a strata subdivision plan of the Hotel Lands creating the Assignee [*OR: has transferred or intends to transfer the fee simple interest in the Hotel Lands to the Assignee*] and now wishes, as contemplated, by the Agreement, to transfer and assign the benefit and burden of the Agreement to the Assignee to which the Assignee has agreed.

Now therefore, in consideration of the said fee simple transfer of the Hotel Lands and the covenants herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each of the parties hereto, the parties agree as follows:

- 1. The Effective Date means _____ [*date of transfer of Hotel Lands*].

2. As of the Effective Date, the Assignor assigns to the Assignee all of the Assignor's right, title and interest in and to the Agreement.
3. The Assignor represents and warrants to the Assignee that:
 - (a) the covenants and agreements set out in the Agreement have been and will to the Effective Date be duly observed and performed by the Assignor;
 - (b) the Assignor has the authority to assign the benefit and burden of the Agreement subject to no restriction of any kind;
 - (c) subject to the observance and performance of the other covenants and agreements by the Assignee, the Assignee may exercise the full benefit of the Agreement and the right, license and liberty granted under it without interruption except as provided in the Agreement.
4. During the currency of the Agreement, the Assignee will:
 - (a) not assign the benefit and burden of the Agreement except in accordance with the Agreement;
 - (b) perform all of the covenants and agreements under the Agreement as if the Assignee was the Licensee originally named in the Agreement; and
 - (c) indemnify and save harmless the Assignor from all actions, suits, costs, losses, damages, charges and expenses for or in respect of any breach by the Assignee of the Agreement covenants and agreements arising on or after the Effective Date.
5. Neither the assignment herein, nor the payment of any money or the performance by the Assignee of any of the Agreement covenants and agreements will waive or modify in any respect any of the rights of the City or relieve the Assignor from observing and performing the Agreement covenants and agreements until such time as an originally signed copy of this Assignment Agreement has been delivered to the City PROVIDED that upon delivery of the said copy of this Assignment Agreement as aforesaid all obligations of the Assignor in respect of the Agreement covenants and agreements which have not accrued before the date of such delivery will be at an end, and thereafter only the Assignee will be responsible for performance of the Agreement covenants and agreements then accruing or arising.
6. This Assignment Agreement will enure to the benefit of and be binding upon the parties to this Assignment Agreement and their respective personal representatives, successors and permitted assigns.

IN WITNESS WHEREOF the parties have duly executed this Agreement this ____ day of _____, 20__.

1324632 ALBERTA INC. by its authorized)
signatory(ies):)

Name:)

Name:)

Date:)

[Assignee] by its authorized signatory(ies):)

Name:)

Name:)

Date:)

APPENDIX 1

[attach signed copy of License Agreement]