

LICENCE OF OCCUPATION

THIS AGREEMENT dated for reference the **1st** day of **January, 2017**.

BETWEEN:

CITY OF KELOWNA, a municipal corporation having its office at 1435 Water Street, Kelowna, BC., V1Y 1J4

(the "City")

OF THE FIRST PART

AND:

VIEWCREST ESTATES LTD.

107-1180 Sunset Drive, Kelowna, BC., V1Y9W6

(the "Licencee")

OF THE SECOND PART

WHEREAS:

- A. The City is the owner of the dedicated roadway located between 223 Bernard Avenue and 227 Bernard Avenue in the City of Kelowna, as shown in blue on the attached Schedule 'A' (the "Property");
- B. The Licencee, operating as Viewcrest Estates Ltd., is the legally registered owner of 223 Bernard Avenue and 227 Bernard Avenue, both of which lie immediately adjacent to the Property, to the west and east respectively;
- C. The Licencee wishes to license a portion of the Property (the "License Area") to operate a food concession (the "Concession"), subject to the restrictions and limitations of this agreement; and,
- D. The City is prepared to grant the Licencee a Licence of Occupation pursuant to Section 35(11) of the *Community Charter*, S.B.C. 2003, c.26 for a term of 7 years over the Licence Area to enable the Licencee to operate the Concession.

NOW THEREFORE in consideration of the payment of one dollar (\$1.00) and other good and valuable consideration, from the Licencee to the City, the receipt and sufficiency is hereby acknowledged, the City and the Licencee covenant and agree as follows:

1. **Grant** – The City grants to the Licencee the non-exclusive right and licence to enter onto and use that portion of the Property having an approximate area of 72 square meters and shown hatched in blue as the Licence Area on Schedule “B” which is attached hereto for the purposes of operating the Concession.
2. **New Construction** – To facilitate the operation of the Concession and improve the public appeal of the Property, the Licencee agrees to make improvements to the Property as shown on Schedule “C” (the “Laneway Improvements”). All costs associated with the Laneway Improvements, as itemized on Schedule “D” (the “Laneway improvements Construction Costs”), will be borne by the Licencee. The Licencee will be required to obtain all required permits with regards to the improvements.
3. **Interim Access** - For the purposes outlined in Section 2, the Licencee, via it’s agents, sub-contractors, and employees, shall have the right to bring onto the Property all necessary materials, vehicles, machinery and equipment, effective as of the date of execution of this agreement.
4. **Term** – The duration of this Agreement and Licence herein granted shall be for a term of 7 years commencing May 1st 2017 and terminating on April 1st 2024, unless earlier terminated in accordance with Section 21.
5. **License Fee** – The Licencee agrees to make annual payments with respect to the License Area as shown in the Fee Schedule attached as Schedule “E”. Annual license fee payments are due at the end of each year of the term. It is the expectation that the Licensee will have an outstanding credit balance of \$70,000 to reflect the Laneway Improvements Construction Costs incurred by the Licensee at the time the first annual payment of \$10,000 is due; as such, payment of the annual license fee’s will be via a reduction in the Licensee’s outstanding credit balance, as shown on Schedule “E”.
6. **Extension** – The term of this Licence of Occupation may be renewed for a 3-year period (the “Renewal Period”) upon written agreement by the City and the Licencee. Compensation to the City by the Licencee for the Renewal Period will be subject to negotiations between the parties at that time.
7. **State of Licence Area at Termination** – In the event that this Agreement terminates or expires for any reason, the Licencee will cease all occupation of the Licence Area and will remove all equipment, chattels, fixtures, buildings and other improvements from the Licence Area. The Licencee will leave the Licence Area in a safe, clean and tidy condition and clear of contamination occurring since the date of commencement of this Agreement. In the event that the Licencee fails to remove any equipment or chattels upon termination of this Agreement then the City may do so and recover the expense thereof from the Licencee. All buildings, improvements and fixtures remaining on the Licence Area become the sole property of the City upon termination of this Agreement, without any compensation whatsoever to the Licencee.
8. **Non-exclusive Use** – The Licencee agrees that:

- (a) the rights granted under this Agreement do not constitute any interest in the Licence Area or entitle the Licencee to exclusive possession of the Licence Area;
 - (b) the Licencee's rights under this Agreement are at all times subject to the rights and interest of the City as owner and possessor of the Licence Area.
 - 9. **No Waste or Nuisance** – The Licencee will not do or permit anything that may become a nuisance to occupiers or invitees on adjoining lands.
 - 10. **Terms and Conditions** – The Licencee will comply with all the terms, conditions, rules or regulations that the City may from time to time impose in respect of the use and administration of the Licence Area. The Licencee acknowledges that the fact that the Licence is granted by the City does not excuse the Licencee from obtaining building permits, development permits, business licences and other required permissions.
 - 11. **Maintenance** – The Licencee will at its own expense keep the Licence Area and the Property in a safe, clean and tidy condition, subject to the maintenance and repair responsibilities agreed to by the parties and attached to this agreement as Schedule 'F'.
 - 12. **Compliance with Laws** – The Licencee will comply with all laws and regulations pertaining to its use and occupation of the Licence Area and the construction of the Improvements.
 - 13. **Inspection by the City** – The City may review and inspect the Licence Area, the Improvements and the Concession which the Licencee is undertaking pursuant to this Agreement to determine if the Licencee is in compliance with the terms of this Agreement.
 - 14. **Transfer of Rights** – The City and the Licencee agree that the Licencee will solicit third-party assistance to:
 - a. construct the Improvements on the Property (the "Construction Contractor"); and,
 - b. operate the Concession on the License Area (the "Concession Contractor").
- While selection and oversight of the Construction Contractor and the Concession Contractor is the responsibility of the Licencee, final approval of the Licencee's chosen Construction Contractor and Concession Contractor is at the sole discretion of the City. The City agrees not to unreasonably withhold approval of the Licencee's preferred choice of Construction Contractor and Concession Contractor provided the respective requirements in Schedule 'G' are met.
- 15. **Risk – License Area & Concession** – The Licencee accepts the Licence Area on an as-is basis and agrees that it will use the Licence Area at its own risk, and the City will not be liable in respect of any loss of life, personal injury, damage to property, loss of property or other loss or damage suffered by the Licencee, its contractors, subcontractors, agents, invitees, employees or any other person arising out of this Agreement or the use and occupation of the Licence Area except in the case of negligence or wilful act or omission by the City, its employees, agents or invitees.
 - 16. **Risk – Property & Improvements** - The Licencee accepts the Property on an as-is basis and agrees that it will construct the Laneway Improvements at its own risk, and the City

will not be liable in respect of any loss of life, personal injury, damage to property, loss of property or other loss or damage suffered by the Licencee, its contractors, subcontractors, agents, invitees, employees or any other person arising out of this Agreement or the construction of the Improvements, except in the case of negligence or wilful act or omission by the City, its employees, agents or invitees.

17. **Frustration** - if the License Area is substantially damaged or destroyed by any cause, including work completed by the City, its employees, agents or contractors, with respect to the underground utilities within the License Area and the Property, to the extent such that in the reasonable opinion of the City the License Area cannot be repaired or rebuilt (based on standard hours of construction work) within 30 days after the occurrence of the damage or destruction, then either the City or Licencee may at its option, indicate by written notice to the other party that it wishes to terminate this License of Occupation.
18. **Indemnity** – The Licencee will indemnify and save harmless the City and its elected and appointed officials, officers, employees, agents and others from and against any claim, action, damage, liability, cost and expense in connection with loss of life, personal injury, loss of property, damage to property or other loss or damage arising from this Licence or any occurrence on or around the Licence Area during the term of this Licence, or by use or occupancy of the Licence Area by the Licencee or any default of the Licencee under this Agreement or any wrongful act, omission or negligence of the Licencee or its officers, employees, contractors, agents or others for whom the Licencee is responsible. This indemnity will survive the expiry or sooner termination of this Agreement.
19. **Release** – The Licencee hereby releases and forever discharges the City, its elected officials, officers, employees, agents and invitees, of and from any claim, causes of action, suit, demand, expense, cost, legal fees and compensation of whatever kind, whether known or unknown, at law or in equity, including without limitation any claim under the *Property Law Act* (collectively “Claims”), which the Licencee may have, sustain or suffer, as the case may be, now or in the future arising from the Works, other improvements in the Licence Area, the expiry or termination of this Licence, the exercise by the City of any of its rights under this Licence or from or in any way connected with the Licencee’s use of the Licence Area, except claims arising from the exclusive negligence of the City.
20. **Insurance** – During the term of this Agreement, the Licencee will carry public liability insurance, in a form and with an insurer acceptable to the City, insuring the Licencee and the City under this Agreement in an amount not less than \$5,000,000.00 per occurrence, and any other type of insurance that the City may reasonably require. The Licencee will provide the City with proof of insurance at the time of execution of this Agreement and at other times upon request.
21. **Termination** – The City reserves the right to terminate this Agreement if the Licencee breaches any of its obligations under this Agreement and fails to remedy the breach within thirty (30) business days of receiving written notice from the City. Furthermore, this Agreement may be terminated subject to Section 17.

Should the Licencee breach its obligations leading to a termination of the Licence, or should the Licencee choose to terminate the License outside of Section 17, then the City will not be liable to compensate the Licencee for damages, costs, or losses resulting from said termination, including any unrecovered Capital Costs incurred by the Licencee.

Should the Licence be terminated under mutually agreeable terms by the Licencee and the City, any unrecovered Capital Costs incurred by the Licencee (as defined in Schedule "D") will be repaid to the Licencee in a manner agreed to between the City and the Licencee at that time.

The City additionally reserves the right to terminate this Agreement in the event that no significant amount of work has been completed with respect to the Laneway Improvements within 6 months of the commencement of the term (the "Work Expectation Date"), or within 30 day extensions of the Work Expectation Date, such extensions to be issued at the City's discretion. In the event that the agreement is terminated under this condition, the City will not be liable to compensate the Licencee for damages, costs, or losses resulting from said termination, including any unrecovered Capital Costs incurred by the Licencee.

22. **Notices** – Any notice given pursuant to this Agreement will be sufficiently given if it is in writing and delivered by hand or mailed by prepaid registered mail or sent by facsimile transmission to the intended party at its address set out on page 1 of this Agreement or to such other address as either party may provide in writing to the other pursuant to the provisions of this paragraph.

All notices to the City must be marked to the attention of the City Clerk.

A notice will be deemed to be received on the day it is delivered, if delivered by hand, on the day of transmission, if sent by facsimile, or 3 days after the date it was mailed or if that day is not a business day, the next day that is a business day. If mailed, should there be at the time of mailing or between the time of mailing and the deemed receipt of the notice, a mail strike or slowdown, labour or other dispute which might affect the delivery of such notice by the mails, then such notice will only be effective if delivered by hand or sent by facsimile transmission.

23. **No Effect on Laws or Powers** – Nothing contained or implied herein prejudices or affects the City's rights and powers in the exercise of its functions pursuant to the *Local Government Act* or its rights and powers under any enactment to the extent the same are applicable to the Licence Area, all of which may be fully and effectively exercised in relation to the Licence Area as if this Agreement had not been fully executed and delivered.
24. **Severance** – If any portion of this Agreement is held invalid by a Court of competent jurisdiction, the invalid portion shall be severed and the decision that it is invalid must not affect the validity of the remainder of the Agreement.
25. **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.
26. **Waiver or Non-action** – Waiver by the City of any breach of any term, covenant or condition of this Agreement by the Licencee must not be deemed to be a waiver of any subsequent default by the Licencee. Failure by the City to take any action in respect of any breach of any term, covenant or condition of this Agreement by the Licencee must not be deemed to be a waiver of such term, covenant or condition.

27. **Reference** – Every reference to a party is deemed to include the heirs, executors, administrators, successors, servants, employees, agents, contractors and officers of such party wherever the context so requires or allows.

28. **General** –

- (a) This Agreement will bind and benefit each party to this Agreement, and its respective corporate successors;
- (b) This Agreement constitutes the entire agreement between the parties and may not be amended except by agreement in writing signed by all parties to this Agreement;
- (c) Time is of the essence of this Agreement;
- (d) This Agreement must be construed according to the laws of the Province of British Columbia.
- (e) This License of Occupation is subject to approval of City of Kelowna Council.

29. **Schedules** – the attached schedules, as summarized below, form part of this Agreement:

- a. Schedule A – the Property
- b. Schedule B – the License Area
- c. Schedule C – Laneway Improvements
- d. Schedule D – Laneway Improvements Construction Costs
- e. Schedule E – Fee Schedule
- f. Schedule F – Maintenance & Repair Schedule
- g. Schedule G – Third-Party Contractor Schedule

As evidence of their agreement to be bound by the above terms and conditions, the parties have executed this Agreement below on the dates written below.

SIGNED, SEALED & DELIVERED by the)
CITY OF KELOWNA, in the presence of:)
)
)
 _____)
 Signature of Witness)
)
 _____)
 Print Name)
)
 _____)
 Address)
)

CITY OF KELOWNA by its authorized)
 signatories:)
 _____)
 _____)

_____)
Occupation)
*As to both signatures)

SIGNED, SEALED & DELIVERED by the)
@, in the presence of:)

@ by its authorized
signatories:

_____)
Signature of Witness)

_____)
Print Name)

Print Name:

_____)
Address)

_____)
Occupation)
*As to both signatures)

Print Name:

Schedule "A"

[PROPERTY]



Schedule "B"

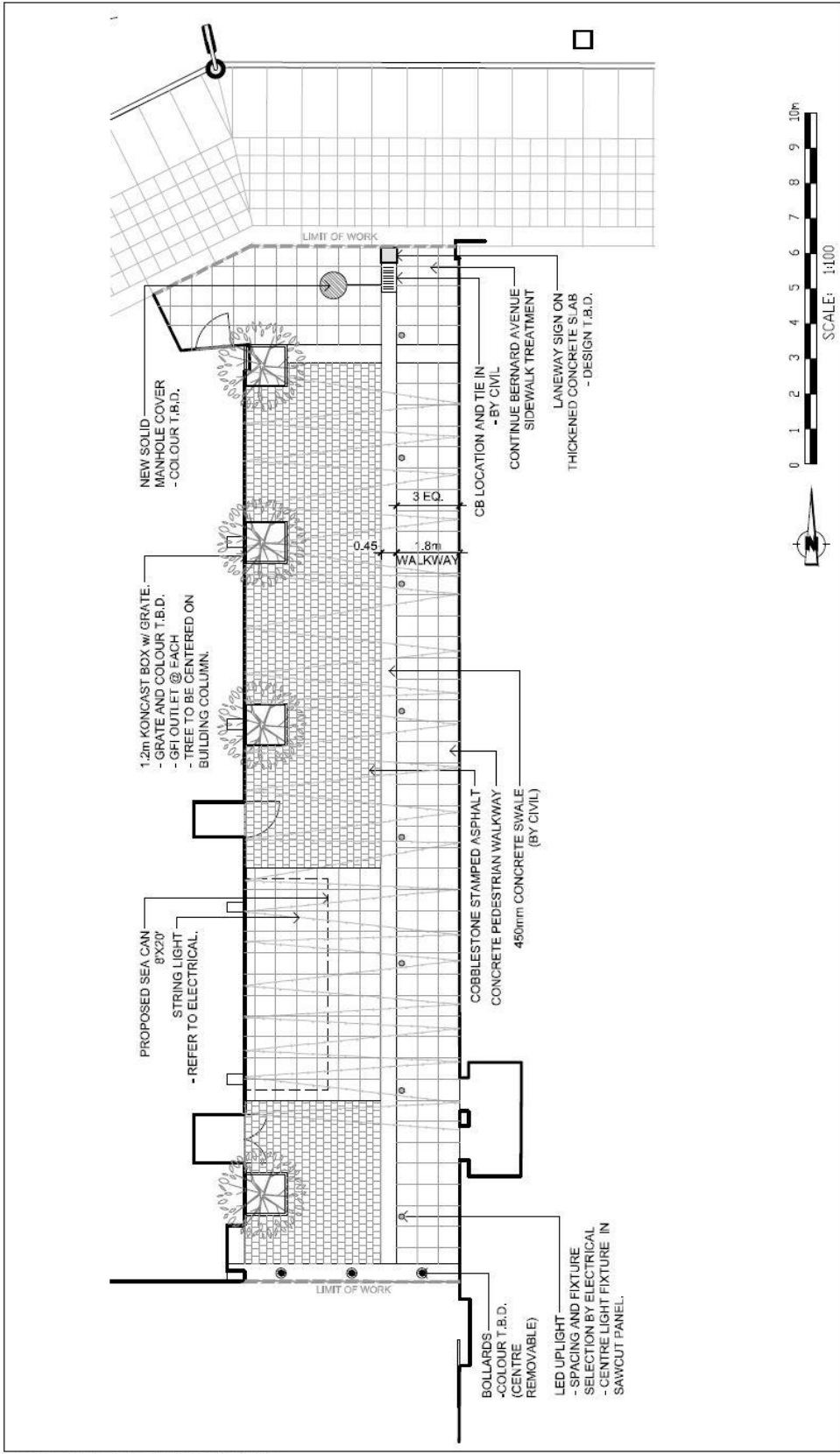
[LICENSE AREA]



License area is set at 18x4m (equaling 72m² in area).
South west corner of the licence area begins at the south east corner of the adjacent legal address at 223 Bernard Avenue.

Schedule "C"

LANEWAY IMPROVEMENTS



LANEWAY CONCEPT
LANDSCAPE PLAN

MMM GROUP
Landscape Architecture & Planning

PROJECT: 000000-000
DATE: 07/11/2016
SCALE: 1:100

SHEET NO: **L-1**

Schedule "D"

[LANEWAY IMPROVEMENTS PRELIMINARY CONSTRUCTION COSTS]

Laneway Concept

Preliminary Estimate

Based on Landscape Concept November 2016

Date: 2016-11-16

Item	Description	Units	Quantity	Unit Price	Amount
1	Construction Requirements				
1.1	Concrete	ls.	1	13,480.00	\$13,480.00
1.2	Sawcut	ls.	1	1,262.00	\$1,262.00
1.3	Bollards	ls.	1	3,000.00	\$3,000.00
1.4	Kon Kast – Tree Boxes	ls.	1	2,600.00	\$2,600.00
1.5	Manhold Cover	ls.	1	2,520.00	\$2,520.00
1.6	Trees / Soil	ls.	1	180.00	\$180.00
1.7	Asphalt	ls.	1	3,420.00	\$3,420.00
1.8	Asphalt Stamping (TBD)	ls.	1	TBD	TBD
1.1	Forklift / Truck	ls.	1	2,000.00	\$2,000.00
1.11	Labour	ls.	1	6,000.00	\$6,000.00
1.12	Electrical	ls.	1	22,500.00	\$22,500.00
1.13	Saddle for roof / light Connection	ls.	1	3,000.00	\$3,000.00
1.14	Powder Coating	ls.	1	1,250.00	\$1,250.00
1.15	Signage	ls.	1	2,500.00	\$2,500.00
1.16	Cath Basin	ls.	1	3,000.00	\$3,000.00
	Constuction Requirements Total:				\$66,712.00
	Project Sub Total				\$66,712.00
	GST				\$3,335.60
	Project Total				\$70,047.60

Schedule "E"

[FEE SCHEDULE]

	Annual Fee	Outstanding Balance	Unrecovered Capital Costs in the event of mutual agreed to termination
Opening Balance		\$70,000	n/a
Year 1	\$10,000	\$60,000	\$60,000
Year 2	\$10,000	\$50,000	\$50,000
Year 3	\$10,000	\$40,000	\$40,000
Year 4	\$10,000	\$30,000	\$30,000
Year 5	\$10,000	\$20,000	\$20,000
Year 6	\$10,000	\$10,000	\$10,000
Year 7	\$10,000	\$0	\$0

Schedule "F"

[MAINTENANCE & REPAIR SCHEDULE]

Item	License Area		Balance of Property	
	City	Licencee	City	Licencee
General sweeping/garbage removal	No	Yes	Yes	No
Emptying and maintenance of waste bin	No	Yes	Yes	No
Maintenance of public seating area	NA	NA	Yes	No
Maintenance of concession seating area	No	Yes	NA	NA
Maintenance of street surface	No	Yes	Yes	No
Irrigation of Trees	No	Yes	No	Yes
Landscaping maintenance & repair	Yes	No	Yes	No
Lighting (repair of light bulbs, etc.)	Yes	No	Yes	No
Graffiti / Vandalism	No	Yes	Yes	No
Snow removal	No	Yes	Yes	No

Schedule "G"

[THIRD-PARTY CONTRACTOR SCHEDULE]

Minimum Requirements Associated with Construction Contractor

- 2 million dollars in liability insurance
- Obtain road usage permit and meet requirements that fall under the permit

Preferred Requirements Associated with Concession Contractor *

- Established food & beverage provider (5+ years' experience)
- Existing downtown Kelowna brick & mortars location
- Provide Healthy Food Choices
- * City approval is required for the selection of the Concession Contractor

Scope of Services and Licence Expectations:

- Design of the Seacan is to be approved by the City of Kelowna
- All associated utility / servicing updates associated with the Licence Area are the responsibility of the Licencee
- Should the City require access to the Laneway for any construction requirements than it is the Licencee's responsibility to move the Seacan