

Memo



Date: April 7, 2010
File: 1140-50
To: City Manager
From: Ron Forbes, Manager, Property Management
Subject: Gerstmar Park Lease Agreement

Recommendation:

THAT City Council approve a three (3) year Lease Agreement based on the attached criteria with Central Okanagan Regional District for the lease of a portion of the Mission Creek Greenway located at the south end of Gertsmar Road for the purposes of a neighbourhood park;

AND FURTHER THAT the Mayor and City Clerk be authorized to execute the lease.

Propose:

To lease property from the Central Okanagan Regional District for the construction of a park.

Background:

The first phase of Gerstmar Park (located at 955 Gerstmar Road, on land owned by the Regional District and leased by the City) is undergoing detail design and will be constructed this summer along with six other neighbourhood parks.

The six parks are being developed at a cost of \$3.3 million with funding from the Infrastructure Stimulus Fund (2/3) and City of Kelowna (1/3).

The Gerstmar Park project is scheduled to be tendered in late April and will be tendered following City policies for purchasing. The budget and estimated cost of the project is \$960,000.

Internal Circulation:

Parks Planning Manager
Parks and Public Open Spaces Construction Manager
Risk Manager

Financial/Budgetary Considerations:

Base Terms of Lease Agreement for Gertsmar Park are:

Term: Five (5) years commencing December 1, 2009

Renewal: First right of refusal on a new lease with the same terms and conditions.

A handwritten signature in the bottom right corner of the page.

Rate: \$1.00 / year
Tenant Improvements: By City
Maintenance: By City

Considerations that were not applicable to this report:

Legal/Statutory Authority:

Legal/Statutory Procedural Requirements:

Existing Policy:

Personnel Implications:

External Agency/Public Comments:

Community & Media Relations Considerations:

Alternate Recommendation:

In light of the above, the Property Management branch of the Real Estate & Building Services department requests Council's support of this matter.

Submitted by:

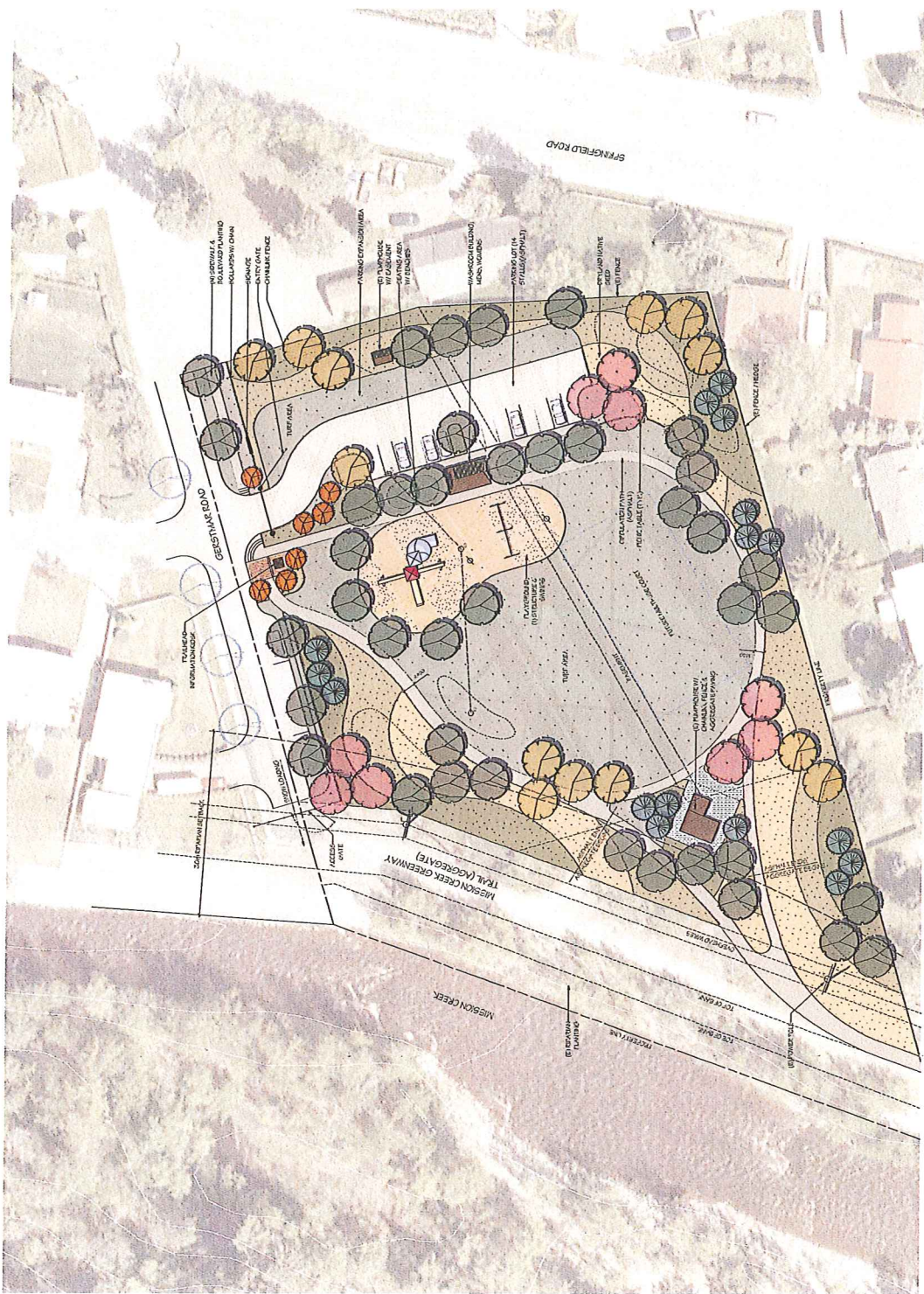


Ron Forbes, Manager
Property Management

Approved for inclusion:



Doug Gilchrist, Director, Real Estate & Building Services



Drawing not to scale



GERSTMAR PARK

Preferred Concept Design Option



THIS AGREEMENT made the _____ date

BETWEEN:

REGIONAL DISTRICT OF CENTRAL OKANAGAN
1450 KLO Road
Kelowna, B.C. V1W 3Z4

(hereinafter called the "Regional District")

OF THE FIRST PART

AND

CITY OF KELOWNA
1435 Water Street
Kelowna, B.C. V1Y 1J4

(hereinafter called the "City")

OF THE SECOND PART

WHEREAS the Regional District is the registered owner of certain lands situated in the City of Kelowna, Province of British Columbia and legally described as:

Parcel Identifier

Lot B, Plan 16702, Sect 22, Twp 26, LD 41, Except Plan 23179 and KAP80881

ODYD

(hereinafter called "the lands")

AND WHEREAS the City has agreed to lease a portion of the Lands for a park and playground.

NOW THEREFORE the parties hereto agree as follows:

- 1.01 **The Premises.** The premises hereby leased comprise that portion of the Lands show outlined in black on the plan attached as Schedule A and forming part of this agreement ("the Premises")
- 2.01 **Terms of the Lease.** The Regional District shall lease the Premises to the City for a term of five (5) years commencing the 1st day of December, 2009 and terminating the 30th day of November 2014. Should the Regional District wish to lease the premises for a term to follow the expiry of the term of this lease, then the City shall have the first right of refusal on a new lease, with the same terms and conditions as outlined herein save and except for the date of commencement and termination, which shall be exercised in writing prior to the expiry of the term; provided however, that the right of first refusal granted herein shall be exercisable by the City only in the event that the City is not in breach of the terms of the agreement.
- 3.01 **Rent.** Yielding and paying to the Regional District rental for the Premises, the sum of one dollar (\$1.00) the receipt of which is hereby acknowledged.
- 4.00 **City Covenants.** The City covenants with the Regional District;

- 4.01 **Maintenance.** To maintain the Premises throughout the term of the lease and any renewals thereof in a neat and tidy condition including mowing and fertilizing all grassed areas and maintaining all improvements. The Premises shall be maintained to a standard agreed upon annually between the City and the Regional District.
- 4.02 **Taxes.** That it will pay promptly as the same become due all rates, taxes, property taxes and assessments of whatever description that may at any time during the existence of this agreement be lawfully imposed or become due and payable in connection with the Premises, which share the City shall determine pro rate in the proportion that the area of the Premises bears to the total area of the Lands.
- 4.03 **Utilities.** That it will pay promptly as the same become due all utilities of whatever description that may be at any time during the existence of this agreement be lawfully imposed or become due and payable in connection with the Premises, which share the City shall be determine pro rata in the proportion that the area of the Premises bears to the total area of the Lands.
- 4.04 **Nuisance and Negligence.** Not to do, suffer or permit any act which may in any manner, directly or indirectly, cause injury or damage to the Premises or to any fixtures or appurtenances thereof, including by not limited to any sidewalk, curb, gutter, road surface and/or landscaped boulevard bordering the Premises, or which may be or become a nuisance or interfere with any one who occupies or has access to any part of the Premises, or which may render the Premises or any part thereof less desirable or injure the reputation thereof.
- 4.05 **Assignment.** Not to assign or sub-let, in whole or in part, the Premises without the prior written consent if the Regional District, which consent may be arbitrarily withheld.
- 4.06 **Abide by Laws.** To abide by and comply with at its own expense all laws, rules and regulations of every authority which in any manner relates to, or affects, the business or profession of the City or the use of the Premises by the city and to save harmless the regional District from all costs, charges or damages to which the Regional District may be put or suffer by reason of any breach by the City and any such law, rule or regulation.
- 4.07 **Insurance.** The City shall, without limiting its obligations under this Agreement, procure and maintain, at its own expense and cost, the insurance policies listed in Schedule "B" attached to this agreement. The insurance policies shall be maintained continuously for the term of the lease or such further period as may be specified in Schedule "B".
- 4.08 **Not to Void Insurance.** Not to do or permit anything to be done which would render any other policy of insurance on the Premises or any part thereof void or voidable or which would cause an increase in the insurance premiums. In the event that the City does anything that would cause an increase in the insurance premiums on the Premises, the City shall pay to the Regional District that amount which represents the increase in the insurance premium by virtue of the City's use or occupation of the Premises.
- 4.09 **Cleanliness.** Not to permit the Premises to become untidy, unsightly or hazardous or to permit unreasonable quantities of waste or refuse to accumulate on the Premises.

4.10 **Use of Premises**

- a. Not to use the Premises for any purpose other than a playground and to operate the playground.
- b. To pay for all works and improvements including any sewer or other works necessary for the use of the Premises including any works or improvements effected to areas immediately adjacent to the Premises.
- c. Identify and locate all registered encumbrances and abide by the terms and conditions therein contained in the operation and construction of the Premises.

4.11 **Conduct of Business.** Recognizing that it is in the best interest of the Regional District and the City that the City should have exclusive use of the Premises only for the purpose described in section 4.10 above, the City agrees with the Regional District not to establish or erect any structure on the Premises without prior written approval from the Regional District.

4.12 **No other Agreement.** No verbal agreement or conversations with any officer, agent or employee of the Regional District, either before or after the execution of this agreement shall affect or modify any of the terms or obligations herein contained.

5.00 **Regional District Covenants.** The Regional District covenants with the City:

5.01 **Quiet Enjoyment.** For the quiet enjoyment.

6.00 **Provisos.** Provided always and it is hereby agreed as follows:

6.01 **Re-entry on Default.** If and whenever the rent is not paid in full when due or in the case of breach of or non-observance or non-performance by the City or any of the provisions of this agreement, and if the default continues for ten days after written notice thereof to the City, or if the Premises are vacated or remain unoccupied for ten days or if the term shall be taken in execution or attachment for any cause whatever, then, in every such case, the Regional District, in addition or in any other remedy now or hereafter provided by law, may at its opinion, cancel this agreement and re-enter and take possession of the Premise or any part thereof by force if necessary, without any previous notice of intention to re-enter in making such removal as the Regional District may deem advisable and such re-entry shall not operate as a waiver or satisfaction in whole or in part of any right, claim or demand arising out of or connected with any breach or violation by the City of any covenant or agreement on its part to be performed.

6.02 **Regional District not Liable for Injury to City.** The Regional District shall not be liable for any injury or damage to the City, its agents, employees, customer or invitees as to any of their property while on the Premises, regardless of the cause of such injury or damage, except such injury or damage which may be caused by the negligence of the Regional District, its officers or employees.

6.03 **Hold Harmless and indemnification.** The City shall be liable for all loss, costs, damages, and expenses whatsoever incurred or suffered by the Regional District, its elected officials, officers, employees and agents (the Indemnitees) including but not limited to damage to or loss of property and loss of use thereof, and injury to or death of a person or persons resulting from or

in connection with the performance, purported performance, non-performance of this Agreement, excepting only where such loss, costs, damages and expenses are as a result of the sole negligence of the Indemnities. The City shall defend, indemnify and hold harmless the Indemnities from and against all claims, demands, actions, proceedings, and liabilities whatsoever and all costs and expenses incurred in connection therewith and resulting from the performance, purported performance, or non-performance of this Agreement, excepting only where such claim, demand, action. Proceeding or liability is based on the sole negligence of the Indemnities.

- 6.04 **No Representation.** The City agrees that it has leased the Premises after examining the same and that no representations, warranties or conditions have been made other than those expressed herein, and that no agreement collateral hereto shall be binding upon the Regional District unless it be made in writing and signed on behalf of the Regional District.
- 6.05 **No Waiver.** The failure of the Regional District to insist upon strict performance of any covenant or condition in this agreement or to exercise any right or option hereunder shall not be construed or operate as a waiver or relinquishment for the future of any such covenant, condition or option and no waiver shall be inferred from or implied by anything done or omitted by the Regional District save only express waiver in writing. The acceptance of any rent or the performance of any obligation hereunder by a person other than the City shall not be construed as an admission by the Regional District of any right, title or interest of such person as a sub-tenant, assignee, transferee or otherwise in the place and stead of the City.
- 6.06 **Overholding.** If the City shall continue to occupy the Premises after the expiration of the term hereby granted and the Regional District shall accept rent, the new tenancy thereby created shall be deemed to be a monthly tenancy and shall be subject to the covenants and conditions contained in this agreement insofar as the same are applicable to the tenancy from month to month save and except that the rental payable shall be as determined by the Regional District.
- 6.07 **Improvements.** At the expiry or termination of this agreement, it is understood and agreed by the Regional District and the City that all improvements fixed to the Premises shall be vested in the Regional District.
- 6.08 **Enurement.** This agreement and everything herein contained shall enure to the benefit of and be binding upon the parties and their heirs, executors, administrator, successor and permitted assigns. Wherever the singular or masculine is used the same shall be construed as meaning the plural or feminine or body corporate or politic as the context may require.

IN WITNESS WHEREOF this agreement has been executed by the parties hereto on the day and year first above written.

REGIONAL DISTRICT OF CENTRAL OKANAGAN

by its authorized signatories:



Authorized Signatory

**ROBERT HOBSON
CHAIR**

Print name



Authorized Signatory

**HAROLD REAY
CHIEF ADMINISTRATIVE OFFICER
REGIONAL DISTRICT OF CENTRAL OKANAGAN**

Print Name

CITY OF KELOWNA

By its authorized signatories;

Authorized Signatory

Print Name

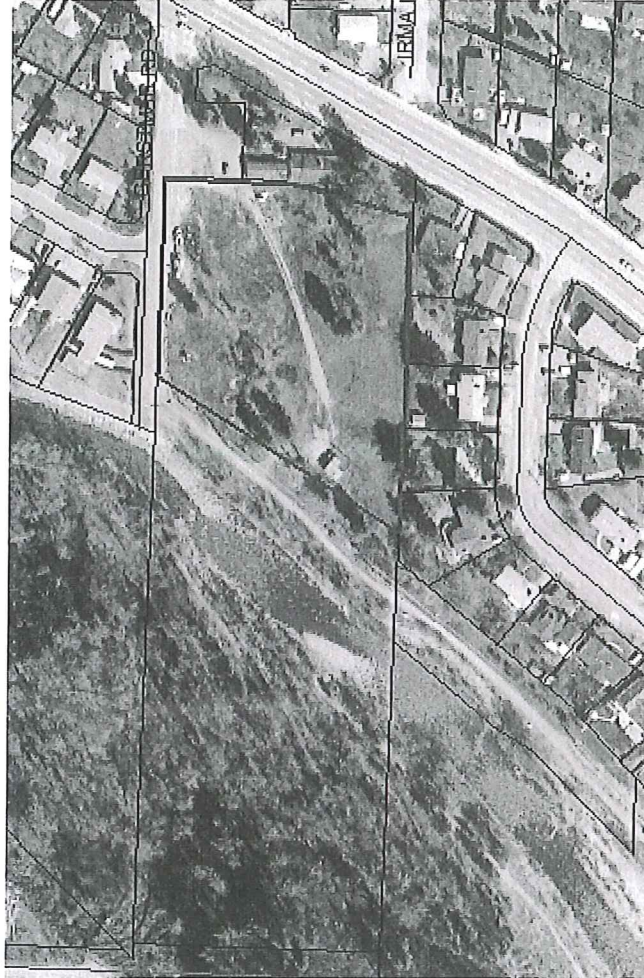
Authorized Signatory

Print Name

SCHEDULE "A"

PREMISES

The Premises is the portion of the land located on part of Parcel Identifier Lot B, Plan 16702, Sect 22, Twp 26, LD 41, Except Plan 23179 and KAP80881 ODYD



Schedule "B" – Insurance Requirements

1. City To Provide

The City shall procure and maintain, at its own expense and cost, the insurance policies listed in section 2 of this Schedule, with limits no less than those shown in the respective items, unless in connection with the performance of some particular part of this Agreement, the Regional District advises in writing that it has determined that the exposure to liability justifies less limits. The insurance policy or policies shall be maintained continuously from commencement of the Term of the Agreement until the termination of this agreement or such longer period as may be specified by the Regional District.

2. Insurance

As a minimum, the City shall, without limiting its obligations or liabilities under any other contract with the Regional District, procure and maintain, at its own expense and cost, the following insurance policies:

2.1 Comprehensive General Liability Insurance

- (i) providing for an inclusive limit of not less than \$2,000,000 for each occurrence or accident;
- (ii) providing for all sums which the City shall become legally obligated to pay for damages because of bodily injury (including death at any time resulting therefrom) sustained by any person or persons or because of damage to or destruction of property caused by an occurrence or accident arising out of or related to this Agreement or any operations carried on in connection with this Agreement;
- (iii) including coverage for Products/Completed Operations, Blanket Contractual, Contractor's Protective, Personal Injury, Contingent Employer's Liability, Broad Form Property Damage, Tenant's Legal Liability and Non-Owned Automobile Liability.
- (iv) including a Cross Liability clause providing that the inclusion of more than one Insured shall not in any way affect the rights of any other Insured hereunder, in respect to any claim, demand, suit or judgement made against any other Insured.

2.2 All Risks Property Insurance for loss of or damage to the ball fields and equipment, owned, leased or for which the City may otherwise be responsible and is used or to be used for the ball field facility. This insurance shall be for an amount not less than the replacement cost value of the ball fields and equipment, as determined from time to time. In the event of loss or damage, City shall if so requested by the Regional District, forthwith replace such lost or damaged ball fields and equipment. Such All Risks Property Insurance shall be endorsed to waive all rights of subrogation against the Regional District.

3. The Regional District Named As Additional Insured

The policies required by section 2.1 above shall provide that the Regional District is named as an Additional Insured thereunder and that said policies are primary without any right of contribution from any insurance otherwise maintained by the Regional District. The Regional District shall also be named as a Loss Payee under the policy required by Section 2.2.

4. Certificates of Insurance

The City agrees to submit a Certificate of Insurance, in the form of Schedule B-1, attached hereto and made a part hereof, to the Regional District prior to the commencement of the Term of the Lease. Such Certificate shall provide that 30 days' written notice shall be given to the Regional District, prior to any material changes or cancellations of any such policy or policies.

5. Additional Insurance

The City may take out such additional insurance, as it may consider necessary and desirable. All such additional insurance shall be at no expense to the Regional District.

6. Insurance Companies

All insurance, which the City is required to obtain with respect to this Agreement, shall be with insurance companies registered in and licensed to underwrite such insurance in the province of British Columbia.

7. Failure to Provide

If the City fails to do all or anything which is required of it with regard to insurance, the Regional District may do all that is necessary to effect and maintain such insurance, and any monies expended by the Regional District shall be repayable by and recovered from the City. The City expressly authorizes the Regional District to deduct from any monies owing the City, any monies owing by the City to the Regional District.

8. Nonpayment of Losses

The failure or refusal to pay losses by any insurance company providing insurance on behalf of the City shall not be held to waive or release the City from any of the provisions of the Insurance Requirements or this Agreement, with respect to the liability of the City otherwise. Any insurance deductible maintained by the City under any of the insurance policies is solely for their account and any such amount incurred by the Regional District will be recovered from the City as stated in section 7 of this Schedule "B".

SCHEDULE B-1

CERTIFICATE OF INSURANCE

PROOF OF LIABILITY INSURANCE WILL BE ACCEPTED ON THIS FORM ONLY

REGIONAL DISTRICT OF CENTRAL OKANAGAN

This is to certify that policies of Insurance, subject to their terms, conditions and exclusions, are at present, in force for the Insured named below with the insurer specified.

NAME OF INSURED: _____

ADDRESS OF INSURED: _____

PROJECT: _____

TYPE	INSURER & POLICY NO.	TERM	LIMITS OF LIABILITY
			(Not less than \$2,000,000)
COMMERCIAL			
GENERAL LIABILITY			
Including	Inclusive Limit each Occurrence		
NON-OWNED AUTOMOBILE			
LIABILITY			
			Aggregate Limit, Products and Completed Operations

REGIONAL DISTRICT OF CENTRAL OKANAGAN has been added as Additional Insured to the Commercial General Liability Policy, but **ONLY** with respect to liability arising out of operations performed by or on behalf of the named Insured. The Policy provides Products and Completed Operations, Blanket Written Contractual, Owners and Contractors Protective Severability of Interest or Cross Liability; and where performed by the named insured, coverages include Piledriving, Demolition, Excavation Hazard, Shoring/Underpinning Hazard and Blasting Hazard.

This is to certify that Policies (including endorsements) or insurance as described above have been issued by the undersigned to the named insured above and are in full force at this time. If cancelled or changed in any manner for any reason, during the period of coverage stated herein so as to effective this certificate, FIFTEEN (15) days prior written notice will be give by this Insurance Company to Regional District of Central Okanagan, 1450 KLO Road, Kelowna, BC V1W 3Z4

Date: _____

Signed by: _____

Authorized Representative/Official