

Memo



Date: December 8, 2010
File: 2390-20-017
To: City Manager
From: Manager, Property Management
Subject: License of Occupation Renewal - West-Wind Nurseries and Landscaping Ltd.
(Saucier Road)

Report Prepared by: T. Abrahamson, Property Officer

Recommendation:

THAT Council approve the City entering into a License of Occupation between the City of Kelowna and West-Wind Nurseries and Landscaping Ltd., in the form attached to the report from the Manager, Property Management, dated December 8, 2010 for the use of City-owned property being a portion of Lot 1, Plan 1247, for a term of three (3) years commencing December 1, 2010 at a rate of \$1,800.00 per year and renewal of one further two (2) year term at the sole discretion of the City for the purposes of landscape material storage;

AND THAT the Mayor and City Clerk be authorized to execute the License of Occupation Agreement.

Purpose:

To enter into a License of Occupation with West-Wind Nurseries and Landscaping Ltd. for landscaping materials storage purposes.

Background:

The City and West-Wind Nurseries and Landscaping Ltd. entered into a three (3) year License of Occupation in 2007 for the use of 0.25 acre of unconstructed dedicated road off of Saucier Road for the purpose of landscape materials storage. West-Wind Nurseries and Landscaping Ltd. has requested a further three (3) year term with a two (2) year option to renew on the same terms and conditions as the current License of Occupation.

A three (3) meter access will be maintained by the Licensee to allow access to lands on either side of the dedicated road. The rental consideration reflects market rates for unconstructed road at this location for the purpose of landscape materials storage.

The use is consistent with the zoning and does not pose a conflict with ALR regulations.

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Internal Circulation:

Design & Construction Services
Civic Operations
Infrastructure Planning
Development Services
Regional Services
Land Use Management
Policy & Planning

Legal/Statutory Authority:

Section 26(3) of the *Community Charter*

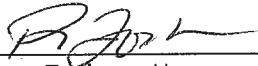
Legal/Statutory Authority Procedural Requirements:

Disposition must be published in a weekly newspaper for two (2) consecutive weeks and posted on the public notice posting place

Considerations not applicable to this report:

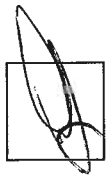
Existing Policy:
Financial/Budgetary Considerations:
Personnel Implications:
External Agency/Public Comments:
Community & Media Relations Considerations:
Alternate Recommendation:

In light of the above, the Real Estate & Building Services department request Council's support of this License of Occupation.



Ron Forbes, Manager
Property Management

Approved for inclusion:



D. Gilchrist, Director, Real Estate & Building Services

LICENCE OF OCCUPATION

THIS AGREEMENT dated for reference the 1st day of December, 2010.

BETWEEN:

CITY OF KELOWNA, 1435 Water Street, Kelowna, B.C., V1Y 1J4
(the "City")

AND:

WESTWIND NURSERY, #206 – 1889 Spall Road, Kelowna, B.C., V1Y 4R2
(the "Licensee")

WHEREAS:

- A. The City owns certain property identified as Road on Subdivision Plan of Lot 1, Plan 11822, and Lot 167, Plan 1247 except Plans 7486, 11822 and 19706, DL 359, ODYD (the "Lands").
- B. The Licensee requires a portion of the Lands, as shown the attached Schedule A, for storage of landscaping materials. A six meter access will be maintained by the Licensee for access to properties adjoining the Lands.
- C. The City is prepared to grant the Licensee a Licence of Occupation pursuant to Section 35(11) of the *Community Charter*, S.B.C. 2003, c.26 for an Initial Term of Three (3) years, with one further Two (2) year Renewal Term at the City's sole discretion, over the Lands as outlined.

NOW THEREFORE in consideration of the payment of Rent in the amount of \$150.00 per month plus HST, for each month of the Initial Term, from the Licensee to the City and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and the Licensee covenant and agree as follows:

1. **Grant** - The City grants to the Licensee the exclusive right and licence to enter onto and use the Lands which is attached hereto as Schedule A (the "Licence Area") for the purposes of storage of landscaping materials to be used for the Licensee's landscaping business.

2. **Additional Rights** – For the purposes outlined in Section 1, the Licensee shall have the right to bring onto the Licence Area all necessary materials, vehicles, machinery, signage and equipment and to perform maintenance and to restrict access to the Licence Area and the items stored there.
3. **Initial Term and Renewal Term** – The duration of this Agreement and the Licence herein granted shall be for an Initial Term of Three (3) years commencing on December 1, 2010 unless earlier terminated in accordance with Section 23. The City, at its sole option, grants to the Licensee, at the Licensee's expense, a renewal of the License for one further term of Two (2) years upon the same terms and conditions as contained in this License, save and except the Rent and any further renewal terms.
4. **State of Licence Area at Termination** – In the event that this Agreement terminates or expires, the Licensee will cease all occupation of the Licence Area and will remove all materials, vehicles, machinery, signage, equipment, fences, and other improvements from the Licence Area. The Licensee will leave the Licence Area in safe, clean and tidy condition and clear of contamination occurring since the date of commencement of this Agreement. The Licensee will replace any signs, fences and other improvements removed from the Licence Area. In the event that the Licensee 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 Licensee. All materials, vehicles, machinery, signage, equipment, fences and other improvements remaining on the Licence Area become the sole property of the City upon termination of this Agreement, without any compensation whatsoever to the Licensee.
5. **Security Deposit** - The Tenant will supply a bond, in the amount of \$1,000.00, as security for the observance of the terms of the Lease.

6. **Taxes** - The Tenant shall pay promptly as the same become due all rates, taxes, property taxes and assessments, of whatsoever description, including municipal, regional district, school, hospital district and other property taxes that may at any time during the Term be lawfully imposed, or become due and payable upon, or in respect of the business of the Tenant, the Leased Area or the Tenant's use of it. The Tenant acknowledges that as a non-municipal occupier of municipal land, the Tenant will be liable for the payment of property taxes.
7. **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.
8. **Hazardous Materials** – The Licensee will not place, store, use, manufacture or release any Hazardous Materials on the Licence Area. Hazardous Materials means all explosives, radioactive materials, pollutants, contaminants, hazardous or toxic substances, special waste, or other waste (including chlorobiphenyls) the storage, use, manufacture, or release of which into the environment is prohibited, controlled or regulated under any laws, regulations, orders, bylaws, permits or lawful requirement of any governmental authority in respect of environmental protection or the regulation and use of hazardous materials. The Licensee will indemnify the City in respect of any costs, expenses, damages or claims which may be suffered by the City in respect of Hazardous Materials placed, stored, used, manufactured or released on the Licence Area by the Licensee, including all clean-up and remediation costs and legal or professional fees. This indemnity will survive the expiry or sooner termination of this Agreement.
9. **Fill** – The Licensee will not import any fill material onto the Licence Area.

10. **Construction** – nothing in this agreement allows the Licensee to construct anything other than signs and gates restricting access within the Licence Area.
11. **No Burning** – The Licensee will not burn any materials on the Licence Area.
12. **No Waste or Nuisance** – The Licensee will not do or permit anything that may become a nuisance to occupiers or invitees on adjoining lands.
13. **Terms and Conditions** – The Licensee 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 Licensee acknowledges that the fact that this Licence is granted by the City does not excuse the Licensee from obtaining building permits, development permits, business licences and other required permissions.
14. **Maintenance** – The Licensee will at its own cost keep the Licence Area in a safe, clean and tidy condition, and will remove snow from the Licence Area.
15. **Compliance with Laws** – The Licensee will comply with all laws and regulations pertaining to its use and occupation of the Licence Area.
16. **Inspection by City** – The City may review and inspect the Licence Area and the work which the Licensee is undertaking pursuant to this Agreement to determine if the Licensee is in compliance with the terms of this Agreement.
17. **No Transfer** – The rights granted to the Licensee under this Agreement may not be sublicensed, assigned, or otherwise transferred.
18. **Risk** – The Licensee accepts the Licence Area on an as-is basis and agree 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 Licensee, 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 negligent or wilful act or omission by the City, its employees, agents or invitees.

- 19. Indemnity** – The Licensee 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 License or any occurrence on or around the Licence Area during the term of this License, or by use or occupancy of the Licence Area by the Licensee or any default of the Licensee under this Agreement or any wrongful act, omission or negligence of the Licensee or its officers, employees, contractors, agents or others for whom the Licensee are responsible. This indemnity will survive the expiry or sooner termination of this Agreement.
- 20. Release** – The Licensee hereby releases and forever discharges the City, its elected officials, officers, employers, 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 at equity, including without limitation any claim under the *Property Law Act* (collectively, “Claims”), which the Licensee 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 Licensee’s use of the Licence Area, except claims arising from the sole negligence of the City.
- 21. Economic Loss** – Notwithstanding or despite any other part or provision of this Agreement in no event shall the City be liable to the Licensee for any special damages, indirect damages, incidental damages or consequential damages, including economic loss.
- 22. Insurance** – During the term of this Agreement, the Licensee will carry public liability insurance, in a form and with an insurer acceptable to the City’s Risk Manager, insuring

the Licensee and the City under this Agreement in an amount not less than \$5,000,000 per occurrence, and any other type of insurance that the City's Risk Manager may reasonably require. The Licensee will provide the City's Risk Manager with proof of the insurance at the time of execution of this Agreement and annually upon renewal of the insurance policy.

23. Termination – The City reserves the right to terminate this Agreement within 30 business days of receiving written notice to the Licensee from the City. The City will not be liable to compensate the Licensee for damages, costs or losses resulting from the exercise of this right of termination or any termination of this License.

24. 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.

25. 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 *Community*

Charter and 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.

26. **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.
27. **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 including, without limiting the generality of the foregoing, the termination of this Agreement and the re-entering of the Licence Area used or occupied by the Licensee, 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.
28. **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.
29. **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.
30. **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.

31. General –

- (a) This Agreement will bind and benefit each party to this Agreement, and its respective corporate successors.
- (b) The Schedules attached to this Agreement form part of this Agreement.
- (c) 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.
- (d) Time is of the essence of this Agreement.
- (e) This Agreement must be construed according to the laws of the Province of British Columbia.

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.

CITY OF KELOWNA by its authorized signatories:

Mayor

Clerk

WESTWIND NURSERIES LTD. by its authorized signatory:



Authorized Signatory

SCHEDULE 'A'

