

Memo



Date: June 21, 2011
File: 2390-20
To: City Manager
From: Manager, Property Management
Subject: Bare Land Lease to M & H Auto Sales (Clement Avenue)

Report Prepared by: T. Abrahamson

Recommendation:

THAT Council approve the City entering into a one (1) year Bare Land Lease Agreement, with M & H Auto Sales Ltd., for the use of City-owned property on the plan attached, being Parts of Lots 2 & 3, Plan 1021, DL 139, O.D.Y.D., in the form attached to the Report of the Manager, Property Management dated June 21, 2011;

AND THAT all revenue received from this lease be allocated to Property Management general revenue, Account No. 4540.157.1254.*.*.000.10.L6820, with a portion of the revenue covering purchased services for grading of the leased premises and the balance to be used to offset property taxes on the remaining vacant land;

AND THAT the 2011 Financial Plan be amended accordingly;

AND FURTHER THAT the Mayor and City Clerk be authorized to execute the Bare Land Lease Agreement.

Purpose:

To enter into a short-term lease for the use of vacant City land with M & H Auto Sales Ltd. for vehicle and equipment storage.

Background:

In November, 2010, the City purchased the subject property from Canada Lands for a future RCMP detachment and emergency related services. While awaiting redevelopment, the Property Management branch has advertised the vacant parcels for a short-term lease in order to maximize the value and utility of our land asset.

M & H Auto Sales Ltd. occupy land immediately north of the subject property. M & H Auto Sales Ltd. operate a used vehicle business as well as a U-Haul franchise. Both of which are consistent the permitted uses allowable under the existing zoning. Storage for the U-Haul component of their business operation will be temporarily accomplished through this proposed lease.

Staff will ensure that the Bare Land Lease Agreement will not detrimentally affect the future development of the subject property.

Financial/Budgetary Considerations:

The lease represents fair market value for vacant land for the purpose of vehicle and equipment storage commencing July 1, 2011 at a rate of \$500.00 per month with month to month renewals thereafter at the City's sole discretion.

Legal/Statutory Authority:

Section 26(3) of the Community Charter

Legal/Statutory 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:

Internal Circulation:

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 and Building Services department requests Council's support of this lease.

Submitted by:



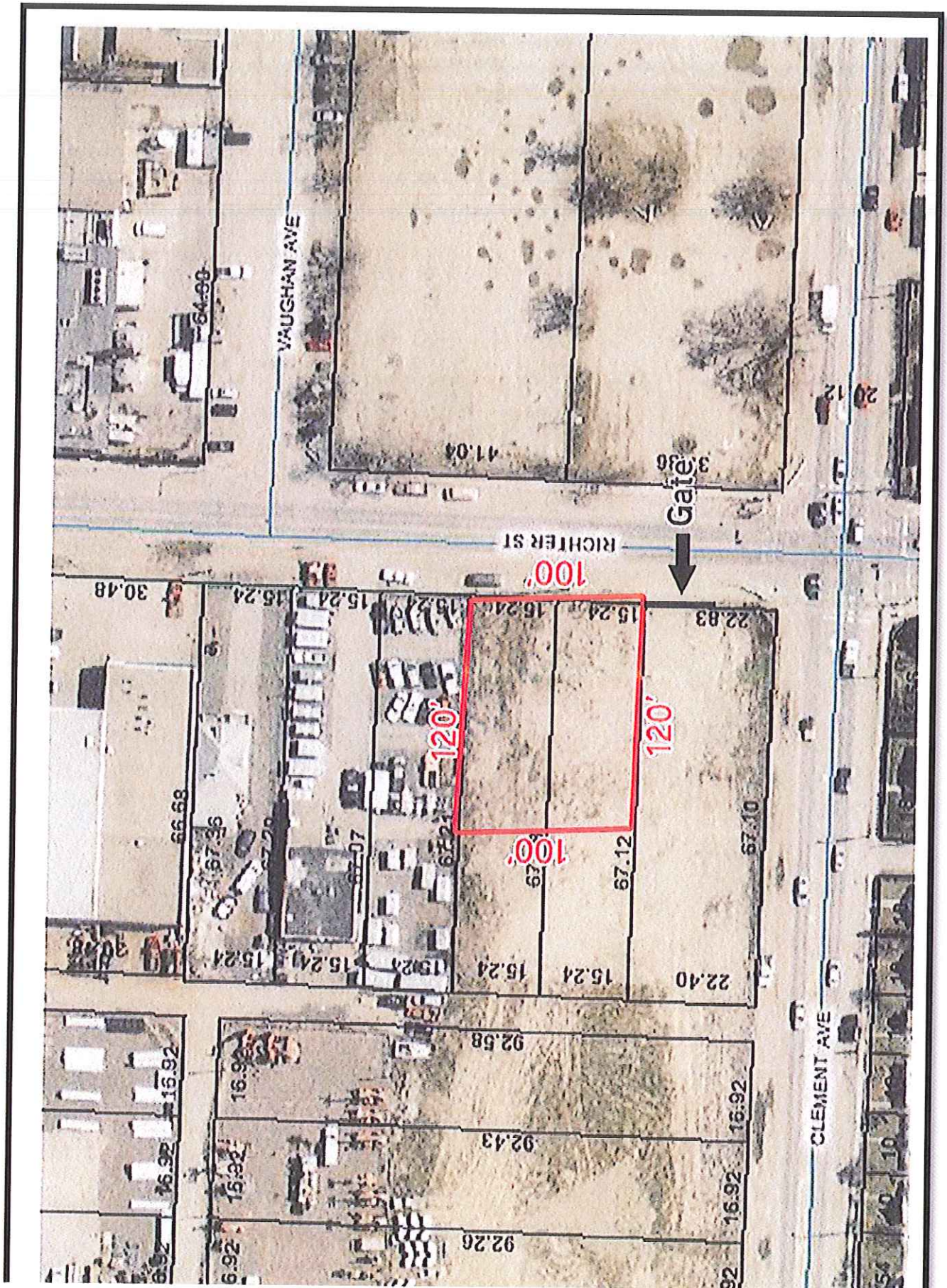
Ron Forbes, Manager
Property Management, Real Estate & Building Services

Approved for inclusion:



Doug Gilchrist, Director, Real Estate & Building Services

cc: Terry Barton, Manager of Parks & Public Spaces



DOCUMENT APPROVAL			
Bareland Lease			
Cir.	Department	Date	Init.
	REBS		

THIS AGREEMENT made the 1st day of July, 2011.

BETWEEN:

CITY OF KELOWNA, a municipal corporation having its offices at
1435 Water Street, in the City of Kelowna, in the Province of
British Columbia

(hereinafter called the "City")

OF THE FIRST PART,

AND:

M & H AUTO SALES LTD. a body corporate, having an address at
1156 Richter Street, Kelowna, British Columbia, V1Y 2K7

(hereinafter called the "Tenant")

OF THE SECOND PART,

WITNESSETH that in consideration of the rents, covenant and agreements hereinafter reserved and contained on the part of the Tenant, to be paid, observed and performed, the City hereby demises and leases unto the Tenant the premises hereinafter described all on the terms, conditions and covenants as hereinafter set forth.

- 1.01 THE PREMISES. The Premises hereby leased comprise those properties as described in Schedule "A"; the said properties are hereinafter referred to as the "Premises".
- 2.01 TERM OF THE LEASE. TO HAVE AND TO HOLD the said Premises for ONE (1) year from the 1st day of July 2011 to and including the 30th day of June, 2012.
- 3.01 BASE RENT. YIELDING AND PAYING to the City rental for the Premises, the sum of FIVE HUNDRED (\$500.00) payable on the first day of each month of the Term.
- 3.02 HST. PAYING HST in addition to Base Rent in the amount of SIXTY DOLLARS AND ZERO CENTS (\$60.00) payable on the first day of each month of the Term.

- 4.00 TENANT'S COVENANTS. The Tenant covenants with the City:
- 4.01 RENT. To pay rent.
- 4.02 TAXES. That it will pay promptly as the same becomes due all rates, taxes, property taxes and assessments, of whatsoever description, that may at any time during the existence of these Presents be lawfully imposed, or become due and payable upon, or in respect of the business of the Tenant, the said leased premises and the operations of the Tenant hereunder, or any part thereof.
- 4.03 BUSINESS LICENCES AND PERMITS. That it will procure and maintain, at the cost and expense of the Tenant, such licences, permits or approvals from any Federal, Provincial, Municipal or other Government authorities, including water permits and/or licences required in connection with the business of fruit harvesting, and such private permits as may be necessary in respect of the business of the Tenant, the said leased premises and the operations of the Tenant hereunder, or any part thereof.
- 4.04 ALL UTILITIES. That it will pay promptly as the same becomes due all utility rates, charges and assessment, of whatsoever description, that may at any time during the existence of these Presents be lawfully imposed, or become due and payable, upon, or in respect of the business of the Tenant, the said leased premises and the operations of the Tenant hereunder, or any part thereof.
- 4.05 INSURANCE. The Tenant shall, at his own expense, maintain and keep in force during the term of this agreement, the insurance coverage listed in this article. The "deductible or reimbursement" for any insurance policy required under this section shall not exceed FIVE THOUSAND DOLLARS (\$5,000.00) per claim.

The Tenant shall at the time the contract is signed, and prior to taking occupancy under this agreement, submit to the City, certificate for all insurance policies or certified copies of the insurance policies (if requested) required under this article and shall also provide to the City from time to time, as may be required, satisfactory proof that such policies are still in full force and effect.

Each insurance policy required under this Article shall contain an endorsement to provide all named insureds with prior notice of changes and cancellations. Such endorsement shall be in the following form:

"It is understood and agreed that the coverage provided by this policy will not be changed or amended in any way or cancelled until thirty (30) days after written notice of such change or cancellation shall have been given or sent by registered mail to all named insureds."

Whenever the word "City" is to appear in the insurance policies, the legal name shall be inserted.

LIABILITY INSURANCE. The Tenant shall be responsible for a policy of public liability and property damage insurance in an amount of no less than Two Million Dollars (\$2,000,000.00) against liabilities or damages in respect of injuries to persons (including injuries resulting in death) and in respect of damage arising out of the performance of this agreement. Participant coverage may also be required at the discretion of the City.

The City of Kelowna shall be a named insured on the policy. The policy shall preclude subrogation claims by the insurer against anyone insured thereunder. In addition, such insurance policy shall include the following 'Cross Liability' clause:

"The insurance afforded by this policy shall apply in the same manner, as though separate policies were issued, to any action brought against any of the named insured by or on behalf of any other named insured."

PROPERTY INSURANCE. The Tenant shall be responsible for a policy to insure all buildings at full replacement value of the portion occupied by the Tenant against loss from physical damage including fire.

TENANT'S LEGAL LIABILITY INSURANCE. The Tenant shall be responsible for a policy to insure its exposure for tenant's legal liability in an amount equal to the full replacement value of all buildings.

AUTOMOTIVE INSURANCE. The Tenant shall licence and insure for business purposes to a minimum of Two Million Dollars (\$2,000,000.00) public liability and property damage, all automotive equipment used by the Tenant in the conduct of the business provided for in this agreement.

- 4.06 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 Tenant does anything that would cause an increase in the insurance premiums on the Premises, the Tenant shall pay to the City that amount which represents the increase in the insurance premium by virtue of the Tenant's use or occupation of the Premises.
- 5.00 CITY'S COVENANTS. The City covenants with the Tenant:
- 5.01 QUIET ENJOYMENT. For quiet enjoyment of the Premises.
- 6.00 PROVIDED ALWAYS AND IT IS HEREBY AGREED AS FOLLOWS:
- 6.01 PROVISO FOR RE-ENTRY ON DEFAULT. If and whenever the rent is not paid in full when due or in case of breach of, or non-observance or non-performance by the Tenant of any of the provisions of this Agreement, and if the default continues for TEN (10) days after written notice thereof to the Tenant, or if the Premises are vacated or remain unoccupied for TEN (10) days or if the term shall be taken in execution or attachment for any cause whatever, then, in every such case, the City, in addition to any other remedy now or hereafter provided by law may, at its option, cancel this Agreement and re-enter and take possession of the Premises or any part thereof by force if necessary, without any previous notice of intention to re-enter and may remove all persons and property therefrom and may use such force and assistance in making such removal as the City 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 Tenant of any covenant or agreement on its part to be performed.
- 6.02 ALTERATIONS BY TENANT. The Tenant agrees not to make any alterations, additions or improvements in or to the Premises without obtaining the City's prior written consent and all such work shall be done only by contractor's or tradesmen or

mechanics approved in writing by the City and at the Tenant's sole expense and at such time, in such manner as the City may approve.

REMOVAL OF ALTERATIONS BY TENANT. If any alterations, additions or improvements are made to the Premises by the Tenant, it shall, on the written request of the City, restore the Premises to their condition at the commencement of the term of this Agreement not later than FIFTEEN (15) days prior to the termination of this Agreement or, if the City would prefer that any alterations, additions and improvements remain, the City may require the Tenant to restore the Premises to such extent as the City may deem expedient although retaining as far as possible the alteration, additions and improvements, without any compensation to the Tenant.

- 6.03 REMOVAL OF TENANT'S PROPERTY. All articles of personal property and all business and trade fixtures, machinery and equipment and furniture owned by the Tenant or installed by the Tenant on the Premises at the Tenant's expense shall remain the property of the Tenant and may be removed by the Tenant at any time during the term of this Agreement, PROVIDED that the Tenant, at its own expense, shall repair any damage to the Premises caused by such removal or by the original installation.
- 6.04 NO WARRANTY OF SERVICES BY CITY. The City does not warrant that any service or facility provided by it in accordance with the provisions of this Agreement will be free from interruption caused by any cause beyond the City's reasonable care and control. No such interruption shall be deemed to be a disturbance of the Tenant's enjoyment of the Premises nor render the City liable for injury to or in damages to the Tenant nor relieve the parties from their obligations under this Agreement. The City shall without delay take all reasonable steps to remove the cause of any such interruption.
- 6.05 CITY NOT LIABLE FOR INTERFERENCE. The City shall not be liable to the Tenant for any interference or inconvenience caused by any labour dispute or by damage to the Premises or by repairs, alterations, improvements or construction in or adjacent to the Premises, or by failure or interruption of any supply of any utility.
- 6.06 CITY NOT LIABLE FOR INJURY TO TENANT. The City shall not be liable for any injury or damage to the Tenant, his agents, employees, customers 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 City, its agents, servants or employees.
- 6.07 INDEMNIFICATION. The Tenant agrees to reimburse the City for all expense, damages, loss or fines incurred or suffered by the City by reason of any breach, violation or non-performance by the Tenant of any covenant or provision of this Agreement or by reason of damage to the premises, persons or property caused by the Tenant, its employees or agents or persons visiting or doing business with the Tenant. The Tenant further covenants and agrees to save and hold harmless the City, its officers, agents, servants and employees, from and against any and all suits or claims alleging damage or injury (including death) to any person or property that may occur or that may be alleged to have occurred, in the course of the term of this Agreement, whether such claim shall be made by an employee of the Tenant, or by a third person and whether or not it shall be claimed that the alleged damage or injury (including death) was caused through a wilful or negligent act or omission of the Tenant, its officers, servants, agents or employees; and at its own expense, the Tenant shall defend any and all such actions and pay all legal charges, costs, and other costs arising therefrom.

- 6.08 NO REPRESENTATION. The Tenant 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 City unless it be made in writing and signed on behalf of the City.
- 6.09 ABATEMENT OF RENT. If the Premises are damaged by any cause for which the City is responsible by virtue of some act or neglect by the City, its servants or agents, then the rent shall be abated in whole or in part according to the portion of the Premises which is not usable by the Tenant until such damage is repaired.
- 6.10 DAMAGE OR DESTRUCTION OF PREMISES. Subject to the provisions of Article 6.11, if the Premises shall be damaged by fire or other casualty against which the City is insured, the damage to the Premises shall be repaired by the City with reasonable diligence at its expense except that repairs to alterations, additions or improvements made by the Tenant shall be performed by the City at the expense of the Tenant and the Tenant shall, at its own expense, make all repairs and replacements of property which belongs to the Tenant.
- 6.11 PREMISES RENDERED UNTENABLE. If the Premises are rendered untenable by fire or other casualty against which the City is insured and if the City shall decide not to restore the same, the City shall, within NINETY (90) days after such fire or other casualty, give to the Tenant a notice in writing of such decision and thereupon the term of this Agreement shall expire forthwith and the Tenant shall vacate the Premises and surrender the same to the City. Upon the termination of this Agreement under the provisions of this article, the Tenant's liability for rent shall cease as of the day following the fire or other casualty.
- 6.12 RIGHT OF ENTRY TO MAKE REPAIRS. The Tenant agrees that the City shall have the right to enter the Premises at all reasonable times to examine the same and make such repairs, alterations, improvements or additions as the City may deem necessary or desirable or as the City may be required to make by law. The City shall be allowed to take onto the Premises all material which may be required for such purpose and the rent reserved shall in no way abate while such repairs, alterations, improvements or additions are being made by reason of interruption of the business of the Tenant. The City will exercise reasonable diligence as to minimize the disturbance or interruption of the Tenant's operations.
- 6.13 DISTRAINT. If the City levies distress against the goods and chattels of the Tenant, such force as may be deemed necessary for the purpose and for gaining admission to the Premises may be used without the City being liable to any action in respect thereof or for any loss or damage occasioned thereby and the Tenant hereby expressly releases the City, its employees and agents from all actions, proceedings, claims or demands whatsoever for or on account or in respect of any such forcible entry or any loss or damage sustained by the Tenant in connection therewith.
- 6.14 COSTS OF RECOVERY OF RENT. If the City shall consider it desirable to retain the services of a lawyer or any other person reasonably necessary for the purpose of assisting the City in enforcing any of its rights hereunder in the event of default on the part of the Tenant, it shall be entitled to collect from the Tenant the cost of all such services as if the same were rent.
- 6.15 INTEREST ADDED TO COSTS OF DEFAULT Without prejudice to any other remedy of the City, any money payable by the Tenant to the City hereunder, other than the rent

referred to in Article 3 of this Agreement, shall be deemed to be rent and shall be subject to "Interest Penalty on Overdue Rent" as outlined in Article 6.16 of this Agreement from the date due or the date the City shall have paid out the same, and shall be paid as additional rent and shall be collectable as rent and unless otherwise provided in this Agreement, shall be payable with the next ensuing instalment of rent.

- 6.16 INTEREST PENALTY ON OVERDUE RENT Without waiving any right of action of the City in event of late payment or default of payment of rents due herein, the Tenant shall pay a penalty of two percent (2%) per month or any portion thereof compounded monthly (26.82% per annum) effective from the day the amount is due. In order to reflect prevailing interest rates, the City may review and adjust the penalty rate from time to time.
- 6.17 NO WAIVER The failure of the City 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 such covenant, condition or option and no waiver shall be inferred from or implied by anything done or omitted by the City save only express waiver in writing. The acceptance of any rent or the performance of any obligation hereunder by a person other than the Tenant shall not be construed as an admission by the City of any right, title, or interest of such person as a sub-tenant, assignee, transferee or otherwise in the place and stead of the Tenant.
- 6.18 OVERHOLDING. If the Tenant shall continue to occupy the Premises after the expiration of the term hereby granted and the City 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 a tenancy from month to month save and except that the rental payable shall be as determined by the City.
- 6.19 ENVIRONMENT

Definitions - For the purposes of this Article:

- (a) "Contaminants" means any pollutants, contaminants, deleterious substances, underground or above ground tanks, asbestos materials, urea formaldehyde, dangerous substances or goods, hazardous, corrosive or toxic substances, special waste or waste of any kind or any other substance which is now or hereafter prohibited, controlled or regulated under Environmental Laws; and
- (b) "Environmental Laws" means any statutes, laws, regulations, orders, bylaws, standards, guidelines, permits and other lawful requirements of any governmental authority having jurisdiction over the Premises [the Project] now or hereafter in force relating in any way to the environment, health, occupational health and safety, product liability or transportation of dangerous goods, including the principles of common law and equity.

Tenant's Covenants and Indemnity - The Tenant covenants and agrees as follows:

- (a) not to use or permit to be used all or any part of the Premises for the sale, storage, manufacture, disposal, handling, treatment, use or any other dealing with any Contaminants, without the prior written consent of the Landlord, which may be unreasonably withheld. Without limiting the generality of the foregoing, the Tenant shall in no event use, and does not plan or intend to use, the Premises to dispose of, handle or treat any Contaminants in a manner that,

in whole or in part, would cause the Premises [the Project] or any adjacent property to become a contaminated site under Environmental Laws;

- (b) to strictly comply, and cause any person for whom it is in law responsible to comply, with all Environmental Laws regarding the use and occupancy of the Premises;
- (c) to promptly provide to the Landlord a copy of any environmental site investigation, assessment, audit or report relating to the Premises [of the Project] conducted by or for the Tenant at any time before, during or after the Term (or any renewal thereof). The Tenant shall, at its own cost at the Landlord's request from time to time, obtain from an independent environmental consultant approved by the Landlord an environmental site investigation of the Premises or an environmental audit of the operations at the Premises, the scope of which shall be satisfactory to the Landlord and shall include any additional investigations that the environmental consultant may recommend. [Where the Term, including renewals, is 30 or more years - The Tenant hereby waives the requirement for the Landlord to provide a site profile for the Premises [or the Project] under the *Waste Management Act* or any regulations pursuant thereto];
- (d) to maintain all environmental site investigations, assessments, audits and reports relating to the Premises [or the Project] in strict confidence and not to disclose their terms or existence to any third party (including without limitation, any governmental authority) except as required by law, to the Tenant's professional advisers and lenders on a need to know basis or with the prior written consent of the Landlord, which consent may be unreasonably withheld;
- (e) to promptly provide to the Landlord on request such written authorizations as the Landlord may require from time to time to make inquiries of any governmental authorities regarding the Tenant's compliance with Environmental Laws;
- (f) to promptly notify the Landlord in writing of any release of a Contaminant or any other occurrence or condition at the Premises, [the Project] or any adjacent property which could contaminate the Premises, [the Project] or subject the Landlord or the Tenant to any fines, penalties, orders, investigations or proceedings under Environmental Laws;
- (g) prior to the expiry or earlier termination of this Lease or at any time if requested by the Landlord or required by any governmental authority pursuant to Environmental Laws, to remove from the Premises all Contaminants, and to remediate any contamination of the Premises, [the Project] or any adjacent property resulting from Contaminants, in either case brought onto, used at or released from the Premises by the Tenant or any person for whom it is in law responsible. The Tenant shall perform these obligations promptly at its own cost and in accordance with Environmental Laws. The Tenant shall provide to the Landlord full information with respect to any remedial work performed pursuant to this section and shall comply with the Landlord's requirements with respect to such work. The Tenant shall use a qualified environmental consultant approved by the Landlord to perform the remediation. The Tenant shall, at its own cost, obtain such approvals and certificates from the B.C. Ministry of Environment, Lands & Parks in respect of the remediation as are required under Environmental Laws or required by the Landlord, including without limitation a certificate of compliance evidencing completion of the

remediation satisfactory to the Ministry. All such Contaminants shall remain the property of the Tenant, notwithstanding any rule of law or other provision of this Lease to the contrary and notwithstanding the degree of their affixation to the Premises [or the Project]; and

- (h) to indemnify the Landlord and its directors, officers, shareholders, employees, agents, successors and assigns, from any and all liabilities, actions, damages, claims, remediation cost recovery claims, losses, costs, orders, fines, penalties and expenses whatsoever (including all consulting and legal fees and expenses on a solicitor-client basis and the cost of remediation of the Premises, [the Project] and any adjacent property) arising from or in connection with:
 - (i) any breach of or non-compliance with the provisions of this Article by the Tenant; or
 - (ii) any release or alleged release of any Contaminants at or from the Premises related to or as a result of the use and occupation of the Premises or any act or omission of the Tenant or any person for whom it is in law responsible.

The obligations of the Tenant under this Article shall survive the expiry or earlier termination of this Lease. The obligations of the Tenant under this Article are in addition to, and shall not limit, the obligations of the Tenant contained in other provisions of this Lease.

6.20 ENUREMENT. This Agreement and everything herein contained shall enure to the benefit of and be binding upon the parties and their heirs, executors, administrators, successors 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.

6.21 SEVERABILITY

If any term or condition of this Lease or the application thereof to any person or circumstance shall, to any extent, be held to be invalid or unenforceable, the remainder of this Lease and the application of that term or condition to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each term and condition of this Lease shall be valid and enforced to the fullest extent permitted by law.

6.22 RIGHT OF TERMINATION - NO DEFAULT

In the event that the Landlord requires the use of the Premises for whatever reason, the Landlord shall have the right to terminate this Lease after giving the Tenant SIXTY (60) days written notice of the Landlord's intention to terminate.

In the event that the Tenant no longer requires the use of the Premises for whatever reason, the Tenant shall have the right to terminate this Lease after giving the Landlord SIXTY (60) days written notice of the Tenant's intention to terminate.

IN WITNESS WHEREOF the parties hereto have hereunto affixed their corporate seals in the presence of their officers duly authorized in that behalf, or have hereunto set their hands and seals, as the case may be, on the day and year first above written.

Signed on behalf of:

THE CITY OF KELOWNA

Mayor

City Clerk

Signed, Sealed and Delivered by:

M & H AUTO SALES LTD.



Authorized Signatory

Authorized Signatory

