

REPORT TO COUNCIL



Date: October 26, 2011

File: 2390-20-043

To: City Manager

From: Manager, Property Management

Subject: Aqua Resort Ltd. - License to Use

Report Prepared by: Ryan W. Smith, Property Officer

Recommendation:

THAT Council approves the City entering into a three (3) year License to Use, with Aqua Resort Ltd., for use of a section of the Cook Street Boat Launch, in the form attached to the Report of the Manager, Property Management, dated October 26, 2011;

AND THAT the Mayor and City Clerk be authorized to execute the License to Use Agreement;

AND FURTHER THAT the 2011 Financial Plan be amended accordingly.

Purpose:

To grant Aqua Resort Ltd. a Licence to Use for a section of the Cook Street Boat Launch.

Background:

Aqua Resort Ltd. ("Aqua") is located on lands adjacent to the Cook Street Boat Launch. Aqua owns the land that was previously leased to the Eldorado Yacht Harbour Ltd. Aqua intends to continue to offer boat storage and quick launch services. To launch vessels, the Cook Street Boat Launch must be used. This license grants access over City property to expedite the boat launching service and eliminate the need to use Lakeshore Road.

Financial/Budgetary Considerations:

Base Terms of License to Use is:

Term: Three (3) years November 1, 2011 - October 31, 2014

Rate: \$6,600 from November 1, 2011 to October 31, 2012
\$6,850 from November 1, 2012 to October 31, 2013
\$7,100 from November 1, 2013 to October 31, 2014

Tenant Improvements: By tenant

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The rent for November 1, 2010 to October 31, 2011 was \$6,350.

Internal Circulation:
Financial Planning Manager

Considerations not applicable to this report:

Legal/Statutory Authority:

Legal/Statutory Procedural Requirements:

Existing Policy:

Personnel Implications:

External Agency/Public Comments:

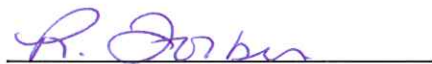
Communications Comments:

Alternate Recommendation:

Internal Circulation:

In light of the above, the Real Estate & Building Services department request Council's support of this Licence to Use.

Submitted by:



R. Forbes, Manager
Property Management

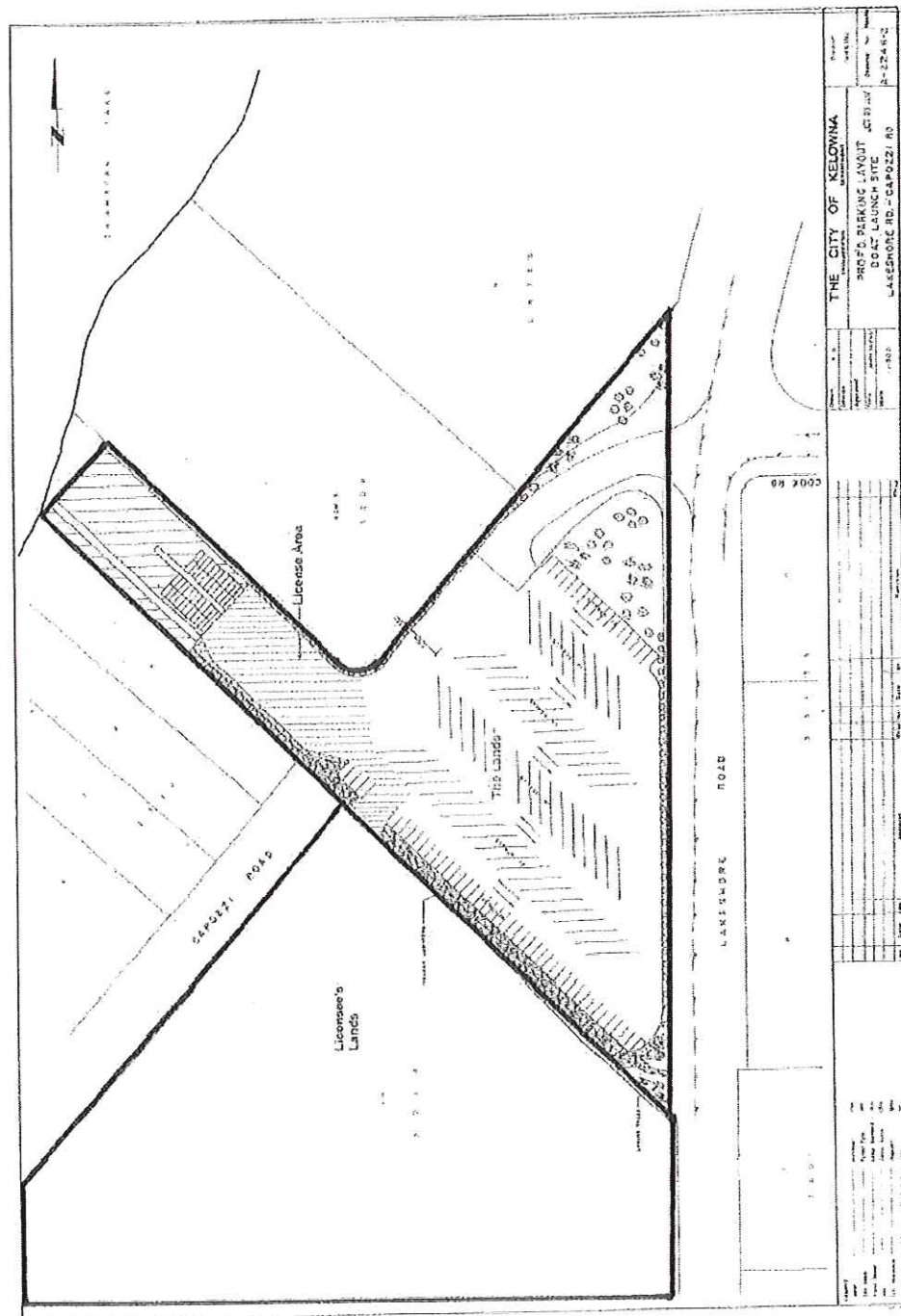
Approved for inclusion:



Martin Johansen, Manager, Building Services for
Doug Gilchrist, Director Real Estate & Building Services

cc: Director, Real Estate and Building Services
Director, Financial Services

SCHEDULE "A" SKETCH OF LICENCE AREA



AQUA MARINE VALET. LICENCE

THIS AGREEMENT dated for reference the day of , 2011.

BETWEEN:

CITY OF KELOWNA, a municipal corporation having its offices
at 1435 Water Street, Kelowna, British Columbia, V1Y 1J4

(the "City")

AND:

AQUA RESORT LTD.

Suite 620 1632 Dickson Avenue

Kelowna, British Columbia, V1Y 7T2

(the "Licensee")

WHEREAS:

- A. The City is the registered owner of certain land, commonly known as Cook Street Boat Launch, situated in the City of Kelowna and legally described as:

Lot 5, Section 1, Township 25 and Section 6, Township 26 Osoyoos Division Yale District Plan 2912, except Plan 35979 and KAP 56428 located at 3786 Lakeshore Road, Kelowna B.C.

("the Lands");

as shown on Schedule "A";

- B. AND WHEREAS The Licensee is the possessor of lands described at Lot 17, Township 25 and District Lot 134, Osoyoos Division Yale District Plan 2714, located at 550 Truswell road, Kelowna B.C. ("Licensee's Lands");

NOW THEREFORE in consideration of the promises and payments provided for in this Agreement and the payment of one dollar (\$1.00) from each party to the other and other good and valuable consideration, the receipt and sufficiency of which both parties hereby acknowledge, the parties agree as follows:

Grant of Licence

1. The City hereby grants to the Licensee the non-exclusive right and licence to enter onto and use that portion of the Lands known as the Lakeshore Boat Launch Facility and shown outlined in heavy black on the explanatory map that is attached hereto as "Schedule A" (the "Licence Area") for the purposes and on the terms provided in this Agreement.

No Interest in Land

2. The licence granted by this Agreement is not to be construed as being granted for all times and it grants no interest in the Lands to the Licensee.

Right of Access

3. The Licensee shall have the right to access the Licence Area from the Licensee's Lands provided that the Licensee complies with all of its obligations under this Agreement.

Term

4. The term of this Licence shall be from the 1st day of November 2011 (the "Commencement Date") to and including 31st day of October 2014 (the "Term"), subject to earlier termination of this Agreement as provided herein.

Use of Licence Area

5. The Licensee shall be allowed to access and use the License Area for the purpose of launching and retrieving boats stored in the dryland moorage on the adjacent Licensee's Lands, and for no other purpose unless authorized by the City in writing, and shall ensure that the License Area is maintained in a tidy condition at all times.
6. The Licensee shall not permit any commercial activity to take place on the Lands or the License Area (other than the launching and retrieving of boats as outlined herein) and shall not store any equipment, vehicles or possessions on the Lands or the License Area. Further the Licensee shall not block access to the Lakeshore Boat Launch Facility and shall use not more than one launch lane at any one time.
7. The City reserves the right to limit access across the Lands as may be required for City purposes.

Licence Fee

8. The Licensee shall pay to the City a seasonal licence fee (the "License Fee") in the amount of:

- (a) \$6,600 from November 1, 2011 to October 31, 2012;
- (b) \$6,850 from November 1, 2012 to October 31 2013;
- (c) \$7,100 from November 1, 2013 to October 31, 2014.

to be paid immediately upon signing (a) and in advance of the first day of the month of November (b and c) during each subsequent year of the Term (the "Licence Fee") and the Licensee shall pay to the City, from time to time and upon demand, all other sums payable to the City pursuant to this Agreement (the "Additional Fees").

- 9. It is the intention of the parties that this is a net agreement and that all expenses, costs and payments incurred in respect of the Licence Area, and any other improvement to the Licence Area shall be borne by the Licensee.

HST

- 10. The Licensee shall pay to the City all taxes, charges. Levies and other fees, including Harmonized Sales Tax or any replacement tax, which may be payable in respect of this Agreement

Further Construction

- 11. The Licensee shall not construct any buildings, structures or improvements in the Licence Area.

Compliance with Laws

- 12. The Licensee shall use and occupy the Licence Area in compliance with all statutes, laws, regulations and orders of any authority having jurisdiction and without limiting the generality of the foregoing, all federal, provincial or municipal laws or statutes or bylaws relating to environmental matters and relating to the Lands or the operation of the Licensee, including all the rules, regulations, policies, guidelines, or criteria made under or pursuant to any such laws.

Public Safety

- 13. The Licensee shall take all possible precautions to ensure the safety of other persons using the Licence Area.

No Waste or Nuisance

14. The Licensee shall not:

- (a) commit, suffer or permit any wilful or voluntary waste, spoil or destruction of the Licence Area or the Lands; or
- (b) do or permit to be done anything that may be a nuisance or annoyance to owners or occupiers of adjoining lands or to the public generally.

Signs

15. The Licensee shall not erect any sign on or in the Lands without the prior written consent of the City.

Right to Inspect

16. The Licensee shall give the City unobstructed access to the Licence Area all times to determine if the Licensee is complying with all of its promises and obligations under this Agreement.

Licence Area Accepted "As Is"

17. The Licensee accepts the Licence Area "as is" and acknowledges that it has had the opportunity to undertake such inspections, tests and surveys of the Licence Area as it considers necessary and that the City has made no representations or warranties respecting the Licence Area, and that by entering into this Agreement, it is satisfied that the Licence Area is suitable for its purposes.

Insurance

18. The Licensee shall obtain and maintain from time to time insurance policies on the terms and in the amounts set out in Schedule B of this agreement.

Release

19. The Licensee hereby releases the City and its elected officials, officers, employees, agents and others (the "City's Representatives") from and against all demands and claims that the Licensee may have, now or in the future, in relation to this Agreement, the Licence Area or the Licensee's use of the Licence Area.

Indemnity

20. Save and except for the negligence of the City and the City's Representatives, the Licensee will and hereby does indemnify and save harmless the City and the City's Representatives from any and all suits, actions, causes of action, liabilities, damages, costs, claims, expenses (including actual fees of professional advisors) and harm, of any nature or kind whatsoever, whether related to death, bodily injury, property loss, property

damage or consequential loss or damage, which may be connected with or arise from:

- (a) any breach of any obligation set forth in this Agreement to be observed or performed by the Licensee;
- (b) any act, omission, or negligence of the Licensee, its members, officers, directors, employees, agents, contractors, subcontractors, sublicensees, invitees or others for whom it is responsible;
- (c) the use or occupation of the Licence Area; or
- (d) the granting of this Agreement.

Survival of Indemnities

21. All the releases and indemnities contained in this Agreement will survive the expiration or earlier termination of the Term.

Early Termination

22. The Licensee has the right to terminate the agreement prior to the end of the term. All rents will be pro-rated to the date when the landscaping restoration is completed as contemplated in Article 29

Notice of Default

23. If the Licensee fails to observe, comply with or perform any of its covenants, agreements or obligations under this Agreement, the City may deliver to the Licensee a notice of default (in the manner required herein for giving notices) stipulating that the default must be rectified or cured within 15 days of the notice if the default is non-payment of the Licence Fee or Additional Fees and within 30 days of the notice for other defaults, but less or no notice is required to be given by the City in emergency or urgent circumstances, as determined by the City in its sole discretion, acting reasonably, or where the Licensee has failed to keep the Licence Area insured.

City May Cure Default

24. If the City fails to rectify or cure a default within the time and in the manner specified in a notice under section 23 and if the default is one that can be rectified or cured by the City, the City may, without further notice to the Licensee, take all steps considered in its sole discretion necessary to rectify or cure the default and all costs of doing so, including the cost of retaining professional advisors, shall be payable immediately by the Licensee as Additional Fees. Nothing in this Agreement obligates the City to rectify or cure any default of the Licensee but should the City choose to do so, the City shall not be liable to the Licensee for any act or omission in the course of rectifying or curing or attempting to rectify or cure any default.

Distress

25. If the Licence Fee or Additional Fees payable by the Licensee is in arrears, the City or a person authorized in writing by the City may enter upon the Licence Area and seize any goods or chattels and may sell the same.

Termination Upon Default

26. Provided always and it is hereby agreed that the City may, without further notice to the Licensee, terminate this Agreement and enter and take possession of the Licence Area if:
 - (a) the Licence Fee or any Additional Fees is unpaid for 15 days after notice pursuant to section 22; or
 - (b) the Licensee fails to observe, comply with or perform any of its covenants, agreements or obligations herein and the failure is not rectified or cured by the Licensee within the time specified in section 22.

No Compensation Upon Termination

27. The Licensee will make no claim for compensation, in damages or otherwise, upon the lawful termination of this Agreement. If the City terminates this Agreement, the City retains the right to proceed at law against the Licensee for all of the Licence Fee and Additional Fees and other loss or damage and costs, including all prospective losses or prospective damages suffered or to be suffered by the City arising from the default of the Licensee under this Agreement.

Dissolution

28. If the Licensee should cease to exist as a registered company in good standing in the records of the Registrar of Companies, or if it should take any proceedings towards dissolution or winding up or if it should be dissolved or wound up, then at the option of the City, the Rent, Additional Rent and all outstanding levies and charges shall become immediately due and payable and the Term shall immediately become forfeited and void and the City may re-enter and take possession of the Licence Area.

State of Licence Area at Termination

29. At the expiry or earlier termination of this Agreement, the Licensee shall deliver to the City the Licence Area:

- (a) vacant of any signage on the site;
- (b) remediated to public park standards, including the removal of the paved section between the Lands and the Licensee's Lands and replacement of matching landscaping, as determined by the City acting reasonably; and
- (c) otherwise in good repair.

No Assigning or Sublicensing

30. The Licensee shall not assign or sublicense the Licensee's interest in or rights under this Agreement in whole or in part.

Own Cost

31. The Licensee shall perform all of its obligations, covenants and agreements under this Agreement solely at its own cost.

Law to the Contrary

32. This Agreement shall enure to the benefit of and be binding on the parties notwithstanding any rule of law or equity to the contrary.

Severance

33. 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 shall not affect the validity of the remainder of this Agreement.

Governing Law

34. This Agreement shall be construed and governed by with the laws of the Province of British Columbia.

No Waiver

35. Waiver by the City of any default by the Licensee shall not be deemed to be a waiver of any subsequent default. A waiver is effective only if it is in writing.

References

36. Every reference to each party is deemed to include the heirs, executors, administrators, successors, directors, employees, members, servants, agents, officers and invitees of such party where the context so permits or requires.

Amendment

37. This Agreement may not be modified or amended except in writing signed by the City and the Licensee.

Remedies Not Exclusive

38. No remedy conferred upon or reserved to the City is exclusive of any other remedy herein or provided by law, but all such remedies shall be cumulative and may be exercised in any order or concurrently.

No Joint Venture

39. Nothing in this Agreement shall constitute the Licensee the agent, joint venturer or partner of the City or give the Licensee any authority or power to bind the City in any way.

Powers Preserved

40. Nothing in this Agreement affects the rights of the City to exercise its powers within its jurisdiction.

Authority of Licensee

41. The Licensee represents and warrants to the City that it is validly established and in good standing under the laws of the Province of British Columbia, that it has full authority to enter into this Agreement and to carry out the actions contemplated herein, that all resolutions and other preconditions to validity have been validly adopted, and that those signing this Agreement on its behalf are authorized to bind the Licensee by their signatures.

Enurement

42. This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, personal representatives, and corporate successors.

Interpretation

43. Wherever the singular or masculine or neuter is used in this Agreement, the same shall be construed as meaning the plural, the feminine or body corporate where the context so requires.

Captions

44. The captions appearing in this Agreement have been inserted for reference and as a matter of convenience and do not define, limit or enlarge the scope or meaning of this Agreement.

Entire Agreement

45. The provisions of this Agreement herein, constitutes the entire agreement between the parties and supersede all previous communications, representations, warranties, covenants and agreements whether verbal or written between the parties with respect to the subject matter hereof.

Time of Essence

46. Time is of the essence of this Agreement.

Covenants and Conditions

47. All of the provisions of this Agreement shall be deemed and construed to be conditions as well as covenants as though the words specifically expressing or importing covenants and conditions were used in each separate section.

Interest

48. If the Licensee fails to pay any money due to the City under this Agreement, the amount unpaid (including unpaid interest) shall bear interest at the rate of 10% per annum calculated monthly not in advance, from the date due until the date paid.

No Abatement

49. Unless otherwise provided herein, the Licensee is not entitled to any abatement or reduction or deduction from the Licence Fee or Additional Fees.

Further Assurances

50. The parties shall execute and do all such further deeds, acts, things and assurances as may be reasonably required to carry out the intent of this Agreement.

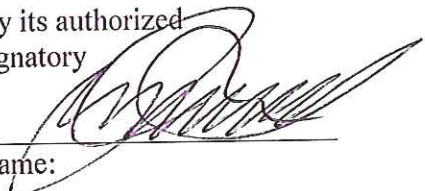
IN WITNESS WHEREOF the parties hereto have executed this lease under seal as of the day and year first above written.

CITY OF KELOWNA
by its authorized signatories

Name:

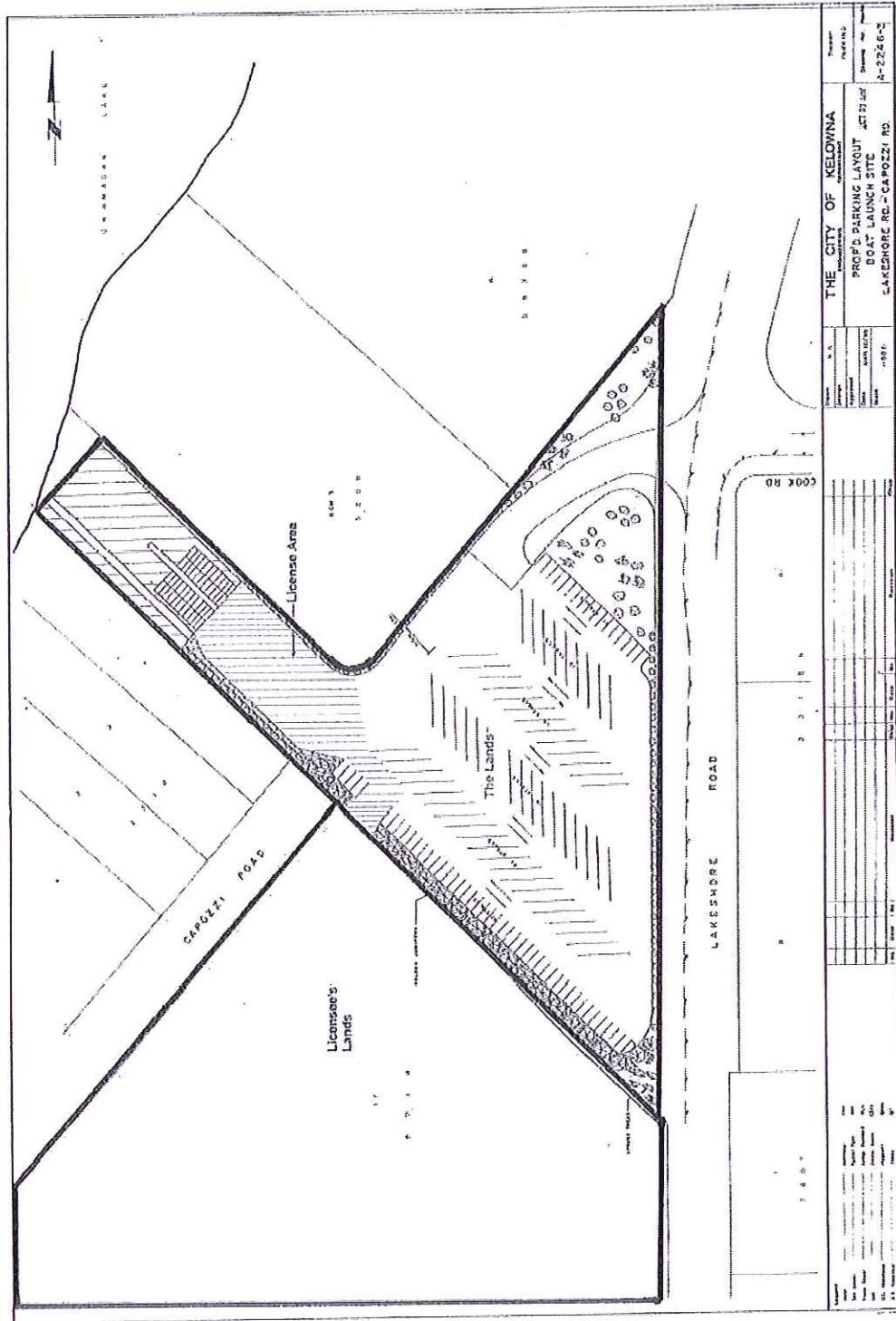
Name:

AQUA RESORT LTD.
by its authorized
signatory



Name:

SKETCH OF LICENCE AREA





1435 Water Street
Kelowna, BC V1Y 1J4
250 469-8500
kelowna.ca

SCHEDULE "B"

APPENDIX A-1
CERTIFICATE OF INSURANCE

City Dept.: Real Estate & Building Services
Dept. Contact: Ron Forbes
Project/Contract/Event: Aqua Resort Ltd.-Licence to Use

Insured

Name:
Address:

Broker

Name:
Address:

Location and nature of operation and/or contract reference to which this Certificate applies:

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Type of Insurance	Company & Policy Number	Policy Dates		Limits of Liability/Amounts
		Effective	Expiry	
Section 1 Comprehensive General Liability including: <ul style="list-style-type: none">• Products/Completed Operations;• Blanket Contractual;• Contractor's Protective;• Personal Injury;• Contingent Employer's Liability;• Broad Form Property Damage;• Non-Owned Automobile;• Cross Liability Clause.				Bodily Injury and Property Damage \$ 2,000,000 Inclusive \$ _____ Aggregate \$ _____ Deductible
Section 2 Automobile Liability				Bodily Injury and Property Damage \$ 2,000,000 Inclusive

It is understood and agreed that the policy/policies noted above shall contain amendments to reflect the following:

1. Any Deductible or Reimbursement Clause contained in the policy shall not apply to the City of Kelowna and shall be the sole responsibility of the Insured named above.
2. The City of Kelowna is named as an Additional Insured.
3. 30 days prior written notice of material change and/or cancellation will be given to the City of Kelowna.

Print Name _____

Title _____

Company (Insurer or Broker) _____

Signature of Authorized Signatory _____

Date _____