Minutes - Executive Policy Committee - September 17, 2003

Minute No. 378
Report - Standing Policy Committee on Property and Development - September 4, 2003

Item No. 27 Sale of City-owned lands / Leave and License - lands within the Bishop Grandin Boulevard right-of-way - St. Vital Shopping Centre Files DAC 14/2001 and ED(35)

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

The Executive Policy Committee concurred in the recommendation of the Standing Policy Committee on Property and Development and submits the following to Council:

1. That the request from OPB Realty Inc., owners of the St. Vital Shopping Centre, to amend the date of possession and adjustments for the closing and sale of the lands, identified as "Street Right-Of-Way Surplus To The Public Works Dept." on Misc. Plan No. 10695/5 as approved by Council on July 18, 2001, from July 19, 2002 to January 16, 2003, be denied.

2. That the commencement date of the Leave and License Agreement for lands identified as "Subject Leave and License" on Misc. Plan No. 10695/7 as approved by Council on July 18, 2001 in favour of OPB Realty Inc., be amended from September 1, 2001 to July 19, 2002.

3. That a new Leave and License Agreement in favour of OPB Realty Inc., owners of St. Vital Shopping Centre, to develop and maintain a vehicle parking area in the portion of the Bishop Grandin Boulevard right-of-way shown shaded and identified as "Subject Leave and License" on Misc. Plan No. 10695/12 be approved in accordance with the terms and conditions as outlined in attached "Schedule A" and any other such terms and conditions deemed necessary by the Director of Planning Property and Development and by the City Solicitor/Manager of Legal Services to protect the City's interest.

4. That the Proper Officers of the City be authorized to do all things necessary to implement the intent of the foregoing.

Minutes - Executive Policy Committee - September 17, 2003

Report - Standing Policy Committee on Property and Development - September 4, 2003

DECISION MAKING HISTORY:

Moved by Councillor Vandal,

That the recommendation of the Standing Policy Committee on Property and Development be concurred in and forwarded to Council.

Carried

STANDING COMMITTEE RECOMMENDATION:

On September 4, 2003, the Standing Policy Committee on Property and Development concurred in the administrative recommendation and submitted the matter to Executive Policy Committee and Council.

Re: Request to Amend Date of Possession and Adjustments for the Previously Approved Sale of City-Owned Land and Commencement Date of Previously Approved Leave and License Agreement and Proposed New Leave and License Agreement for Lands Within the Bishop Grandin Blvd. Right-Of-Way - St. Vital Shopping Centre (OPB Realty Inc.)
Riel Community
St. Vital Ward

For submission to: **Standing Policy Committee on Property and Development.**

Original report signed by: **Director of Planning, Property and Development**

Report date: August 18, 2003

Recommendation(s):

1. That OPB Realty Inc., owners of the St. Vital Shopping Centre, request to amend the date of possession and adjustments for the closing and sale of the lands, identified as "Street Right-Of-Way Surplus To The Public Works Dept." on Misc. Plan No. 10695/5, attached, as approved by Council on July 18, 2001, from July 19, 2002 to January 16, 2003 be denied.

2. That the commencement date of the Leave and License Agreement for lands identified as "Subject Leave & License" on Misc. Plan No. 10695/7, attached, as approved by Council on July 18, 2001 in favour of OPB Realty Inc., be amended from September 1, 2001 to July 19, 2002.

3. That a new Leave and License Agreement in favour of OPB Realty Inc., owners of St. Vital Shopping Centre, to develop and maintain a vehicle parking area in the portion of the Bishop Grandin Boulevard right-of-way shown shaded and identified as "Subject Leave and License" on Misc. Plan No. 10695/12, attached, be approved in accordance with the terms and conditions as outlined in attached "Schedule A" and any other such terms and conditions deemed necessary by the Director of the Planning Property and Development Department and by the City Solicitor/Manager of Legal Services to protect the City's interest.

4. That the Proper Officers of the City be authorized to do all things necessary to implement the intent of the foregoing.

REPORT SUMMARY

Key Issues:

- On July 18, 2001, Council approved the terms and conditions for the sale of the lands identified as "Street Right-Of-Way Surplus To The Public Works Dept." on Misc. Plan No. 10695/5, (to be closed pursuant to By-law), to OPB Realty Inc., the owners of the St. Vital Shopping Centre (hereinafter called the Centre) and the Leave and License Agreement for the use of additional lands within the Bishop Grandin right-of-way identified as "Subject Leave & License" on Misc. Plan No. 10695/7 for parking.

- The July 18, 2001 Council approved terms and conditions for the sale of the subject property defined the Date of Closing, Possession and Adjustments to be "30 days following the enactment of the closing by-law for the subject right-of-way".

- On June 19, 2002 Council enacted Road Closing By-law No. 8072/2002, thus creating the subject property and establishing the Date of Closing, Possession and Adjustments to be July 19, 2002.

- On July 19, 2002 the City Legal Services Department advised the Centre's Solicitor, via couriered letter, that registration of the Transfer of Land for the subject property may be delayed at the Winnipeg Land Titles Office.

- However, as of July 19, 2002 the Centre had the legal right, pursuant to the terms of the sale, to take possession of the subject property and commence with the development of the site at anytime thereafter. It is not an uncommon practice for a Purchaser to take possession and begin development of a property prior to the Transfer of Title being registered in the Purchaser's name.

- On January 16, 2003 title to the subject property was issued in the name of the Purchaser.

- The Centre did not advise the Department of its concerns regarding the dates of possession and adjustments until January 22, 2003, nor at any time did it advise the Department that development of the site was being held in abeyance due to the delay in registering the Transfer of Title. The development of the subject property began in the early spring of 2003.

- The Centre has requested that the date of possession and adjustments for the Offer to Purchase be deferred from July 19, 2002 to January 16, 2003 and that the commencement date for the Leave and License Agreement be amended and deferred from September 1, 2001 to January 16, 2003.

- The Department is of the opinion that there is no reason why development of the subject property could not have commenced on or after July 19, 2002. Therefore the Department does not support the Centre's request to amend the dates of possession and adjustments for the property being purchased from the City.

- The Department however acknowledges the Centre's position that there is a relationship between the acquisition of the subject property and the requirement for and development of the Leave and License area. Therefore, it would be reasonable that the commencement date for the Leave and License Agreement be amended to be coincident with the July 19th, 2002 possession date of the lands purchased.

- The Department does not support the Centre's request to amend the commencement date of the Leave and License Agreement to January 16, 2003, but it recommends that the commencement date be amended to July 19, 2002, the Council approved date of possession and adjustments.

- The Centre wishes to develop the portion of the Bishop Grandin Boulevard right-of-way described as the "Subject Leave and License" on the attached Misc. Plan No. 10695/12, for parking purposes.

- The Public Works Department has advised that the "Subject Leave and License" area can be made available for approximately 10 years.

- The Centre has consulted with the Bishop Grandin Greenway Association in regard to the design of the area and the Association is pleased with the Centre's design.

- The proposed negotiated terms and conditions for the proposed new Leave and License Agreement are considered reasonable and fair and are consistent with the previous Leave and License Agreement as approved by Council in 2001.

Implications of the Recommendation(s):

General implications:

X	**None**
	For the organization overall and/or for other departments
	For the community and/or organizations external to the City of Winnipeg
	Involves a multi-year contract

Comment(s):

-

Policy implications:

X	**No**
	Yes

Comment(s):

-

Environmental implications:

X	**No**
	Yes

Comment(s):

- No issues of environmental contamination are apparent on this portion of the Bishop Grandin Boulevard right-of-way.

Human resources implications:

X	**No**
	Yes

Comment(s):

-

Financial implications:

X	**Within approved current and/or capital budget**
	Current and/or capital budget adjustment required

-

REASON FOR THE REPORT:

The Department has received a request from OPB Realty Inc. (hereinafter referred to as the Centre) to amend the date of possession and adjustments in the Council approved Offer to Purchase lands identified as "Street Right-of-way Surplus to the Public Works Dept." on Misc. Plan No. 10695/5, attached, from July 19, 2002 to January 16, 2003.

The Centre has also requested that the commencement date of the previously Council approved Leave and License Agreement for lands identified as "Subject Leave & License" on Misc. Plan No. 10695/7, attached, be amended from September 1, 2001 to January 16, 2003.

Changes to the terms and conditions of Purchase/Sale Agreements and Leave and License Agreements that have already been approved by Council require the further consideration and approval of Council

The Centre also proposes to enter into a new Leave and License Agreement for additional lands within the Bishop Grandin right-of-way, for the development and maintenance of a parking lot.

In general, The City of Winnipeg cannot grant the lease of land comprising a public right-of-way except by first legally closing the public right-of-way. The City has, however, the power to permit or license the use of public right-of-way subject to the continuing pleasure of Council. This report seeks Council's approval to a proposed Leave and License Agreement, in favour of the Centre, as negotiated by the Department respecting the use of a portion of the Bishop Grandin Boulevard right-of-way identified as "Subject Leave and License" on Misc. Plan No. 10695/12, attached.

HISTORY:

At its meeting of July 18, 2001 Council approved, among other things, the sale of City-owned lands identified as, "Street Right-Of-Way Surplus To The Public Works Dept." on Misc. Plan No. 10695/5, attached, and a Leave and License Agreement for lands identified as "Subject Leave & License" on Misc. Plan No. 10695/7, attached, both in favour of OPB Realty Inc., the owners of St. Vital Shopping Centre (hereinafter called the Centre).

At the time of Council's approval, the parcels of land to be sold to the Centre were portions of legally opened right of ways. Therefore, prior to the transferring title of these parcels of land to the Centre a road closing by-law was required.

On June 19, 2002 Council enacted By-law No. 8072/2002 thus legally closing the portion of the street right-of-way creating the two parcels of land, to be sold to the Centre. In accordance with the Purchase/Sale agreement, the date of closing, possession and adjustments was to be 30 days from the enactment of the road closing by-law or July 19, 2002. Thirty days is considered to be sufficient time to prepare the appropriate documents to enable the Transfer of Land.

On July 16, 2002 the Centre forwarded the Department a cheque for the sum of $489,460.50, which represented the balance owing for the purchase of the subject property.

On July 19, 2002 the City's Legal Services couriered to the Centre's Solicitor, among other things, a Transfer of Land drawn and executed in favour of the Centre to convey the subject property to the Centre. Legal Services further advised the Purchaser that three underlying titles, dating back to the early 1900's, could not be located. Unless these titles could be located or evidence provided that they no longer existed, there might be a delay at the Winnipeg Land Titles Office in transferring and registering the title to the land.

Initially the Winnipeg Land Titles Office would not allow the Transfer of Land to be registered. However, after several discussions between the City's Geomatics Branch and the Land Titles Office, the District Registrar agreed to allow the Transfer of Land to be registered. This information was forwarded to the Centre's Solicitor in mid December of 2002. Title to the subject property was issued in the name of the Centre on January 16, 2003.

On January 22, 2003, the Solicitor for the Centre advised the Department that he disagreed with the July 19, 2002 date of possession and adjustments and said that this date should be amended to reflect the date that title to the subject property was issued in the name of the Centre on January 16, 2003.

On January 28, 2003 the General Manager for the Centre forwarded the Department an e-mail reiterating its disagreement with the July 19, 2002 date of adjustment requesting that consideration be given to the following:

- The Centre did not take possession of the subject property until January 16, 2003 when the City advised that land could now be registered in the Centre's name (OPB Realty Inc.) and no development activity nor construction had taken place prior to this date.
- During this time the subject lands has remained signed "Private Property – City of Winnipeg" and any use of these land for parking purposes was not at the direction of the Centre.
- The City received payment for these lands on July 16, 2002 and has had the use of these funds in spite of the Centre not having possession or use of the land until January 16, 2003.

On April 8, 2003 the Centre forwarded the Department a letter advising it wished to explore the possibility to lease the remaining portion of the Bishop Grandin Blvd. right-of-way, described as "Subject Leave and License" on attached Misc. Plan No. 10695/12, under the same terms and conditions of the July 18, 2001 Council approved Leave and Licence Agreement.

On April 17, 2003 the Department met with representatives of the Centre to further discuss the request to change the dates of possession and adjustments. The Centre reiterated its January 28, 2003 position as to why it felt that the July 19, 2002 dates of possession and adjustments was not fair and reasonable.

Also at the April 17, 2003 meeting the Centre enquired if the remaining portion of land identified as "Right of Way Available for Leave and License", on attached Misc. Plan No. 10695/7, was still available, and if so, it would be prepared to enter into an additional Leave and License Agreement for this property.

On June 10, 2003 the Department was advised that the Centre had made an encroachment application to the City's Zoning and Permits Division for the development of the "Subject Leave and License" area for parking purposes.

In a subsequent conversation on August 15, 2003, the Centre further advised the Department that it perceives its expressed intention to enter into a second Leave and License Agreement for additional Bishop Grandin Blvd. right-of-way lands warrants the City's favorable consideration of the requested change to the commencement dates of the prior Council approved Offer to Purchase and Leave and License Agreement.

DISCUSSION:

Sale of the Closed R.O.W. as Approved by Council on June 19, 2001

Council approved the terms and conditions of the sale of the lands identified on Misc. Plan No. 10695/7 as "Street Right Of Way Surplus to the Public Works Dept." on July 18, 2001 which defined the Date of Closing, Possession and Adjustments to be "30 days following the enactment of the closing by-law for the subject right-of-way". On June 19, 2002 Council enacted a Road Closing By-law No. 8072/2002 thus creating the subject property and establishing the Date of Closing, Possession and Adjustments to be July 19, 2002.

In accordance with the Council approved Purchase/Sale Agreement, effective July 19, 2002 the Centre had the legal right to take possession of the subject property and commence with its development. It is not an uncommon practice for a Purchaser to take possession of a property prior to the Transfer of Title being registered in the purchaser's name nor is it uncommon for a Purchaser to begin the development of the site prior to the new title being registered. The City has many precedent-setting examples where the aforementioned has taken place.

In a meeting held on April 17, 2003, the Centre supported its e-mail dated January 28, 2003 requesting the City to amend the effective closing date of the sale by explaining that the subject property was required to allow for the proposed expansion of one of its anchor tenant's retail floor space. To accomplish the proposed expansion the building would have to be extended into the present parking area. The purchase of the City owned lands would allow it to maintain an acceptable retail area to parking ratio as well as the re-alignment of interior roadways. The Centre further commented that due to the uncertainty when title to the subject property would be transferred, it would not have been prudent for any development of the site to take place

Prior to the aforementioned time the Centre had not made any indication to the Department that there were any concerns in regard to the date of possession and adjustments or that the

development of the subject property was being delayed because title had yet to be issued in the Centre's name.

The Department is of the opinion that there were no extenuating circumstances preventing the Centre from taking possession of or commencing with the development of the subject property on or anytime after July 19, 2002. Any decision not to proceed with the development of the subject property was at the sole discretion of the Centre and therefore the date of possession and adjustments should remain July 19, 2002.

Leave and License Agreement (2.44 acres) as Approved by Council on June 19, 2001

In the aforementioned meeting of April 17, 2003, the Centre further advised the Department that it felt there was a direct relationship between the development of the subject property and the Leave and License that commenced on September 1, 2001. If the Centre expanded its retail floor area the purchase of the subject property was required to maintain acceptable retail floor area to parking ratio and re-alignment of interior roadways. However this did not provide for any additional parking required during the Centre's "busy seasons". The development of the Leave and License area would allow for this additional parking. Therefore, until such time that title to the subject property was issued in the Centre's name the Leave and License area was not required nor was it developed.

The Centre has also requested that the commencement date of the Leave and License Agreement be changed from September 1, 2001 to January 16, 2003, citing that no development of the Leave and License lands had taken place.

The Department inspected the Leave and License area in early June of 2003 and determined that aside from the relocation of trees that took place in the spring of 2002, development of the Leave and License area had only recently commenced; the start date of these works is unknown.

The Department acknowledges the Centre's position that there is a relationship between the acquisition of the property for development and the need for the Leave and License area and that the Centre's request to amend the commencement date of the Leave and License Agreement is not unreasonable.

However, the Department does not support the Centre's request to amend the commencement date of the Leave and License Agreement to January 16, 2003; rather the Department recommends that the commencement date be amended to July 19, 2002, being the date coincident with the Council approved date of possession and adjustments for the Centre's purchase of the legally closed lands.

Proposed Leave and License Agreement for Additional Lands Within the Bishop Grandin Blvd. Right-Of-Way

Originally in the fall of 1999 the Centre contacted the Department and advised that it was interested in purchasing all lands surplus to the City adjacent to its property along Bishop Grandin Boulevard. It was determined that most of the City-owned lands, including legally

opened right-of-ways, were required for the future development of Bishop Grandin Boulevard therefore only a portion of the City-owned lands and right of ways could be made available for sale and approximately 4.736 acres of legally opened right-of-way was available for Leave and License purposes.

On June 18, 2001 the Riel Community Committee concurred with the recommendation of the Department that the 4.736 acres of legally open right-of-way be made available to the Centre for Leave and Licence purposes for the development of a parking lot

During the negotiation process for the proposed Leave and License the Bishop Grandin Greenway Association was contacted and asked to provide its comments in regard to the proposed Leave and License. The Bishop Grandin Greenway Association is a non-profit group with the mandate "*to create, enhance, and conserve an accessible network of nature areas and pathways that link and support both wildlife and human communities along Bishop Grandin Boulevard*." The Bishop Grandin Greenway Association was included in the Centre's design of the Leave and License area resulting in a number of shrubs and trees being preserved or relocated. In addition, the Centre has made a financial contribution to the Bishop Grandin Greenway Association's fundraising efforts for the installation of walking and bike trails.

Also during the negotiation process the Centre advised the Department that at this time it only required approximately 2.44 acres of the total 4.736 acres available.

The City's Public Works Department has advised that the remaining 2.35 acre portion of the right-of-way is still available for Leave and License purposes for approximately 10 years, if not longer, and that it has no objections for this portion of the Bishop Grandin Boulevard right-of-way to be developed for parking purposes.

The Centre has advised that it has maintained a good working relationship with the Bishop Grandin Greenway Association. A representative of the Association has had the opportunity to review the proposed design plans for the proposed new Leave and License area and is very happy that the Centre is making every effort to preserve a number of mature trees and shrubs in its development plan.

The Department has reviewed the terms and conditions of the "Existing Leave and License" agreement and has determined that it would be acceptable to use similar terms and conditions for the proposed new Leave and License agreement. Although the proposed rental rate is considered to be at the lower end of the acceptable rental rate range, consideration has been given to the development limitations due to the existing water-main located within the area. As well it is very unlikely that any other development of the site other then for parking purposes would receive the community's approval or would adequately address the Bishop Grandin Greenway Association's concerns. However, it must also be recognized that the St. Vital Shopping Centre operation will derive a benefit as a result of its use of the right of way lands as there are no other opportunities for it to expand to other adjacent property.

The proposed Leave and License Agreement for the additional 2.25 acres will result in net revenue to the City of approximately $774,000.00 (base rent plus realty tax equivalent charges) over 9 years assuming that the City does not terminate the agreement prior to its expiry date.

The Centre has further advised that it intends to continue to lease the proposed new Leave and License area and the existing Leave and License areas after both agreements expire and in the event that the properties ever become available for sale, it would consider the purchase of both.

Financial Impact Statement

Date: August 18, 2003

Project Name:

First Year of Program 2003

Amened Date of Commencement of Previously Approved Leave and License Agrmt. & Proposed New Leave and License Agrmt. - Bishop Grandin Blvd. Right-Of-Way - St. Vital Shopping Centre, OPB Realty Inc.

	2003	2004	2005	2006	2007
Capital					
Capital Expenditures Required	$ -	$ -	$ -	$ -	$ -
Less: Existing Budgeted Costs	-	-	-	-	-
Additional Capital Budget Required	$ -	$ -	$ -	$ -	$ -
Funding Sources:					
Debt - Internal	$ -	$ -	$ -	$ -	$ -
External	-	-	-	-	-
Grants (Identify)	-	-	-	-	-
Reserves, Equity, Surplus, Other	-	-	-	-	-
Total Funding	$ -	$ -	$ -	$ -	$ -
Total Additional Capital Budget Required	$ -				
Total Additional Debt Required	$ -				
Current Expenditures/Revenues					
Direct Costs	$ -	$ -	$ -	$ -	$ -
Less: Incremental Revenue/Recovery	151,087	175,301	175,301	175,301	175,301
Net Cost/(Benefit)	$ (151,087)	$ (175,301)	$ (175,301)	$ (175,301)	$ (175,301)
Less: Existing Budget Amounts	-	-	-	-	-
Net Budget Adjustment Required	$ (151,087)	$ (175,301)	$ (175,301)	$ (175,301)	$ (175,301)

Additional Comments:

Amendment of Dates of Possession and Adjustments -Changes related to the delay in implementing the original Leave and License Agreement have been ignored. Leave and Licence Agreements – The Incremental Revenue/Recovery consists of leasing revenue and equivalent to Realty Taxes. The 2003 value of $151,087.00 is comprised of the values from the July 18/01 Council approved Leave and License July 19/02 to Dec. 31/02 - $40,070.00 & Jan. 1/03 to Dec. 31/03 - $89,354.00; The Proposed Leave and License with a commencement date of Oct. 1/03, Oct. 1/03 to Dec. 31/03 - $21,663.00. The 2004, 2005, etc. values are the total of both Leave and License Agreements $175,301. Rent & Tax Equiv. subject to GST.

"Original signed by"
Gord Courage, Manager
Support Services Division

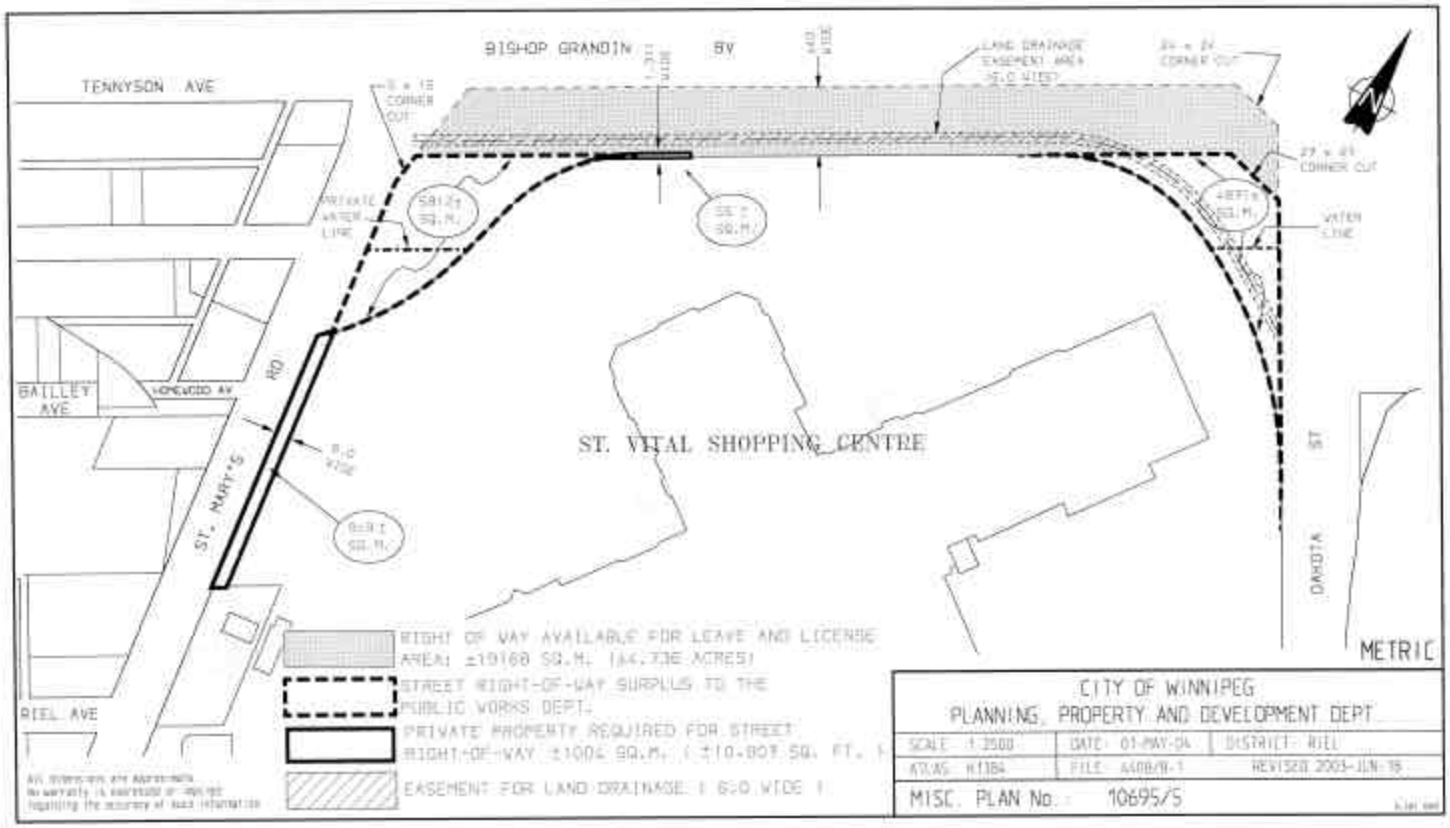
IN PREPARING THIS REPORT, THERE WAS CONSULTATION WITH AND CONCURRENCE BY:

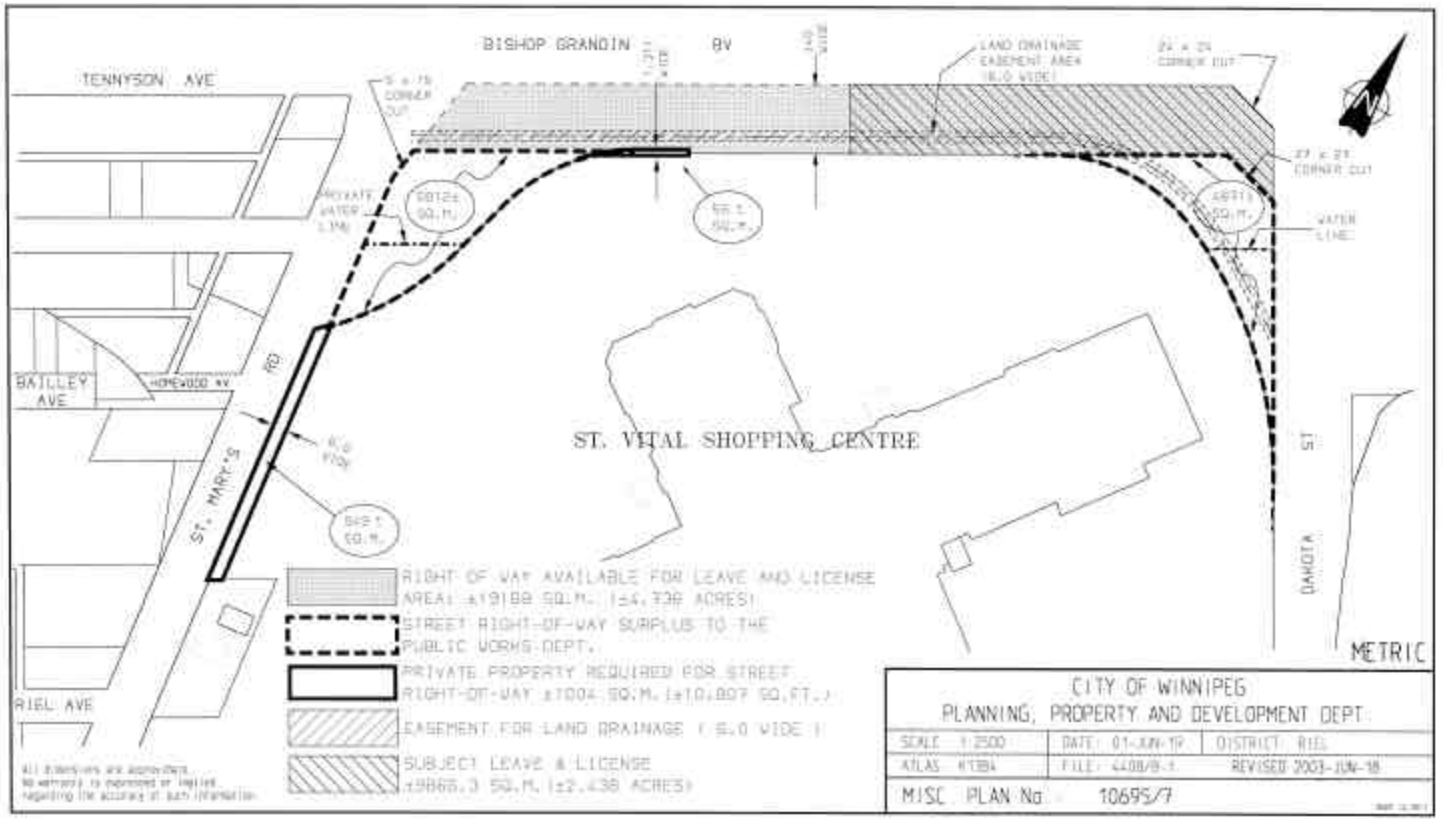
The City's Legal Services Division and Geomatics Branch.

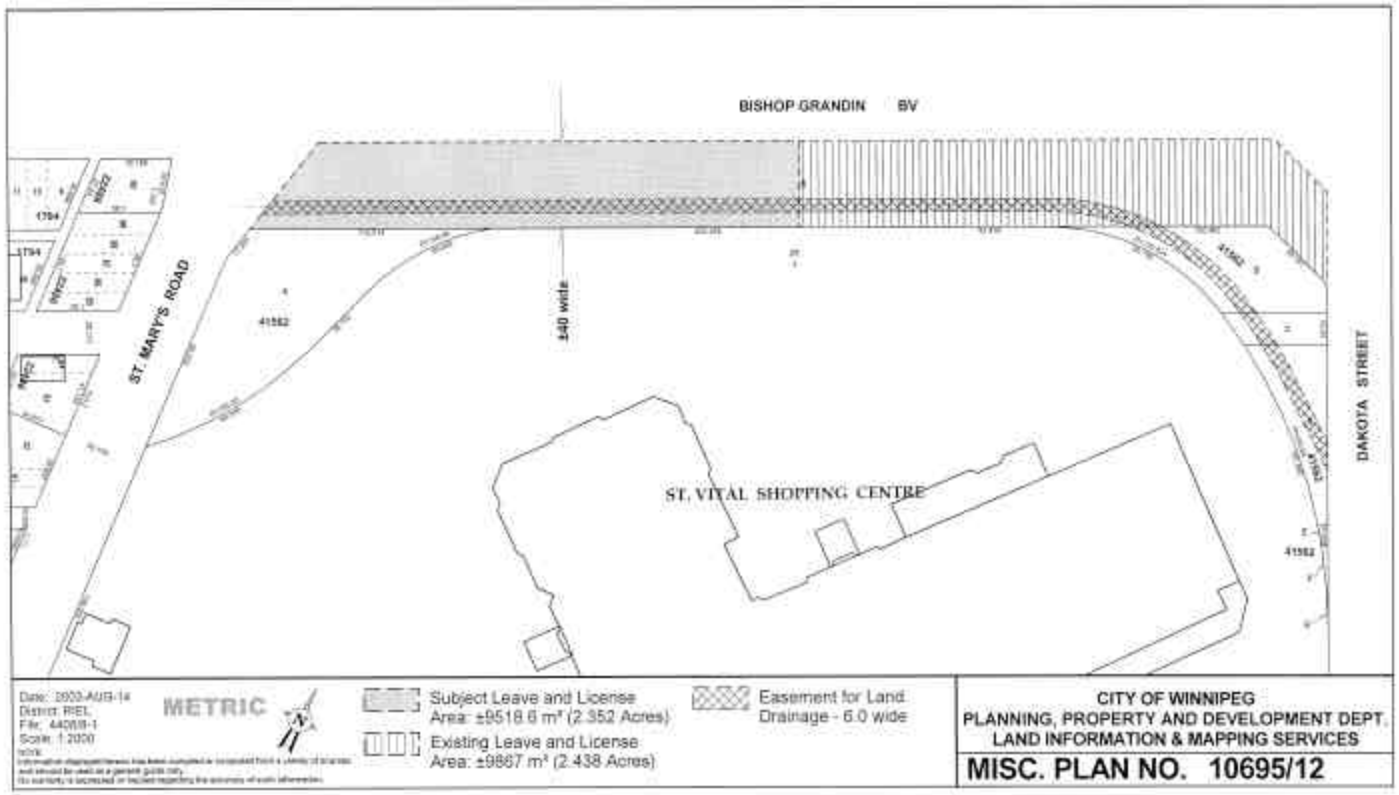
THIS REPORT SUBMITTED BY:

Planning, Property and Development Department
Division: Real Estate Division
Prepared by: Stewart Anderson
PPD File #: 4088/8-1 Vol. 4

Document name: o:\reports directive\real estate\leasing\(sa) stvitmal -renego-rpt.doc


BISHOP GRANDIN BV
TENNYSON AVE
BAILLEY AVE
HOMEWOOD AV
ST. MARY'S RD
RIEL AVE
LAND DRAINAGE EASEMENT AREA (6.0 WIDE)
5.0 x 15 CORNER CUT
27 x 27 CORNER CUT
PRIVATE WATER LINE
WATER LINE
ST. VITAL SHOPPING CENTRE
DAKOTA ST
METRIC
RIGHT OF WAY AVAILABLE FOR LEASE AND LICENSE
AREA: ±19160 SQ.M. (4.736 ACRES)
STREET RIGHT-OF-WAY SURPLUS TO THE PUBLIC WORKS DEPT.
PRIVATE PROPERTY REQUIRED FOR STREET RIGHT-OF-WAY ±1004 SQ.M. (±10,807 SQ. FT.)
EASEMENT FOR LAND DRAINAGE (6.0 WIDE)
CITY OF WINNIPEG
PLANNING, PROPERTY AND DEVELOPMENT DEPT.
SCALE 1:2500
DATE: 01-MAY-04
DISTRICT: RIEL
ATLAS: H13B4
FILE: 4408/R-1
REVISED 2005-JUN-15
MISC. PLAN No. 10695/5


BISHOP GRANDIN BV
TENNYSON AVE
BAILLEY AVE
HOMEWOOD AV
RIEL AVE
ST. MARY'S RD
ST. VITAL SHOPPING CENTRE
DAKOTA ST
LAND DRAINAGE EASEMENT AREA (6.0 WIDE)
5 x 15 CORNER CUT
25 x 25 CORNER CUT
27 x 27 CORNER CUT
PRIVATE WATER LINE
WATER LINE
RIGHT OF WAY AVAILABLE FOR LEAVE AND LICENSE AREA: ±19188 SQ.M. (±4.738 ACRES)
STREET RIGHT-OF-WAY SURPLUS TO THE PUBLIC WORKS DEPT.
PRIVATE PROPERTY REQUIRED FOR STREET RIGHT-OF-WAY ±1004 SQ.M. (±10,807 SQ.FT.)
EASEMENT FOR LAND DRAINAGE (6.0 WIDE)
SUBJECT LEAVE & LICENSE ±9865.3 SQ.M. (±2.438 ACRES)
All dimensions are approximate. No warranty is expressed or implied regarding the accuracy of such information.
METRIC
CITY OF WINNIPEG
PLANNING, PROPERTY AND DEVELOPMENT DEPT.
SCALE 1:2500
DATE: 01-JUN-19
DISTRICT: RIEL
ATLAS: NTS84
FILE: 4408/8-1
REVISED 2003-JUN-18
MISC. PLAN No. 10695/7


BISHOP GRANDIN BV
ST. MARY'S ROAD
±40 wide
DAKOTA STREET
ST. VITAL SHOPPING CENTRE
41562
1794
Date: 2003-AUG-14
District: REL
File: 440618-1
Scale: 1:2000
METRIC
Subject Leave and License
Area: ±9518.6 m² (2.352 Acres)
Existing Leave and License
Area: ±9867 m² (2.438 Acres)
Easement for Land Drainage - 6.0 wide
CITY OF WINNIPEG
PLANNING, PROPERTY AND DEVELOPMENT DEPT.
LAND INFORMATION & MAPPING SERVICES
MISC. PLAN NO. 10695/12

"SCHEDULE A"

PROPOSED TERMS AND CONDITIONS OF LEAVE AND LICENSE

(9518.6 SQ. M – EAST OF ST. MARY'S RD, SOUTH OF BISHOP GRANDIN)

BETWEEN:

THE CITY OF WINNIPEG,
(herein called ***"the City"***),

OF THE FIRST PART,

- and -

OPB REALTY INC.

(herein called ***"the Licensee"***),

OF THE SECOND PART.

WHEREAS the City, in accordance with the provisions of The City of Winnipeg Act, is empowered to control the use and permit private works in the streets within the City of Winnipeg;

AND WHEREAS the Licensee has requested permission to use a portion of Bishop Grandin Boulevard, being approximately 9,518.6 square metres (or 102,453.12 square feet), shown illustrated and identified as ***"SUBJECT LEAVE & LICENCE AREA"*** on Misc. Plan No. 10695/12 hereto attached (herein called ***"the Land"***) for the purpose of a parking lot in conjunction with the Licensee's adjoining shopping centre;

AND WHEREAS the City has consented to permit the Licensee to use the Land for the purpose of a parking lot as aforesaid, subject to the terms, covenants and conditions in this Agreement contained;

NOW THEREFORE THIS AGREEMENT WITNESSETH THAT in consideration of the payments hereby reserved and the covenants on the part of the Licensee hereinafter contained, the parties hereto covenant and agree, each with the other, as follows:

1. The preamble shall form an integral part of this Agreement.

2. (a) The City, insofar as it lawfully can and may, and subject to the terms and conditions hereinafter set forth, hereby grants leave and licence to the Licensee to use the Land for the purpose of a parking lot as aforesaid and for no other purposes whatsoever.

(b) The leave and licence hereby granted shall commence on the 1st day of month immediately proceeding Council's approval of the proposed Leave and License, and shall be fully ended on the 31st day of July, A.D., 2006 (herein called ***"the said term"***).

LICENCE FEE, TAXES & OPERATING COSTS

3. The Licensee hereby covenants and agrees with the City that it shall during the said term, pay:

(a) to the City, a minimum licence fee (herein called ***"the licence fee"***) in respect of each year or any part thereof, in the amount of **FIFTY THREE THOUSAND TWO HUNDRED AND SEVENTY-SIX ($53,276.00) DOLLARS** of lawful money of Canada, payable in advance on the 1st day of month immediately proceeding Council's approval of the proposed Leave and License, in each and every year of the said term;

(b) in addition to the licence fee:

- to the City, an amount equivalent to the realty taxes, including local improvement levies, which would be charged in respect of the Land if it were privately held and subject to taxation, in each year during the term of this Agreement. Any amount so payable shall be paid within thirty (30) days of the request for payment being made by the City; and

- all licence fees and business tax together with all applicable goods and services tax which may be charged in respect of the use and occupation of the Land by the Licensee, whether such fees and taxes are charged by any municipal, provincial or federal authority or otherwise; and

- all costs, utilities and operating expenses in connection with its use of the Land.

USE

4. The Land shall be used as a parking lot in conjunction with its adjoining shopping centre only and for no other purposes whatsoever, at the sole cost, effort and expense of the Licensee.

DEVELOPMENT

5. (a) The Licensee hereby acknowledges and undertakes that it shall, at its sole cost effort and expense:

- prior to the commencement of any work done in connection with the development of the Land as herein contemplated submit to the City's Director of Water and Waste and the City's Director of Public Works for approval, site development plans and drawings (herein called ***"the plans"***) which shall identify all works required for the protection of the City's municipal services located in, on, under or upon the Land;

- complete the development of an asphalt parking area (herein called ***"the parking area"***), concrete curbs and /or fencing in strict compliance with the plans and in a good and workmanlike manner, ensuring that said concrete curbs and/or fencing is installed around the perimeter of the parking area so as to contain all vehicular traffic to the asphalt surface; and

- ensure that all conditions of approval by the City of the plans are complied with at all times during and after construction;

(b) The Licensee shall not erect or permit the erection of any building or other structure upon the Land, whether underground, surface and/or above ground, whether permanent or temporary, whether having a foundation or not, whether an improvement or an enhancement, nor make any excavation therein nor place any fill thereon which has not been pre-approved of by the City, without having first obtained the prior written consent of the City's Director of Planning, Property and Development (herein called ***"the Director"***), and shall, at its sole cost, effort and expense, obtain all necessary permits from the City's Permits Branch, Planning, Property and Development Department; and

(c) The Licensee hereby acknowledges and agrees that the size and location of any and all approaches, if required, are subject to the prior written approval of the City's Director of Public Works.

COMPLIANCE WITH LAWS

6. The Licensee shall:

(a) at its sole cost, effort and expense, obtain all necessary permits and shall comply promptly with all laws, by-laws, ordinances, rules, regulations, orders, requirements and recommendations of any and all federal, provincial, municipal and other governmental authorities or associations of insurance underwriters or agents which may be applicable to the Licensee or to the manner of use of the Land;

(b) at its sole cost, effort and expense, ensure that all environmental contaminants are received, handled, used, stored, treated, shipped and disposed of in the manner required from time to time by applicable laws, by-laws, regulations, rules or requirements of all authorities having jurisdiction over the demised premises or the Licensee; and

(c) not at any time release into the environment, or deposit, discharge, place or dispose of, at, on or near the demised premises and/or into the Red River, any dangerous goods as that term is defined in The Dangerous Goods Handling and Transportation Act, R.S.M. 1987, c.D12, as amended, replaced or substituted from time to time.

ENVIRONMENTAL ASSESSMENT and/or SOIL TESTING

7. The Licensee hereby acknowledges and agrees that the City has made no representation, warranties or guarantees of any nature or kind whatsoever as to the quality, condition or suitability of the Land for any use or purpose, nor as to any environmental conditions, which may exist.

FURTHER, the Licensee agrees that in the event the Licensee, at its sole cost, effort and expense conducts or causes to be conducted an Environmental Site Assessment and/or soil testing of the Land (herein called ***"the said Assessment"***), and in that event it shall:

(a) maintain the Land in safe condition at all times during the conduct of any work done in pursuance of this Clause 7;

(b) restore the Land to the same condition as prior to its entering in or upon same in pursuance of this Clause 7;

(c) indemnify and save harmless the City from and against all damages and claims arising out of or in any way attributable to the conduct of the said Assessment;

(d) provide copies of any such Environmental Site Assessment and/or Report concerning soil testing of the Land to the City for its own use, at no cost to the City.

AND in the event it is determined as a result of the said Assessment that contamination levels exceed Provincial Environmental Standards for the Licensee's intended use of the Land and documentation to that effect is produced to the City prior to the commencement

of this Leave and Licence Agreement, the Licensee may at its sole discretion, terminate this Leave and Licence Agreement and in that event, any and all rights, interests, entitlements, obligations and liabilities on the parts of the respective parties hereto, shall be deemed null and void.

FURTHER if the City has not been advised of any non-compliance of the Land to Provincial Environmental Standards as aforesaid, the Licensee agrees to indemnify the City from and against any and all claims arising from or in any way connected with the existence of contaminants of any kind in, at, under or upon the Land.

AND FURTHER, the City hereby agrees that upon its receipt from the Licensee of forty-eight (48) hours notice, the City will permit the Licensee, its employees or agents to enter on the Land for the purposes of conducting the said Assessment in pursuance of this Clause 7.

NUISANCE

8. The Licensee shall not at any time, use, exercise or carry on or permit or suffer to be used, exercised or carried on, in or upon the Land or any part thereof, any noxious, noisome or offensive art, trade, business, occupation or calling and the Licensee shall not do, omit or suffer or permit to be done or omitted in, on or upon the land or any part thereof anything whatsoever which shall or may be or grow to the annoyance, nuisance, damage or disturbance of the City of the owners or occupiers of neighbouring properties.

MAINTENANCE

9. The Licensee shall, at all times and at its sole cost, effort and expense:

(a) maintain the Land in a neat and tidy condition, satisfactory to the Director;

(b) ensure that access to the Land is conducted in a careful manner, in accordance with good industry standards and in compliance with the provisions of any and all applicable environmental, health or safety statutes, regulations, orders or directives of any government or governmental agency having jurisdiction over such matters;

(c) be responsible for the clean-up of litter in the immediate area of the Land and the clean-up any wind-blown litter generated as a result of the use and occupation of the Land by the Licensee; and

(d) forthwith comply with any written notice to repair received by it from the City and if the Licensee does not so repair, the City may enter upon the Land and conduct the repairs at the sole cost and expense of the Licensee.

RIGHT TO ENTER

10. (a) The City and any persons authorized by the City, shall have the right to enter upon the Land at any time, with or without equipment, for any purpose whatsoever including, but not limited to

(i) those purposes related to the safety, protection, preservation or improvement of the Land and for doing any work of maintaining or repairing its utilities in or near to the Land;

(ii) and any and all appurtenances thereto such as but not limited to pipes, mains, conduits, connections, valves, manholes and fixtures necessary and incidental thereto;

or for any City purposes without being responsible for any damage occasioned thereby unless caused as a result of any negligent or willful act of the City, its contractors, agents, servants or employees,

(b) The City reserves the right to MTS Communications Inc., Centra Gas (Manitoba) Inc., The Manitoba Hydro-Electric Board and/or other public utilities (herein jointly and severally called ***"the utilities"***) to enter upon the Land for maintenance and/or repair of their utilities, without being responsible for any damage occasioned thereby unless caused as a result of any negligent or willful act of such public utility, its contractors, agents, servants or employees;

(c) The Licensee shall, without any compensation whatsoever, whenever so requested, remove any improvements which it may have placed, installed, constructed or erected on the Land in order to permit the City and/or the utilities unimpeded access to its services either above or below ground;

AND the Licensee hereby acknowledges and agrees that it shall not be entitled to and does hereby waive any and all claims for compensation for any loss or damage to its property unless caused as a result of any negligent or willful act of the City, its contractors, agents, servants or employees and/or such public utility, its contractors, agents, servants or employees, inconvenience, nuisance, discomfort, and/or interruption of business caused by the City and/or such public utility in pursuance of this Clause 10;

AND FURTHER, the City does hereby agree and undertake that it shall exercise reasonable effort to restore the parking area to the same condition as it was in prior to the commencement of any work done in pursuance of this Clause 10.

REIMBURSEMENT FOR DAMAGE

11. (a) The Licensee shall reimburse the City for any and all costs incurred by the City in making good any loss or damage to the Land or utilities caused as a result of the Licensee's use of the Land and, without limiting the generality of the foregoing, caused as a result of any negligent or willful act of the Licensee, its contractors, agents, servants or employees;

(b) The Licensee further covenants and agrees that should the existing land-drainage underground utility be damaged due to the fault of the Licensee during the construction of the parking area or at any other time thereafter, it shall:

(i) allow the City's Director of Water and Waste to oversee and arrange for all engineering and construction aspects of the repair; and

(ii) compensate the City for all costs directly attributable to such repair or for any subsequent restoration works as may, at the sole discretion of the City's Director of Water and Waste, acting reasonably, be required.

INDEMNITY and INSURANCE

12. (a) The Licensee shall, at its sole cost, effort and expense, indemnify and keep indemnified the City from and against all claims, actions or proceedings for loss, injury, damages or compensation by any person, firm or corporation, whether to real or personal property, wheresoever situated, or by any member, employee, agent, licensee, invitee, licensee or third party, whether claiming through or under the Licensee or otherwise caused by reason of or in any way attributable to the Licensee's use of the Land or the construction, maintenance, existence or use of any buildings or structures erected thereon, or in any way connected therewith, or otherwise by reason of the exercise by the Licensee of the use hereby granted or the performance of or failure to perform its obligations hereunder, or by reason of:

- any breach, violation, non-observance or non-performance of any covenant, condition or agreement in this Leave and Licence Agreement contained, and on the part of the Licensee to be kept, observed or performed; or

- any loss or damage to property, whether belonging to the Licensee or otherwise, and any injury to person or persons, including death resulting at any time therefrom, arising out of or in connection with the Licensee's use or occupation of the Land and/or by or through anything done or omitted to be done by the Licensee or any assignee, sub-Licensee, contractor, agent, servant or employee of the Licensee; and

- any repairs, improvements, installations or alterations which the Licensee may make or cause to be made upon or to the Land, including without limitation, claims for liens in respect of wages, work, services or materials, liability for damage to property and liability for injury to person or persons;

and such indemnities shall survive the expiry or sooner determination of the term hereof.

(b) TO FURTHER SAFEGUARD THE CITY, the Licensee shall purchase and keep in force during the full term of this Leave and Licence Agreement, a comprehensive general liability policy including but not limited to, the following provisions:

- The City of Winnipeg shall be added as an additional named insured; and

- the policy must contain a cross-liability clause; and

- minimum limits of $2,000,000.00 all-inclusive

AND the Licensee shall file with the City a certified copy of the policy(s) in a form satisfactory to the City Solicitor;

AND FURTHER, the City shall have the right to alter the limits and coverages as required from time to time, during the continuance of this Leave and Licence Agreement.

QUIET ENJOYMENT

13. Except as otherwise herein provided in this Agreement, the Licensee, paying the licence fee hereby reserved, and keeping the agreements, performing the covenants and observing the conditions herein contained on the part of the Licensee to be paid, kept, observed and performed, shall and may peaceably possess and enjoy the Land for the term hereof, without any interruption or disturbance from the City or any other person or persons lawfully claiming by, from or under the City.

ASSIGNMENT

14. (a) The Licensee shall not otherwise assign or sublet the Land or any part thereof without the prior written consent of the City, such consent shall not be unreasonably withheld;

(b) In consideration of the City considering the Licensee's request to consent to an assignment or sublet of this Leave and Licence Agreement, the Licensee shall pay to the City a non-refundable administrative fee in the amount of TWO HUNDRED AND FIFTY ($250.00) DOLLARS or such amount as may from time to time be determined by the City in its sole and unfettered discretion, together with applicable goods and services tax; and

(c) Any consent by the Director to an assignment shall not relieve the Licensee of its obligations for the payment of the licence fee and the performance of the terms and conditions herein contained.

CANCELLATION or TERMINATION

15. (a) This Leave and Licence Agreement is subject to cancellation:

(i) if at any time during the currency of this Leave and Licence Agreement the Licensee shall fail to pay an installment of the licence fee payable hereunder when due, or shall fail to keep, observe or perform any of the covenants, conditions and agreements herein contained on the part of the Licensee to be kept, observed or performed, and such failure shall continue for a period of Ten (10) Days following notice to remedy such default being delivered by the City to the Licensee; or

(ii) during the Renewal Period only, the City may terminate this agreement on Three Hundred and Sixty-five (365) Days written notice, provided the lands are required by Public Works for future road improvements along Bishop Grandin Boulevard.

(b) In the event of default as defined in sub-clause 15.(a)(i) above, it shall be lawful for the City at any time thereafter, to enter into and upon the Land or any part thereof in the name of the whole, to re-enter using force if necessary, without being liable for any prosecution or suit therefore, to gain, repossess and enjoy, as of the City's former estate, anything herein contained to the contrary notwithstanding.

(c) Upon the City becoming entitled to re-enter the Land prior to the expiration of the term hereof, by reason of some default of the Licensee hereunder, the City may, through the Director, in addition to all other rights hereunder, terminate this Leave and Licence Agreement forthwith upon notice therefore in writing given to the Licensee and thereupon the licence fee and any other payments for which the Licensee is liable hereunder, shall be computed, apportioned and paid in full to the date of such termination and the Licensee shall immediately deliver up possession of the Land to the City and the City may enter and take possession thereof.

(d) If the term hereby granted shall be at any time seized or taken in execution or attachment by any creditor of the Licensee or its permitted assigns, or if the Licensee or its permitted assigns shall make any assignment for the benefit of creditors or becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the current year's licence fee shall immediately become due and payable and the said term shall immediately become forfeited and void.

OBLIGATIONS UPON TERMINATION

16. (a) At the expiry of this Leave and Licence Agreement, the Licensee shall at its sole cost, effort and expense:

- peaceably surrender and yield up the Land unto the City and shall within Thirty (30) Days, take up and remove any and all improvements which it may have placed, installed, constructed or erected on the Land to a condition satisfactory to the Director of Planning Property and Development and the Director of Public Works;

AND in the event the Licensee defaults in so doing, the City may do the said removal and restoration work at the sole risk and expense of the Licensee.

(b) In the event this Leave and Licence Agreement is terminated by the City during the Renewal Period as per sub-clause 15(a)(ii) above, the Licensee will peaceably surrender and yield up the Land to the City, and the City will take back the Land on an "as is" basis. Should the City terminate this agreement during the Renewal Period as herein contemplated, the City will be responsible to reimburse the Licensee for the amount of the unamortized costs of the parking lot improvements constructed on the Land. (To clarify and as an example if the actual improvement costs are $450,000.00 and the City terminates the Agreement, as per sub-clause 15.(a)(ii) with 4 years remaining, the Licensee would have use of the Land for a further 365 days, and the City will be responsible for 3/10ths of the improvement costs or 3/10 x $450,000.00 = $135,000.00) The Licensee is to provide to the City all receipts confirming the final costs to construct its parking lot improvements on the Land.

(c) Notwithstanding the forfeiture or termination of this Leave and Licence Agreement in any manner herein provided for, the Licensee shall be and remain liable to the City for all payments due and obligations and liabilities incurred hereunder up to the date of such forfeiture or termination and for the fulfillment of all obligations herein contained on the

part of the Licensee to be observed and performed upon or after said forfeiture or termination.

OPTION TO RENEW

17. PROVIDED that the Licensee is not in default of any of the obligations herein contained and provided this Leave and Licence Agreement shall not have terminated for any cause whatsoever, the Licensee shall be entitled to renew this Leave and Licence Agreement for a further period of FIVE (5) YEARS (herein called the ***"Renewal Period"***) as and from the expiration of the said term upon the same terms and conditions, subject to review of the annual rent by the City, which rent in any event, shall not be less than that paid during the previous term excepting this Clause 17.

GENERAL

NO CHANGE or WAIVERS

18. No assent or consent to changes in or waiver of any provisions of this Leave and Licence Agreement in spirit or letter shall be deemed or taken as made unless the same is done in writing and attached to or endorsed thereon by the City. The City's agents (unless such agents are authorized in writing by the City) are not authorized to change or waive any provision of this Leave and Licence Agreement and any purported changes or waivers by them or any of them are null and void.

CAVEAT

19. The Licensee shall not file any caveat or other encumbrance against the Land.

DEFINITIONS

20. Unless the context otherwise requires, the words ***"the City"*** wherever used herein, shall be construed to include and shall mean the City, its successors and assigns and the words ***"the Licensee"*** shall be construed to include and shall mean the Licensee, its successors and permitted assigns; the words ***"the Licensee"*** and the personal pronoun ***"it"*** relating thereto are used therewith shall be read and construed as the Licensee, and ***"his", "her", "its"*** or ***"their"*** respectively as the number and gender of the party or parties referred to each require, and the number of the verb agreeing therewith shall be construed and shall agree with the said word or pronoun so substituted.

HEADINGS

21. The headings in this Leave and Licence Agreement form no part hereof and shall be deemed to have been inserted for convenience of reference only.

BINDING AGREEMENT

22. This Leave and Licence Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns.

NOTE: THE ABOVE PROPOSED TERMS AND CONDITIONS ARE SUBJECT TO THE FINAL CONSIDERATION AND APPROVAL OF CITY COUNCIL OR ITS DELIGATED AUTHORITY.