

UPPER HUTT CITY

# Tender



## **TENDER TO OCCUPY PREMISES AND OPERATE A CAFÉ**

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September 2019



## **TENDER TO OCCUPY PREMISES AND OPERATE A CAFÉ**

Premises: Kiosk at H<sub>2</sub>O Xstream

Upper Hutt City Council (Council) invites tenders for the occupation of the Kiosk of the above premises more particularly described in the attached Licence to Occupy (Licence).

### **CONDITIONS OF TENDER**

#### **1 Form of tender**

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Each tender must be made by the tenderer:

- a. completing and signing the Form of Tender; and
- b. completing and signing the Licence to Occupy in duplicate in accordance with these conditions.

The tender must be enclosed in a sealed envelope clearly marked on the outside, "Tender to Occupy the Premises and operate a café".

#### **2 Closing date and place of tender**

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Tenders must be received at the Council Civic Administration Building not later than 4:00p.m. on 4 October 2019.

#### **3 Acceptance obligations**

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The Council reserves the right to:

- a. reject any or all tenders, including the highest tender;
- b. accept any tender including any non-complying tender at any time prior to the deadline for acceptance of tenders in clause 8;
- c. negotiate with any tenderer to the exclusion of other tenderers;
- d. re-advertise for tenders;
- e. waive any minor irregularities or informalities in the tender documentation or tendering process;
- f. withdraw the premises from Licence to Occupy by tender at any time without notice;
- g. accept any tender including any non-complying tender at any time prior to 4 October 2019.

#### **4 Modification of Licence to Occupy**

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The tender is submitted on the express acknowledgment by the tenderer that the area to be occupied is accepted in all respects and that the Council is not obliged to accept any amendments to the Licence to Occupy.

## 5 Insertion of details

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- a. The tenderer must insert the following details in the appropriate spaces in the Licence to Occupy:
  - i. the tenderer's name and contact details;
  - ii. the licence fee;
  - iii. the commencement date;
  - iv. the name of the tenderer's solicitors and the individual acting, if appropriate;
  - v. any amendments to the Licence that the tenderer submits;
  - vi. the number of extensions; and
  - vii. the café name the tenderer proposes to use.
- b. The chattels included in the Licence to Occupy are those shown in the Third Schedule of the Licence to Occupy.
- c. Any special conditions and/or amendments to the Licence to Occupy.

## 6 Formation of contract

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- a. The Council's invitation to tender contains no contractual offer of any kind. It is merely an invitation to treat and a tender will be regarded as an offer not as an acceptance of any offer.
- b. A licence to occupy for the amount of the successful tender, in the form of the Licence to Occupy and subject to these conditions, must be formed when the Council has informed the successful tenderer (**Licensee**) by written notice to the licensee or the licensee's solicitor that the Council accepts the tender. Having communicated acceptance, the Council will then forward an executed copy of the Licence to Occupy to the Licensee's solicitor.

## 7 Council's notice

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- a. In this clause, **Business Day** means any day other than a Saturday, Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's birthday, Labour Day and Wellington Anniversary Day.
- b. The Council's notice of acceptance of the tender must be addressed to the Licensee or the Licensee's solicitor at the postal address or email address given on the Licensee's form of tender for the Licensee or for the Licensee's solicitor (as the case may be).
- c. Delivery may be effected by hand, by post with postage prepaid, or by email.
- d. If delivered by hand, the notice must be deemed to have been received at the time of delivery. However, if the delivery is not made on a Business Day or is made after 5:00p.m. on a Business Day, then the notice will be deemed to have been delivered on the next Business Day.

- e. If delivered by pre-paid post, the notice must be deemed to have been received on the next Business Day after posting.
- f. If sent by email, the notice must be deemed to have been received on the day of transmission. However, if the date of transmission is not a Business Day or the transmission is sent after 5 pm on a Business Day then the notice will be deemed to have been given on the next Business Day after the date of transmission.

## **8 Period during which all tenders to remain open**

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Every tender must be a continuing offer and irrevocable until 29 November 2019 even if the Council has accepted a tender before that date. The Council may accept any tenders during this period if the Council is free to withdraw from the contract with the Licensee and does so and in such case the successful tenderer will become the Licensee.

## **9 Time of the essence**

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The times for the performance, fulfillment of obligations fixed by the conditions of tender are strictly of the essence.

The Council in accepting any tender and entering a Licence to Occupy under clause 7 is not providing its consent in its regulatory capacity. The successful tenderer must separately apply and obtain any Council consents required to operate a café on the Premises from the Council.

## **10 Tender evaluation attributes**

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### **a. Relevant experience**

The tenderer's previous experience operating a café in a similar environment including menus.

### **b. Track record**

For example, but not limited to, if the tenderer no longer operates a café, why the tenderer no longer operates a café.

### **c. Technical skills**

The competence, qualifications and experience of the tenderer and the personnel that the tenderer proposes to use with particular regard to their skills and experience in hospitality.

### **d. Resources**

The equipment, additional to that equipment included in the Licence, that the tenderer proposes to use in the café.

### **e. Management and marketing skills**

The tenderer's organisation or personnel with appropriate management and marketing skills together with effective management systems and methods appropriate to the successful management and marketing of the café, including likely staffing levels and quality control systems.

f. **Methodology**

The procedures the tenderer proposes to use to achieve and maintain good service and quality products for the duration of the Licence including a description of the uniforms to be worn by café staff.

g. **Health and safety**

Documents that demonstrate how the tenderer will comply with its obligations under the Health and Safety at Work Act 2015.

h. **Nature and effect of amendments to the Licence to Occupy**

**11 Tender evaluation**

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All tenders will be evaluated using the Tender Evaluation Attributes listed in clause 10. Tenderers are required to provide information addressing the listed attributes, failure to supply the required information may exclude the tender from consideration.

**12 Further information**

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Requests for further information must be made by email to the Manager of Recreation Services and all information will be published on the Council's website.

**FORM OF TENDER**

To: Upper Hutt City Council

- 1 [I/We] tender for the licence to occupy and operate a café at the Premises described in the attached Licence to Occupy on the terms and conditions expressed and implied in that Licence as modified by the Conditions of Tender.
- 2 If this tender is accepted, [I/we] agree to occupy and operate the café in accordance with the attached Licence to Occupy as modified by the Conditions of Tender.

Signed by  
by its authorised representative:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Position

**Tenderer's particulars:**

Full Name: \_\_\_\_\_

Occupation (need not be completed if tenderer is a company): \_\_\_\_\_

Address: \_\_\_\_\_

Registered Office (need not be completed if tenderer is an individual): \_\_\_\_\_

Telephone: \_\_\_\_\_

Email: \_\_\_\_\_

Solicitor:

(a) Name: \_\_\_\_\_

(b) Firm: \_\_\_\_\_

(c) Address: \_\_\_\_\_

(d) Telephone: \_\_\_\_\_

(e) Email: \_\_\_\_\_

**IMPORTANT REMINDER:**

**Remember to attach two completed and signed copies of the Licence to Occupy to this form.**

The above offer is [*accepted / not accepted*].

Signed by Upper Hutt City Council

by its authorised representative:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Position

# Licence to use Kiosk in H<sub>2</sub>O Xstream

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# Licence to use Kiosk H<sub>2</sub>O Xtream

## Parties

1. Upper Hutt City Council ("Licensor")
2. [ ] ("Licensee")

## Background

- A. The Licensor is the registered proprietor of the land on which H<sub>2</sub>O Xtream ("the Centre") is constructed, more particularly described in the First Schedule.
- B. The Licensor granted the Licensee a licence to use the café ("the Kiosk") and the Licensor's chattels listed in the Third Schedule and the parties have entered into this Licence to record the terms and conditions on which the Licensee will occupy and operate a café from the Kiosk.

## THIS LICENCE WITNESSES

### 1. Reference schedule

#### 1.1. Area (clause 2.1)

That part of the Centre comprising the full description and measurements of the area on which the Kiosk is constructed, shown as the coloured area on the plan attached as the Second Schedule.

#### 1.2. Commencement date (clause 4)

[ ].

#### 1.3. Licence fee (clause 6.1)

A licence fee of \$[ ] per annum plus GST.

#### 1.4. Payment of licence fee (clause 6.2)

Monthly payments in advance of \$[ ] plus GST, the first full payment being due on the first day of the month following the commencement date and a part payment due on the commencement date.

#### 1.5. Interest on overdue licence fees or other monies (clause 6.2)

The penalty percentage rate per annum is 6%.

### 1.6. Permitted use of Kiosk (clause 11)

The Licensee shall only use or permit the Kiosk to be used for the purpose of operating a café and catering service.

### 1.7. Term

One year from the commencement date.

### 1.8. Right of extension (clause 6.5)

[ ] rights to extend the term of this Licence. Each extension will be for one year. The total period during which the Premises are licensed, inclusive of the initial term, is no more than [ ] years (*including extensions*).

### 1.9. Rent review dates

On the annual anniversary of the commencement date (including, for the avoidance of any doubt, during any extended or renewed term(s)), and contemporaneously with the exercise of any right or extension or renewal.

## 2. Definitions and interpretation

### 2.1. Definitions

In this Licence unless the context otherwise requires:

"**Area**" means that part of the Centre referred to in clause 1.1 on which the Kiosk is erected.

"**Business Day**" means any day other than a Saturday, Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's birthday, Labour Day and Wellington Anniversary Day.

"**Centre**" means H<sup>2</sup>O Xstream Complex.

"**Centre Regulations**" means the rules and policies for the Centre issued by the Licensor, governing the day to day activities in, and control and management of the Centre, as varied or replaced from time to time by the Licensor.

"**Common Areas**" means the areas, as varied, extended or reduced from time to time by the Licensor at the Licensor's discretion, permitted by the Licensor to be used in general by the occupants of the Centre, including, by way of example only, the car parking areas, grounds, forecourts, entrances, vestibules, passages, stairways, landings, escalators and lifts, tea rooms, toilet and washroom facilities where not included as part of any occupant of the Centre's premises.

**"Goods and Services Tax or GST"** means all tax payable from time to time under the Goods and Services Tax Act 1985.

**"Kiosk"**, means the Kiosk constructed on the Area.

**"Land"** means the land described in the First Schedule and includes any additional land the Licensor develops and manages as part of the Centre.

**"Licence"** means the licence to occupy the Kiosk granted in this Licence.

**"Licence fee"** means the fee stated in clause 1.3.

**"Licensor"** also includes the successors in title to the land.

**"Occupants of the Centre"** includes all tenants, subtenants, Licensees (including the Licensee) and other persons (including the Licensor) from time to time entitled to occupy space in the Centre on a permanent or semi-permanent basis.

**"Persons under the control of the Licensee"** includes all employees, trainees, agents, contractors, suppliers, customers and other invitees of the Licensee.

### **3. Interpretation**

In this licence:

- 3.1.1.** Where obligations bind more than one person those obligations shall bind those persons jointly and severally;
- 3.1.2.** The benefits and burdens shall be binding upon the parties and their respective successors and personal representatives and references to the parties shall be construed accordingly;
- 3.1.3.** Words importing one gender include the other gender and words importing the singular number include the plural and vice versa;
- 3.1.4.** A "person" includes any individual, company, corporation, firm, partnership, joint venture, association, organisation, trust, state, agency of state, government department or territorial authority in each case whether or not having separate legal personality;
- 3.1.5.** Any schedules to this Licence shall have the same effect as if set out in the body of this Licence;
- 3.1.6.** Clause headings are inserted for reference only and shall not affect the interpretation of this Licence;
- 3.1.7.** References to any statute refer also to any regulation, bylaw, order and notice made under or pursuant to the statute; and

- 3.1.8.** References to statutes and regulations refer also to statutes and regulations amending, consolidating or re-enacting those referred to; and
- 3.1.8.1.** Expressions defined or explained in any statute shall bear those meanings in this Licence; and
- 3.1.9.** Any covenant not to do anything also constitutes an obligation not to suffer, permit or cause that thing to be done:
- 3.1.9.1.** References to covenants include conditions and agreements;
- 3.1.9.2.** References to covenants include covenants expressed or implied.
- 3.1.10.** To "perform" a covenant includes keeping, observing and fulfilling that covenant.
- 3.1.11.** A right granted or reserved may be exercised from time to time and at all times.
- 3.1.12.** Any reference to a "month" or "monthly" shall mean respectively calendar month and calendar monthly.

#### **4. Grant of licence**

The Licensor grants to the Licensee and the Licensee accepts a Licence from the Licensor to use the Kiosk and Licensor's chattels on the Area upon and subject to the terms of this Licence.

#### **5. Term of licence**

- 5.1** The term of this Licence shall be one year from the commencement date – unless earlier extended or terminated pursuant to clauses 6.5, 12 or 15.

#### **6. Licence fee**

##### **6.1. Covenant to pay licence fee**

The Licensee shall pay the licence fee to the Licensor in the amount provided in clause 1.4.

##### **6.2. Interest on overdue licence fees or other monies**

If any licence fees or other monies payable by the Licensee remain unpaid for 5 business days after their due date, the Licensee must pay interest at the rate provided in clause 1.5 calculated from the due date to the date of payment. The Licensor may recover any monies in arrears (and interest) as a liquidated debt due.

**6.3. Manner of payment of licence fee**

- 6.3.1.** The Licensee must pay on account of the Licence Fee, monthly payments provided in clause 1.3 in advance on the first day of each month, but the first payment must be made on the commencement date on a proportionate basis for any Broken Period until the first day of the next month.
- 6.3.2.** Licence fees and other monies must be paid by the Licensee without deduction or set off (whether legal, equitable, statutory or any other form) by automatic bank authority or as the Licensor may in writing otherwise direct.

**6.4. Financial Records**

The Licensee will provide the Licensor with audited accounts for its previous financial year at the time it gives notice under clause 6.5.2 of its intention to extend this Licence.

**6.5. Right of Extension**

If the Licensee has:

- 6.5.1.** at all material times and in respect of each of the terms and conditions duly observed such terms and conditions of this Licence; and
- 6.5.2.** given to the Licensor not less than three months' notice in writing prior to the Expiration Date (which notice will be irrevocable) of intention to extend the Term of this Licence.
- 6.5.3.** the Lessor must extend the Term of this Licence:
- 6.5.4.** for the next relevant further term of years fixed in clause 1.8 commencing from the day after the Expiration Date of the preceding term;
- 6.5.5.** at a Rental for the Premises payable during such extended term (or part of that until the occurrence of a further rent review in accordance with the provisions of clause 1.9) determined in accordance with clause 1.9. However, the Rental agreed upon or fixed will never be less per annum than the rental payable for the Premises in the 12-month period immediately preceding the commencement of the extended term; and
- 6.5.6.** otherwise on the same terms and conditions of this Licence, including any rent reviews, save that the extended Licence will acknowledge that the Licensee has expended one or more of its rights of extension and as such clause 1.8 will be amended under deed (or where the parties elect not to execute such a deed,

deemed to be so amended) so as to record only those rights of extension not yet having been exercised.

## **7. Licence not assignable**

### **7.1. The Licensee shall not:**

**7.1.1.** Assign, mortgage, charge or otherwise part with possession of their interest under this Licence without the prior written consent of the Licensor provided that consent shall not be unreasonably or arbitrarily withheld, provided the following conditions are met:

**7.1.1.1.** The assignee is, in the opinion of the Licensor, a respectable, responsible, solvent and suitable assignee or sub-Licensee.

**7.1.1.2.** The Licensee demonstrates to the Licensor the assignee is responsible and of sound financial standing.

**7.1.1.3.** All monies due to the Licensor under this Licence are paid up to the date of the assignment.

**7.1.1.4.** The Licensor has executed a licence in the same form.

**7.1.1.5.** All reasonable costs incurred by the Licensor (whether or not the proposed assignment proceeds to completion) have been paid by the Licensee.

**7.1.1.6.** The assignee satisfies the Licensor that they have the necessary experience, track record, technical skills and management skills.

## **8. Maintenance and repair of Kiosk**

### **8.1. The Licensee shall:**

**8.1.1.** Ensure all routine waste is placed daily in the Centre's public rubbish receptacles and waste or rubbish that will not fit into the Centre's public rubbish receptacles is removed from the Centre.

**8.1.2.** Immediately make good any damage to any part of the Centre (including the common areas) or to the Kiosk or any part of it caused by the Licensee and persons under the control of the Licensee.

**8.1.3.** Take any steps necessary to control any pest infestation occurring in, or emanating from within, the Area, and if required by the Licensor, engage a pest exterminator approved by the Licensor.



- 8.1.4.** Repair, or where appropriate replace, heating, lighting, electrical or plumbing fittings in the Centre broken or damaged by the Licensee and persons under the control of the Licensee.
- 8.1.5.** Comply with all statutes, ordinances, proclamations, orders and regulations affecting the Kiosk or any fixtures or fittings installed by the Licensee; and
- 8.1.6.** Comply with any notices or orders given by any competent authority in respect of the Kiosk or its use and shall keep the Licensor indemnified in respect of all such matters.
- 8.1.7.** Keep the interior and exterior of the Kiosk and all fixtures and fittings installed in the Kiosk in good repair and condition and shall also, throughout the day and at the close of business, complete the following:
  - 8.1.7.1.** Sweep and clear rubbish off the floor.
  - 8.1.7.2.** Keep all tables wiped and free of rubbish and scraps.
  - 8.1.7.3.** Keep the kitchen area visible from public areas tidy and clean in appearance to the satisfaction of the Licensor.
- 8.1.1.4** Set up and take down the chairs within the Kiosk at the beginning and end of each working day.
- 8.1.8.** The Licensee shall clean the Kiosk floor and the kitchen and serving area each day at the close of H<sub>2</sub>O Xstream.
- 8.1.9.** If required by the Licensor, use a cleaner nominated by the Licensor and pay the cleaner's charges.
- 8.1.10.** The Licensor shall also give the Licensee access to the Licensor's laundry facility for the purpose of washing towels and aprons. The Licensee is responsible for washing, drying and returning its own washing.

**8.2. Alterations or additions to Kiosk**

The Licensee shall not make any alterations or additions to the Kiosk (whether internal or external, to decor, or to fixtures and fittings within it) without the prior written consent of the Licensor. In granting consent the Licensor may impose such conditions as it considers appropriate.

**8.3. The Licensee shall not:**

- 8.3.1.** Sell any products packaged in glass or containers of any kind that are made of glass.
- 8.3.2.** The Licensee shall not sell any glass products.

- 8.3.3.** Alter or interfere with any of the Licensor's equipment, fittings or fixtures or the heating, ventilation or other systems; and
- 8.3.4.** Install or alter any water, gas or electrical fittings, equipment or appliances or any apparatus for illuminating, air conditioning, heating, cooling or ventilating the Centre without the Licensor's prior written approval.
- 8.3.5.** The Licensee shall not bring into the Centre any plant, machinery or other equipment without the prior written consent of the Licensor, which consent shall not be unreasonably withheld if the same is reasonably necessary for the conduct of the Licensee's business and will not cause or be likely to cause any structural or other damage to or exceed the designed loadings of the floors, walls or any other parts of the Centre.

## **9. Removal of plant by Licensee on termination**

### **9.1. The Licensee shall:**

- 9.1.1.** If required by the Licensor, prior to or on the expiration or earlier termination of this Licence remove all of the Licensee's fixtures, fittings, and other effects from the Centre and make good damage to the Centre caused by such removal.

### **9.2. If the Licensee does not comply with subclause 9.1.1**

- 9.2.1.** The Licensor may remove and store the effects not removed. The Licensee shall pay on demand all costs and expenses incurred by the Licensor in removing the effects before the Licensee may uplift them. Alternatively, the Licensor may by written notice to the Licensee advise that unless the Licensee effects removal within 14 days of the date such notice is given, the effects not then removed shall be forfeited to the Licensor without payment or compensation. If the Licensee fails to comply with such notice the effects shall pass to the Licensor accordingly.

## **10. Insurance and indemnity**

### **10.1. Licensee not to prejudice Licensor's insurance or premium rate**

The Licensee shall not, and covenants persons under the control of the Licensee shall not, do anything in the Kiosk or the Centre whereby any insurance effected by the Licensor or by the Licensee be rendered void or voidable or (except with the Licensor's prior written approval) whereby the premium payable shall be liable to increase. The Licensee shall pay upon demand all extra premiums payable as a result of any breach of this clause.

## **10.2. Licensee to occupy Kiosk at Licensee's risk**

The Licensee agrees to occupy and use the Kiosk at the Licensee's risk and releases to the full extent permitted by law the Licensor and the Licensor's employees and agents from all claims and demands of any kind and from all liability which may arise in respect of any accident, damage or injury occurring to any person or property in or about the Kiosk or the Centre.

## **10.3. Indemnity by Licensee**

The Licensee shall keep the Licensor indemnified against all claims, actions, losses, and expenses of any nature which the Licensor may suffer or incur or for which the Licensor may become liable in respect of or arising out of:

**10.3.1.** The neglect or careless use or misuse by the Licensee and persons under the control of the Licensee of the Kiosk or the Centre or any of the utilities or other services to the Kiosk or the Centre or arising out of any faulty fixture or fitting of the Licensee; and

**10.3.2.** Any accident or damage to property or any person arising from any occurrence in or near the Kiosk wholly or in part by reason of any act or omission by the Licensee and persons under the control of the Licensee.

## **10.4. Public Risk Insurance**

The Licensee, at the Licensee's expense, shall effect and keep current in respect of the Kiosk, and the Licensee's use of the Kiosk, a policy of public risk insurance for an amount not less than \$2,000,000, or such other amount reasonably required from time to time by the Licensor, for any one event with a substantial reputable insurance office or company first approved in writing by the Licensor (such approval not to be unreasonably or arbitrarily withheld).

## **11. Use of Kiosk and Centre**

### **11.1. Use to which Kiosk may be put by Licensee**

The Licensee shall:

**11.1.1.** Only use the Kiosk for the purposes stated in clause 1.6; and

**11.1.2.** Not stock, exhibit for sale or sell merchandise that is in breach of the Licensor's obligations to sell certain products exclusively under its various sponsorship contracts as listed in the Fourth Schedule hereto and any other sponsorship contracts that are notified to the Licensee in writing at any time.

**11.1.3.** Not stock glass products or products contained in glass.

- 11.1.4. Have installed and keep operational at the Licensee's expense, within the designated Kiosk area, for the duration of this Licence, machines supplying drinks and ice creams at the Centre.
- 11.1.5. The Licensee shall, within two days of receipt of written notice of any breach of this clause, remove from the Kiosk any merchandise in contravention of this clause and in default, the Licensor may:
  - 11.1.5.1. Enter and remove the contravening merchandise; and
  - 11.1.5.2. Hold the same at the Licensee's risk and cost in all things until recovered by the Licensee.

**11.2. No warranty by Licensor as to suitability of Kiosk**

The Licensor does not warrant that the Kiosk or the Area are, or will remain, suitable or adequate for any of the Licensee's purposes. The Licensee accepts the Kiosk and the Area as being satisfactory in all respects and with full knowledge of, and subject to, any prohibitions or restrictions on their use.

- 11.2.1. The Licensee is responsible for obtaining, at its own cost, all necessary licences, permits and consents for the operation of the café and clause 20 applies.

**11.3. The Licensee shall:**

- 11.3.1. Not do anything so the working or efficiency of the air conditioning or ventilating plant servicing the Centre is affected; and
- 11.3.2. Duly and punctually observe the Centre regulations. For the purposes of this Licence references in the Centre regulations to "premises" shall include "Kiosks", and to "lessor" shall mean "Licensor".

**11.4. Restrictions on use of premises by Licensee**

The Licensee shall not:

- 11.4.1. Use or permit to be used other than for their designed purpose any of the fixtures or fittings in the Kiosk or the Centre.
- 11.4.2. Store or use inflammable or dangerous substances upon the area.
- 11.4.3. Do or permit to be done on the Area or in the Centre anything which in the opinion of the Licensor may become a nuisance, disturbance or obstruction or cause damage whether to the Licensor or to other tenants or users of the Centre.
- 11.4.4. Obstruct or interfere with any of the entrances or common areas of the Centre or use the common areas in any way for the display of merchandise or the conduct of the Licensee's business.

**11.4.5.** Permit any television or radio antenna, sign, advertisement, name or notice to be placed on any part of the Kiosk or the Centre without the prior written consent of the Licensor; or

**11.4.6.** Use the Kiosk in any noisy, noxious, illegal or offensive manner or for any illegal purpose.

**11.4.7.** Operate its catering business if, in the opinion of the Licensor, it is detracting from the operation of the café.

#### **11.5. Opening Hours**

**11.5.1.** The Kiosk shall be closed when the Centre is closed.

**11.5.2.** The Kiosk shall be open for business seven (7) days a week for the following minimum periods:

- Saturday to Thursday from 8:00a.m. to 5:00p.m. (or later if required)
- Friday from 8:00a.m. to 8:30p.m. (or later if required)

Or by negotiation with the Licensor

**11.5.3.** The Kiosk shall be closed on 24, 25, 26 December and open from 12 noon to 6:00p.m. on Anzac Day.

**11.5.4.** These trading hours may be varied at any time by written agreement between the Licensor and the Licensee.

**11.5.4.1.** The Licensor may from time to time close the Centre to the public for a private function and require the Licensee to close the Café for the duration of such function. The attendees of such function will be permitted to use the public part of the Area Licenced to the Licensee under this Licence.

**11.5.5.** In the event the Licensor closes the Centre under clause 11.5.4.1 the Licensor shall:

**11.5.5.1.** Give the Licensee 15 days' written notice of the Centre closure including the duration of the Centre closure.

**11.5.6.** In the event the Licensor decides to close the Centre for a period or periods to make urgent repairs or necessary maintenance without the Licensee's agreement and thereby reducing the Licensee's operating hours, the Licensee will not be entitled to any compensation from the Licensor. The Licensor will use its best endeavours to give the Licensee notice of the closure as soon as the Licensor is aware of the need to close. This clause relates to the closure of the entire complex, not the closure of pools and/or features for specific incidents that may arise from time to time.

**11.6. Licensee to provide staff**

- 11.6.1. The Licensee shall, at the Licensee's own expense, provide all necessary staff to adequately carry on the Licensee's business in the Kiosk (in respect of which staff the Licensee shall be the employer); and
- 11.6.2. Require staff to conform to a uniform dress code, such code to be approved by the Licensor.

**11.7. Common areas**

The Licensee and the Licensee's employees, contractors and agents shall not:

- 11.7.1. Solicit business in the common areas or distribute hand bills, pamphlets or other advertising matter nor display advertising materials otherwise than shall be approved by the Licensor; and
- 11.7.2. Park any motor or other vehicle in any car parking area forming part of the common areas other than those designated by the Licensor (if any) from time to time.

In the event the Licensor becomes aware of any of the Licensee's vehicles parked in breach of this subclause it may forthwith and without notice have the vehicle towed away and the cost of removal shall be paid by the Licensee.

**11.8. Merchandising display**

The Licensee shall:

- 11.8.1. Use to best advantage of all space available in the Kiosk for display and adequate merchandising of the Licensee's goods, wares and stock-in-trade.
- 11.8.2. Keep the display area of the Kiosk adequately decorated and displayed in an attractive and proper manner in harmony with H<sub>2</sub>O Xtream's existing values of being customer focused, communicative, professional and passionate.
- 11.8.3. Comply with all reasonable requests by the Licensor in relation to the display of merchandise.

**11.9. Other obligations of Licensee**

The Licensee must manage the Licensee's affairs such that the Licensee does not:

- 11.9.1. Make or enter into or endeavour to make or enter into any composition, assignment or other arrangement for the benefit of the Licensee's creditors; or
- 11.9.2. Become insolvent, be adjudged bankrupt or placed in liquidation; or
- 11.9.3. Suffer distress or execution against the Licensee's property, goods or effects under any judgment against the Licensee or any costs for a sum in excess of \$5,000.

## **12. Rights reserved by Licensor**

### **12.1. Maintenance by Licensor**

The Licensor may use, maintain and repair all services, fixtures and fittings passing through the area, but in doing so the Licensor shall cause as little inconvenience to the Licensee as is reasonably possible.

### **12.2. Payment of rates and utility charges by Licensor**

The Licensor shall pay to the proper authorities all charges for utilities and other services connected or used in the Kiosk. Further, the Licensor shall supply telephone to the Kiosk (as an extension through the Licensor's switchboard), and will pay all line rental, maintenance and local telephone charges in respect of the telephone.

### **12.3. Work by Licensor to remedy Licensee's default**

The Licensor may elect to remedy, at any time without notice, any default by the Licensee under this Licence. Whenever the Licensor so elects, all costs and expenses the Licensor incurs in so doing (including legal costs and expenses) shall be paid by the Licensee to the Licensor immediately on demand.

### **12.4. Termination**

**12.4.1.** In case of breach by the Licensee of any covenant or agreement on the Licensee's part herein expressed or implied, after the Licensee has failed to remedy that breach within the period specified in the notice served on the Licensee; or

**12.4.2.** In the event of the insolvency, bankruptcy, liquidation of the Licensee or the Licensee shall suffer distress or execution to issue against the Licensee's property, goods or effects under any judgment against the Licensee in any Court for a sum in excess of \$5,000, and the Licensee has failed to remedy such breach within the period specified in the notice served on the Licensee, then the Licensor may (in addition to the Licensor's right to apply to the Court for an order for possession) cancel this Licence by re-entering the Kiosk at the time or anytime thereafter and the term shall terminate on such cancellation but without prejudice to the rights of either party.

### **12.5. Fire drills and evacuation procedures**

The Licensor may require the Licensee from time to time to perform fire drills and observe all necessary and proper emergency evacuation procedures. The Licensee and persons under the control of the Licensee shall co-operate with the Licensor in performing such drills and procedures. In requiring such drills and procedures the Licensor shall use best endeavours to minimise disturbance to the Licensee. It is acknowledged by the Licensee that such fire drills will, however, be carried out in the

normal trading hours of the Centre but that the Licensor shall seek to avoid peak trading periods. No compensation for any disruptions or claim for loss of trade shall be made by the Licensee as a result of any fire drills or other safety procedures undertaken by the Licensor.

#### **12.6. Relocation of Kiosk by the Licensor**

**12.6.1.** The Licensor may, without determining this Licence, on giving one month's written notice to the Licensee, at the expiration of that notice move the Kiosk to such other location in the Centre as the Licensor reasonably considers suitable for the Licensee's business. This Licence shall then apply to such new location as if it were the area provided in clause 1.1.

**12.6.2.** While the Licensor shall use best endeavours to effect such relocation with as little interference to the Licensee's business as practicable, the Licensee shall not be entitled to any compensation or reimbursement for any loss, cost or expense (including economic loss and loss of business or business opportunity) arising from the Licensor exercising its powers under this clause.

### **13. Common areas**

#### **13.1. Control of common areas**

The manner in which the common areas are used and maintained and the expenditure on them shall be at the absolute and uncontrolled discretion of the Licensor including, in particular, the conduct and control of all promotional activities in the common areas.

#### **13.2. Use of common areas**

The Licensee's customers may use the common areas in common with the Licensor and all others to whom the Licensor has or may in the future grant such right. The Licensee and the Licensee's suppliers, employees and agents shall not, without the prior consent of the Licensor, use the common areas except for ingress and egress and for transporting goods to or from the Kiosk in the ordinary course of the Licensee's business and then always subject to the control of the Licensor.

### **14. Miscellaneous**

#### **14.1. Damage or destruction of the Centre**

If the Centre or any substantial part of the Centre or the Kiosk is destroyed or so materially damaged by fire, earthquake or other cause so as to require



reconstruction or so as to be rendered untenable or unfit for use and occupation, in the opinion of the Licensor, this Licence shall immediately terminate.

**14.2. Partial destruction**

**14.2.1.** If the building shall be damaged but not so as to be rendered untenable, and:

- a. the Licensor's policy or policies of insurance shall not have been invalidated or payment of the policy monies refused in consequence of some act or default of the Licensee and/or any person under the control of the Licensee; and
- b. all the necessary permits and consents shall be obtainable within a reasonable timeframe; and
- c. the Licensor does not exercise the right to terminate under subclause 14.2.6;

the Licensor shall, with all reasonable speed, expend the insurance monies received by the Licensor towards repairing such damage or reinstating the premises, but the Licensor shall not be liable to expend any sum of money greater than the amount of the insurance monies received.

**14.2.2.** Any repair or reinstatement shall be:

- a. carried out using such materials and form of construction and according to such plan as the Licensor thinks fit; and
- b. sufficient, so long as it is reasonably adequate, for the Licensee's occupation and use of the premises; and
- c. carried out so as to cause as little disturbance to the Licensee as is reasonably possible.

**14.2.3.** The Licensee shall permit the Licensor and the Licensor's agents, servants and contractors with all necessary equipment and materials to enter the premises to carry out repairs or reinstatement to the building.

**14.2.4.** Until the completion of the repairs or reinstatement a fair proportion of the rental and the property expenses shall cease to be payable according to the nature and extent of the damage.

**14.2.5.** If any of the conditions in subclause 14.2.1 are not met then the term shall at once terminate but without prejudice to the rights of either party against the other for any prior breach.

**14.2.6.** If the Licensor decides at its discretion that the insurance monies actually received by the Licensor are inadequate to repair the said damage, the Licensor may terminate the Licence by giving the Licensee one month's notice.

### **14.3. Licensee to pay Licensor's costs**

The Licensee shall pay:

- 14.3.1.** All costs, charges and expenses for which the Licensor shall become liable in consequence of, or in connection with, any breach or default by the Licensee in the performance or observance of any of the terms, covenants and conditions of this Licence; and
- 14.3.2.** All costs, charges and expenses (including actual legal costs as between solicitor and client) that may be incurred by the Licensor in enforcing or attempting to enforce any of the Licensee's covenants, or any of the Licensor's rights, under or arising out of this Licence.

### **14.4. Notices**

- 14.4.1.** Any notice or other document required to be given or served under this Licence may (in addition to any other method permitted by law):
  - 14.4.1.1.** In the case of the Licensee, be given or served by signature required courier to the Licensee at the Licensee's last known abode or business or by delivery to the Kiosk; and
  - 14.4.1.2.** In the case of the Licensor, by signature required courier to the Licensor's principal place of business, namely the Civic Administration Building, 838-842 Fergusson Drive, Upper Hutt, or Private Bag 907, Upper Hutt.
- 14.4.2.** Any notice or other document shall be deemed to have been served on the other party upon receipt of notification that the courier has been received and signed for by that party.
- 14.4.3.** In the case of any notice or document required to be served or given by the Licensor the same may be signed on behalf of the Licensor by any authorised officer of the Licensor or by the Licensor's solicitors.

### **14.5. Dispute Resolution**

- 14.5.1.** If any dispute or difference shall arise between the parties as to:
  - 14.5.1.1.** The meaning or application of any part of this Licence; or
  - 14.5.1.2.** Any other matter in connection with, arising out of, or which may have an effect on, this Licence;

Then representatives of the Licensee and the Licensor shall meet within 14 days of the dispute or difference ("issue") arising to endeavour to reach an agreement on the resolution of the issue.

- 14.5.2.** If the meeting referred to in 14.5.1.2 ("meeting") does not result in the resolution of the issue:
- 14.5.2.1.** Then the Licensee and the Licensor shall, within 14 days of the date of the meeting, appoint a mediator to mediate the issue.
- 14.5.2.2.** If the parties are unable to agree upon the person to be appointed as mediator, then the president of the New Zealand Law Society shall be asked to appoint the mediator.
- 14.5.2.3.** The mediation shall be held within one month of the date of the meeting.
- 14.5.2.4.** The Licensee and the Licensor shall attend and participate in the mediation in good faith to negotiate towards achieving a settlement of the issue.
- 14.5.3.** If at the mediation the issue is not resolved then the issue shall be determined by arbitration.
- 14.5.4.** If the Licensor and the Licensee are unable to agree upon a single arbitrator within 10 days of either party notifying the other in writing of their wish to have the issue arbitrated then either party ("Notifying Party") may at any time subsequently by written notice to the other party ("Receiving Party") require the issue to be determined by two arbitrators (one to be appointed by the Licensor and one to be appointed by the Licensee) and their umpire (to be appointed by the arbitrators before proceeding to determine the issue). The notice to be given by the notifying party pursuant to this subclause shall:
- 14.5.4.1.** Nominate the arbitrator appointed by the notifying party; and
- 14.5.4.2.** Require the receiving party to nominate their arbitrator by a date not less than 10 days after the date of service of the notice by the receiving party; and
- 14.5.4.3.** Warn the receiving party of the consequences under subclause 14.5.5 of failure to appoint an arbitrator by the date specified by the notifying party.
- 14.5.5.** If the receiving party fails to appoint their arbitrator by the date specified then the notifying party may by written notice to the receiving party have the issue determined solely by the notifying party's arbitrator.
- 14.5.6.** If any arbitrator appointed pursuant to clause 14.5.4 refuses or fails to act (including appointing an umpire, if necessary) within a reasonable time of their appointment then either the Licensor or the Licensee may (provided the defaulting arbitrator has first been given in writing a reasonable time in which to act) request the president of the New Zealand Law Society to appoint a replacement arbitrator or an umpire who shall act in lieu of the defaulting arbitrator or as the umpire, as the case may be.

- 14.5.7.** Time shall be of the essence under this clause.
- 14.5.8.** The parties agree to be bound by any decision or award completed pursuant to this clause.
- 14.5.9.** This provision shall survive the expiration or earlier determination of this Licence.
- 14.5.10.** Any referral to arbitration under this clause shall be a submission to arbitration under the Arbitration Act 1996, which Act shall, to the extent not inconsistent with anything in this clause, apply to any such submission.

**14.6. Licence not an interest in land**

The Licensee has a right of occupation for the term of this Licence and has no interest in the Area. The legal right to possession and control over the Area remains vested in the Licensor throughout the term.

**15. Termination**

**15.1. This Licence may be terminated early**

- 15.1.1.** By either party by giving the other three months' notice in writing of their intention to do so.

**15.2. For the avoidance of doubt**

- 15.2.1.** The parties hereby confirm that no goodwill or any other consideration will be payable by the Licensor to the Licensee when the Licensor resumes possession of the Kiosk on the expiration or sooner termination of this Licence.

**15.3. Termination rights for redevelopment**

- 15.3.1.** In the event the Licensor is planning to Redevelop the Centre, should the Licensor require the Area or any part of it for Redevelopment Purposes and the Licensor considers that vacant possession of the Area is necessary to permit such development, then the Licensor may, by written notice to the Licensee, suspend this Licence for the duration of the development work by specifying a suspension commencement date to be effective not less than six months after the date of service of such notice on the Licensee. Upon the expiration of such notice, this Licence will be in abeyance unless the Licensee has exercised its option to terminate the Licence under clause 15.3.3.
- 15.3.2.** Redevelopment Purposes means a determination made by the Licensor to carry out substantial or material additions, renovations or alterations to the Centre or any part of it.

- 15.3.3.** The suspension notice in clause 15.3.1 must also give the Licensee an option to terminate the Licence with such termination to take effect on the suspension commencement date specified in the Licensor's notice under clause 15.3.1.
- 15.3.4.** In the event the Licensee does not exercise its option to terminate, the Licensor must give the Licensee notice of the Licensee resumption date, such date to be no less than three months from the date the Licensee receives notice of the resumption date. The licence fee and expenses payable by the Licensee under this Licence must cease to accrue from the suspension commencement date and will remain in abeyance until the resumption date.
- 15.3.5.** The Licensee must give the Licensor written notice that it is exercising its option to terminate no less than two months prior to the suspension commencement date in the Licensor's notice under clause 15.3.1.
- 15.3.6.** In the event the Licence is terminated under clause 15.3.5, for the avoidance of any doubt, the licence fee and expenses payable by the Licensee must cease to accrue from the date of termination. The Licensor must not be entitled to any compensation or damages arising from such termination but without prejudice to the rights of any party, the Licensor is entitled to any licence fee and expenses accrued prior to the termination of the Licence.

## **16. Confidentiality**

The Licensee acknowledges that business and marketing information in relation to H<sub>2</sub>O Xtream is commercially sensitive and as such, shall not disclose any such information to anyone without first obtaining the Licensor's consent.

## **17. City's representative**

The City's representative in relation to this Licence shall be the Recreation Services Manager and in his or her absence, such person as he or she nominates.

## **18. Obligations under Health and Safety at Work Act 2015**

- 18.1.1.** The Licensee shall fulfil its obligations under the Health and Safety at Work Act 2015 including but not limited to maintaining a current and observed Safety Management Plan to be submitted to the Licensor.
- 18.1.2.** The Licensee will ensure that its employees will observe the Licensor's Health and Safety Policies and observe every direction given for safety reasons, issued by the Licensor, and will take all practical steps to ensure the safety of employees, customers and members of the public generally who are in the facility.



**EXECUTED** by  
as Licensee  
in the presence of:

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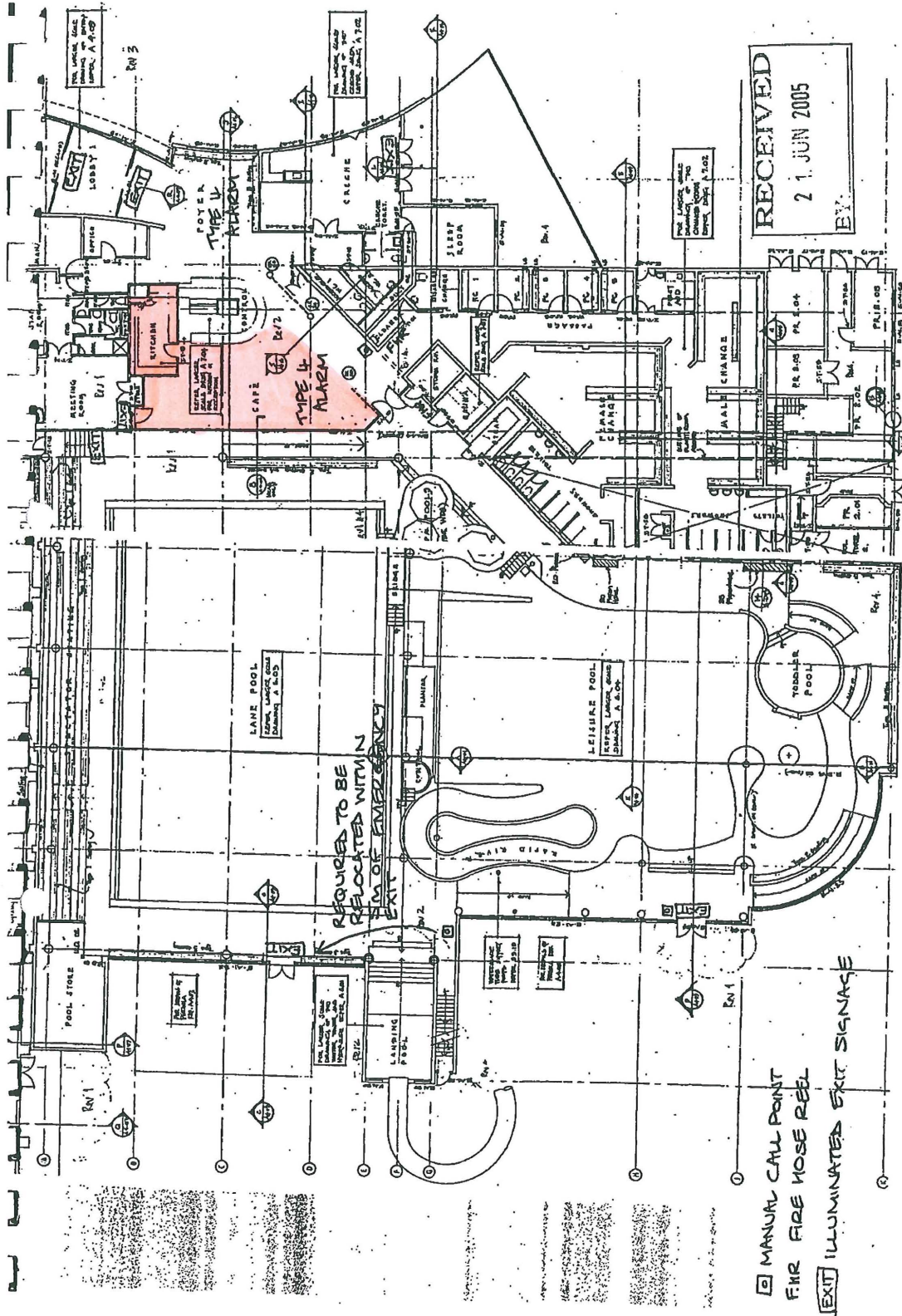
## FIRST SCHEDULE

830 Fergusson Drive, Upper Hutt

Lot 1 and 2 DP 14682 Wellington Land Registry.



SECOND SCHEDULE



### THIRD SCHEDULE

|    |                            |
|----|----------------------------|
| 2  | deep fry holders           |
| 1  | whiteboard                 |
| 10 | tables                     |
| 38 | chairs                     |
| 4  | stools                     |
| 1  | espresso machine           |
| 1  | coffee grinder             |
| 2  | kitchen benches            |
| 1  | dishwasher                 |
| 1  | pie warmer                 |
| 1  | chilled cabinet            |
| 1  | gas range                  |
| 1  | laser hot water heater     |
| 1  | freezer                    |
| 1  | small white microwave oven |

## **FOURTH SCHEDULE**

Streets Ice Cream

Frucor beverages